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Articles

Case and Comment

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- The *Journal* provides:
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  - Analysis of developments by experienced practitioners.
  - Practical guidance on procedure.
- The *Journal* is published quarterly.
  - Each issue includes "*Articles*" written by barristers, solicitors and academics many of whom are leaders in their fields (and appeared in the relevant cases) as well as contributions from up and coming personal injury lawyers.
  - Each issue contains *"Case and Comment"* a concise summary of the most important cases with expert analysis and editorial comment on the meaning and effect of the case set against the background of the present law.
- The *Journal* has an estimated readership of thousands of solicitors, barristers, experts and academics who practice in, or are connected with, personal injury law.
- Articles from The *Journal* are summarised in services such as Lawtel, Butterworth's PI Online, Legal Information Resources and the APIL Newsletter.
- The Editor welcomes articles on any personal injury topic of current interest (we cannot of course guarantee that they will be published). Please submit articles to:

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- *Write a summary in italics at the start, one or two paragraphs in length, summarising the key issues covered and conclusions so that readers can tell at a glance what the article is about.*
- Provide your full name/s and work address and contact telephone numbers if you wish these to be printed at the top of the article.
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March 2014

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Editorial

Welcome to the March 2014 edition of JPIL.

In this edition we look again at the Enterprise Act 2013 and its implications for practitioners. *Patrick Limb QC and Jason Cox* look at whether the Act is compliant with the UK's European obligations and what challenges the Act might face on that front and also provide useful guidance for practitioners on how to address health and safety at work claims post the Act.

The European flavour continues with an article by former PEOPIL President *Antoinette Collignon* on what happens where the provisions of Rome II conflict with those of the Hague convention on road accidents with a cross-European jurisdictional dimension.

Whilst we wait for the Lord Chancellor to publish his response to the MOJ consultations on the Discount Rate, *Peter Walmsley* puts the case for the defence as to why the Lord Chancellor should move away from the confines of the decision in *Wells v Wells* and assess the discount rate on the basis that claimants tend to be prudent investors in a mixed portfolio rather than reliant on GILTS.

The recent case of *Wilkin-Shaw v Fuller* raised issues regarding the provision of negligent advice by an intermediary and the extent to which this could constitute a *novus actus*. Counsel for the successful defendants in the case, *Ronald Walker QC* and *Henry Charles*, discuss the case and look at the caselaw surrounding *novus actus*.

It has been nearly 10 years since PPOs were first introduced and *Robert Weir QC* looks at what has happened since they became available, considers the advantages and disadvantages to both parties of using PPOs, and highlights some of the issues that can still arise when seeking to agree settlement involving one or more PPOs.

Following on from a series of articles on part 36 JPIL board member *John McQuater* and *Julian Chamberlayne* turn their attention to interest on costs and provide an analysis of the framework for claiming interest and a summary of the key decisions and precedents.

Lastly, JPIL Board member *Jonathan Wheeler* and two of his colleagues *Caroline Klage* and *Suzanne Trask* share with us their perspective on Legal Aid after LASPO.

As always, I am grateful to all those who have contributed to this edition and to the Digest Editor Nigel Tomkins, the JPIL Editorial Board and the team at Sweet and Maxwell.

Muiris Lyons

Section 69 of the Employment and Regulatory Reform Act 2013—Plus Ca Change?

Patrick Limb QC

Jason Cox*

Breach of statutory duty; Direct effect; Employers' liability; EU law; Failure to fulfil obligations; Health and safety at work; Negligence

Patrick Limb QC and Jason Cox consider to what extent European law may yet bear on liability for personal injury, in light of s.69 of the Enterprise & Regulatory Reform Act 2013, which abolishes civil liability for breach of statutory duty. Have Defences been shored up against Europe and, even if they have, will "plus ça change, plus c'est la même chose" prevail?

Turning the European tide

> "But when we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back, Parliament has decreed that the Treaty is henceforward to be part of our law. It is equal in force to any statute."

So spoke Lord Denning M.R. in *Bulmer v Bollinger*,[1] when referring to the European Communities Act 1972. As Laws L.J. commented in the third of his Hamlyn Lectures, entitled "Europe and the Common Law" delivered on November 27, 2013:

> "Lord Denning's metaphor about the estuaries and the rivers, whether or not he meant it thus, has a whiff of apprehension about it."

In fact, one can be sure there was more than a whiff. So much is confirmed by the "Introduction to the European Court of Justice: Judges or Policy Makers?"—published by the Bruges Group in 1990, when Lord Denning returned to, and extended, his own metaphor in the following stark terms:

> "Our sovereignty has been taken away by the European Court of Justice … Our courts must no longer enforce our national laws. They must enforce Community law … No longer is European law an incoming tide flowing up the estuaries of England. It is now like a tidal wave bringing down our sea walls and flowing inland over our fields and houses—to the dismay of all."

A clarion call to shore up the defences!

There is a sense that anti-European sentiment of that kind helped s.69 of the Enterprise and Regulatory Reform Act 2013 ("ERRA") become law on October 1, 2013. To don, for a moment, the union-jack waistcoat of "John Bull", just as some have been heard to complain about the march of human rights as stemming from Strasbourg, so also talk of "It's health and safety gone mad" has been heard in recent years, with dark mutterings about the influence of Brussels in the next breath.

Some commentators have asserted that s.69 will have a seismic effect on personal injury litigation in the future. After all, s.47(2) of the Health and Safety at Work Act 1974 ("HSWA")—the modern

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[1] *HP Bulmer Ltd v J Bollinger SA (No.2)* [1974] Ch. 410 at 418.

embodiment of the principle established 115 years ago in *Groves v Lord Wimborne*,[2] namely that a breach of statutory duty though punishable at criminal law is also actionable by an individual affected by the breach—has been turned on its head. Section 69 ERRA replaces HSWA s.47 with a provision to this effect:

> "Breach of a duty imposed by statutory instrument containing (whether alone or with other provisions) health and safety regulations shall not be actionable except to the extent that Regulations under this Section so provide."

As a result, an injured claimant will not be able to rely on breaches of statutory duty in a civil claim for compensation but instead will need to prove that the employer had been negligent. In response to the clocks being turned back in this way, this article considers whether and, if so, to what extent European law may yet bear on liability for personal injury in this new era.

Why is Europe relevant at all?

What has European law got to do with the question of whether civil remedies are provided for breaches of statutory duty in our courts? The basic answer is of course that much of current UK health and safety secondary legislation, and specifically the "six pack" which has been at the heart of employers' liability cases for two decades, was born in Brussels.

The founding articles include a goal of "improvement in particular of the working environment to protect workers' health and safety". In order to promote free trade across Europe there must be common standards of health and safety across Europe—otherwise Member States might sacrifice worker safety in order to compete on price.

In 1989, the Second Framework Directive 89/391[3] created a new EU-wide programme aimed at harmonisation and a levelling up of standards, but it was for Member States to implement the Directive. A number of "daughter directives" were adopted under the Framework Directive dealing with workplace health and safety, work equipment, personal protective equipment, manual handling, display screen equipment. These individual subjects are immediately recognisable as the basis for five of the six regulations within the "six pack"; the sixth being the Management of Health and Safety at Work Regulations 1992[4] (which themselves pick up much of the detail of the Framework Directive).

The primary issue which arises, following the enactment of ERRA s.69, is whether it can be successfully argued that the removal of civil liability effected by s.69 renders the United Kingdom's implementation of the various directives inadequate and, if so, with what consequences. To address this requires consideration of the various mechanisms by which challenges having their origin in Europe might be launched.

Enforcement Action by the European Commission

Although plainly not a matter for individual litigants, it is possible that ERRA s.69 could be challenged by the European Commission on the basis that it results in a situation where the Framework Directive has not been adequately implemented. In order to consider the likelihood of such proceedings and their possible outcome, it is instructive to look back at the only previous health and safety case where such an approach has been taken: *Commission of the European Communities v United Kingdom*.[5]

That challenge concerned HSWA s.2(1) which provides that:

[2] *Groves v Lord Wimborne* [1898] 2 Q.B. 402.
[3] Directive 89/391 on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ L183/1.
[4] Management of Health & Safety at Work Regulations 1992 (SI 1992/3242).
[5] *Commission of the European Communities v United Kingdom* (C-127/05) [2007] All E.R. (EC) 986.

> "It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees."

The Commission contended that the qualification to the duty, which is limited to what is reasonably practicable in each case meant that the United Kingdom had failed to fulfil its obligations under arts 5(1) and (4) of the Framework Directive, which provide that:

> **"Article 5(1):**
>
> The employer shall have a duty to ensure the safety and health of workers in every aspect related to the work.
>
> **Article 5(4):**
>
> This Directive shall not restrict the option of Member States to provide for the exclusion or the limitation of employers' responsibility where occurrences are due to unusual and unforeseeable circumstances, beyond the employers' control, or to exceptional events, the consequences of which could not have been avoided despite the exercise of all due care."

The Commission's argument focused on two matters. First, earlier health and safety directives had included a "reasonably practicable" qualification, which had been abandoned in the Framework Directive. Secondly, the test of what was "reasonably practicable" involves taking account of the "cost of preventative measures" and thereby (according to the argument) clearly conflicts with the preamble to the Directive, which states that health and safety "is an objective which should not be subordinated to purely economic considerations".

However, the United Kingdom argued that there was nothing in the Directive, which required employers to be subject to "no-fault liability" and in essence the court accepted this argument. Of relevance to the prospects of, and for, any future enforcement action relating to ERRA s.69 are the three specific arguments advanced by the United Kingdom, albeit they were not specifically addressed in the judgement.

First, it was argued that the Directive:

> "simply provides that the employer has a duty to ensure the safety and health of workers, but does not also lay down an obligation to provide compensation for damage suffered as a result of workplace accidents."

That the Directives do not impose a requirement to provide for compensation would surely be fatal to an argument that civil liability should result from breach of a Directive notwithstanding ERRA.

In this regard, of equal note are the conclusions of the Advocate General at para.118 and para.124 of his Opinion to this effect: They read as follows:

> "118. Although defined in particularly broad terms, the employer's liability resulting from Article 5(1) and (4) of that directive is in fact liability based on fault which flows from a failure to discharge the duty to ensure safety devolving on the employer.
>
> …
>
> 124. … I consider it necessary to make clear that, as well as not requiring Member States to adopt a specific *form* of liability, as the United Kingdom was right to point out, the framework directive does not require that the different forms of liability—civil, criminal or other forms of liability—envisaged by each national legal system should be *identical in terms of their extent*."

Perhaps ironically, the Advocate General seemed to have in mind at para.125 a system where a Member State might have a wider form of civil liability than criminal liability!

Secondly, it was argued that the criminal sanctions provided by HSWA had a "greater deterrent effect than civil liability resulting in the payment of damages, against which employers are able to take out insurance cover".

Thirdly, it was argued that the United Kingdom has an established compensation system for victims of workplace accidents with its social security payments and damages for breach of the common law duty of care.

In all events, both the outcome and the arguments rehearsed in this case, do not suggest that the Commission is likely to have a huge appetite for challenging s.69 in the European Court.

Direct effect

The doctrine of direct effect may circumvent s.69 in a limited class of cases—there being three fundamental requirements for such an action:

- The relevant provisions of the directive must be sufficiently clear, precise and unconditional.
- The date for implementation must have passed.
- A claim can only be made "vertically" and thus against an "emanation of the state", which encompasses governing bodies of voluntary aided schools,[6] local authorities,[7] police authorities[8], privatised water companies,[9] public health bodies[10] and tax authorities[11] etc.[12] There is no horizontal direct effect as between private parties.

Until October 1, 2013 it has not been necessary for claimants in personal injury claims to seek to rely on the doctrine of direct effect. The Six Pack Regulations which sought to implement the Framework and "daughter" Directives could give rise to a cause of action in UK law. If it could be argued that there was some material difference between the regulation and the relevant Directive, the principles of interpretation considered below should fill the gap.

However, post-s.69 ERRA, a debate may arise as to whether there is a two-tier system where employees or others owed duties by an "emanation of the state" can invoke and rely on EU Directives in a civil claim whereas those seeking a remedy against an ordinary private body cannot.

A close reading of the Directives reveals that the duties imposed are relatively clear and precise and it is also clear that the obligations imposed are upon employers and for the benefit of workers. Just as an example, set out below is the text of art.12 of the Framework Directive in respect of training:

"Training of workers

1. The employer shall ensure that each worker receives adequate safety and health training, in particular in the form of information and instructions specific to his workstation or job:
   - on recruitment,
   - in the event of a transfer or a change of job,
   - in the event of the introduction of new work equipment or a change in equipment,
   - in the event of the introduction of any new technology.

   The training shall be:
   - adapted to take account of new or changed risks, and
   - repeated periodically if necessary.

[6] *NUT v St Mary's Church of England Junior School Governing Body* [1977] I.R.L.R. 334.
[7] *Fratelli Costanzo SpA v Comune di Milano* (103/88) [1989] E.C.R. 1839; [1990] 3 C.M.L.R. 239.
[8] *Johnston v Chief Constable of the Royal Ulster Constabulary* (222/84) [1987] Q.B. 129; [1986] E.C.R. 1651.
[9] *Griffin v Southwest Water Services Ltd* [1995] I.R.L.R. 15.
[10] *Marshall v Southampton and South West Area HA* (152/84) [1986] Q.B. 401.
[11] *Becker v Finanzant Münster Innenstadt* (8/81) [1982] E.C.R. 53.
[12] For further details of what is an emanation of the State, see *Redgrave*, para.2.42.

2. The employer shall ensure that workers from outside undertakings and/ or establishments engaged in work in his undertaking and/ or establishment have in fact received appropriate instructions regarding health and safety risks during their activities in his undertaking and/ or establishment.
3. Workers' representatives with a specific role in protecting the safety and health of workers shall be entitled to appropriate training.
4. The training referred to in paragraphs 1 and 3 may not be at the workers' expense or at that of the workers' representatives.

The training referred to in paragraph 1 must take place during working hours.

The training referred to in paragraph 3 must take place during working hours or in accordance with national practice either within or outside the undertaking and/ or the establishment."

And in the latest Work Equipment Directive[13] it is provided that:

"Without prejudice to Article 12 of Directive 89/391/EEC, the employer shall take the measures necessary to ensure that:

(a) workers given the task of using work equipment receive adequate training, including training on any risks which such use may entail;
(b) workers referred to in Article 6(b) receive adequate specific training."

There is no obvious reason to think that the requirements of these articles are not sufficiently clear and precise in the standards that they set to prevent them having direct effect.

The key issue here will be the adequacy of the remedy provided in national law; in essence the European law concepts of effectiveness and equivalence. Most directives do not specify the remedies for breach of their provisions and neither the Framework Directive nor daughter directives do so. In *Van Colson*[14] the ECJ held that the choice of remedy was a matter for the Member State but that any sanction "must be such as to guarantee real and effective judicial protection" and that "measures must be sufficiently effective to achieve the objective of the Directive".

This has lead the editors of *Redgrave* to assert that:

"In keeping with this approach, a worker injured by breach of directly affected provisions of a Directive should be able to bring a claim for damages as in an action for breach of statutory duty."

Whether that assertion holds water will be the key issue in any future litigation.

However, the arguments deployed by the United Kingdom in the EU Commission's challenge to the wording of HSWA s.2, give a strong indication of what the opposing arguments will be, namely that the Directives clearly leave open to the Member States freedom to decide as to the form of liability, civil or criminal, which should be imposed on employers and, of course, that the injured person will always have a common law remedy in any event.

The ECJ has, no doubt for good reasons, been reluctant to interfere more than necessary in domestic rules as to the jurisdiction and procedure of national courts, and the remedies which they can grant. In an early case, *Rewe-Handelsgesellschaft Nord mbH and Rewe-Markt Steffen v Hauptzollamt Kiel*,[15] the ECJ stated that:

"it was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law."

[13] Directive 2009/104 concerning the minimum health and safety requirements for the use of work equipment by workers at work (second individual Directive within the meaning of art.16(1) of Directive 89/391) [2009] OJ L260/5, which came into effect on September 16, 2009.
[14] *Von Colson v Land Nordrhein-Westfahlen* (C-14/83) [1984] E.C.R. 1891.
[15] *Rewe-Handelsgesellschaft Nord mbH and Rewe-Markt Steffen v Hauptzollamt Kiel* (158/80) [1981] E.C.R. 1805 at [44].

Therefore, it seems that in order to be able to launch a claim relying upon direct effect with any degree of confidence, it would be necessary to identify a particular factual scenario in which the common law would not allow an injured party to succeed in a claim but that the terms of the Directive would.

Just as an example therefore, and perhaps an ironic one given that *Stark v Post Office*[16] has long been the bête noire of defendants, on the facts of that case an argument of direct effect would not assist. This is because as was expressly accepted by Waller L.J. in *Stark* the language of arts 3 and 4 of the Work Equipment Directive is "not such as to compel a member state to introduce absolute obligations" so that the reg.5 obligation to "maintain work equipment in an efficient state, in efficient working order and in good repair" in essence amounts to over-implementation rather than non-implementation by the United Kingdom.

In addition, the recent drivers' hours case of *R. (on the application of the United Road Transport Union) v Secretary of State for Transport*[17] identifies the steepness of the hill which claimants seek to ascend. In that case,[18] the Court of Appeal noted that the test for effectiveness, concerns whether the domestic rules render the assertion of the community right "impossible or excessively difficult". Here, the drivers were seeking the introduction of secondary legislation, which might provide commercial road transport workers with a civil remedy in the form of access to an employment tribunal if they were required to work in contravention of regulations concerning breaks and rest periods requirements. The Court of Appeal had no difficulty in agreeing with the trial judge that the ability of such workers to complain to VOSA; to rely upon the protected disclosure (whistleblowing) provisions of employment legislation; and to bring a civil claim for breach of implied duty in the contract of employment all meant that the principle of effectiveness was not infringed. The fact that protection of the workers could have been improved by a specific remedy in the employment tribunal was not relevant.

Francovich action

The final prospect for European remedies lies in a *Francovich*[19] action. This may arise in the event of a demonstrable failure by a Member State to implement the standards of the Directives and to provide effective means of enforcement, in which case an individual may in appropriate and limited circumstances sue the State for damages for any loss sustained thereby.

There are generally four fundamental requirements for such an action:

- The law which has been infringed must be intended to confer rights on individuals.
- The content of those rights must be made sufficiently clear by the Directive.
- The breach of duty on the part of the State must have directly caused damage to the individual.
- The breach must be sufficiently serious, amounting to a manifest and grave disregard by a Member State of its discretion as to how to implement.

Again, the main area of argument is likely to be whether or not the extent of implementation affected by s.69—and in particular the removal of a civil remedy—amounts to a sufficiently manifest and grave disregard of the discretion. The authors suspect that the fact the Regulations still impose criminal liability will suffice to defeat a Francovich claim. By contrast, in the Francovich case, the Italian Government had done nothing at all towards implementation of the directive.

[16] *Stark v Post Office* [2000] I.C.R. 1013.
[17] *R. (on the application of the United Road Transport Union) v Secretary of State for Transport* [2013] EWCA Civ 962.
[18] Citing heavily *Oyarce v Cheshire CC* [2008] EWCA Civ 434 [2008] ICR 1179.
[19] *Francovich v Italy* (C-6/90) [1991] E.C.R. I-5357; [1995] I.C.R. 722.

What use the Directives and Regulations now?

Opportunities for injured workers to circumvent the intended effect of ERRA s.69 by reference to European law, by means of any of the mechanisms considered above, appear to be relatively limited.

The two main difficulties which are likely to be encountered in any such challenge will concern: (a) establishing that on the facts of the individual case there is in fact a substantive difference between the Framework or Daughter Directives and national law; and (b) finding a way around the fundamental problem that the Directives do not specify remedies and in particular that there be a civil remedy available to an individual affected by a failure to comply with the standards imposed by the Directives.

It remains to be seen whether an attempt to rely upon direct effect is a desirable approach (for those claimants who can), or whether litigants are generally better off seeking to revitalise the common law. We suspect the latter as the challenge for claimants is that the Directives do not require the imposition of civil liability for breach, still less do they generally impose any obligation that provides for strict liability.

In reinvigorating the common law, that has lain largely moribund since January 1, 1993, European influences ought still to prevail, both explicitly and less overtly. Explicitly because a breach of the Regulations can and should be relied upon as evidencing negligence; indirectly, by reference to the stringent guidance published by the HSE, which guidance has in no small part been informed by the systematic, approach found in the Directives themselves.

Whilst breach of statutory duty based on the Regulations is effectively gone, any suggestion that breach of them is not relevant to negligence should be met (or headed off) with pleaded reliance on this Ministerial Statement in the House of Lords from Viscount Younger, made on April 22, 2013:

> "We acknowledge that this reform will involve changes in the way that health and safety-related claims for compensation are brought and run before the courts. However, to be clear and to avoid any misunderstanding that may have arisen, this measure does not undermine core health and safety standards. The Government are committed to maintaining and building on the UK's strong health and safety record. The codified framework of requirements, responsibilities and duties placed on employers to protect their employees from harm are unchanged, and will remain relevant as evidence of the standards expected of employers in future civil claims for negligence."

Purposive interpretation of the Regulations

It is well-established that a regulation or statute intended to implement a European directive must be construed so far as is possible to achieve the result intended by the Directive: see *Van Colson*.[20] Following the case of *Marleasing*,[21] it is clear that this obligation to interpret exists regardless of the status of the parties before the court and even where neither party is an "emanation of the state". Thus, as stated by the European Court of Justice:

> "In applying the national law, whether the provisions in question were adopted before or after the Directive, the national Court, called upon to interpret is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189."

However, that in turn necessarily begs the question of what the Directives are intended to achieve. Consider, for example, *Green v Yorkshire Traction*.[22] This concerned reg.6 of the Provision and Use of

[20] *Von Colson v Land Nordrhein-Westfahlen* (C-14/83) [1984] E.C.R. 1891 and see the excellent analysis of how this process is to be achieved in *Redgrave*, paras 2.9/20.
[21] *Marleasing SA v La Comerical Internacionale de Alimentacion SA* (C-106/89) [1990] E.C.R. I-4135.
[22] *Stephen Paul Green v Yorkshire Traction* [2001] EWCA Civ 1925.

Work Equipment Regulations 1992[23]—now reg.5 of the 1998 Regulations bearing the same name.[24] The claimant's case was that rain on a bus step placed the bus operator in breach as, so it was contended, the obligation to maintain work equipment should be interpreted as an absolute one—for which proposition much support was derived from the Framework Directive as cited above.

The defendant argued that art.5(1) of the Framework Directive was not to place an absolute responsibility on the employer. The requirement that there should be a duty on the employer did not provide any guidance as to the *extent* of the duty: such guidance could be derived by consideration of other parts of the Framework Directive and also, in this case, the Work Equipment Directive. The recital to both the Framework Directive and Work Equipment Directive made specific reference to art.118a of the Treaty of Rome and the obligation on the Council to provide minimum requirements for encouraging improvements to guarantee a better level of protection of the safety and health of workers. The reference to *minimum* requirements was, it was submitted on behalf of the defendant, hardly appropriate if the duty being imposed was in fact an absolute duty. Reference was also made to art.1(1) of the Work Equipment Directive, which again made reference to minimum requirements. On that occasion, the defendant's arguments prevailed.

An altogether more recent example of how interpretation of the Directives informed the result is *Hide v Steeplechase Co*[25] concerning injury to a jockey who fell from his mount and struck a guard rail sustaining injury, his contention being that the hurdle was placed too close to the perimeter rail, which was too unyielding and/or insufficiently padded. In that case, it was held at first instance and not challenged on appeal that both the railings and hurdles were work equipment and the case turned on the definition of "suitability2 at reg.4(4) of the Provision and Use of Work Equipment Regulations 1998 which means "suitable in any respect, which it is reasonably foreseeable will affect the health or safety of any person". The starting point was that PUWER had been enacted in order to implement the Framework Directive and the Use of Work Equipment Directive (89/655).[26] However, neither Directive included a definition of "suitable" and as noted above, the only qualification on the general duty in the Framework Directive is to be found in art.5(4) and is much more limited than a general consideration of what is reasonably foreseeable.

These considerations led the Court of Appeal at [23] to conclude that the words "reasonably foreseeable" in reg.4(4) had to be construed so as to be consistent with the limited concepts of foreseeability in art.5(4) of the Framework Directive. In practical terms, this meant that an employer must prove that any relevant accident was due either to "unforeseeable circumstances beyond the employers control" or to "exceptional events the consequences of which could not be avoided despite the exercise of all due care". Once that more restrictive interpretation was placed on the meaning of suitable, it was not possible for the defendant to discharge the onus upon it.

The obligations imposed on employers by the Six Pack and other regulations, backed by a criminal sanction, will continue to be relevant in setting the standard of care to be expected of the employer at common law. When doing so, the reasoning and outcome in *Hide* and in other similar scenarios could continue to set the bar high for employers as to what steps are reasonable.

Stark re-visited

The status of *Stark v Post Office* as somehow demonstrating what happens as a consequence of allegedly too much regulation from Europe is worthy of re-consideration. We have already noted above what Waller

[23] Provision and Use of Work Equipment Regulations 1992 (SI 1992/2932).
[24] Provision and Use of Work Equipment Regulations 1998 (SI 1998/2306).
[25] *Hide v Steeplechase Co* [2013] EWCA Civ 535; reviewed by Nigel Tomkins at [2013] J.P.I.L. 151.
[26] Directive 89/655 concerning the minimum safety and health requirements for the use of work equipment by workers at work (second individual Directive within the meaning of art.6(1) of Directive 89/391 [1989] OJ L393/13.

L.J. had to say about arts 3 and 4 of the Work Equipment Directive, namely that in and of themselves they do not enable the Claimant to establish civil liability. But what of establishing fault?

On its face though, *Stark* is a claim where the claimant was taken as only being able to prove breach of a statutory duty of a strict application. However, it is suggested that such cases will be very much the exception—and that having to prove fault should not be insoluble. The defect to the bicycle was either a manufacturing defect or metal fatigue. If the former, the claimant would have succeeded even without strict liability—the Employers Liability Defective Equipment Act 1969 refers. If the latter, it would be reasonable to contend that employers should guard against the foreseeable risk of metal fatigue by a system of inspection and renewal. For example, one notes this recital of facts at the beginning of Waller L.J.'s judgment:

> "The employer did in fact have a policy of replacing bicycles at 10 years, but this was not an inflexible rule. Sometimes, as in the case of this bicycle, they thought a bicycle had a few years' serviceable life left and allowed it to continue in service. This bicycle was in its fourteenth year. The judge found that if it had been replaced at 10 years the accident would have been prevented but did not suggest there was any fault on the part of the employer in taking the decision they did. In the result Judge Cracknell found that there was no liability in negligence and from that finding there is no appeal."

One can readily see how, in this new era, a greater concentration of effort on that feature of the evidence could and would yield winning arguments.

In short, without being sanguine about the effects of s.69, the authors conclude that whilst European itself does not provide the means to overbear s.69—that flood defence will hold for so long as it remains on the statute-book—the forensic reality may be that not a lot has changed. "Plus ça change, plus c'est la même chose" to borrow from the Continent.

Misguided Advice as a Novus Actus: *Wilkin-Shaw v Fuller*

Ronald Walker QC

Henry Charles*

Adventure activities; Breach of duty of care; Causation; Clinical negligence; Fatal accidents; Foreseeability; Intervening events; School trips

Ronald Walker QC and Henry Charles look at the case of Wilkin-Shaw v Fuller *and consider the issue of novus actus. They look at how it was applied in that case and then look at its application more generally in the context of other cases including in clinical negligence claims.*

ML

The decision of the Court of Appeal in *Wilkin-Shaw v Fuller and Kingsley School Bideford Enterprises Ltd*[1] is illustrative of circumstances in which the intervention of an adviser (in that case a well-meaning but misguided scoutmaster) which causes an accident which would not otherwise have happened may break the chain of causation.

The facts

The Ten Tors challenge was, and is, an annual event that has been held since 1960 over the rugged terrain of Dartmoor. It is organised by the Ministry of Defence and takes place over two days. It involves some 400 teams, each consisting of six youngsters between 14 and 19. The teams cover a distance of 35, 45 or 55 miles depending on their ages, checking in at check points located at Ten Tors. Charlotte Shaw, 15, was a member of a team which her school, the second defendant, had entered for the event, and the accident happened on a training weekend for the event itself.

On the day of the accident the team set out as planned, with the aim of completing a route along which were various checkpoints—at which their well-being would be checked by volunteer teachers. Weather conditions rapidly deteriorated during the course of the day. Early in the afternoon Charlotte's team arrived, tired and wet, at their checkpoint, but the teacher (T) had not arrived, having become lost.

The next, and final, leg of their walk would, but for the weather conditions, have involved crossing a small brook. However, rainwater had turned it into a fast flowing stream of substantial depth and breadth which the team were unable to cross. They sought advice by telephone from the teacher in charge (F) who advised them not to attempt to cross the brook, but to take an alternative route. However, at this point they had a conversation with a scout master (W) whom they had met at the checkpoint. He assessed their wellbeing, then spoke with F, and suggested that the children were fit to continue. They were sent on their way.

The children tried to cross the brook, but failed. They went back to the checkpoint. F spoke with the children and instructed them to take a route off the moor which avoided crossing the brook, and indeed specifically told them not to cross the brook. Professional instruction had previously been given to the

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[1] *Wilkin-Shaw v Fuller* [2013] EWCA (Civ) 410.

children to avoid crossing brooks unless they were of minimal depth and could be walked across. The children had earlier encountered another group leader who gave them advice in similar terms.

However, at this stage they again met the scout master, who decided to show them a different crossing point at which he thought they could cross the brook safely. The children, who were by then tired and dispirited, accepted his proposal. The members of the group, apart from Charlotte Shaw, managed to cross the brook at this point, albeit with difficulty (it was necessary to leap across, on to and then from a small "island" in the centre of the brook, having first removed backpacks). However Charlotte, who was about to jump from the island to the opposite bank, lost her balance as she endeavoured to retrieve a backpack, fell into the water, and was swept downstream with fatal consequences.

The first instance decision

Amongst many findings, the trial judge, Owen J, held that the failure of T to reach the checkpoint was not negligent. He also held that even if he had found negligence on the part of the defendants, the actions of the scout master broke the chain of causation: although it was reasonably foreseeable that children would ask advice from adults supervising other groups, it was not reasonably foreseeable that bad advice would be given. In any event, the advice of W was an independent supervening cause for which it would not be fair to blame the school.

Findings on Appeal (Pill L.J. giving the judgment of the Court of Appeal)

On appeal it was held that T's failure to reach the checkpoint was in fact a breach of duty, but the Court of Appeal declined to find any causative consequence: it was very speculative as to what course events would have taken had T arrived—it would have been appropriate for her to have checked the condition of the children and sent them on their way, had any queries been raised she would have telephoned F whose advice would have been in the same terms as the advice which he had in fact given. Further, the failure to obey F's instruction not to cross the brook was not foreseeable. The Court of Appeal also held that W's intervention broke the chain of causation.

The "but for" test: The starting point

In a negligence action, the first hurdle that a claimant has to surmount is to prove that but for the defendant's negligence his injury would not have occurred; if he cannot prove this, causation is not established. One basis for the Court of Appeal decision in *Wilkin-Shaw* was that the claim failed because, even if T had arrived at the checkpoint in time (so that there was no negligence), the accident would, on the balance of probabilities, still have happened

However the application of the "but for" test is not necessarily at all straightforward.

An old rhyme[2] encapsulates the problem:

> "For want of a nail the shoe was lost.
> For want of a shoe the horse was lost.
> For want of a horse the rider was lost.
> For want of a rider the battle was lost.
> For want of a battle the kingdom was lost.
> And all for the want of a horseshoe nail."

[2] Which may have originated as a warning to soldiers that the smallest dereliction of duty could have profound consequences.

So a tortious act may have far-reaching consequences. At what point do those consequences cease to be the responsibility of the tortfeasor? In *Kuwait Airways Corp v Iraqi Airways Co*[3] Lord Nicholls answered the question in the following, now frequently cited, passage:

> "How then does one identify a plaintiff's 'true loss' in cases of tort? … I take as my starting point the commonly accepted approach that the extent of the defendant's liability for the plaintiff's loss calls for a twofold enquiry; whether the wrongful conduct causally contributed to the loss and, if it did, what is the extent of the loss for which the defendant ought to be held liable. The first of these enquiries, widely undertaken as a simple "but for" test, is predominantly a factual inquiry … The second inquiry, although this is not always openly acknowledged by the courts, involves a value judgment ('ought to be held liable'). Written large the second inquiry concerns the extent of the loss for which the defendant ought fairly or reasonably or justly to be held liable … the inquiry is whether the plaintiff's harm or loss should be within the scope of the defendant's liability, given the reasons why the law has recognised the cause of action in question. The law has to set a limit to the causally connected losses for which a defendant is to be held liable."

When is satisfying the but-for test not enough?

This question was addressed by Lord Rodger in *Simmons v British Steel Plc*[4] as follows:

> "These authorities suggest that, once liability is established, any question of the remoteness of damage is to be approached along the following lines which may, of course, be open to refinement and development. (1) The starting point is that a defender is not liable for a consequence of a kind which is not reasonably foreseeable … (2) While a defender is not liable for damage that was not reasonably foreseeable, it does not follow that he is liable for all damage that was reasonably foreseeable: depending on the circumstances, the defender may not be liable for damage caused by a novus actus interveniens or unreasonable conduct on the part of the pursuer, even if it was reasonably foreseeable … (3) Subject to the qualification in (2), if the pursuer's injury is of a kind that was foreseeable, the defender is liable, even if the damage is greater in extent than was foreseeable or is caused in a way that could not have been foreseen … (4) The defender must take his victim as he finds him … (5) Subject again to the qualification in (2) where personal injury to the pursuer was reasonably foreseeable, the defender is liable for any personal injury, whether physical or psychiatric, which the pursuer suffers as a result of his wrong doing."

So, having satisfied the but-for test, the claimant may still fail if his injury was either (a) not reasonably foreseeable, or (b) caused by a novus actus interveniens. However, both of these concepts are imprecise. Almost every eventuality is foreseeable, at least as a possibility; the question of whether it was "reasonably" foreseeable is essentially one of impression for the court.

Nor is every step in the passage of events beginning with the defendant's tortious act and culminating in the claimant's injury, classifiable as a novus actus. Whether it is so classifiable is, again, a matter of how it impresses the court. Lord Bingham in *Corr v IBC Vehicles*[5] at [15], acknowledged that the judges proceed on the basis of what they considered to be fair:

> "The rationale of the principle that a novus actus interveniens breaks the chain of causation is fairness. It is not fair to hold a tortfeasor liable, however gross his breach of duty may be, for damage caused

[3] *Kuwait Airways Corp v Iraqi Airways Co (No.6)* [2002] UKHL 19 at [69].
[4] *Simmons v British Steel Plc* [2004] UKHL 20 at [67], cited with approval by Lord Bingham in *Corr v IBC Vehicles Ltd* [2008] UKHL 13; [2008] 1 A.C. 884.
[5] *Corr v IBC Vehicles Ltd* [2008] UKHL 13; [2008] 1 A.C. 884.

to the claimant not by the tortfeasor's breach of duty by some independent, supervening cause (which may or may not be tortious) for which the tortfeasor is not responsible."

Older authorities

The older cases dealing with the circumstances in which an intervening act might qualify as a novus actus interveniens so as to deprive the claimant of his damages, did not treat the issue as one of fairness, and therefore adopted a more rigorous approach, in particular where the intervening event was an action of the claimant himself..

On this topic, because it was a decision of the House of Lords, the leading case is *McKew v Holland & Hannen & Cubitts (Scotland) Ltd*,[6] wherein the House of Lords held that in attempting to descend a steep staircase without a handrail without assistance, when his leg had previously given way, the claimant had been guilty of unreasonable behaviour which broke the chain of causation between the original tortious act and the consequences of the second accident. Lord Reid said at 1623:

> "In my view the law is clear. If a man is injured in such a way that his leg may give way at any moment he must act reasonably and carefully. It is quite possible that in spite of all reasonable care his leg may give way in circumstances such that as a result he sustains further injury. Then that second injury was caused by his disability which in turn was caused by the defender's fault. But if the injured man acts unreasonably he cannot hold the defender liable for injury caused by his own unreasonable conduct. His unreasonable conduct is novus actus interveniens. The chain of causation has been broken and what follows must be regarded as caused by his own conduct and not by the defender's fault or the disability caused by it. Or one may say that unreasonable conduct of the pursuer and what follows from it is not the natural and probable result of the original fault of the defender or of the ensuing disability. I do not think that foreseeability comes into this. A defender is not liable for a consequence of a kind which is not foreseeable. But it does not follow that he is liable for every consequence which a reasonable man could foresee. What can be foreseen depends almost entirely on the facts of the case, and it is often easy to foresee unreasonable conduct or some other novus actus interveniens as being quite likely. But that does not mean that the defender must pay for damage caused by the novus actus"

However, since Lord Bingham's identification of the applicable criterion (fairness) in *Corr v IBC Vehicles*, the judicial approach has manifestly softened and it may be doubted whether the decision in *McKew* would be the same if the facts arose today. This is apparent from the Court of Appeal decision in *Spencer v Wincanton Holdings Ltd*.[7] In that case, the claimant had been injured by the defendant's breach of duty, resulting in a leg amputation. He subsequently further injured himself at a filling station, when attempting to fill his petrol tank unaided and without using sticks or his prosthesis. The trial judge held that the claimant was carrying out an everyday task that he had done a number of times before without incident. He was seeking to act without reliance on others; in general terms his determination to live his life as normally as possible was to be commended. His conduct fell far below what could be described as *McKew* unreasonable. The Court of Appeal dismissed the defendant's appeal against that finding. Sedley L.J. cited Lord Nicholls' speech in *Kuwait Airways Corp v Iraqi Airways Co* and at [15] provided some amplification:

> "Fairness, baldly stated, might be thought to take things little further than reasonableness. But what it does is acknowledge that a succession of consequences which in fact and in logic is infinite will be halted by the law when it becomes unfair to let it continue. In relation to tortious liability for

[6] *McKew v Holland & Hannen & Cubitts (Scotland) Ltd* [1969] 3 All E.R. 1621.
[7] *Spencer v Wincanton Holdings Ltd* [2009] EWCA Civ 1404; [2010] P.I.Q.R. P8.

> personal injury, this point is reached when (though not only when) the claimant suffers a further injury which, while it would not have happened without the initial injury, has been in substance brought about by the claimant and not the tortfeasor."

The above passage was cited with approval by the Court of Appeal in *Dalling v RJ Heale & Co Ltd*.[8] In that case, the claimant, who had originally suffered a head injury at work due to his employer's negligence, suffered further injury when he fell from a bar stool as a result of allowing himself to become drunk. The evidence showed that the claimant was capable of controlling his drinking, albeit his self control had been impaired by the original head injury. The defendant, therefore, argued that his second accident was caused by his own volitional act in drinking to excess, thereby endangering his own safety. The trial judge, and the Court of Appeal, rejected this argument. The claimant's ability to control his drinking had been impaired by his original head injury; therefore his drunkenness on the occasion of his second accident had been caused, at least in part, by the original accident, and, applying the criterion of fairness, his volitional act was not a novus actus inteveniens.

Clinical negligence as a novus actus

A particular application of the novus actus principle is seen in cases where, having originally suffered injury due to the negligence of the defendant, the claimant receives improper or inadequate medical treatment, with the result that he suffers further injury. The question is then whether the medical intervention is to be regarded as a novus actus, thereby relieving the defendant of responsibility for the further injury. The tensions were apparent in *Hogan v Bentinck Collieries*[9] wherein the House of Lords held that an operation which had been carried out pursuant to a surgeon's negligent advice broke the chain of causation. Lord Normand stated that:

> "… if a surgeon, by lack of skill or failure to take reasonable care, causes additional injury or aggravates an existing injury and so renders himself liable in damages, the reasonable conclusion must be that his intervention is a new cause and that the additional injury should be attributed to it and not to the original accident. On the other hand, an operation prudently advised and skilfully and carefully carried out should not be treated as a new cause, whatever its consequences may be."

However, subsequent authorities demonstrate that in this area too the tide has turned in favour of claimants. Thus in *Wright v Cambridge Medical Group*[10] the Court of Appeal manifestly adopted the *Corr* approach. A young child contracted a super-bug in hospital. The treating clinicians did not know. The infection developed, the claimant was taken to the GP who negligently failed to see the child. Eventually the child was referred to hospital, the hospital vacillated over a consultant referral, junior doctors' did not provide effective treatment, and hip damage resulted.

For some reason (which did not impress the Court of Appeal) only the GP was sued. The trial judge dismissed the claim, but that was reversed on appeal. Lord Neuberger M.R. and Dame Janet Smith held that as the GP's negligence had reduced the time available to the hospital to diagnose and treat so the GP's negligence remained an operative cause of the injury. Elias L.J., however, found the hospital so much more to blame than the GP that the GP could no longer be held liable. His reasoning was as follows:

> "Whether later negligence of a third party will have the effect of relieving the earlier wrongdoer of liability for his negligent conduct depends on whether it is just that this should be so … Considerations of policy loom large in the analysis of whether the injury is in law too remote from the breach, notwithstanding the causal link in fact, although they are generally concealed beneath the legal

[8] *Dalling v RJ Heale & Co Ltd* [2011] EWCA Civ 365.
[9] *Hogan v Bentinck West Hartley Collieries* [1949] 1 All E.R. 588.
[10] *Wright (A Child) v Cambridge Medical Group (A Partnership)* [2011] EWCA Civ 669.

concepts used to justify the result. Sometimes it is said that the liability is outside the scope of liability for breach of the particular duty, or that the act of the third party is a novus actus interveniens, or simply that the damage is too remote. The choice of concept is not, however, entirely arbitrary. Depending upon the context, one might more adequately encapsulate the court's reasoning than another …

Focusing on the nature of the duty brings out an unusual feature of this case when compared with most situations where the claimant's injuries are exacerbated by negligent hospital treatment, such as the *Rahman* case. Typically it is the negligent act of the initial wrongdoer which causes the claimant to have to see a doctor whom he would not otherwise have to see and does not want to see. It is not difficult in those circumstances to conclude that justice will often require the initial wrongdoer to remain liable for all the foreseeable consequences of the negligence, even where they include the exacerbation of the injuries resulting from the negligent but foreseeable acts of doctors. In this case, however, the very purpose of the doctor's duty is where necessary to present the patient to the specialist in time to enable the patient to be properly treated. Where the doctor has done that, albeit with culpable delay, it seems to me unjust to make him liable for the hospital's negligent treatment …

As I have indicated, I recognise that there will be cases, of which this is one, where the delay will limit the opportunity of the hospital to put right any negligent treatment before it is too late. It seems to me that if the doctor is to be liable, this has to be the route by which he is made so. I see force in the analysis of the Master of the Rolls and Lady Justice Smith that this is enough to impose liability, but I am not ultimately persuaded that it is."

Conclusions

Wilkin-Shaw v Fuller is in some ways a remarkable case at appellate level in that not a single authority is referred to in the judgment of the Court of Appeal notwithstanding extensive reference to, and reliance on, authorities in argument, and in the first instance judgment.

However, the structure of the judgment at [51]–[55] is clearly acknowledging the principles set out by the House of Lords in *Kuwait Airways v Iraqi Airways* and *Corr v IBC*, echoed in *Wright v Cambridge*.

What *Wilkin-Shaw* does demonstrate, however, is that, although the judicial tide has undoubtedly turned in favour of claimants, the defence of novus actus interveniens is by no means a dead letter, though ultimately its success or failure in any individual case will depend upon the court's concept of "fairness", so that citation of authorities may be of little if any value.

Periodical Payments Orders—Where Are We Now?

Robert Weir QC*

Damages; Periodical payments orders; Personal injury; Road traffic accidents

Robert Weir QC looks at how PPOs have developed from their introduction almost nine years ago and weighs up the advantages and disadvantages of PPOs for both parties. He considers the issues that PPOs can throw up during settlement negotiations and discusses some of the ways those issues can be addressed and the role the Court can play.

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Introduction

This article takes a look at some of the developments and some of the unresolved issues surrounding Periodical Payments Orders ("PPOs"). Before doing so, I set out some preliminary comments on PPOs.

The PPO regime has been in place since April 1, 2005. Eight and a half years on, it is quite clear that:

- PPOs work for claimants with high value care/case management claims.
- Defendants have recognised that PPOs are likely to be ordered, at least for future care/case management in the vast majority of high value claims, and so have long been prepared to settle cases on the basis of "retained lump sum plus PPO" agreements/orders. Some defendants, such as the NHSLA, even embrace the PPO regime.

PPOs work for claimants

PPOs work in large care claims for a number of reasons, the importance of these reasons varying somewhat in each case. First of all, they produce a more accurate assessment of future loss (as recognised by Lord Dyson in *Simon v Helmot*[1]). Where there is a wide divergence of opinion between the experts as to the claimant's predicted life expectancy, a PPO produces a welcome degree of certainty. The claimant and/or his family members can rest assured that so long as he lives, payments will continue to be made. In this way, the claimant will miss out on the potential windfall to his estate of being paid now for future losses that he may never incur if he dies before the date settled upon by the parties or the court as his expected life expectancy, but that it is almost invariably seen as a small price to pay for avoiding the stark and very real risk of heavy under-compensation by settling on the basis of a compromise figure for life expectancy which the claimant might well outlive.

PPOs also work for claimants because the Court of Appeal in *Flora v Wakom (Heathrow) Ltd*[2] interpreted s.2(8) and s.2(9) of the Damages Act 1996 in a way which permitted the Court of Appeal subsequently in *Thompstone v Tameside and Glossop Acute Services NHS Trust*[3] to link care payments to an inflationary index related to carers' wages. In this way, the potential hazard of a claimant paying ever increasing wages to his carers but recovering payments from the defendant index-linked to RPI (which does not track those wages) was avoided.

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[1] *Simon v Helmot* [2012] UKPC 5 at [105].

[2] *Flora v Wakom (Heathrow) Ltd (formerly Abela Airline Catering Ltd)* [2006] EWCA Civ 1103; [2007] 1 W.L.R. 482.

[3] *Thompstone v Tameside and Glossop Acute Services NHS Trust* [2008] EWCA Civ 5; [2008] 1 W.L.R. 2207.

Another key advantage for claimants of the PPO regime has been the fact that the burden of investment has been placed onto the shoulders of the defendant. This burden can be a heavy one. The current discount rate of 2.5 per cent makes it a tall order for claimants to invest a lump sum award so as to meet future expenses. Claimants cannot recover damages for investment advice and will have to pay tax on profits from investment in the usual way. So even if they are prepared to take their chances with more risky investments, the expectation is that they will struggle to keep track of actual inflationary changes.

Defendants have engaged in the PPO regime

Almost all cases, including high value claims, settle. A very substantial proportion of those high value claims settle with a PPO award. This is a product of the defendants, mostly defence insurers and the NHSLA, recognising that, if they do not agree to settle on the basis of a PPO award, the court may well make such an award anyway. The court can do this even if one or both parties are opposed to the making of a PPO: this is the effect of s.2(1) of the Damages Act 1996. The court's role is "to some extent paternalistic" (per the Court of Appeal in *Thompstone*) and the court has shown itself prepared to make a PPO for future care in a case where the claimant, who was rendered tetraplegic, sought a lump sum payment only.[4]

Some defendants such as the NHSLA may expressly approve of the PPO regime because they are deferring payment of substantial sums until future financial years (i.e. not their problem). In my experience, defence insurers have shown a mixed response. It is not unusual still to be offered a "lump sum only" payment in negotiations, at least as a first offer in cases of up to around £3m. The impression I have is of an idiosyncratic approach to cases which may turn on issues such as how close the insurer is to the year end when the settlement negotiations are afoot and how much the insurer reserved for in a given case.

Reasonable security of continuity of payments

A court cannot make a PPO unless satisfied that the continuity of payment under the order is reasonably secure: s.2(3) of the 1996 Act. In the vast majority of cases, this requirement is satisfied. Most high value claims arise out of road traffic accidents in this country in circumstances where the defence insurer is protected by the Financial Services Compensation Scheme ("FSCS"). By virtue of s.2(4) of the 1996 Act, continuity of payment is deemed to be reasonably secure in such cases.

Even if the defence insurer was not protected by the FSCS, provided the case fell within the remit of the MIB Uninsured Drivers Agreement, it would seem that the continuity of payment will nevertheless be reasonably secure. This is because, in the event of the insurer becoming insolvent and so defaulting on the PPO, the MIB would become liable to make good the shortfall: see *Bennett v Stephens* and *Bennett v Stephens (No.2)*.[5]

If there is difficulty establishing whether the defence insurer is covered by the FSCS, disclosure can be sought even if the defence insurer is not a party to the action: see *Western v Clayson*[6] in which the insurer at the time of the accident, Direct Line, had at some point subsequent to the accident ceased to be authorised by the FSCS and its policy of insurance had been transferred UKI. The court ordered the insurer to disclose the original policy of insurance; the transfer instrument between Direct Line and UKI; proof from Direct Line that the policy was issued in the United Kingdom; and proof that the vehicle was registered in the United Kingdom.

In a case where liability arose before December 1, 2001 (that being the date on which the FSCS came into being), provided the insurer would have been covered by the precursor to the Financial Services Act

[4] See *Burton v Kingsbury* [2007] EWHC 2091 (QB).
[5] *Bennett v Stephens* [2010] EWHC 2194 (QB) and *Bennett v Stephens (No.2)* [2012] EWHC 1 (QB).
[6] *Western v Clayson* , Unreported, January 25, 2013 per Master Kay.

and Markets Act 2000, namely the Policyholders Protection Act 1975, the insurer will be covered by the FSCS in the event it is subsequently wound up. Accordingly, a PPO can be made: see *Boreham v Burton*.[7]

Where the road traffic accident occurs in England but the defence insurer is foreign and issued the certificate of insurance abroad, the insurer can still fall within the FSCS scheme provided that:

- the insurer is from an EEA state;
- the defendant vehicle was registered in the United Kingdom; and
- the insurer is a member of the MIB: see *Billingsley v UPS Ltd*.[8]

What though if the accident occurs abroad and the defence insurer is foreign? The defence insurer will not be covered by the FSCS or by the MIB. But no doubt there are equivalent bodies in many other States (not least European countries). Even so, the court is bound to feel anxious about its ability to protect the claimant. The foreign insurer may default on a PPO payment without becoming insolvent. Enforcement proceedings against a foreign insurer are most unlikely to be straightforward. Foreign legal advice would be needed on the ability of an English claimant to obtain the benefit of the foreign residual compensation scheme in the event the foreign insurer did become insolvent.

All this is against the backdrop that, per Mackay J., the court would need to be satisfied to a high level, something beyond balance of probabilities, that the continuity of payment was reasonably secure: *Bennett v Stephens*.[9] In such circumstances, I would have thought it quite unlikely the court would be satisfied without further ado.

The court does have the power to take a positive step to see that the continuity of payment is made reasonably secure. Section 2(5)(c) of the 1996 Act provides that the court may make an order requiring the paying party to take specified action to secure continuity of payment. This is unchartered territory for the court. Presumably it could order the foreign insurer to lodge substantial funds in England or to purchase an annuity. The court could also make use of s.2(5)(a) which permits it to order the paying party to use a method under which the continuity of payment is reasonably secure by virtue of s.2(4). This provision would appear to envisage the insurer purchasing an annuity from another insurer, itself covered by the FSCS.

Further problems arise where the defendant's liability is capped. This can occur with foreign road traffic insurers as the Motor Directive sets a level of minimum insurance or, for instance, with local authorities (who generally obtain insurance on the open market up to certain amount, such as £2m or £5m). A court certainly could not make an order under s.2(5) of the 1996 Act which required the defendant to purchase an annuity at a cost which (together with the lump sum payment) exceeded its overall liability. Whether an annuity is available in the market place to be purchased is another problem.

Heads of loss suitable for PPOs

PPOs can be made for any future pecuniary loss. In practice, however, they are generally made only in respect of future care (and case management). PPOs make such a good fit for future care claims in high value claims because the care award is invariably by far and away the largest element of the award and it continues for life. So, in taking future care by way of a PPO, the claimant has obtained a secure payment which will meet his single largest expense for so long as he shall live.

PPOs have been made for other heads of loss but, in practice, it is the exception rather than the norm. There are a number of reasons for this:

- Claimants need a certain amount of money on a lump sum basis to pay for accommodation.

[7] *Boreham v Burton* [2012] EWHC 930 (QB).
[8] *Billingsley v UPS Ltd* [2013] R.T.R. 30.
[9] *Bennett v Stephens* [2010] EWHC 2194 (QB).

- A lump sum can be used flexibly.
- Claimants like to know they have a substantial lump sum payment anyway.
- A PPO payable to a fixed date, short of the claimant's anticipated life expectancy, lacks the upside of a PPO which is payable for life. If the claimant lives longer, he will still only recover the same amount under the PPO whereas if he dies within the period for which the PPO is paid, he will have recovered less than he would have done by way of a lump sum payment.

Future nursing care/care home costs

Some very seriously injured claimants require substantial amounts of nursing care as well as care from support workers. In these cases, the claimant can seek to split up the overall award and link the nursing care to the ASHE index for health associate professionals, ASHE 321, and the support worker care to ASHE 6115. There is a balance to be struck between accuracy and administrative burden. In a case, for instance, where a nurse was required for only a handful of hours each week in a case meriting 24/7 care, there could be no sensible basis for seeking to separate out these nursing costs on a different inflationary index. In just the same way, this request for supreme accuracy is waived in every case as case management costs are heaped together with the care costs and all linked to the index for carers' wages.

Sometimes a claimant is best placed in a care home. In that case, the claimant will very often seek a PPO to cover the costs of the care home fees. The care home charge is itself made up of a combination of: ordinary food and lodging costs; care costs; nursing costs; costs for treatments such as physiotherapy; and management costs. Claimants' legal teams should be able to discover from the care home the approximate split between these different expenses. In most cases, the lion's share of the expense relates to staff costs, which will principally be made up of unqualified support workers' costs. In such a case, it may be as well to stay with ASHE 6115 for the entire cost. But if a substantial proportion of the overall cost relates to a different expense, which can be linked to a different ASHE index, the claimant can at least seek to link the separate cost to a different index.

Future loss of earnings

Future loss of earnings was assessed on a PPO basis in *Whiten v St George's Healthcare NHS Trust*[10] but in that case the claimant's predicted life expectancy was to age 35. So this was an example of a PPO running for life rather than to a fixed date in advance of the predicted life expectancy.

In *Whiten*, Swift J. linked the earnings PPO to the ASHE index for gross annual pay for all male full-time employees in the United Kingdom. This made sense because the assessment was being made in respect of a cerebral palsy claimant, that is someone who was injured at birth. Where the claimant already has an employment history by the time of the accident, there is no reason not to link the lost earnings claim to the appropriate ASHE index most closely corresponding to the work which the court assesses the claimant would have engaged in but for the accident. After all, that level of exactitude was applied in *Thompstone* to the claim for future care. So a claimant who was a social services manager could rely on ASHE 1184 (for social services managers and directors).

Future Court of Protection costs

This head of loss is often well suited to a PPO award. In cases where the claimant plainly lacks capacity and is going to have a professional deputy for life, it can make matters easier for the deputy if this head of loss is segregated off by way of a PPO. In this way, there is less likely to be a squabble between family

[10] *Whiten v St George's Healthcare NHS Trust* [2011] EWHC 2066 (QB).

and deputy over the amount of funds which should be used to pay for the deputy. Furthermore, the PPO provides a guarantee that this cost will be met for life. The one-off or occasional payments such as replacing the deputy and preparing a statutory will (often anticipated to occur every ten years) and the contingency award can be separated out and paid on a lump sum basis.

The most obvious index for the remaining expenses is one relating to legal fees as the work of professional deputyship is done by a solicitor and associated support staff. As the work is not generally that of a solicitor alone, it can be questioned whether the index should be ASHE 2413 (the index for solicitors) and might not more appropriately be ASHE 241 (the index for legal professionals).

It is, of course, one thing to ask a defendant insurer to provide a separate index of inflation in this way, another thing to get it. Given the vast majority of cases settle, it may be question of "who blinks first" as to whether parties who can agree the quantum of the PPO can settle their differences over an appropriate index.

Some defence insurers have tried to negotiate payment of CoP costs on a PPO basis with conditions attached: the claimant's capacity to manage his financial affairs will be reviewed regularly; if, at any point, he is found to have capacity, the payments under the PPO will cease. In a case where the claimant's evidence suggests he lacks capacity and the defendant's does not, it is difficult to see any proper basis for imposing such conditions. Either the claimant lacks capacity or he does not. If the defendant is not prepared to accept the claimant's case and the parties cannot agree a compromise figure, then the issue can always be litigated out.

In a minority of brain injury cases, some experts will opine that the claimant lacks capacity now but may regain capacity at some point in the future. In such cases, it at least becomes plausible to understand how a defendant may wish to protect itself from paying for CoP costs for life which may not be necessary. However, much would turn in the first instance on an assessment of the strength of the expert evidence which suggests that a person currently lacking capacity may yet regain it. In any event, even if the claimant regains capacity, that is not to say that he will necessarily cease to require financial assistance. The likelihood is that the expert evidence will still support the imposition of a trust with a professional trustee. No case has yet decided whether such costs are recoverable: I would say that they plainly are, not least given the terms of s.1(3) of the Mental Capacity Act 2005. Involving a professional trustee is part of taking practicable steps to help the claimant make a decision.

So, even if the claimant does regain capacity, that is not to say that the costs associated with the claimant managing his financial affairs should cease. Furthermore, if the claimant can regain capacity, presumably there is a risk that he can lose capacity at some further point. Should there be a mechanism for the claimant, now found to have capacity, to be reassessed so that, if he is subsequently found to have lost capacity, payments under the PPO can be retriggered?

There are also real practical problems in providing a fair mechanism for re-assessing the claimant's capacity. Should this be left to a single neuropsychiatrist? Or a neuropsychiatrist and a neuropsychologist? What evidence should they consider—should it include witness evidence from friends, family, existing support workers and the existing deputy? Who is to select the relevant expert or experts? What if they disagree? What if the assessment appears flawed—what right should the claimant have to challenge it? Who is paying for all these steps to be taken? And how often should the claimant have to bear the intrusion of this detailed assessment of his capacity?

It is a moot point whether the court could order that the PPO be varied in the event the claimant regained capacity: art.2 of the Damages (Variation of Periodical Payments) Order 2005[11] provides that the court can provide for a PPO to be varied where there is a chance that at some time in the future the claimant will "enjoy some significant improvement, in his … mental condition".

[11] Damages (Variation of Periodical Payments) Order 2005 (SI 2005/841).

Future accommodation claim

In the ordinary way, future accommodation claims are settled on a lump sum basis applying the *Roberts v Johnstone* formula. There are some cases where this works a serious injustice to the claimant; in particular, those cases where the claimant's predicted life expectancy is very short but there is no doubting the need for expensive new accommodation (classically the tetraplegic client in his 60s or older). The result is that the multiplier to be applied to the *R. v J* calculation is low and the claimant can hope only to recover a modest proportion of the actual housing costs he needs to incur.

A potential solution to this problem is to purchase a property with a mortgage which is funded by a PPO. The PPO could be linked to the Bank of England base rate or a mortgagee's interest rate (provided this was deemed by the courts to be acceptable).

The principal difficulty with this proposal is a practical one. It is very hard to identify a mortgagee willing to lend to an injured person on the strength of a PPO. Furthermore, claimants can be reluctant to enter into a scheme such as this which requires the property to be sold (to pay off the mortgage) on the claimant's death. Any claimant with a partner, in particular, is most unlikely to want to leave their other half homeless just when they are bereaving.

Fixed period PPOs

In a negotiation, there is nothing to stop the defendant from proposing a PPO on terms which do not match one head of loss in particular. In one case, my client was offered the sum of £100,000 pa linked to RPI for a period of ten years, come what may. There was a real issue as to whether the claimant would die within a short period of time and the defendant sought to tempt her to take this offer, which meant a guarantee of funds to her or her husband regardless of when she died. The offer was rejected as there was a chance, albeit small, that the claimant would live longer than this period and her assessed care needs were for more than the annuity offered.

I have not heard of a claimant accepting such an offer; if it is to happen, I expect it will be for a claimant who has capacity. It is hard to envisage a court approving this kind of chancer's charter approach towards PPO.

The effect of partial recovery of damages on the decision whether to seek a PPO

In a great number of cases, road traffic accidents in particular, liability is divided to take into account either risks on primary liability or contributory negligence. Whether a PPO remains a viable option will turn on a number of factors such as the level of reduction and the amount of lump sum needed by the claimant, for instance to purchase a suitable property.

Sometimes the claimant will know that he can make his care regime work with reduced funds. If, say, there is an agreed 20 per cent reduction, it may be that the claimant's partner will decide to undertake night care; or share in some double up daytime support worker duties. Or the claimant may opt for a live-in carer after the case settles. In this way, a PPO for 80 per cent of the assessed value of the claimant's care needs is still worth having for all the ordinary reasons in favour of a PPO.

In other cases, the claimant really needs to recover the full cost of care. The claimant can seek to have other future heads of loss translated into a PPO for care to make up the shortfall. So, if a claimant recovered 80 per cent of damages, and his care claim was for £120k pa, he could invite the defendant to deduct the equivalent of £24k pa for life from the lump sum element of his claim and to pay him his care claim in full. Failing that, he could seek to recover his Court of Protection costs as a PPO or loss of earnings on a PPO basis (even though this may not last for as long as his predicted life expectancy).

Where, say, the claimant is only recovering 25 per cent of damages, it may seem obvious that a PPO will be unworkable. But even here, a claimant may be advised that it would be helpful to have, as part of

his portfolio, a PPO. Treated only as an investment tool, it is still treated as a highly valuable item and may be worth having even though it cannot possibly meet all of the claimant's care needs.

Undertakings and reverse indemnities

The issue of claimants giving undertakings or reverse indemnities can arise in lump sum as well as PPO cases but I propose to cover it briefly anyway.

The starting point is that this issue should not be raised at all in a case unless there is good evidence that state funding may well be relied upon in the future. Otherwise, it is idle speculation on the part of the defendant whether a claimant may, at some point in the future, choose to avail himself of state funding. The obvious case in which the issue can be raised is one where, at the date of settlement, the claimant is in receipt of state funding.

In such a case, the claimant may give evidence that he intends to forego state funding in favour of relying on the defendant as the paying party once the case is resolved. The Court of Appeal in *Peters v East Midlands SHA*[12] resolved that a claimant is entitled to select in this way between state and private funding. Such evidence is frequently given, especially in cases where the claimant is recovering 100 per cent of damages.

In such a case, it is hard to see why the claimant should accede to any request to enter into a reverse indemnity. The claimant is being asked to sign up to something which the court, in all probability, cannot order: see *Firth v Geo Ackroyd Junior Ltd*, *Howarth v Whittaker* and *Burton v Kingsbury*.[13] That is not tempting. Nor is it necessary when the claimant has expressed an intention not to rely on state funding in the future.

It is more realistic for a defendant to raise the issue of reverse indemnities where the claimant acknowledges an intention to rely on state funding in the future. This will generally happen only in cases of partial recovery of damages.

Contributory negligence is not to be taken into account when assessing damages: see *Sowden v Lodge*.[14] So the fact that the claimant may wish to rely on state funding as well as damages from the defendant in order to obtain sufficient funds/services to meet his care needs is not relevant at the stage of assessing damages where this is a product simply of there being partial recovery. For this reason, defendants should recognise that any reverse indemnity is concerned only with payments from the state which take the total amount recovered by the claimant over 100 per cent of his assessed care needs.

So if the parties agree that the claimant has assessed care needs of £200,000 pa, and the claimant is recovering 60 per cent of his damages, he should be entitled to £120,000 pa PPO from the defendant. The defendant could then seek a reverse indemnity for payments made by the state over £80,000 in any given year.

If the claimant chooses to agree to such a reverse indemnity, the threshold level (£80k in the example above) should itself be index-linked in the same way that the £120,000 pa PPO will be.

The claimant should be careful to define the state benefits which are to be taken into account in the reverse indemnity so that they relate only to care provided in respect of the claimant's injury. Otherwise, the claimant risks giving credit for state benefits he needs as a result of a further unrelated injury or illness which serves to increase his overall care needs. The agreement could provide for account to be taken of:

> "state benefits obtained in respect of the claimant's care for personal injuries suffered by him as a result of the road traffic accident of …"

[12] *Peters v East Midlands SHA* [2009] EWCA Civ 145; [2010] Q.B. 48.
[13] *Firth v Geo Ackroyd Junior Ltd* [2001] P.I.Q.R. Q4, *Howarth v Whittaker*, Unreported, January 23, 2002 per Elias J. and *Burton v Kingsbury* [2007] EWHC 2091 (QB).
[14] *Sowden v Lodge* [2004] EWCA Civ 1370; [2005] 1 All E.R. 581.

Further, the term 'state benefits' should be closely defined. It could relate to:

> "sums obtained (not services) from NHS PCTs or local authorities for care provided in the claimant's home and not, for instance, in hospital."

If a claimant is generous enough to sign up to a reverse indemnity, it should surely be a passive one. This might provide simply that: "the claimant undertakes to pay to the defence insurer any sums obtained …". An active reverse indemnity places an unfair and unnecessary burden on the claimant, for instance to "use reasonable endeavours to ensure that he claims and receives all statutory funding …". What if the claimant wished to move abroad at some point in the future? And why should the claimant work so tirelessly on the defence insurer's behalf?

PPOs in lower value claims

PPOs are generally made only in claims with an equivalent lump sum value of around £1.5m+.

By virtue of s.2(1) of the Damages Act 1996, the court is required to consider whether to make a PPO in any case involving future pecuniary loss (in respect of personal injury). There is no threshold below which the court is not so obliged.

Be that as it may, the expectation is that PPOs will not be awarded or agreed unless the claim is of sufficiently high value. One driving factor for this is the administrative cost associated with setting up and running a PPO. Insurers tend to have their own bottom line figure for PPOs. When settling one brain injury claim with a PPO of £25,000 pa for future care, I was told that this represented the lowest PPO that Aviva had (as of 2009) agreed to.

If the claim is for less than around £1m, the factors militating against extending PPOs beyond future care apply even to the future care claim. So claimants will often prefer to have the certainty of a complete lump sum payment with a clean break from the defendant and total control over their funds to a relatively modest PPO.

There is, however, no fixed rule. In one case involving a claimant who was in a minimally aware state and residing in a care home, the case was settled on the basis of a lump sum of £430,000 plus a PPO of £115,000 pa to meet the future costs of the care home and ancillary case management. The claimant's life expectation was drastically reduced, the neurologists agreeing it at a further two to four years. Despite that, the correct order was clearly to have a PPO for future care home costs.

The nuts and bolts of a PPO

The basic framework for a PPO is set out in the revised model order as approved by Swift J. in *RH v University Hospitals Bristol NHS Foundation Trust* [2013] P.I.Q.R. P12.[15] Defence insurers, unlike the NHSLA, have rather stronger views as to some of the particular terms that should be included in the actual order. For this reason, it is as well to ensure at the stage of any round table meeting that as much particularity is given to the terms of any offer made as possible. Otherwise, the risk is that the parties will not be able to come to terms. Unless the parties have found common ground in relation to the entire Order, a court will be unable to make an approval Order; the court cannot approve what has not been agreed.

A way through this problem is for the court to determine any outstanding issues the parties cannot agree on. If the parties request the court to do this, the court does have jurisdiction to consider the residual drafting disputes: see *Follett v Wallace*.[16]

[15] *RH v University Hospitals Bristol NHS Foundation Trust (formerly United Bristol Healthcare NHS Trust)* [2013] EWHC 299 (QB); [2013] P.I.Q.R. P12.

[16] *Follett v Wallace* [2013] EWCA Civ 146.

In *Follett*, the Court of Appeal resolved the issue of whether the defence insurer should be able to have the claimant medically examined periodically so as to obtain up to date life expectancy figures for the purposes of calculating their reserves. This was held to be appropriate and so now will have to be conceded by the claimant. The Court of Appeal also decided a very minor point, namely that the defence insurer was entitled to suspend payment of the PPO in the event that the claimant did not provide written confirmation that he was still alive within the set timeframe.

Issues on which the parties can still beg to differ include:

- Whether the first inflationary uplift should take place on the next December 15 following the court order or on the December 15 over 365 days after the court order. Defence insurers will argue that it should be the latter and that if the claimant seeks an uplift 365 days after the court order, payments should be made quarterly rather than annually in advance.
- After the claimant dies, any balance outstanding of that year's PPO payment has to be repaid to the defence insurer. That is subject to deduction by the claimant's estate of sums payable on termination of the employment of the claimant's carers. Defence insurers may suggest that this should be limited to payments at the level of the statutory minimum for termination. There is, I think, no good reason for so limiting the payments. A compromise would involve limiting the set-off to sums reasonably incurred.
- Some defence insurers seek to put a clause in that the claimant's estate shall be liable for interest in the event of non-payment of this balance outstanding after the claimant's death. If so, that raises the question of when interest should run from and at what rate. A fair compromise is from three months after death and at the special investment account rate.
- If there is to be a stepped change, the amount payable in the year when the change occurs can be pro rated to produce an accurate figure. So, if there is a step change at age 19, when the claimant ceases full-time education, if that is deemed to occur on June 30, the payment for the year (December 15-December 14) including this period can be accurately calculated as being (0.54 x PPO level prior to step change) + (0.46 x PPO level after step change). A number of defence insurers baulk at this approach because it imposes two actual step changes to the PPO, an administrative burden that appears to weigh heavily with them.

No doubt these minor issues will be ironed out and we can look forward to a fully standardised model Order.

The Discount Rate: Is it time for the Lord Chancellor to loosen the straightjacket of *Wells v Wells*?

Peter Walmsley*

LT Discount rate; Future loss; Investments; Measure of damages; Personal injury

This article examines the ongoing debate surrounding the discount rate, following on from the Ministry of Justice's consultations on the issue and seeks to examine the reasons why the Lord Chancellor should move away from the decision of the House of Lords in Wells v Wells*, which is restricting him to a methodology for calculating the appropriate discount rate by reference to Index Linked Government Stock ("ILGS").*

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The discount rate forms a major part of a personal injury practitioner's toolkit when assessing the level of damages for ongoing losses that a claimant should receive, following an injury as a result of a defendant's negligence. In its present form, the discount rate adjusts the award of damages to allow for the fact that a claimant receives their compensation in full up front at the time the award is made by the court, or agreed between the parties, and is able to invest that sum and create returns. The discount rate should ensure that a claimant is not over or under compensated and is put back as far as is possible in the financial position he would have been in but for the negligence.

In England and Wales, the Damages Act 1996[1] conferred on the Lord Chancellor the power to set a statutory discount rate. Whilst this power was created in 1996, the Lord Chancellor did not choose to exercise this power until 2001.

In the meantime, the House of Lords heard the case of *Wells v Wells*[2] in 1999 and set down a discount rate to be used until such time as the Lord Chancellor exercised his power under the Damages Act.

In *Wells*, the principle of 100 per cent compensation, no more, no less, was confirmed by the House of Lords. The Lords held that claimants were not obliged to bear investment risk for the benefit of defendants and that they were entitled to be protected against inflation at the expense of defendants, otherwise they would not receive full compensation. In order to achieve this, the House of Lords used a real rate of return, based on the average gross redemption yields on ILGS over a three-year period. The rationale was that ILGS provided a risk-free, inflation-proof, lump sum which would reflect claimants' needs more accurately than any other available investments. The House of Lords further held that what claimants actually do in reality regarding investment was irrelevant.

This remained the position until 2001, when following consultation the Lord Chancellor set the discount rate under the Damages Act at 2.5 per cent. In doing so, the Lord Chancellor provided a statement setting out the principles to which he had adhered in setting the discount rate at this level. These were:

- A claimant should be placed as nearly as possible in the same position he or she would have been but for the injury.
- A claimant should not be treated as an ordinary investor.

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[1] Damages Act 1996 s.1(1).

[2] *Wells v Wells* [1999] 1 A.C. 345.

- A court does not have to reach any conclusion as to what a claimant will actually do with the money once it is received.

The Lord Chancellor stated that he followed the judgment in *Wells v Wells*, using a real rate of return based on the average gross redemption yields of ILGS over a three-year period.

The Lord Chancellor, however, also took into account additional factors, including the fact that the Court of Protection continued to invest in multi asset portfolios, and the likelihood that a claimant with a large award of damages would, if properly advised, invest in a mixed portfolio, in which any investment risk would be very low. On that basis, the Lord Chancellor concluded that setting a 2.5 per cent discount rate would not place an intolerable burden on claimants to take on excessive risk in the equity market.

The discount rate of 2.5 per cent set by the Lord Chancellor has remained in place since 2001. Recently, however, the decision of the Privy Council in the Guernsey personal injury claim *Helmot v Simon*[3] caused reverberations, not only in the Channel Islands, but elsewhere in the United Kingdom. As in other Crown Dependencies, including Jersey and the Isle of Man, the Damages Act 1996 does not apply in Guernsey and therefore the statutory discount rate does not form part of the law. Practice on the island had been to assess the level of awards for future losses using a discount rate of 2.5 per cent, but the plaintiff challenged this practice, arguing that the Lord Chancellor's rate should not apply. Instead, the discount rate should be calculated by reference to the net rate of return of ILGS, in line with *Wells*, but within the context of the Guernsey economy. The rate of return should then be adjusted to reflect a difference in price inflation between the mainland and in Guernsey.

Further, the plaintiff contended that, as there is no power for a trial judge in Guernsey to make a periodical payment award linked to earnings inflation as there is in England and Wales under the Damages Act 1996, there was a risk that a plaintiff would be under-compensated if the rate applied to earnings based losses was based on price inflation alone, because the differential between price and earnings inflation would not be reflected in the multiplier.

The Privy Council, which included Lord Hope who sat as part of the House of Lords in *Wells*, approved of the Guernsey Court of Appeal's decision that the discount rate should be calculated on a case by case basis, taking into account the average gross redemption yield of ILGS over a period of one year to the date of trial, adjusting it for tax at Guernsey rates, and then adjusting it for the difference between the UK and Guernsey rates of price inflation. The appropriate rate was set at 0.5 per cent.

For "earnings related losses", including the cost of care, the Privy Council went one step further, approving the adjustment of the discount rate downwards to reflect the average excess of earnings inflation over price inflation. The appropriate rate was reduced even further to -1.5 per cent.

Against this backdrop in Guernsey, whilst ILGS remain available as an investment, the three year average yield had declined from 2.46 per cent in 2001 to 0.2 per cent in mid-2011, both before tax. Further, whilst periodical payments are available to claimants on the mainland, linked to care wage inflation, the majority of damages awards still take the form of a lump sum payment. Claimants argue therefore that the current discount rate, given further decline in ILGS yields, is too high to give effect to the principle of 100 per cent compensation and so it is appropriate that the rate should be reviewed.

In this environment, the Lord Chancellor sensibly embarked upon a consultation on the issue of the discount rate, with a view to reviewing the appropriateness of the level of the discount rate in England and Wales.

In October 2012, the Ministry of Justice published a Consultation Paper into the methodology used by the Lord Chancellor and his counterparts in Scotland and Northern Ireland in independently setting the discount rate for personal injury damages in their respective jurisdictions. This was later followed in May 2013 by a second Consultation Paper looking at the legal basis for setting the discount rate and whether

[3] *Helmot v Simon* [2012] UKPC 5.

the current legal parameters ought to be changed. At the time of writing, the Ministry of Justice has yet to publish the results of these Consultations and the discount rate in England and Wales remains at 2.5 per cent.

The case of *Helmot* remains good law in Guernsey and, whilst it is not binding in Jersey and the Isle of Man, it will be persuasive when the issue comes before the local courts. To date, no challenge to the discount rate in Jersey or the Isle of Man has been heard by the local courts, albeit there are cases being advanced on the basis of negative multipliers.

The courts of England and Wales,[4] and also the court in Scotland,[5] have declined to interfere with the statutory rate given the ongoing consultation.

For the reasons that will be discussed below, the defendant lobby believes that now is the time for the Lord Chancellor to take a realistic view of the discount rate and overhaul the legal framework currently in place. The Lord Chancellor is not bound by the decision in *Wells* and now is the opportunity to exercise discretion to set the discount rate based on the reasonable reality of how claimants invest their damages, rather than by reference to the outdated methodology based on ILGS as set down by the House of Lords. Such an assessment should take place with a view to imposing a tolerable burden on claimants in terms of future investment and risk.

In so doing, the Lord Chancellor will no doubt reflect upon the view that many of the underlying assumptions underpinning the decision of the House of Lords in *Wells* simply do not apply to claimants today.

In the 15 years that have elapsed since that decision, the global economy has gone through an extensive period of financial instability which is continuing today. Should the Lord Chancellor stick to the *Wells* methodology, calculating the discount rate either exclusively or otherwise on the current ILGS yields, this will lead to a discount rate that is not valid even in the long term future. Looking at an average rate of return over one to three years, particularly in the current climate, is not representative of the position in the long term of losses that will be incurred over potentially the next 40–50 years by claimants. The depression in real yields on ILGS in recent years is a transient feature caused by many factors including quantative easing and the flight to quality consequent upon the crisis in many parts of the Euro zone. ILGS has become disproportionately more expensive in recent years in comparison with alternative prudent investments. The rate of return on ILGS does not reflect a pure and undistorted measure of the real rate of return that the market would afford to investments of minimal risk. The market remains artificially low and scarcity of supply and the high demand for ILGS continues to suppress yields.

Even if ILGS is the sole benchmark, a change in approach must be taken in relation to the period of time to use when considering real yields on ILGS. Real yields of a very short duration should be excluded. It is critically important to consider historical real yields which have been significantly higher than the depressed yields in recent years. Using real yields for the last three years only will not adequately reflect likely future returns. Real yields will rise again in due course and, as they do, if the discount rate was to be reduced based on today's depressed values then claimants would be significantly over compensated.

Furthermore, 15 years ago, it simply was not envisaged in *Wells v Wells* that there would be any possibility for negative returns on ILGS. ILGS was considered to be effectively risk-free and inflation-proof. In reality ILGS is not the risk-free investment that was envisaged by the House of Lords.

Whilst there is little "market risk" given that ILGS is backed by the UK government, there is significant "mismatch risk" in that the longest dated ILGS available may redeem before the life expectancy of an individual claimant, and there is no guarantee that further, suitable ILGS will be issued. Furthermore, when the ILGS pays coupons or is redeemed, the claimant is exposed to reinvestment risk. That is to say that the claimant may have to reinvest monies at a time when investment terms are unfavourable. This is

[4] *Harries v Stevenson* [2012] EWHC 3447 (QB).
[5] *Tortolano v Ogilvie Construction Ltd* [2012] CSOH 162.

likely to be a material risk to a large proportion of claimants as the longest dated ILGS available at present is 2062.

Further still the financial needs of the claimant simply will not conveniently follow an inflation index. Individual personal circumstances will determine cash flow and investment strategy. ILGS will not match the cash flow needs of each individual claimant.

It is notable that prior to the Courts Act 2003 it was frequently the case that financial advisors advocated the purchase of structured settlements on a split basis, half index linked to the Retail Price Index and half linked to the performance of with profits fund maintained by life insurers. This achieved a better balance between risk and return. It is very unlikely that any financial advisor would invest in 100 per cent ILGS with a lump sum for damages and historically claimants have not done so.

The rationale in *Wells* also assumed that claimants would hold ILGS to redemption. In practice, they do not as there is a limited return at the end of the term. In reality, the market place allows for trading in ILGS which has enabled claimants to enhance their returns in excess of quoted redemption values. In addition, the selling of ILGS prior to redemption has provided claimants with protection from the risk of capital erosion.

One of the major criticisms of the current legal framework is that to set the discount rate based on ILGS ignores what actually happens in practice and how claimants invest their awards.

Although courts are required to treat claimants as a special category of investor, in reality the claimant pursues a strategy very much in line with an ordinary investor, albeit a prudent one.

There is now a wealth of publically available information that illustrates the historical investment patterns of claimants. This demonstrates the reality that claimants invest their damages in mixed asset portfolios. How the portfolio is made up will depend on the individual needs of the claimant and how risk averse each individual claimant is. It is not surprising that at the time of the Lord Chancellor's decision in 2001, no claimants invested only in ILGS. No claimant would receive investment advice to invest in only one investment vehicle. A mixed portfolio is needed to provide for diversification of risk. Indeed, the Court of Protection continues to invest in four mixed portfolio strategies on behalf of its clients.

It is important that the Lord Chancellor approaches the question in a way that the House of Lords in *Wells* failed to do namely hold the balance evenly between the two sides in litigation. It is clearly fair and appropriate that defendants are entitled to assume that claimants will adopt a prudent investment strategy. The evidence suggests that claimants will do so. It is not controversial that how a single individual chooses to spend his or her damages award is irrelevant. The purpose of the discount rate should not be to protect spendthrifts or punish the careful majority. It should, however, be based on the reality of general investment practice. A tolerable level of risk should be permitted.

Wells was decided over a decade ago and at a time when the court did not have the ability to order periodical payments. Indeed, it was a major factor in the decision in *Helmot* that there was no power for a trial judge in Guernsey to make a periodical payment award linked to earnings inflation as there is in England and Wales under the Damages Act 1996, although opinion differed in the Privy Council on the potential for the common law to develop to permit a trail judge to do so in the future.

As a general proposition there is an inevitable risk with lump sum payments that the award will not comply with the principle of 100 per cent compensation as the life expectancy of a claimant is impossible to predict in advance. There is, therefore, a real risk to both parties that the award will either under compensate the claimant, if the claimant exceeds estimated life expectancy, and an equal risk of over compensation if the opposite is true. The real issue should be the risk of the claimant running short of funds before his actual death not before an average life expectancy. This is even more important in the case of a claimant with a reduced life expectancy who might outlast gloomy mortality predictions.

Of course, periodical payments offer an alternative method of damages for more risk adverse claimants. Such an award is thought to be more secure than lump sum awards, as, with a lump sum award the

investment, mortality, security, tax and inflation risk is transferred to the claimant whereas, with a periodical payment award, the defendant retains these risks. If a risk free investment is what a claimant requires, then a periodical payment award can be utilised in the alternative to a lump sum. As such, when considering the discount rate it should be remembered that the vast majority of claimants have this option, are sufficiently informed about the availability of periodical payment orders and how they operate and simply choose a lump sum award instead.

A further relevant issue that falls to be taken into account is the different measures of price inflation in the United Kingdom. ILGS is linked to the Retail Price Index but it is arguable that the Consumer Price Index is a better measure of inflation. A debate as to which measure is best is beyond the scope of this article and is a question best answered by expert economists, but if the Consumer Price Index is the right measure for future inflation then the real rate of return by reference to the Consumer Price Index is higher than the real rate of return in relation to the Retail Price Index and so the discount rate must be adjusted accordingly.

As a global consideration the effect of a shift in the discount rate on public bodies and insurers and their customers is relevant. The Ministry of Justice has recently published the result of research into the discount rate which it commissioned from Ipsos MORI Social Research Institute.[6] It reported that "even a small shift in the discount rate would have a significant impact on the amounts for future pecuniary loss" and in turn on public bodies and the insurance industry.

Particular impact was said to be likely in clinical negligence claims even though their number is smaller in proportion with other claims, as they tended to be of higher value. The motor insurance industry was also noted to be potentially affected by a shift in the discount rate if claimants that would have chosen periodical payments previously would prefer a larger lump sum payment. This will cause motor insurers to increase premiums which will have a knock on effect on the public.

Interestingly, the research also highlighted that claimants were investing in mixed portfolios of investments.

The research found evidence gaps and recommended further research, all of which may delay a final decision and create further uncertainty. It did confirm, however, that claimants—while generally risk averse—did invest in a mixed portfolio of investments and that this would have remained their investment strategy had they received larger awards as a consequence of a more favourable discount rate. In short, the research has confirmed that the assumption underlying *Wells* of 100 per cent investment in ILGS was, in practice, erroneous.

In conclusion, a discount rate based on *Wells* does not as Hirst L.J. said in the Court of Appeal hold the balance evenly between the two sides in serious personal injury litigation, it does not reflect the reality of investment of actual funds arising from damages awards and it is not even in the best interests of the claimant to invest 100 per cent in ILGS so why use this measure as the absolute starting point? To continue to hide behind the straight-jacket of *Wells* does not create a fair or appropriate discount rate, nor does it achieve the aim of holding the balance evenly between the parties. To do so, defendants need to be able to treat claimants as reasonably prudent investors and adopt a discount rate based on the reality of general investment practice. This would not create an intolerable burden on claimants, it would allow for a tolerable measure of risk for claimants and reverse the injustice to defendants currently felt by a discount rate that is based far from the confines of reality.

For the reasons set out above, it is indeed time that the Lord Chancellor loosened the straight-jacket of *Wells v Wells*.

[6] Personal Injury Discount Rate Research Ipsos MORI Social Research Institute, MoJ Analytical Series 2013.

Legal Aid—But Not As We Knew It: A Guide to the New Legal Aid Scheme for Personal Injury Practitioners Following LASPO

Caroline Klage, Suzanne Trask and Jonathan Wheeler*

Child protection; Civil legal aid; Clinical negligence; Exceptional funding; Human rights; Inquests

The authors analyse how legal aid operates in a post-LASPO world. The article looks at the extent to which residual public funding remains available in clinical negligence and child abuse proceedings and also for inquests. The authors assess the impact of changes to means testing and financial eligibility and consider how the merits assessment is now carried out and what criteria the Legal Aid Agency apply when assessing whether to grant public funding. They look at the benefits to clients of public funding in comparison with other funding mechanisms and conclude that the availability of public funding has been substantially curtailed as a consequence of LASPO.

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A guide to acronyms used in this article:

ATE	After the event insurance
AvMA	Action against Medical Accidents
BTE	Before the event insurance
CICA	Criminal Injuries Compensation Authority
CFA	Conditional Fee Agreement
ECHR	European Convention on Human Rights
FOIA	Freedom of Information Act 2000
LAA	Legal Aid Agency
LASPO	Legal Aid, Sentencing and Punishment of Offenders Act 2012
LSC	Legal Services Commission
QOCS	Qualified one-way costs shifting

Is legal aid really dead to us now, or are rumours of its demise exaggerated? This article aims to provide a practical analysis of the new civil legal aid scheme following the passing of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO").

Legal aid is theoretically available for the clients of personal injury lawyers, but mainly to those pursuing clinical negligence claims for children neurologically injured during birth and people pursuing compensation claims for abuse and assault. However eligibility has been narrowed, and this, combined with the abolition of the recoverability of CFA success fees and insurance premiums from defendants (save for the "recoverable" element of the premium for clinical negligence cases) could ultimately result in claimants

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with complex, high risk and disbursement heavy cases struggling to find a lawyer who is prepared to take on such cases, thus reducing access to justice.

The new scheme

The Legal Services Commission was abolished under LASPO[1] and in its place the Legal Aid Agency ("LAA") was created as an Executive Agency of the Ministry of Justice. A new post was created for a Director of Legal Aid Casework, the office holder apparently being able to maintain an independence from the Lord Chancellor who issues guidance about the scheme.

The provisions of the Access to Justice Act 1999 relating to legal aid have been replaced by the relevant provisions of LASPO and the Funding Code is replaced by regulations made under the new Act which govern the merits criteria and procedures for funding cases. The new merits and procedural regulations apply to all cases where the legal aid application is made on or after April 1, 2013.[2]

Which cases are still eligible for public funding?

The cases for which civil legal aid remains available are set out in full in the first schedule to LASPO. The schedule also sets out the many exclusions that apply.

Legal aid remains available in the broad civil categories of actions against the police or a public body, community care, some claims for clinical negligence, mental health, public law, claims relating to the protection of children and vulnerable adults, victims of domestic violence, some family proceedings, immigration, housing, and some other residual cases, along with cases brought under the new rules for exceptional funding.

As before, organisations which wish to offer legal aid must tender for a contract from the LAA and only those firms or organisations with a current contract in a particular category may undertake work in that category. In a number of categories, the number of legal aid funded cases a firm or organisation is permitted to take on is prescribed by a minimum and maximum number of "matter starts" by the LAA.

Eligibility requirements

Following the introduction of LASPO, the general eligibility requirements have changed for all cases.

The means test

As before, a claimant may be required to contribute towards the costs of their case by:

- a contribution from capital; and/or
- monthly contributions from disposable income; and/or
- repayment at the end of a successful case via the statutory charge for any costs not recovered on an inter partes basis.

Capital passporting has been abolished, ensuring that all applicants are subject to the same capital test regardless of the statutory benefits that they receive. Whilst this will result in an increase in the number of full means assessments that are required, this change actually removes an anomaly, as previously capital assessments were approached differently when applying for legal aid as opposed to when applying for other means-tested benefits.

[1] LASPO s.38.
[2] All cases funded by legal aid before April 1, 2013 will continue to be dealt with under the Access to Justice Act 1999.

Claimants on "passported" benefits (Income Support, Income-based Job Seekers Allowance, Income-related Employment and Support Allowance, State Pension Credit Guarantee) were previously automatically deemed eligible for legal aid and were not means tested for income or capital when applying (as this would have been undertaken by Department for Work and Pensions). All other claimants were means tested for income and capital.

From April 1, 2013, applicants on the state benefits identified above who have more than £3,000 but not more than £8,000 in disposable capital are eligible but will need to pay a capital contribution towards their legal aid costs. This contribution could be all of their capital above £3,000, but may be less depending on the likely cost of funding the case. Where applicants on state benefits have more than £8,000 in disposable capital they are no longer financially eligible for civil legal aid.

Claimants with a monthly disposable income of £315 or less are not required to pay income contributions; this lower threshold is unchanged. However, for those claimants with incomes above this, the proportion of income required for the contribution will be moderately increased to 30 per cent of disposable income.

The merits test and alternative funding methods

The Civil Legal Aid (Merits Criteria) Regulations 2013[3] ("the Merits Regulations") have replaced the Funding Code merits criteria. As previously, the merits criteria come down to two broad issues:

- The prospects of success of the case to be funded; and
- The cost/benefit criteria—that is the likely damages to costs ratio, with proportionality requirements that vary according to prospects of success in any particular type of case.

Perhaps by far the most significant change is that legal aid is likely to be refused where suitable alternative funding is available, such as a conditional fee agreement ("CFA").[4]

An individual may qualify for legal representation only if the Director of the Legal Aid Agency is satisfied that:

- The individual does not have access to other potential sources of funding (other than a CFA) from which it would be reasonable to fund the case.
- The case is "unsuitable" for a CFA.
- There is no person other than the individual, including a person who might benefit from the proceedings, who can reasonably be expected to bring the proceedings.
- The individual has exhausted all reasonable alternatives to bringing proceedings including any complaints system, ombudsman scheme or other form of alternative dispute resolution.
- There is a need for representation in all the circumstances of the case including:
  - — the nature and complexity of the issues; and
  - — the existence of other proceedings; and
  - — the interests of other parties to the proceedings; and
  - — the proceedings are not likely to be allocated to the small claims track.

The Lord Chancellor has issued guidance on this regulation and said that other sources of funding could include:

- insurance, where an individual's household or motor policy covers the (proposed) proceedings;
- membership of a trade union which provides legal services to its members. The test is whether it would be reasonable to fund the case from the other potential source of funding, so that

[3] Civil Legal Aid (Merits Criteria) Regulations 2013 (SI 2013/104).
[4] Civil Legal Aid (Merits Criteria) Regulations 2013 (SI 2013/104) Pt 4 reg.39

a refusal by the union to fund the case that appeared unreasonable would not allow the criterion to be met;
- where another body, such as the Equalities and Human Rights Commission or special interest group might be expected to fund a particular case; and
- whether another person or persons who would benefit from a successful outcome should fund the case. [5]

The Lord Chancellor's guidance also defines what is meant by a CFA which is said to include damages based agreements and "litigation funding agreements."[6]

The key issue is whether conducting the case on a CFA is "unsuitable" and the guidance states that:

> "The test of suitability for a CFA is an objective one, rather than a question of whether an individual provider is willing to act under a CFA."[7]

In principle a case may be considered suitable for a Conditional Fee Agreement if:

- prospects of success are considered to be at least 60 per cent;
- the opponent is considered able to meet any costs and/or damage that might be awarded; or
- after-the-event ("ATE") insurance can be obtained by the applicant.

An applicant without ATE insurance seeking legal aid for a case otherwise considered suitable for a CFA will be expected to provide evidence of attempts to secure such insurance. Even where evidence is provided of refusals of insurance, the LAA may make enquiries of insurers to see if they would support a CFA in the individual circumstances; and just because the applicant cannot afford the premium, or defer its payment, will not necessarily be fatal to CFA suitability. Although the applicant may prefer legal aid funding because the potential deduction in damages would not be so great as with a post April 2013 CFA, this will not of itself prevent a case being suitable for a CFA.[8]

In deciding whether or not a case should be funded by a CFA, the LAA will also consider its own objective assessment of the applicant's prospects of success at a final hearing (which may be an appeal). This is dealt with in the Merits Regulations Pt 1 reg.4 and the Lord Chancellor's guidance. The LAA must not have regard to the possibility of settling the proceedings before hand. A "successful outcome" means the outcome a reasonable individual would intend to achieve in the proceedings in all the circumstances of the case.

The prospects of a case being resolved in advance of a contested trial should be taken into account only to the extent that the case may be finally concluded by the court or tribunal at an earlier stage. If, for example there is an argument that the opponent has a limitation defence, the danger of the case being defeated on this ground must be taken into account, whether or not the limitation issue is dealt with as a preliminary point or at the final hearing.

Prospects of success are defined in the Merits Regulations Pt 1 reg.5 as:

- "very good", which means a 80 per cent+ chance of succeeding;
- "good", which means a 60–79 per cent chance of succeeding;
- "moderate", which means a 50–59 per cent chance of succeeding;

[5] *Lord Chancellor's Guidance on Civil Legal Aid*, April 2013 para.7.14.
[6] *Lord Chancellor's Guidance on Civil Legal Aid*, April 2013 para.7.16 quotes reg.2 of the Civil Legal Aid (Merits Criteria) Regulations 2013 (SI 2013/104) as to how such funding agreements are defined.
[7] *Lord Chancellor's Guidance on Civil Legal Aid*, April 2013 para.7.17.
[8] *Lord Chancellor's Guidance on Civil Legal Ai*d, April 2013 paras 7.17–17.20.

- "borderline", which means that the case is not "unclear" but that it is not possible, by reason of disputed law, fact or expert evidence, to decide that the chance of obtaining a successful outcome is 50 per cent or more;[9]
- "poor", which means the individual is unlikely to obtain a successful outcome; or
- "unclear", which means the Director cannot currently put the case into any of the other categories until investigations are carried out.

What impact has LASPO had on clinical negligence claims?

Clinical negligence claims now have specific eligibility criteria and fall outside the scope of legal aid except "where a child suffers a neurological injury resulting in them being severely disabled during pregnancy, child birth or the postnatal period (8 weeks)".[10]

This rather narrow definition means that sadly a number of severe cases involving children who are injured more than eight weeks post child birth are not eligible for legal aid. Similarly complex cases involving adults who would previously have satisfied the means criteria will no longer be eligible. Such cases may involve life-changing brain or spinal injuries. On such complex cases, relatively high investigation costs have to be incurred before prospects of success can be determined. Medical notes must be obtained and scrutinised and then a number of medical experts will need to consider and report on the issues of liability and causation. Where pre-LASPO legal aid may have been available to fund these vital initial investigation costs, the many claimants who fall outside the above eligibility criteria will now need to look to alternative forms of funding.

Claimants who benefit from union funding or pre-existing legal expenses insurance may be able to call upon the relevant union or legal expenses insurer to meet initial investigation costs. However, they will then be subject to the particular terms and conditions imposed by their union or legal expenses insurer. They are also likely to be restricted in terms of the solicitors they can instruct pre- issue of proceedings as unions may refer them to union-appointed solicitors and legal expenses insurers to their own panel firms.

Where union or legal expenses funding is not available, claimants will have to appeal to solicitors to fund their cases on conditional fee agreements. Whether there will be a strong enough appetite on the part of firms of solicitors to take on such cases when prospects are uncertain and the cost of funding investigations is so high is yet to be seen. Claimants able to fund their own disbursements will be in a stronger position, but claimants unable to afford such expense will have to look to their own solicitors to finance the case. It cannot be denied that funding such costs at the outset presents challenges to a firm's cash flow and some firms may not wish to take on such cases, meaning that justice for deserving claimants with complex cases will be harder to access. This will also impact on the freedom of claimants to instruct solicitors of their own choosing as they will be confined only to those firms able to fund disbursements at the outset. The situation is not helped by the fact that LASPO has abolished the recoverability of success fees from defendants. Indeed, it was historically these success fees which helped to fund unsuccessful or discontinued cases. The situation seems wholly unfair on many deserving claimants who may well now find themselves unable to pursue claims for life-changing injuries. In such cases, compensation provides claimants with the means to meet their very complex care, therapy and treatment needs and also helps them to avoid the financial hardship that can be experienced when serious injuries prevent claimants from returning to work.

[9] From January 27, 2014, new rules dictate that applications received on or after that date for full representation (as opposed to investigative help) will not be granted where cases are assessed as "borderline". See *http://www.justice.gov.uk/legal-aid/newslatest-updates/crime-news/reforms-on-crown-court-eligibility-and-borderline-merits*. [Accessed January 28, 2014.]

[10] LASPO Sch.1 Pt 1 para.23.

Although after the event insurance is available for clinical negligence cases, post LASPO, the non-recoverable element of the insurance has to be funded by the claimant and therefore, taking out such insurance will effectively result in a claimant experiencing a shortfall in damages recovery upon the successful conclusion of the claim. Whilst, as the name would suggest, the recoverable element of the insurance can be recovered from the defendant if the claim is successful, such insurance may be of limited benefit in complex claims where indemnity for liability and causation reports is limited and may not be sufficient to cover the high costs incurred in obtaining the number of expert reports required to investigate and determine prospects of success.

What has been the impact of LASPO on abuse claims?

Cases of intentional abuse to a child or vulnerable adult causing injury remain within the scope of legal aid funding,[11] as well as sexual offences causing injury to anyone.[12] Claims can also still be legally aided where it is alleged that there was an abuse of position or powers by a public authority[13] or where a public authority has breached the applicant's human rights.[14] Cases for injunctive relief (but not compensation) brought under the Protection from Harassment Act 1997 are in scope[15] whilst applications to the CICA are excluded;[16] pre-LASPO they could have been brought under Legal Help.

It is perhaps early days to see if the system is truly working but anecdotal evidence appears to suggest that the LAA is rejecting or at least stalling on a high number of child abuse claims where they consider that they could and should be brought under a CFA. The LAA seems to be refusing applications where firms have not proved that they cannot obtain after the event insurance. With the decimation of the after the event insurance market (through LASPO) and the fact that claimants are protected by one-way costs shifting ("QOCS") in any event, it is perhaps difficult to see the LAA's rationale here. Note too the burden is on the applicant to show he/she cannot obtain insurance. How many failed applications for insurance will it take to convince the LAA no one rightly knows. In the Government's consultation on the future of legal aid which brought about the LASPO changes,[17] the Ministry of Justice said this of claims arising from allegations of abuse and sexual assault:

> "In the light of the importance of the issue at stake, the seriousness of the alleged harm suffered by the litigant, the likelihood of their vulnerability and the lack of sufficient alternative forms of assistance to justify the withdrawal of legal aid, it is our view that the provision of legal aid funding is justified. We propose that it is retained for these claims."[18]

Clearly the Government made a specific commitment to abuse survivors to retain legal aid for their cases. Whilst this has indeed been enshrined in the new legal aid scheme, the application of the guidance on refusing legal aid where objectively a CFA may be offered as an alternative, would appear to be reneging on that commitment by the back door.

It is the case that a great many child abuse cases have been and are being taken on a CFA basis—both before and after LASPO. Certainly prospects of success can be more accurately predicted where the abuser has been convicted and there is a decent vicarious liability claim against an institutional (and hopefully

[11] LASPO Sch.1 Pt 1 para.3.
[12] LASPO Sch.1 Pt 1 para.39.
[13] LASPO Sch.1 Pt 1 para.21.
[14] LASPO Sch.1 Pt 1 para.22.
[15] LASPO Sch.1 Pt 1 para.37.
[16] LASPO Sch.1 Pt 2 para.16.
[17] Ministry of Justice consultation CP12/10 "Proposals for the Reform of Legal Aid in England and Wales" November 10, 2010.
[18] Consultation CP12/10 para.4.58.

insured) employer. Legal inroads made by claimants in test cases on limitation,[19] vicarious liability[20] and non-delegable duty of care[21] are also of great assistance to the firm's risk assessor. The LAA's stance then would appear to be a self fulfilling prophecy of doom: it won't fund cases which a solicitor somewhere might be prepared to take on a CFA. The LAA therefore will only fund those cases where prospects of success are less than "good". Costs/benefit concerns will cut into any lawyer's ability to adequately prepare the case. The LAA will eventually end up having to fork out for the less than ideal cases taken on legal aid and be less likely to recover its outlay through an inter partes costs order or the statutory charge because the cases are more likely to fail or be abandoned.

The LAA also of course assumes that clients will pick up the tab for the hefty disbursements that may have to be incurred to prove the case, even though the client is of such low means that he would otherwise be eligible for legal aid, and therefore is unable to do so. Realistically, it is, of course, the claimant's solicitors that are expected to shoulder this financial burden but many of them may not be able to do so in these straitened times. The knock-on effect will be a reduction in a client's choice of solicitor and quite likely limited access to justice for all but those with the most straight forward claims. The writers know of at least two firms which are considering a judicial review of the way the LAA is interpreting the guidance on the suitability of CFA's in these cases.

One final point on child abuse claims: Under the new Jackson costs rules, claimants will potentially lose their QOCS protection if their claim is struck out for failing to have reasonable grounds for bringing an action.[22] Child abuse compensation litigation is a relatively new and fertile area of the law. Whilst in the main, limitation is not as big an issue as it once was, cases can still be struck out on their own facts if a limitation defence is taken. Further, often these cases may be pursued in good faith but in order to test the law at the very edge of vicarious liability or to establish a possible duty of care where perhaps one had not existed before. Such test cases are vulnerable to strike out applications. The risk-adverse insurance market may not provide protection. Legal aid must be available to allow such cases to be brought.

Exceptional funding

LASPO introduced a "human rights safety net" with an expanded exceptional funding scheme to provide funding for exceptional cases where the failure to grant legal aid would result in an actual breach, or a risk of a breach, of an individual's rights under the Human Rights Act 1998 or European Union law.[23] This would include the potential breach of an applicant's rights to a fair trial under art.6(1) of the European Convention on Human Rights ("ECHR"). The Lord Chancellor has exhorted legal aid case workers to apply this within the context of a civil legal aid scheme that has refocused limited resources on the highest priority cases. He has stated that the threshold for such a breach of art.6 is very high to overcome.[24]

Specific guidance is provided for cases of clinical negligence otherwise excluded from the legal aid scheme. The questions caseworkers must ask themselves are:

- How complex is the case at hand bearing in mind the complexity and volume of any medical expert evidence and any medico-legal arguments in issue in the case?
- How able is the applicant or litigation friend to present their own case? Their own medical problems and disabilities or caring responsibilities have to be borne in mind.

[19] See *A v Hoare* [2008] UKHL 6.
[20] See, e.g. *Lister v Hesley Hall Ltd* [2001] UKHL 22; [2002] 1 A.C. 215; *Maga v Birmingham Roman Catholic Archdiocese Trustees* [2010] EWCA Civ 256; *JGE v English Province of Our Lady of Charity* [2012] EWCA Civ 938; *Various Claimants v Institute of the Brothers of the Christian Schools* [2013] 2 A.C. 1.
[21] See *Woodland v Essex CC* [2013] UKSC 66.
[22] CPR 3.4(2) and CPR 44.15.
[23] LASPO Pt 1s.10(3).
[24] *Lord Chancellor's Exceptional Funding Guidance (non-inquests)*, April 2013 paras 7 and 10.

- How important is the matter at stake? Is the applicant a disabled person who is seeking to recover damages which would, in whole or in part, cover adjustments, adaptations, equipment and care?[25]

Exceptional funding is not intended to be a category of funding in itself and is envisaged to be a "safety net". It is difficult to see when this would be granted in the circumstances of a "standard" clinical negligence claim: One can perhaps foresee a deserving case in circumstances where a vulnerable brain injured adult without legal capacity has a potential claim for compensation, which if successful would allow for a care regime to be established, and where objectively a CFA would not be offered because of uncertain prospects of success. However, it is not clear how likely it would be that such an application would succeed.

A recent article in the *Law Gazette*[26] commented upon the release of the report of the Low Commission on the future of advice and legal support.[27] The report follows a year-long investigation by cross-bencher Lord Low following LASPO. The report calls for urgent reform of the operation of the exceptional funding arrangements intended to act as a safety net for those not ordinarily eligible for legal aid, as it says that the current arrangements are "unwieldy and unworkable". The commission found that advice lines to voluntary agencies such as Citizens Advice have been overwhelmed with people looking for legal advice. The Commission was established by the Legal Action Group in 2012.

Can legal aid be obtained for inquests?

Whilst legal representation of families is becoming more common at inquests involving healthcare issues, this is largely because solicitors are increasingly willing to represent families on the basis that they will recover their costs in a subsequent clinical negligence claim, and will act on a CFA basis.

Exceptional funding applications can be made to the LAA for representation at inquests. In order to be granted, the Director has to make a wider public interest determination.[28]

The Lord Chancellor's guidance[29] is that funding is not generally available because an inquest is a relatively informal inquisitorial process, rather than an adversarial one. An inquest is not a trial. There are no defendants, only interested persons, and witnesses are not expected to present legal arguments. An inquest cannot determine civil rights or obligations or criminal liability, so ECHR art.6 is not engaged.

However under ECHR art.2 there is a procedural obligation on the state to conduct an effective and proactive investigation into a death where the circumstances give rise to the possibility of a breach of the positive duty on the state to protect life. For exceptional funding to be granted there must be an arguable breach. The question to answer is whether providing legal aid to the next of kin is required for the state to discharge its procedural obligation to safeguard their interests and those of the wider public. This would apply to cases such as police shootings, deaths in custody or suicides whilst sectioned under the Mental Health Act 1983.

In the "ordinary course" of a negligently caused death it is thought unlikely that legal aid would be granted although evidence of possible systemic failures could give rise to a public interest determination such as the identification of dangerous practices, systematic failings or other findings that identify significant risks to the life, health or safety of other persons. This could apply within the context of deaths in a medical care setting and equally to the death of a child who was either in care, or should have been in care, were it not for the alleged negligence of a local authority's social services department.

[25] *Lord Chancellor's Exceptional Funding Guidance (non-inquests)*, April 2013 para.46.
[26] *Law Gazette* January 13, 2014.
[27] *Tackling the Advice Deficit, A strategy for access to advice and legal support on social welfare law in England and Wales*, The Law Commission, January 2014.
[28] LASPO Pt 1s.10(4).
[29] *Lord Chancellor's Exceptional Funding Guidance (inquests)*, April 2013.

In the case of *Humberstone*[30] in 2010, the High Court quashed a decision of the Legal Services Commission ("LSC") to deny a mother public funding for legal representation at her son's inquest. As a result of the court's decision, the LSC then agreed to recommend that Ms Humberstone received public funding. Hickinbottom J.'s comments are likely to have wider implications.

In *Humberstone*, it was argued that legal representation is likely to be necessary to enable the Coroner to carry out an effective investigation into the death. The judge also considered the ECHR art.2. Many practitioners have assumed that the secondary duty of art.2 is parasitic and only arises where the primary duty is engaged. However, the judge in *Humberstone* said that an art.2 inquest may be required"even where there is no reason to believe that state agents have failed to perform the primary duty imposed by Article 2" and that "any death in the care of any medical professionals triggers the secondary duty under Article 2".

It was suggested that Ms Humberstone would probably have little grasp of the technical issues involved in the cause of her son's death. She would therefore be in a vulnerable position, whilst the other interested parties—to include the ambulance service, hospital and GP—would all be legally represented, such that there would be an inequality of arms.

In his conclusion, the judge recognised that the view of the Coroner was that an effective investigation could not be conducted unless Ms Humberstone was represented. Hickinbottom J. said that "putting the Coroner into a position where he can progress the inquest as soon as possible is of vital importance".

Although peculiar to its own facts, this decision is likely to encourage more applications for public funding for families to be represented at inquests. Whether these applications will be granted remains to be seen, and so we may see more challenges to the refusal of funding in this area.

How many applications are made?

The Legal Action Group has conducted research indicating a huge drop in applications since April 1, 2013.[31] The charity is calling for a review of the exceptional funding mechanism, claiming that it is failing to provide a safety net as intended. The Legal Action Group's research is based on the government's estimates of the number of applications made and figures from the LAA.

Since LASPO came into force, 3,866 fewer people than predicted have received civil legal aid. The Legal Action Group partly attributes the decline to the smaller numbers of firms and agencies undertaking legal aid work and the more onerous hurdles which must be overcome before legal aid is granted. Many practitioners say they have had problems in identifying clients who are eligible for public funding due to the complexity of the rules.

A request made under the Freedom of Information Act 2000 ("FOIA") to the Ministry of Justice in December 2013 revealed that between April 1, 2013 and December 1, 2013 there were 586 applications received for civil legal aid in the Clinical Negligence category of law.[32] Statistics published by the Legal Services Commission show that in the year between April 2012 to March 2013 3,853 applications for clinical negligence certificates were made, and 2,398 were granted.[33] This is a huge drop, reflecting the limited cases that remain eligible for public funding.

The FOIA request also showed that there were 198 applications for civil legal aid relating to historic child abuse reported under the Against the Police etc category of law received between April 1, 2013 and December 1, 2013, and 301 made in the full year before April 1, 2013, so the number of applications in

[30] *R. (on the application of Humberstone) v Legal Services Commission* [2010] EWHC 760 (Admin) decided April 13, 2010.

[31] Reported in the *Law Society Gazette*, September 9, 2013 at *http://www.lawgazette.co.uk/practice/disturbing-reduction-in-take-up-of-civil-legal-aid/5037472.article*. [Accessed January 28, 2014.]

[32] Freedom of Information Act 2000 request to Ministry of Justice, reference 87203, response from Information Governance at Legal Aid Agency dated December 30, 2013.

[33] *Legal Aid Statistics in England & Wales*, Legal Services Commission 2012–2013 Ministry of Justice statistics bulletin published June 25, 2013 p.34 at *http://www.justice.gov.uk/downloads/publications/corporate-reports/lsc/legal-aid-stats-12-13.pdf* .[Accessed January 28, 2014].

this category is broadly unchanged. The Ministry was unable to provide statistics as to how many of those applications were granted, nor was it able to identify those applications that related to historical child abuse that were made under the Personal Injury franchise category.

With regards to Exceptional Funding the FOIA request revealed that, as at November 30, 2013, 1,030 applications for exceptional funding had been received since April 1, 2013 and only 31 had been granted.[34]

Over recent years there has been a marked shift in the culture surrounding legal aid. The Legal Services Commission were increasingly pro-active in both identifying and sanctioning contract breaches such as a failure to comply with the financial limit on a certificate, with the ultimate sanction being the termination of a firm's contract. The LAA is likely to continue this work. When one adds the reduced eligibility criteria for clinical negligence cases and the tightening of eligibility criteria across a number of other areas of civil law, this explains the fall of 30 per cent in civil legal aid providers since 2007/8.[35]

What are the pros and cons now of being able to offer legal aid?

The claimant's perspective

Legal aid remains an attractive funding option for successful claimants if the deductions from compensation to pay the non recoverable costs pursuant to the statutory charge are likely to be less than the corresponding deductions for the solicitor's success fee, (and the non recoverable ATE insurance premium) on a CFA. The claimant obtains protection from adverse costs orders under LASPO s.26 although he will be subject to an order that the costs should not be enforced without leave of the court; there is therefore some uncertainty, should the claimant's financial circumstances change.

There is no costs protection from failing to beat a Pt 36 offer, which can be obtained (at a price) if the case is CFA funded with legal expense insurance.

A client may have to pay a monthly contribution from income or a capital contribution subject to their means, and may prefer the option of a CFA where no money is required "up front". Due to the miserly rates allowed by the LAA with which to pay experts, a client may be put off from legal aid funding if he perceives that his cheaper experts will be less effective than his opponent's.

The firm's perspective

Simply having a legal aid contract to carry out a particular category of work is a valuable marketing tool for a firm and a visual demonstration of a commitment to social justice. It is often viewed as a badge of credibility, indicating that the firm has specialist solicitors practising in that particular category. Indeed, to be awarded a contract, the firm must have the requisite number of category supervisors who must fulfill specific requirements imposed by the LAA. For clinical negligence, a category supervisor must be either a member of the Law Society's clinical negligence panel or the AvMA panel.

The ability to receive interim payments on a quarterly basis remains an attractive feature, particular for small firms covering only a small number of practice areas where cash flow and the funding of large disbursements over a long period of time may represent a financial challenge.

However, liaising and negotiating with the LAA is tortuous and the costs associated with this will not be recoverable inter partes as a rule. Completing applications for funding and extensions, and waiting to hear back from the LAA with their decisions can increase the time within which the case can be concluded by months (maybe even years!)

[34] Freedom of Information Act 2000 request to Ministry of Justice, reference 87203, response from Information Governance at Legal Aid Agency dated December 30, 2013

[35] *Legal Aid Statistics in England and Wales*, Legal Services Commission 2012–2013 Ministry of Justice statistics bulletin published June 25, 2013 p.34 at *http://www.justice.gov.uk/downloads/publications/corporate-reports/lsc/legal-aid-stats-12-13.pdf*. [Accessed January 28, 2014.]

As above, the restrictions on experts' rates are problematic. In the complex and high value birth injury cases, solicitors will want to instruct leading and eminent experts and counsel to give their claimants the very best prospects of succeeding in their claims. There were new maximum rates for certain types of expert introduced from April 1, 2013 under the 2013 Remuneration Regulations. These also removed the London/non-London rate differentials for a number of the expert types. For example, the hourly rate allowed for either a neurology expert or GP expert in London is £90 per hour.[36] It is possible to apply for exceptional rates for experts but completion of the application forms is time consuming in itself and there is no guarantee of success.

Public funding certificates are subject to strict scope and funding limits. Exceeding either limit constitutes a breach of a firm's legal aid contract and in extreme circumstances could potentially result in the contract being revoked. It may well be that in cases where the LAA are unwilling to increase scope or financial limits sufficiently, claimants will have to request that their funding certificates be discharged and investigate alternative funding options with their solicitors for the future stages of their case.

Advising eligible clients on funding

Essentially, there is a need to perform a balancing act. Solicitors are under a duty to consider and alert their clients to all potential funding options and then advise as to which particular option is the most suitable for them. Naturally, the best interests of the client should always be at the forefront of our minds. It is important to bear in mind that if pre-existing legal expenses insurance ("BTE") is available, then legal aid will not be offered. Therefore, it is vital that solicitors make the necessary enquiries with their clients and also ask them for copies of any relevant policies. If there is no available BTE then the solicitor will need to consider whether or not the claim is eligible for legal aid funding. If the claim is eligible, then considering the other funding options available, the solicitor must advise on which form of funding is in the client's best interests. The most obvious alternative will be a CFA with or without ATE insurance.

Deductions from compensation will be likely either by way of the legal aid statutory charge or by way of the success fee under a CFA. Clear explanations must be given as to the effects of the funding arrangement on any award in a successful claim. It is currently unknown how the courts will approach potential statutory charge deductions from compensation awards in the case of legally aided children or protected parties. Arguably they should allow the deductions as it may not have been possible to get the claim off the ground without legal aid, and the costs of applying and liaising with the LAA are generally not recoverable inter partes. However the courts may naturally be cautious to do this where the compensation pays for crucial future care packages. Litigation friends will need to have certified that they will act in the claimant's best interests and will step into the shoes of the claimant for the purposes of costs—will they face liability for deductions? The answers to such questions are currently uncertain.

Access to justice

There is no doubt that LASPO has limited access to justice for people bringing claims and will continue to do so. Cuts in pro bono legal provision and law centres will also put a heavy strain on remaining resources. Potentially, people are going to go without funding, and therefore without a solicitor, and chance their arm in the courts alone, often against wealthy institutional defendants. As the Jackson reforms bed-in, the courts are already stretched to their limit and the added burden of dealing with many more unrepresented litigants could well tip them over the edge. Happy days ahead then!

[36] The Civil (Legal Aid (Remuneration) Regulations 2013 (SI 2013/422) Sch.5 at *http://www.legislation.gov.uk/uksi/2013/422/made*. [Accessed January 28, 2014.]

Crossing Borders: What Happens When Rome Meets The Hague

Antoinette Collignon-Smit Sibinga*

Applicable law; Choice of law; EU law; International law; Road traffic accidents

Antoinette Collignon-Smit Sibinga looks at the complexities that can arise in road accidents with a jurisdictional flavour and, in particular, the different ways that cases can be dealt with depending on whether Rome II or the Hague Convention is applicable. She concludes that whilst two contradictory conventions can apply there will continue to be unnecessary uncertainty and complexity.

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Introduction

John Bull, an English national holidaying in the Netherlands, was involved in a traffic accident. On January 2, 2014, his car with English registration plates was hit by a car, also bearing English plates, driven by Andrew McCloud, a Scot living in Edinburgh, who had borrowed the car from a friend in England. John sustained serious injuries and demanded damages from the English motor liability insurer. Under Council Regulation 44/2001 ("Brussels I"),[1] John may start proceedings against those insurers in either England (as the place of business of the insurers) or in the Netherlands (where the accident took place).

The competent court will then decide which law applies, based on the rules of private international law. Although Council Regulation 64/2007 ("Rome II")[2] applies within Europe, it does not mean that all countries in Europe apply that regulation to traffic accidents. The Netherlands for instance, unlike England, is a contracting State to the Hague Traffic Accident Convention.[3] This convention supersedes Rome II,[4] and what's more, courts apply this convention even if the applicable law is not that of a Contracting State.[5] If John turns to the English court, Rome II will be applied and, in consequence, Dutch law.[6] A Dutch Court will apply the Hague Traffic Accident Convention. As both cars bear English registration plates, this will lead to English law.[7]

Before deciding where to sue the Scottish driver, John will have to appraise where he stands the best chance of success. In his decision he should consider differences in procedural law, such as evidentiary rules, how expert opinions are obtained and assessed, the extent of extrajudicial costs and procedural costs. Substantive law including liability, causality, loss, limitation periods and time limits also varies per country.

This article discusses the main differences between Rome II and the Hague Traffic Accident Convention, in terms of object and scope, governing law, choice of law and the law of evidence. It will be clear that

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[1] Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1.

[2] Regulation 864/2007 on the law applicable to non-contractual obligations [2007] OJ L199/40 ("Rome II").

[3] Convention on the Law Applicable to Traffic Accidents, May 4, 1971 Trb. 1971, 118. The Convention can be found at *www.hcch.net* under "Conventions". [Accessed January 28, 2014.]

[4] Rome II art.28.1 stipulates that the Regulation does not affect international conventions to which one or more Member States are parties at the time this Regulation is adopted.

[5] Hague Traffic Accident Convention art.11. This article stipulates that the Convention shall be independent of any requirement of reciprocity. It shall be applied even if the applicable law is not that of the contracting state.

[6] Rome II art.4.1.

[7] Hague Traffic Accident Convention art.1.

the differences are major and that the choice of court may have a major impact on the outcome and the size of damages.

Object of Rome II and the Hague Traffic Accident Convention

The sixth recital of Rome II shows its object is to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments. For this purpose a set of conflict-of-law rules has been included designating the same national law irrespective of the country of the court in which an action is brought.

The object of the Hague Traffic Accident Convention is to create a set of clear and simple rules to determine which law governs international traffic accidents.[8]

Scope of application of Rome II

European Regulation 865/2007 ("Rome II") applies to all EU Member States with the exception of Denmark, with regards to non-contractual obligations from January 11, 2009,[9] onwards. This means that the Regulation applies in 27 European countries.

It follows from the preamble to Rome II (recital 7) that the substantive scope should be consistent with Brussels I and Rome I.[10] The term non-contractual obligation should be understood as an autonomous concept.[11] The definition of the concept of obligations arising out of tort can be tied in with the interpretation of this concept in Brussels I.

Scope of application of the Hague Traffic Accident Convention

At the time of writing 22 States have ratified the Hague Traffic Accident Convention.[12] Of these 18 are EU Member States.

The Hague Traffic Accident Convention only determines the law applicable to civil non-contractual liability arising from traffic accidents.[13] As each country has its own definition of the term "non-contractual", there may be differences. An example: an English passenger in a taxi gets injured in a traffic accident outside England. Depending on the country where it is filed, the claim may be qualified as contractual or non-contractual if that country applies the Hague Traffic Accident Convention.

The Hague Traffic Accident Convention understands traffic accidents as accidents that involve one or more vehicles, whether motorised or not, and are connected with traffic on the public highway, in grounds open to the public or in private grounds to which certain persons have a right of access.[14]

It is evident from the explanatory report on the Hague Traffic Accident Convention that almost any means suitable to carry people, animals or things is a vehicle in the sense of the Convention. The concept of "road" should be broadly interpreted. This means that almost every collision or crash is covered by the Convention, except for skiing accidents involving ski tows.[15]

[8] See also *www.hcch.net* under "Conventions": Overview of the Hague Convention of May 4, 1971 on the Law Applicable to Traffic Accidents. [Accessed January 28, 2014.]

[9] Rome II Recital 20 preamble. In *Homawoo v GMF Assurances SA* , November 17, 2011 the EU Court of Justice held that Rome II governed non-contractual disputes after January 11, 2009 (*Homawoo v GMF Assurances SA* (C-412/10) [2012] I.L.Pr. 2).

[10] Recital 7 in preamble to Rome II.

[11] Recital 11 in preamble to Rome II. In *Kalfelis v Bankhaus Schroder Munchmeyer Hengst & Co (t/a HEMA Beteiligungsgesellschaft mbH)* (189/87) [1988] E.C.R. 5565, the Court of Justice ruled in 18 that the term "matters relating to tort, delict or quasi-delict" within the meaning of art.5(3) of the Convention must be regarded as an independent concept covering all actions which seek to establish the liability of a defendant and which are not related to a "contract" .

[12] The contracting states are: Belgium, Bosnia and Herzegovina, France, Croatia, Latvia, Lithuania, Luxemburg, Macedonia, Morocco, Montenegro, Netherlands, Ukraine, Austria, Poland, Serbia, Slovenia, Slovakia, Spain, Czech Republic, Belarus and Switzerland.

[13] Hague Traffic Accident Convention art.1.1.

[14] Hague Traffic Accident Convention art.1.2.

[15] See Dutch Supreme Court, November 23, 2001, RvdW 2001, 90.

The Hague Traffic Accident Convention does not apply to recourse actions[16] and subrogation, actions against parties maintaining roads and the liability of manufacturers, sellers or repairers of vehicles.[17] Those actions are governed by Rome II.[18]

Applicable law under Rome II

General rule

The general rule of Rome II is *lex loci damni*.[19] This means the law of the place where the damage occurs, regardless of the country in which the event causing the loss has occurred and regardless of the countries in which the indirect consequences of that event occur.[20] As the preamble[21] shows, in cases of personal injury or damage to property the country in which the damage occurs or injury is sustained is leading. This means that to a single-vehicle traffic accident in Germany in which an English national sustains injuries, German law applies.

Exceptions

The Regulation provides for several exceptions to the general rule, the first one being art.4.2: if the party whose liability is at issue and the party sustaining damage both have their habitual residence in the same country at the time when the damage occurred, the law of that country will apply.

Thus, if two English holidaymakers, who both have rented cars in Germany, collide in France, English law will apply by virtue of art.4.2.

The second exception to the general rule is contained in art.4.3: if it is clear from all circumstances that the tort is manifestly closer connected with a country other than that referred to in paras 1 and 2, the law of that other country will apply. A closer connection, so the article explains, could arise from a pre-existing relationship between the parties that is closely connected with the tort, such as a contract.

Recital 18 cautions that art.4.3 should be considered an escape clause from paras 1 and 2, where it is apparent from all circumstances of the case that the tort has a manifestly closer connection with another Member State.

Applicable law under Hague Traffic Accident Convention

As mentioned earlier, the Hague Traffic Accident Convention lays down an entirely different set of rules.

General rule

The general rule contained in art.3 is that the internal law of the State where the accident occurred applies (*lex loci delicti*).[22] This means that in case of a traffic accident in Spain involving an English car and a Spanish car Spanish law would apply.

[16] Hague Traffic Accident Convention art. 2(4).
[17] Hague Traffic Accident Convention art. 2(1).
[18] In product liability cases such as exploded airbags, the Hague Product Liability Convention may apply (Convention on the Law Applicable to Products Liability of October 2, 1973. Contracting parties are Finland, France, Croatia, Luxemburg, Macedonia, Montenegro, the Netherlands, Norway, Serbia, Slovenia and Spain).
[19] Rome II art.4.1.
[20] See also Rome II recital 17.
[21] See Rome II recital 17 second sentence.
[22] See, e.g. Court of Amsterdam July 26, 2012, LJN BX4272, para.4.5.

Exceptions

Articles 4, 5 and 6 of the Convention list several cases in which *lex loci delicti* has to give way to a different legal system i.e. that of the State in which the vehicle involved has been registered (*lex vehiculi*).

If a vehicle has not been registered (such as bicycles) or registered in more than one state, the law of the state in which the vehicle is usually stationed (*lex loci stabuli*)[23] takes the place of the law of the State of registration.

Of course, there are exceptions:

Single-Vehicle Accidents (article 4 part a)

If in an accident just one vehicle is involved that is registered in another country, *lex vehiculi* governs liability towards three categories of persons, i.e.:

- Towards the driver, holder, owner or any other person having control of or an interest in the vehicle, regardless of his habitual residence;
- Towards a passenger, provided that his habitual residence is in a state other than the one where the accident occurred; and
- Towards a victim who is outside the vehicle at the place of the accident and whose habitual residence is in the State of registration.

The applicable law is determined for each victim separately.[24] However, if more than one person may be liable for the consequences of the accident one and the same law applies to all of them, so art.4 implies.

Multiple Vehicles Registered in Same State (article 4 part b)

Lex vehiculi also applies if all the vehicles involved in a traffic accident are registered in the same State, so art.4 pt b stipulates. If they are not, the general rule of *lex loci delicti* applies.

The word "involved" does not presume "at fault". Case law is quick to assume that another vehicle, even if it has not collided with another vehicle, is "involved" in the accident. An example is a driver who has to swerve to avoid a lorry that fails to yield right of way. Although the two vehicles do not collide, the lorry is considered to have played a significant part in the accident and it is no longer a single-vehicle accident as understood by art.4 pt a. In that case the general rule of art.3 is applicable. Even a properly parked car or motorcycle could be "involved" in the sense of this article.[25]

Multiple Persons Outside Vehicle Having Habitual Residence in the State of Registration (art.4 pt c)

If multiple persons outside the vehicle are involved and possibly liable, *lex vehiculi* applies only if all those persons have their habitual residence in the State in which the vehicles involved are registered; if not, the general rule is applicable (*lex loci delicti*). This holds true also if those persons are victims of the accident. In Spain, a lorry with English plates hits a motorcycle that is registered in England, but whose driver lives in France. The driver of the motorcycle gets injured. The accident was caused by two Spanish nationals living in England, who did not look before suddenly crossing the road. In this case English law applies.

[23] Hague Traffic Accident Convention art.6.
[24] Hague Traffic Accident Convention art.4 pt a, final sentence.
[25] See, e.g. Arnhem Court of Appeal, May 18, 2004, NIPR 2004, 238 and Arnhem Court of Appeal May 18, 2004, LJN AP0037.

Damage to Other Goods (article 5)

The Convention furthermore provides for several rules on liability for goods carried in the vehicle. A distinction is made between goods belonging to the passengers, other goods carried and other goods outside the vehicle.

Liability for passenger goods is governed by the same law that pursuant to arts 3 and 4 governs liability towards the passenger (*lex vehiculi*) unless the passenger resides in the state in which the accident occurred. Damage to other goods carried is governed by the same law as the one applicable to liability towards the owner of the vehicle (arts 3 and 4). In other words: in terms of the law applicable damage to those goods is equated to damage to the vehicle. To other goods outside the vehicle *lex loci* applies, with the exception of damage to personal property of a victim outside the vehicle. Here the law governing the victim's claims is applicable.

Examples

The above outlines the differences in the rules of Rome II and the Hague Traffic Accident Convention. How those differences can influence the outcome in practice is illustrated below.

John is touring the Netherlands in a car with French plates that he has borrowed from Gregory, also a resident of England. The car hits a tree. No other vehicles are involved in the accident. Not only John is hurt in the accident, but also his passenger, Natasha, who lives in Belgium. As he lay unconscious under the tree Peter, an English national living in France, is hurt as well.

Upon application of Rome II the liability of driver John towards the owner of the car is governed by English law.[26] John's liability towards Natasha is governed by Dutch law,[27] which is also applicable to Peter's claim.[28] If Peter had had his habitual residence in England, English law would be applicable.[29]

If the court applies the Hague Traffic Accident Convention, the liability of driver John towards the owner of the car would be subject to French law.[30] His liability towards his passenger Natasha would be governed by French law.[31] Had Natasha been living in the Netherlands, Dutch law would have been applicable under *lex loci delicti*.[32] And finally, his liability towards Peter would be subject to French law.[33]

A road accident occurs in Austria when Rudolf, a resident of Germany, driving his car with German plates, commits an error. He hits a car with German plates rented by an English family taking a winter sports holiday. The English family sustains injuries. The application of Rome II indicates that Austrian law[34] should be applied to the English family's claims, while the Hague Traffic Accident Convention would point to German law.

Choice of law

Rome II

Under Rome II the parties can make a choice of law. The preamble[35] explains that:

[26] Rome II art.4.2.
[27] Rome II art.4.1 lex loci damni Rome II.
[28] Rome II art.4.1 Rome II.
[29] Rome II art.4.2 Rome II.
[30] Hague Traffic Accident Convention art.4 pt a.
[31] Hague Traffic Accident Convention art.4 under pt a as Natasha lives in Belgium, after all.
[32] In that case Hague Traffic Accident Convention art.3 applies.
[33] Hague Traffic Accident Convention art.4 under a as Peter resides habitually in France, the State where the car is registered.
[34] Rome II art.4.1.
[35] Rome II Preamble Recitals 31 and 32.

> "To respect the principle of party autonomy and to enhance legal certainty, the parties should be allowed to make a choice as to the law applicable to a non-contractual obligation. This choice should be expressed or demonstrated with reasonable certainty by the circumstances of the case. Where establishing the existence of the agreement, the court has to respect the intentions of the parties. Protection should be given to weaker parties by imposing certain conditions on the choice."

The agreement may be concluded only after the event giving rise to the damage has occurred.[36]

That a choice of law can be implied is apparent from a judgment of the Court of Zutphen of August 15, 2012[37] in a case in which the correspondence between the parties referred to Dutch law and Dutch case law. This was enough to assume an implicit choice of law in favour of Dutch law, as the other party did not argue that the law of another country applied.

Hague Traffic Accident Convention

Although the Hague Traffic Accident Convention does not say so in so many words, Dutch case law allows an implicit choice of law, and even before the accident occurs.[38] Another interpretation suggests that in events not provided for by the Hague Traffic Accident Convention, Rome II applies. In that case a choice of law can be made only after the accident. The object and purport of Rome II lead me to agree with this latter interpretation.

Evidence

Rome II

According to Rome II art.1.3 does not apply to evidence and procedure, without prejudice to arts 21 and 22. Article 22.1 stipulates that the law governing a non-contractual obligation under Rome II applies to the extent that it contains rules which raise presumptions of law or determine the burden of proof in matters of non-contractual obligations. The reason that presumptions of law and the division of the burden of proof come within the scope of Rome II is that they are part of substantive rules of evidence that in non-contractual obligations help to specify the obligations between parties and therefore cannot be isolated from the law governing those non-contractual obligations.[39]

Hague Traffic Accident Convention

The Hague Traffic Accident Convention does not contain any articles on evidence. Again, it is fair to assume that failing such regulation Rome II applies. In applying the convention the Dutch courts in practice, therefore, make a distinction between formal and substantive rules of evidence. The procedural rules are decided based on *lex fori* while the substantive law of evidence is subject to the rules of *lex causae*.

[36] Rome II art.14.1a. Only if the parties have commercial dealings with each other, may the choice of law be laid down in a clause before the event giving rise to the damage has occurred.

[37] Court of Zutphen August 15, 2012, ECLI:NL:RBZUT:2012:BX4722.

[38] See Court of Amsterdam April 12, 1993, NIPR 1994, No.147, Court of The Hague December 13, 1995, NIPR 1997, No.102, Court of Zwolle February 4, 1998, NIPR 1998, No.305, Court of Arnhem February 18, 2009, LJN BH3775, para.4.3.

[39] See interpretation of the Convention on the Law applicable to Contractual Obligations that is valid for Rome II as well as Rome II: M. Giulano and P. Lagarde, "Report on the Convention on the law applicable to contractual obligations" OJ 1980, C 282, p.36.

Review Clause

Article 30 of Rome II contains a review clause requiring the Commission to submit a report on the application of the regulation and proposals to amend the regulation, if necessary. Part of the report is a study of the effects of art.28 regarding the Hague Traffic Accident Convention.

That study has meanwhile been performed and was published in 2012.[40] The author made a comparison between Rome II, the Hague Traffic Accident Convention and the Motor Insurance Directives ("MID"). One of the conclusions was that application of the conventions leads to forum shopping, and is not in the interest of victim protection. Several suggestions were made for amending Rome II, such as applying the law of the country in which the victim lives to compensation of the loss, should the victim wish to file claims in his or her own country based on direct action against the insurer. To my knowledge the European Commission has not yet taken any further action in this respect.

Conclusion

Under art.28.1, the Hague Traffic Accident Convention prevails over Rome II. The Hague Traffic Accident Convention is valid in 18 European countries, which is almost half of all EU Member States.

The objects of the two conventions are not the same. The rules applied to decide on the applicable law are essentially different. While Rome II applies *lex loci damni* principle, linking up with the parties' habitual residence, the Hague Traffic Accident Convention generally starts from *lex loci delicti* and in some cases the country in which the vehicle(s) involved are registered.

Side-by-side application of the two conventions has produced a system within Europe in which cross-border road accidents are subject to the law of different countries, depending on the court where the action is filed. This holds particularly true in single-vehicle accidents, or accidents in which both parties have their residence in the same country or involving cars registered in the same country.

In cross-border cases it is vital, therefore, to first establish whether Rome II or The Hague Traffic Accident Convention applies and then decide where it would be best to launch the action with the most suitable governing law. For this purpose lawyers handling such cases should consult their counterparts abroad in time about the procedural and substantive aspects, including loss and time limits, to allow for a balanced consideration.

As long as both conventions exist side by side, this complex and confusing system will continue, in my opinion. This is counter to the objective of Rome II to create unity and clarity within Europe. Article 28.1 of Rome II should be deleted and Rome II applied to cross-border road accidents.

[40] J.. Papettas, "Choice of law for cross-border road traffic accidents" at *http://www.europa.eu/studies*. [Accessed January 28, 2014.]

Interest on Costs

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LT Costs between the parties; Interest; Part 36 offers

Introduction

Interest on costs is a topic which all practitioners, whether or not directly involved in costs, should be aware of.

Issues relating to interest on costs can arise under the Judgments Act, where there is an order for payment of costs, and may also arise in relation to Part 36 where the claimant becomes entitled to enhanced interest under the terms of Part 36.14(3).

Judgments Act Interest

The approach to interest on costs under the Judgments Act was reviewed by the Court of Appeal in *Simcoe v Jacuzzi UK Group Plc* [2012] EWCA Civ 137.

The issue for the court was whether interest on costs ran from the date of the order for costs as agreed or assessed (the "incipitur" date) or from the date the sum was agreed between the parties or assessed by the court (the "allocatur" date).

Pre-CPR

The court reviewed how this issue had been dealt with prior to the CPR.

Section 17 of the Judgments Act 1838 provides for every judgment to carry interest from the time of entering up the judgment until that judgment was satisfied.

Section 18 of the Judgments Act 1838 provides all court orders whereby any sum of money or any cost should be payable by any person would have the effect of judgments.

In *Hunt v AM Douglas (Roofing) Ltd* [1990] 1 A.C. 398, the House of Lords confirmed the effect of these two sections was that interest on costs ran from the date the order for costs was made, not the date on which the costs was subsequently assessed or agreed.

However, in *Thomas v Bunn* [1991] 1 A.C. 362 the House of Lords confirmed that where there was a split trial interest on costs ran from the date of judgment or agreement on quantum but otherwise endorsed *Hunt*.

The County Court (Interest on Judgment Debts) Order 1991 (SI 1991/1184, "the 1991 Order") provided for judgments, in the county courts, of not less than £5,000 to carry interest.

Post CPR

The court reviewed the impact of the CPR on earlier law.

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Concurrent with the introduction of the CPRs.17 of the 1838 Act was amended to provide for interest at 8 per cent, but for rules of the court to provide that all or part of interest might be disallowed.

Part 40.8 CPR gave the court power to order interest should run from a date different to that when judgment was given.

Technically, Part 40.8 CPR was not effective in the county court as s.74(1) of the County Courts Act 1984 required the concurrence of the Treasury on rules relating to interest. Consequently, although Part 40.8 impliedly repealed and replaced the 1991 Order, at least in respect of interest on costs in the county court, the position under the 1991 Order would be the same as the general rule under Part 40.8(1), so the ineffectiveness of the CPR on this point in the county court would not have affected many cases.

The question, therefore, was whether the normal rule under Part 40.8 was the "incipitur" date or the "allocatur" date.

Decision

The Court of Appeal held that under the CPR the normal rule was for interest to run on costs from the "incipitur" date.

That was because:

- both the 1991 Order and Part 40.8 used the word "judgment", when on costs the only judgment would be that reflected in the order for costs to be assessed if not agreed; and
- it would be surprising if the word judgment had a different meaning in Part 40.8 in the county court from that which it had in the High Court (and there was no doubt in the High Court it meant the "incipitur" date given the decision in *Hunt*).

This normal rule was also held to apply where the claimant had entered a CFA. That was because, applying the reasoning given in *Hunt*, it was not right to distinguish a case funded by a CFA. In particular:

- the claimant's solicitors would still have done the work reflected in the costs awarded before the costs order was made; and
- that approach would be a stimulus for there to be a payment made on account of costs; and
- the legal representatives should not be expected to finance the litigation until assessment of costs was completed.

A CFA providing for an uplift on costs did not change the normal rule, as the purpose of that uplift was to provide compensation for the risk of recovering nothing in costs if the claim did not succeed (and nothing to do with compensation for delay in receiving money under a costs order).

The defendant's argument that the hourly rates would have allowed for delay was rejected as there was no evidence to support such a suggestion (indeed given the general rule in Part 40.8 the presumption must be that such rates would have been calculated on the basis interest would be paid from the "inciptur" date).

The general approach in *Fattal v Walbrook Trustees (Jersey) Ltd* [2009] EWHC 1674 (Ch) was endorsed, that a departure from the general rule in Part 40.8 was only appropriate when "justice requires". However, the Court of Appeal discouraged a too detailed approach into the facts of any particular case for the purposes of determining the date from which interest should run. That was because the court should take a broad view of the position and a broad brush approach would normally be appropriate.

Consequences

The Court of Appeal judgment in *Simcoe* overrules the county court judgment in *Gray v Toner* (Liverpool County Court, November 11, 2010).

Interest on costs, as eventually assessed or agreed, will run at 8 per cent a year from the date of the judgment providing for costs to be assessed, rather than the date of those costs eventually being assessed or agreed, until the date of payment.

This judgment has facilitated payments on account of costs, as many defendants recognise this will be more costs effective than paying interest under the Judgments Act. Obviously, where such a payment has been made allowance of that should be made when calculating interest on costs.

However, when calculating interest on costs, care is necessary if the claimant has acquired Part 36 benefits of enhanced interest. That will be payable, at the relevant figure above base rate provided for in the order, which may be higher than interest under the Judgments Act.

The court does still have a discretion in relation to interest on costs but there will need to be some very good reason, not simply the fact of a CFA, for that discretion to be exercised. It would seem the Court of Appeal did not want to encourage a case by case assessment of what would be appropriate in terms of interest on costs, as that would be inconsistent with the overriding objective.

Part 36

Parts 36.14 (1) (b) and 36.14 (3) provide that if judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer (unless the court considers this would be unjust) the claimant is entitled to:

- interest on the whole or part of any sum of money (excluding interest) awarded at a rate not exceeding 10 per cent above base rate for some or all of the period starting with the date on which the relevant period expired; and
- costs on the indemnity basis from the date on which the relevant period expired; and
- interest on those costs at a rate not exceeding 10 per cent above base rate; and (for offers made on or after April 1, 2013)
- an additional amount, namely 10 per cent of the amount awarded up to £500,000 and 5 per cent on any amount awarded above £500,000 up to £1,000,000, on the sum awarded to the claimant by the court, where the claim is or includes a money claim, or on the sum awarded to the claimant by the court in respect of costs, where the claim is only a non-monetary claim, subject to a maximum of £75,000.

The "additional amount" was introduced as part of the implementation of the Jackson Report and was intended to be exactly that: an award additional to the other, existing, Part 36 benefits on the basis that these were not a sufficient incentive to claimants.

Accordingly, each and every benefit provided for under Part 36.14 (3) ought to follow when judgment is at least as advantageous as the claimant's own Part 36 offer unless that would be "unjust": The courts have consistently emphasised it will be rare for these consequences to be "unjust": *Huck v Robson* [2002] EWCA Civ 398; *Matthews v Metal Improvements Co Inc* [2007] EWCA Civ 215.

Interest, on both damages and costs, is a particular incentive for the claimant to make an early offer and, accordingly, it seems important the court should allow the claimant to have that benefit.

The court has a discretion on the rate at which enhanced interest is payable and also the period over which interest is payable. Caselaw reflects the range of rates allowed, up to and including the maximum 10 per cent. Details are set out in the table accompanying this article.

Conclusion

Practitioners acting for both paying and receiving parties need to be aware of the impact of interest on costs under both the Judgments Act and, where applicable, Part 36.

Table of Part 36 awards to Claimants

Case name	Date/reference	Nature of case	Judge(s)	Judgment sum	Period over which enhanced interest to run	Rate of Interest	Amount of interest if shown
Little, Smith and Wade v Sebire & Co	[2001] EWCA Civ 894	Prof negligence	David Foskett QC	£50,000 (£36,500 before interest and enhanced interest awarded on the £36,500)	June 20, 1999–September 17, 1999	2% above base rate (8% total) for costs, 10% above base (16% total) on damages	
Petrotrade Inc v Texaco	CA (Civ Div), May 23, 2000	Commercial	CA (Lord Woolf M.R., and Clarke and Latham L.JJ.)	US$140,660.75 (excluding interest)	Not specified	4% above base indicative rate though not applied in this instance	
Earl v Cantor Fitzgerald	QBD, May 16, 2000	Commercial—claim for benefit under health policy	Moore-Bick J.	£500,000	September 17, 1999–May 16, 2000	5% over base rate (11% total) on the full amount of the agreed sum in substitution for statutory interest. Plus enhanced interest on costs at same rate	£36,666.66 which was rounded to £35,000
Seashore Marine v Phoenix	QBD, July 31, 2001	Commercial	Aikens J.	£185,908.62	August 11, 2000–July 31, 2001	Interest on damages and costs at LIBOR plus 3% (1.5% above normal rate).	
Huck v Robson	[2002] EWCA Civ 398	Personal injury	Schiemann, Tuckey and Jonathan Parker L.JJ.	100% liability, damages to be assessed	unspecified	Indemnity costs plus interest (unspecified)	
Gaynor v Blackpool FC	CC, December 10, 2001	Personal injury	H.H.J. Armitage QC	100% liability, damages to be assessed	November 6, 2001 until payment	interest on costs at 5% above base rate.	
Humpheryes and Nedcon v Storage Eng	[2004] EWHC 2558 (QB)	Personal injury	Roderick Evans J.	£304,221.21 (excluding interest).	September 24, 2002–November 10, 2004	6% above base rate. And interest on costs at same rate	
Read v Edmed	[2004] EWHC 3274 (QB)	Personal injury	Bell J.	Not specified		1.25% above base rate on costs only which were indemnity costs.	Not specified
Capital Bank v Stickland	[2004] EWCA Civ 1677	Commercial—delivery up of a vessel or its value	H.H.J. Kershaw QC CA: Mance, Keen and Longmore L.JJ.	£97,088.80	July 1, 2003–February 27, 2004	10% above base on damages and costs	
Dugmore v Swansea NHS Trust	CC, June 16, 2004	Personal injury	H.H.J. Masterman	£240,000.00 taking interim payment into account	November 16, 2000–June 16, 2004	10% above base rate (14.5% total) on all damages (less interims) and costs	
Peacock v Wincanton	Unreported, October 23, 2008	Personal injury	H.H.J. Foster QC	£767,014.00	June 28, 2005–June 28, 2008	5.6% overall pa for 3 years (0.6% above base). Costs not considered.	£129,000.00

Case name	Date/reference	Nature of case	Judge(s)	Judgment sum	Period over which enhanced interest to run	Rate of Interest	Amount of interest if shown
Edwards v Worman & Co-operative Insurance	December 2008	Personal injury	Master Leslie	£227,505.32	August 1, 2008–December 4, 2008	10% above base on all damages and costs	
Bunch v Scouts Association	Unreported, December 3, 2009	Personal injury	Master Rose	£75,000	September 19, 2008–June 10, 2009	8% (Judgment Act rate) applied overall	£4,440
Stanton v Collinson	[2009] EWHC 342 (QB)	Personal injury	Mrs Justice Cox	To be assessed	From December 18, 2008	10% on costs. Compromised to 7.5% on appeal.	
Andrews v Aylott	[2010] EWHC 597 (QB)	Personal injury	H.H.J. McMullen QC and Tugendhat J.	£2,025,000 plus PPs of £100,000 rising to £122,500 for care and £25,000 for earnings	November 23, 2007–April 3, 2009	10% above base on 33% of damages and all costs. Compromised to 5% over base on appeal. Damages award restricted to lump sum by Tugendhat J.	5% above base on £2,025,000 lump sum damages for 16 months, plus 5% above base interest on costs
Streets v Esso	[2009] EWHC 3748 (QB)	Fatal—mesothelioma	Mr N. Wilkinson QC	£315,901 (£40,000 costs)	March 8, 2009–October 15, 2009	5% on amount of damages considered in dispute—£100,000	£2,083
Black v Doncaster and Bassetlaw Hospitals NHS Trust	CC, April 20, 2009	Clinical Negligence	H.H.J. Swanson	100% liability, damages to be assessed	October 22, 2007–April 20, 2009	Indemnity costs and interest on costs at 10%.	
Curtis v Pulbrook	[2009] EWHC 1370 (Ch)	Chancery—recovery of wrongful payments	Richard Sheldon QC (sitting as Deputy in the Chancery Div)	£124,195	May 20, 2008–April 8, 2009	Indemnity costs, 4% over base on costs and 6% over base on damages (3% above normal rate).	
Pankhurst v White & MIB	[2009] EWHC 1117 (QB)	Personal injury	Mr Justice Macduff	£2,344,077	21 months ending May 2008	P36 interest on damages (not costs) awarded on past loss element only at 4% above special account rate of 6% and on general damages at 2% above the going rate of 2%. Indemnity costs for whole two-year period.	£9,000 on past losses and £8,000 on general damages
Gibbon v Manchester CC	[2010] EWCA Civ 726	Civil	Lord Justice Carnwath and Lord Justice Moore-Bick	Appeal dismissed. £2,500.	November 18, 2008–February 26, 2009	Judge ordered the Council to pay costs up to the date of the Claimant's offer and Claimant to pay the Council's costs thereafter.	

Case name	Date/reference	Nature of case	Judge(s)	Judgment sum	Period over which enhanced interest to run	Rate of Interest	Amount of interest if shown
Smith v LC Windows	[2009] EWHC 1532 (QB)	Personal Injury	Cranston J.	£1,063,000 (of which £480,678 related to future care PPs)—reduced to £950,000 in compromise of appeal	January 8, 2009–June 30, 2009	5% above base on all damages (inc capitalised PPs) and all costs. No issue taken by Defendant as to interest on capitalised PPs	£37,590 (but slightly reduced by compromise on appeal)
Brown & Brown v Bath Travel	November 12, 2010	Personal Injury	Master Leslie	100% liability, damages to be assessed	September 2, 2010–November 12, 2010	Indemnity costs, 10% over base on costs. Interest on damages assessed reserved.	
Linklaters Business Services v Sir Robert McAlpine Ltd	[2010] EWHC 3123 (TCC)	Commercial	Mr Justice Akenhead	£2,845,435.60	Period from and including September 7, 2010 to November 23, 2010.	Indemnity costs and interest on damages and costs at a rate of 5% above base rate.	Estimated at £38,978.57
Epsom College v Pierse Contracting Southern Ltd	[2011] EWCA Civ 1449	Civil	Rix and Tomlinson L.J. and Sir Mark Waller	£21,075	November 1, 2010–Jan 20, 2011; unjust to award earlier interest due to prior non-production of evidence for inspection	Indemnity costs and interest on damages and costs 6% above base rate	£277.15
Hemming v Westminster CC	[2012] EWHC 1582 (Admin)	Public Law/Local Gov	Mr Justice Keith	Appeal dismissed on May 24, 2013. Damages to be assessed.	From expiry of claimant offer on April 18, 2011	Rate of 10% above base rate, and costs with interest thereon at the rate of 10% over base rate from April 18, 2011, but further submissions sought to clarify when Claimant put their solicitors in funds in relation to the interest on costs award.	
Feltham v Bouskell (Costs)	[2013] EWHC 1952 (Ch)	Commercial	Mr Charles Hollander QC	Main judgment sum of £650,000 plus £62,000 costs in the 2006 probate action	June 3, 2013–July 15, 2013.	Post Jackson award under CPR 36.14(3)(d) declined as unjust; offer only 22 days pre-trial, new determinative issue raised at trial and failure to disclose relevant nursing notes. Awarded indemnity costs and 3.5% above base rate.	Estimated at £2,867.51
Thinc Group Ltd v UK	[2013] EWCA Civ 1306	Civil	Arden, Ryder and Macur L.JJ.	Judge awarded the claimant approximately one third of the original claim, namely £9,510		Defendant had to pay the claimant 20% of its costs on the indemnity basis because it would have been unjust to award C all costs due to conduct issues and the fact that D had made Calderbank offers to settle for very similar sums at earlier stages	

Case and Comment: Liability

Woodland v Essex CC

SC ((Lady Hale J.S.C., Lord Clarke J.S.C., Lord Wilson J.S.C., Lord Sumption J.S.C., Lord Toulson J.S.C., October 23, 2013, [2013] UKSC 66)

Personal injury—liability—negligence—schools—in loco parentis—swimming lessons—vicarious liability—duty of care—powers and duties—delegability—local authorities

Contracting out; Delegation; Duty of care; Local authorities' powers and duties; Personal injury; Pupils

On July 5, 2000 schoolgirl Annie Woodland was then 10 years old. She went with her class to the Gloucester Park swimming pool in Basildon. The class was divided into groups, according to their ability to swim. She was in a group of better swimmers, who used the deep pool. In groups of three or four abreast, at 5–10 second intervals, they were to dive into the pool at the deep end, swim the length to the shallow end, exit the pool, and return by the pool side to the deep end ready to swim the next length when it was their turn to do so. The swimming lesson was supervised by a swimming teacher Ms Burlinson, who was in the pool, and by a life guard Ms Maxwell, who was at the side of the pool.

The swimming pool facilities were not those of the Education Authority. They were run by Basildon Council, the fifth defendant. Nor were the life guard (the third defendant) or swimming teacher employees of the school. They were employees of the second defendant, Beryl Stopford, who traded as Direct Swimming Services, which provided swimming lessons for school children and organised the arrangements under which the children had their lessons, including the availability of the pool for that use.

When Annie was in the pool, she had been swimming front crawl toward the shallow end. At some point during the lesson Annie was seen no longer swimming but was hanging vertically in the water. There was a dispute of fact as to whether others of her classmates drew the life guard's attention to this, or whether she noticed it for herself. Annie was pulled from the pool too late to prevent her suffering severe hypoxic brain injuries as a result.

The local authority accepted that it owed a common law duty of care to Annie, which included obligations to take such care as would be exercised by a reasonably careful parent and to take reasonable steps to ensure that independent contractors who were engaged to carry out tasks in respect of pupils were reasonably competent to perform those tasks. However, they denied the existence of a non-delegable duty. Their view was supported at the trial of a preliminary issue both at first instance[1] and on appeal.[2]

The Supreme Court held that if the highway and hazard cases were put to one side, the following were the criteria which would give rise to the existence of a non-delegable duty of care.

First, the claimant was a patient or a child, or for some other reason was especially vulnerable or dependent on the protection of the defendant against the risk of injury. Other examples were likely to be prisoners and residents in care homes.

Secondly, there was an antecedent relationship between the claimant and the defendant, independent of the negligent act or omission itself, which placed the claimant in the actual custody, charge or care of the defendant, and from which it was possible to impute to the defendant the assumption of a positive

[1] *Woodland v Swimming Teachers Assoc* [2011] EWHC 2631 (QB).
[2] *Woodland v Swimming Teachers Assoc* [2012] EWCA Civ 239.

duty to protect the claimant from harm, not just a duty to refrain from conduct which would foreseeably damage the claimant. It was characteristic of such relationships that they involved an element of control over the claimant, which varied in intensity from one situation to another, but was clearly very substantial in the case of schoolchildren.

Thirdly, the claimant had no control over how the defendant chose to perform the relevant obligations (whether personally or through employees or third parties).

Fourthly, the defendant had delegated to a third party some function which was an integral part of the positive duty which he had assumed towards the claimant; and the third party was exercising, for the purpose of the function thus delegated to him, the defendant's custody or care of the claimant and the element of control that went with it.

Fifthly, the third party had been negligent not in some collateral respect but in the performance of the very function assumed by the defendant and delegated by the defendant to him.

In *A (A Child) v Ministry of Defence*,[3] the court had suggested that a non-delegable duty had only been found to exist where the claimant suffered an injury while in an environment over which the defendant had control. Control of the environment in which injury was caused was not an essential element in the kind of case with which the court was presently concerned; rather, the essential element was control over the claimant for the purpose of performing a function for which the defendant had assumed responsibility.[4]

In this case, the local authority had assumed a duty to ensure that Annie Woodland's swimming lessons were carefully conducted and supervised, by whomever it might get to perform those functions. Annie was entrusted to the school for certain essential purposes, which included teaching and supervision. The swimming lessons were an integral part of the school's teaching function. They did not occur on school premises, but they occurred in school hours in a place where the school chose to carry out that part of its functions.

The teaching and the supervisory functions of the school, and the control of the child that went with them, were delegated by the school to Beryl Stopford and through her to Ms Burlinson, and probably to Ms Maxwell as well, to the extent necessary to enable them to give swimming lessons. The alleged negligence occurred in the course of the very functions which the school assumed an obligation to perform and delegated to its contractors. It had to follow that if the latter were negligent in performing those functions and Annie was injured as a result, the local authority was in breach of duty.

The appeal was allowed.

Comment

This is a monumentally significant case in the tort of negligence. In recent years there has been an expansion in the terrain of vicarious liability, but as Lord Sumption points out, that concept "has never extended to the negligence of those who are truly independent contractors".[5] So when Annie Woodland was attending swimming lessons as part of the primary school curriculum it appeared that any remedy for her hypoxic brain injury from near drowning could only be against those who were not employees of the Education Authority, and astonishingly the swimming teacher appeared to be uninsured. However, the Supreme Court in a sweeping judgment has reclaimed ground for a *personal* and *non-delegable* duty of care owed by Essex CC, who were held to be under an obligation for "procuring the careful performance of work delegated to others".[6]

[3] *A (A Child) v Ministry of Defence* [2004] EWCA Civ 641; [2005] Q.B. 183.
[4] *A (A Child) considered*, *Myton v Wood* Times , July 12, 1980 and *Farraj v King's Healthcare NHS Trust* [2009] EWCA Civ 1203; [2010] 1 W.L.R. 2139 approved.
[5] *Woodland v Essex CC* [2013] UKSC 66 at [3].
[6] *Woodland v Essex CC* [2013] UKSC 66 at [5].

At first instance in this case it was held that neither a school nor a local authority would be liable on a "non-delegable" basis for the alleged negligence of an independent contractor for services rendered off-site. The case against Essex CC was struck out, and that was supported by a majority in the Court of Appeal. There are certainly many policy reasons tending against non-delegability where the injury was suffered on premises away from the school and in circumstances not under the direct control of the school. Langstaff J. indicated that such a new non-delegable duty, if it was ever established, should be capable of precise and careful formulation so that its scope could be determined.[7] His prescient comments have now had an answer.

Lady Hale notes in her Supreme Court analysis that:

> "The common law is a dynamic instrument. It develops and adapts to meet new situations as they arise. Therein lies its strength. But therein also lies a danger, the danger of unbridled and unprincipled growth to match what the court perceives to be the merits of the particular case."[8]

She then gives the classic "incremental" warning, deriving from Lord Macmillan in his 1934 Rede lecture[9] and enshrined in *Caparo*,[10] a perspective which she neatly summarises as judicial expansion which "must proceed with caution, incrementally by analogy with existing categories, and consistently with some underlying principle".[11]

The concept of a "non-delegable duty" has of course a venerable history in employers' liability cases, stemming from the speech of Lord Wright in *Wilson's and Clyde Co v English* where the House of Lords evaded the pernicious Victorian doctrine of "common employment", dating from 1837. Personal duties were formulated for employers, principally to provide "a competent staff of men, adequate material, and a proper system and effective supervision".[12] In an era of "outsourcing" to independent contractors, particularly by central and local government in an effort to reduce costs, there have inevitably been some legal puzzles. As Professor Lord Wedderburn remarked "there is a spectre haunting labour law, the spectre of self-employment".[13] This spectre is, of course, also a critical component in many other fields of the law, such as revenue, social security and in tort, where it can be used as a tool to evade liability.

Langstaff J. in an exemplary tour d'horizon at first instance in *Woodland* noted subtly that "Nowhere in the re-amended particulars of claim is the precise nature of the alleged non delegable duty set out", but then sets out a recitation of policy reasons as to why there should not be such a strict "non-delegable" liability claim in such circumstances, opening the door to a higher court to change tack. It was significant that he gave permission for an appeal on the basis that this was an issue of importance for schools, parents and pupils.[14] Laws L.J. in the Court of Appeal, also postulating an adventurous course to steer, described Langstaff J.'s judgment as "very painstaking".[15] The Supreme Court takes up the challenge, looking in detail at those authorities, and in particular at the Australian cases. Lord Sumption also ranges widely across the law of contract and the tort of nuisance before coming to the conclusion that there was indeed personal liability here. He notes two strands to non-delegable duty cases, the first involving public place and extra-hazardous activities, but the second where there are three elements: antecedent relationship, a positive or affirmative duty to protect a particular class of persons against particular risks; and, crucially, that this is a *personal* duty in the circumstances.[16] In a key passage he indicates that:

[7] *Woodland v Swimming Teachers' Association* [2011] EWHC 2631.
[8] *Woodland v Essex CC* [2013] UKSC 66 at [28].
[9] Lord Macmillan, "Two Ways of Thinking" Rede Lecture (1934) in Macmillan, *Law and Other Things*, 76.
[10] *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605; [1990] 2 W.L.R. 358; [1990] 1 All E.R. 568.
[11] *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605; [1990] 2 W.L.R. 358; [1990] 1 All E.R. 568.
[12] See generally *Wilsons & Clyde Coal Co Ltd v English* [1938] A.C. 57; [1937] 3 All E.R. 628.
[13] Lord Wedderburn, *The Worker and the Law*, 2nd edn (Penguin, 1961), p.61. See the expanded discussion of "temps, casuals, homework and self-employment" in the 3rd edn, pp.121–132.
[14] See generally Julian Fulbrook, "*Woodland v Swimming Teachers' Association*" [2012] J.P.I.L. 7–11.
[15] *Woodland v Essex CC* [2012] EWCA Civ 239 at [4].
[16] *Woodland v Essex CC* [2013] UKSC 66 at [7].

> "Both principle and authority suggest that the relevant factors are the vulnerability of the Claimant, the existence of a relationship between the Claimant and the Defendant by virtue of which the latter has a degree of protective custody over him, and the delegation of that custody to another person."[17]

Lord Sumption draws on employment cases in the House of Lords such as *Wilsons & Clyde Coal Co Ltd*[18] and *McDermid v Nash Dredging*,[19] on hospital cases such as *Gold v Essex CC*,[20] and in four leading cases in the High Court of Australia.[21]

As yet there seems no finite end to the litigation on Annie Woodland, as the Supreme Court had no option but to remit to the High Court for a trial of the action, having allowed the appeal and set aside the judge's order striking out the allegation of a non-delegable duty. Ward L.J. in the Court of Appeal indicated some of the unsatisfactory features of the factual determination of the case so far, particularly a Health and Safety Executive ("HSE") report in 2001 which he characterised as a "cursory document" suggesting that Annie Woodland had been "rescued promptly and, perhaps surprisingly, that she had made a full physical recovery". This was then contradicted by a further investigation which the HSE commissioned from the Institute of Sport and Recreation Management in April 2002 which suggested that two school friends of Annie Woodland's were "instrumental in spotting Annie in difficulty and in bringing her to the side … They probably saved her life".

The conclusion of this second report was that, in contrast to the earlier view: "The lifeguard and the instructor were distracted from or not applying proper attention to their duties."[22] Aside from these factual matters which have yet to be resolved there is, of course, the wider issue of policy and the impact on school swimming lessons.

Tomlinson L.J. in the Court of Appeal warned that allowing an appeal might have a "chilling effect on the willingness of education authorities to provide valuable educational experiences for their pupils"[23] and Lord Faulks QC has indicated that "the general message it sends out to schools, however inaccurate, is that you have to be more cautious". He added that the Supreme Court decision "may well increase insurance premiums".[24] Unhappily, one of the alarming features of this case was that school swimming had seemingly been outsourced to swimming teachers who were uninsured, so the issue was not necessarily having any premiums increasing but in having a total insurance vacuum for these particular swimming lessons unless liability could be laid at the door of the Education Authority.

As in a previous era after local authority cases such as *Tomlinson v Congleton BC*[25] and *Jolley v Sutton BC*[26] there are plenty of "doomsayers" predicting litigation overload and the imminent end of school swimming. Commentary in the *Local Government Lawyer* is more reasoned, but ranged from a view that this case was a "valuable reminder that liability for the actions of contractors may remain" with local authorities, to a suggestion that Lady Hale's judgment "rather ominously" indicated that boundaries "will have to be worked out on a case by case basis as they arise".[27] However, the Supreme Court was very careful to set some immediate "boundaries", in that, as Lord Sumption indicated, there was a need "to prevent the exception from eating up the rule".[28]

[17] *Woodland v Essex CC* [2013] UKSC 66 at [12].
[18] *Wilsons & Clyde Coal Co Ltd v English* [1938] A.C. 57; [1937] 3 All E.R. 628.
[19] *McDermid v Nash Dredging & Reclamation Co Ltd* [1987] A.C. 906.
[20] *Gold v Essex CC* [1942] 2 K.B. 293; [1942] 2 All E.R. 237.
[21] *Commonwealth v Introvigne* (1982) 150 C.L.R. 258; (1982) 56 A.L.J.R. 749; *Kondis v State Transport Authority* (1982) 150 C.L.R. 258; (1982) 56 A.L.J.R. 749; *Burnie Port Authority v General Jones Pty* (1994) 179 C.L.R. 520; *New South Wales v Lepore* (2003) 212 C.L.R. 511.
[22] See [4]–[11] for Ward L.J.'s analysis in *Woodland v Stopford* [2011] EWCA Civ 266. See also the 2011 statement by the Swimming Teachers' Association "Setting the Record Straight", *The Leisure Review* (July 4, 2012).
[23] *Woodland v Essex CC* [2012] EWCA Civ 239 at [57].
[24] "Fears for school swimming after court ruling on injured woman", *Daily Telegraph* (October 24, 2013). See also "Swimming lessons under threat", *The Times* (October 24, 2013).
[25] *Tomlinson v Congleton BC* [2003] UKHL 47; [2004] 1 A.C. 46; [2003] 3 W.L.R. 705; [2003] 3 All E.R. 1122.
[26] *Jolley v Sutton BC* [2000] 3 All E.R. 409.
[27] "The Supreme Court ruling in Woodland v Essex County Council: the reaction", *Local Government Lawyer* (October 24, 2013).
[28] *Woodland v Essex CC* [2013] UKSC 66 at [22].

Lord Sumption delineates very carefully that what is proposed is not "open ended liability" and that the courts "should be sensitive about imposing unreasonable financial burdens on those providing critical public services". A non-delegable duty should clearly only be imputed to schools when it is "fair, just and reasonable" to do so, but then in a summary of his reasoning Lord Sumption points out that the decision is in accordance with:

> "the long-standing policy of the law, apparently notable in the employment cases, to protect those who are both inherently vulnerable and highly dependent on the observance of proper standards of care by those with a significant degree of control over their lives."[29]

No doubt *Woodland* will be much debated, and its parameters of a non-delegable personal duty of care further explored, but it was understandable that Annie Woodland's mother should express herself as "greatly relieved that justice has been done".[30]

Practice points

- In addition to a potential for vicarious liability there is a parallel personal duty which is non-delegable when an organisation "outsources" a service in circumstances where the claimant is vulnerable, where there is a relationship of "protective custody", and where that custody is delegated.
- A non-delegable duty will only be imputed in so far as it is "fair, just and reasonable".
- Where a school delegates control to someone else it will be answerable for the "careful exercise of its control by the delegate".
- In the absence of negligence of their own, for example in the selection of contractors, schools will not be liable for the negligence of independent contractors where on analysis their own duty is not to perform the relevant function but only to arrange for its performance.
- Schools will also not be liable for the defaults of independent contractors providing extra-curricular activities outside school hours, such as school trips in the holidays. Nor will they be liable for the negligence of those to whom no control over the child has been delegated.

Julian Fulbrook

Boyle v Commissioner of Police of the Metropolis

(CA (Civ Div), Longmore L.J., Black L.J., November 5, 2013, [2013] EWCA Civ 1477)

Personal injury—liability—negligence—breach of duty of care—procedure—causation—late disclosure of expert evidence—exclusion of medical evidence—inability to prove causation—Civil Procedure Rules 1998 Pt 35 r.3.9

LT Breach of duty of care; Foreseeability; Police officers; Road traffic accidents

On January 25, 2008, at 9pm or shortly afterwards 17 year old Jonathan Boyle, accompanied his friend and neighbour Joseph Berner to the Lord Morpeth public house. Both were drinking alcohol during the

[29] *Woodland v Essex CC* [2013] UKSC 66 at [25].
[30] In the local newspaper in Blackpool, where the family has moved; "Justice for Annie", *Blackpool Gazette* (October 27, 2013).

course of the evening. Just after 2am on the following morning they found themselves on Grove Road in the vicinity of a bus stop to the south of the Victoria public house.

Travelling south along this road was Acting Police Sergeant Currey driving a marked Vauxhall Vectra police car. He was on duty but not responding to an emergency. The road was subject to a speed limit of 30mph. Mr Currey was travelling between 33mph and 35mph and positioned in the road equidistantly between the kerb and the central white lines.

As Mr Currey was approaching the bus stop, Jonathan Boyle fell into the road ahead of him. Mr Currey applied full emergency braking but he slowed up by no more than about 1mph before the impact with Boyle who claimed damages against the police force for the catastrophic injuries he suffered.

Boyle submitted that the police officer was in breach of his duty of care:

- by driving too fast;
- by driving too close to the kerb;
- by not keeping a proper lookout; and
- that if Mr Currey had been driving with the requisite degree of care then his injuries would have been avoided or at least less severe.[1]

The defence submitted that there was no breach of duty involved in driving above the speed limit as it was 2am, there were no crowds of people, there was nothing likely to attract crowds, traffic could be expected to be light and he had a job to do. Turner J.[2] held that the police officer had acted in breach of the duty of care owed to the claimant. That duty extended to him because he was within the class of people in the neighbourhood of his vehicle at the time.[3] The factors that the police officer pointed to were not sufficient to exonerate him. Had he been on the way to an emergency, the situation would have been very different but the fact that he had a job to do which did not require him to arrive at his destination with any particular promptness put him in no different position to any other driver with a legitimate purpose to be using the highway. Once it was conceded that the time of arrival was not a relevant factor it was not for the court to start making value judgments as to the utility of the journey when deciding whether any given driver was going too fast. There was the danger of a spurious level of accuracy in cases such as this one from attempting a level of analysis on limited evidence.

However, it was held to be more likely that the officer was travelling at the lower end of the agreed narrow range of speeds at about 33mph. A reasonably prudent driver would have driven about 5mph slower, taking into account that he was driving at night in an area in which it was at least foreseeable that the occasional intoxicated pedestrian might still be at large.

The judge decided that the police car's position on the road was a reasonable one in all the circumstances and the issue was one of experience and common sense. He concluded that the circumstances prevailing in the vicinity of the accident did not require a reasonably prudent driver to adopt a different course to that chosen by the police driver.

The evidence was not strong enough to find that driver had failed to keep a proper look out. The judge said that it was a counsel of perfection[4] to require any motorist to treat pedestrians on the pavement in the

[1] Relying upon *Grealis v Opuni* [2003] EWCA Civ 177 Mantell L.J. held at [8]: "Although it does not necessarily follow that negligence is to be imputed to a driver who breaks the speed limit, there is no doubt that evidence the speed limit was being broken as with breaches of the Highway Code may provide evidence of negligence."

[2] *Boyle v Commissioner of Police of the Metropolis* [2013] EWHC 395 (QB).

[3] *Farrugia v Great Western Railway Co* [1947] 2 All E.R. 565 applied. Where a person has created on the highway a potential source of danger, he must be taken to owe a duty of care towards any person who might be on the highway in the near neighbourhood, whether he is there lawfully or whether he is there unlawfully. The test in such a case is: Was the plaintiff within the area of potential danger, and, if it is found as a fact that the plaintiff was so placed, might the plaintiff be reasonably expected to be injured by the omission to take care?

[4] *Ahanonu v South East London and Kent Bus Co Ltd* [2008] EWCA Civ 274 considered: see Laws L.J. at [10]: "There is sometimes a danger in cases of negligence that the court may evaluate the standard of care owed by the defendant by reference to fine considerations elicited in the leisure of the court room, perhaps with the liberal use of hindsight. The obligation thus constructed can look more like a guarantee of the claimant's safety than a duty to take reasonable care."

early hours of the morning as an actual as opposed to a potential hazard in the absence of particular features such as obvious drunkenness or horseplay. There was nothing about the police officer's presentation as a witness that suggested that he would have been complacent about the consequences of failing to react promptly to objectively hazardous behaviour on the part of pedestrians.

There was no evidence before the court to assist in determining what difference the lower speed would have had upon the injuries the claimant sustained. The expert evidence suggested that travelling 5mph slower would not have enabled the driver to move sufficiently far to the offside once he had reacted to the hazard so as to avoid the collision or to bring the car to a halt before the collision by applying emergency breaking.

The claimant had not provided expert medical evidence on liability despite having been ordered to do so. The judge refused to admit expert medical evidence produced the day before the trial was due to start on grounds that it was far too late and the evidence in any event was not useful.

The claimant then relied upon *Stanton v Collinson*.[5] In this case, in contrast to the position in *Stanton*, in which there was, at least, engineering evidence upon which to base an assessment of the level of exacerbation of injury, there was no material upon which to form a judgment on the matter.[6]

As the judge said, embarking on a process of pure speculation was impermissible. Accordingly, the claimant had failed to prove what, if any, loss had been occasioned as a result of Currey's breach of duty.

The case was dismissed. The claimant appealed.

The Court of Appeal held that the judge had not misunderstood the expert evidence when dismissing the claim arising and had been entitled to refuse to admit expert medical evidence produced the day before the trial was due to start on grounds that it was far too late and the evidence in any event was not useful.

Comment

This case serves as a useful reminder of some basic points. Perhaps first of all is that, in spite of everything, there are some cases defendants can win!

In both the first instance decision and on Appeal, there were several references made to *Stanton v Collinson*. Now, before I go any further it is time to get something off my chest and make a confession: one of my team ran *Stanton* and we got it wrong!

Before going on to discuss the issues that arise in *Stanton*, the second timely reminder is in respect of the importance to comply with Orders. As Longmore L.J. said in his judgement to the appeal: "There is prejudice to the system of justice as a whole and, in particular, to waiting litigants if their cases are to be deferred."

Let that be a warning to us all! We should also remember that we must behave "reasonably towards each other in the conduct of the litigation and that the old culture which used to drag personal injuries cases out should now be at an end". So we must play nicely and hooray to that.

So back to *Stanton*. At the risk of sounding bitter, *Stanton* involved injuries to a front seat passenger of a car. He was not wearing a seat belt and there was a suggestion that he was in actual fact sitting on the lap of a girl also seated in the front. There was an accident and Stanton sustained a severe head injury, we argued for a greater degree of contributory negligence than the usual 25 per cent and had engineering evidence in support. We thought that this expert evidence was sufficient to address the medical causation issue that the injuries would have been less severe had a seat belt been worn. At trial we lost. It was a question of degrees of brain injury sustained and the court held that it had insufficient evidence on that point—not that we are bitter or anything!

[5] *Stanton v Collinson* [2010] EWCA Civ 81 considered.
[6] *Stanton v Collinson* [2010] EWCA Civ 81 distinguished.

In *Stanton*, Hughes L.J. did say that whether evidence on causation was required or not was a matter of proportionality and that:

> "any doubt about the appropriateness of medical evidence ought to be capable of avoidance in the great majority of cases if the case management process is operated in such a way as to ensure that it is clear to the parties well in advance of trial whether the causation aspect of contributory negligence is, or is not, in issue."

The third timely reminder: Cards on table and make sure everyone understands whether causation is in issue. If it is, is it proportionate to obtain medical evidence to assist the court? Tricky one that, as in both *Stanton* and *Boyle* there is little help in that regard, save for it is clearly proportionate and appropriate in cases involving catastrophic injuries to obtain medical evidence on causation.

Fourth and final timely reminder: speed in itself is not evidence of negligence. In the first instance decision Turner L.J. held that 28mph would have an acceptable speed for a "reasonably prudent driver" to have been travelling at. It was agreed between the reconstruction experts that even if the police officer had been travelling at 27–28mph and applied an emergency stop the police car would not have come to a halt in time and the speed at impact would have been around 20–23mph. As with *Stanton* there was no evidence to assist the court in determining what, if any, difference the lower speed (or in the case of *Stanton*, the wearing of a seat belt) would have had on the injuries sustained.

Practice Points

- Defendants can and will take liability points when they can.
- Rightly so, the courts are far less tolerant of failures to comply with the terms of Orders. In this era of budgeting and new proportionality rules, it is something all practitioners should be mindful of.
- Cards on the table and play nicely so as to ensure that everyone is aware of what the issues are and the steps need to be taken to assist the court in addressing those issues if they have not been resolved before hand.
- When arguing causation, ensure you have both medical and engineering evidence in support that will assist the court in determining the "what if" questions.
- And finally … don't be bitter, no likes a poor loser.

David Fisher

Japp v Virgin Holidays Ltd

(CA (Civ), Richards L.J.; Tomlinson L.J.; Lewison L.J., November 7, 2013, [2013] EWCA Civ 1371)

Personal injury—liability—negligence—duty of care—hospitality and leisure—holiday accommodation—building regulations—common practice—construction industry—package holidays—British standards—local standards—Package Travel, Package Holidays And Package Tours Regulations 1992—standard of care

LT Building regulations; Common practice; Dangerous premises; Duty of care; Hotels; Package holidays; Personal injury

In September 2008, Mrs Moira Japp was on holiday at the Crystal Cove Hotel, Barbados. She had gone onto the balcony of her hotel room to read a book, closing behind her the sliding glass balcony doors. When the telephone in her room rang a short time later, she got up from her chair and made to go back to the room, but she walked into the closed doors. The glass shattered, causing lacerations to her body. She subsequently brought a claim for damages for personal injury against the tour operator, Virgin Holidays Ltd.

The hotel was constructed in 1994. It was described by the hotel manager as a four and a half star hotel with between 50 and 60 rooms. He was not aware of any similar accidents at the hotel. The focus of the case at trial was on whether the glass in the balcony doors complied with local safety standards. The glass actually used was ¼ inch annealed float glass. The claimant's case was that safety glass should have been used.

H.H. Judge Hayward found that the Barbados National Building Code 1993 was applicable. The code stated that safety glass should be used in doors. The judge concluded that the hotel had breached the code at the date of construction and at the date of the accident, as it had a continuing duty to have regard to safety issues and to update facilities. H.H. Judge Hayward gave judgment in her favour (subject to a 20 per cent deduction for contributory negligence) in the sum of £19,200. Virgin appealed against the judge's finding of liability.

It was common ground that Virgin owed Mrs Japp the same duty of care as the hotel, by reason of the Package Travel, Package Holidays and Package Tours Regulations 1992,[1] and that the relevant safety standards were those applicable locally rather than British standards. The Court of Appeal had to determine whether:

- the duty of care fell to be considered by reference to custom and practice at the date of the accident, rather than the date of construction of the hotel;
- the hotel owed a continuing duty to update the fabric of the premises as custom and practice developed; and
- the judge was wrong to find that it was custom and practice at the date of construction to comply with the code.

The Court of Appeal confirmed that where the question was whether a structural feature of a building complied with local standards, the starting point was the standards applicable at the date of design and construction. In this case that meant those applicable at the date when the balcony doors were installed. They accepted that there would be circumstances where changing standards made specific provision for further action to be taken in relation to a structural feature of an existing building. However, subject to that, there was no duty to engage in a constant process of updating existing buildings by rebuilding or refurbishment to reflect changes in standards.[2]

In this case, the code was directed at the standards to be observed at the time of design and construction. None of its material provisions required changes to be made to the structure of existing buildings. They held that the judge had been wrong to look at the matter in terms of compliance with local standards at the date of the accident in 2008, or in terms of a duty to update the hotel so as to comply with developing standards. Virgin therefore succeeded on the issues of principle raised by the first two questions.

That left the matter of custom and practice. The Court of Appeal held that it was plain that the experts at trial looked at the position from the date of construction of the hotel to the date of accident, including the relevance of the code throughout that period. The judge had preferred the views of the claimant's expert who had stated that in 1994 it was the custom and practice in the Barbados building industry to

[1] Package Travel, Package Holidays and Package Tours Regulations 1992 (SI 1992/3288).
[2] *McGivney v Golderslea Ltd* (2001) 17 Const. L.J. 454 considered.

follow the code. The judge's decision that the doors had not complied with local standards at the date of installation was therefore inevitable, and meant that Virgin's appeal was dismissed.

Comment

Since the introduction of the Package Travel, Package Holidays and Package Tours Regulations 1992 the tour operator is:

> "liable to the consumer for the proper performance of the obligations under the contract, irrespective of whether such obligations are to be performed by [the operator] or by other suppliers of services."[3]

This is more onerous on the operator than the pure contractual obligation under the Supply of Goods and Services Act 1982, which simply required the exercise of reasonable care to exclude from the accommodation offered any hotel whose characteristics were such that guests could not be accommodated in reasonable safety.[4]

With the tour operator being directly liable under the Regulations for improper performance of the contract by the hotel, the focus can be on the exercise of reasonable care in the operation of the hotel itself rather than the selection of the hotel.[5] This widening of the duty makes the standards applicable to the premises all the more important and gives tour operators every incentive to ensure that the standard of care is not further extended as contended for by the claimant in this case. Although ultimately dismissing the appeal by Virgin Holidays on a point of fact, the judgment will no doubt have come as a relief to the appellant as the points of principle upheld by the Court of Appeal curtailed any wider ramifications on the tourism industry and beyond.

The decision confirms that in accidents involving the safety standards of premises, the duty of care must be considered by reference to custom and practice at the date of construction, rather than the date of the accident, and that generally no continuing duty exists to update premises as custom and practice develops. This is essentially an important restatement of established principle, and is relevant to all claims regarding the standards of premises, including those under the Occupier's Liability Acts.

Relevant date of consideration/Continuing duty

It has long been held that in overseas holiday cases the relevant standards of accommodation are measured against local standards, not those applicable to buildings in the United Kingdom. This was common ground between the parties in the present case. The factual dispute in question surrounded the applicability of a non-legally binding Code of Practice. It was accepted that the premises in question did not comply with the Code, and the issue was whether, at the time of construction, it was local custom and practice to follow it.

The claimant's contention was that the standard of construction of the glass door was to be assessed by reference to local standards *as at the date of the accident* since the claim was in contract and the relevant date was that of the alleged breach. By way of response to the appeal she also alleged that even if the construction was in accordance with local standards, that would not be sufficient to fulfil the duty of care as the glass door did not comply with the relevant Barbados Building Code, and the danger created by plate glass doors ought to have been well known when it was installed.

The reasoning of the trial judge was quoted in the judgment of Richards L.J.:

> "Although there is no statutory requirement for hotels to carry out works to comply with the [Barbados Building Code] or update to comply with the Code, in my judgment if the hotel in question fails to

[3] Package Travel, Package Holidays and Package Tours Regulations 1992 (SI 1992/3288) reg.15.
[4] *Wilson v Best Travel Ltd* [1993] 1 All E.R. 353.
[5] *Evans v Kosmar Villa Holidays Ltd* [2008] 1 W.L.R. 297.

> do so then it runs the risk of being held liable in the event of an accident occurring because of a breach of that code and a failure to update to comply with it."

When pressed by counsel for Virgin to clarify whether he was referring to the date of construction of the building, or the date of the accident, the trial judge stated: "It seems to me that there is a continuing duty on a hotel to have regard to safety issues and if necessary update facilities."

The trial judge's approach was rejected by the Court of Appeal and their Lordships confirmed that the starting point must be the standards applicable at the date of construction.

The existence of a continuing duty to update premises was also rejected save for circumstances where "changing standards make specific provision for further action to be taken in relation to a structural feature". The exact wording of the judgment on this point leaves some uncertainty as to when such a duty might arise. For instance it is unclear whether "changing standards" refers exclusively to legally enforceable rules and regulations, or whether non-obligatory codes of practice could give rise to a duty of care in certain circumstances. Similarly it is unclear whether "specific provisions" would need to be phrased in mandatory terms to impose a duty. The example given in the judgment itself—regulations relating to removal of asbestos—is perhaps suggestive of a higher threshold.

As for the claimant's contention that there was a breach of duty even if the glass door complied with custom and practice at the time of manufacture the appellant claimed that such a conclusion would involve an impermissible undermining of the general rule laid down in *Wilson v Best Travel Ltd* that, at least in the case of structural features, it is necessary to prove non-compliance with local standards in order to establish a breach of duty. Given the finding of fact that the local standards were breached however, the Court of Appeal considered it unnecessary to consider this point further.

Expert evidence

At the appeal it was accepted by Virgin that their expert, a personal injury lawyer from Barbados, could not speak with the experience and expertise of the claimant's expert, an experienced surveyor. In relation to the former the judge at first instance stated:

> "She is a personal injury lawyer with some experience of accidents happening in hotels. She has no real experience of the building industry, she made very limited enquiries of those who are involved and such enquiries really only revealed what we already know, namely the Code is not mandatory."

Their Lordships accepted that it was open to the judge below to prefer the evidence of the claimant's expert, and the lesson here is that on issues of foreign architectural custom and practice the court will probably prefer evidence from a professional in the field rather than a lawyer.

Practice points

- Where there is an issue concerning the safety standards of premises, the duty of care must be considered by reference to custom and practice at the date of construction.
- Generally there is no continuing duty of care to update premises as custom and practice develops.
- A duty of care to update might arise where changing standards or regulations make specific provision.
- Where there is a question of custom or practice in a foreign jurisdiction, expert evidence of a professional in that field is likely to be preferable to that of a lawyer providing evidence on the application of Codes of Practice.

Nathan Tavares

Mclaughlin[1] V Morrison[2]

(OHCS, Lord Jones, October 16, 2013, [2013] CSOH 163)

Liability—personal injury—road traffic accidents—negligence—defences—ex turpi causa—European Communities (Rights Against Insurers) Regulations 2002 reg.3

LT Criminal conduct; Defences; Ex turpi causa; Insurers' liabilities; Motor insurance; Personal injury; Road traffic accident; Scotland

John Rennie was seriously injured on or about May 22, 2010, when he was standing in Royston Road, Glasgow. It was alleged that suddenly and without warning Pauline Morrison[3] drove a car at him at speed, hitting him and knocking him to the ground. On July 19, 2011, Pauline Morrison was convicted of assault to severe injury, permanent disfigurement, permanent impairment and to the danger of John Rennie's life.

Damages of £8 million were claimed on behalf of John Rennie on the basis that he sustained a serious brain injury and requires full-time care. Pauline Morrison's insurers, Esure Services Ltd were sued as the second defender, relying upon the terms of reg.3[4] of the European Communities (Rights against Insurers) Regulations 2002 on the basis that they were directly liable to compensate Rennie to the same extent as their insured driver. The insurer accepted that Pauline Morrison was convicted as alleged by the pursuer. Nevertheless they sought to defend the action on the merits.

This was their case. The accident occurred in the vicinity of premises known as the Ranza Bar. The licensee of the premises was Pauline Morrison's uncle. Shortly prior to the accident a group of individuals had been involved in an attack on the premises. Stones and other items were thrown at the premises. The group of individuals had arrived in two cars, a Volkswagen Golf and a Landrover Discovery.

After an initial attack on the premises by the occupants of the Volkswagen, one of the occupants was shot. Then the Landrover Discovery was brought to a halt in the offside lane of the eastbound carriageway of Royston Road, close to the Ranza Bar. Mr Rennie was a known associate of the occupants of the vehicle. He alighted from the vehicle and the Volkswagen pulled up in the offside lane of the eastbound carriageway. At the time of the accident, he was standing at the nearside front window of the Volkswagen. He was engaged in conversation with the occupants of the vehicle.

Their defence stated that:

> "Mr Rennie was at the locus of the accident to engage in criminal conduct. In particular, he was at the locus in order to involve himself in the attack on the premises."

The insurer avered, among other things the defence of "*ex turpi causa non oritur actio*". The pursuer applied for summary judgment against the insurer[5] and an interim payment of damages.

Lord Jones held that the insurer's ex turpi causa defence was bound to fail. The attack on the licensed premises involved no attack on any person. Pauline Morrison had not been in the premises at the time of

[1] Frances McLaughlin as guardian of John Rennie.
[2] Esure Services Ltd.
[3] The first defender.
[4] Right of action—(1) Paragraph (2) of this regulation applies where an entitled party has a cause of action against an insured person in tort or (as the case may be) delict, and that cause of action arises out of an accident.—(2) Where this paragraph applies, the entitled party may, without prejudice to his right to issue proceedings against the insured person, issue proceedings against the insurer which issued the policy of insurance relating to the insured vehicle, and that insurer shall be directly liable to the entitled party to the extent that he is liable to the insured person.
[5] The first defender did not enter an appearance. The pursuer applied for a summary decree against the second defender, under the provisions of Rule of Court 21.2.

the attack but had been nearby, she had not been assaulted by Rennie. It was not alleged that she had been or even felt under threat.

The judge held that against that background she had taken it upon herself to assault Rennie with a vehicle, with severe consequences, and in the circumstances as averred by the insurers, the cause of Rennie's injuries had been the assault upon him, not any criminal activity on his part. Lord Jones concluded that it could not be said that, although the damage would not have occurred but for Pauline Morrison's illegal conduct, it had been caused by Rennie's criminal act. Rather, although the damage would not have happened without his alleged criminal act, it had been caused by her illegal act.[6]

It was held that on the available material, the insurer was bound to fail in its defence, and a summary decree was granted against Esure.

Comment

Whenever *ex turpi causa non oratur actio* is recited more as an incantation than as a carefully considered defence, this is a sure and certain sign of the opponent's desperation. No matter how able and heroic the advocacy, the defence is likely to flounder unless the claimant's criminality was directly causative of the loss.

On the facts, Mr Rennie was grievously injured when Ms Morrison attempted to kill him, or at the very least to inflict serious injury. Unhappily for the second defendant, Esure, her weapon of choice was a car; one that they had unwittingly insured.

It is well settled law that the compulsory third party insurance provisions of ss.143 and 145 of the Road Traffic Act 1988 impose a duty to insure against any use of the vehicle: lawful or criminal.[7] Accordingly, where an insurer is "on risk" for a vehicle that has been used as an offensive weapon, the insurer has a statutorily imposed duty imposed by s.151 of the 1988 Act to satisfy the victim's claim. This leaves Esure in the invidious position of facing a whopping £8 million personal injury claim from the fall-out of a Glaswegian mob squabble. Mr Rennie and Ms Morrison came from the dark side of Glasgow's dystopian criminal underworld: picture Rab C. Nesbitt but one portrayed with the vicious energy of *Trainspotting*.[8]

These statutory provisions are set out within Pt VI of the 1988 Act. Part VI is supposed to implement the Sixth Motor Insurance Directive[9] whose primary objective is to ensure a consistent approach across the European Community to guaranteeing the compensatory entitlement of third party victims of motor vehicle use, by means of civil liability insurance.

Part VI can also be viewed as an instrument of social policy whereby law abiding insured drivers are required not only to mutualise the risk arising from their own legitimate use of a vehicle but they must also effectively underwrite, the illegitimate use of motor vehicles by those who are less law abiding. This is normally achieved through the statutorily imposed third party indemnity, which applies where some insurance is in place but it is either insufficient or where the contractual obligation to indemnify has been vitiated by a breach of policy term. Where no insurance is in place at all or where the driver responsible cannot be identified then the Motor Insurers Bureau ("MIB") becomes the compensating agency. The MIB's outlay is recouped from all motor insurers by means of a levy and that outlay is ultimate passed onto the law abiding motorists through their motor insurance premiums. So one way or another, it is always the law abiding premium paying road user that foots the bill at the end of the day. Victims don't have to be nice people to benefit from these provisions; indeed they can be downright nasty!

[6] *Gray v Thames Trains Ltd* [2009] UKHL 33 considered.

[7] See *Hardy v Motor Insurers Bureau* [1964] 2 Q.B. 745; *Gardner v Moore* [1984] A.C. 548; *Charlton v Fisher* [2001] EWCA Civ 112 and *Keeley v Pashen* [2004] EWCA Civ 1491.

[8] The 1996 Scottish film *Trainspotting* is a hard-hitting black comedy set in Edinburgh. It was directed by Danny Boyle.

[9] EU Sixth Motor Insurance Directive (Directive 2009/103 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability [2009] OJ L263/11).

Small wonder that Esure should strive to avoid its statutory liability in any way possible. Unfortunately what it did was to resort to a rather Potteresque use of the ex turpi causa maxim, as though it were one of Harry's "stupify" spells capable of discombobulating its opponent. Unfortunately for Esure, it was not operating in a cosy Hogwartsian fantasy world where efficacious utterances produce miraculous outcomes. In any event, Esure's ex turpi causa "spell" backfired: for all it achieved was to increase the cost of the claim.

It was said that Mr Rennie was "well known to the police" and that he was closely associated with a violent gangland turf war that led up to the attack on the bar and that Ms Morrision was a member of the rival gang. However, Rennie was not directly involved in the attack on the besieged members of the rival gang. Furthermore, by the time he was attacked, those hostilities had in any event stopped, because one of the assailants had been shot in the leg.

Ms Morrison's assault came as Mr Rennie was standing in the road speaking to the injured man and the other assailants. It appears that Ms Morrision simply took it into her head to take him out Grand Theft Auto-style, presumably in retaliation for the recent attack. She is currently serving a nine-year prison sentence.

Rennie's solicitors applied to strike out Esure's ex turpi causa defence at a summary hearing. Their brief, Maria Maguire QC, argued succinctly and with devastating effect that the ex turpi causa defence was bound to fail. Her case was simply that Esure could not establish criminality that was *causative* of the injury because the attack on the pub has ceased.[10] This QC had no need for the *Petrificus Totalus*[11] curse; her judicious application of good old fashioned common law magic sufficed. The logic of the causation argument proved to be unassailable.

This case is only one of a series of failed attempts by motor insurers to avoid liability under what has become known as the *ex turpi causa non oratur actio* rule. It seems to be routinely raised whenever a claimant's activities are tainted with criminality.[12] However, the maxim properly applied should be viewed as a facet of public policy whose object is to avoid absurd outcomes; as distinct from punishing criminality. This was well illustrated in *Vellino v Chief Constable of Greater Manchester Police*[13] where the claimant injured himself whilst jumping from a window when attempting to flee from Police custody. His claim against the Police was dismissed; surprise, surprise! In the judgment, Sir Murray Stuart-Smith explained the type of illegality required to establish an ex turpi causa defence:

> "The operation of the principle arises where the claimant's claim is founded upon his own criminal or immoral act. The facts which give rise to the claim must be inextricably linked with the criminal activity. It is not sufficient if the criminal activity merely gives occasion for tortious conduct of the Defendant."

The key to understanding the correct use of this public policy defence lies in the word "causa" and in the application of a little common sense.

In *McLaughlin*, Mr Rennie's actions did not *cause* his injury. Whilst it is true that had Mr Rennie not been in the area and associated with a criminal attack on the pub he would not have been assaulted, it was not the attack on the pub that caused his injuries but Ms Morrison's assault. It *really is* as simple as that.

So motor insurers kindly take note that however wicked the dastardly Malfoys of this world might be, their criminality is no defence or justification for an unprovoked assault. The author cannot vouch for Potterland but in this jurisdiction outlawry holds no sway.[14] For those interested in a more detailed

[10] Ms Morrision had not been in the pub when it was attacked and so had not been threatened by the attack.

[11] The full body-bind curse.

[12] See *Delaney v Pickett* [2011] EWCA Civ 1532; *Clarke v Clarke* [2012] All E.R. (D.) 06 (Apr) where the *ex turpi causa* defence failed; to be contrasted with *Pitts v Hunt* [1991] 1 Q.B. 24 and *Joyce v O'Brien* [2013] EWCA Civ 546 where it succeed.

[13] *Vellino v Chief Constable of Greater Manchester Police* [2001] EWCA Civ 1249; [2002] 1 W.L.R. 218.

[14] The writer wishes to acknowledge Miss Elizabeth Hebe Bevan, his technical advisor on *Potteresque* issues.

explication of the ex turpi causa defence, they are referred to the writer's analysis in J.P.I.L.'s case comment on *Joyce v O'Brien*.[15]

Practice points

- The common law is a spell-free zone!
- Many motor policies expressly exclude liability for road rage or deliberate acts. Whilst there is a strong case to argue that this constitutes a breach of the EU Motor Insurance Directives[16] the recent Court of Appeal ruling in *EUI v Bristol Alliance Partnership*[17] seems to endorse any contractual limitation that is not specifically nullified or prevented by Pt VI of the 1988 Act.[18] The same court ruled that where such a restriction has been breached the driver is to be treated as an uninsured driver. The corollary of this, probably erroneous ratio, is that the claim then falls under the Uninsured Drivers Agreement 1999. That scheme offers significant tactical advantages to the insurer and it excludes certain heads of claim under cl.6.[19] It also maintains a right to offset other sums received as a result of the accident from the compensation awarded under cl.17.[20] The United Kingdom's transposition of the Motor Insurance Directives is the subject of a formal infringement complaint and is being investigated by the European Commission under the EU Pilot scheme.[21]
- It is interesting that the second defendant did not defend the claimant's entitlement to bring a direct action against them under the European Communities (Rights against Insurers) Regulations 2002 as this right is restricted to "accidents"[22] and the insurers liability is restricted to its contractual liability to its policyholder.[23]
- It is conceivable that the application of *ex turpi causa non oratur actio* may also be intrinsically unlawful in a motor claim scenario due to the application of European Community law. The Court of Justice has ruled that national rules whose effect is to omit automatically the requirement that an insurer compensate a passenger who is a victim of a road traffic accident are unlawful.[24] Although Mr Rennie was not a passenger it seems plausible to extend the rule to these circumstances as surely a general rule that applies to protect passenger rights should also apply by analogy to other third party victims. This is because the underlying Community law policy, of ensuring a consistent approach to civil liability third party insurance cover between member states, is equally applicable to pedestrians as to passengers.
- Contributory negligence is likely to feature as a significant factor in this kind of claim.

[15] *Joyce v O'Brien* [2013] EWCA Civ 546.

[16] Article 13 of the Sixth Motor Insurance Directive (Directive 2009/103 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability [2009] OJ L263/11) permits only one exclusion of third party insurance cover imposed under art.3: this applies to/against the voluntary passenger with actual knowledge that the vehicle responsible for the loss or injury has been stolen.

[17] *Williams v Bristol Alliance Partnership* [2012] EWCA Civ 1267.

[18] See the nullifying provisions within s.148 of the 1988 Act and s.151(2) and (3).

[19] Such as subrogated claims.

[20] Such as an award made under the Criminal Injuries Compensation Scheme.

[21] *Bevan v United Kingdom* CHAP(2013) 02537.

[22] European Communities (Rights against Insurers) Regulations 2002 reg.3 provides. "(1) Paragraph (2) of this regulation applies where an entitled party has a cause of action against an insured person in tort or (as the case may be) delict, *and* that cause of action arises out of an *accident*." (emphasis added).

[23] These restrictions may also constitute an infringement of art.18 of the Sixth Motor Insurance Directive (Directive 2009/103 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability [2009] OJ L263/11). See the writer's detailed critique of the Court of Appeal's decision in *Williams v Bristol Alliance* in *Marking The Boundary* in J.P.I.L. issue 3 of 2013.

[24] See the judgment of the Court of Justice of the European Union in *Churchill Insurance Co Ltd v Wilkinson* (C-442/10) [2011] [2013] 1 W.L.R. 1776.

- For further practice points dealing specifically with *ex turpi causa* defences, see the authors detailed commentary in JPIL under the *Joyce v O'Brien* case.

Nick Bevan

Case and Comment: Quantum Damages

Bloy v Motor Insurers' Bureau

CA (Civ) (Sir Terence Etherton (Chancellor); Hallett L.J.; Sharp L.J., November 29, 2013, [2013] EWCA Civ 1543)

Personal injury—road traffic accidents—insurance—uninsured drivers—compensation—applicable law—conflict of laws—European Union—Directive 2009/103 art.10(1)—Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003 reg.13

LT Applicable law; Compensation; Lithuania; Motor Insurers' Bureau; Personal injury; Road traffic accidents; Uninsured drivers

The claimants[1] in this case are British citizens domiciled and resident in England. On September 7, 2007, they suffered serious injuries in a road traffic accident in Lithuania. The second claimant was just under four months old at the time of the accident. He suffered catastrophic injuries, including severe brain damage, resulting in permanent symptoms and the need for life-long care.

The accident was the fault of a Lithuanian national who was domiciled in Lithuania, Daviva Ramanciuckiene. She was subsequently convicted by a Lithuanian court of driving while under the influence of alcohol, careless driving and driving a motor vehicle without insurance. At the date of the accident her insurance had lapsed.

On January 11, 2013, applying *Jacobs v Motor Insurers Bureau*[2] the High Court H.H. Judge Platts ruled as a preliminary issue that the compensation payable to the claimants was to be assessed in accordance with English, rather than Lithuanian, law. Since Ramanciuckiene was uninsured as the UK compensation body for the purposes of the Sixth Motor Insurance Directive 2009/103[3] ("the 2009 Directive") art.10(1), the Motor Insurers Bureau ("MIB") was obliged by the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003[4] ("the 2003 Regulations") reg.13 to pay compensation. This situation arises where a UK resident has been injured in a car accident in another EU Member State caused by an uninsured driver.

Pursuant to art.24 of the Directive, the MIB can then claim reimbursement from the compensation body in the other Member State in accordance with an agreement made in 2002 between the various compensation bodies. However, under Lithuanian law, the liability of the MIB's Lithuanian counterpart was capped at €500,000. The MIB argued that it was liable to pay the claimants compensation assessed in accordance with Lithuanian, rather than English, law and so its liability was likewise capped. They also argued that even if English law applied, the Regulations, on their proper interpretation, limited its liability to the maximum recoverable under Lithuanian law.

On appeal the MIB submitted *Jacobs* was not applicable. They contended that under English private international law, the cap on its liability was a matter of substantive law and thus governed by Lithuanian law as the lex causae, rather than a matter of procedure and thus governed by English law as the lex fori.

[1] The 1st claimant is the mother of the 2nd claimant and sues as the 2nd claimant's litigation friend.
[2] *Jacobs v Motor Insurers Bureau* [2010] EWHC 231.
[3] Directive 2009/103 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability [2009] OJ L263/11.
[4] Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003 (SI 2003/37).

They also said that the imposition of the cap on the liability of the Lithuanian compensation body derived from European Union law as the Directive and its predecessor motor insurance directives, the 2002 MIB agreement and the Regulations had to be read together so as to produce a coherent scheme. They also argued that the High Court should have made a preliminary reference to the European Court of Justice.

The Court of Appeal held that whilst the arguments in *Jacobs*[5] and this case were different, they had all been deployed in respect of the same critical question: whether the law applicable to the assessment of compensation under reg.13(2)(b) was to be assessed by reference to the law of the part of Great Britain where the injured party resided or the law of the place where the accident took place. The decision in *Jacobs* was that, subject to establishing the tortious liability of the culpable driver under the applicable law for the tort, reg.13(2)(b) was a deeming provision with all the consequences that followed, including that the assessment of compensation was governed entirely by the law of the relevant part of Great Britain. That precisely answered the preliminary issue in the instant case.[6]

They confirmed that reg.13(2)(b) deemed the accident to have occurred in England and that left no room for Lithuanian law at all in the assessment of compensation. In any event, the cap was properly classified as procedural and therefore governed by the law of England and Wales. They described it as a simple monetary limit on recoverable compensation and held that it was to be distinguished from rules of substantive law which, for example, excluded certain kinds of damage or required a certain causal connection or related to remoteness.[7]

They noted that although the 2002 MIB agreement was entered into pursuant to Directive 2000/26[8] art.6(3), the parties to it were purely private bodies. The agreement was, therefore, neither legislation nor an agreement between Member States. It was a purely private agreement between insurance industry bodies. The motor insurance directives had not empowered such bodies or such an agreement to impose on the governments of Member States limitations on the liability of insurers and, hence, Member States where such governments wished to provide for greater compensation for victims of traffic accidents than the minimum amounts specified in the directives.

Finally they held that there was no advantage to be obtained from an ECJ reference because the critical question in this case was the meaning of reg.13(2)(b) of the Regulations, rather than art.24 and art.25 of the 2009 Directive. The appeal was dismissed.

Comment

It is easy to empathise with the tragic plight of a mother and her infant child gravely stricken in a road accident for which they were not responsible. Both were badly hurt but the child, now six, sustained catastrophic brain injuries that has left him with extensive lifelong care needs. That the accident happened in Lithuania and was caused by a drunk driver who had allowed her insurance to lapse only served to compound this family's misery.

One might think then that claimant could hope to look to the Motor Insurer's Bureau for support. It is the United Kingdom Government's official compensating body for dealing with such claims and which all insured road users fund through their insurance premiums. The opening lines of the MIB's constitution states that its object is to provide a safety net for innocent victims of uninsured and untraced drivers and to settle claims for any liability for which insurance is required by law, whether by statute, common law; whether imposed under a EU Regulation or Directive.[9] Its own website proclaims a mission to compensate victims of uninsured and untraced drivers fairly and promptly.

[5] *Jacobs v Motor Insurers Bureau* [2010] EWHC 231.
[6] *Jacobs v Motor Insurers Bureau* [2010] EWHC 231 applied.
[7] *Harding v Wealands* [2006] UKHL 32, applied.
[8] Directive 2000/26 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles and amending Council Directives 73/239 and 88/357 [2000] OJ L181/65
[9] The MIB's Memorandum and Articles of Association cl.3(A)(1).

Unfortunately, this is one of those instances where the MIB not only lost its legal bearings but also seems to have lost its moral compass too. It sought to avoid its legal duty to compensate fully and fairly two particularly vulnerable individuals by advancing a tenuous line of argument that was almost predestined to fail; why?

The answer lies in the MIB's disinclination to incur an irrecoverable outlay. The MIB did not dispute its legal responsibility to compensate victims injured in a foreign European Economic Area ("EEA") state by an uninsured driver under art.25 of the 2009 Directive.[10] It knew that art.24 entitles it to recoup its outlay from settling a claim arising from an accident in a different EEA state from that state's compensating body and the driver responsible. However, the MIB was also aware of the implications of an agreement it signed in 2002:[11] one that is binding on all EEA compensating bodies and which limits the amount of the art.24 reimbursement to whatever sum is allowable under the national law of for the accident location.[12] It should be noted that this is only a private law administrative arrangement binding on the EEA bureaux who signed it; it has no bearing on an injured claimant's legal entitlement.

The primary source of law governing an injured victim's entitlement to a compensatory indemnity where the driver responsible is uninsured is to be found in art.10 of the 2009 Directive. This confers on the MIB:

> "the task of providing compensation, at least up to the limits of the insurance obligation for damage to property or personal injuries caused by an unidentified vehicle or a vehicle for which the insurance obligation provided for in Article 3 has not been satisfied."

This right is extended to victims of accidents in foreign EEA states by arts 20–26 of the 2009 Directive.

Our national law implementation of this is to be found in reg.13 of the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003, referred to above. This UK provision expressly provides that the MIB:

> "shall compensate the injured party in accordance with the provisions of Article 1 of the second motor insurance directive[13] as if it were the body authorised under paragraph 4 of that Article and the accident had occurred in Great Britain."[14]

The plain and ordinary meaning is crystal clear: the Bloy family are entitled to an equivalent level of compensation to that they would expect to receive from an insured driver in the United Kingdom.

The MIB, no doubt mindful of the *Jacobs v MIB* ruling,[15] did not seek a reprisal of its earlier failed challenge based on the erroneous contention that Rome II choice of law considerations applied to the 2003 Regulations; they don't. They are part of our national legislation and as such they are to be interpreted using our national law. Notwithstanding this, the MIB recast its former arguments, hoping to recover from its earlier reversal by a different route. In doing so it sought to reduce its own exposure at the expense of the innocent victims whose interests it professes to serve.

What motivated the MIB was its belief that under Lithuanian national law[16] it appeared to stand to recover only a small proportion of its potential liability to the Bloy family, if those damages were quantified

[10] The Sixth Motor Insurance Directive 2009/103 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability [2009] OJ L263/11.

[11] The Agreement is headed "*Comité Européen Des Assurances*" and, underneath that, "*Agreement Between Compensation Bodies and Guarantee Bodies*", it is dated April 29, 2002.

[12] See cl.7.2 of the 2002 Agreement.

[13] Now Directive 2009/103 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability [2009] OJ L263/11 art.10.

[14] See Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003 (SI 2003/37) reg.13(2)(b).

[15] See above.

[16] The judgment is ambiguous on this point. However, the author's own research indicates that the Lithuanian civil law, Civil Code of the Republic of Lithuania, of July 18, 2000, Law No.VIII-186 (as amended) does not impose an arbitrary cap on recoverable damages. The disparity lies not so much in the quantification of the Bloys' damages but in the transposition of the Fifth Motor Insurance Directive (Directive 2005/14 amending Council Directives 72/166, 84/5, 88/357 and 90/232 and Directive 2000/26 of the European Parliament and of the Council relating to insurance against civil

under UK civil law principles.[17] It should be recalled that the 2009 Directive does not attempt to harmonise the civil or criminal law of Member States. One of its key objectives is to introduce consistent standards of civil liability third party motor indemnity cover throughout the Member States.[18]

Liability was conceded. The MIB had already advanced interim payments of £600,000. It was concerned to avoid paying out any more unless it could recoup this from its Lithuanian counterpart under art.24, as modified by the terms of the intra-bureaux agreement of 2002. It is evident that the Bloy child's needs alone far outreached this.

The MIB sought to deflect the constraints of imposed by the 2002 Agreement by arguing once again that the quantification of its liability under the 2003 Regulations should be based on Lithuanian law, hoping thereby to restrict its outlay to those paltry limits. This was in effect round two of the fight it had lost three years previously in *Jacobs v MIB* and it failed once more.

Sir Terence Etherington,[19] also noted that there was a strong case for holding that art.25 of the 2009 Directive (which provides for compensation to be provided in these circumstances in accordance with the provisions of arts 9 and 10) produces exactly the same outcome as under the 2003 Regulations, anyway: namely, full compensation at UK national law levels. It is also independent of Rome II choice of law considerations.

The MIB's challenge was at best a speculative one. It is inconceivable that the MIB, with all its resources and its extensive international role, was not properly advised. It also possess over 60 years experience in cross border issues under the Green Card Scheme,[20] it has been a member of the Conseil Des Bureau for even longer, and latterly it is the appointed compensation body designated to handle cross border claims. Its ample resources afford it the best legal advice and it has preferential access to Whitehall. It is unfortunate that it is not the MIB that will pay for this folly but the premium paying public who ultimately foot the bill for every ill considered insurer instigated legal challenge.

The MIB should have spared the mother of this grievously injured child the stress of this misconceived attempt to evade its legal obligation to fully compensate him. It is worth noting that the MIB is also directly responsible for the numerous longstanding breaches of Community law that pepper the Uninsured and Untraced Drivers Agreements, which a previous government credulously rubber stamped, whose effect is to short-change victims from their full compensatory entitlement and in some instances even to disentitle them completely, often for trivial infractions of procedural conditions precedent unknown elsewhere in

liability in respect of the use of motor vehicles [2005] OJ L149/14) (now to be found in art.9 of the 2009 Directive, see below) under art.11 of the Lithuanian Law on Compulsory Insurance Against Civil Liability In Respect of The Use of Motor Vehicles June 14, 2001 No.IX-378 (as amended). This Lithuanian provision restricts the minimum levels of civil liability insurance cover for accidents in Lithuania that predate December 10, 2009 to €500,000 in total for personal injury (regardless of the number of claimants) and €100,000 for damage to property—roughly equivalent in total, at the current exchange rate, to £495.276.60. It will be readily appreciated that these are significantly less than the minimum sums prescribed under Community law, see below. However, Lithuania was authorised to defer its implementation of this provision. The Lithuanian minimum levels of cover were brought into line with the Fifth Directive for accidents occurring on or after 11 June 2012.

[17] Directive 2009/103 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability [2009] OJ L263/11 art.9 prescribes the minimum amounts of indemnity cover: (a) in the case of personal injury, a minimum amount of cover of €1,000,000 per victim or €5,000,000 per claim, whatever the number of victims; (b) in the case of damage to property, €1,000,000 per claim, whatever the number of victims. The Directive does not seek to regulate issues such as civil liability or the quantification of the awards, which in many European countries are significantly lower than in the UK. Most, if not all, UK motor insurance policies have no financial limit on the indemnity they offer in respect of a personal injury claim. Similarly, the MIB's obligation under reg. 13 is to compensate applicants in full, based on a conventional civil law assessment of damages. Accordingly, in serious and catastrophic injury claims, either the indemnifying insurer (or the MIB) face a liability that often exceeds the art.9 minima by a very considerable margin.

[18] As the court held in *Criminal Proceedings against Bernaldez* (C-129/94) [1996] All E.R. (EC) 741; [1996] E.C.R. I-1829 at [13]–[16], the preambles to the directives in question show that their aim is, first, to ensure the free movement of vehicles normally based on Community territory and of persons travelling in those vehicles and, second, to guarantee that the victims of accidents caused by those vehicles receive comparable treatment irrespective of where in the Community the accident occurred.

[19] Sir Terrence delivered the only reasoned, unanimous, judgment of the court.

[20] The Green Card Scheme was incepted in 1952 and designed to encourage cross border travel by ensuring that victims of foreign registered vehicles are not disadvantaged in their claims for compensation.

our civil justice system.[21] The European Commission is currently investigating the United Kingdom's failure to fully implement the 2009 Directive.[22]

Perhaps the MIB's time would be better deployed reviewing its priorities. Where a UK citizen is injured abroad in an EEA state, is it really such a bad thing to expect the premium paying public to effectively underwrite the difference between that state's lower award and their actual compensatory need assessed at UK standards?[23] Perhaps that question can only be answered once we know the full cost implications of the inter-bureaux agreement that the MIB signed back in 2002. Maybe the MIB's time would be better applied in establishing the scale of the problem[24] and in opening a dialogue with the Secretary of State for Transport and the European Commission to address this issue.

So perhaps instead of picking on the hapless victims it is supposed to protect, the MIB might have done better by us all by reviewing whether the 2002 Agreement represents good value for the long suffering premium paying public.

This case serves as a further illustration of how vital it is for all road traffic accident injury practitioners to have a sound working knowledge and understanding of the relevant European Community law. Our national law provision cannot be properly interpreted in isolation. The Court of Appeal decision is correct in this instance. However, it is a deplorable fact that our national law is badly out of keeping with the minimum standards imposed by the 2009 Directive, as interpreted by our national courts as by the Court of Justice for the European Union which has precedence in these matters. Sadly not every recent Court of Appeal ruling has applied the correct purposive construction of our law to give proper effect to the superior Community law requirement.[25]

Practice points

- Just because a road traffic accident takes place abroad in another EEA state does not necessarily involve the victim in a cross border claim. Where the defendant is uninsured or untraced, the foreign EEA location merely provides the occasion for triggering the victims UK national law right to compensation from the MIB under the 2003 Regulations.
- In most cases, where liability is not at issue, there will be no need to consider local safety codes and standards.
- It is a different matter where the defendant is identified and insured, art.18 of the 2009 Directive confers on the victim a right to sue the foreign insurer direct from this jurisdiction, if a negotiated settlement with the insurers local representative is not possible.
- If liability is admitted, whilst leave to serve the claim out of the jurisdiction may be necessary, the claim will be quantified in this country but according to the national law of the accident location. The local national law will affect what heads of claim are recoverable, any caps on quantum and it will also govern issues such as remoteness and the availability of periodical payments.
- If liability is denied then this will be determined by applying the national law of the accident location. This will involve considerable expenditure on foreign legal and expert evidence.

[21] See Nicholas Bevan, "Why the Uninsured Drivers Agreement 1999 needs to be scrapped" [2011] J.P.I.L. 123.

[22] *Bevan v United Kingdom* , CHAP(2013)02537.

[23] At present it is the premium paying public that underwrite the difference between the lower levels of compensation to be found in many EEA countries every time at UK citizen is seriously injured in another EEA Member State by an uninsured or unidentified driver. Although the MIB make the initial payment from its Guarantee Fund, that outlay is of course recouped from the premium paying public in the form of costly motor insurance premiums.

[24] By undertaking: (i) a comparative law analysis to identify the disparity between the UK levels of compensation and civil liability cover and those of other EEA Member States, especially the new entrants and those in Southern Europe; and (ii) to appraise the scale of the potential hazard posed by EEA migrants resident in the UK but suffering injury in the EEA.

[25] See Nicholas Bevan, "Marking the Boundary", [2013] J.P.I.L. 151.

- Given that many, if not most, EEA states offer a lower level of compensatory award than can be attained in the United Kingdom and that where liability is disputed the claim is complicated and delayed by the need for foreign expertise, where a victim is injured abroad in another EEA country, he is often better off, both financially and procedurally, if the other driver is either uninsured or untraced.[26]

Nicholas Bevan

Davison v Leitch

(QBD, Andrews J., October 18, 2013, [2013] EWHC 3092 (QB))

Clinical negligence—damages—financial traders—loss of congenial employment—loss of earnings—measure of damages—perineum

Birth; Clinical negligence; Costs; Interest; Loss of earnings; Measure of damages; Part 36 offers

On December 7, 2008 Mrs Sarah Davison was under the care of the defendant Consultant Obstetrician Craig Leitch. During the delivery of her first child, Freddie, in the course of her labour, the defendant performed a mid-line episiotomy which caused a third degree tear affecting both her internal and external anal sphincters. In the United Kingdom the more conventional form of episiotomy is a medio-lateral one, so as to avoid the risk of such injuries.

The defendant carried out some form of repair at the time, but failed to keep a clear record of what he did. It appears that there was no proper examination carried out post-delivery, so that the severity of the tear remained undetected meaning that it was not made the subject of immediate surgical repair and treatment with antibiotics. Unfortunately, the defendant failed to tell Mrs Davison about either the injury or the repair that he had undertaken, save that her discharge letter stated that "a small mid-line episiotomy extended slightly and I repaired this with vicryl".

Whatever the nature of the repair, it was plainly insufficient. Some two weeks after Freddie's birth, Mrs Davison had a very painful experience whilst straining to empty her bowels, when she felt a sensation as if her stitches had given way, and she passed a lot of blood. It took most of the evening for the pain and the bleeding to subside. Although the midwife who examined her the next morning said that everything looked as it should, Mrs Davison remained in constant pain in the region of her coccyx, and began to experience severe difficulty in controlling her bowels, and incontinence of flatus.

The claimant only became aware that she had suffered a serious obstetric injury after a review by a colo-rectal surgeon, Mr Richard Cohen, to whom the defendant referred her following her six-week check up on January 21, 2009, and consequential investigation by endo-anal ultrasound on February 24. That revealed "unequivocal evidence of a structural internal and external sphincter defect and an associated functional deficit". Mrs Davison had suffered significant obstetric trauma and a total loss of her perineum. On examination it was found that there was virtually no sphincter between the anal canal and the vagina.

On March 20, 2009, Mr Cohen undertook a sphincter overlap repair and reconstruction of her perineum. The operation was successful in separating the vagina and anal canal. In the immediate aftermath of the

[26] This is because, as we have seen, the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003 (SI 2003/37) reg.13 requires the MIB to compensate victims to UK standards.

surgery she suffered excruciating pain for two to three weeks and was bedridden for around five weeks. She was then referred for biofeedback treatment commencing in June 2009.

The biofeedback treatment did bring about some improvement but, despite this, the claimant was left with significant ongoing symptoms, which caused her embarrassment, inconvenience and distress, and which had a significant impact upon her life and career trajectory. In addition, the experience took a toll on Mrs Davison's mental health and in particular, on her ability to cope with stressful events. Prior to her injury, she had no history of depressive illness or anxiety, even though she had suffered an earlier miscarriage.

Mrs Davison had been working as an equity sales trader in the City of London when she began maternity leave, and had earned a total salary of £206,828 gross. She had intended to return to work in June 2009. In October 2009, her husband obtained a good banking job in Hong Kong and the family moved there. Subsequently, her husband was made redundant but obtained employment in London, and the family returned there in April 2011. The family moved back to Hong Kong in March 2012. Mrs Davison had a second child in November 2010 and a third in May 2013.

The defendant admitted liability on July 25, 2013, some three years after the original letter of claim was sent. The court had to determine the sums due for loss of past and future earnings and loss of congenial employment.

In relation to past losses, following the family's initial move to Hong Kong in October 2009, Andrews J. held that it was likely that Mrs Davison would have obtained employment as an equity sales trader there by January 2010. It was likely that her gross salary in 2010 would have been £185,000, including a bonus for her performance that year. That was even taking into account a re-establishment period where she would have needed to familiarise herself with new products, to have taken examinations and to have built up new client relationships. She had the necessary drive and interpersonal skills to re-establish herself within six months and to qualify for the year's bonus.

On the family's return to London in 2011, the judge held that it was likely that Mrs Davison would have approached her previous employer and would have been offered her old job back, and that she would have recommenced work around July 2011. There would have been a period that year when she was neither working nor on paid maternity leave, from April to June. She would have earned £50,000 for six months and a bonus of £75,000 relating to that period. Her maternity pay would have been £26,667 gross for January to April 2011.

In 2012, her baseline salary would have continued at the rate of £100,000 per annum, and an equivalent baseline salary would have been maintained when the family moved back to Hong Kong in March. The move would not have disrupted her career: it was foreseen and planned, and her career prospects would have been specifically discussed and included in the plans. Mrs Davison was likely to have continued working during her pregnancy and to have achieved her target of becoming a director in January 2013. Her bonus would have been around £200,000, but her total claim for that period was £251,828 meaning that the court could not award more than that.

In 2013, her base salary would have been the equivalent of £130,000, on the understanding that she would have achieved a directorship, with a bonus for the year of £100,000, making a total of £208,000 gross for the five months to her son's birth in May. A sum of £650 per month was allowed for the costs of childcare.

In relation to future earnings, following the birth of her third child in May 2013 Andrews J. concluded that it was far more likely that Mrs Davison would have moved to a less stressful role within the bank, involving shorter hours, than that she would have returned to the stresses of the trading floor with the prospect of not seeing her three small children during the week, even if she was fully fit. If it was assumed that such a role would have brought in approximately half what a director of her calibre could have earned as an equity trader, £138,505 per annum was held to be a realistic figure.

Turning to residual earning capacity, the judge decided that it was out of the question for Mrs Davison to return to the trading floor or to any form of work that involved a substantial client interface or a crowded office environment. She faced very significant challenges in finding a suitable area of work and then employment in it. One possibility was running her own small business. She was found to be likely to earn an average of £25,000 per annum to the age of 55.

In respect of loss of congenial employment, the judge accepted that her injury had prevented return to any form of work in the financial sector and had severely limited the nature of any future employment. Her future was uncertain and any work she did undertake was likely to be solitary and considerably less well paid. A figure of £6,500 was awarded.[1]

The multiplier applicable for loss of future earnings was £82,625 x 14.52 x 0.89, and for future residual earnings was £19,819 x 14.52 x 0.42.

Comment

This was a judgment that attracted a significant amount of coverage in both the mainstream media and the legal world:

> "High-flying banker whose career was cut short by botched post-natal surgery awarded £1.6million in damages … Sarah Davison, 36, suffered a third degree tear after having an episiotomy … She was left in agonising pain after undergoing 'plainly insufficient' repair work at Portland Hospital, London … The Credit Suisse banker can no longer work in the financial sector … She was awarded £1.6million in damages at London's High Court today."[2]

The coverage was due in no small part to the overall sum awarded of approximately £1.6m. However, there is more to the case than the simple value which was always going to be significant given that the claimant was a successful equities trader in the City.

This was her first birth and she elected for private care from the defendant Obstetrician Craig Leitch. Whilst giving birth to her son, Freddie, the claimant underwent an episiotomy which caused a third-degree tear. This was a severe and debilitating injury that was not properly identified or repaired at the time and subsequently caused the claimant significant pain and loss. Liability was eventually admitted but only some three years after the Letter of Claim was sent. The judge described the lateness of the admission as "regrettable" and the claimant remained desperately aggrieved that no apology was forthcoming despite the admission.

The claimant was unable to return to work and the judgment of Andrews J. deals primarily with evaluating her past and future loss of earnings. It is a helpful analysis of the approach to take in any case involving substantial loss of earnings and the costs of childcare and unsurprisingly the key to a successful outcome is preparation of the relevant evidence. In this case the judge described the claimant as "an impressive witness … robust in her rebuttal …". The judge was also impressed by the evidence of the claimant's former manager a Mr Keneally who "… gave evidence at trial via video link from the United States en route to catching a plane and the Court is indebted to him for interrupting his busy schedule in order to do so". Cogent and persuasive evidence provides the foundations for the findings a judge needs to make in building a substantial claim for lost earnings.[3]

One aspect of the judgment that has received less coverage however is in relation to Pt 36. The claimant had made a Pt 36 offer before trial of £900,000 and the defendant had made one for £800,000. At this stage one might have been forgiven for thinking that a deal might have been struck at £850,000 to avoid the costs and risks of what appears to have been a four-day trial but evidently not (however see later). So

[1], *Evans v Virgin Atlantic Airways* [2011] EWHC 1805 (QB) and *Dudney v Guaranteed Asphalt Ltd* [2013] EWHC 2515 (QB) applied.
[2] *Daily Mail*, October 18, 2013.
[3] See also, e.g. *XYZ v Portsmouth Hospitals NHST* [2011] EWHC 243 (QB); [2011] J.P.I.L C85–C88.

the claimant was successful in beating her own Pt 36 offer so what costs consequences should flow in the post-Jackson landscape?

CPR 36.14 provides that the court will, unless it considers it unjust to do so, order that the claimant is entitled to:

- interest on damages at a rate not exceeding 10 per cent above base rate;
- costs on the indemnity basis;
- interest on those costs at a rate not exceeding 10 per cent above base rate; and
- an additional amount, which shall not exceed £75,000.

In considering whether it is unjust to do so, the court will take into account "all the circumstances of the case" including the terms of the Pt 36 offer, the stage in the proceedings at which the offer was made including how long before trial started, the information available to the parties at the time when it was made, and the conduct of the parties with regard to the giving or refusing to give information for the purposes of enabling the offer to be made or evaluated.

When weighing up these factors the judge first noted that the claimant had beaten her own offer by "a very significant margin". Indeed, the claimant could have been awarded more than she was in fact awarded. The judge found on the evidence that the claimant would have probably earned in excess of £300,000 in 2012 but was only able to award £251,828 as this was the amount claimed by the claimant in her schedule and as the judge rather wryly noted "I cannot award her more than she is seeking for that period … she is likely to have earned more than she is claiming".

The second factor to consider is the length of time before trial because if the offer is made less than 21 days before trial, unless the court has abridged the relevant period,[4] these provisions do not apply. As the judge recognised, the Pt 36 regime is designed to encourage parties to settle and to save costs and so the later the offer is made the less the costs savings.

The judge was rather critical of the claimant's team who had not got "their tackle in order". The trial was due to start on October 2 but did not. On October 3 the judge gave directions as no trial bundles had been lodged, the claimant's skeleton argument had not been filed and the joint experts' statements had not been finalised. Indeed at least one pair of experts had yet to meet. No formal application for an adjournment was forthcoming but the claimant's lawyers had asked the listing officer to rearrange the trial for the October 10.

The defendant had indicated a willingness to accept the claimant's Pt 36 offer of £900,000 on October 7 provided that the claimant paid the defendant's costs from the date of the defendant's Pt 36 offer. This was because the defendant's own offer had been made at a time when the claimant had not yet obtained permission to serve the highly significant witness statement of Mr Keneally (in breach of the terms of a Final Order).[5]

However, the judge weighed up what information the defendant was in fact aware of at the time he made his offer and concluded that despite the procedural breaches by the claimant, the defendant was aware of the full nature of the claimant's case notwithstanding the service of a revised schedule of loss of one working day before the hearing. The judge was also mindful that acceptance of the offer would have avoided the need for the claimant to give evidence (travelling from Hong Kong and leaving a small baby) and would have spared the time of the key witness Mr Keneally.

Weighing up all the factors the judge therefore concluded that it would not be unfair for some of the consequences of Pt 36.14 to be visited on the defendant but that it probably would be unfair for them all

[4] See *Matharoo v Medway NHS Foundation Trust* [2013] EWHC 818 (QB) (QBD); [2013] J.P.I.L C112–C114 for a case where the judge did abridge the relevant period.

[5] One rather doubts the same sort of latitude will be shown in a post-Mitchell environment: *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537.

to apply. Costs are always in the discretion of the court and the judge felt that an order in the following terms would do justice:

- claimant's costs on the standard basis (rather than the indemnity basis);
- interest on costs at 2 per cent above base;
- the full award of additional damages of £75,000; and
- no additional interest on damages.

One can sense the judge's frustration with the procedural breaches and delays by the claimant's lawyers and their apparent disarray on the first day of trial which may explain the absence of an order for indemnity costs. The judge also ordered that the claimant do pay the defendant's costs of the hearing on October 3 (when the judge gave directions due to the non-effectiveness of the first day of trial on October 2). The fact that the claimant beat the defendant's Pt 36 offer by such a significant margin and was awarded sufficient to justify the full additional damages award capped at £75,000 probably more than justifies the additional damages award.

In conclusion this appears to be the first personal injury case under the new Pt 36 regime where the claimant was awarded the full additional award of £75,000; an expensive additional liability for the defendant.[6]

Practice points

- In a post-*Mitchell* environment one speculates whether the outcome of this case would have been the same.
- From a claimant perspective, the rebalancing of the Pt 36 regime by Jackson L.J. away from it being simply a powerful tool for the defendant to one where both parties may enjoy substantial advantages was one of the more sensible of the reforms. This case illustrates how powerful a well-placed Pt 36 offer can be for a claimant and how expensive it can be for a defendant. Indeed here the defendant did not have to pay the full extent of possible Part 36 because the claimant's lawyers had not got their tackle in order.
- The case raises the interesting dilemma claimant lawyers face when valuing a claim. We are exhorted not to exaggerate or "over-egg the pudding" yet here the claimant's lawyers under-estimated their own client's loss of earning claim leaving the judge indicating she would have wished to award the claimant more but was constrained by the value claimed in the revised Schedule.

Muiris Lyons

[6] See also *Feltham v Bouskell (Costs)* [2013] EWHC 3086 (Ch) for a decision where the claimant beat her own Pt 36 offer of £700,000 in a Chancery claim but where the Pt 36 offer was made late in the day and the judge concluded that it would be unjust to award the additional amount.

CP (A Child) v Hill

(QBD, H.H. Judge Gosnell, May 20, 2013, Unreported)

Personal injury—damages—certificates—periodical payments—protected parties—settlement—MIB—proof of life

Certificates; Periodical payments; Personal injury; Protected parties

CP had suffered a brain injury and would always remain a protected party. An application was made for the approval of the settlement of the resulting personal injury claim brought by the child CP against an uninsured driver.

The Motor Insurers' Bureau ("MIB") had agreed to make periodical payments for her benefit for the rest of her life. The parties had agreed that the MIB would require proof of life each year before making the requisite annual payment. The issue was whether the "proof of life" certificate should be granted by CP's deputy or by her GP.

The judge held that the purpose of the certificate was to deal with the very small percentage of cases where the family cynically kept information back from the paying party with a view to making a financial gain. A deputy's certificate was only as good as the information the deputy had been given; if he or she had not seen the claimant recently or had been given inaccurate information through the family, he or she might be duped by the family. It would be preferable to have someone who was genuinely independent. The GP would have to physically see the protected party before granting the certificate and that would provide additional security to the paying party.

Accordingly the decision was that CP's GP should give the "proof of life" certificate. The fact that the GP would have to physically see the protected party would avoid the small risk that her family would be guilty of duplicity.

Comment

This decision does potentially cause a claimant inconvenience and expense.

Gosnell J. decided in favour of the defendants that the proof of life must be provided by the GP. Whilst he did not doubt the probity of a Deputy, he considered that they were less independent than the GP. Bearing in mind that the claimant will be one of the GP's patients, as opposed to the Deputy's client, it is difficult to see why a GP would be that much more independent.

Perhaps the more central issue is that the claimant will be required to go to see the GP so the GP can prepare a letter confirming that the claimant is still alive. This is inconvenient for a claimant and may also amount to extra expense if the GP charges.

A Deputy is required to see a protected person on an annual basis. They can ensure that the date of the visit takes into account the time when a proof of life statement has to be given. This will be at no cost and inconvenience.

Practice point

- If it is anticipated that in an Order for periodical payments there will be the requirement to obtain a proof of life statement from the GP, then the cost of this should be built into the claim for damages.

Colin Ettinger

Tutas v East London Bus & Coach Co Ltd

(CA (Civ Div), McFarlane L.J., Sir Stephen Sedley, October 16, 2013, [2013] EWCA Civ 1380)

Personal injury—damages—civil procedure—civil evidence—findings of fact—fresh evidence—liabilities—measure of damages—mitigation—physiotherapist—special damages

Findings of fact; Fresh evidence; Mitigation; Personal injury claims; Physiotherapists; Special damages

Mr Hasan Tutas worked for the defendant as a bus driver. He was injured in November 2007 when another bus shunted into the rear of the bus he was driving. He suffered injury and indicated his intention to claim damages from his employer for personal injury. The bus company admitted liability.

Proceedings to determine quantum were issued in September 2010. As part of his claim for special damages, Hasan Tutas sought £513.50 for private physiotherapy treatment consisting of two assessments and eight treatment sessions. The bus company sought disclosure of evidence in support of that claim, and Mr Tutas delivered invoices and forms from the physiotherapy service detailing the treatment he had had and its cost.

On the eve of trial in November 2011, the bus company filed an updated counter-schedule of damages raising for the first time the point that there was no evidence that the claimant had paid the physiotherapy costs or was legally obliged to pay them.

In evidence, Mr Tutas was asked about the basis of his referral for physiotherapy and stated that he thought that the defendant had sent him and presumed that he would not be expected to pay the bill, and that he did not know who had paid for his treatment. A couple of days after the trial ended, on the morning judgment was expected, Mr Tutas produced documents including a letter from the physiotherapy provider sent to Mr Tutas in November 2007 which referred to the accident and the fact that it was not his fault and that a claim was pending.

The letter informed him that physiotherapy could assist his claim and aid his recovery, and that they could provide him with treatment, the cost of which would form part of his claim and would be pursued against third party insurers. H.H. Judge Cryan refused to admit the letter as evidence. He went on to give his prepared judgment, in which he stated that the letter should have been produced earlier so as to give the defendant an opportunity to consider the new case presented by the claimant, and that it was clear from the claimant's own evidence that he did not believe that he was liable for the physiotherapy costs. The judge therefore rejected that aspect of the special damages claim.

The claimant appealed and contended that the judge had been wrong to criticise him for the late production of the November 2007 letter where, in truth, the lateness derived from the defendant raising a new point on the eve of trial. He submitted that to characterise him as acting late in the day when he was responding to a late point was unfair. He sought to go behind the judge's finding that the claim failed

because he had accepted that he was not liable to pay the bill, since that conclusion went further than that justified by his evidence.

The Court of Appeal held that at its highest, the evidence of Hasan Tutas indicated that he was baffled by the responsibility of one agency or another to pay for his physiotherapy. The evidence and his presumption was that the defendant bus company was responsible. That was a reasonable presumption given that liability had already been admitted and the content of the letter inviting him to undergo treatment.

The court stated that the claimant's evidence could not be elevated to an assertion that he, personally, had no liability to pay: he was merely trying to help the court in establishing his understanding. It was not disputed that it had been reasonable for him to have received physiotherapy treatment and for that to have happened timeously. No issue had been taken as to the level of the claim or that the physiotherapy provider expected to be paid for the treatment given.

The court noted that it was not common in personal injury claims that a chain of actual payment for treatment had to be nailed down with evidence of who had paid the bill: the rendering of reasonable evidence of the requirement to pay, such as an invoice, was normally enough. Such documentary evidence had been provided by Hasan Tutas six months before the trial.

The point as to where the money was coming from to pay the invoices was taken late and was an opportunistic claim made in the absence of evidence as to who had actually paid the bill. It was unsatisfactory for the judge to have presented the process in the way he had. He should either have excluded the defendant's late point or adjourned the judgement to enable questions arising from the November 2007 letter to be dealt with.

Accordingly the judge's approach in allowing the point to be run but not answered could be validly criticised: ignoring the letter was not justified. The judge's conclusion that Hasan Tutas did not believe he was liable to pay for the physiotherapy was not borne out by the oral evidence. Mr Tutas had not known the position, and had assumed that the defendant was responsible for the payment. Both grounds of appeal were made out.

Comment

A case in the Court of Appeal over the princely sum of £513.50? The defendants should have their heads examined!

It was only on the eve of trial that the defendant particularised its objection to the claimant's claim for physiotherapy costs, a claim which had been made in the original schedule served over a year before. It was not contested that the claimant had had the treatment, nor that this was reasonably required as a result of the accident for which the defendant had admitted liability. The defendant's main argument was that the claimant had not been liable to pay for the treatment himself and therefore these costs could not be visited upon them.

The claimant's solicitors had arranged for the treatment and they had struck a deal with the provider that payment would be deferred until the end of the claim, when the treatment costs would be recovered. The claimant himself had not paid for them, and had assumed in fact that the defendants had done so at the time, as he said in evidence at trial. He had not expected to pay the costs himself. Later before judgment was given, the arrangement as to payment was clarified with disclosure of a letter from the clinic to the claimant. The judge refused to admit this late disclosure, even though he had allowed the defendant to make their points as first ventilated a day before the trial. That, said the Court of Appeal, was unfair: "To allow the point to be run, but then not allow it to be answered is, in my view a valid criticism of the judge's approach."[1]

[1] *Tutas v East London Bus and Coach Co Ltd* [2013] EWCA Civ 1380 per McFarlane L.J. at [28].

The defendant in this case seems to have had a real problem in sticking to directions timetables. Their respondent's notice to the appeal was only served two weeks before the appeal, six months late. Despite this, their Lordships allowed the defendant to rely on the new points—hardly a ringing endorsement of Jackson L.J.'s strict case management regime[2]—but did so in order to knock the points down: One does not in the normal course of events require "nitty gritty proof of the channel of payment" said McFarlane L.J.[3] The arrangement between the claimant's solicitors and the rehabilitation provider was not unusual in personal injury litigation. Often a claimant cannot afford to pay for treatment which, if given in a timely manner, is of benefit to both parties. The Court of Appeal concluded that the defendant's argument was an "opportunistic point"[4] and such litigation by ambush would not pay.

Oh to have been a fly on the wall in the defendant's solicitor's office when they explained to their client the costs consequences of pursuing this to the Court of Appeal and losing: madness!

Practice points

- Establishing exactly who paid what to whom is not normally necessary to prove a financial loss for medical rehabilitation; this case is an endorsement of deferred payment schemes arranged by claimants' solicitors for the benefit of their clients. Beware, however, the consumer credit implications of any similar schemes which could make them unenforceable.
- Counter schedules should be served well in advance of the trial, in accordance with court rules and/or specific directions, and set out any substantive points the paying party wishes to make about a particular claimed loss. Litigation by ambush is unlikely to pay.

Jonathan Wheeler

Moore v Plymouth NHS Trust

(QBD, Stuart-Smith J., September 26, 2013, [2013] EWHC 3193 (QB))

Personal injury—damages—civil procedure—interim payments—life expectancy—periodical payments—medical evidence—late disclosure—potential significant reduction in value of claim

Clinical negligence; Expert evidence; Interim payments; Life expectancy; Periodical payments

In July 2009, Garry Moore went to see his general practitioner with what was mistakenly diagnosed as an infected foot. He was referred to hospital and again there was a failure to diagnose the real problem, which has subsequently been admitted to be negligent. The consequences of the negligence were disastrous for Mr Moore. Instead of losing one toe, or possibly two toes, which is what should have happened, he underwent successively a below knee amputation of the right leg and then on August 27, 2009 an above knee amputation when the below knee amputation stump failed to heal. As a consequence, he was unable to work since and forced to live a severely restricted lifestyle.

An interim payment of £50,000 had been paid voluntarily. Garry Moore, aged 50 at the date of this application, asserted that the claim was worth more than £2 million on the basis of a relatively normal life

[2] Contrast the Court of Appeal's approach in *Mitchell v News Group Newspapers* [2013] EWCA Civ 1537.
[3] *Tutas v East London Bus and Coach Company Ltd* [2013] EWCA Civ 1380 per McFarlane L.J. at [25].
[4] *Tutas v East London Bus and Coach Co Ltd* [2013] EWCA Civ 1380 per McFarlane L.J. at [29].

expectancy. He sought the interim payment under the principle in *Eeles v Cobham Hire Services Ltd*[1] for accommodation needs and for the provision of better quality prostheses.

Just days before the hearing, the trust disclosed, without any prior warning, an expert report which stated that Mr Moore's life expectancy was reduced because of his habitual smoking and peripheral arterial disease, and that his leg would have been amputated by 2016 in any event because of an embolisation that pre-dated the negligent amputation. The claimant having declined the court's offer of an adjournment, the court was required to consider whether, and to what extent, an interim payment was appropriate.

The claimant criticised the trust's report on the basis that its author had not examined him, and that its conclusion was contingent upon sight of certain scans. He argued that if his life expectancy was as short as the trust asserted, his case was no longer comparable with *Eeles* and the only question was the appropriate capital sum that would be awarded by way of damages. He maintained that the court could be confident that the damages would exceed the trust's own estimate of £600,000 because no defendant ever succeeded on every point, and that a significant interim payment could still be awarded.

Stuart-Smith J. held that the trust's production of the report, well-landed to provide a solid blow for the purposes of the application, was deeply unsatisfactory. Nevertheless, it could not be ignored. Some of the doubts in the report could be dispelled by the claimant's own expert report, but Mr Moore had been severely disadvantaged because his own expert had not dealt with the issue of inevitable amputation in 2016. The point was never raised when he was instructed.

The judge concluded that the right approach was to take the trust's overall valuation of the claim as an irreducible minimum. There were grounds for believing that its general damages figure was too low, and it had factored into its calculation the cheaper of two accommodation proposals. Even on the trust's own case, it seemed likely that the figures would support a higher award of damages than £600,000.

Accordingly a further interim payment of £500,000 could safely be awarded and the application was granted in part.

Comment

As is seen from this case, the circumstances of this application were very much fact specific. However, the interesting feature to emerge from this was how the claimant was able to use the defendants' approach to the case to secure what they were seeking by way of interim payment.

The claimant's application proceeded on the basis that they would be seeking a periodical payment. As a result the considerations as set out by the Court of Appeal in *Eeles* had to be taken into account. The defendants' argument revolved around the late disclosure of a report that dealt with life expectancy. The report also contended that the amputation was of a leg that would have happened in any event soon after. Accordingly, their position was that this was not a periodical payment case. The claimant then argued that the court was entitled to adopt the approach of the least best position for the claimant. This was set out by the defendants who valued the claim at £600,000 which the court found was clearly the minimum.

An award of £500,000 was made and it seems that the court was clearly influenced by the late disclosure of a report which was described as "deeply unsatisfactory".

Practice point

- In this case there was late disclosure of medical evidence. However, this did not defeat the claimant's application for an interim payment entirely. On careful scrutiny of all of the

[1] *Eeles v Cobham Hire Services Ltd* [2009] EWCA Civ 204; [2010] 1 W.L.R. 409.

medical evidence, it demonstrated that the report disclosed late in the day by the defendants was not, necessarily, as damaging as they may have otherwise thought.

Colin Ettinger

Blythe v Ministry of Defence

(CA (Civ Div), Toulson L.J., Floyd L.J., Christopher Clarke L.J., November 25, 2013, Unreported)

Personal injury—damages—civil procedure—provisional damages—time limits—consent orders—discretion—extensions of time—implied terms—RSC ord.37—CPR Pt 41

LT Asbestos; Consent orders; Discretion; Extensions of time; Personal injury claims; Provisional damages

Blythe had worked for the MOD for several decades and had been significantly exposed to asbestos. He began to suffer from chest problems, and a consent order which entitled him to provisional damages for asbestos-induced injury was approved in 1990. Under the RSC Ord.37 r.8, then in force, such an order would normally specify the period of time in which Blythe could apply for further damages. In this case, that period was 20 years.

22 years after the order for provisional damages, Blythe applied to extend that period. He had not developed any further asbestos-related illnesses. A fresh medical report stated that the risk to his health still remained, and there was no justification for imposing the 20-year time limit. The Master Eastman held that the RSC Ord.37 had been understood to have required a finite term to apply for further damages and 20 years was a conventional period. However, under the current CPR Pt 41 there was no requirement for a fixed term and no need to apply for an extension of time. He therefore used his discretion under the new rules to allow the extension of time. That decision was confirmed[1] by Judge Alan Gore QC.

On appeal the MOD submitted that:

- it was part of the settlement agreement that there should be a 20-year time limit and that had been made on a contractual basis, namely an implied term in an offer letter to Blythe;
- RSC Order 37 r.8 and r.10 continued to have effect throughout the life of the order and the master had no power to order as he did; and
- in exercising his discretion, the master had acted contrary to principle.

The Court of Appeal noted that the order was silent on Blythe's liberty to apply for an extension of time and it did not meet the standard test of an implied term. The order had to be read as it stood. There were two possible ways of reading the order; that the parties did not seek to put any fetter on when an application for an extension could be made, but left it to be determined by the application of the rules and therefore the 20-year period was otiose, or it had been intended to allow applications to extend time. The former was more likely. However, it was sufficient to reject the argument that the order embodied a positive contractual term limiting the period within which an application to extend time could be made. It therefore had to be determined by application of the rules.

CPR Pt 51 contained transitional arrangements and specified that the CPR applied to all existing proceedings. CPR Pt 41 contained the relevant present rules. The language of CPR Pt 41.3 was in contrast

[1] *Ministry of Defence v Blythe* [2013] EWHC 1422 (QB).

to Order RSC 37 r.8 and r.10, which prevented an application for an extension of time after expiration of the period in which further damages could be applied for.

They concluded that although the CPR did not expressly authorise an extension of time after expiry of the relevant period, it did not exclude it. The High Court had been right to find that the court had the power to extend after expiration of the relevant period. Whether that power should be exercised was a fact specific matter, taking into account the CPR's overriding objectives.

They pointed out that courts had recognised that consent orders had different purposes.[2] In this case, a provision had not been revoked. It was an application for an extension of time pursuant to a liberty to apply for further damages clause which lay in the court's power to grant. The period of 20 years was not related to an anticipated duration of medical risk but, rather, was a fairly common term of an order of that kind.

The MOD argued that the period of 20 years was a finite cap on its liability, but the court held that it was no such thing. The MOD conceded that if Blythe had applied for an extension before the expiry of the 20 years it would have gone unopposed. The master's decision lay well within the proper ambit of his discretionary power. The only prejudice to the MOD vested on the false premise as to the proper ambit of a court's power when considering such an application. Conversely, the prejudice to Blythe if the period was not extended and he had to spend the remainder of his life in fear of developing an asbestos-related disease without being compensated was manifest.

The appeal was dismissed.

Comment

In the mad post-Jackson world anything can happen. I take as example a straightforward PI case going to trial. All directions had been complied with, save that the day before trial the bundles hadn't arrived at court. The judge made an order of his own volition vacating the trial and listing the case for a CMC instead. The claimant's solicitors had the bundles hand-delivered at midday the same day when they found out what had happened. Everyone turned up fully prepared for a trial in any event.

However, when the defence saw the order vacating the trial they made an application (to a different judge) to strike out the claimant's case for failing to comply with the direction in relation to the bundles, citing amongst other stuff the *Mitchell*[3] case. All agreed that they could easily have proceeded with the trial. However, the judge struck out the claimant's case, awarding the defence full costs. Not what I would call a just outcome.

However, this case is very different. We have justice in action, post *Mitchell*. It provides a glimmer of hope that perhaps there is some sanity left when the courts apply the CPR. The tale starts a long time ago. On February 13, 1990 a Master approved an order that was then sealed two days later, on February 15, by which the plaintiff, as Mr Blythe was then known was awarded an immediate award of damages for pleural plaques, an asbestos induced illness, then, but not now, considered to be an actionable injury. It was a provisional award under a relatively new jurisdiction introduced in the High Court by s.32A of the Supreme Court Act 1981, as it was then known, now the Superior Court Act.

It named so-called "comeback conditions" excluded from consideration in the quantum of the award. In this case there was no dispute that the claimant had not now developed any of them as far as yet could be established. Paragraph 2 of the order read:

> "The Plaintiff has leave to apply for further damages within 20 years of the date of this Order if he develops one or more [of] the diseases specified in paragraph 1 the Plaintiff to be at liberty to apply for such time to be extended."

[2] *Pannone LLP v Aardvark Digital Ltd* [2011] EWCA Civ 803; [2011] 1 W.L.R. 2275 considered.
[3] *Mitchell MP v News Group Newspapers Ltd* [2013] EWCA Civ 1537.

So this case was first concluded under and therefore subject to the old RSC. The material provisions were order 37 r.8 and r.10. The material sections for this appeal, r.8 sub-paras (2) and (3) provided as follows:

> "An order for an award of provisional damages shall specify the disease or type of deterioration in respect of which an application may be made at a future date, and shall also, unless the Court otherwise determines, specify the period within which such application may be made.
>
> The Court may, on the application of the plaintiff made within the period, if any, specified in paragraph (2), by order extend that period if it thinks it just to do so, and the plaintiff may make more than one such application."

Order 37 r.9 dealt with acceptance of offers to submit to a provisional award and order 37 r.10 provided at sub-para.2 that no application for further damages may be made after the expiration of the period, if any, specified under r.8(2) or such period as extended under r.8(3).

When those rules were brought into force they represented the first occasion when the law departed from the prior common law tradition that all damages for prospective losses had to be awarded in a single lump sum at the time of the trial of the single cause of action. The rules were amplified by a practice direction[4] issued by the Lord Chief Justice, then Lord Lane, which differentiated between provisional damage awards after trial proceedings and provisional damages orders without trial. The latter was dealt with in s.(b) of the Practice Direction stating that: the material parts of which read as follows:

> "Section 32A of the Supreme Court Act 1981 requires that immediate damages and provisional damages must be the subjects of awards by the court if they are to be enforced [I emphasise the words 'if they are to be enforced'] under that section. Accordingly the following practice shall be followed in relation to settlements under that section.
>
> Applications shall be made by summons for leave to enter judgment by consent in the terms of a draft annexed to the summons. If the plaintiff is under a disability, the approval of the court should be asked for in the summons and recited in the draft judgment.
>
> The draft shall contain the particulars in paragraphs 1 to 3 hereof. It should also contain a direction as to the documents to be placed on the case file. These will normally be (a) a copy of the order made on the summons, (b) a copy of the judgment, (c) pleadings, if any, (d) an agreed statement of the facts, (e) agreed medical reports. The contents of the case file shall be scheduled to the order and to the judgment. The terms of the order and judgment shall be subject to the court's approval.
>
> The plaintiff's solicitor shall (1) prepare the case file, which shall be secure and clearly marked, (2) draw up the order and judgment and place copies on the case file, (3) lodge the case file in the office in which the action is proceeding, where it shall be preserved as though it were the pleadings of an action disposed of by trial, (4) forward a copy of the judgment as directed in paragraph 8(2) hereof."

The MOD's primary argument was that the dominant feature in relations between the parties was a contract embodied in a consent order compromising the claim. That contract, entered into by each party of full age and capacity, and with the benefit of legal advice, had contractually obtained the certainty of being free from any further liability after 20 years. So the claimant could not do anything.

It is important to remember that when this original order was made under the old RSC 37, a finite period of time was required to be included in an order made pursuant to that rule. A conventional time, if not the actual regulated time, was 20 years. So this was an entirely conventional order of its time. The old r.37.8(3) required any application for an extension to be made within the period of the order.

[4] *The Practice Direction (Provisional Damages Procedure)* [1985] 1 W.L.R. 961.

That has all changed. The new relevant rules (r.41.2 and the general r.3.1(2)) have no such requirement in them nor indeed does the rule applying for an actual application for further damages, namely, r.41.3. Rule 41.3, indeed, anticipates the possibility of an extension to the original time because it says:

> "The claimant may not make an application for further damages after the end of the period specified in rule 41.2 or such period as extended by the court."

The key in this case lay with Pt 3.1.(2)(a) which says:

> "Except where these Rules [and I emphasise those two words] provide otherwise, the court may: (a) extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired."

That was precisely the rule that governed this case. Therefore, Master Eastman had a discretion to make the order the claimant sought and indeed he did.

From that point on the MOD were attempting to overturn a decision of a judge who had exercised his case management discretion. He gave extensive reasons which were certainly not perverse. That was sufficient for Gore J. to dismiss the first appeal and the Court of Appeal the second.

It seems to me that almost all judges would have exercised their discretion in the same way and it is no surprise to me that this appeal was dismissed. The attitude of the MOD seems totally disproportionate. This is not in my view a justifiable way to spend public money.

Practice points

- Never assume that the CPR and the old rules are the same. Often there are differences, as here which matter.
- Time limits on orders for provisional damages can be extended even retrospectively.
- Post *Mitchell* all is not lost as sometimes "Justice" will actually still be done in the old fashioned sense.

Nigel Tomkins

Case and Comment: Procedure

PGF II SA v OMFS Co 1 Ltd

(CA, Maurice Kay L.J., Beatson L.J., Briggs L.J., October 23, 2013, [2013] EWCA Civ 1288)

Civil procedure—alternative dispute resolution—costs orders—mediation—refusal—silence—unreasonable conduct—CPR Pt 36

Costs orders; Mediation; Part 36 offers; Refusal; Silence; Unreasonable conduct

PGF had brought proceedings against OMFS for alleged breaches of tenant's repairing covenants in a lease of a commercial building. PGF claimed approximately £1.9 million. PGF made two Pt 36 offers, of £1.125 million and £1.25 million, which were not accepted by OMFS. It then sent OMFS a detailed invitation to participate in mediation. OMFS did not respond, even though the invitation was repeated a few months later. Instead, OMFS made a Pt 36 offer of £700,000 which PGF eventually accepted shortly before trial.

Ordinarily, upon acceptance of the offer, PGF would have been obliged to pay OMFS's costs. However, the judge considered *Halsey v Milton Keynes General NHS Trust*[1] and concluded that OMFS had unreasonably refused to participate in mediation. He therefore deprived OMFS of its costs for the relevant period under the CPR r.36.10, but did not order OMFS to pay PGF's costs.

OMFS appealed, and PGF cross-appealed against the judge's refusal to award costs to it. OMFS submitted that it had not acted unreasonably and that its silence did not amount to a refusal to engage in mediation. They contended that mediation stood no reasonable prospect of success in any event because of the distance between the parties' Pt 36 offers. They submitted that the judge's costs sanction was too harsh as he had not weighed PGF's responsibility for failing to accept OMFS's Pt 36 offer earlier.

The Court of Appeal held that the time had come for the court to firmly endorse the advice given by S. Blake, J. Browne and S. Sime in the *ADR Handbook* that, as a general rule, silence in the face of an invitation to participate in ADR was itself unreasonable. This was regardless of whether a refusal to engage in ADR might have been justified. They conceded that it was possible, however, that there might be rare cases where ADR was so obviously inappropriate that to characterise silence as unreasonable would be pure formalism, or where the failure to respond was a result of a mistake, in which case the onus would be on the recipient of the invitation to make that explanation good.

They decided that there were sound practical and policy reasons for such a modest extension to the guidelines set out in *Halsey*, first, because an investigation of the reasons for refusing to mediate, advanced for the first time at a costs hearing perhaps months or years later, posed forensic difficulties for the court concerning whether those reasons were genuine. Secondly, a failure to provide reasons for a refusal was destructive of the objective of encouraging parties to consider and discuss ADR. Any difficulties or reasonable objection to a particular ADR proposal should be discussed, so that the parties could narrow their differences. The court pointed out that this occurred routinely in relation to expert issues so there was no reason why the same should not apply to ADR. Thirdly, they held that it would also serve the policy of proportionality.

[1] *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576.

Accordingly, OMFS's silence in the face of two requests to mediate was itself held to be unreasonable conduct sufficient to warrant a costs sanction. The court said that it would be perverse not to regard silence in the face of repeated requests for mediation as anything other than a refusal. That was all the more so because PGF's first request was couched in such detailed and sensible terms that it could not reasonably have been regarded as a mere tactic.

The court recognised that Part 36 offers did not necessarily represent the parties' respective "bottom line". Accordingly, there was no unbridgeable gulf between PGF and OMFS's respective Pt 36 offers which could not in any circumstances have been overcome in mediation. The dispute was eminently suited to mediation, and it had had a reasonable prospect of success when offered by PGF.

They rejected the suggestion that a finding of unreasonable conduct by a refusal to mediate would produce an automatic result in terms of a costs penalty. At first instance the judge was plainly conscious that he was exercising a broad discretion.[2] To deprive OMFS of the whole of its costs during the relevant period was considered to be within the range of proper responses to its seriously unreasonable conduct. The judge's lack of an express balancing exercise did not demonstrate that he did not in fact carry it out in his mind.

There was no recognition in *Halsey* that the court might go further and order the otherwise successful party to pay all or part of the unsuccessful party's costs. While recognising that in principle the court had that power, it was held that a sanction so draconian should be reserved for only the most serious and flagrant failures to engage with ADR. For example where the court encouraged the parties to do so, and its encouragement was ignored.

Both the appeal and cross-appeal were dismissed.

Comment

As Kay L.J. neatly put it in the opening paragraph of his judgment, this appeal considered:

> "a matter of principle, the following question: what should be the response of the court to a party which, when invited by its opponent to take part in a process of alternative dispute resolution ('ADR'), simply declines to respond to the invitation in any way? [3]"

This was to consider an extension of the law since 2004 on the unreasonable refusal to participate in mediation laid down in *Halsey* including the tests to identify whether the refusal was unreasonable and secondly that costs sanctions can be made.

CPR 36.10 provides:

> "where a Part 36 offer is accepted within the relevant period the claimant will be entitled to the costs of the proceedings up to the date on which notice of acceptance was served on the offeror"

and 36.14 (2):

> "…, where rule 36.14(1)(a) applies, the court will, *unless it considers it unjust* to do so, order that the defendant is entitled to—(a) costs from the date on which the relevant period expired; and (b) interest on those costs."(emphasis added)

Thus the defendant argued they were entitled to their costs to be paid by the claimant for the seven and a half months after the Pt 36 had been made and the claimant argued the failure to respond to repeated offers to mediate amounted to a refusal and the triggering of the court's discretion to amend the automatic

[2] *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 followed.
[3] *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 at [1].

costs provisions of Pt 36. The failure to respond being akin to a refusal had been looked at in earlier tribunals as cited by the judge, including *Burchell v Bullard*[4] and *Rolf v De Guerin*.[5]

Halsey's principled guidance on when to sanction a costs penalty was cited by Kay L.J.:[6]

- The court should not compel parties to mediate even were it within its power to do so. This would risk contravening art.6 of the Human Rights Convention, and would conflict with a perception that the voluntary nature of most ADR procedures is a key to their effectiveness.
- Nonetheless the court may need to encourage the parties to embark upon ADR in appropriate cases, and that encouragement may be robust.
- The court's power to have regard to the parties' conduct when deciding whether to depart from the general rule that the unsuccessful party should pay the successful party's costs includes power to deprive the successful party of some or all of its costs on the grounds of its unreasonable refusal to agree to ADR.
- For that purpose the burden is on the unsuccessful party to show that the successful party's refusal is unreasonable. There is no presumption in favour of ADR.

Interestingly Kay L.J. turned to various pieces of extraneous material over and beyond the usual consideration of court rules and precedents to set out the atmosphere in civil justice currently prevailing and dictating the court and indeed the parties' attitude towards reducing a dispute. For example, aside from the ADR Handbook he cited, with some caution, statistical research from 2010 and 2012 conducted by the Centre for Effective Dispute Resolution ("CEDR"):[7]

> "… when it is undertaken, mediation achieves a remarkable level of success, within a growing market of the order (in 2012) of approximately 8000 cases per annum. The 2012 reported success rates can be summarised as 70% on the day, with 20% more settling shortly thereafter. In 2010 comparable figures were 75%:14%."

Turning to the handbook, the judge quoted its guidance on how one could refuse a mediation offer whilst reducing the prospects of a costs sanction, albeit as the judge conceded he thought the authors had based this on the first instance decision of this very case:[8]

- Not ignoring an offer to engage in ADR.
- Responding promptly in writing, giving clear and full reasons why ADR is not appropriate at the stage, based, if possible, on the Halsey guidelines.
- Raising with the opposing party any shortage of information or evidence believed to be an obstacle to successful ADR, together with consideration of how that shortage might be overcome.
- Not closing off ADR of any kind, and for all time, in case some other method than that proposed, or ADR at some later date, might prove to be worth pursuing.

This represents a tightening up of the advice to litigants seeking to avoid ADR efforts started by *Halsey*. There will be cases a where a party can refuse ADR, although they will have to clearly set out their reasons contemporaneously. There will be cases where the court decides the refusal is unreasonable and worthy of a costs penalty. This decision reinforces that whilst also saying that making the refusing party pay all of the costs of the litigation may be inappropriate.

[4] *Burchell v Bullard* [2005] EWCA Civ 358.
[5] *Rolf v De Guerin* [2011] EWCA Civ 78.
[6] *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 at [22].
[7] *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 at [24].
[8] *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 at [30].

When one considers the low ceilings caused by fixed costs and proportionality the issue of whether a court should in fact go further than simply penalising unreasonably reluctant litigants from going to ADR and actually move to compulsion is an intriguing one. The senior judiciary say that with increased costs management will come increased case management. ADR can be expensive but it can also be seen as bringing the court doors nearer. If the judge sees a directions expensive case with proportionality issues shouldn't they be actively encouraging ADR?

Briggs L.J. could not have given a clearer warning to litigants and their lawyers for the future:[9]

> "… this case sends out an important message to civil litigants, requiring them to engage with a serious invitation to participate in ADR, even if they have reasons which might justify a refusal, or the undertaking of some other form of ADR, or ADR at some other time in the litigation. To allow the present appeal would, as it seems to me, blunt that message. The court's task in encouraging the more proportionate conduct of civil litigation is so important in current economic circumstances that it is appropriate to emphasise that message by a sanction which, even if a little more vigorous than I would have preferred, nonetheless operates pour encourager les autres."

Sir Rupert Jackson said he was tasked with providing access to at proportionate cost. ADR must be a heavy tool in that task and probably more useful to parties early on in a case than plodding to a trial with inadequately budgeted directions.

Practice points

- Parties should never ignore serious invitations to ADR.
- If they wish to decline they should give a detailed and contemporaneous reply.
- Parties must always give serious consideration to the various forms of ADR.

Mark Harvey

Matthews[1] v Collins (T/A Herbert Collins & Sons)

(QBD, Swift J., October 4, 2013, [2013] EWHC 2952 (QB))

Civil procedure—personal injury—asbestosis—causation—statements of case—abuse of process—striking out—tissue samples

LT Abuse of process; Asbestosis; Destruction of evidence; Personal injury claims; Tissue samples; Unreasonable conduct

The claimant brought a claim as the widow and executrix of the late Mr Reginald Anthony Matthews ("the deceased") under the provisions of the Law Reform (Miscellaneous Provisions) Act 1934 and for her own benefit as the deceased's dependant under the provisions of the Fatal Accidents Act 1976 (as amended). She alleged that, throughout the deceased's periods of employment as a steel erector/cladder with the seven defendants between 1973 and 1980/81, he was exposed to and inhaled asbestos dust caused by cutting, mitring and drilling asbestos cement sheets and asbestos boards. It was alleged that, as a result of his exposure to asbestos dust, the deceased developed the type of diffuse interstitial pulmonary fibrosis

[9] *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 at [56].
[1] Dorothy Clara Florence Matthews (Widow and Executrix of Reginald Anthony Matthews, Deceased).

which, when caused by asbestos exposure, is known as "asbestosis". It was alleged that his asbestos exposure also resulted in the development of lung cancer which caused his death.

All seven defendants denied liability and causation. They accepted that the deceased developed diffuse interstitial pulmonary fibrosis but they denied that any asbestos exposure which may have occurred during the deceased's employment with them caused or contributed to the development of that condition. They contended that it was probable that his pulmonary fibrosis was in fact idiopathic pulmonary fibrosis ("IPF"), i.e. pulmonary fibrosis the cause of which is unknown. The most common sub-type of IPF is usual interstitial pneumonia ("UIP"). The defendants also denied that the deceased's lung cancer was caused by asbestos exposure. They contended that the most likely cause of his lung cancer was cigarette smoking.

In July 2008, the deceased had consulted solicitors about an asbestosis claim, but the matter had not been pursued because at that time he was asymptomatic. He died in January 2009. A post mortem referred to asbestos exposure and concluded that he had died from pulmonary fibrosis and lung cancer. In July 2009, an inquest returned a verdict of death by industrial disease and, in November 2010, the coroner's office asked Mrs Matthews what she wanted to do with samples of the deceased's lung tissue, taken for the purposes of the post mortem and retained by the coroner. Upon being told that samples were not normally retained, she authorised their destruction.

Solicitors who had not represented the claimant at the inquest were unaware of that exchange and issued proceedings in January 2012. Having denied both liability and causation the defendants sought access to the tissue samples. Upon discovering that they had been destroyed, the seven defendants applied to strike out the claimant's statement of case as an abuse of process pursuant to CPR 3.4(2)(b).

Relying on *Arrow Nominees Inc v Blackledge*,[2] the defendants submitted that the destruction of the tissue samples was unreasonable and blameworthy and was an abuse of process giving rise to a real risk of injustice such that a fair trial was no longer possible.

Swift J. held that the defendants' criticism was unjustified. The claimant had lost her husband quite suddenly and had been confused and distressed. It was most unlikely that she would have appreciated why it might have been necessary to preserve the tissue samples. Her solicitors had not represented her at the inquest and so were not in a position to have explained matters. When she was approached by the coroner's office she had sought clarification and had seen no reason to depart from what she had been told was the usual practice, which was to authorise disposal of the samples. There was no reason to believe that she would have connected the preservation of the samples with a possible claim against the defendants, and the suggestion that she should have recognised that the samples might be required for her claim was wholly unrealistic. It would not have occurred to her to consult solicitors about what she should do, and she could not be criticised for her actions.

The judge agreed that with hindsight, it was easy to say that the solicitors should have told both the claimant and the coroner that the samples should be preserved until they advised otherwise. However, they could not be criticised for failing to anticipate what happened. Given the post mortem report, the inquest verdict, and the fact that the coroner's office knew of their involvement, it was not unreasonable for them to have assumed that the coroner would not dispose of the samples without seeking their prior agreement or advising the claimant to do so.

The judge held that it was not necessarily the case that the decision in *Weaver v Contract Services Division Ltd*[3] should have alerted the solicitors to the potential problem. In that case, the coroner's office had told the claimant that she had to obtain her solicitor's authority before permitting the disposal of the samples. Had the solicitors here been aware of the case they might have been reassured that, in an industrial

[2] *Arrow Nominees Inc v Blackledge* [2000] C.P. Rep. 59.

[3] *Weaver (Widow & Personal Representative of Harry L Weaver, deceased) v Contract Services Division Ltd* considered [2009] unreported, Senior Master, September 3, 2009).

disease case where a solicitor was involved, a coroner would not dispose of tissue samples on the authority of a lay client alone,.

Swift J. also held that the defendants were not assisted by CPR PD 31B. There was no equivalent provision in the CPR relating to real evidence, and there was a difference between documents held by a litigant and histological samples held by a judicial officer. In short, there had been no culpable behaviour by either the claimant or her solicitors; the circumstances were completely different from those in *Weaver* or *Currie v Rio Tinto Plc*;[4] and neither the claimant nor her solicitors had deliberately acted so as to prevent a fair trial.[5]

The judge concluded that in any event, a fair trial was still possible and it would not be just, necessary or proportionate to deprive the claimant of the opportunity of having her claim heard. The histological evidence would have been of only limited value, and the remainder of the evidence was sufficient to enable a judge to reach a satisfactory conclusion on.

Swift J. suggested that the chief coroner should consider advising coroners that, in any case where the verdict involved industrial disease, the deceased's family should be advised that, if a claim in respect of the death was pending, they should consult their solicitor before authorising the disposal of tissue samples. In such cases it would be good practice for solicitors to advise both their clients and the relevant coroner's office that histological samples should not be disposed of without confirmation that they were not required for the purposes of a claim.

The application was refused.

Comment

It is important take away the right lesson from this decision because the case facts make the outcome more of an exception than a rule. The basic rule is that solicitors must advise their clients, or where they have represented the client at the inquest they should take direct action themselves, to ensure that the Coroner's office preserves any test samples taken from a deceased victim where there is a reasonable prospect of a disease claim arising out of a culpable exposure to asbestos dust (or any other toxic substance for that matter). If they fail to do so, they risk having their client's claims struck out if the defendant's can demonstrate that the loss of that evidence prejudices the prospects of a fair trial.

In this case, the Coroner's verdict was of death due to industrial disease. That verdict was based on lay and medical evidence, including a post mortum report that attributed the death to pulmonary fibrosis and lung cancer. The claimant's case was that these conditions were the result of the victim being wrongfully exposed by seven defendant employers to asbestos particles during the course of his working life. However, the defendants denied that they had exposed him to sufficient quantities of asbestos to trigger these diseases and they contended that the post mortum findings failed to establish this.

The defendants argued that the asbestos bodies that had been identified by the pathologist in his post mortem examination could just as easily be attributed to environmental exposure, for which they could not be held responsible. In essence, they claimed that the report lacked the precision needed to establish causation. They contended that both diseases were just as capable of being attributed to idiopathic (natural) causes (or because the deceased smoked) as from exposure to asbestos. They alleged that had the samples survived, further light or electron microscopy tests might have revealed that the level to which the deceased had been exposed fell below the causative levels set by Helsinki Criteria in 1977.[6]

[4] *Irene May Currie v Rio Tinto Plc* [2009] unreported Master Eastman, October 6, 2010).

[5] *Irene May Currie v Rio Tinto Plc* [2009] unreported Master Eastman, October 6, 2010) and *Arrow Nominees Inc v Blackledge* [2000] C.P. Rep. 59 considered.

[6] This internationally recognised criteria sets the threshold for the total cumulative dose of asbestos likely to be associated with the development of clinical signs of asbestosis.

The gravamen of the defence case was that that the deceased's daughter had deliberately prejudiced a fair trial by authorising the destruction of the tissue samples and that had they survived, further microscopic tests would have been capable of determining the issues either way.

Swift J. did not accept that the claimant was to blame. Dorothy Matthews had been misinformed by the Coroner's Court that she could dispose of the samples and she found that it was reasonable for her to have acted on that erroneous advice. Furthermore, the fact that she had unwittingly allowed the evidence to be destroyed did not, in the circumstances, threaten to prejudice a fair trial. In this particular case, the expert medical evidence indicated that the electron microscopy tests which the defendants' would have liked to commission would have been unlikely to have been determinative because of the body's ability to cleanse itself of certain types of asbestos particles over time. The judge held that there was sufficient evidence remaining (including the lay witness evidence of the deceased's work colleagues, as well as engineering and medical expert evidence) to permit a fair trial and so she dismissed the Defendants' strike out application.

A strike out application was also refused in *Preston v Hurst*.[7] In that case, the deceased had died from lung cancer. The claimant alleged that this was due to wrongful occupational exposure to asbestos. The defendants were not informed of the victim's death for some time and missed the opportunity to request the deceased's tissue samples be preserved. However, as there had been a lifetime diagnosis of asbestosis, accompanied by detailed evidence of the victims' occupational exposure to asbestos, and well-established scientific evidence which associates a fivefold increased risk lung cancer in asbestosis sufferers, the loss of the tissue samples (however regrettable) did not threaten to prejudice a fair trial.

Nevertheless it should not be forgotten that the strike out applications can and do succeed, as the *Weaver* and *Currie v Rio Tinto Plc*[8] cases demonstrate. In *Weaver*, the deceased died from pulmonary fibrosis. The pathologist's report had identified "occasional asbestos bodies" which was insufficient to categorise the condition as asbestosis. Unfortunately the claimant's solicitor mistakenly thought that this was sufficient and so authorised the samples to be destroyed, without consulting the defendants. In *Currie*, the deceased had died in Australia where post mortems are not routinely conducted in industrial disease cases. The defendants expressly requested the family to undertake a private post mortem because they disputed that the deceased condition of pulmonary fibrosis had been caused by exposure to asbestos. The family refused. In both of these cases, the claims were struck out because the claimants' failure to preserve test samples for analysis had prejudiced the prospects of a fair trial.

Practice points

- Practitioners often have to contend with very real and genuine emotional pressures from grieving relatives anxious to bring closure to their family tragedy. It is entirely understandable that the relatives will want their loved ones' post mortem tissue samples destroyed as soon as possible. However, in an adversarial court system such as ours, unless liability has been admitted in full and unequivocal terms, the Coroner's office should always be instructed to preserve the samples.
- Whilst it is encouraging that Swift J. has written to the Chief Coroner to alert him to the problems caused by the premature destruction of tissue samples and whilst it seems likely that procedures will be tightened up in industrial disease cases, it is unsafe to assume that this will be applied in every case. Practitioners would be wise to ensure that they take the initiative by contacting the relevant Coroner's office to instruct it to preserve the samples in these cases.

[7] *J. Preston and Sons Ltd v Julie Hurst* [2012] EWHC 870 (QB).
[8] *Irene May Currie v Rio Tinto Plc* [2009] unreported Master Eastman, October 6, 2010)

- It is important to consult with the defendants, as a matter of course, on whether the tissue samples need to be preserved. They should be informed that the victim has died and of the Coroner's verdict, if they have not attended the inquest, as soon as possible.
- It would also be sensible to prepare a tactfully worded generic client fact sheet or pro former letter to ensure that the requisite advice is always provided to clients; even potential clients where no formal retainer has been set up.

Nick Bevan

Sneller v Das[1]

(ECJ (Judgment of the Eighth Chamber), November 7, 2013, C-442/12)

Costs and funding—legal expenses insurance—insured persons' freedom to choose a lawyer—Directive 87/344 art.4(1)

EU law; Insurance policies; Legal expenses insurance; Legal representation; Netherlands

Following the termination of his employment, Mr Sneller wished to bring proceedings for unfair dismissal against his former employer. Jan Sneller had previously taken out a legal expenses insurance policy with DAS. He wished to choose a lawyer himself and to have the costs of this legal assistance covered by DAS under his policy.

DAS was happy for legal proceedings to be initiated, but claimed that their contract with Mr Sneller didn't provide cover for the cost of legal assistance provided by a lawyer chosen by the insured person. Instead, DAS said that they would provide legal assistance to Mr Sneller in the form of one of their own employees who wasn't a lawyer. Mr Sneller rejected DAS's offer.

Jan Sneller then issued proceedings in the domestic courts of the Netherlands seeking confirmation that he could choose his own lawyer. Mr Sneller lost both at first instance and on appeal on the basis that art.4(1)[2] of the Directive[3] was only applicable where there was a conflict of interest as there was no requirement for a lawyer to act as it was not a mandatory requirement of Netherlands law and DAS did not consider the matter needed to be referred to external counsel.

The Supreme Court of the Netherlands[4] decided to stay proceedings and to refer the following questions to Court of Justice of the European Union ("CJEU") for a preliminary ruling on these questions:

- Does art.4(1) of Directive [87/344] allow a legal expenses insurer, which stipulates in its policies that legal assistance in inquiries or proceedings will in principle be provided by employees of the insurer, also to stipulate that the costs of legal assistance provided by a lawyer or legal representative freely chosen by the insured person will be covered only if the insurer takes the view that the handling of the case must be subcontracted to an external lawyer?
- Will the answer to Question 1 differ depending on whether or not legal assistance is compulsory in the inquiry or proceedings concerned?

[1] DAS Nederlandse Rechtsbijstand Verzekeringsmaatschappij NV.
[2] See below.
[3] Council Directive 87/344 on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance [1987] OJ L185/77.
[4] The Hoge Raad der Nederlanden.

Article 4(1) of the Directive provides that any contract of legal expenses insurance shall expressly recognise that:

- where recourse is had to a lawyer or other person appropriately qualified according to national law in order to defend, represent or serve the interests of the insured person in any inquiry or proceedings, that insured person shall be free to choose such lawyer or other person; and
- the insured person shall be free to choose a lawyer or, if he so prefers and to the extent that national law so permits, any other appropriately qualified person, to serve his interests whenever a conflict of interests arises.

The CJEU held that the preamble to the Directive and art.4(1) were to be interpreted such that the interests of persons covered by legal expenses insurance must have the freedom to choose their own lawyer. It further held that given the purposes of the Directive was to protect the interests of insured persons, it was incompatible with that purpose to have a restrictive interpretation of art.4(1).

Accordingly the CJEU concluded that Mr Sneller had the freedom to choose who his legal representative should be. They stated that the requirement that the insurer must decide if lawyers are to be instructed was too restrictive and held that an insured person must be free to choose their own legal representation.[5]

Comment

One of the constant battles during the various CFA fights before April 2013 was the frustration expressed by many personal injury claimant lawyers to secure a new client and then to lose them to the appointment of a panel lawyer by their legal expense insurer. For legal expenses insurers their frustration is that there has never been the take up of their products in the United Kingdom as in the rest of Europe where generally it has been a more portable product. At the core of its business model is the usual insurance policy tension between the desire of the insurer to sell its product and the hope that no one makes a claim on it. This is exacerbated in legal expense insurance by the particularly low premium charged and the range of legal matters insured. Until recently, at least in the United Kingdom, this model was supplemented by the referral fee paid by the panel law firm for the benefit of being able to represent the claimant. Ironic because the non panel law firm had probably paid its own referral fee to secure the claimant in the first place.

The present interpretation of reg.6 of the Insurance Companies (Legal Expenses Insurance) Regulations 1990[6] provides that the freedom of choice of solicitor for the policyholder only arises at the issue of court proceedings and not before as most non panel appointed lawyers would like; hence the constant tension. The decision in *Sneller*, as with the other recent decisions of *Brown-Quinn*[7] and *Eschig*,[8] does nothing to solve this issue. The UK Court of Appeal in *Brown-Quinn* had previously held that certain conditions in legal expenses insurance contracts that restrict the insured's choice of legal representative are in breach of the Regulations. In particular, ruling that the freedom of choice could not be fettered by the refusal to appoint the non panel firm for not accepting the insurer's terms and conditions particularly where some were onerous. Interestingly, the court went on to comment that insurers can limit the costs for which they were liable to the insured to their non-panel rates as long as the freedom of choice guaranteed by the Directive "was not rendered meaningless". This seems to be the widely accepted position held by the UK courts in their interpretation of art.4(1).

The European Court in *Eschig* determined that the existence of a group action did not enable the insurer to fetter the freedom of choice.

[5] It was noted by the court that, in certain circumstances, insurers may not necessarily have to meet the costs in full of a chosen legal representative.
[6] Insurance Companies (Legal Expenses Insurance) Regulations 1990 (SI 1990/1159).
[7] *Brown-Quinn v Equity Syndicate Management Ltd* [2012] EWCA Civ 1633.
[8] *Eschig v UNIQUA Sachversicherung AC* (C-199/08) [2010] 1 All E.R. (Comm) 576.

Sneller followed in this vein by setting further parameters within which the ability of the insurer to control the representation is drawn. The CJEU held that the requirement that the insurer must decide if lawyers are to be instructed was too restrictive on the freedom of choice. The claimant's freedom of choice as to their representative should not be dependent upon the insurer's view on whether it is necessary to instruct lawyers. Nevertheless, as though to balance this out, the court went on to state that this does not oblige European Union countries to require insurers to cover all the costs incurred in connection with the defence of an insured person or to prohibit insurers from imposing higher premiums for a higher level of cover for legal assistance costs.

So it may well be said that this EU decision adds little to the practice in the United Kingdom. The best that can be said therefore being that *Sneller* simply reinforces the current practice here that whilst the freedom of choice of a lawyer may not be as broad as many claimant personal injury lawyers at least would like, at the same time the insurers cannot simply forbid the freedom. Their restrictions must be close to the guidance these cases, *Sneller*, *Brown-Quinn* and *Eschig* have set.

The Financial Services Ombudsman said in July 2013:[9]

> "… We look at each case on its own individual merits. However, we are likely to decide that the policyholder should be able to appoint their own solicitors *from the start* only in exceptional circumstances."(original emphasis)

Commenting on Eschig, it adds:

> "Although we are not bound by the law, we do not take the view that the *Eschig* case affects the right of UK insurers to *limit* a policyholder's freedom of choice to *the start* of proceedings or in cases of conflict of interest. However, each case should be considered individually."

It is suggested that this advice will not change following this ruling. Despite the number of complaints expressed by claimant personal injury lawyers that reg.6 is wrongly interpreted and even by some that *Eschig* did actually provide for freedom of choice before proceedings, it is noteworthy no one has challenged this actual point.

Of course in personal injury at least, where qualified one way costs-shifting exists, there is less of a reason to require legal expenses insurance going forward. It may be easier for non panel lawyers hoping to keep their clients in the new regime because they have less protection to replace so that the insurance becomes otiose in the individual case. On the other hand, DAS for example has now established its own ABS incorporating a firm of solicitors. It will want to continue to minimise its outlay and whilst in the Netherlands it was seeking to use in house unqualified personnel, that would not be the case here. We are unlikely to see legal expense insurers throwing open their doors to welcome non-panel lawyers' appointment.

Practice points

- It remains a fundamental duty of a solicitor to ascertain if their client has satisfactory legal expenses insurance.
- If they do the legal expense insurer may object to the appointment of a non panel lawyer prior to the issue of proceedings.

[9] See *http://www.financial-ombudsman.org.uk/publications/technical_notes/legal-expenses.html*. [Accessed January 22, 2014.]

- A solicitor may continue to represent a client prior to the issue of proceedings without using their insurance providing the client has received proper advice on funding and their liability to meet costs and expenses.

Mark Harvey

Greenway v Davies

(SCCO, Master Simons, October 30, 2013, unreported)

Civil procedure—personal injury—pre-action protocol for road traffic accidents—consent orders—costs—detailed assessment—points of dispute—CPR r.45.36—conduct—proportionality—basis for costs recovery

LT Costs; Detailed assessment; Road traffic accidents; Standard basis; Unreasonable conduct

Simon Davies, Kathleen Ollin and Cheryl Ollin were the driver and passengers in a vehicle that was struck in the rear by Roger Greenaway's vehicle as it slowed for a pedestrian crossing. The three claimants claimed for damages were within the scope of the Pre-Action Protocol for Personal Injury Claims in Road Traffic Accidents ("the RTA Protocol"). Their solicitors Lyons Davidson submitted claim notification forms ("CNFs") to Greenaway's insurer AXA via the Protocol's online portal. However, the forms were inadvertently submitted to the wrong AXA Northern Ireland instead of AXA Birmingham. AXA subsequently requested that Lyons Davidson resubmit the forms via the portal. Liability was admitted at that point.

Lyons Davidson did not resubmit the forms and, after receiving limited response from the insurer, issued CPR Pt 7 proceedings. Judgment was entered for the claimants and the claims were settled by consent. The consent order provided that Greenaway would pay the claimants' costs of the action on the standard basis to be assessed if not agreed.

Lyons Davidson served a bill totalling £17,430. Greenaway served points of dispute claiming that, as a result of the failure to comply with the RTA Protocol, costs were to be limited to an amount commensurate with the costs under Pt 45 pursuant to the express power in r.45.36.[1] The case was transferred to the Senior Courts Costs Office where a costs officer held that he was unable to overturn the consent order and would deal with the costs on a standard basis, not under the fixed costs scheme.

Greenaway appealed and submitted that as a result of the claimants' unreasonable behaviour their costs should have been limited to RTA Protocol Stage 1 and Stage 2 costs only.

Master Simons held that it was implicit in the wording of r.45.36 that the power to restrict costs was to be exercised when the judgment was given in favour of the claimants. If Greenaway had wanted to rely on the rule, the time for doing so would have been after the terms of the settlement had been agreed and the parties were negotiating the question of costs. He had not done so and consented to an order for there to be a detailed assessment on a standard basis. That was a contract which the costs judge did not have the power to vary. Even if that conclusion was wrong, the power in r.45.36 was discretionary and not mandatory.

The Master further held that in conducting a detailed assessment on a standard basis, a costs judge was obliged to consider all the circumstances when deciding whether the costs had been proportionately and

[1] Where—(a) the only claim is for a specified sum of money; and (b) the defendant pays the money claimed within 14 days after service of the particulars of claim, together with the fixed commencement costs stated in the claim form, the defendant is not liable for any further costs unless the court orders otherwise.

reasonably incurred, or were proportionate and reasonable in amount. He also had to consider the parties' conduct including, in particular, the efforts made, if any, before and during the proceedings in order to try and resolve the dispute.[2]

Although the consent order overreached the costs consequences set out in r.45.36, the Master held that it had been permissible at the detailed assessment to consider whether the conduct of the claimants was such that it was unreasonable to have removed the case from the alternative regime and therefore unreasonable to have incurred the extra costs that had flowed from that decision.

The Master decided that under the regime in operation at the time the costs judge should have considered first the issue of proportionality as raised in Greenaway's points of dispute. The claimants had sought profit costs in excess of £9,000. The claims were three straightforward small claims for minor injuries sustained in a simple rear-end collision where liability was never in dispute. Master Simons had no doubt that the costs were disproportionate.

On behalf of the claimants, Lyons Davidson had acknowledged their mistake in failing to resend the forms to the correct insurer office, but claimed that AXA had ignored correspondence and failed to engage in any negotiations. The Master held that while AXA's conduct could be criticised, the claimants' failures had led to disproportionate costs being unreasonably and unnecessarily incurred.

Master Simons noted that the claimants were obliged under the Protocol to re-serve the forms on the correct insurer and held that by failing to do so they had acted unreasonably. Had they acted reasonably, then they would not have been entitled to recover more than Protocol costs. The master held that it would be unjust if Lyons Davidson profited as a result of their unreasonable conduct.

Accordingly, in conducting the detailed assessment on a standard basis, the court was not necessarily obliged to carry out a line-by-line assessment of the claimants' bill of costs as the reasonable and proportionate costs recoverable by them were those limited by stages 1 and 2 of the Protocol, and they should not recover more than those costs.

The appeal was allowed.

Comment

Introduction

The introduction of fixed costs across a range of personal injury claims, within the scope of either the RTA Protocol or the EL/PL Protocol, will inevitably lead to arguments on the appropriate level of costs where the defendant contends the claimant has failed to comply with the terms of the relevant protocol and that, as a result, higher costs than would otherwise have been payable, whether fixed or assessed, are being claimed.

In the past, as in this case, the issue has arisen when court proceedings have been commenced in claims subject to the original RTA Protocol (or predictable costs regime). In the future, with cases that leave either the RTA Protocol or the EL/PL Protocol, the same argument may arise where the claim moves from fixed costs payable where the claim is settled within the protocol to one of the subsequent levels of fixed costs.

This topic has previously been explored by the courts in a number of cases including *O'Beirne v Hudson*[3]; *Drew v Whitbread*[4]; *Smith v Wyatt* [2011] EWCA Civ 941; *Patel v Fortis Insurance Ltd*[5]; and *Boyd v Clark*.[6]

[2] *Smith v Wyatt* [2011] EWCA Civ 941 considered.
[3] *O'Beirne v Hudson* [2010] EWCA Civ 52.
[4] *Drew v Whitbread* [2010] EWCA Civ 53.
[5] *Patel v Fortis Insurance Ltd* (December 5, 2011, Leicester County Court).
[6] *Boyd v Clark* (APIL PI FOCIS Vol.21 Issue 5).

These cases suggest that whether the court is applying the terms of Pt 45.24 (formerly Pt 45.36) or assessing costs in accordance with the terms of Pt 44.4 the same considerations are likely to be relevant.

First, the court will need to have regard to the terms of the relevant protocol and whether these have been complied with.

Secondly, if it would appear the terms have not been complied with, the court will need to decide whether that was unreasonable conduct on the part of the claimant, whether that be by causing the claim to leave the protocol or never entering a claim, which was potentially within scope, into the appropriate protocol in the first place.

Thirdly, if the claimant has acted unreasonably, the court will need to consider the extent to which extra costs have been incurred as a result of the claimant's conduct. That may involve consideration of conduct by the defendant because it may be the further costs would, as a result of the defendant's conduct, have probably been incurred in any event.

If there has been a breach of the protocol which unreasonably causes extra costs the court may, in appropriate circumstances, impose a costs sanction under Part 45.24, and effectively cap the claimant's costs at the figure set out in the relevant protocol. Alternatively, as judgment in this case illustrates, the court may reflect the claimant having incurred disproportionate costs when assessing the claimant's costs under Pt 44.4. From a forensic point of the latter rule requires the court to assess costs, rather than simply apply the relevant figure for fixed costs which would have been applicable in the absence of the claimant's unreasonable conduct, though the end result may be precisely the same.

In *Smith*, H.H. Judge Maloney QC held, in a passage expressly approved both when permission to appeal that judgment was dismissed and in this judgment, that:

> "The essential test that emerges from *O'Beirne* and *Drew* appears to me to have two elements, one of substance and one of process.
>
> (a) In substantive terms, the test to be applied on a detailed assessment when this problem arises is:
>
> > Whether it is reasonable for the paying party to pay more than would have been recoverable had the relevant alternative regime applied.
>
> (b) In process terms, what is important is that the Costs Judge always bears in mind that he is both conducting a detailed assessment and applying the test at (a) above. If he does so, and having done so concludes that it was not reasonable to take the case out of the alternative regime and hence not reasonable to incur the extra costs that flow from that unreasonable decision, he will have remained within his proper discretion. If he does not do so, but simply concludes that the case ought really to have been (say) a small claim and therefore that the regime automatically and comprehensively applies, regardless of reasonableness one way or the other, he will have stepped outside of his discretion and in effect rewritten the costs order he is supposed to be applying.
>
> As Waller J. said in *Drew* at 42, this may in some cases be a distinction without a difference; but in other cases, an express consideration of reasonableness may lead to the conclusion that a particular item of costs is allowable, even though it would not have been paid or even considered for payment under the alternative regime."

Consequently, although it may be important, for forensic purposes, to determine whether the court is limiting costs under the terms of Pt 45.24 or assessing costs in accordance with Pt 44.4 the same three considerations are likely to be relevant and are, therefore, worth considering in turn.

Terms of the protocol

Each Protocol describes the behaviour the court will normally expect of the parties prior to the start of court proceedings.

The protocols are, as the court recognised in *Patel*, prescriptive so where these terms are absolute the court is likely to follow the letter rather than what might be perceived as the spirit of those rules.

In this case there was a clear non-compliance in the failure to send the CNF to the defendant's insurer coupled with a failure to re-submit the CNF to the correct insurer.

In *Patel*, it was held that the absence, in the protocol, of an express provision failure to acknowledge the CNF would cause the claim to leave that protocol meant that it would not exit on this basis.

However, in *Boyd*, the court accepted that electronic communication would include by fax and that it was not essential for the CNF to be submitted through the portal.

Claimant's conduct

Where the claimant has not complied with the terms of the relevant protocol the court will need to consider the claimant's conduct.

Under the terms of Pt 45.24 the rule expressly requires the court to determine whether the claimant has acted unreasonably in either causing the claim to leave the relevant protocol or by having never entered a claim, which was potentially suitable, into the appropriate protocol in the first place.

The former situation was considered in *Patel*, where the court held that it was unreasonable to cause a claim to exit the relevant protocol in the absence of an acknowledgement of the CNF.

The latter situation might occur, for example, because the claimant's solicitors believed, at the relevant time, the value of the claim was likely to exceed the upper limit in the protocol. Here it would seem necessary for the court, in the way the court has approached matters when determining allocation, to assess what was a reasonable expectation on quantum in the light of the information then available to the claimant's solicitor. That would ensure the approach towards the upper limit corresponds with the approach the protocol itself provides for the lower limit (even if damages are eventually below that lower limit the claimant will still be entitled to costs if there was a reasonable expectation, at the relevant time, the value would exceed that limit and the defendant has not caused the claim to exit meanwhile).

Under Pt 44.4 the claimant's conduct will again be a very relevant consideration.

Costs consequences

It seems clear, from the caselaw so far in this area, the conduct of the claimant characterised as unreasonable must have caused costs to be incurred, certainly if the court is conducting an assessment and considering the factors identified in Pt 44.4.

In *Smith*, H.H. Judge Maloney QC talked about "extra costs" and, when refusing permission to appeal against the order that judge had made, Moore-Bick L.J. referred to the need for a costs judge to determine "that a particular course of conduct has led to a group of costs being incurred unnecessarily".

This, inevitably, brings into play the defendant's conduct even if that played no part in causing the claim to leave, or never enter, the relevant protocol. Such conduct must be relevant as it is necessary to consider what actually occurred, outside the relevant protocol, to assess what would have happened, and hence what costs would have been incurred, if the claimant had complied with the protocol. Accordingly, in *Patel*, as there had to be a hearing to determine quantum, the court accepted that if the claim had stayed within the protocol costs would have been incurred for Stage 3 as well as Stages 1 and 2.

Prior to the introduction of the new RTA Protocol and the EL/PL Protocol, with associated fixed costs for cases that leave those protocols, if liability was disputed, or even not admitted, by the defendant it was

hard to see how any conduct on the part of the claimant would, ultimately, have resulted in additional costs being incurred. That is because the claim would, in any event, have left the relevant protocol.

In the future, if a claim never enters a protocol the failure to admit liability will not have the same significance, because an ex-protocol claim would still be subject to fixed costs, but that may remain very relevant to the appropriate level of fixed costs.

More generally a defendant should not be allowed to advance an argument the claim would have been dealt with differently had the claimant, in turn, taken, or not taken, the certain step. That is on the basis of applying, by analogy, the observations of Waller L.J. in *Straker v Tudor Rose*[7] when he said:

> "If the judge is finding that the case would have settled as opposed to finding that there was a chance it would have settled, that could not have been other than a speculation. In my view it does not come well from a defendant who has paid money into court to argue that if a claimant had been more reasonable he would have offered more. An investigation as to how negotiations would have gone is precisely the form of investigation which should be avoided. In a case about money a defendant has the remedy in his own hands where a claimant is being intransigent. He can pay into court the maximum sum he is prepared to pay."

The decision of the Master in this case does appear to have rather glossed over what appear to have been failings on the part of the defendant. Crucially, perhaps, it would seem this conduct did not generate any, or any significant, costs as it is evident the claim settled reasonably quickly and hence perhaps open to the judge to reach the conclusion that if the protocol had been followed the claim would have resolved within Stage 2. Whilst not expressly stated this is implicit in the conclusions reached and the order made.

Practice points

A number of important practice points can be made from the judgment in this case.

- Claimants need to be aware of, and comply with, the letter of any applicable protocol. It would be wise to have a contemporaneous file note explaining any decisions or steps that may later be subject to scrutiny, such as a decision not to enter a case, it might later be argued was within scope, into a protocol or causing the claim to leave a protocol.
- A defendant, who contends the claimant has acted in breach of any such protocol, needs to ensure the case is conducted in such a way that the court can be satisfied the claim would have been resolved under the relevant protocol if the claimant had either entered the claim or kept the claim within that protocol. Additionally, a defendant wishing to rely on Part 45.24 should do so at the stage judgment is entered.
- Both parties should be ready to deal with arguments about whether or not extra or unnecessary costs have been caused by the conduct of the other whenever the court is invited to make an order under Pt 45.24 or to assess costs in circumstances when the paying party seeks to argue an alternative costs regime should have applied.

John McQuater

[7] *Straker v Tudor Rose (A firm)* [2007] EWCA Civ 368.

Kesabo v African Barrick Gold Plc

(QBD, Simon J., October 23, 2013, [2013] EWHC 3198 (QB))

Personal injury—civil procedure—extensions of time—late service—particulars of claim—relief from sanctions—CPR r.3.9—exercise of the court's discretion

Deemed service; Extensions of time; Late service; Particulars of claim; Penalties; Personal injury claims; Relief; Service

The 13 claimants claimed in their own capacity in respect of injuries personally sustained and/or as the administrators of the estates of deceased individuals and/or as dependants of deceased individuals. The claims all pertained to injuries or deaths that occurred in or around the North Mara gold mine in Tanzania since 2010 as a result of the use of unlawful and/or excessive force by private security agents and/or police at the mine. The mine is operated under licence held by second defendant ("NMGML"). At all material times, NMGML and the mine were under the control of the first defendant ("ABG").

The injuries and/or death were caused by the acts and/or omissions of the defendants; and/or acts and/or omissions of private security agents and/or police for which the defendants are vicariously liable, and/or in whose acts or omissions the defendants conspired; and for which the defendants are liable in negligence, trespass to the person, conspiracy and/or occupiers and/or equivalent wrongs in law in circumstances in which the law of another country is held to apply to the determination of the substantive issues between the parties.

On March 28, 2013, a claim form was issued by Leigh Day & Co on behalf of all 13 claimants against both defendants. A declaration was sought confirming that their particulars of claim were served in time. The claimants had issued a claim form under CPR r.7.5, which provided that where the claim form was served within the jurisdiction, the claimants had to complete the step required in relation to the particular method of service chosen, before midnight on the calendar day four months after the date of its issue.

The claimants had to issue the claim form by midnight on July 29, 2013. It was in fact served three days earlier but the particulars of claim were not served with the claim form; they were delivered to the defendants' solicitors the following day, 16 hours after midnight on July 29. Under r.16.4 a claim form served within the United Kingdom is deemed to be served on the second business day after the completion of the relevant step under r.7.5(1).

As an alternative to a declaration, the claimants sought relief from sanctions under r.3.1(2)(a) and r.3.9, for non-compliance with r.7.4(2) and that time for service of the particulars of claim be extended for 16 hours or, if necessary 21 days from the hearing of the application. The claimants submitted that r.6.14 (deemed service) had to be looked at to see when the claim form was served.

Simon J. held that on the face of it the requirement was clear; the document had to be served before midnight four months after the claim form was issued.[1] Rule 6.14 did not have the effect of extending the time in which the claim form had to be served. It gave certainty as to when the claim form was deemed to be served: for example, if the claim form was served after business hours on the last day for service, it would be deemed to be served two business days later. Rule 6.14 identified the moment from which subsequent steps in litigation were calculated to take place. It followed that the particulars of claim were not served within the time specified for service.

[1] That view is supported by CPR PD 16 3.2.

An application for relief from sanctions and/or an extension of time under r.3.1(2)(a) must be considered by reference to r.3.9. The judge noted that as from April 1, 2013 it provided that on an application for relief from sanctions the court had to consider all the circumstances of the case, including the need for litigation to be conducted efficiently and at a proportionate cost while giving due weight to the importance of compliance with rules.

Simon J. doubted whether, in the usual case, the new words of r.3.9 required any further elaboration or refinement. However the judge considered that some of the criteria in the old version of the rule might be relevant to the exercise of the court's discretion, although they should not be applied in a formulaic way.[2]

In this case, the judge concluded that the balance was in favour of granting the relief sought to enable the claimants within a short period to serve the particulars of claim.

Comment

The court's approach to applications for extensions of time changed on April 1, 2013. As confirmed by Lord Dyson M.R. in his lecture of March 22, 2013:

> "The tougher, more robust approach to rule-compliance and relief from sanctions is intended to ensure that justice can be done in the majority of case."

He continued: "Parties can no longer expect indulgence if they fail to comply with their procedural obligations."[3]

With that in mind, it is perhaps surprising on the face of it that the court granted relief in this case. It was clear that the claimants' solicitors were aware that the time for serving the claim form and particulars of claim was approaching but made a mistake about the time for service of the particulars of claim, believing they had 14 days after service of the claim form in which to serve them.

Moreover, the particulars of claim contained a number of deficiencies. The detail of the claim had largely not progressed and the pleadings were inadequate, being couched in broad terms with lack of focus on the individual claims and a lack of causative link to the allegations. A number of the pleadings were impossible to respond to, the statement of truth was deficient and the court was not overly impressed with the quality of evidence served in support of the claim.

Notwithstanding those inadequacies and the new overriding objective, the court decided to grant relief. Those factors which were pivotal to its decision was the fact that the fault lay with the claimants' solicitor, as opposed to the claimants themselves; the difficulties experienced having been compounded by the challenges of taking instructions from unsophisticated litigants living in a remote area of Tanzania. Furthermore, the court considered that if relief was refused and new proceedings were brought, they would be brought under a less favourable costs regime, would pose the risk of a jurisdictional challenge and would result in delay which could affect the cogency of witness' recollection. Overall, the court considered the balance was towards granting relief. The emotive nature and public policy considerations of the claim almost certainly had a part to play as well in reaching the decision.

Would the same result be forthcoming now? Kesabo was decided before the Court of Appeal judgment in the widely-reported "Plebgate" case of *Mitchell v News Group Newspapers Ltd*.[3] In Mitchell, the claimant's solicitors failed timeously to file a costs budget or to engage in discussions about costs budgeting. Mitchell was restricted to a budget containing only court fees and was unsuccessful in his application for relief from sanction under the new r.3.9. Both decisions were upheld on appeal.

The Court of Appeal in *Mitchell* made it clear that the most important factors in an application for relief from sanctions "are the need for litigation to be conducted efficiently and at proportionate costs and to

[2] *Rayyan Al Iraq Co Ltd v Trans Victory Marine Inc* [2013] EWHC 2696 (Comm) considered.
[3] *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537.

enforce compliance with rules, practice directions and orders"[4] (emphasis added). Coincidentally, it did so by considering the lower court decision in the case of *Raayan Al Iraq Co Ltd v Trans Victory Marine Inc*[5] in which the claimant applied for an extension of two days for the service of its particulars of claim—slightly more than the 16-hour delay in the present case. The court also used *Raayan* to highlight that there should be little focus on the old version of the rule in deciding applications for relief.

Instead, *Mitchell* confirmed that the starting point is the non-compliance itself. The expectation is that unless the breach of a default sanction is trivial or there is good reason for it, the court will not grant relief. However, what is trivial and what are good reasons? If non-compliance is not trivial (as I would argue is the case in *Kesabo*), the court will consider why the default occurred. The weaker the reason, the more likely the court will be to refuse to grant relief. Good reasons are likely to arise from circumstances outside the control of the party in default. A well intentioned diary error is unlikely to be a good reason. Evidence of prejudice would, therefore, be vital if the present case were to be heard again in order to persuade the court away from refusing to grant relief.

The threshold for relief in practice is likely to come under scrutiny in the coming months. Indeed, contrary to the Court of Appeal's belief that its decision would provide certainty, concern about inconsistent application of the judgment is already apparent. Satellite litigation is inevitable. We are also likely to see applications seeking leave to appeal in cases in which relief was granted post-April 1, 2013 and pre-*Mitchell* on the basis that *Mitchell* should now apply. The present case may well be a contender on its facts. Despite the emotive nature of *Kesabo*, if it were to come before the court again at the time of writing (December 2013), the approach to the outcome would be different and on a strict *Mitchell* basis, relief may well be refused. For the time being, the overriding objective has lost its primacy—it is now secondary to compliance.

Practice points

Some best practice guidelines post *Mitchell* for claims handlers, parties and their lawyers include:

- Put your client on notice of the need to react promptly to requests for assistance, be it disclosure or witness statements, at the outset of a claim.
- Send copies of all court orders to both your client and experts (medical and non-medical) so all those involved in the claim are aware of court ordered deadlines. Explain the importance of meeting deadlines and the potential consequences of missing them.
- Act quickly if you are likely to breach a court order. Apply for a variation or change to the timetable before the deadline occurs, do not wait to apply for relief against sanctions. Time is of the essence as applications for extensions before the applicable deadline may be looked upon more favourably by the court. If in doubt about what sanction might apply to the breach, consider making an application for both a variation and relief from sanctions at the same time.
- Ask your opponent(s) to consent to an application to extend as mutual agreement will presumably be looked upon more favourably by the court. However, in this new climate will litigants readily agree? If you are applying for relief against sanction then, post Mitchell, expect it to be opposed with inherent cost consequences.
- Formulate orders which allow room around court imposed requirements. For example, disclosure where a third party is involved "using best endeavours". Set out the sanction for default in express terms to avoid arguments later and include liberty to apply in respect of specifics. Depending on the case, consider shorter timetables if possible interspersed with CMCs.

[4] See *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537 at [49].
[5] *Raayan Al Iraq Co Ltd v Trans Victory Marine Inc* [2013] EWHC 26966 (Comm).

- Be prepared to explain in detail to the court why an extension of time is needed. Reasons need to be strong and cogent as inadvertence of looming deadlines will not suffice. Be prepared to admit what went wrong, including with regard to third party responsibilities. The court will expect you to be proactive in moving a case on which may require making use of third party orders.
- If prejudice will be suffered as a result of refusal to grant relief (or extend a deadline) then say so. Serve evidence to assist the court (as was missing and noted as required by the Court of Appeal in *Mitchell*).

Richard West

Davidson v Aegis Defence Services (BVI) Ltd

(CA (Civ Div), Longmore L.J., McFarlane L.J., Vos L.J., December 11, 2013, [2013] EWCA Civ 1586)

Personal injury—civil procedure—delay—limitations—prejudice—discretion—exclusion of time limits—refusal to disapply—prejudice caused by delay—Limitation Act 1980 s.33—service of claim forms—CPR 6.3(1)

LT Extensions of time; Late service; Personal injury claims; Prejudice; Professional negligence; Solicitors' powers and duties

Mr Davidson had brought a personal injury claim against his employers following a back injury sustained during a medical training course. His claim form was considered not to have been served in time. Mr Davidson instructed new solicitors and a new claim form was issued and served together with an application to disallow the three-year time limit pursuant to s.33.

The judge dismissed the application on the basis that unfairness had been caused to the employer by a delay in notification of the claim, which had been aggravated by the claimant's failure to commence proceedings within the limitation period and exacerbated by a loss of documents after they had been moved to a different location. He stated that the prejudice to the claimant in having to pursue a claim against his former solicitors was slight by comparison. The judge set out the guidance in *Cain v Francis*[1] and cited dictum in *McDonnell v Walker*[2] that it should not be easy for a claimant to commence a second action and obtain a disapplication of the limitation period.

The claimant appealed submitting that *McDonnell* was inconsistent with *Aktas v Adepta*[3] which was to be preferred. He also argued that the judge failed to take into account that any claim against his former solicitors would have to be confined to a loss of the chance of success against the employers and would be an unsatisfactory way of litigating his claim. In addition, he contended that the judge was wrong to find that there had been any prejudice to the employers arising after the expiry of the three-year limitation period.

The Court of Appeal held that there was no conflict between *McDonnell*, which stated that it should not be easy to obtain a disapplication of the time limit and *Aktas*, which stated that it should not be too

[1] *Cain v Francis* [2008] EWCA Civ 1451.
[2] *McDonnell v Walker* [2009] EWCA Civ 1257.
[3] *Aktas v Adepta* [2010] EWCA Civ 1170.

difficult either.[4] The judge correctly followed the guidance in *Cain* which was of most use to first instance judges who were asked to disapply the three-year time limit in personal injury cases.[5]

They further held that the judge was fully aware that a claim against the claimant's former solicitors would be based on a loss of chance of success in the original proceedings. They confirmed that litigation against a claimant's former solicitors was second best recognising that it was something which a judge could, and usually should, take into account as best he could.[6] All of the matters relating to prejudice raised by the claimant had been considered by the judge as well as the well-known fact that memories became less reliable, the staler an action became.

Their decision was that the judge was entitled to conclude that there had been prejudice caused to the employers after the expiry of the limitation period. The appeal was dismissed.

Comment

The claimant, Mr Davidson, was originally a member of the Parachute Regiment and had served in Iraq before he left the army in 2002. Subsequently he worked as a protection operative and in November 2007 was engaged as a Security Escort Team the defendants.[7]

In November 22, 2007, while in Basra, he participated in a medical training course wearing full military body armour, weapons and equipment. Part of that training involved him dragging and lifting a colleague wearing the same kit. The combined weight of the men and equipment was 155kg. While doing this Mr Davidson sustained a back injury which he alleged was caused by rotation of his back under the heavy load.

Although the injury did not appear to be too bad at first as a result of the injury his employment was terminated with effect from December 18, 2007 by which time he was back in England.

In about March 2009, he instructed solicitors to pursue this claim against Aegis but they did not send a letter of claim pursuant to the pre-action protocol for personal injuries until December 10, 2009.[8] Matters proceeded in what the Court of Appeal called "a leisurely fashion" but on July 23, 2010 Aegis' insurers said that Aegis intended to deny liability.

A letter requiring Aegis to make the disclosure required by the pre-action protocol letter elicited a response on October 12, 2010 from Aegis' insurers that their inquiries were incomplete. The three year time bar for personal injury was due to expire on November 22, 2010 and the solicitors issued a claim form on November 15, 2010.

The claim form had to be served within four months; a photocopy of the claim form was served on Aegis on February 18, 2011 "but that did not comply with CPR 6.3(1) which requires an original sealed claim form to be served".[9] Aegis did not assert that the claim form had not been served until 3.30pm on March 15 when they consented to a request from Irwin Mitchell for an extension of time for service of the particulars of claim until May 10, 2011. Mr Davidson applied for a further extension of time which was not agreed. An application was listed for June 20, 2011, when Aegis said in the face of the court that the claim form had not been served.

An application was made for an extension of time for service pursuant to CPR 7.6 until August 26, 2011 or an order dispensing with service altogether. That application was refused by District Judge Birkby on September 5, 2011 and an appeal from that order was dismissed by H.H. Judge Robinson on January 13, 2012.

[4] *McDonnell v Walker* [2009] EWCA Civ 1257 and *Aktas v Adepta* [2010] EWCA Civ 1170 considered.
[5] *Cain v Francis* [2008] EWCA Civ 1451 followed.
[6] *Donovan v Gwentoys Ltd* [1990] 1 W.L.R. 472 followed.
[7] The second defendant was a company which, until July 2011, provided security services to western organisations operating in Iraq. It sub-contracted the recruitment and engagement of personnel to the first defendant, a wholly owned subsidiary of the second defendant.
[8] This may have been because they were awaiting a medical report which Mr Davidson sent to Aegis on October 30, 2009.
[9] *Davidson v Aegis Defence Services (BVI) Ltd* [2013] EWCA Civ 1586 at [4] per Longmore L.J.

Inevitably Mr Davidson was advised to instruct new solicitors; they issued a new claim form on April 5, 2012 which was duly served on May 10, 2012 together with an application to disallow the three-year time bar pursuant to s.33 of the Limitation Act 1980. That application was dismissed by Mr Nigel Wilkinson QC sitting as a Deputy Judge of the High Court and the decision of the Court of Appeal above is the result.

When I read this decision what leapt out from the page was the statement that a photocopy of the claim form was served on Aegis on February 18, 2011 but that did not comply with CPR 6.3(1) which requires an original sealed claim form to be served. Is that correct? Can that be correct?

In *Weston v Bates*,[10] Tugendhat J. considering service out of the jurisdiction[11] noted that the steps required to bring a claim form to a person's attention may be taken by any method permitted by the law of the country in which those steps are to be taken. If those steps are successful in bringing the claim form to that person's attention by such a method, there is no additional requirement that a particular hard copy of the claim form be used. He stated the concepts of "original", "first generation copy" and "second generation copy" which had been discussed in the case were not terms that can be derived from the CPR concluding:

> "So far as the CPR is concerned, what constitutes a claim form is a matter of substance. The words 'claim form' are not a reference to a particular hard copy of a document."

In *Hills Contractors & Construction Ltd v Struth*,[12] Ramsey J. took a different view. He concluded that a claim form was not properly served when a photocopy was sent with a letter, the one and only sealed original copy had to be served otherwise service was not effective.

On October 1, 2008, a new version of CPR Pt 6 came into effect. Prior to that service had become a minefield. Perils and pitfalls abounded. Case after case ended up in the Court of Appeal on technical service points. The changes were meant to stop all that. To a large extent they have.

The passing comment of Longmore L.J.[13] that the photocopy of the claim form served on Aegis did not comply with CPR 6.3(1) which requires an original sealed claim form to be served sent shivers down my spine. Is that correct?

CPR 6.4(3) states that: "Where the court is to serve the claim form, the claimant must, in addition to filing a copy for the court, provide a copy for each defendant to be served." The claimant will also be sent a sealed copy. However, if the claimant is to serve (on the basis of the Salford practice[14]) usually the court will only send one sealed copy back to the claimant back. If that is served the claimant will not have a sealed copy available for his file.

CPR 6.3(d) authorises service by fax or other means of electronic communication.[15] It is impossible to serve an original copy by either of those means, so only a copy can be served. PD 4.3 specifically states that: "Where a document is served by electronic means, the party serving the document need not in addition send or deliver a hard copy." Again that change came in on October 1, 2008 to remove another technical service point trap.

In *Abela v Baadarani*,[16] Sir Edward Evans-Lombe cited at [59] an earlier judgment in the same case where Lewison J. said at [4]:

> "The purpose of service of proceedings, quite obviously, is to bring proceedings to the notice of a Defendant. It is not about playing technical games. That echoes the definition of 'Service' in the Glossary to the CPR: Steps required by rules of court to bring documents used in court proceedings to a person's attention."

[10] *Weston v Bates* [2012] EWHC 590 (QB).
[11] CPR Pt 6.40(3)(c).
[12] *Hills Contractors & Construction Ltd v Struth* [2013] EWHC 1693.
[13] *Davidson v Aegis Defence Services (BVI) Ltd* [2013] EWCA Civ 1586 at [4].
[14] National Civil Business Centre.
[15] In accordance with Practice Direction 6A.
[16] *Abela v Baadarani* [2011] EWHC 116 (Ch).

This section was repeated again by Lord Clarke when *Abela*[17] reached the Supreme Court and at [37] he made his view clear saying:

> "Service has a number of purposes but the most important is to my mind to ensure that the contents of the document served, here the claim form, is communicated to the defendant. In *Olafsson v Gissurarson (No.2)*[18] I said, in a not dissimilar context, that
>
> > '… the whole purpose of service is to inform the defendant of the contents of the claim form and the nature of the claimant's case: see e.g. *Barclays Bank of Swaziland Ltd v Hahn* [1989] 1 W.L.R. 506 at 509 per Lord Brightman, and the definition of service" in the glossary to the CPR, which describes it as "steps required to bring documents used in court proceedings to a person's attention …"'
>
> I adhere to that view."

In both *Weston v Bates* and *Hills Contractors & Construction Ltd v Struth* the court considered the Court of Appeal decision in *Cranfield v Bridgrove Ltd*.[19] In the second case, Ramsey J. concluded that it was "evident from the judgment of Dyson L.J. [in *Cranfield*]" that a service of a copy of the claim form was not sufficient and that what was required was a document originally issued and sealed by the court. For those reasons, in *Hills* he held that the photocopy of the claim form which was sent by Document Exchange to the defendants solicitors was not the document required for service to be achieved under CPR 6.3.

In *Weston*, Tugendhat J. recognised that in *Cranfield* the decision of the Court of Appeal turned on "the interplay between s.725 and the Rules",[20] a point first raised by that court itself.[21] Although the court refered to "the original claim form", there was no discussion in prior authorities of what is meant by "the original claim form", nor of first generation and second generation copies. In fact, the guidance the court was giving[22] was stated to be as to CPR Pt 6.9, not as to what documents had to be served.

Tugendhat J. also noted that CPR Pt 7.5 includes no express reference to the court sealing a claim form. All that it, and the Practice Direction, refer to is the issuing of claim form and the entering of the date on the form. In Practice Direction 7A,[23] it is clear that the words "claim form" refer to the document received in the court office, and so at a time when it does not yet bear any date stamp or seal fixed to it by the court staff.

CPR Pt 7.3 is worth considering too. It provides that: "A claimant may use a single claim form to start all claims which can be conveniently disposed of in the same proceedings." So in a case with say two defendants, a claimant may use a single claim form. But the claimant cannot simultaneously serve the same hard copy on two different defendants. So where there are two or more defendants, surely what must be served cannot be required to be the one and only claim form first issued by the court.

Here because of a point which Longmore L.J. called "one of the great technicality",[24] service of a copy rather than the original claim form, the claimant now faces the uncertainty of a loss of a chance action against his former solicitors instead of a being able to pursue an action against those he believes are responsible for his injuries. CPR 1.1(1) states: "These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost." Not in this case I fear.

[17] *Abela v Baadarani* [2013] UKSC 44.
[18] *Olafsson v Gissurarson (No.2)* [2008] EWCA Civ 152 at [55].
[19] *Cranfield v Bridgrove Ltd* [2003] EWCA Civ 656.
[20] *Weston v Bates* [2012] EWHC 590 (QB) at [84].
[21] *Weston v Bates* [2012] EWHC 590 (QB) at [74].
[22] In *Weston v Bates* [2012] EWHC 590 (QB) at [67].
[23] *Davidson v Aegis Defence Services (BVI) Ltd* [2013] EWCA Civ 1586 at [5.1] and [5.2].
[24] *Davidson v Aegis Defence Services (BVI) Ltd* [2013] EWCA Civ 1586 at [5].

On the limitation aspect the claimant's best point seems to have been that there was a conflict between *McDonnell* and *Aktas*. The court's view was that the fact that one judge says of another judge's "general remarks" that he would be "somewhat circumspect" does not constitute a conflict. To them it was merely the second judge saying that the remarks of the earlier judge cannot be treated as an easy or universal mantra which will apply in all cases.

In *McDonnell*, Waller L.J. was saying that it should not be easy to obtain a disapplication of the time-limit (which this court confirmed it should not be). In *Aktas*, Rix L.J. was reminding practitioners that it should not be too difficult either (which this court also confirmed it should not be). Neither judge questioned the guidance of Smith L.J. in *Cain v Francis*.[25] That was applied by the judge when he exercised his discretion not to disapply the three-year time.

Practice points

- It should neither be too difficult nor too easy to obtain a disapplication of the three year time-limit.
- Disapplication of the time-limit is a matter of discretion.
- Cases are always fact sensitive.
- Applications for a retrospective extension of time to serve a claim form under CPR 7.6 or for an order dispensing with service altogether under CPR 6.16 will rarely succeed.
- If you are in trouble consider the possibility of using CPR 6.15(2) and ask the court to order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service.
- Orders under CPR 6.15(2) can be made if there is "good reason " to do so.[26]
- The fact that the defendant learned of the existence and content of the claim form is a critical factor when considering what constitutes a good reason to make an order under CPR 6.15(2).[27]
- Service has a number of purposes, the most important of which is to ensure that the contents of the document served are communicated to the person served.[28]
- The fact that a claimant has delayed before issuing the claim form is not, save perhaps in exceptional circumstances, relevant when determining whether an order should be made under CPR 6.15(2). The focus must be on the reason why the claim form cannot or could not be served be served within the period of its validity.[29]
- Service of proceedings remains an area with traps for the unwary.
- To avoid one trap always serve an original sealed copy not a photocopy.

Nigel Tomkins

[25] *Cain v Francis* [2008] EWCA Civ 1451 at [73].
[26] The Court of Appeal was wrong to say that the making of an order under CPR 6.15(2) in a service out case is an "exorbitant" power. It is not appropriate to say that such an order may only be made in "exceptional" circumstances: *Abela v Baadarani* [2013] UKSC 44 .
[27] *Abela v Baadarani* [2013] UKSC 44.
[28] *Abela v Baadarani* [2013] UKSC 44.
[29] *Abela v Baadarani* [2013] UKSC 44.

Hussain v King Edward VII Hospital

(CA (Civ Div), Longmore L.J., Lewison L.J., Kitchin L.J., December 12, 2013, unreported)

Personal injury—clinical negligence—civil evidence—shoulder—pain post cancer-related operation—causation—credibility—fresh evidence—failure to obtain fresh evidence with reasonable diligence—Data Protection Act 1998—Civil Procedure Rules 1998 r.31.17

LT Clinical negligence; Credibility; Fresh evidence; Permission to appeal; Sufficiency of evidence

Mr Hani Hussain was an electronic engineer who worked for the Kuwait Oil Company. He was exposed to noxious gases following an accident at an oil refinery in Kuwait. When he was medically examined a potentially cancerous growth was found. In April 2004, when he was aged only 32, he underwent a cystoscopy. Tests revealed about two months later that he had contracted bladder cancer. He was advised that regular investigations would be required. He was referred to the King Edward VII Hospital and saw Mr Julian Shah, a consultant urologist, in December 2004. A further cystoscopy was arranged for January 5, 2005.

The procedure took only a few minutes, from approximately 10.50am to 10.55am. A general anaesthetic had been administered under the supervision of Dr Hamilton-Davies. Unfortunately, when he woke following the operation about 20 minutes afterwards, Mr Hussain found that he was experiencing severe pain in his left shoulder. For this he was prescribed morphine and again became unconscious.

After spending two nights at the hospital, Mr Shah advised him not to return to Kuwait but to remain in England to recuperate. He was also to see a consultant orthopaedic surgeon, Mr Lambert, in connection with the shoulder pain. He subsequently underwent a number of tests and investigations in relation both to his bladder and to his shoulder. Subsequently he had considerable further treatment, initially for kidney stones and later for recurrence of the bladder cancer. Finally he had to take retirement on medical grounds.

On May 17, 2007, solicitors instructed by him wrote a letter before action to the King Edward VII Hospital relating to the onset of his persistent shoulder pain while he had been under its care on January 5, 2005. The bladder cancer then recurred, necessitating an urgent operation in Kuwait in August 2007. In March 2008, he returned for a further growth to be removed at the Harlesden Hospital and was not well enough to return home until July 4, 2008.

The claimant's case was that he had not been aware of any shoulder problem before the first operation. The referral letter stated that there was no evidence of bruising or bleeding on examination and that the claimant could not recall any such bruising. The scan showed that he was suffering from a chronic underlying degenerative condition.

Mr Hussain issued a claim in 2010 asserting that the hospital's negligence had led to his injury. The parties' medical experts agreed that there had been an acute exacerbation of a chronic underlying degenerative condition. At trial, the claimant asserted that his shoulder had been bruised. Eady J. found in a reserved judgment[1] that the claimant had failed to establish a prima facie case of negligence. He held that the relaxation of his muscles during the operation had caused the onset of the shoulder pain and that if he had suffered trauma as a result of the hospital's negligence there would have been bruising present but there was no contemporaneous evidence of bruising.

During the period when Eady J. was considering his decision, the claimant became aware of a fax cover sheet signed days after his operation in 2005 by a senior medical administrator from the Kuwait Health

[1] *Hussain v King Edward VII Hospital* [2012] EWHC 3441 (QB).

office in London. It stated that blood had been seen underneath his skin. A letter, written after judgment, had been handed down by a doctor who had been the head of the Kuwait Health office in London stating that he had seen bruising on the claimant.

The claimant submitted that if the fresh evidence were to be admitted it would demonstrate that the judge's decision was wrong and unjust, and that he was in fact bruised at the material time.

The Court of Appeal noted that after the claimant had woken from his operation and had been examined, there was no note documenting any redness or lumps. Neither was there any evidence from his physiotherapist or Mr Shah that he was bruised. The first mention of bruising had been when the claimant's medical expert had given evidence and stated that the claimant had seen bruising after his operation.

They held that the claimant should have tried to obtain all relevant documents to support his case however nothing was done until 2011 when he explained to his solicitors that his employer had its own hospital in Kuwait and even then a request for the documents was not made promptly. It was not until 2012 that the first written request for his medical notes was made, and the request was made under the Data Protection Act 1998 instead of CPR r.31.17.

In addition, even if his assertion in his witness statement that he did not appreciate the importance of the bruising was true, he had known the importance of the bruising by the time of trial. He should not have waited until judgment had been handed down before bringing it to the court's attention. Similarly he had again behaved in a dilatory manner in drawing the court's attention to the letter, as Mr Shah had, in his witness statement, referred to the writer being responsible for co-ordinating the claimant's care. They had no doubt that inquiries could have been made much earlier in respect of the letter from the doctor who had been the head of the Kuwait Health office. In the circumstances, it was clear to them that the evidence could have been adduced at trial with reasonable diligence.

The next issue was credibility. The Court of Appeal concluded that the fax cover sheet and letter both lacked credibility. The fax cover sheet was vague; it stated that blood had been seen under the claimant's skin, but it did not specify who had seen blood under his skin. In addition, no attempt had been made to contact the senior administrator who had supposedly signed the document, nor was there any evidence from her. No contemporaneous note had been made of the bruising he now stated that he had seen in his letter, and the court concluded that it was inconsistent with the fax cover sheet, which noted the presence of blood but not bruising. Even if the fresh evidence had been before the trial judge they held that it would not have changed his mind. The proposed evidence failed requirements one and three of the *Ladd v Marshall* test and thus could not be adduced.[2]

The appeal was dismissed.

Comment

This is another clinical negligence action for damages where the claimant sought to rely on the evidential principle of res ipsa loquitur.[3] In short, the claimant invited the judge to conclude that the facts established a prima facie case in negligence. In a nutshell, the judge, Eady J., concluded they did not stating: "I am bound to dismiss the claim in negligence, for which there is simply no convincing support."

At first instance the main issue was the mechanism of injury. Causation was established in that the experts agreed that the claimant had a serious shoulder injury and that he sustained it during his operation. The issue was whether there was any breach of duty and the claimant was relying on res ipsa loquitur. The claimant went into the operation with an apparently normal shoulder and awoke in pain and severely disabled. The experts agreed that he had a previously asymptomatic underlying degenerative condition and that during surgery something occurred to cause the condition to become apparent and disabling.

[2] *Ladd v Marshall* [1954] 1 W.L.R. 1489 applied.
[3] See *Thomas v Curley* [2013] EWCA Civ 117 and my comment at [2013] J.P.I.L. C83–C86.

The claimant invited the court to conclude that this was a result of some trauma sustained in breach of the duty of care owed to him. The defendant disputed that there was any trauma and called evidence to rebut any inference of a breach of duty. The experts agreed that onset of acute pain could be brought about by forces very much less than those necessary to injure a normal shoulder. Even careful handling in accordance with good practice could have exerted sufficient pressure to cause the injury. The evidence was that even the relaxation of the shoulder musculature produced by the general anaesthetic could itself have altered the anatomical alignment of the degenerative structures in such a way as to cause an acute arthropathy. In other words, the anaesthetic itself could have given rise to the injury.

In order to try to bolster the case for some traumatic cause, the claimant made various claims regarding bruising of his shoulder and raised issues relating to his handling and transfer. He claimed there was bruising of his shoulder which supported his claim for a traumatic cause. Unfortunately, the judge concluded that none of the factual evidence provided any support for this. Indeed to the extent that the defendant called significant evidence on this issue to rebut the res ipsa loquitur presumption, the judge felt compelled to conclude otherwise stating:

> "This is a very tenuous basis upon which to invite the court to conclude that the trigger for the realignment of the bone and tissue was, probably, an extraneous impact to the surface of the shoulder or that this occurred through negligent handling during the period of anaesthesia. On the totality of the evidence before me, I am not satisfied, on a balance of probabilities, that bruising was present at any material time. That is a significant point in this case, since bruising would at least provide some evidence of a possible trauma. Also, in the context of res ipsa loquitur, it could arguably have given rise to a prima facie case of negligence. Without such a finding the doctrine has no application."

The claimant appealed, applying to adduce fresh evidence on the issue of bruising. This consisted of some further medical records from Kuwait. However, the Court of Appeal gave this short shrift. They said the claimant should have tried to obtain all relevant documents to support his case before trial. They noted that despite the Protocol Letter of Claim being sent in 2007 nothing was done until 2011 when the claimant explained to his solicitors that his employer had its own hospital in Kuwait. They noted that even then a request for the documents was not made promptly. It was not until 2012 that the first written request for the claimant's medical notes was made and they further noted that the request was made under the Data Protection Act 1998 instead of CPR r.31.17.

Applying the *Ladd v Marshall* test they concluded that the evidence could have been obtained previously and adduced at trial with reasonable diligence and in any event lacked credibility so that if it had been available at trial it would not have changed the judge's mind.

Practice points

- Acting for claimants who have been treated abroad can make obtaining relevant medical records difficult. Here the Court of Appeal were not sympathetic to the claimant when he tried to put further records in evidence on appeal indicating that they could (and should) have been obtained and produced before trial. That must surely be correct. There was implicit criticism of the claimant's lawyers for their delay in obtaining the records and for the manner in which disclosure was sought. Practitioners should be alert to the difficulties and delays that can arise in seeking records from overseas and the procedural basis for obtaining such evidence which differs from that of a conventional domestic application for records under the Data Protection Act 1998. Here the correct approach was to seek an Order for disclosure against a person not a party to proceedings under CPR r.31.17.

- With apologies to *Yes Minister*,[4] it's a courageous claimant who goes to trial relying solely on res ipsa loquitur, particularly in the face of a defendant's expert who has come up with a logical and not unlikely explanation for the mechanism of injury and a plethora of witness evidence to rebut the presumption of any breach of duty.

Muiris Lyons

[4] One of my favourite scenes from the classic BBC political comedy *Yes Minister* is from "The Right to Know": Sir Humphrey: "There are four words you have to work into a proposal if you want a Minister to accept it." Sir Frank: "Quick, simple, popular, cheap. And equally there are four words to be included in a proposal if you want it thrown out." Sir Humphrey: "Complicated, lengthy, expensive, controversial. And if you want to be really sure that the Minister doesn't accept it you must say the decision is courageous." Bernard: "And that's worse than controversial?" Sir Humphrey: (laughs) "Controversial only means this will lose you votes, courageous means this will lose you the election."

Cumulative Index

This index has been prepared using Sweet & Maxwell's Legal Taxonomy.