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Articles

Case and Comment

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- The *Journal* provides:
  - Information on the key cases decided in the last quarter.
  - 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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Please:

- Provide the article on paper and on floppy disc or via e-mail.
- Submit in Word for Windows or Wordperfect or Rich Text Format or ASCII.
- Make it as long or short as you like but the average length is around 10–20 pages of A4 in 1.5 line spacing.
- *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.
- Only submit original work which has not been published elsewhere.
- Do not libel anyone in the article!

Thank you.

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Editorial

Welcome to the June 2014 edition of JPIL.

The Jackson/LASPO reforms are now a year old, although there was little in the way of cake and balloons to mark this occasion from the majority of claimant personal injury practitioners struggling to come to terms with the reforms. As the profession gets to grip with the impact of these changes, this edition includes a strong Jackson/*Mitchell* theme.

APIL Chief Executive and JPIL Board member *Deborah Evans* examines the changes in the market place which the reforms have exacerbated and addresses how the banning of referral fees and the growth of ABS-type organisations have started to have a profound impact on the way the personal injury profession organises itself.

Recently elected APIL President (and new JPIL Board member) *John Spencer* adds his expert perspective on how firms should adapt to the ban on referral fees and approach the issue of marketing themselves with particular reference to their digital market strategy.

The case of *Mitchell* saw the Court of Appeal adopt a very hard line on issues of delay and default and introduce a whole new judicial approach to procedural compliance. Does "form" now trump "substance"? Is the good administration of the courts now more important than justice between the parties? Is there another way of approaching the issue of relief from sanctions? *Steven Akerman* suggests there is, and his article on using CPR 3.10 to deal with errors in procedure may provide a valuable lifeline for litigators and give the courts an alternative to the strict application of *Mitchell*.

The impact of Jackson is also being felt "north of the border", where first the Gill Report and, more recently, the Taylor Report have addressed similar issues in Scotland. APIL EC member and Scottish representative *Gordon Dalyell* looks at the (dare I say more sensible?) approach taken by Sheriff Principal Taylor and compares and contrasts this with that adopted by Jackson L.J.

A significant impetus for the Jackson reforms came from concern by some about the increasing number of and cost of whiplash claims and, notwithstanding the introduction of fixed costs and the RTA portal, this remains very much an area of contention. Consultant Trauma Surgeons *Nikhal Shah* and *Stuart Matthews* are recognised medico-legal experts and give us the benefit of their views on the medical causation of whiplash-type injuries, including low velocity impact collisions.

Another area of reform introduced by Jackson was the abolition of the recoverability of success fees, but there are still a significant number of pre-Jackson CFA claims working their way through the system and, whilst they do, the issue over what level of success fee is recoverable remains live. This is particularly so in the area of noise-induced hearing loss. *Robert O'Leary* looks at the issues that have arisen in these cases and the challenges that insurer defendants are making to what was accepted to be the appropriate fixed success fee by seeking to reclassify these cases as outside the scope of the industrial disease provision for fixed success fees.

In the December 2013 edition of JPIL, we featured an article from Priestley, Manchester and Aram on neuropsychological evidence in brain injury cases. JPIL Board member *Colin Ettinger* builds on this article, looking at the practical aspects of using such evidence by reference to three High Court decisions, and maps out for practitioners the issues that arise.

Our final article in this edition is a thought-provoking and topical look at the issue of self defence in the context of defending oneself and one's property from burglars. *Jill Dickinson* looks at the issue of "burglar battering" and contrasts the approach taken by the criminal law (influenced hugely by political posturing) and that taken by the civil law.

There are also two Board changes to report. We say thank you and bid farewell to *Richard West* and long-standing Board member *Nick Bevan*. We are grateful to both for their contributions to the Journal and, in particular, to Nick who has been a staunch supporter of the Journal for many years.

In their stead, we welcome to the Board two very well known personal injury practitioners. As indicated above, we are delighted to welcome new APIL President *John Spencer*, and also Slater & Gordon partner *Simon Allen*. Their huge experience and depth of expertise will make a valuable contribution to the future of the Journal.

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 & Maxwell.

Muiris Lyons
General Editor

Whiplash Injury

Nikhil Shah*

Stuart Matthews**

LT Neck; Road traffic accidents; Whiplash injury

Nikhil Shah and Stuart Matthews are both Consultant Trauma and Orthopaedic Surgeons. In this article they provide a brief review of the medical literature on the issue of whiplash-type injuries and examine the difficulties that arise in trying to make a diagnosis based on objective signs and symptoms as opposed to subjective sign and symptoms. They explain the anatomy of the spine and the bio-mechanics of whiplash-type injuries and explore the issues surrounding chronic whiplash injuries and those attributed to low-velocity impact collisions. They conclude that the overall quality of the medical literature is less than robust and that there is a need for more conclusive research.

Introduction

The term whiplash was first coined by Crowe in 1928. Whiplash injury comes at a significant cost to the UK economy. It elicits significant controversy in the medical and in the legal world and remains a debated contentious topic, with strong opinion in favour of, and against, this condition being a serious medical condition, versus a social problem.

This brief article attempts to explore some aspects of this subject. It is not meant to be a comprehensive review but we hope it will stimulate the reader to adopt a more questioning attitude to published literature, the overall quality of which remains less than robust.

The term whiplash actually refers to the mechanism of injury and is stated to be an acceleration/deceleration mechanism of energy transfer to the neck which may result from motor vehicle accidents. The Quebec Taskforce definition of whiplash associated disorders, published in 1995 by Spitzer, is known universally. It is believed that the differential acceleration of the head and upper torso in relation to the trunk, because of being subjected to a sudden change in velocity, is responsible for causing the whiplash injury.

There seems to be a general agreement that an acute injury may indeed have occurred in some patients who are labelled as a whiplash patient after a traffic collision. The main controversy arises when victims involved in accidents seem to have chronic symptoms for extended periods of time and these symptoms are often attributed to the accident.

Patients involved in low speed accidents often report much higher levels of pain than those involved in high velocity accidents. It seems paradoxical that the incidence of whiplash injury following polytrauma is lower than that found after low speed accidents.

Quality of research

Proponents of whiplash injury would argue that such an injury can occur irrespective of the magnitude of the collision. It is stated that the force of impact has little to do with injury causation.

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Such arguments are usually based on a paper by Brault. This merits a brief mention. In Brault's experiment 42 persons were exposed to controlled low-speed rear-end automobile collisions. Approximately 29 per cent and 38 per cent of the subjects exposed to 4km/h and 8km/h experienced or reported symptoms (not proven injury). The authors (none of them doctors) therefore concluded that this establishes a cause and effect relationship between rear end collisions and clinical symptoms and signs.

This piece of research is still stated by a proportion of the legal and medical profession to be the proof of low velocity road traffic accidents leading to many months if not years of symptoms, without any attempted scientific analysis of the methodology of this article. Subjective symptoms reported by volunteers have often been misinterpreted as objective injury. There is no proven injury in any of Brault's subjects. Since spinal pain is so prevalent in the general population, even without injury, as known from epidemiological studies, other sources of symptoms were being ignored by Brault's study. The subjects who reported symptoms did so for between one and three days. The paper does not constitute evidence of long-term symptoms or prolonged recovery times. A subsequent review by Davis, based on accepting and quoting Brault's study, argued that a change in velocity of 2.5mph was sufficient to cause symptoms.

This unfortunately has been the main problem associated with the literature regarding whiplash injury. Older studies with poor methodology have been repeated in future subjective reviews, without performing a critical analysis each time, and then erroneously passed on as evidence.

A landmark paper in 2001 by Castro demonstrated the production of symptoms that are commonly associated with the acute whiplash injury in volunteers, effectively by fooling the subjects into believing that they have been in a collision when in fact they were not. This paper immediately questioned the validity of conclusions made by Brault.

Many of the whiplash studies suffer from methodological flaws such as selection bias, retrospective nature, sample size, less than robust statistical analysis, lack of a control group, and flawed assumptions. The reader is referred to literature reviews dealing with methodological critique of the literature supporting and opposing the concept of chronic whiplash injury, and the reader is advised to study these articles in detail. Freeman and others have produced a review and methodological critique of the literature that refutes the concept of the whiplash syndrome and makes interesting reading. Kwan and co-workers have in return criticised the literature that is supportive of the concept.

Symptoms, signs and injury

A wide spectrum of symptomatology is reported by those involved in such collisions. It is suggested that just less than 50 per cent of all patients make a full recovery and 4.5 per cent are permanently disabled. However, it is difficult to explain the reported long term symptoms and disability on the basis of a persisting physical injury.

There is very little that is objective when dealing with a so-called soft tissue injury of the neck. In Grade 1 and Grade 2 whiplash associated disorder ("WAD"), the injury cannot be proven objectively and claimants report pain, tenderness, and other subjective symptoms that are difficult to prove and difficult to refute.

Most studies dealing with symptomatology and prognoses only study claimants, introducing an immediate bias. There is no control group.

One must appreciate that an objective sign in medicine is a physical sign that does not require any input or response from the patient. In other words, it can be detected without the patient being asked questions and without any response, e.g. a skin rash or deformity of bone, a cut in the tissue or swelling of a joint can be stated to be objective signs. In a medico-legal sense of the term, elicitation of tenderness requires the patient to respond that it hurts when prodded and therefore becomes a non-objective sign. Restriction of movement and elicitation of tenderness can be a finding even in a person who sleeps awkwardly at night and wakes up with a stiff neck.

One must also appreciate that similar symptoms can be reported from various different causes. The finding therefore does not give us the cause for the pain.

Apart from anecdotal reports (which are not necessarily accurate extrapolations), the exact pathognomonic and pathological lesion in whiplash injury that should logically exist in most, if not all, whiplash patients, has not been demonstrated. It is also accepted that there is no physical test that can be done to prove or disprove that an injury has occurred in whiplash patients.

Anatomical considerations

The vertebra is the main building block of the cervical spine. There are seven cervical vertebrae. From the back of each vertebra, bony arches meet in the midline to form a ring which protects the spinal cord. The vertebra has posterior and transverse spinous processes which help with ligamentous and muscular attachments.

In between the main vertebral body lie intervertebral discs. These consist of a tough ring on the outside, called annulus fibrosus, and an inner gel-like material called nucleus pulposus. The discs can stretch and bulge in different directions to allow movement. In simple words, when a disc is ruptured, the annulus fibrosus has been torn and the nucleus pulposus protrudes through the tear. This can sometimes press on a nerve or on the spinal cord. The disc becomes dehydrated as part of the normal aging process. This can make it more likely to tear, and this process is called disc degeneration.

The vertebra also has bony facet processes that form the facet joints with adjacent vertebra. The spine is supported by ligaments which have the capacity to stretch to allow movement. This is another structure which protects the intervertebral disc from injury. There are numerous muscles that are attached and surround the cervical spine which help in movement and protection and also offer stability. The spinal cord runs from the base of the skull in the canal formed by the vertebrae. The range of motion in the normal population shows a lot of variation depending on age.

Disc degeneration is very common in the general population and can exist without causing any symptoms. It has been shown by twin studies to be a genetically controlled process. Not every case of disc degeneration causes neck pain. The presence of neck pain and disc degeneration on X-ray is weakly associated with each other. Between 15 and 50 per cent of pain-free subjects can have radiological abnormalities in their lumbar spine with imaging techniques. There is a clear lack of statistical association between the presence of disc degeneration and pain. There is also little correlation between the severity of disc degeneration and the severity of pain. A high incidence of radiological abnormalities has been identified even in younger patients on MRI studies of the cervical spine. Studies in patients with whiplash injury have demonstrated similar incidence of radiological signs of disc degeneration as in the asymptomatic population.

Studies of cervical spines in individuals with no complaints referred to the neck and no history of injury have demonstrated various different abnormalities, such as flattening of the curve and disc degeneration, even without any symptoms and without any injury in asymptomatic individuals. Therefore, these radiological findings do not necessarily cause symptoms or pain and do not establish causation with a whiplash injury. In clinical practice, one can have severe neck pain with a normal X-ray and a normal MRI scan, and a severely abnormal X-ray or MRI scan with no neck pain at all.

Controlled studies of symptomatic and asymptomatic patients have shown no difference in the rate of disc degeneration on MRI and abnormalities on MRI are not generally seen after a whiplash injury.

Cultural and geographical differences

It is interesting to note that the problem of chronic whiplash injury does not exist in every country which has cars and accidents. It is clear that automobiles and accidents happen universall,y but the recovery rate from the so-called acute whiplash injury varies considerably from culture to culture. It is seen that in some

countries, such as Greece, Germany, and Lithuania, even though patients involved in these mechanisms report acute pain, they seem to get better within weeks. One must ask the question, therefore, whether these patients have differences in their neck, compared to other patients in countries with large numbers of whiplash patients reporting chronic pain.

Schrader suggests that chronic symptoms were not usually caused by the car accident. Expectation of disability, a family history, and attribution of pre-existing symptoms to the trauma may be more important determinants for the evolution of the late whiplash syndrome. In a country where there is no preconceived notion of chronic pain arising from rear end collisions, and thus no fear of long term disability, and usually no involvement of the therapeutic community, insurance companies, or litigation, symptoms after an acute whiplash injury are self-limiting, brief, and do not seem to evolve to the so-called late whiplash syndrome. Such studies (Schrader) have been vigorously criticised in literature for poor methodology. The authors have repeated the study with improved methodology with similar conclusions.

It is likely that an acute injury does occur, even in countries such as Lithuania, but there is a distinct lack of patients reporting chronic symptoms beyond one to four weeks. This would suggest that the acute whiplash injury is similar to a neck sprain where the acute whiplash syndrome does not seem to be associated with any progression to chronicity.

What is the injury in whiplash injury?

Sophisticated imaging techniques like bone scans and MRI scans have failed to detect a specific pathognomonic and reproducible lesion in the vast majority of whiplash patients and, therefore, there is no evidence to suggest that the injury is anything more than a minor sprain.

The general assumption is that Grade 1 and Grade 2 WAD represent a sprain. Most volunteers in whiplash experiments behave as if there had been a minor sprain, with symptoms resolving within a matter of days, if not weeks. MRI scans and bone scans readily detect abnormalities of the joints and bones of the cervical spine, particularly if the damage is beyond a minor injury. Studies of whiplash patients have routinely failed to reveal any injury on sensitive scans.

In general terms, muscle strains and ligament sprains occur elsewhere in the body and one knows from clinical experience that they can be objectively demonstrated by MRI studies and get better with time. It is therefore difficult to understand from a physiological and pathological point of view that the neck muscle sprain, which is thought to occur in a whiplash-type injury but demonstrable objectively with sophisticated imagining techniques, would cause symptoms for a number of months if not years. Additionally, ligament sprains in other locations broadly demonstrate a correlation between the severity of trauma, clinical signs and imaging findings. Logically, therefore, if MRI scan findings do not reveal any evidence of the whiplash injury in the neck, the sprain must necessarily be of a severity lesser than that observed in other common sprains.

Bone scans have not detected muscle and ligament injury in whiplash patients. Studies by Ronnen and Borchgrevink performed within three weeks of the collision and two to four days after the collision have not detected any trauma-related abnormality on MRI scans in whiplash patients. There was also no sign of trauma in the muscles or ligaments or in the soft tissues.

Whiplash and neck degeneration

There is no robust high quality evidence that we are able to find to suggest that disc degenerative changes in the neck develop any more rapidly in a whiplash patient than they do as part of the natural history in the general population. There is also no evidence to suggest that an acute whiplash injury can make pre-collision degenerative changes worse.

MRI scans are very sensitive tests and can pick up minor muscle and ligament injuries. They also show that 15–50 per cent of asymptomatic individuals can have abnormalities shown on an MRI scan in their spine. This is known to occur even in younger people and in healthy people. Many older studies looking at radiology around whiplash injuries lack a control group and are open to mis-interpretation.

In 1974, Hohl showed that 58 per cent of patients with radiological evidence of disc degeneration had no symptoms, but 44 per cent of patients with normal X-rays continued to have symptoms. Several papers, including Balla in 1988, Hildingsson in 1990 and Parmar in 1993, have confirmed that disc degenerative changes in the neck do not develop more rapidly in whiplash patients than they do in the general population and acute whiplash injury does not make any degenerative changes present before the accident worse.

An abnormal X-ray was not necessarily predictive of the chronicity of symptoms in a whiplash patient. Pierce in 1989 also showed that 19 patients with moderate or severe symptoms after whiplash had normal MRI scans.

Observations from such studies basically emphasise the improbability that symptoms in whiplash patients are produced by the presence or persistence of any physical damage. MRI findings in patients after whiplash injuries are no different from controls with the exception of finding a specific neurological abnormality and such findings are not relevant to the persistence and severity of symptoms or the long-term outcome.

The facet joint as a source of whiplash pain?

Some authors have suggested that neck pain may arise from the facet or zygapophysial joints and this has been suggested as the culprit behind chronic neck pain in some whiplash patients. The methodology of these papers have been criticised for various reasons, such as some of the subjects in the study not having neck pain at all, others not being involved in a motor vehicle collision, and yet others developing neck pain as much as three months after the accident.

MRI scans have failed to detect any facet joint injuries in whiplash patients. Facet joint pain can also occur in patients with neck pain who have no history of trauma. There is therefore no definite evidence that patients who report chronic symptoms after traffic collisions attributed to the so-called whiplash injury have any long-term evidence of persistent damage or physical injury after the acute injury. The acute injury is likely to be a minor sprain.

Epidemiological studies

Chronic neck pain is very frequent in the general population. It is not inconceivable that some whiplash patients may be attributing constitutional and non-accident related neck pain to an accident. There was no control group present in the studies that report chronic long term symptoms. Various epidemiological studies report a 20–30 per cent monthly incidence of neck pain and a 70–80 per cent lifetime incidence, even without any rear end traffic accident.

Change in velocity

Where it is difficult to find an objective injury, help has been taken from engineering concepts, using the concept of Delta-V or head acceleration. The popularity of the concept of Delta-V is attributed to the fact that, where no objective injury is demonstrable, authors have used this concept to determine the probability of injury occurring. Therefore, when the delta velocity is less than the threshold, then the "whiplash mechanism" to the neck does not occur, and therefore an injury explanation for the patient's symptoms would appear improbable. This change in velocity of Delta-V gives an indication of the severity of collision and has been used by authors as the key predictor of the probability of injury.

The whiplash experiments have therefore shown that the probability of neck injury is low with a Delta-V of less than 5mph, and even when symptoms are reported at this change in velocity, they are transient, short-lasting, and resolve rapidly without treatment.

Proponents of the whiplash injury and those who oppose the concept of Delta-V argue that Delta-V cannot be accurately measured, and whiplash experiments do not replicate real life crashes.

Whiplash experiments

Experiments have been conducted in human volunteers under controlled conditions. We have already commented upon the experimental data from Brault and also from Castro.

Proponents of whiplash injury offer experimental data (such as from Brault) to advance their theory that even low-velocity road traffic accidents can lead to a whiplash injury when the delta velocity is much below the threshold that is meant to cause an injury.

Several animal and dummy experiments have also been conducted in order to study the subject of whiplash using different types of accelerations. The threshold for minor symptoms lasting from hours to one day from these experiments appears to be a change in velocity or delta velocity of about 5mph or 8km/hour for the target vehicle struck in a rear-end road traffic collision. No volunteer has ever reported chronic pain following the acute injury in these whiplash experiments despite various different designs being used.

It is shown that the hyperextension/hyperflexion mechanism of the cervical spine which is assumed to cause injury does not occur for impacts which result in a Delta-V of less than 8km/hour. In McConnel's study in 1993, the authors showed that there was no forcible hyperextension of the neck in rear-end collisions. Using analysis of elaborate photography, the cervical extension and flexion angles in volunteers who were found to fall within their voluntary physiological limits, hyperextension and hyperflexion did not occur in any of the test runs. Similar results have been found in other studies. The forces experienced by occupants with impacts of less than 5km/hour are not sufficient to cause the head of the occupant to be displaced rearward far enough to contact the head restraint.

None of the experiments have demonstrated that collisions lead to chronic neck pain that is reported by whiplash patients. The experimental data is very similar to observations from Lithuania, Greece, and Germany. In other words, the patients get better rapidly.

Although such experiments have been criticised, they probably represent the closest approximation of collisions that whiplash patients experience in real life. Experimental data has shown that when the change in speed of the target vehicle is less than 8km/hour, the range of movement of the neck is confined within the normal physiological range regardless of the degree of support that is given by the headrest. Even where symptoms have been experienced by volunteers, they were minor, short lasting and resolved spontaneously without treatment within hours to days of testing.

Castro, in 2001, performed an ingenious experiment where the volunteers were subjected to the experience of being involved in a crash without a collision ever occurring. The experiment was extremely well designed and well controlled. The subjects were basically fooled into believing that there had been a collision when in reality there was none. This study was able to reproduce that some subjects reported symptoms even when a collision did not take place, suggesting that the reporting of symptoms did not necessarily stem from an injury. The study of Brault therefore could not be validly interpreted.

In 1997, Castro, in Germany, in a well-designed study which included MRI scans taken before and after the collision, did not find any abnormalities. They found five subjects had reported transient symptoms when the Delta-V exceeded 11.4km/hour.

Bus accidents

There seem to be a large number of claims of whiplash injury by occupants in a bus even when a significantly heavier bus has been struck by a car of much lower mass. In 1996, a paper by Dubois found that when a vehicle strikes a bus in a rear-end collision, in order for the threshold of injury to be reached, the bus must undergo a Delta-V of at least 5mph. For a car that has one eighth the mass of a bus, it must be travelling at more than 100km/hour to accomplish this which may be fatal for the driver of the car. When the car was moving at much lower speeds, the volunteers in the bus could not even tell that a collision had taken place. It could be accepted that hearing a loud noise could cause fright in some bus occupants but physical injury could not be explained by the known laws of physics.

Effect of litigation in chronicity

Opinion remains divided about the role of litigation in perpetuating the chronicity of whiplash symptoms. The effect of elimination of the litigation process in recovery after whiplash injury also remains keenly debated. Opinion remains divided in the studies that report on the effect of litigation and whiplash injury.

There are reviews suggesting that compensation was not a prognostic factor in recovery while other reviews have concluded that insurance and compensation schemes had substantial influence on recovery from whiplash. Cassidy showed that the elimination of compensation for pain and suffering is associated with a decreased incidence and improved prognosis of whiplash injury. Another study also showed that health outcomes in relation to disability, pain and physical functioning, for people with whiplash were substantially improved after legislative change that restricts access to compensation for noneconomic loss, and disability and encouraged early acceptance of insurance claims and early treatment.

A comparative study suggested that patients who sustained cervical spinal fractures had been subjected to greater force and would therefore be expected to have worse symptoms than those with whiplash injuries. The study found that patients who had sustained fractures of the cervical spine had significantly lower levels of pain and disability than those who had received whiplash injuries and were pursuing compensation but had similar levels to those whiplash sufferers who had settled litigation or had never sought compensation. Thus the authors concluded that functional recovery after neck injury was unrelated to the physical insult and that the increased morbidity in whiplash patients is likely to be psychological and is associated with litigation.

Biopsychosocial models of chronicity

Various factors have been blamed as responsible for increased vulnerability of certain patients in sustaining a whiplash injury. Similar factors have also been blamed for the adverse prognosis in some patients who referred chronic pain. These factors have included age, sex, position of the occupant in the vehicle, position of the head, being unaware of the impact, and pre-existing degenerative neck changes amongst others. Recent well conducted systematic reviews on the other hand have shown no relationship of any of these factors in being responsible to cause vulnerability of injury or for the chronicity of symptoms and in fact the only factors that have a relationship with such chronicity are psychological factors.

They also argue that other factors such as age, position of the occupant and the occupant's head, rotated or twisted position of the neck, direction of impact, gender, and awareness of the impact affect the likelihood of injury and may influence prognosis. Modern systematic reviews and meta-analyses refute these factors. The main predictive factors for long term pain and disability appear to be higher initial pain levels, and psychological factors such as catastrophising, perceived injustice, post-traumatic stress symptoms, depression amongst others.

Various biopsychosocial models have been proposed to explain why some victims report chronic symptoms from an acute injury and why others do not. These models suggest that while it may be possible for physical sources and processes to cause pain, it is the psychosocial factors that act to generate the clinical picture of chronic pain and its duration. These models also suggest that symptom expectation, amplification, and attribution may be more important in the genesis and persistence of chronic symptoms in some whiplash patients. The biopsychosocial model accepts a physical reason as a source of initial pain but the severity and duration as well as attribution depend upon psychosocial factors which influence the patient's behaviour.

In summary, it is apparent that controversy still exists in many different areas surrounding whiplash injury, and there is a requirement for high-quality research in future.

Open Season for Burglar Battering: Is it Time to Check in with the Civil Courts?

Jill Dickinson*

Burglary; Deadly force; Occupiers' liability; Self-defence; Trespassers; Use of force

In this article, Jill Dickinson examines the extent to which the law currently permits homeowners to defend their territory from trespassers. Identifying that the recent UK public debate on home defence has largely overlooked the civil law dimension, Jill explores possible rationales behind the continued fascination with home defence and evaluates proposals for the law's future development.

Introduction

The well-established Castle Adage continues to be a firmly-founded cornerstone of our political and legal system. As early as the 17th century, it was recognised that:

> "A man's home is his castle, et domus sua cuique est tutissimum [and each man's home is his safest refuge]."[1]

Since then, this notion has been frequently popularised by high-ranking politicians. Two hundred and fifty years ago William Pitt noted that:

> "The poorest man may in his cottage bid defiance to all the forces of the crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter—the rain may enter—but the King of England cannot enter."[2]

More recently the current UK Prime Minister David Cameron alluded to the Castle Adage when he vehemently challenged a Crown Court judge's comment that:

> "it takes a huge amount of courage … to burgle somebody's house [and that he wouldn't] have the nerve."[3]

The judge was attempting to rationalise passing a 12-months' suspended sentence for the burglary of 3 homes in 5 days. Critics have suggested that his statement that burglars are courageous is actually "outrageous";[4] that such comments only serve to highlight the failure of the criminal justice system and further fuel the perception that victims are not really at its "heart".[5] It comes as no surprise that the judge

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[1] Sir Edward Coke *The Institutes of the Laws of England* (1628).

[2] William Pitt, The Elder, Lord Chatham *Speech*, c. March 1763, quoted in H.P. Brougham, *Historical Sketches of Statesmen Who Flourished in the Time of George III*, (1839) Vol.1, p.52.

[3] D. Mitchell "Where should we place burglars on the bravery-cowardice spectrum?", at *http://www.theguardian.com/commentisfree/2012/dec/09/judge-peter-bowers-david-mitchell* [Accessed May 19, 2014].

[4] David Hines, Chairman of the National Victims Association, cited by *Telegraph* Reporters, "Judge who said burglary needed courage to be investigated", *Telegraph*, at *http://www.telegraph.co.uk/news/uknews/crime/9525652/Judge-who-said-burglary-needed-courage-to-be-investigated.html* [Accessed May 1, 2014].

[5] Labour unlocked, *Victims should be at the heart of our criminal justice system—Khan*, at *http://www.labour.org.uk/victims-at-the-heart-of-criminal-justice-system,2011-07-14* [Accessed May 1, 2014].

has since been formally reprimanded by the Office of Judicial Complaints for making such provocative comments[6] which "have damaged public confidence in the judicial process".[7]

Clearly, feelings run high on the topic of home defence, and have done for some time. But what exactly can a homeowner do or not do to protect both themselves and their premises against intruders, without leaving themselves open to legal proceedings?

In exploring such questions, this article will focus on the relatively recent phenomenon of burglar battering. It will examine whether the civil law of England and Wales in relation to occupiers' rights and liabilities is keeping up with its criminal law counterpart. In doing so, it will discuss the reasoning behind the developments within each of these strands of law and evaluate some potential proposals for the future.

First of all though, we need to examine the rationale behind the continuing plethora of news headlines relying on this Castle Adage.

Brave or battered burglars?

Angrily responding to the judge's observation that "burglars are brave",[8] Prime Minister David Cameron stated that:

> "Burglary is not bravery. Burglary is cowardice, burglary is a hateful crime."[9]

Like many politicians before him,[10] Cameron capitalised on the opportunity to add:

> "that is why this Government is actually changing the law to toughen the rules on self-defence against burglars, saying householders have the right to defend themselves."[11]

The backdrop …

Before we examine these changes, we need to consider the backdrop against which they are being played out. Previously, the use of force in self-defence has been within the common law's remit. In comparison, the use of force in crime prevention has been dealt with by s.3 of the Criminal Law Act 1967. As such, there is a clear overlap between the two, as householders, even though they might not realise it,[12] are likely to use force against intruders not only to defend themselves but also to prevent the intruder from committing further crimes.[13] In deciding whether householders have used an appropriate amount of force, both legal frameworks ask whether the use of that force was *necessary*. If so, the next question to be asked is whether such force was also reasonable *in the circumstances*. To pass both of these tests, the householder does not need to undertake a detailed risk assessment;[14] they just need to show that they did what they "honestly

[6] O. Bowcott, "Crown court judge reprimanded for telling burglar he had 'courage'", *Guardian*, at *http://www.guardian.co.uk/law/2012/dec/04/judge-reprimanded-buglar-courage* [Accessed May 1, 2014].

[7] Office for Judicial Complaints, *Statement from the Office of Judicial Complaints—His Honour Judge Bowers*, OJC 37/12, December 4, 2012, at *http://judicialcomplaints.judiciary.gov.uk/docs/His_Honour_Judge_Bowers_-_OJC_Investigation_Statement_-_3712.pdf* [Accessed May 1, 2014].

[8] D. Mitchell, "Where should we place burglars on the bravery-cowardice spectrum?", at *http://www.guardian.co.uk/commentisfree/2012/dec/09/judge-peter-bowers-david-mitchell* [Accessed May 1, 2014].

[9] Prime Minister David Cameron speaking on ITV's Daybreak, "Burglary is cowardice not bravery", ITV, at *http://www.itv.com/news/update/2012-09-06/cameron-burglary-is-cowardice-not-bravery/* [Accessed May 1, 2014].

[10] M. Townsend, "Householders to be given new rights to defend themselves against intruders" *Guardian*, at *http://www.guardian.co.uk/law/2010/jun/06/householders-rights-laws-intruders-burglars* [Accessed May 1, 2014]; P. Hennessy and M. Kite, "Tories back new rights to help homeowners protect themselves from burglars" The Telegraph, at *http://www.telegraph.co.uk/news/uknews/law-and-order/6844682/Tories-back-new-rights-to-help-home-owners-protect-themselves-from-burglars.html* [Accessed May 1, 2014].

[11] Prime Minister David Cameron speaking on ITV's Daybreak, "Burglary is cowardice not bravery", ITV, at *http://www.itv.com/news/update/2012-09-06/cameron-burglary-is-cowardice-not-bravery/* [Accessed May 1, 2014].

[12] Archbold, *Criminal Pleading Evidence & Practice* (2004), 19–39 as referred to in *Criminal Law (Amendment) (Householder Protection) Bill, Bill 20 of 2004–5*, Research Paper 05/10 January 31, 2005, House of Commons Library, p.8, at *http://www.parliament.uk/documents/commons/lib/research/rp2005/rp05-010.pdf* [Accessed May 1, 2014].

[13] S. Lipscombe, *Householders and the Criminal Law of Self-Defence* House of Commons, at *http://www.parliament.uk/briefing-papersSN02959.pdf* [Accessed May 1, 2014]. p.2.

[14] S. Lipscombe, *Householders and the Criminal Law of Self-Defence* House of Commons, at *http://www.parliament.uk/briefing-papersSN02959.pdf* [Accessed May 1, 2014]. p.2.

and instinctively thought was necessary".[15] On the face of it, these tests seem clear. But how well do they actually operate in practice?

The Tony Martin case[16]

To answer this question, we need to consider the high-profile case of Tony Martin.[17] Fifteen years ago, Martin shot two burglars from behind as they fled from his remote farm house. In doing so, he killed one of them. Martin was subsequently convicted of murder and imprisoned for nine years. After submissions from Martin's defence team[18] that "there was 'compelling' evidence to show that the farmer acted in self-defence and under provocation or diminished responsibility" [19] the Court of Appeal reduced Martin's conviction to manslaughter and shortened his sentence to three years.[20]

Clearly frustrated by a spate of previous break-ins, Martin had taken what he believed were "security measures". He had removed part of the staircase within his property and set a booby trap on the landing. The court also learned that Martin would "sleep fully clothed, wearing his boots in contemplation of something happening".[21]

Such extreme actions surely indicate a man so disillusioned with the system that he felt the need to take the law into his own hands. Whilst it is often said that actions speak louder than words, the court also heard that the farmer had "regularly professed his hatred of burglars, once threatening that if he caught them he would blow their heads off".[22]

Despite being convicted of manslaughter and serving four years' imprisonment in total, it appears that Martin's views on home defence remain the same today. Just in May last year, Martin confronted another burglar who was attempting to steal from his shed. The burglar quickly fled in his car but this time Martin made no attempt to stop him. Speaking to the press, Martin said:

> "There were weapons inside the shed so, if I had wanted to fight him off, I could have. I wished I had but, after everything I've been through in the past, I just couldn't face all that hassle again … I haven't changed my views about what happened in 1999 but the whole experience has made me lose faith in the system and I didn't want to be made out as the criminal again."[23]

There has been much public debate surrounding the case. Reports suggested that Martin had become a "folk hero" and described his case as a "cause celebre".[24] Martin had been "depicted as the ordinary man … plagued by burglars and let down by the police. [He] had struck back but was … [seen as] being persecuted for his actions".[25]

It is not surprising then that 85 per cent of people polled in a subsequent television survey believed that the jury had been wrong to convict Martin.[26] Such strong public support for householders' rights to defend themselves and their premises helped to pave the way for the subsequent introduction of s.76 of the Criminal Justice and Immigration Act 2008.

[15] As per Lord Morris in *Palmer v R.* [1971] A.C. 814 at [832].
[16] *R. v Martin (Anthony Edward)* [2001] EWCA Crim 2245; [2003] Q.B. 1.
[17] *R. v Martin (Anthony Edward)* [2001] EWCA Crim 2245; [2003] Q.B. 1.
[18] Led by Michael Wolkind QC.
[19] BBC News, "Timeline: the Tony Martin case", at *http://news.bbc.co.uk/1/hi/england/norfolk/3087003.stm* [Accessed May 1, 2014].
[20] Press Association, "Tony Martin says he has confronted another burglar on his property" *Guardian*, at *http://www.guardian.co.uk/uk/2013/may/10/tony-martin-confronted-burglar-property* [Accessed May 1, 2014].
[21] A. Gillan, "Farmer set booby traps and waited in the dark" *Guardian*, at *http://www.guardian.co.uk/uk/2000/apr/11/tonymartin.ukcrime* [Accessed May 1, 2014].
[22] A. Gillan, "Farmer set booby traps and waited in the dark" *Guardian*.
[23] Press Association, "Tony Martin says he has confronted another burglar on his property" *Guardian*.
[24] S. Morris, "The killer who won a nation's sympathy", *Guardian*, at *http://www.guardian.co.uk/uk/2001/oct/30/tonymartin.ukcrime2* [Accessed May 1, 2014].
[25] S. Morris, "The killer who won a nation's sympathy", *Guardian*.
[26] S. Morris, "The killer who won a nation's sympathy" *Guardian*.

Criminal Justice and Immigration Act 2008

This new section permitted an occupier to use such force as was reasonable in the circumstances as the occupier, acting genuinely, believed them to be. Householders, seeking to avoid prosecution, had to demonstrate a clear correlation between the danger that they faced from the intruder and the amount of force that they used against them. Section 76(6) went on to specifically make clear that the occupier was prohibited from using *disproportionate* force.

A knee-jerk reaction?

Mendelle has suggested that the introduction of this new provision:

> "illustrate[s] [just] how much political posturing has supplanted reasoned debate in the field of criminal law. Instead of allowing the common law to continue to develop in that pragmatic, rational way that is its peculiar genius, the two main parties now take turns to pass wholly unnecessary legislation … which is now deployed as a weapon in a PR war."[27]

This is a particularly pertinent point given that s.76 merely codified the existing common law reasonableness test;[28] that:

> "a person who uses force is to be judged on the basis of the circumstances as he perceived them, that in the heat of the moment he will not be expected to have judged exactly what action was called for, and that a degree of latitude may be given to a person who only did what he honestly and instinctively thought was necessary … even if that belief was mistaken."[29]

As such, s.76 did not really add anything to the existing equation. The result of an apparent knee-jerk reaction, it merely, as Mendelle suggested, provided a public relations' platform for politicians.[30]

The Crime and Courts Act 2013

Can the same be said of the recently-introduced s.43 of the Crime and Courts Act 2013? This section was also enacted in the wake of "overwhelming" public support[31] following well-publicised cases involving self-defence and the home.[32] The question is whether this new provision brings anything to the table or whether we are simply just seeing history repeat itself?

Upon examining the new provisions, it is clear that they do at least tip the balance further in favour of householders, providing them with "even greater protection from burglars".[33] In what could be perceived as a U-turn move, the new law now specifically *permits* householders to use *disproportionat*e force against intruders. Whilst the new law recognises some of the concerns that have previously been raised by householders, it does go on to state that householders may still not use force which is *grossly* disproportionate.[34]

[27] P. Mendelle, "Self-defence law shows how politicians use legislation as PR" *Guardian*, at *http://www.guardian.co.uk/law/2011/oct/31/self-defence-law-legislation-pr* [Accessed May 1, 2014].

[28] S. Lipscombe, *Householders and the Criminal Law of Self-Defence* House of Commons, at *http://www.parliament.uk/briefing-papersSN02959.pdf* [Accessed May 1, 2014], p.3.

[29] S. Lipscombe, *Householders and the Criminal Law of Self-Defence* House of Commons, p.3, citing Lord Morris in *Palmer v R.* [1971] A.C. 814 at 832.

[30] P. Mendelle, "Self-defence law shows how politicians use legislation as PR" *Guardian*.

[31] P. Hennessey, D. Barret and R. Lefort, "Overwhelming support for campaign to protect householders who confront intruders"*The Sunday Telegraph*, at *http://www.telegraph.co.uk/news/politics/7004471/Overwhelming-support-for-campaign-to-protect-householders-who-confront-intruders.html* [Accessed May 1, 2014].

[32] *R. v Hussain (Tokeer) and R. v Hussain (Munir)* [2010] EWCA Crim 94; Telegraph Reporters, "Burglary shooting couple emigrate to Australia" *Telegraph*, at *http://www.telegraph.co.uk/news/uknews/crime/9568506/Burglary-shooting-couple-emigrate-to-Australia.html* [Accessed May 1, 2014].

[33] Ministry of Justice, *Greater Protection for Homeowners*, at *https://www.gov.uk/government/news/greater-protection-for-homeowners--2* [Accessed May 1, 2014].

[34] Criminal Justice and Immigration Act 2008 s.76(5A).

Interestingly, this proposal was originally propounded by the Conservative Party in 2005,[35] but it has taken over eight years to enact.[36] Why the delay? In sponsoring the Criminal Law (Amendment) (Householder Protection) Bill, Patrick Mercer[37] sought to "shift the balance so that the fear of imprisonment or physical harm … [lies] with the intruder, not the householder".[38]

In seeking support for the Bill, the Research Paper behind it[39] cited various case examples, including the *Martin* case[40] referred to earlier. In another case, a 73 year old, Ben Lyon, was originally charged with attempted murder and wounding with intent after firing a shotgun at a man that he thought was about to burgle his shed. Like Martin, Lyon had endured repeated raids and had decided to take matters into his own hands. However, he was subsequently convicted of the lesser offence of unlawful wounding, and given an 18-month suspended sentence accordingly.[41] Like Martin, he stated afterwards that he had "no confidence in the law and order system" and that he would "do it again if [his] life was in danger".[42] Following the case, the then-Home Secretary Michael Howard suggested that people "who used violence to defend themselves should be treated more sympathetically".[43]

In a later case referred to by the Research Paper,[44] a man was cleared of:

> "deliberately wounding two burglars after they broke into his wine store. He claimed he never intended to harm them when he opened fire in the dark with a 12 bore shotgun."[45]

These cases, and the others that are referred to in the Research Paper,[46] help to illustrate the difficulties that the courts face in ensuring that home defence law is consistently applied to ensure that a fair and just result is reached in all cases, and as a resulting consequence, help to restore public faith in the criminal justice system.

Despite Mercer clearly stating that his proposals would not protect people like Tony Martin, who he suggested used *grossly* disproportionate force, his proposals were still subject to much criticism; that permitting householders to use disproportionate force could "encourage vigilantism and … sanction extrajudicial punishment".[47]

There were also concerns that the uncertainties surrounding what was meant by *reasonable* force were simply being shifted; that questions would still be asked as to what the new threshold of *disproportionate* force would actually mean in practice.[48]

[35] *Criminal Law (Amendment) (Householder Protection) Bill, Bill 20 of 2004–5*, Research Paper 05/10 January 31, 2005, House of Commons Library, at *http://www.parliament.uk/documents/commons/lib/research/rp2005/rp05-010.pdf* [Accessed May 1, 2014], Summary of Main Points.

[36] D. Casciani, *Q&A: What is reasonable force? BBC News*, at *http://news.bbc.co.uk/1/hi/uk/6902409.stm* [Accessed May 1, 2014].

[37] The then-Conservative Spokesman for Homeland Security.

[38] Criminal Law (Amendment)(Householder Protection) Bill, Bill 20 of 2004-5. Research Paper 05/10, January 31, 2005, House of Commons Library at *http://www.parliament.uk/documents/commons/lib/research/rp2005/rp05-010.pdf* [Accessed May 1, 2014], summary of main points.

[39] *Criminal Law (Amendment) (Householder Protection) Bill, Bill 20 of 2004–5*, Research Paper 05/10 January 31, 2005, House of Commons Library at *http://www.parliament.uk/documents/commons/lib/research/rp2005/rp05-010.pdf* [Accessed May 1, 2014].

[40] *R. v Martin (Anthony Edward)* [2001] EWCA Crim 2245; [2003] Q.B. 1.

[41] *Criminal Law (Amendment) (Householder Protection) Bill, Bill 20 of 2004–5*, Research Paper 05/10 January 31, 2005, House of Commons Library p.13 at *http://www.parliament.uk/documents/commons/lib/research/rp2005/rp05-010.pdf* [Accessed May 1, 2014].

[42] *Criminal Law (Amendment) (Householder Protection) Bill, Bill 20 of 2004–5*, Research Paper 05/10 January 31, 2005, House of Commons Library p.13 at *http://www.parliament.uk/documents/commons/lib/research/rp2005/rp05-010.pdf* [Accessed May 1, 2014].

[43] "Vigilante or victim", *The Times*, December 12, 1995, as referred to in *Criminal Law (Amendment) (Householder Protection) Bill, Bill 20 of 2004–5*, Research Paper 05/10 January 31, 2005, House of Commons Library p.19 at *http://www.parliament.uk/documents/commons/lib/research/rp2005/rp05-010.pdf* [Accessed May 1, 2014].

[44] *Criminal Law (Amendment) (Householder Protection) Bill, Bill 20 of 2004–5*, Research Paper 05/10 January 31, 2005, House of Commons Library at *http://www.parliament.uk/documents/commons/lib/research/rp2005/rp05-010.pdf* [Accessed May 1, 2014].

[45] *Criminal Law (Amendment) (Householder Protection) Bill, Bill 20 of 2004–5*, Research Paper 05/10 January 31, 2005, House of Commons Library pp.13–14 at *http://www.parliament.uk/documents/commons/lib/research/rp2005/rp05-010.pdf* [Accessed May 1, 2014].

[46] *Criminal Law (Amendment) (Householder Protection) Bill, Bill 20 of 2004–5*, Research Paper 05/10 January 31, 2005, House of Commons Library pp.12–18 at *http://www.parliament.uk/documents/commons/lib/research/rp2005/rp05-010.pdf* [Accessed May 1, 2014].

[47] S. Lipscombe, *Householders and the Criminal Law of Self-Defence House of Commons*, at *http://www.parliament.uk/briefing-papersSN02959.pdf* [Accessed 17 July 2013] p.1.

[48] *Criminal Law (Amendment) (Householder Protection) Bill, Bill 20 of 2004–5*, Research Paper 05/10 January 31, 2005, House of Commons Library p.8 at *http://www.parliament.uk/documents/commons/lib/research/rp2005/rp05-010.pdf* [Accessed May 1, 2014].

Human-rights issues were also cited. Critics believed that the proposed Bill would breach the State's "positive obligations to protect Convention rights to life and physical integrity"[49] as provided for in art.2.[50] In permitting householders to use disproportionate force against intruders, the State could be:

> "failing to safeguard the lives of individuals … (here, burglars). There is no doctrine of forfeiture of the right to life if one has entered … a building as a trespasser."[51]

All of these concerns, coupled with a series of further high-profile cases, continued to help fuel the debate and keep it firmly in the public eye.

Munir Hussain

One of these cases[52] concerned a householder, Munir Hussain, who was prosecuted for chasing away and then attacking an intruder so hard with a cricket bat that the bat broke into three pieces and the intruder was left with serious brain damage as a result. Whilst the intruder was only given a supervision order for his role in the aggravated burglary, Hussain was sentenced to over two years in prison. His defence lawyer suggested at the time that as a result:

> "the criminal justice system has failed twice. The court was unable to sentence [the intruder] … with sufficient harshness, or … Hussain with sufficient compassion."[53]

However, Hussain's sentence was not only subsequently reduced to a year, it was also then suspended for two years, which enabled his immediate release. In reaching this decision, the Lord Judge noted that Hussain had only attacked the man in reaction to "extreme provocation".[54] As such, the judge said that it was inappropriate to rely on the usual sentencing principles and instead rationalised the reduced sentence by reference to the "ancient principles of justice and mercy".[55]

Unlike Tony Martin, Munir Hussain still believes in the criminal justice system, but has stated that:

> "the law does need perhaps to be revisited—it is very, very clear that it is ambiguous … It is not clear as to where the householder stands and [the law] may be interpreted in many different ways."[56]

Despite such comments, and the continuing "media frenzy about the rights of homeowners to protect themselves from attack",[57] the Court of Appeal made it clear that their decision in the *Hussain* case[58] had been based on very distinctive facts, and that no general legal, self-defence principles should be drawn from it. The Lord Judge clearly stated that the case:

> "is not, and should not be seen as, a case about the level of violence which a householder may lawfully and justifiably use on a burglar."[59]

[49] M. Jefferson, "Householders and the use of force against intruders" [2005] *Journal of Criminal Law* Vol.69(5), 412.
[50] European Convention on Human Rights.
[51] M. Jefferson, "Householders and the use of force against intruders" [2005] *Journal of Criminal Law* Vol.69(5), 412.
[52] *R. v Hussain (Tokeer) and R. v Hussain (Munir)* [2010] EWCA Crim 94.
[53] J. Sturcke, "Self defence or malicious revenge? Jail for brothers who beat burglar with bat" *Guardian*, at *http://www.guardian.co.uk/uk/2009/dec/14/jail-brothers-burglar-cricket-bat* [Accessed May 1, 2014].
[54] J. Bingham and N. Britten, "Freed businessman Munir Hussain calls for law to be changed to protect householders" *Telegraph*, at *http://www.telegraph.co.uk/news/7044895/Freed-businessman-Munir-Hussain-calls-for-law-to-be-changed-to-protect-householders.html* [Accessed May 1, 2014].
[55] J. Bingham and N. Britten, "Freed businessman Munir Hussain calls for law to be changed to protect householders" *Telegraph*.
[56] J. Bingham and N. Britten, "Freed businessman Munir Hussain calls for law to be changed to protect householders" *Telegraph*.
[57] A. Hirsch, "Don't read too much into Munir Hussain judgment, say lawyers" *Guardian*, at *http://www.guardian.co.uk/uk/2010/jan/20/munir-hussain-appeal-court* [Accessed May 1, 2014].
[58] *R. v Hussain (Tokeer) and R. v Hussain (Munir)* [2010] EWCA Crim 94.
[59] A. Hirsch, "Don't read too much into Munir Hussain judgment, say lawyers" *Guardian*.

Instead, it was suggested that the judgment recognised how harshly Hussain had been reprimanded for an attack which was "totally out of character" and one which could "only be understood as a response to the dreadful and terrifying ordeal and the emotional anguish".[60]

Whilst the common law may be much better-placed than statute to facilitate the adoption of a more flexible approach, such comments clearly indicate the judiciary's concerns to avoid stepping over the apparently fine line between law-interpreting and law-making.

The Ferries

Such a reserved approach meant that the uncertainties surrounding home defence law, and the consequent calls for its elucidation continued. Only two years ago, a couple moved to Australia earlier than expected following fears of revenge attacks after the husband, Mr Ferrie, shot at burglars who had broken into their home.[61]

The couple had been asleep in bed late on a Saturday night when they were woken by the sound of both banging and breaking glass downstairs. Four men had broken into their home. The couple awoke to find one of the burglars standing in their bedroom wearing a mask. In an attempt to scare the intruders away, Mr Ferrie fired a shotgun that he used for clay pigeon shooting, and wounded two of them. Mr and Mrs Ferrie were subsequently arrested by the police on suspicion of causing grievous bodily harm. Mr Ferrie was subsequently warned that he could possibly be charged with attempted murder. The couple were detained for 66 hours in total but were subsequently released without charge.[62]

Some general principles

Publishing a statement last September, the Crown Prosecution Service stated that:

> "the law is clear that anyone who acts in good faith, using reasonable force, doing what they honestly feel is necessary to protect themselves, their families or their property, will not be prosecuted for such action."[63]

In the Ferries' case, the MP for Rutland and Melton suggested that the real crime would have been if the couple had been prosecuted for defending their home.[64]

Despite the Crown Prosecution Service's assurance that each case will be considered on its own merits and only on the basis of the evidence available,[65] it is clear from the cases referred to earlier that crucial factors to be taken into consideration will include firstly the occupier's grounds for attacking the intruder because "the law should not exculpate those whose motivation is primarily revenge".[66]

Secondly, and connected with this first point, consideration will be given to the lapse of time between the break-in and the intruder(s) being attacked. In using force against the intruder, is the householder merely acting on impulse, or has sufficient time elapsed to enable them to make a much more informed decision as to what would be the appropriate action to take?

And these are just a few of the many different factors which will need to be taken into account. As is evident from the examples cited, all cases will raise their own issues and will therefore need to be decided

[60] A. Hirsch, "Don't read too much into Munir Hussain judgment, say lawyers" *Guardian*.

[61] Telegraph Reporters, "Burglary shooting couple emigrate to Australia" The Telegraph, at *http://www.telegraph.co.uk/news/uknews/crime/9568506/Burglary-shooting-couple-emigrate-to-Australia.html* [Accessed May 1, 2014].

[62] Telegraph Reporters, "Burglary shooting couple emigrate to Australia" The Telegraph, at *http://www.telegraph.co.uk/news/uknews/crime/9568506/Burglary-shooting-couple-emigrate-to-Australia.html* [Accessed May 1, 2014].

[63] *CPS statement: Andy and Tracie Ferrie* CPS, at *http://www.cps.gov.uk/eastmidlands/news_and_publications/press_releases/cps_statement__andy_and_tracie_ferrie/* [Accessed May 1, 2014].

[64] BBC News, "Welby farm shooting couple Andy and Tracey Ferrie 'humbled'", at *http://www.bbc.co.uk/news/uk-england-leicestershire-19507678* [Accessed May 1, 2014].

[65] *CPS statement: Andy and Tracie Ferrie* CPS.

[66] Editorial, "Defending self-defence" [2010] *Criminal Law Review* Vol.3, 167.

on their own merits. They help to illustrate that it is the common law, rather than statute, which is best-placed to achieve that goal.

Trying to draft more detailed statutory provisions to cover all of the different scenarios that householders and intruders could potentially find themselves in would be impossible. Whilst it would involve creating a:

> "fascinating matrix [which] could calibrate 'victim shot three times in the back'/'victim slightly injured with porcelain teapot' with 'accused grabbed a weapon'/'accused searched for a weapon which he then used' and with 'victim weighed 16 stones and was six feet tall'/'accused weighed eight stones and was five feet tall' … [it would go on] just about *ad infinitum.*"[67]

The one-size-fits-all statutory approach (clearly favoured by politicians),[68] does rely heavily on the flexibility of its common law counterpart to ensure that its provisions are interpreted to reach a fair and just outcome in each individual case.

"Grossly disproportionate"

It appears that s.43 of the Crime and Courts Act 2013 is no different in this respect. As was previously feared back in 2005,[69] the new provisions mean that we are still faced with definitive queries as to what *disproportionate* force actually means, and at what point such force becomes *grossly* disproportionate. As such, it seems that case-law will still play an important role in the actual interpretation of these phrases in practice.

When Mercer sponsored the original Bill[70] which proposed this new test, he did try to tackle such concerns head-on, suggesting that:

> "the term 'not grossly disproportionate' [would] allow home owners … to do whatever they [thought was] necessary to defend themselves when confronted by an intruder. What they will not be entitled to do is chase a burglar down the street and plunge a knife into his back once he is off their property. My Bill is not a licence to commit murder."[71]

But if, as Mercer seems to suggest, it is clear as to what the phrase "grossly disproportionate" means, why was there this missed opportunity to incorporate clear guidance on the point within the Criminal Law (Amendment) (Householder Protection) Bill itself?

Whilst similar wording has been incorporated into other legislation, again little guidance has been provided as to its interpretation. For example, s.329 of the Criminal Justice Act 2003 enables those who are guilty of an imprisonable offence, in certain circumstances, to bring a civil action for damages for trespass to the person, against their victim and/or also against any third party who intervenes to protect that victim. Those circumstances include where either the victim and/or the third party intervener were acting in self-defence. If that is the case, the claim can only proceed if the victim and/or the third party (as the case may be) used "grossly disproportionate" force in defending themselves. But again, no interpretative guidance was provided as to what this meant in practice.

It has been suggested that the test was incorporated to help restore public faith in the civil justice system, and that perhaps attempts to include such a test in the criminal home defence framework have been based

[67] M. Jefferson, "Householders and the use of force against intruders" [2005] *Journal of Criminal Law* Vol.69(5), 412.

[68] P. Mendelle, "Self-defence law shows how politicians use legislation as PR" *Guardian*, at *http://www.guardian.co.uk/law/2011/oct/31/self-defence-law-legislation-pr* [Accessed May 1, 2014].

[69] *Criminal Law (Amendment) (Householder Protection) Bill, Bill 20 of 2004–5*, Research Paper 05/10 January 31 2005, House of Commons Library at *http://www.parliament.uk/documents/commons/lib/research/rp2005/rp05-010.pdf* [Accessed May 1, 2014] p.8.

[70] *Criminal Law (Amendment) (Householder Protection) Bill, Bill 20 of 2004–5*, Research Paper 05/10 January 31 2005, House of Commons Library at *http://www.parliament.uk/documents/commons/lib/research/rp2005/rp05-010.pdf* [Accessed May 1, 2014].

[71] *Criminal Law (Amendment) (Householder Protection) Bill, Bill 20 of 2004–5*, Research Paper 05/10 January 31 2005, House of Commons Library pp.8–9 at *http://www.parliament.uk/documents/commons/lib/research/rp2005/rp05-010.pdf* [Accessed May 1, 2014].

on a similar rationale.[72] But whilst such a motive is laudable, can the provisions of the Crime and Courts Act 2013 really have such a desired effect when inherent uncertainties remain as what level of force can be used in practice? As such, critics have suggested that the new test is just another "vote-catcher".[73] And when you reflect back on the rocky, evolutionary road of today's home defence law, it is easy to empathise with such scepticism.

Of course, the latest statutory intervention[74] has yet to be tested with high-profile cases. However, history suggests that the introduction of these new home defence provisions will provide little reassurance to the public, who are seeking definitive guidance as to what they can and cannot do to protect both themselves and their premises from intruders. As such, the flurry of newspaper headlines concerning the rigour and suitability of the current home defence legal framework is likely to remain.

Whether or not the Crime and Courts Act 2013 is seen as providing a satisfactory solution, it has certainly served to heighten what appears to be a general pre-occupation by key stakeholders in the defence of the home.

Pre-occupation with home defence

Yet there is a clear disparity between the sheer amount of news articles and media campaigns[75] calling for increased home defence rights, and the number of homeowners who have actually been prosecuted for using force against intruders. To illustrate the point, the Crown Prosecution Service suggests that, between 1990 and 2005, there were only 11 prosecutions of people who attacked intruders in houses, commercial premises or private land, and only seven of those resulted from domestic burglaries.[76]

So given this relatively low risk of a person being prosecuted for defending their home, why are the Government, the media and the general public still so clearly pre-occupied with home defence law?

Perhaps one answer is rooted in classic motivational theory. In 1943, Maslow[77] suggested that for a person to realise their full potential (or self-actualisation) they need to first fulfil a hierarchy of supporting, motivational needs. These are physiological, safety, belongingness and esteem. One of the most obvious physiological human needs is shelter. People clearly need their home, but they also need to feel safe there if they are to develop to their full potential. Such feelings of safety are clearly compromised by the potential threat of burglary. Statistics[78] show that most occupiers[79] reported feeling emotionally affected by a burglary; whether angry,[80] shocked[81] or vulnerable.[82] Occupiers need not just be fearful for their personal safety, either, as property damage is also caused in half of all burglaries.[83]

Besides being emotionally affected, it is easy to see why homeowners may also feel aggrieved; not only at the possibility of being prosecuted for defending their own home against intruders but also at the prospect

[72] M. Jefferson, "Householders and the use of force against intruders" [2005] *Journal of Criminal Law* Vol.69(5), 408–9.

[73] Michael Turner QC, Chair of the Criminal Bar Association, as cited by O. Bowcott, "Plan to allow 'disproportionate force' against burglars included in crime bill" *Guardian*, at *http://www.guardian.co.uk/law/2012/nov/25/disproportionate-force-burglars-crime-bill* [Accessed May 1, 2014]

[74] Crime and Courts Act 2013.

[75] The *Telegraph*'s Right to Defend Yourself Campaign as referred to by P. Hennessy, "New rights for householders who attack burglars to be unveiled" *Telegraph*, at *http://www.telegraph.co.uk/news/uknews/law-and-order/9700694/New-rights-for-householders-who-attack-burglars-to-be-unveiled.html* [Accessed May 1, 2014].

[76] CPS, *Homeowners and self defence—DPP issues further details of cases*, at *http://www.cps.gov.uk/news/press_releases/106_05/* [Accessed May 1, 2014].

[77] A. H. Maslow, "A Theory of Human Motivation Psychological Review [PsycARTICLES]" Vol.50(4), 370 as referred to in C. Green, *Classics in the history of psychology*, at *http://psychclassics.yorku.ca/Maslow/motivation.htm* [Accessed May 1, 2014].

[78] *Crime in England and Wales 2010 to 11*, 2nd edn (Home Office), at *https://www.gov.uk/government/publications/crime-in-england-and-wales-2010-to-2011* [Accessed May 1, 2014].

[79] 87 per cent.

[80] 53 per cent.

[81] 41 per cent.

[82] 28 per cent.

[83] Crime in England and Wales 2010 to 11, 2nd edn (Home Office) .

of being sued by the intruders in the civil courts.[84] Homeowners need clarity as to what they can and cannot do when confronted by an intruder. Parliament's continued tinkering with the law suggests that the various statutory attempts have failed in this respect.

An additional explanation for perhaps excessive burglar-battering debates may include the backdrop of the actual physical and economic environments within which the glut of headlines on home defence is played out. For example, according to figures published by the Office for National Statistics for 2010,[85] the population of the United Kingdom has been growing at its fastest rate for 50 years.[86] It therefore comes as no surprise to learn that "an Englishman's home has become little more than a broom cupboard, and an expensive one at that".[87]

Such comments betray a concerned recognition that not only is land a finite resource,[88] it is also in increased demand. These facts, coupled with the recession[89] and also the recent rise in house prices,[90] encourage empathy with homeowners who are keen to protect their home, not only as a vital asset in itself but one which will also help to defend them from unwanted visitors.

As such, whether the country is in a double-dip or triple-dip recession, or even if it is now finally on the path to financial recovery, it is particularly unlikely that the welfare of burglars will feature very prominently on most householders' priorities lists.

And the problem appears, at least on the face of it, to have become more prevalent in recent times, with the results of the British Crime Survey 2010–2011 apparently indicating a clear correlation between the economic downturn and such acquisitive crime. Upon closer inspection, however, whilst the number of burglaries did rise by 14 per cent in just one year,[91] it is important to recognise that levels have actually just returned to the level of burglaries committed two years earlier, and that "the underlying trend in domestic burglaries … has been generally flat since 2004–5".[92] But it is easy to see how, without knowledge of this contextual background, such figures could easily add further kindling to help fuel householders" concerns over home defence issues.

Human rights

Prosecutions of homeowners also bring into play difficult issues concerning the interface between different human rights. Articles 2, 3 and 8 of the European Convention on Human Rights enshrine the rights to life, freedom from inhuman and degrading treatment and respect for private life.[93] But in home defence situations there could often be a conflict between these three rights.

In recognising this, the Joint Committee on Human Rights have referred to art.2 as imposing:

> "a positive obligation on the State to take reasonable steps to protect the right to life of individuals … [and that this includes] an obligation to protect against the actions of private individuals which breach that right."[94]

[84] P. Johnston, "Move to ban burglars from suing victims" *Telegraph*, at *http://www.telegraph.co.uk/news/uknews/1430314/Move-to-ban-burglars-from-suing-victims.html* [Accessed May 1, 2014].

[85] *National Population Projections*, Office for National Statistics, at *http://www.ons.gov.uk/ons/rel/npp* [Accessed May 1, 2014].

[86] T. Whitehead, "UK population growing at fastest rate for 50 years" *Telegraph*, at *http://www.telegraph.co.uk/news/uknews/immigration/8608777/UK-population-growing-at-fastest-rate-for-50-years.html* [Accessed May 1, 2014].

[87] J. O'Shaunessey, "An Englishman's home is a broom cupboard", Telegraph, February 27, 2006.

[88] Office of the Deputy Prime Minister, *Land Use Change Statistics (LUCS) Guidance* (2004), p.2.

[89] L. Elliot, "George Osborne is upbeat, but the squeeze shows no sign of ending soon" *Guardian*, at *http://www.guardian.co.uk/politics/2013/may/24/george-osborne-upbeat-squeeze* [Accessed May 1, 2014].

[90] H. Osborne, "UK house prices up again in May says Nationwide" *Guardian*, at *http://www.guardian.co.uk/money/2013/may/30/uk-house-prices-may-nationwide* [Accessed May 1, 2014].

[91] Home Office, *Findings from the British Crime Survey and police recorded Crime*, 2nd edn (July 2011) , at *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/116417/hosb1011.pdf* [Accessed May 1, 2014] p.73.

[92] Home Office, *Findings from the British Crime Survey and police recorded Crime*, 2nd edn (July 2011) p.73.

[93] Liberty, *Right to life*, at *http://liberty-human-rights.org.uk/human-rights/human-rights/the-human-rights-act/index.php* [Accessed May 1, 2014].

[94] *Criminal Law (Amendment) (Householder Protection) Bill, Bill 20 of 2004–5*, Research Paper 05/10 January 31, 2005, House of Commons Library, at *http://www.parliament.uk/documents/commons/lib/research/rp2005/rp05-010.pdf* [Accessed May 1, 2014] p.10.

The Committee went on to state that:

> "where essential aspects of rights to life or physical integrity are at stake, it has been established that there is an obligation on the state to put in place criminal law sanctions which ensure effective deterrence against breaches of these rights."[95]

The Committee made these comments in relation to the proposed Criminal Law (Amendment) (Householder Protection) Bill,[96] and, in doing so, expressed concern that such a change in the law would remove its deterrent effect in relation to home defence cases involving murder, manslaughter and assault, amongst others.[97]

Striking an appropriate balance between the rights of both householders and intruders is a difficult task, not only because such fundamental human-rights issues are at stake but also because of the wide range of different circumstances that these parties often find themselves in.

Achieving such a balance is not just a criminal law issue; the same castle conundrum raises its head in civil law proceedings too. Yet the public debate's clear emphasis on the criminal law means that the civil law framework of occupiers' rights and liabilities has been inevitably side-lined. Perhaps if it is time for burglar-battering, someone needs to check-in with the civil courts too.

The civil law framework

The civil law liability imposed on occupiers has changed considerably over time. In the key case of *Robert Addie and Sons (Collieries) Ltd v Dumbreck*,[98] a colliery company was held not liable for the death of a four-year-old boy who was playing in, and was subsequently crushed by, the wheel of its haulage system. Criticising this decision, writers such as Fleming[99] have suggested that treating trespassers as getting their just desserts is not appropriate especially where, to coin a Lord Diplock phrase, more "meritorious trespassers"[100] are involved. A distinction should be drawn between burglars who have the intent to steal and trespassing children who are merely playing "hide and seek".

Matters came to a head in the key case of *British Railways Board v Herrington*,[101] where the court took the opportunity to overturn the *Addie*[102] decision, making it possible for trespassers to sue an occupier for injuries suffered whilst on their premises.

Despite this decision, there were still unanswered questions as to what the occupier's duty towards trespassers entailed. In seeking to provide some answers, the Law Commission stepped in.[103] The Commission originally suggested that an occupier should not owe any duty of care to a trespasser who was involved in a "serious criminal enterprise".[104] Whilst this proposal appeared commendable in principle, the Commission subsequently decided against it, suggesting that it would involve putting in place either

[95] *Criminal Law (Amendment) (Householder Protection) Bill, Bill 20 of 2004–5*, Research Paper 05/10 January 31, 2005, House of Commons Library p.10 at *http://www.parliament.uk/documents/commons/lib/research/rp2005/rp05-010.pdf* [Accessed May 1, 2014].

[96] *Criminal Law (Amendment) (Householder Protection) Bill, Bill 20 of 2004–5*, Research Paper 05/10 January 31, 2005, House of Commons Library at *http://www.parliament.uk/documents/commons/lib/research/rp2005/rp05-010.pdf* [Accessed May 1, 2014].

[97] *Criminal Law (Amendment) (Householder Protection) Bill, Bill 20 of 2004–5*, Research Paper 05/10 January 31, 2005, House of Commons Library p.10 at *http://www.parliament.uk/documents/commons/lib/research/rp2005/rp05-010.pdf* [Accessed May 1, 2014].

[98] *Robert Addie and Sons (Collieries) Ltd v Dumbreck* [1929] A.C. 358.

[99] J. Fleming, "Tort liability of occupiers of land: duties owed to trespassers" [1953] *The Yale Law Journal* Vol.63 No.2 , 144.

[100] *British Railways Board v Herrington* [1972] A.C. 877 at 933.

[101] *British Railways Board v Herrington* [1972] A.C. 877.

[102] *Robert Addie and Sons (Collieries) Ltd v Dumbreck* [1929] A.C. 358.

[103] The Law Commission (Law Com. No.75), *Report on liability for damage or injury to trespassers and related questions of occupiers' liability advice to the Lord Chancellor under section 3(1)(e) of the Law Commissions Act 1965* (Cmnd.6428), (Session 1975–6), Law Commission, London.

[104] The Law Commission (Law Com. No.75), *Report on liability for damage or injury to trespassers and related questions of occupiers' liability advice to the Lord Chancellor under section 3(1)(e) of the Law Commissions Act 1965* (Cmnd.6428), (Session 1975–6), Law Commission, London, para.32.

an "unacceptably wide" or "unattractively complex" definition;".[105] In explaining their conclusion, the Commission noted that defining the phrase by reference to any offence which had a particular maximum sentence length, for example 10 years, would bring with it potentially unjust consequences. It would mean that someone stealing an apple would be owed the same duty of care as someone stealing the Crown jewels.[106] Whilst the cases are completely different in terms of their severity, because both involve theft, they are subject to the same maximum punishment. Applying the Commission's proposed definition of "serious criminal enterprise", both trespassers would therefore be categorised together accordingly and the occupier would owe them both the same duty of care. (In making this point, it appears that the Commission was suggesting a sliding scale duty of care which was closely correlated with the severity of the crime. But such a proposal only takes into account the trespasser's actions. It completely ignores what steps the occupier may or may not have taken to ensure the safety of entrants to their premises. Clearly such factors should also form part of the equation).

Rather than recommend the adoption of a more specific test, the Commission (and subsequently Parliament in its enactment of the Occupiers' Liability Act 1984) preferred to leave the courts with discretion, requiring reference to a test of "reasonableness" so that each case could turn on its own merits.

It is evident that the civil law on occupiers' liability shares a similar problem to the criminal law of self-defence; namely, both legal frameworks need to cover an extraordinarily broad spectrum of situations in which occupiers and entrants might find themselves. Lord Morris alluded to this in the case of *Herrington*[107] when he noted that:

> "the term trespasser … covers the wicked and the innocent: the burglar, the arrogant invader of another's land, the walker blithely unaware that he is stepping where he has no right to walk, or the wandering child."[108]

Whilst the approach of the Occupiers" Liability Act 1984 was at least a step in the right direction (to address some of the concerns that had been raised previously by judges in cases such as *Herrington*),[109] there has been very little subsequent case-law to help illustrate whether or not the new provisions have made much practical difference, at least when compared against the glut of criminal law cases on home defence issues.

Revill v Newbery[110]

One case which did provoke much public interest, though, was *Revill v Newbery*.[111] Over 20 years ago, a 76-year-old pensioner, Newbery, owned an allotment shed. Like both Martin and Lyon, Newbery had suffered previous break-ins. So, in a bid to protect his garden shed from any further intruders, Newbery decided to start sleeping in it. One night, Revill attempted to break into the shed. In doing so, he woke Newbery. Intending only to frighten Revill, Newbery loaded up his 12-bore shotgun and cartridges and fired through a hole in the door. He hit and injured Revill, who was standing about five feet away.

In subsequent criminal proceedings, Revill admitted attempting to burgle the shed and was prosecuted accordingly. Newbery was charged with, but subsequently acquitted for, wounding offences.

[105] The Law Commission (Law Com. No.75), *Report on liability for damage or injury to trespassers and related questions of occupiers' liability advice to the Lord Chancellor under section 3(1)(e) of the Law Commissions Act 1965* (Cmnd.6428), (Session 1975–6), Law Commission, London, para.32.

[106] The Law Commission (Law Com. No.75), *Report on liability for damage or injury to trespassers and related questions of occupiers' liability advice to the Lord Chancellor under section 3(1)(e) of the Law Commissions Act 1965* (Cmnd.6428), (Session 1975–6), Law Commission, London, para.32.

[107] *British Railways Board v Herrington* [1972] 2 W.L.R. 537.

[108] *British Railways Board v Herrington* [1972] 2 W.L.R. 537 as per Lord Morris of Borth-y-Gest at 904.

[109] *British Railways Board v Herrington* [1972] A.C. 877.

[110] *Revill v Newbery* [1996] Q.B. 567.

[111] *Revill v Newbery* [1996] Q.B. 567.

However, Revill sued Newbery in the civil courts for both negligence and breach of duty under the Occupiers Liability Act 1984, claiming damages for the injuries that he had suffered.

In his defence, Newbery cited the doctrine of *ex turpi causa non oritur actio* (that no action can be founded on an immoral or illegal act). Newbery claimed that, because Revill had been attempting to burgle the shed, Revill should not be able to bring a claim against him.

Newbery also argued that, even if Revill could bring a claim against him, his damages should be reduced by two-thirds, as he alleged that Revill was contributorily negligent by attempting to burgle the shed in the first place.

At first instance the judge found in Revill's favour but reduced the amount of compensation payable on the basis of contributory negligence. The judge stated that:

> "due allowance should be made for the natural fears of the defendant, a man in his seventies, suddenly woken in the middle of the night by things going bump, when fears become magnified and cloud reason and judgment."[112]

Newbery subsequently appealed. In the Court of Appeal, Neill L.J. referred to s.1(3)(b) of the Occupiers" Liability Act 1984 and made a similar distinction to that which can be made between the *Hussain*[113] and Ferrie[114] cases referred to above. Newbery had not just fired a warning shot up into the air to get rid of the burglars, as Ferrie had done. Instead, like Hussain, he had deliberately taken action to injure the intruder. Newbery had pointed his gun at a horizontal level, where people in the vicinity could easily be injured or killed. Whilst Newbery could not see who was behind the door, he did believe that someone was there and he accordingly took direct action to attack them. Accordingly, Newbery's appeal was unsuccessful.

In drawing these comparisons it is clear that for pleas of home defence to succeed, whether in criminal law or civil law actions, there must be a direct correlation between the risks posed by the intruder and the action taken by the occupier to stop them. However, whilst it is clear that the criminal law has moved towards adopting a more burglar-battering approach, the case of *Revill*[115] suggests that, at least 20 years ago, the civil law may have been struggling to keep up. The key question is what, if anything, has changed since? Has the civil law developed to mirror the criminal law's tendency towards favouring occupiers?

Since Revill …[116]

Whilst there appears to be growing support for burglar-bashing in criminal home defence cases, the civil law seems to be following suit, albeit in its own way. There appears to be a growing tendency for civil courts, faced with occupiers' liability claims, to lay the blame for any injuries suffered squarely at the entrants' feet. For example in *Tomlinson v Congleton BC*,[117] Lord Hoffmann stated that it should be:

> "extremely rare for an occupier of land to be under a duty to prevent people from taking risks which are inherent in the activities that they freely choose to undertake … if people want to climb mountains, go hang-gliding or swim or dive in ponds or lakes, that is their affair."[118]

[112] *Revill v Newbery* [1996] Q.B. 567 as per Neill L.J. at 571, citing Rougier J.

[113] J. Sturcke, "Self defence or malicious revenge? Jail for brothers who beat burglar with bat" *Guardian*, at *http://www.guardian.co.uk/uk/2009/dec/14/jail-brothers-burglar-cricket-bat* [Accessed May 1, 2014].

[114] Telegraph Reporters, "Burglary shooting couple emigrate to Australia" The Telegraph, at *http://www.telegraph.co.uk/news/uknews/crime/9568506/Burglary-shooting-couple-emigrate-to-Australia.html* [Accessed May 1, 2014].

[115] *Revill v Newbery* [1996] Q.B. 567.

[116] *Revill v Newbery* [1996] Q.B. 567.

[117] *Tomlinson v Congleton BC* [2003] UKHL 47; [2004] 1 A.C. 46.

[118] *Tomlinson v Congleton BC* [2003] UKHL 47; [2004] 1 A.C. 46 at [84]–[85].

And in the case of *Grimes v Hawkins*,[119] a 19-year-old woman was left paralysed from the chest down after diving into a friend's swimming pool. In finding that the pool was safe and that the injuries resulted from the claimant's own actions, Thirlwall J. concluded that it should not be:

> "incumbent on a householder with a private swimming pool to prohibit adults from diving into an ordinary pool whose dimensions and contours can clearly be seen. It may well be different where there is some hidden or unexpected hazard but there was none here."[120]

In reaching her decision, the judge noted that some witnesses appeared to regard the trial as "a social event or entertainment" and believed that this had provided her with "insight into their likely conduct" when the accident happened and "they were 5 years younger and in drink".[121] Perhaps, in making that decision, she was therefore sending out a message to encourage young adults to take more responsibility for their own safety.[122]

Such cases indicate the civil law's move away from a compensation culture towards an approach where responsibility is firmly put back on the claimants' shoulders for the consequences of their own actions.

Returning full circle?

Whilst such cases may suggest a change in approach which favours the occupier, and it has been suggested that "hard working home and business owners need and deserve a justice system where their rights come first",[123] it is still difficult to envisage the law returning full-circle to echo the position pre-1957, before occupiers' liability law was statutorily codified and there was an "over-zealous preoccupation with the sanctity of real property rights".[124] The debates and discussions which formed part of and were also provoked by the *Herrington* case[125] and the subsequent Law Commission's Report[126] should help to ensure this.

Flexibility v certainty?

One question which is not so clearly answerable is the *flexibility* versus *certainty* issue. Whilst statute is best-placed to codify general principles, it is let down by its inflexible approach. Whilst case law can provide this flexibility, it is not always easy to draw out general principles from cases which can often turn on their own facts. It is a question which troubles many areas of our law as it seeks to pursue an elusive "will-o'-the-wisp"[127] of an appropriate one-size-fits-all approach.

How do other jurisdictions deal with such home defence issues?

The Castle doctrine

Such castle conundrums have vexed stakeholders across the world, most recently in Florida. There, a neighbourhood watch volunteer, George Zimmerman, spotted (what he thought was) a suspicious looking

[119] *Grimes v Hawkins* [2011] EWHC 2004 (QB).
[120] *Grimes v Hawkins* [2011] EWHC 2004 (QB) at [86].
[121] *Grimes v Hawkins* [2011] EWHC 2004 (QB) at [7].
[122] *Grimes v Hawkins* [2011] EWHC 2004 (QB) at [7].
[123] W. Johnson, "Government plans to scrap squatters' rights" *The Independent*, at *http://www.independent.co.uk/news/uk/home-news/government-plans-to-scrap-squatters-rights-2312840.html* [Accessed May 1, 2014].
[124] R.A. Buckley, "The Occupiers' Liability Act 184—Has *Herrington* Survived? [1984] *Conveyancer and Property Lawyer* 413.
[125] *British Railways Board v Herrington* [1972] 2 W.L.R. 537.
[126] The Law Commission (Law Com. No.75) Report on liability for damage or injury to trespassers and related questions of occupiers' liability advice to the Lord Chancellor under s.3(1)(e) of the Law Commissions Act 1965 (Cmnd.64-28), (Session 1975-6). Law Commission, London.
[127] M.P. Reynolds, "The rise and fall of the Atkin doctrine: searching for a will-o'-the-wisp" [2004] Const. L.J. Vol.20(3), 111.

man, Trayvon Martin, walking down the street through a gated housing community.[128] Being later described as a "wannabe cop",[129] Zimmerman had "profiled … the black, hoodie-wearing student"[130] who was in fact simply "on his way home … armed only with a can of sweet ice tea and a bag of skittles".[131] There was a subsequent struggle between the two men, during which Zimmerman used the 9mm handgun that he had been carrying to shoot Martin dead. [132]

It was previously thought that Zimmerman's legal team would endeavour to have his second degree murder charge quashed on the basis of Florida's Stand Your Ground principle. This allows someone to use deadly force if they feel that their life is in danger. However, Zimmerman's defence lawyers instead successfully relied on self-defence principles;[133] the jury finding that Zimmerman only fired the gun during a violent onslaught from Martin. Zimmerman has been acquitted accordingly.[134]

The case has been described as:

> "a litmus test of justice in America today. It put the country's proliferating 'stand your ground' gun laws, racial profiling and discrimination against black young men—as well as police incompetence—in the dock."[135]

Whilst Zimmerman's defence did not ultimately rely on Florida's Stand Your Ground principle, the case has certainly reignited a worldwide debate as to what action a person should be able to take to defend not just themselves and their family at their own premises, but also beyond those boundaries too.

It is only relatively recently that Florida's self-defence law made the colossal leap from what was known as a Duty To Retreat to the current Stand Your Ground principle. Until 2005, if a person was involved in a violent confrontation, they were obliged to take steps to defuse the situation and retreat before resorting to using deadly force.

The exception was the Castle doctrine, explained by US Supreme Court Justice Benjamin Cardozo as:

> "a man assailed in his own dwelling is [not] bound to retreat. If assailed there, he may stand his ground and resist the attack. He is under no duty to take to the fields and the highways, a fugitive from his own home."[136]

As mentioned earlier, this doctrine has since been extended to apply beyond the "castle walls" enabling a person to use deadly force *wherever* they feel that their life is in danger. Critics[137] suggest that the real problem is not one of self-defence, but rather whether this change in law provides people with an excuse

[128] H. Shelton, "Court was prevented from considering the real issue at play—racial profiling" *The Independent*, at *http://www.lexisnexis.com.lcproxy.shu.ac.uk/uk/nexis/results/docview/docview.do?docLinkInd=true&risb=21_T17788738565&format=GNBFI&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29_T17788432600&cisb=22_T17788738568&treeMax=true&treeWidth=0&csi=8200&docNo=2* [Accessed May 1, 2014].

[129] P. Foster, "'The law has spoken' … but America is divided over what it says; Obama calls for calm as neighbourhood watch volunteer is cleared of murdering black teenager in trial that gripped a nation", Daily Telegraph, London, Edition 1, National Edition.

[130] J. Goddard, "US protests grow after 'vigilante' is cleared"*Times*, at *http://www.lexisnexis.com.lcproxy.shu.ac.uk/uk/nexis/results/docview/docview.do?docLinkInd=true&risb=21_T17788525143&format=GNBFI&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29_T17788432600&cisb=22_T17788525146&treeMax=true&treeWidth=0&csi=10939&docNo=9* [Accessed May 1, 2014].

[131] G. Younge. "Cleared of Martin's murder, but has justice been done?" *Guardian*, at *http://www.lexisnexis.com.lcproxy.shu.ac.uk/uk/nexis/results/docview/docview.do?docLinkInd=true&risb=21_T17788525158&format=GNBFI&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29_T17788432600&cisb=22_T17788525161&treeMax=true&treeWidth=0&csi=138620&docNo=1* [Accessed May 1, 2014].

[132] G. Younge, "Cleared of Martin's murder, but has justice been done?" *Guardian*.

[133] R. Luscombe, "Trayvon Martin case: Zimmerman drops stand-your-ground defence" *Guardian*, at *http://www.guardian.co.uk/world/2013/mar/06/trayvon-martin-case-george-zimmerman* [Accessed May 1, 2014].

[134] P. Foster, "'The law has spoken' …. but America is divided over what it says; Obama calls for calm as neighbourhood watch volunteer is cleared of murdering black teenager in trial that gripped a nation"*The Daily Telegraph*.

[135] E. Pilkington, "Trayvon Martin: how a teenager's death sparked a national debate" *Guardian*, at *http://www.lexisnexis.com.lcproxy.shu.ac.uk/uk/nexis/results/docview/docview.do?docLinkInd=true&risb=21_T17788738565&format=GNBFI&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29_T17788432600&cisb=22_T17788738568&treeMax=true&treeWidth=0&csi=284355&docNo=4* [Accessed May 1, 2014].

[136] J. Bellin, "How 'duty to retreat' became 'stand your ground'", at *http://edition.cnn.com/2012/03/21/opinion/bellin-stand-your-ground-law/* [Accessed May 19, 2014].

[137] e.g. Daniel Vice, senior attorney for the Brady Campaign to Prevent Gun Violence as referred to in Pearson M. "Florida shooting renews debate over 'stand your ground' laws" *CNN*, at *http://edition.cnn.com/2012/03/20/us/florida-teen-shooting-law/index.html#1* [Accessed May 1, 2014]

for provoking confrontation and then shooting to kill. However, the prime House sponsor of the legislation has attempted to quell such speculation.[138]

So whilst home-defence dilemmas are clearly faced cross-continentally, it appears that such a comparative approach unfortunately does not provide any clear-cut answers. However, what it does do is help to highlight a precautionary tale if we are, as the Conservatives have suggested,[139] looking to adopt more robust protection mechanisms for occupiers. Since the "Stand Your Ground" principles were introduced in Florida eight years ago, cases of so-called justifiable homicide have increased three-fold.[140]

The Conservatives have previously advocated following Ireland's lead on the issue, believing that their proposals strike an appropriate balance which provides comfort to concerned householders without advocating vigilantism.[141] Adopting this approach would mean that a householder could use lethal force against an intruder if there were no other means available. Furthermore, householders would also be allowed to stand their ground and use such lethal force, even if they could have safely retreated from their premises. It is this second element which, if adopted, would mean a giant leap for our current home defence laws,[142] and one that the current government appears reluctant to take for the time being.

Conclusion

Whilst the examination of both the criminal and civil law frameworks for home defence has posed many more questions than answers, it is very clear that the ancient adage that a person's home is their castle (at least to some extent) is here to stay, in whatever guise that may take.

Whilst it is unlikely that Floridian methods will be adopted in the United Kingdom, it will be interesting to observe how Ireland's approach develops and consider whether there any aspects of that approach that could be adopted to help provide much-needed clarification on the home defence issues faced in England and Wales.

The continued deliberations about home defence law suggest that it remains an important issue, at least in terms of stakeholder perception if not in actual statistics. Recent debates appear to have focused unwaveringly on the criminal rather than the civil law. Yet to conclude that the civil law is not "keeping up" would be wrong. On the contrary, civil claims appear to be following suit, albeit in a more understated way, as judges are moving away from a compensation culture and tipping the often delicate balance of rights in the occupiers' favour.

Whilst the flexibility versus certainty conundrum continues to be of concern, perhaps the best approach is to consider statute as a script, which inevitably requires the judiciary to play a lead role in its interpretation according to the individual circumstances of each particular case.

[138] M. Pearson, "Florida shooting renews debate over 'stand your ground' laws" *CNN*, at *http://edition.cnn.com/2012/03/20/us/florida-teen-shooting-law/index.html#1* [Accessed May 1, 2014].

[139] D. Casciani, "Q&A: What is reasonable force?" , *BBC News* at *http://news.bbc.co.uk/1/hi/uk/6902409.stm* [Accessed May 1, 2014].

[140] R. Prince, "Trayvon Martin: 'Justifiable homicide' cases double across US in last decade" *Telegraph*, at *http://www.telegraph.co.uk/news/worldnews/northamerica/usa/9179162/Trayvon-Martin-Justifiable-homicide-cases-double-across-US-in-last-decade.html* [Accessed May 1, 2014].

[141] A point that concerned both Liberty (*Liberty Report Stage Briefing on Crime and Courts Bill in the House of Commons Liberty*, at *http://www.liberty-human-rights.org.uk/pdfs/policy13/liberty-s-hoc-report-stage-briefing-crime-and-courts-bill-march-2013-.pdf* [Accessed May 1, 2014]) and the Law Society. (The Law Society *The Law Society Parliamentary Brief House of Commons Second Reading 14 January 2013* The Law Society).

[142] D. Casciani, "Q&A: What is reasonable force?" , *BBC News*

Traumatic Brain Injury Cases—Impact of Neuropsychological Evidence

Colin Ettinger*

Brain damage; Expert evidence

JPIL Board member Colin Ettinger looks at the evidence required in brain injury cases. Following on from a previous JPIL article on the use of neuro-psychological expert evidence in such cases, he analyses how such evidence has been dealt with in three recent High Court cases. He concludes that it is the totality of the evidence available to the judge that will be important, including lay witness evidence from friends and family, and that reliance on neuro-psycholgical testing alone is neither recommended nor reliable.

In the December 2013 issue of JPIL, an article was published called "Presenting Evidence of Executive Functions Deficit in Court: Issues for the Expert Neuropsychologist". The article was written by two neuro-psychologists, Nicholas Priestley and David Manchester, and a personal injury solicitor, Rachael Aram.[1]

This article assesses three High Court actions in order to see what approach the court took in those cases to assessing this evidence. The previous JPIL article stressed the importance of understanding the behavioural indicators of everyday functioning. This should be in addition to the testing of executive functions. The authors expressed concern that without integrating reliable behavioural observations into neuro-psychological reports there is a risk of significantly undervaluing claims in clients with traumatic brain injury.

Verlander v Rahman

The first case scrutinised is the one referred to in the previous JPIL article. In *Verlander v Rahman*,[2] the High Court was concerned with a claim for damages for personal injury arising out of a serious constellation of injuries sustained by the claimant. She was struck by a motor car when crossing the road. Liability was admitted. The case was heard by Sir Robert Nelson. There was a dispute in the case between the parties on virtually every quantum issue. The main area of contention was the extent and consequence of the head injury which the claimant sustained. Whilst both parties accepted that a head injury had occurred, and that the claimant suffered from depression as a result of the accident, the effect each of these had upon the claimant's condition was strongly contested. The claimant contended that most of her disabilities were due to the frontal lobe brain damage and she was incapable of significant improvement. The defendant, on the other hand, contended that most, if not all, of the claimant's disabilities were due to depression or psychological factors which may well improve over time. The dispute had a profound effect on the most substantial parts of the claim, those which relate to future loss of earnings and future care.

The claimant, who was 27 at the time of the hearing, sustained other significant physical injuries as well as the traumatic brain injury. The judge gave details of the background facts but in terms of the traumatic brain injury, he focused on five particular aspects of the evidence. The first of these was the Glasgow Coma Scale ("GCS"). This, he found, was very significant in establishing the severity of the

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[1] Nicholas Priestley, David Manchester and Rachael Aram, "Presenting Evidence of Executive Functions Deficit in Court: Issues for the Expert Neuropsychologist" (2013) 4 J.P.I. Law 240–247.

[2] *Verlander v Rahman* [2012] EWHC 1026 (QB).

head injury. It was noted at the scene as 3/15 with the claimant "moaning" and recorded at this level on several occasions after this. It did improve to 9 or 10/15 but apart from this one instance, the GCS was 3/15 during the immediate aftermath of the incident.

The second consideration when determining this particular issue was Post Traumatic Amnesia ("PTA"). Here the judge found that this lasted for six days, which is significant in terms of the severity of the head injury.

The third important issue was the evidence adduced by the claimant. This evidence included lay evidence from her parents and also her fiancé. They were able to give full accounts of the claimant's condition, pre- and post-accident. Further evidence was given by work colleagues. What emerged from this evidence was that the claimant was described as being a very diligent employee. She was very thorough, applied great attention to detail and was liked by everybody. She received a promotion. However, after the incident, she attempted to return to her pre-accident job, without success, and has been unable to secure gainful employment since.

The picture painted of the claimant after the accident was in marked contrast to the description of her beforehand. For instance, she could no longer initiate and required prompting to carry out tasks. If she had a structure or a rota, she could work to it but did not always keep to it unless prompted. She became shy and quiet. She would sit in a corner and people didn't like having conversations with her as she repeated herself over and over again.

Evidence was also given on her behalf by a support worker. She was able to describe the tasks that she helped the claimant with such as housework, memory support, organisation and strategic support.

Fourthly, in addition to this, the court had before it a considerable number of documents dealing with the various visits of the claimant to the treating doctors, occupational therapists and others in which her accounts of her condition, whether worse, better or the same, are recorded. Reliance was placed on these by the defendants, as showing they demonstrated an improvement which could not have happened had the claimant suffered from a brain injury. They also argued that these showed the claimant to be much better than she or her family considered her to be.

Finally, the court also considered the medical evidence in this case. The court also heard live evidence from Professor Ron and Dr Sumners (neuro-psychiatrists) and Dr Leng and Dr Walton (neuro-psychologists).

In this case, there was no suggestion that the claimant was lying or exaggerating, but in addition to the points referred to above, the defendants relied heavily on the evidence of Dr Walton. There was no scanning taken immediately after the incident, so no radiological evidence of a brain injury. Dr Walton was of the view that there was no continuing impact of frontal lobe brain damage. This was contrary to the evidence of the other three doctors. Dr Walton very much relied on the testing that he carried out. He argued that some of the tests are computer-generated so that, for example, on the Wisconsin Test, after the claimant had got 10 consecutive responses correct, the computer then changed the parameters without her knowing, and yet she was able to respond and adapt to that, completing the test normally. The tests are designed to "tap" the functions of the brain rather than imitate real life.

Dr Walton said that the measuring of brain function by objective testing provided a better basis for diagnosis than clinical examination or experience. He said there was a wealth of evidence suggesting that clinical experience was likely to be of less value than objective test data, though he produced no articles or reports in support of this.

The other neuro-psychologist involved in the case, Dr Leng, produced an article from the journal "Brain Injury".[3] This was an article prepared by the same neuro-psychologists who prepared the previous JPIL article referred to above, Priestley and Manchester, as well as a third neuro-psychologist, Dr H. Jackson. In this report, it concluded that the reports of "significant others", that is family or work colleagues, are

[3] Brain Injury 18(11) (2004), 1067–1081.

likely to play an increasingly important role in the assessment of impaired executive functioning. It warned of the dangers of inaccurate reporting caused by family distress, dynamics and relative familiarity with the claimant's everyday functioning. However, in spite of these reservations, the authors concluded that the initial identification of executive deficits in everyday life was best achieved by more naturalistic assessment measures in conjunction with the structured reports of "significant others".

The court heard from the other doctors (Ron, Leng, Sumners) about the frontal lobe paradox, in which it is a known feature of neuro-psychological testing that it does not necessarily reveal deficits that are present in everyday life.

Other issues that the judge, Sir Robert, took into account are issues that arise generally in TBI cases. First, recovery from a moderate head injury is generally said to be good and usually better than the recovery in severe head injury cases. It was commented, though, that this general proposition is not particularly helpful in individual cases. Secondly, recovery that is going to occur in head injury would generally, though not always, have occurred by the end of two years from the injury; another useful yardstick, but again, not necessarily applicable in all cases. Thirdly, a normal MRI does not exclude the existence of a significant brain injury.

Having considered all of the evidence, Sir Robert held:

> "I am satisfied that the course which the doctor and, indeed, this Court must take is to look at all the evidence, both clinical and the neuro-psychological testing, and form a judgment as to the existence and extent of brain damage and continuing symptoms."

Having made this finding, he preferred the evidence of Dr Sumners, Dr Leng and Professor Ron and found that the symptoms the claimant was having were largely caused by brain injury rather than a psychological cause.

The other two cases that are discussed are also concerned with a traumatic brain injury. In both cases it is accepted by all sides that the brain injury was serious. However, in both cases, the court was concerned with the impact of the results of effort tests—symptom validity tests.

Edwards v Martin

In *Edwards v Martin*,[4] the claimant was admitted to hospital unconscious and suffered prolonged Post Traumatic Amnesia. It was common ground that the head injury was severe enough, although it had not resulted in any continuing impairment. The neuro-psychiatric effects of the injury were multiple, but there was a significant issue as to how severe they were. This was particularly important in this case as the court's conclusion on their severity would assist in resolving the most important areas of dispute, which are the issues of future care, capacity and residual employability.

In this case, the defendants relied on surveillance material and the results of effort tests. The surveillance material was to demonstrate that the claimant was capable of leading a normal life. The defendants' neuro-psychologist (Dr Parker) placed reliance on the effort testing within the psychometric tests but Dr Parker was the only doctor who expressed the view that the claimant was consciously exaggerating his disability and relied on the evidence of the psychometric tests alone. The claimant's neuro-psychologist, Dr Dghadiali, did not accept a finding of deliberate exaggeration. He said this could not be justified on the strength of psychometric testing alone. He stressed the importance of taking into account the lay evidence and other professionals' advice as to the nature and extent of the disability. He argued that there can be other explanations for inconsistency in the results of psychometric tests. Whilst deliberate under-performance may be an explanation for some of the test results, he ruled it out in that case. The claimant did not under-perform in all the tests and it would be highly unlikely that a person who is

[4] *Edwards v Martin* [2010] EWHC 570 (QB).

deliberately exaggerating would perform normally in tests of verbal memory. Dr Dghadiali pointed out that the claimant had co-operated fully on all other tests which were applied, not knowing what they were designed to measure. He considered that some of the inconsistencies arose from episodes of depression from which the claimant was suffering at the time of the tests. The judge, David Clarke J., said that Dr Parker did not give this any weight. David Clarke J. accepted the substance of Dr Dghadiali's evidence.

In reaching his conclusions, David Clarke J. was fortified in his view by the consistency of the contemporary accounts of the claimant's functioning contained in the reports of the case manager and treating doctor. He also noted that the claimant had shown little interest in the progress of the litigation.

Ali v Caton

The third case to which reference is made is *Ali v Caton*.[5] This case was heard before Stuart-Smith J. It concerned a claimant who sustained a very severe brain injury as a result of a road traffic collision which occurred on January 30, 2006. The trial gave rise to complex issues of fact and medical opinion. The central issue to be determined was the extent to which the claimant suffers, and will continue to suffer, lasting consequences attributable to the accident. The claimant's case was that the brain injury had had, and would continue to have, serious consequences on his ability to lead an independent life. The defendants' case was that the claimant had been consistently malingering. The defendants asserted that any ongoing cognitive defects that the claimant had were mild and that, once the litigation was over, he would be motivated to function and would function at a far higher level than had been exhibited.

This is a very detailed judgment but, for the purposes of this article, focuses on the evidence of the expert neuro-psychologists and, particularly, the defendants' neuro-psychologist, Dr Walton, who contended that reliance on the outcome of the case should be placed exclusively on the neuro-psychological tests and contended that the claimant was deliberately exaggerating his difficulties. Dr Walton carried out several tests to establish the validity of the symptom measured and found that the claimant failed miserably in all of them.

Mention should also be made of the aspect of the defendants' case, which was described by Stuart-Smith J. as their "high point", in that the claimant took a UK citizenship test and passed it. The defendant argued, with support from experts called on their behalf as well as on behalf of the claimant, that, for the claimant to have passed this test, whether fairly or by cheating, was inconsistent with the level of cognitive disability that he had displayed on a day-to-day basis.

During the course of this judgment, there was lengthy discussion by Stuart-Smith J. of Dr Walton's evidence. Dr Walton's conclusion was that he thought the claimant could live a largely independent life, with a minimal level of support, and highlighted areas of significant inconsistency, apart from the validity tests. Dr Walton emphasised the need for objective scientific evidence but stated that this was unavailable because of the claimant's failure with regards to the validity tests and so he could not arrive at any reliable conclusions, which is why he formed the conclusion that he did concerning the claimant's capacity.

The evidence of Dr Walton was rejected. It is interesting to observe that Stuart-Smith J. found it damaging that although Dr Walton asserted that he could not express any reliable opinion in the light of the claimant's response to the symptom validity tests, he appeared to dismiss the value of clinical observations as a basis for clinical judgment. In spite of this, he was prepared to express his opinions in terms which left no room for doubt that the claimant was a malingerer.

Stuart-Smith J. found that when the neurological and rehabilitative evidence is taken into account, it shows that consequences of a very severe traumatic brain injury are poorly understood and incapable of either prediction or accurate definition. He found:

[5] *Ali v Caton* [2013]) EWHC 1730 (QB).

> "The presence of reliable test results is useful but not determinative; their absence does not absolve clinicians or the Court from reviewing all of the available evidence in order to form an opinion."

This is exactly the exercise that Stuart-Smith J. carried out. He reviewed all of the lay evidence that had been given. This included family members, as well as treating therapists, such as the occupational therapist. He gave due weight to each of this evidence on the basis of how credible he found it. He also considered in great detail the medical records. These covered the two periods of rehabilitation that the claimant had. All of this evidence, in his view, gave a good picture of the extent of the claimant's disability. Obviously, he also took into account the expert evidence that was given and comment has already been made on his views regarding Dr Walton, who was the defendants' main witness, for trying to establish that the claimant was malingering. When considering the claimant's success with the citizenship test, Stuart-Smith J. gave a number of reasons why the claimant succeeded against all the odds.

It is interesting to note that in the article by Priestley, Manchester and Aram, they note that in the last 100 medico-legal cases in which they have been involved, some 30 per cent demonstrated an indicator of questionable effort. This, apparently, is broadly consistent with the findings in the literature. They also give an example of an individual with a severe brain injury who deliberately exaggerated on all effort tests in order to enhance his claim. However, this did not detract from the fact that the individual clearly had problems with executive functions caused by brain injury. It follows that the failure to pass the effort/validity tests is just one factor to take into account.

Conclusion

When taking into account the views expressed in the JPIL article referred to and the three court cases, it is clear that the approach that will be taken by the court is to look at all of the evidence and not simply the results of the neuro-psychological tests. This would include:

- an assessment of the scores of the Glasgow Coma Scale. These are not necessarily determinative but indicative;
- the assessment of Post Traumatic Amnesia is also very significant. Care should be taken by the medico-legal expert to take a detailed history so that the PTA can be properly established;
- neuro-psychological testing is obviously very important. If this demonstrates deficits then this will be strong evidence of brain injury. However, if no deficits are identified, it does not follow that there is no brain injury;
- results from brain scans showing brain damage are conclusive. However, it is well established that if there is no damage that appears on the scan, that does not mean that there is no brain injury;
- lay evidence is also important. This is particularly the case from individuals who knew the claimant before and after the incident. Very often this will be family members and friends and so the question of their partiality will need to be considered. However, what emerges from the cases is if this evidence is consistent, it will be accepted by the court;
- medical records will also be very helpful in determining a pattern of behaviour that is very much reflective of a traumatic brain injury;
- in many cases, the claimant is likely to undergo a programme of rehabilitation. The reports that emerge from this, whether it be psychology, occupational therapy or from the support workers, will help to validate symptoms of the traumatic brain injury; and
- finally, there are, of course, the medico-legal experts, who will assist the court in determining the extent of the causation, but their evidence is going to be based upon examination of the claimant as well as all the evidence referred to above.

As already indicated, it seems quite clear that the best approach to adopt by the courts, and indeed is being adopted by them, is one where all of the evidence is taken into account in order to resolve any issues on causation.

Shifting Strategy in the Personal Injury Legal Market

Deborah Evans*

Advertising; Claims management; Fixed fees; Law firms; Personal injury; Referrals

Deborah Evans, APIL Chief Executive, looks at how the personal injury marketplace has evolved in recent years and how it continues to change structurally in the post-LASPO, post-Jackson, post-ABS environment.

The competitive forces of this industry have historically made it more profitable than others. The industry has typically been fragmented, with few firms having significant market share. Competitive behaviour was restrained, with little advertising, no overt competitiveness and players taking a more gentlemanly approach to marketing. So, whilst the industry's competitive structure was still quite stable, this approach to business became outdated, meaning that there was potential for challenge and instability.

Back in the old days, the personal injury legal sector operated in a largely traditional way. Firms were generally small or medium-sized, with PI being practised alongside a mixed bag of other private client disciplines. Clients went in the main to their local lawyer, often using "yellow pages" to inform their judgement. Advertising was low key and brands were unimportant. Lawyers nestled under a protective umbrella of benign competitive conditions, enjoying good returns for their work. The vulnerable client was properly provided for through legal aid, but for clients of moderate means cost was still a barrier. Whilst many people each year were injured at the negligence of others, not everybody chose to sue. There were many reasons for this—fear of the legal system, a stoic attitude (that feeling you should "take it on the chin"), or not needing the money. However, the biggest issue, most likely to dissuade injured people, was cost. Legal fees were an obvious barrier to those who are injured and unable to work, as they wrestled with other financial hardships and expressed concern about their future.

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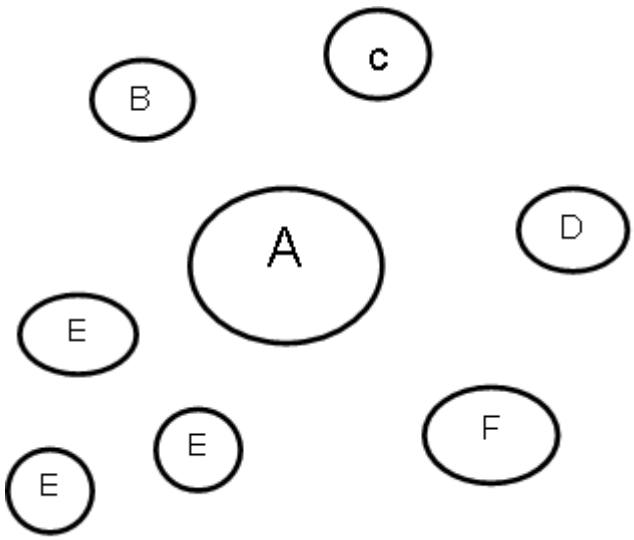

Diagram 1: Firms were small or medium-sized, sometimes with several branches, in an uncrowded local market

Great strides were then made to improve access to justice for all through the development of "no win no fee" models. This commercially savvy funding model meant that cost barriers fell away, and growth in the sector came swiftly.

The rising number of claims and the economic attractiveness of the industry—seen as a cash cow—drew new entrants in. Previously, there had been significant barriers to new entrants—only traditionally structured law firms could compete. Legal reform began to remove barriers to entry, allowing first claims management companies and then alternative business structures into the market. The real entry barriers were then very low. The number of players in the market, and indeed the number of lawyers, grew exponentially.

A typically local market (where claimants used to walk through the door of a local solicitor), morphed quickly into a national market, with lawyers willing to travel distances to see the more seriously injured client in their own home.

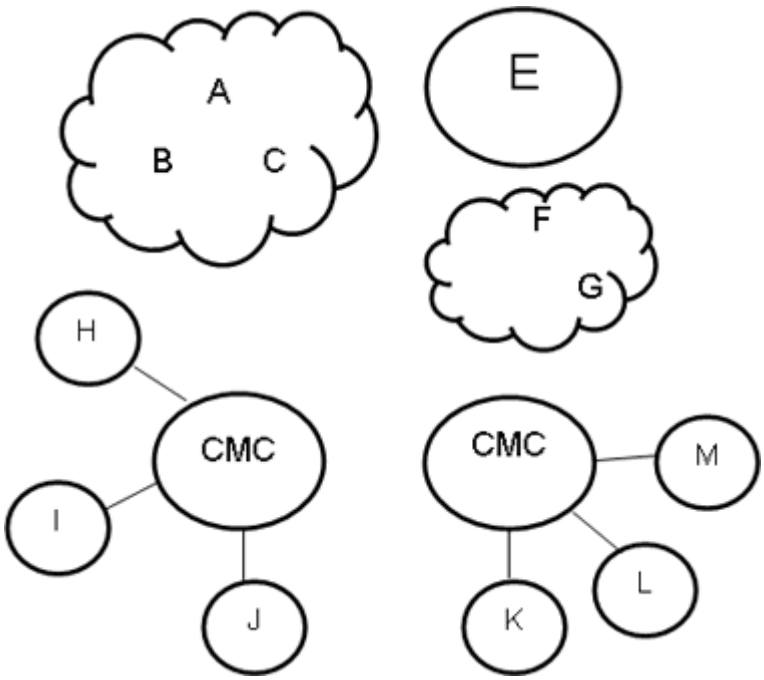

Diagram 2: Firms grow organically, consolidate, form marketing co-operatives, become ABSs, or work with CMCs to have a national reach

New entrants had new options—options not necessarily open to existing firms with long leases on commercial property and expensive staff overheads. They opened up in cheaper property in business parks, carried out their work nationally via the phone and the internet, and had well leveraged staff with paralegal "work horses". The internet also offered potentially interesting routes for new players to enter the market without need for expensive overheads. Any firm can look big on the internet.

As many existing law firms were typically very traditional in their output, there was a lot of latent, uncontested space, particularly in the arena of marketing and advertising. Low brand awareness meant that it was easy for ABSs to move in and begin competing in a different way, winning market share. Indeed, many recent new entrants were household names with strong, well-recognised and trusted brands on which they intended to trade—the Co-op and trusted rescuers such as the AA, for example.

With an increasingly crowded market came real competition for claims. Increased advertising raised awareness and pushed up claims numbers to levels previously unseen.

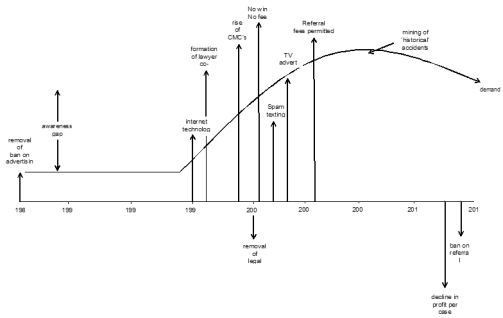

Diagram 3: Key events that shaped consumer demand

The biggest leap in claims numbers occurred as a result of claims management companies entering the market. To compete effectively on a national stage a law firm needs to be able to finance the TV advertising and resource the work that flows from it. CMCs bridged the gap by being the face of a hundred local firms. Suddenly, small law firms could compete on a national plane from their provincial office.

CMCs were not content to "wait and see" if someone will claim, instead choosing to promote the advantages of claiming to drive claims upwards. The market then became typified by more aggressive advertising. This approach captured the latent claimers—those who haven't taken action to date but would if pushed, if someone else was willing to do the work or make the first call. It also, sadly, encouraged the opportunistic claimers—those who hadn't been injured at all, who were willing to lie or exaggerate their injuries in search of a fast buck.

And the bucks came fast. Insurance companies, alarmed by the increasing number and cost of claims, decided to cut out the middle man and settle claims themselves, direct with the injured party. This approach was, however, short-sighted. Cost-cutting meant that medical reports were not always obtained, and indeed settling the case and closing the file was seen as more important than getting the right answer. Third party capture, as it is called, became a substitute for using a lawyer. To many, it seemed an easy route to quick compensation. The claimant was in no position to judge whether the offer was fair or not. This led to endless cases of under-settlement, as claimants unwittingly accepted the first offer on the table. It was not the right answer for every claimant, but proved an answer for the insurance industry. Another business model that worked for them was to capture the client opportunistically before they even needed the service. "Before the event" legal expenses insurance was helpful to motorists to protect them against legal costs, but it also assured panel firms with access to the claim, should it happen.

The operation of market forces in the personal injury market has not been clear cut. It is an imperfect market. Clients and their families are often emotional—it is a distress purchase. Price has not been a factor in the decision to appoint a lawyer, due to the operation of "no win, no fee". Shopping around was rare. The person who pays the bill, the wrongdoer, is not the one who appoints the lawyer. The client was not interested in the price of a service he would never have to pay for, and picked a lawyer on the basis of experience and trust—it was quality of work, reputation, and relationships that counted. As a consequence, firms' strategies for growth concentrated on acquiring well-known, experienced PI heavyweights, and were able to support multiple partners in a single discipline. Profits could be increased through recovering higher rates on each case, and attracting a serious caseload of more complex, higher value injuries, with lower value work providing cash flow and reducing average lock up times. PI was often the most profitable discipline in a multi-disciplinary firm.

Economists would argue that a market with no price sensitivity will show no restraint, and that demand for services and the costs that attach to them will inevitably rise unabated. And so it was in personal injury. The percentage increase in claims outstripped the percentage increase in accidents, as more injured people

than ever before chose to make a claim. The increased cost burden that followed became cause for concern for the insurance industry, who argued they were fighting a losing battle in keeping motor premiums affordable.

Policy makers moved fast to address costs in the majority of PI claims—those low value, road traffic claims that make up 70 per cent of the total cases. The profitability of the market was then swiftly capped by the imposition of fixed fees in the fast track.

Initially, the fixed fee in the portal was set at a level that meant that both small firms and large firms could make a satisfactory profit on the work. In a fixed-fee environment, growth in profits can only be achieved through increasing the number of claims settled, reducing time spent per case, and shrinking overheads. Thus, economies of scale became relevant. Firms specialising in lower value work focussed their strategies around volume, commoditisation, and lowering the cost of their salary overheads through hiring paralegals. The PI market, at the low value end, had its eye firmly on being commercial.

The relaxation of advertising rules, coupled with the entrance of CMCs into the market, put a very different complexion on the face of things. Advertising tipped from gentlemanly to assertive and persuasive, and, in some cases, into downright pushy. Few people appreciated the bombardment of text messages and cold calls from claims management companies or offshore marketing organisations. Such practices were banned, but were blatantly disregarded.

So had access to justice gone too far in the favour of the injured person? APIL would argue that every genuine claim deserves redress, and that as long as the claims were justified, the number is irrelevant. Increased claims, which could be viewed as the delivery of social justice, were instead seen as "spiralling out of control". The insurance industry persuaded the government that the pendulum had swung too far, and the government chose once more to shift the balance within the market. Clearly, the imperfect market could be improved by giving the buyer more of a financial interest—as they put it (rather distastefully), some "skin in the game". So, since April 2013, claimants pay the success fee and the ATE premium. Whilst this does not require them to find money upfront, and as such is not a barrier, it does reduce the amount they receive in compensation. It still matters, enough, the government hopes, to encourage them to shop around, which in turn may drive down the price.

However, whilst financial stimuli may work in other markets, the buyer is often in a fog of misery. When someone is injured, their priority is to get better, not to shop around. Emotions affect the ability and the desire to negotiate. Family members being seen to shop around on behalf of an injured person to get the cheapest deal may appear distasteful. There is some evidence of shopping around—calls from clients are now less easy to convert into actual cases than they were pre-April 2013—but the reality is that financial drivers are still less important than expertise and trust. Rightly so. This is not a service selected solely on price.

A legal transaction for personal injury is unlike any other. If a client was buying a house they would ask friends to recommend a lawyer, discuss it openly and shop around. But if they are injured it takes on a different complexion. Whilst they or their family may do some private research—on the internet perhaps, or maybe talking to someone they know has been in a similar situation—they often contract with the first lawyer they call. Often, the client didn't even need to pick up the phone—in about a third of all cases, they were contacted by their insurer's panel lawyer who instigated the claim on their behalf. Once a lawyer had been referred the case, clients were very unlikely to move it. This is why referral fees prospered—if a lawyer received a referral, it was a sure fire bet they'd get the case. As a consequence, the government banned referral fees in an attempt to strip cost out of the system, and to control the automatic conversion of an injury to a claim. This pulled the rug from under this business model, and now a myriad of small firms are left without a viable source of new work—left to reinvent themselves, flounder, pull out of personal injury or be sold.

So, on the advice of Sir Rupert Jackson, the government had brought about changes which would improve price sensitivity, reduce costs and potentially reduce demand, but it did not stop there. Lowering costs even further was a priority. Mistakenly, they thought that banning referral fees meant that there was a pot of money on each fast track or portal case that would now not need to be spent. This was misguided in that it left little or no money for marketing spend to attract new clients. This caused by far the biggest shift in the personal injury market.

The fee was now so low that profitability nosedived and only the large, volume players could prosper. It was now simply unaffordable to do low-value work in many small firms. The strategy of a law firm now had to focus on the ability to acquire new work, financial stability, sustainability, risk assessment of cases, cost control and differentiation.

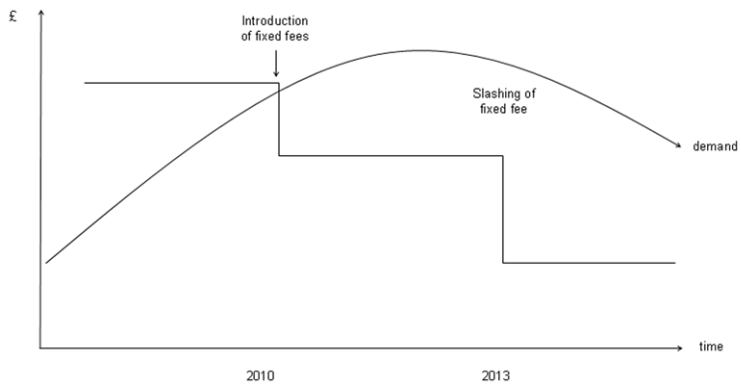

Diagram 4: Change in profitability of low value RTA work over time

The reforms had the following impacts:

- **instability:**

  a number of firms were put up for sale, and a market for buying and selling WIP developed. A number of firms could not acquire new work or had funding issues, leading to high-profile failures;

- **opportunity:**

  takeover and merger activity has been rife, with a number of very big firms emerging;

- **visibility:**

  marketing on a national scale is only sustainable by the biggest of firms or co-operatives. Brand is everything. The advertising focus is on building "household name" type brands;

- **maturity:**

  the market now appears more crowded with big players, and is less attractive to new entrants (unless they have a strong brand coupled with venture capital);

- **changing emphasis:**

  differentiation has always been important, and becomes more so in a competitive market. Compensation-themed adverts have been replaced by sensitive advertising focusing on

assisting seriously injured people in gaining rehabilitation, or helping them through the complex legal process, fighting their battles etc;

- **specialisation:**

  smaller firms focus on work above £25k and turn away fast-track work as it is no longer profitable. There are, however, increasing numbers of firms fighting over the same pot of work; and

- **justice gaps:**

  firms had to turn away some clients whose case would have succeeded pre-LASPO. Some areas of work have become unprofitable, some cases too financially risky to run. Some claims are deserving, but fail the new proportionality test. A sub-set of injured people are being failed by the system.

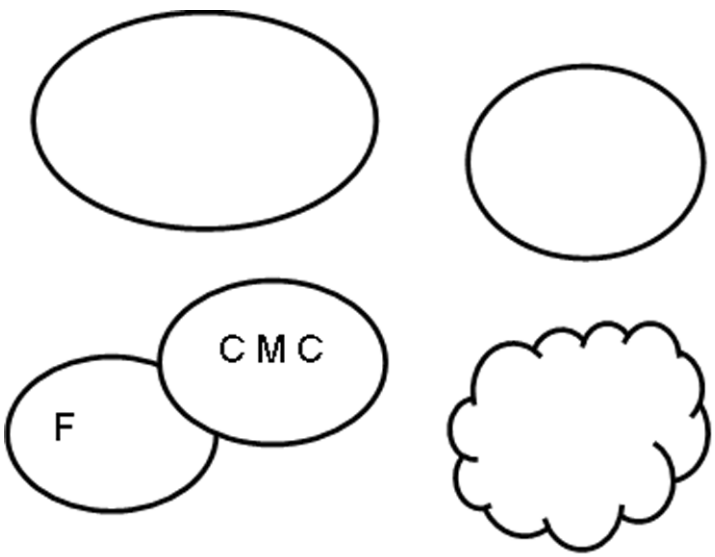

Diagram 5: The market has larger players, retailers, ABSs, with some smaller specialist niche firms

Niche firms, specialising in more serious or specialist claims, have been less impacted by the reforms. These areas rarely operate within a fixed fee framework, and work was generated through reputation and outcomes rather than referral fees. However, they have not been immune to the reforms. The capping of success fees will dent both turnover and profitability, and the changes to the way the ATE premium operates means that risk assessment of cases is key in order to avoid doing work for which no fee is subsequently recovered. Some complex yet justified cases are now simply too risky to run. There is now growing competition in this sector, as more firms try to reposition themselves to concentrate on serious injury cases. There is also the threat from brands being built on national TV by firms which deliver both low value and high value personal injury advice, which will undoubtedly draw market share.

Specialist or high value work has a markedly different "profit per case" profile than low value work. There is far less work, claims take significantly longer with more lock up. They require more expertise and are higher risk. As a consequence, profit per case is far higher.

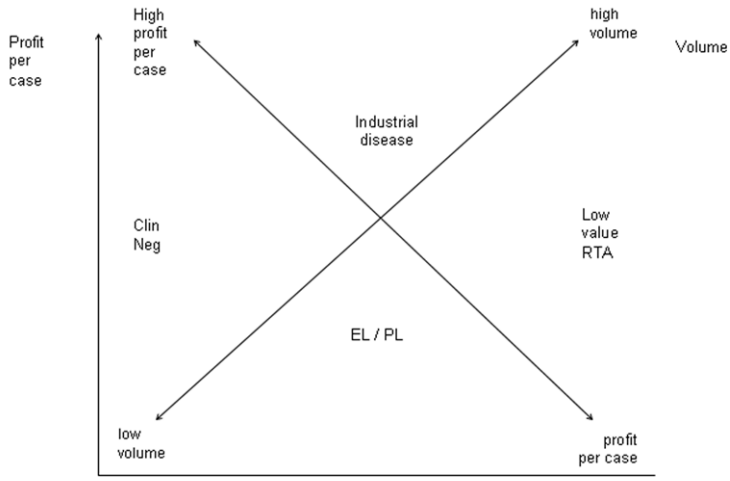

Diagram 6: Differing profit per case across specialist personal injury areas

Relationship between profit per case, volume, and type of work

Clearly, overall, we now have a crowded market, but is there an oversupply of lawyers? Claims have fallen for the last two years, whilst the number of lawyers has increased. There is a fight for clients. Undoubtedly, there will need to be a rebalance, and it is widely predicted that the personal injury market will shrink over the next 12–18 months, perhaps in the region of 20 per cent.

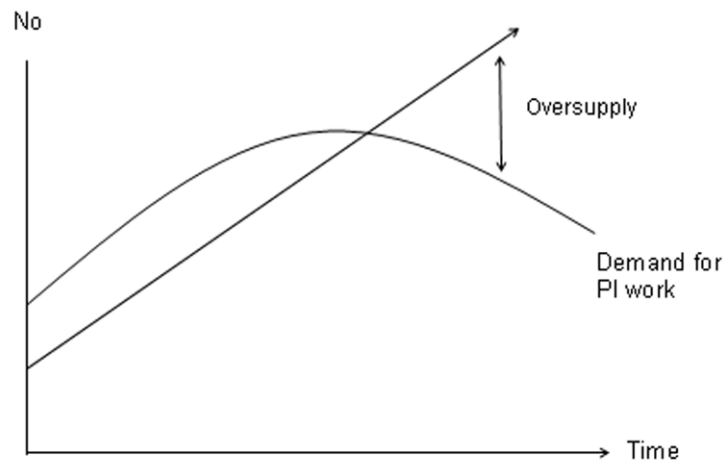

Diagram 7: The growth in the legal profession has continued despite the decline in claims numbers

So what does the future hold? With lower value work, big players will split market share between them. Building the brand is a key strategy. Maintaining market share will be a dependent on profile—advertising expenditure will continue to be high until the brands become established "household names". This cost of competition and the lack of space in the market will make it less attractive to new entrants, and the

market will stabilise. Demand for services is likely to remain stable, although lawyers will be competing with the insurance company to advise the client. In such circumstances, differentiation and added value are key, spelling out clearly why the injured person fares better when supported by a lawyer, and why they should ultimately pick you.

Low value work will rarely be done on the high street. Economies of scale will continue to be a key strategy, as will cost leadership. For those already well positioned in the industry, long term profit projections should be good.

However, size is not everything. The market will remain segmented, with low value work being delivered by volume providers, and more serious work being done by smaller niche firms who will fill the gaps and continue to prosper in higher end claims or specialist areas.

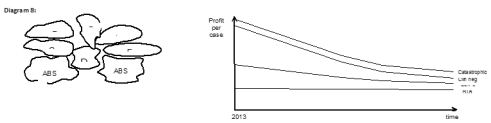

Diagram 8: A crowded market with large players and niche firms Government policy decisions may strip profit out of other areas over time

The injured person trusts in the legal advice they are given—the lawyer is, after all, the expert. There is therefore an absolute compulsion on the lawyer to be good, and to be right, and to be ethical, and to be putting the client first. The emotional client is also more likely to want to accept low early offers to settle and solicitors have to work with their clients and take them through the case in a structured, supportive way to get the best result. The basic service a claimant buys is reasonably undifferentiated whichever law firm they choose—the claim follows the same process, and, assuming a competent lawyer, should achieve about the same answer. However, differentiation comes through the add-ons—the client care, the local knowledge, out-of-hours availability, the personality/chemistry with the lawyer, the geographical location, ease of contact, reputation, etc. Some lawyers fight for the last penny for a client, and so will argue that their settlements are typically higher than others. Expertise is a major selling point, particularly for more complex work where it really improves the outcome of the case. Indeed, the expertise of the lawyer can undoubtedly lead to an enhanced settlement figure. In this world of outcome-focused regulation, surely a focus on getting the best outcomes is important. So how can competence be communicated to the consumer? Hence, the focus on advertising will rightly be on expertise and quality. The government are currently seeking to accredit medical experts. We have accredited lawyers for years. Accreditation, properly run, can be a strong indicator of quality, and a strong indicator of a favourable outcome, and our hope is that over time it is recognised by the claimant too.

Where the market then goes is, to some extent, in the hands of the government and their interventions of choice. Policy choices may include more fixed fees, particularly in areas such as low value clinical negligence, increasing the small claims limit, changing the discount rate, or other methods of cost control which may lead to a decline in profitability of the overall market and will in many cases have a detrimental effect on the injured person. Our hope is that after such a period of instability and change, future interventions will be taken with care. We would argue that no further changes are needed—that recent reforms have gone, if anything, too far, and that some adjustment may be needed the other way to better serve the interests of the claimant. Whilst the price and the process may fluctuate with political intervention, the rules of litigation are unlikely to change too much more, so long term planning is now possible.

The industry mindset is a crucial factor—how does the injured person behave when they are injured? The government hopes policies will drive new behaviours, and the media sometimes tries to set new cultural norms about whether it is or isn't acceptable to claim. However, no-one knows the injured person

better than those of you who have dealt with them for years. Think about how they will behave and what service they want, and watch how it changes over time. Consumers surf the internet to expand their choices. Ten years ago, blogs and sites such as Facebook and Twitter did not feature in your marketing strategy. Things change. Implement your strategies in the right place, at the right time, and in the right way.

The market has a different degree of attractiveness now to 10 years ago because it has commoditised, segmented and expanded. It will be different again in 10 years' time. What will it be like? We will wait and see.

Marketing Successfully in the Post-Jackson Era

John Spencer*

Advertising; Law firms; Marketing; Personal injury; Search engines; Social media; Websites

The legal profession has been able to advertise since 1986. What was first a case of crossing the Rubicon for an instinctively conservative profession was quickly embraced and is now widely practised. But the Legal Services and Punishment of Offenders Act 2012 ("LASPO") makes it more important than ever to advertise effectively. This article focuses on digital media and how traditional promotional methods should work in tandem with digital technologies to reach more clients, concluding with an examination of how to monitor and measure the success of work generation strategies. The author draws on his own experience over the past 30 years, and especially since the autumn of 2011—during which period the author rebuilt his practice from one which depended exclusively on referral fee based sources of work to one which, in 2014, generates 70 per cent of its work directly rather than from referrals.

The legal and professional framework

Since 1986 it has been possible for PI practices to advertise, but with the implementation of Legal Aid Sentencing and Punishment of Offenders Act 2012 ("LASPO") on April 1, 2013, the necessity to market well and effectively has been brought home with renewed force. Indeed, in today's legal services landscape, to ignore marketing imperatives would be tantamount to commercial suicide. The welter of change to which the PI sector has been subject is as well-known as it is dramatic, involving the introduction of qualified one way costs shifting, the removal of recoverability of success fees and ATE premiums, the increase of 10 per cent in general damages, a greater emphasis on proportionality of costs and the extension of fixed costs, as well as fundamental changes to the court's approach to case management and costs budgeting. Aside from all these factors, arguably it is the ban on referral fees (LASPO ss.56–60) which brings about the greatest challenge for firms having to "self-generate" work for the first time.

This article does not focus on ways to circumvent the referral fee ban through one of the avenues available, whether by forming an alternative business structure ("ABS") or embarking on a joint venture through an ABS, or through arranging for the provision of "information" which would enable the recipient to provide relevant services to the client through the client him or herself, or indeed through other methods. Instead, it focuses on how to generate work directly through other marketing techniques. But aside from the referral fee ban, what are the relevant regulatory provisions that practitioners need to have in mind?

In marketing, as in all areas of practice, the 10 mandatory principles in the SRA Code of Conduct[1] are pertinent and form an overarching framework for practitioners. Principles most relevant to marketing[2] are to act with integrity, not to allow independence to be compromised, to act in the best interests of each client and to behave in a way that maintains the trust the public places in the legal profession as a whole. In addition, practitioners must comply with their legal and regulatory obligations. Outcomes from this part of the Code include ensuring publicity is not misleading, that charges are clearly and unambiguously expressed, and that unsolicited approaches in person or by telephone to publicise practices are avoided. Taking code compliance as read, how should firms proceed to plan their work generation strategies?

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[1] SRA Code of Conduct 2011 Pt 1.

[2] SRA Code of Conduct 2011 Pt 1 Principles 2, 3, 4, 6 and 7.

Ethos and focus

Each practice should ensure that it has a clear position, established through focusing first on its clients and developed through engagement with all those working in its business. This will form the backdrop to the practice's business plan generally and specifically its business development plan. Never is it more important to have clarity in positioning than when communicating with the public. An established, clearly defined firm ethos will help establish priorities, for example whether the emphasis is local or national and which categories of injured persons and liability types are in focus (and in what order of priority). The ethos and targets will inform communication and advertising as will ancillary choices such as those with regard to sponsorship.

Existing clients are a goldmine of information. For instance they will inform the importance of reliable ancillary advice and home visits, as well as the sorts of information that injured people would like to be able to access through a firm's website. What questions they have, and in what level of detail they would like answers, can all help identify changes and enhancements to assist clients and potential clients. Clients will also reveal what matters most to them, perhaps the importance of their local community, and other issues which they see as a high priority. Each practice will have different dynamics to consider and will make different choices, but it is vital that there is this kind of engagement with clients. It is an ethical as well as a commercial mistake not to do this.

Traditional media

Traditional media should not be ignored, and the mix of media used will vary according to budget, locality, ethos and preferences. Digital resources simply provide new and more powerful ways of promoting a practice. There is still need to create written articles and comment, engage in conferences and be involved in and known around your community. Just as personal folders in Microsoft Outlook replace paper files, so the internet supplies the foundation for a relatively new and extremely powerful communication tool. There remains the need have to have something to communicate which is consistent with the chosen ethos and focus and it must be credible. This remains core material for practices which now can reach so many more through digital technologies.

Moving away from referred work means that advertising in all its forms becomes vital. Through newspapers, radio and even TV, each practice will cut its cloth according to its budget taking account of its target audience. Consistency and core values become even more important here to ensure that practices are consistently presented; ideally, nothing should ethically jar.

Digital media

Digital applications are the single most powerful tool with which businesses can communicate today. Referring to IT in his latest book *Tomorrow's Lawyers*, Richard Susskind states:

> "IT is now pervasive in our world. There are over 2.2 billion Internet users … and every two days, according to Google's Eric Schmidt, 'we create as much information as we did from the dawn of civilisation up until 2003'."[3]

Website

The website is the shop window of a practice and it must be right. If the shop window is wrong, people will not visit. The ethos, approach and philosophy need to be accurate and therefore credible and clearly explained. This needs to be consistently presented across all aspects of the website. Services need to be

[3] Richard Susskind, *Tomorrow's Lawyers* (Oxford University Press, 2003).

clearly explained, contradictory services should be avoided; if this is not the case there needs to be a focus on something other than service type to avoid contradiction. For example, a practice specialising in both claimant and insurer PI work may have a core value around excellent and fearless professional representation whatever the issue at stake, whereas an exclusively claimant practice can take a more unequivocal claimant-campaigning position if it so chooses. Visitors to sites need to be comfortable with where they have landed, and confident they will be well looked after. Advice needs to be relevant, clear and concise.

Moreover, potential client visitors landing need to be converted to be clients. Technologies like conversion analytics and heat maps to show where visitors tend to focus can help inform where an invitation to provide instructions might be most effective; it will also reveal areas of lesser interest to visitors. To most visitors external accreditations and kite marks are important, as are (perhaps more surprisingly) photographs of premises.

Pay per click

Pay per click is a method of advertising on a search engine when a user types in a certain phrase. But unlike most other forms of advertising payers only pay for the click once someone has interacted with it.

Pay per click became very expensive in the immediate aftermath of the referral fee ban in April 2013. Prices have settled somewhat but it remains expensive and each enquiry generated through pay per click may cost several hundred pounds or more. Pay per click is a bidding process where quality and price are relevant. If a practice is perceived to be of greater "quality" it will pay less for a search term. This is another reason for firms to invest time and resource in optimisation in that it will improve its quality rating and consequently reduce the cost of pay per click. To increase scale will also reduce the cost of pay per click. However, I focus on quality in looking at optimisation.

Search Engine Optimisation

In the United Kingdom, Google has 88 per cent of the search market, with its closest competitor Bing/Yahoo having around a combined 10 per cent of the rest. In the United States, Google is less dominant, having around 70 per cent of the market. Maximising the impact of a practice through optimisation when people use search engines is important, especially so with Google given its dominant market share.

While pay per click advertising can get services onto Google, the majority of the content on the results page is still made up from organic listings. Organic listings appear on merit and what Google judges to be the most relevant content for what a web user is searching for.

Optimising content to try to rank higher in search-engine owner results, known as Search Engine Optimisation ("SEO"), is a long-term project, whereas pay per click provides quick and early wins. A practice can also calculate fairly accurately, once its strategy is established, what its pay per click spend will yield in terms of enquiries; this is not so with SEO. SEO is about quality content, and refreshing, reviewing and continually working to improve the number of visitors received. For a successful SEO strategy it is important to engage as many people working in an organisation as possible in the process.

There are different challenges with pay per click: it is expensive, and the lower the perceived quality of content the more expensive it is. There are, however, dangers with SEO and organic listings. Search engines like Google are becoming increasingly strict. They want genuine websites that offer the most value and relevance, and without any manipulation. They regularly develop and change their algorithms (the rules which the search engine uses in order to rank pages), and are making concerted efforts to eradicate manipulation. Constant vigilance is required to avoid falling foul of their policing through optimisation strategies. In essence, optimisation must be genuine rather than seeking to enhance reputation falsely—which is what the search engines are trying to prevent.

Search engine policing

As stated earlier, Google is the overwhelmingly dominant search engine, and for this reason I use it as an example. However, the principles in operation will equally apply to other search engines.

Google monitors approximately 200 signals from web pages when deciding how to rank them in its results. This process is largely done automatically and algorithmically by constantly trawling web pages to determine which is the most relevant to display in relation to users' searches.

In theory, this means that pages which are the most relevant and offer users the most value will rank above those that offer less. Google details its ranking principles in a Webmaster Guideline which sets out how pages should be built in order to provide users with the best experience.

But as with any rule, there are those who will seek to bend and even break them. For this reason, a large part of the guidelines relate to "Quality Guidelines". If a website breaches them then the practice will run the risk of a Google penalisation.

Google can and does take manual action on websites where it spots anything untoward, either with regard to unnatural links or otherwise trying to "trick" Google or its users. Examples would be websites that hide text, that copy content from other websites or generally try to deceive users.

There have been a number of solicitors' practices which have been delisted following action by Google. Rather more famously, Interflora's website was delisted for a period of time after it was discovered that the company had financially incentivised bloggers to talk about and link to its website. The number and quality of links to a website is a key factor that Google takes into account when ranking websites. Attempting to manipulate these links can result in severe penalties and manual action.

Complying with search engine guidelines

The SEO agency needs to be trusted implicitly. Due diligence and referencing is essential. Practice members need to speak to the agency and those people specifically allocated to its account. A firm needs to share its plans and hear its agency's ideas and vice versa. There needs to be clear understanding of the practice ethos and business. Practices need to be satisfied that their agency's ethics are sound. Return on investment needs to be evaluated and understood. It needs to be known how the agency intends to raise profile online; if any of this sounds like it is easy or too good to be true then it probably is.

Offers may be received from websites or agencies wanting to sell links to the firm's website, blog or even promising more followers on Twitter and Facebook. Many of these are trying to exploit search engine algorithms and if their covert efforts are discovered it will be apparent that they have done more harm than good.

There are organisations which operate solely to sell advertising on a so called "churn and burn" basis. These organisations set up a suitably and appositely named website and then set about selling sponsorship to firms, businesses and individuals who will be interested in instructions or workflow from such an organisation. However, the reality is that there may be little traffic to the website and their only goal is to sell potential sponsorship packages for 12 months.

Not all website listings and sponsorships operate in this way and some may add genuine value. For example, many people still use Yell.com and having an enhanced Yell.com listing may be valuable when attracting local clients. But when offered sponsorship of this type which apparently might be useful in attracting potential clients firms need to do due diligence to ensure there is likely to be a return on investment.

Social media

The number of social networks (Twitter, Facebook, LinkedIn, Google+, etc) is ever-increasing and practices should have at least a basic presence on each major social networking site. Use of social media can range from publishing news items and content to taking part in discussions or engaging with clients. Each network has its own technologies and audience, but it is important to develop a social media strategy that includes as a minimum:

- who in the practice is responsible for social media and interacting with each social network;
- what content is to be placed on each network;
- if individual lawyers are to use their personal accounts for business purposes; and
- ensuring guidelines and a framework is in place.

Visitor conversion and client retention

Once a practice has acquired visitors to its website it must then turn these visitors into clients. Once a firm is instructed, tight risk assessment procedures need to be in place. A dedicated and well-trained initial client liaison team may be the best way to ensure that potential clients are looked after and secured. Over-worked practitioners are not always the best at converting and then retaining clients. It is beyond the scope of this article to say much more on this, other than to emphasise the importance of enquiries converting to instructions for your firm in meritworthy cases which clients wish to pursue.

Measurement and monitoring

There are various ways to measure effectiveness in marketing and there are no absolute answers to what is right or wrong. There are below set out some suggestions for areas to scrutinise.

Web content should be monitored, likewise the creation of blogs, articles and other content, including content on social media. It is important to have a clear and effective policy to ensure good content is generated which is useful to enquirers and clients. It is imperative it is accurate. Any opinions expressed should, where appropriate, be suitably caveated.

Content must be consistent with a practice's culture and ethos. Non-lawyer as well as lawyer input can be appropriate. Writing does need to express personality, which can be an area of difficulty for lawyers, for whom care and precision of expression rather than personality are more natural.

Some practices, according to size and resource, may employ PR agencies and again measurement and engagement is vital.

With digital agencies content should be monitored, so too the exposure that they gain and the traffic they generate to a practice's website. Agency performance should be scrutinised for evidence of the agency's appetite and quality of new ideas and targeting and general "nose" for a good idea or opportunity.

Each practice will make its own decisions regarding what it chooses to review and measure, but the following might usefully be considered:

- **Organic performance:**
  - what search terms a practice is aiming to rank for and progress towards achieving these rankings;
  - amount of organic traffic to the website;
  - visitor conversion rates, i.e. the number of site visitors versus the number of enquiries made;
  - client retention rates, setting an appropriate period or periods for measuring and evaluating this; and

— the quality and quantity of links to websites; as mentioned earlier not all links are beneficial.

- **Pay per click:**

— keywords, the most relevant search terms for services that are being targeted;
— Impressions, how often advertisements are shown;
— clicks, how often advertisements are clicked;
— cost per click, and what a practice is willing to pay for a targeted visitor; and
— cost per enquiry, how many clicks have been paid for to generate an enquiry.

- **Marketing and financial:**

— work generation;
— cost per enquiry;
— cost per converted and retained case;
— abandon rates;
— billing rates;
— risk rates by case category; and
— case acquisition cost by type, to take account of any disbursement write offs, both fault and no fault.

Conclusion

It is a regrettable fact of life that such is the intensity and uncertainty of change that even for the excellent there is no guarantee of success. Forecasting is, at best, an educated guess. Time alone will tell how successful a firm's marketing strategy, digital or otherwise, has been.

Following the implementation of LASPO as well as rapidity of technological change, the dynamics and cost of acquiring work are now very different—especially to how they were back in the days when law firms were prohibited from advertising. The fees which can be earned for every type of PI work have altered, and for some types of case the alteration is dramatic. Changes are compound and cumulative and cover recoverable fees, procedure and process, not to mention increased client competition fuelled by the increasing prevalence of consolidation through the availability of ABSs.

Add to all this the need for most to invest in wholesale new procedures and processes, and training and retraining, and one can readily conclude that these are very uncertain times. However, the vast majority of practitioners are highly motivated and determined people, who will hopefully survive and, indeed, flourish. In order to do so is, though, they need to embrace the brave new world and ensure that the firm is at the cutting edge of digital marketing.

Noise Induced Hearing Loss—Is it a Disease or Not?

Robert O'Leary*

Disease and illness claims; Hearing; Noise; Personal injury; Success fees

Robert O'Leary considers the issue of whether noise induced hearing loss constitutes an industrial disease or not. The issue arises primarily in relation to the recoverable success fee that such cases attract in pre-Jackson CFA cases. He reviews the case law that has arisen and puts those decisions in the context of the wider jurisprudence of disease cases and the principles of statutory interpretation and concludes that noise induced hearing loss was always intended to be treated as an industrial disease, has always been treated as such, and should continue to be treated as such.

Introduction

As readers of this publication are only too well aware, prior to the Jackson reforms which were implemented on April 1, 2013, conditional fee agreements ("CFAs") in certain categories of personal injury cases were subject to fixed success fees. CFAs in such cases which were entered into between solicitors and clients before April 1, 2013 remain subject to the fixed success fees set out in Pt 45 of the Civil Procedure Rules 1998 as drafted prior to its revision on April 1, 2013 (referred to below as "CPR Part 45"). There are many thousands of such cases that remain to be resolved.

Noise induced hearing loss[1] has always, at least until very recently, been accepted by all sides to constitute a "disease" within the meaning of s.V of CPR Pt 45, thereby attracting a success fee of at least 62.5 per cent. However, following the decision of Males J. in *Patterson v Ministry of Defence*,[2] certain defendants and their insurers have started to argue that noise induced hearing loss should, in fact, be classified as a "bodily injury" under s.IV of CPR Pt 45, attracting a reduced success fee of 25 per cent. This argument was accepted by District Judge Davies in *Smith v Secretary of State for Energy and Climate Change*.[3]

Noise induced hearing loss

The term noise induced hearing loss refers to the permanent reduction in auditory acuity associated with prolonged noise exposure over many years. The natural progression of an occupational hearing loss is to increase fairly rapidly at 4kHz and into the surrounding frequencies. In time a gradually deepening and widening notched sensorineural hearing loss centered at around 4kHz becomes a steeply sloping loss starting at around 500Hz. Sound waves are detected by hair cells in the cochlear which connect via the auditory nerve to the brain. The loss of hearing is caused by hair cell death brought about by an ototoxic reaction to noise exposure and is known as a sensorineural hearing loss. In many cases, noise induced hearing loss is accompanied by tinnitus and/or hyperacusis. The natural ageing process also causes sensorineural hearing loss. However, the pattern and rate of hearing loss caused by ageing is generally

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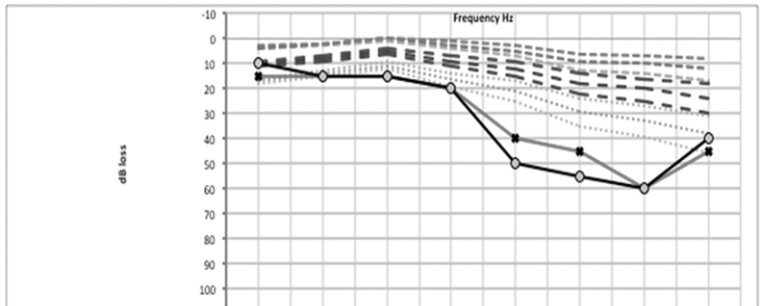
[1] This article deals with typical occupational hearing loss which accrues over many years' exposure to high levels of noise, rather than acoustic shock cases.

[2] *Patterson v Ministry of Defence* [2012] EWHC 2767 (QB); [2013] 2 Costs L.R. 197.

[3] *Smith v Secretary of State for Energy and Climate Change* Unreported, September 20, 2013, Mansfield County Court.

very different to that brought about by noise exposure.[4] The difference in a typical case is illustrated below for a male aged 45, with the dashed lines showing typical age related losses for males aged between 40 and 50 on different centiles of the population, and the solid lines showing the actual hearing threshold levels of the claimant.



	250	500	1000	2000	3000	4000	6000	8000
75th 50	4	3	1	4	7	13	14	17
50th 50	11	9	6	11	15	22	25	30
25th 50	18	15	12	19	25	35	39	46
75th 45	4	2	0	3	5	9	10	12
50th 45	10	8	5	9	12	18	20	24
25th 45	17	14	11	16	21	29	33	38
75th 40	3	2	0	1	3	6	7	8
50th 40	9	7	4	7	9	14	16	18
25th 40	16	13	9	14	17	24	27	31
Left	15	15	15	20	40	45	60	45
Right	10	15	15	20	50	55	60	40

PROCEDURE

CPR Pt 45[5]

The relevant parts of CPR Pt 45 state as follows:

"IV **Fixed Percentage Increase in Employers Liability Claims**

(1) **Scope and interpretation**

Subject to para (2), this Section applies where—

(a) the dispute is between an employee and his employer arising from a bodily injury sustained by the employee in the course of his employment; and

(b) the claimant has entered into a funding arrangement of a type specified in rule 43.2(1)(k)(i).

(2) This Section does not apply—

(a) where the dispute—

(i) relates to a disease;

(ii) relates to an injury sustained before 1 October 2004; or

(iii) arises from a road traffic accident (as defined in rule 45.7(4)(a)); or

[4] This very brief description is derived from Scott Brown's *Otorhinolaryngology, Head and Neck Surgery*, 6th and 7th edns, as well as from *Parkes v Meridian* [2007] EWHC B1 (QB) per H.H. Judge Inglis.

[5] It is interesting to note that CPR Pt 45 came into being following negotiations sponsored by the Civil Justice Council (CJC) between claimant representatives and defendant representatives, including all major insurers, who identified five specific categories of disease claim by name, including noise induced hearing loss, and agreed specific fixed success fees in relation to them, including one of 62.5 per cent for noise induced hearing loss. The agreed terms were then sent to the Rules Committee which drafted CPR Pt 45. See *"Calculating 'Reasonable' Success Fees for Employers' Liability Disease Claimant"—A Report to the CJC and DCA* (final version December 2004), by Paul Fenn and Neil Rickman, which names each disease considered, including noise induced hearing loss.

(iv) relates to an injury to which Section V of this Part applies;

…

V **Fixed Recoverable Success Fees in Employer's Liability Disease Claims**

(1) **Scope and Interpretation**

Subject to para (2), this Section applies where—

(a) the dispute is between an employee (or, if the employee is deceased, the employee's estate or dependants) and his employer (or a person alleged to be liable for the employer's alleged breach of statutory or common law duties of care); and

(b) the dispute relates to a disease with which the employee is diagnosed that is alleged to have been contracted as a consequence of the employer's alleged breach of statutory or common law duties of care in the course of the employee's employment; and

(c) the claimant has entered into a funding arrangement of a type specified in rule 43.2(1)(k)(i).

(2) This Section does not apply where—

(a) the claimant sent a letter of claim to the defendant containing a summary of the facts on which the claim is based and main allegations of fault before 1 October 2005; or

(b) rule 45.20(2)(b) applies.

(3) For the purposes of this Section—

(a) rule 45.15(6) applies;

(b) 'employee' has the meaning given to it by s 2(1) of the Employers' Liability (Compulsory Insurance) Act 1969 ;

(c) 'Type A claim' means a claim relating to a disease or physical injury alleged to have been caused by exposure to asbestos;

(d) 'Type B claim' means a claim relating to—

(i) a psychiatric injury alleged to have been caused by work-related psychological stress;

(ii) a work-related upper limb disorder which is alleged to have been caused by physical stress or strain, excluding hand/arm vibration injuries; and

(e) 'Type C claim' means a claim relating to a disease not falling within either type A or type B.

(The Table annexed to the Costs Practice Direction contains a non-exclusive list of diseases within Type A and Type B.)"

The Pre-Action Protocol for Disease and Illness Claims

There is no definition of disease contained within CPR Pt 45. However, the Pre-Action Protocol for Disease and Illness Claims states:

"2.2 Disease for the purpose of this protocol primarily covers any illness physical or psychological, any disorder, ailment, affliction, complaint, malady or derangement other than a physical or psychological injury solely caused by an accident or other similar single event.

2.3 In appropriate cases it may be agreed between the parties that this protocol can be applied rather than the Pre-Action Protocol for Personal Injury Claims where a single event occurs but causes a disease or illness."

Patterson v Ministry of Defence

In *Patterson v Ministry of Defence*, [6] Males J. considered whether non-freezing cold injury ("NFCI") should be classified as a "disease" or a "bodily injury" under CPR Pt 45. Having set out the relevant parts of ss.IV and V of CPR Pt 45, Males J. stated:

"14. I draw attention at this stage to a number of points:

(1) Section IV applies where the dispute arises 'from a bodily injury'. It constitutes the basic or default rule applicable to success fees in employers' liability claims.

(2) Claims falling within Section V which would otherwise fall within Section IV are expressly excluded from Section V. The exclusion applies not only to cases where the dispute 'relates to a disease', but also where the dispute 'relates to an injury to which Section V of this Part applies'. (These latter words were not in the original version of Section IV which came into force at a time when Section V did not yet exist, but were added later.) The provisions contemplate, therefore, that as a matter of language the terms 'disease' and 'injury' are not mutually exclusive. At least some injuries can also be regarded as diseases, and therefore fall within Section V. However, because of the express exclusion of disputes relating to diseases and to injuries to which Section V applies, Sections IV and V are mutually exclusive.

(3) Certain injuries which would not be regarded as constituting a disease as a matter of ordinary language expressly fall to be treated as within Section V. For example, CPR 45.23(3) refers to 'a disease or physical injury alleged to have been caused by exposure to asbestos', from which it is apparent that a physical injury caused by such exposure need not amount to a disease (at least as that term is ordinarily used) in order to fall within Section V. Similarly, some (but not all) psychiatric injuries and upper limb disorders expressly fall within Type B, even though they would not be regarded as diseases as a matter of ordinary language.

(4) However, as appears from CPR 45.23(1)(b), in order to fall within Section V the dispute in question must still relate to a disease. It follows that, at least to some extent, the term 'disease' appears to have a more extensive meaning in Section V than its meaning in everyday language. In particular, it must include those injuries not ordinarily regarded as constituting diseases which are expressly referred to in the definitions of Type A and Type B claims.

(5) When there is a dispute whether Section IV or V applies, the question is whether the condition in question qualifies as a disease (including one of the specific categories of injury expressly included in Section V). If it does, Section V applies and it does not matter whether the disease also constitutes or results from a 'bodily injury'.

(6) However, although some terms used in the Rule are defined, and some specific examples are given of claims falling within Section V, there is no definition of 'disease'.

15. As already noted, cases falling within Section V are divided into three categories. A 'Type A claim' is, in short, an asbestos claim, while a 'Type B claim' is a claim relating either to a psychiatric injury due to work-related psychological stress or a work-related upper limb disorder

[6] *Patterson v Ministry of Defence* [2012] EWHC 2767 (QB); [2013] 2 Costs L.R. 197.

alleged to have been caused by physical stress or strain, but excluding vibration injuries. It is common ground that NFCI does not fall into either of these categories. The issue, therefore, is whether it is a 'Type C claim', namely 'a claim relating to a disease not falling within either type A or type B'. Nevertheless, as explained below, the definitions of Type A and Type B claims played an important role in the parties' submissions."

His Lordship said that the following principles of interpretation were clear:

"18 …

(1) The task of the court is to ascertain the intention of the legislator expressed in the language under consideration. This is an objective exercise.

(2) The relevant provisions must be read as a whole, and in context.

(3) Words should be given their ordinary meaning unless a contrary intention appears.

(4) It is legitimate, where practicable, to assess the likely practical consequences of adopting each of the opposing constructions, not only for the parties in the individual case but for the law generally. If one construction is likely to produce absurdity or inconvenience, that may be a factor telling against that construction.

(5) The same word, or phrase, in the same enactment, should be given the same meaning unless the contrary intention appears."

Males J. rejected submissions on behalf of the claimant based upon various dictionary definitions of "disease" and went onto consider the scheme of the Rules, stating:

"36. It is common ground between the parties that (1) the definitions of Type A and Type B claims in CPR 45.23(3)(c) and (d) include some claims which would not in ordinary language be regarded as disease claims, and (2) for the purpose of CPR 45 those claims must be regarded as related to a 'disease' within the meaning of CPR 45.23(b). If that were not so, the claims in question could not fall within Section V at all, as CPR 45.23(b) provides that Section V applies only to claims which are related to a 'disease'. The issue between the parties is whether that demonstrates an intention that the word disease" should be given an extended meaning throughout CPR 45 (as the claimant contends) or whether the term 'disease' is used in its natural meaning subject only to the specific exceptions inherent in the definitions of Type A and Type B claims (as the defendant contends).

37. A question arose as to the status of psychiatric injuries and upper limb disorders. These are injuries which, if they fall within the definition of Type B claims in CPR 45.23(3)(d) , count as 'diseases' for the purpose of CPR 45 . Whether they fall within that definition depends, not on the nature of the condition, but on its causation. Thus psychiatric injuries which are alleged (though not necessarily proved) to have been caused by work related psychological stress fall within the definition, and therefore give rise to Type B claims, while psychiatric injuries caused in other ways (including by an employer's negligence) are not. Similarly, upper limb disorders which are work related, and which are alleged to have been caused by physical stress or strain, fall within the definition, and therefore give rise to Type B claims, provided that they do not constitute 'hand/arm vibration injuries', while other limb disorders are not.

38. The status of injuries of the nature described in CPR 45.23(3)(d) but which do not fall within the Type B definition because they do not satisfy the causation requirements of the definition was in dispute between the parties. Mr Williams for the claimant contends that such injuries, even though not falling within Type B, nevertheless fall and are generally understood to fall within Type C. He relies on this to support his submission that the term 'disease' in CPR

> 45 is used to include conditions which would not normally be regarded as diseases even if such conditions are not within the specific definition of Type B claims. He refers also to other injuries not normally regarded as diseases and plainly not Type B claims (e.g. noise induced hearing loss) which, he says, have attracted success fees calculated in accordance with Section V, not Section IV, thus demonstrating that the term 'disease' has been generally understood as having an expanded meaning. Mr James for the defendant, in contrast, contends that such injuries do not fall within Section V at all, and must be dealt with under Section IV.
>
> 39. I do not find it necessary to determine this issue, although there does appear to be some force in Mr Williams' submission as to the way in which in practice some claims not falling within Type B (for example, vibration white finger claims) are generally regarded as Type C Section V claims and not Section IV claims. Even if psychiatric injuries and upper limb disorders which do not satisfy the causation requirements of the Type B definition nevertheless constitute 'diseases' within the meaning of CPR 45, these represent specific extensions of the ordinary meaning of the term 'disease' and in my judgment do not demonstrate with sufficient clarity that the intention of the legislator was to apply an extended meaning of 'disease' more generally. Similarly, even if such claims as claims for noise induced hearing loss have in practice generally attracted the higher success fees applicable under Section V, I cannot regard that as a sure foundation on which to conclude that an extended meaning of the term 'disease' was intended."

The learned judge also rejected the submission that the definition of "disease" contained in the pre-action protocol should be imported into CPR Pt 45. Males J. continued:

> "45. I conclude, therefore, that the definition of 'disease' in the Protocol, let alone any general understanding of personal injury practitioners which may underlie that definition, is not a reliable guide to the meaning of 'disease' in CPR 45 …
>
> 46. Accordingly the claimant has not demonstrated that the term 'disease' in CPR 45 is used in other than its natural and ordinary meaning, save to the extent that the specific injuries included in the definitions of Type A and Type B claims must be regarded as constituting diseases for the purpose of the award of success fees …"

Rejecting the claimant's submission that NFCI was a disease, Males J. concluded:

> "48. Thus NFCI is not caused or contributed to by any virus, bacteria, noxious agent or parasite. It is simply a case where blood fails to reach the cells in the nerves, skin and muscle of the claimant's feet as result of exposure to weather or environmental conditions. Although it involves no trauma in the sense of the direct application of force to the body, the mechanism is essentially the same as occurs in a case of trauma such as when a tourniquet is applied to a limb or a victim is stabbed. The result is damage or injury to the body parts affected, but this cannot be regarded as a 'disease'. I accept the defendant's submission that if NCFI is a 'disease', so too are such conditions as chilblains, hypothermia, frostbite, sunstroke, sunburn and heat blisters which are no more than the result of exposure to weather conditions, and that this would be stretching the meaning of 'disease' to surprising lengths which cannot have been intended."

Smith v Secretary of State for Energy and Climate Change (successor to the National Coal Board/British Coal Corp)

On September 20, 2013, District Judge Davies, sitting in the Mansfield County Court, had to decide whether the noise induced hearing loss, which the claimant had suffered as a result of working in various collieries between 1985 and 1996, was a "disease" or a "bodily injury" with a consequently lower success

fee. The defendant relied on *Patterson*, certain County Court decisions which held in principle that a case involving an acceleration or exacerbation of a condition could not amount to a "disease"[7] and upon an "academic document", "Mechanisms of Noise Induced Hearing Loss". The District Judge decided that noise induced hearing loss represented "excessive wear and tear on the delicate inner ear structures" and further accepted that it amounted to an acceleration of hearing loss which would occur due to the natural ageing process in any event. The District Judge concluded:

> "26. Ultimately, is NIHL a disease or an injury brought on by an external cause, in this case excessive noise? … Applying [the Patterson] guidelines to his case, in my judgment a disease, unless specifically included and incorporated into the rules, is a biological process caused by a virus, bacteria, noxious substance or parasite. Those are the words used by Males J. in coming to the conclusion that NFCI was not a disease. They are equally apposite in respect of NIHL …"

District Judge Davies therefore applied a 25 per cent success fee.

Diseases associated with physical agents

The limitation of "disease" to "a biological process caused by a virus, bacteria, noxious substance or parasite" referred to in both *Patterson* and *Smith* is overly restrictive and, it is submitted, unsupported as a definition for the ordinary meaning of that word.

For five decades, *Hunter's Diseases of Occupations*[8] has remained the pre-eminent text on work-related diseases. It is now in its 10th edition. Part Three deals with "Diseases Associated with Physical Agents", Section One of which considers "Sound, noise and the ear".

Industrial Injuries Disablement Benefit covers more than 70 "diseases" including deafness.[9] Occupational deafness is a prescribed disease under the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985.[10] Schedule 1 to the Regulations contains a list of prescribed diseases and includes in Pt A, "Conditions due to physical agents" referring at A10 to sensorineural hearing loss amounting to at least 50dB in each ear, being the average of hearing losses at 1, 2 and 3kHz frequencies, and being due in the case of at least one ear to occupational noise (occupational deafness).

The error of limiting "disease" so as to exclude conditions caused by physical agents or environmental conditions, would mean, for example, that skin cancer caused by exposure to radiation from the sun would not qualify as a "disease".

Books and publications

Numerous legal publications refer to noise induced hearing loss as a disease. These include *Occupational Illness Litigation*,[11] which has a chapter on Industrial Deafness, *Munkman on Employer's Liability*,[12] which at para.18.03 refers to noise induced hearing loss "or disease cases generally", *Butterworths Personal Injury Litigation Service*,[13] which in its section dealing with costs and CFAs, expressly refers to deafness as giving rise to a 62.5 per cent success fee, and, indeed, *The IRS Guide to the Noise at Work Regulations*

[7] *Fountain v Volker Rail Ltd* Unreported, August 24, 2012, Central London County Court per H.H. Judge Mitchell; and *Bird v Meggitt Aerospace Ltd* Unreported, June 22, 2012, Nottingham County Court per District Judge Hales.

[8] Baxter, *Hunter's Diseases of Occupations* (CRC Press, 2010).

[9] See *https://www.gov.uk/industrial-injuries-disablement-benefit/eligibility* [Accessed May 1, 2014]; *http://iiac.independent.gov.uk/prescribed_diseases/* [Accessed May 1, 2014].

[10] Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985 (SI 1985/967).

[11] Andrew McDonald and Allan Gore QC (eds), *Occupational Illness Litigation*.

[12] Daniel Bennett (ed), *Munkman on Employer's Liability*, 16th edn.

[13] *Butterworths Personal Injury Litigation Service* (LexisNexus: Looseleaf).

1989,[14] which in a foreword by Alan Dove, Head of the Noise Policy Section of the Health and Safety Executive (HSE) states: "Occupational hearing damage is among the oldest recorded industrial diseases … ."

The HSE and other organisations

It is also plain that the HSE regard claims for noise induced hearing loss as occupational disease claims. For instance:

> "Throughout all industry, industrial hearing loss remains the occupational disease with the highest number of civil claims accounting for about 75% of all occupational disease claims."[15]

Similarly, the TUC and the Institute of Occupational Medicine (IOM) consider occupational hearing loss to be a "disease".[16]

Case law

Perhaps most importantly, noise induced hearing loss has long been recognised as a disease by the courts, including those at the very highest level.

In *Thompson v Smiths Shiprepairers (North Shields) Ltd*,[17] Mustill J., in the seminal judgment for noise induced hearing loss claims, referred to industrial deafness becoming a prescribed "disease" in 1975.[18]

In *Barker v Corus UK Ltd*,[19] a case concerned with the Fairchild exception in mesothelioma cases, Lord Walker stated:

> "So there may be borderline cases of indivisibility of damage, but I do not think that your Lordships can avoid the problem by treating mesothelioma itself as a borderline case. It is not an industrial disease (such as hearing loss eventually leading to profound deafness) which becomes progressively more severe (although not necessarily at a uniform rate) with continuing exposure to a harmful agent (such as excessive noise in shipyards)."

Similarly, in *Sienkiewicz v Grief*,[20] Lord Phillips distinguished mesothelioma from divisible, dose-related "diseases", including industrial deafness.

In *Baker v Quantum Clothing Group Ltd*,[21] Lord Mance, dealing with the application of s.29 of the Factories Act 1961 to claims involving noise, noted that the section

[14] Wright and Powell, *The IRS Guide to the Noise at Work Regulations 1989* (1991).

[15] See *http://www.hse.gov.uk/food/noise.htm* [Accessed May 1, 2014]. Other examples can be found at *http://www.hse.gov.uk/STATISTICS/causdis/deafness/index.htm* [Accessed May 1, 2014] (where an HSE spreadsheet IIDB02 describes occupational deafness as a disease) and again at *http://www.hse.gov.uk/research/rrpdf/rr584.pdf* [Accessed May 1, 2014].

[16] TUC: *http://www.tuc.org.uk/workplace-issues/health-and-safety/noise-and-vibration* [Accessed May 1, 2014]: "Hearing loss caused by exposure to noise at work continues to be a significant occupational disease. Recent research suggests 170,000 people in the UK suffer deafness, tinnitus or other ear conditions as a result of exposure to excessive noise at work." IOM: *http://www.iom-world.org/sicknessabsence/noise.htm* [Accessed May 1, 2014]: "When people are exposed to high levels of noise in the workplace, it can lead to permanent hearing damage. This damage can cause poorer hearing ability (general hearing loss), as well as a condition known as tinnitus, which manifests itself as a constant ringing in the ears. The Health and Safety Executive ('HSE') have identified noise induced hearing loss as a considerable occupational disease with over 170000 people in work reported to suffer from deafness, tinnitus or other ear conditions resulting from excessive exposure to noise at work." See also the *Scottish Law Commission Discussion Paper on Personal Injury Actions: Limitation and Prescribed Claims* (February 2006), Discussion Paper 132, para.3.27.

[17] *Thompson v Smiths Shiprepairers (North Shields) Ltd* [1984] Q.B. 405 at 409, 420.

[18] See also, by way of example, *Holtby v Brigham & Cowan (Hull) Ltd* [2000] 3 All E.R. 421; [2000] I.C.R. 1086 C at [22]; *Cookson v Novartis Grimsby Ltd* [2007] EWCA Civ 1261 CA at [66]; *Sniezek v Bundy (Letchworth) Ltd* [2000] P.I.Q.R. P213 CA; *Davies v Secretary of State for Energy and Climate Change* [2012] EWCA Civ 1380 CA at [35], [44] and [46].

[19] *Barker v Corus UK Ltd* [2006] UKHL 20; [2006] 2 A.C. 572 HL at [112].

[20] *Sienkiewicz v Grief* [2011] 2 A.C. 299 SC at [12]–[15].

[21] *Baker v Quantum Clothing Group Ltd* [2011] UKSC 17; [2011] 1 W.L.R. 1003 SC at [54].

> "is essentially dealing with safety, rather than health. Safety typically covers accidents. Health covers longer-term and more insidious disease, infirmity or injury to well-being suffered by an employee. Hearing loss, at least of the nature presently in issue, falls most naturally into this latter category."

Dictionary definitions and the Pre-Action Protocol for Disease and Illness Claims

Although arguments based upon various definitions of disease contained in dictionaries and the Pre-Action Protocol for Disease and Illness Claims were rejected by Males J. in *Patterson*, it is submitted that when viewed against the backdrop of the plethora of other material referred to above, they *are* relevant and supportive of noise induced hearing loss being regarded as a "disease" for the purposes of CPR Pt 45. In *Smith v Secretary of State for Energy and Climate Change*,[22] a case concerning pre-action disclosure in a deafness claim, the Court of Appeal made substantial reference to the Pre-Action Protocol for Disease and Illness Claims in its judgment. It seems entirely artificial that the appropriate Pre-Action Protocol for a noise induced hearing loss claim is that for Disease and Illness Claims when a claim is first intimated to a defendant, but that, on its conclusion, the claim is to be regarded as having related to a "bodily injury" not being a "disease" for the purposes of costs.

Conclusion

Adopting the "principles of interpretation" listed by Males J. at [18] of *Patterson*, it is submitted that noise induced hearing loss is clearly to be regarded as a "disease" for the purposes of CPR Pt 45. It was so regarded long before the fixed success fee regime for CFAs came into being; it has been a prescribed "disease" since 1975 and it has continued (until very recently) to be regarded as a "disease" by the courts and representatives of both claimants and defendants alike. In the author's view, at least, the argument that noise induced hearing loss should not be treated as a "disease" under CPR Pt 45 is wrong and should be rejected.

[22] *Smith v Secretary of State for Energy and Climate Change* [2013] EWCA Civ 1585 CA.

Jackson in a Kilt?—An Analysis of the Taylor Report

Gordon Dalyell*

Comparative law; Damages-based agreements; Funding arrangements; Personal injury claims; Qualified one-way costs shifting; Referrals; Scotland

Gordon Dalyell considers the recommendations contained within Sheriff Principal James Taylor's Report following his Review of Expenses and Funding of Civil Litigation in Scotland, and draws some comparisons with the way in which Jackson L.J. approached similar issues in his own review.

PROCEDURE

Background to Report

In 2007, Lord Gill, the then-Lord Justice Clerk, was asked to review the working of the civil courts in Scotland. His report was published in 2009.[1] It made a number of recommendations, many of which are now incorporated into the Courts Reform (Scotland) Bill, which was published on February 6, 2014 and which is currently progressing through the Scottish Parliament.

One of the areas which the Gill Review specifically did not address was that of expenses and funding. The Review of Civil Litigation Costs under the chairmanship of Jackson L.J. had been announced during the Gill deliberations but was not due to report until the end of 2009. The Gill Review took the view that following publication of the Jackson Report, there may be considerable implications for the conduct of litigation in Scotland. The final report recommended that a separate review be set up to look at this.

Consequently, Sheriff Principal James Taylor was asked in 2011 to carry out a Review of Expenses and Funding of Civil Litigation in Scotland.

The Review Team consisted of Sheriff Principal Taylor and a team of five. The Review Team were assisted by a Reference Group, consisting of practitioners, academics, members of the judiciary, and consumer representatives.

The remit was to review the costs and funding of civil litigation in the Court of Session and Sheriff Court in the context of the Gill Review recommendations. In particular, Taylor was tasked with looking at the affordability of litigation; the recoverability and assessment of expenses; and different models of funding litigation, including contingency, speculative and conditional fees, BTE and ATE insurance, and referral fees and claims management.

The work commenced in May 2011, with a Consultation Paper being published in November 2011. Seventy-one responses were submitted. The Review Team met with many interested parties, including practitioners, members of the judiciary, and other interest groups. Fact-finding visits were made to the Mercantile and Technology and Construction Courts in Birmingham, as well as meetings with the Civil Justice Council, Ministry of Justice, Dame Hazel Genn QC, and notably, with Jackson L.J.

The final report was published in September 2013.[2] There were a number of principles underpinning the report, including the requirement that the civil justice system should be fair in its procedures and working practices; it should be accessible to all and sensitive to users' needs; should encourage early resolution of disputes and deal with cases as quickly and with as much economy as is consistent with

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[1] *Report of the Scottish Civil Courts Review* (2009).

[2] *Review of Expenses and Funding of Civil Litigation in Scotland—Report by Sheriff Principal James Taylor* (September 2013).

justice; make effective and efficient use of its resources by allocating them proportionately to cases bearing in mind importance and value; and having regard to the effective and efficient application of the resources of others.

The Review made 85 recommendations.

There are two main themes which permeate throughout the report—access to justice and equality of arms. It is noteworthy that Taylor—rightly—placed such importance on these, particularly when considering the recommendations in the context of other proposed reforms throughout the Scottish judicial system.

The main areas that will be considered are:

- Qualified One Way Costs Shifting (QOCS);
- Damages Based Agreements (DBAs);
- Speculative Fee Agreements (SFAs);
- Referral Fees;
- Sanction for Counsel; and
- Predictability.

In looking at each of these areas in turn, where appropriate a comparison may be made with the position in England and Wales with particular reference to the Jackson reforms.

Qualified one way costs shifting ("QOCS")

Taylor has reached the same view as Jackson L.J. in that he has recommended the introduction of qualified one way costs shifting. He did, however, arrive at this view by a different route. He was heavily influenced by the current and likely future state of the After the Event ("ATE") Insurance market in Scotland. As insurance premiums have never been recoverable in Scotland, the burden of paying them has fallen upon pursuers and their solicitors. Given the volume of cases in Scotland, the level of premiums was often prohibitively expensive. Taylor saw this as a barrier to access to justice. As with Jackson, he also concluded that there would be little cost to the insurance industry by the introduction of QOCS.

QOCS will apply to personal injury litigation and will include clinical negligence actions. It will also apply to appeals from decisions in personal injury cases.

As in England and Wales, where a claim involves both a personal injury and a non-personal injury element, in the event that the latter element is unsuccessful, and there is an award of expenses against the pursuer for that element, the award shall be enforceable. Similarly, if a claim, or an element of it, is made for the benefit of someone other than the pursuer, the benefit of QOCS will only extend to the element of the claim which would have benefited the pursuer. Consequently, claims for items such as credit hire will be affected. However one may wonder about how heads of claim such as recoverable sick pay, or medical expenses incurred as a result of the accident, will be dealt with.

As with Jackson's recommendations, there are a number of exceptions to the protection afforded by QOCS.

The first is where there is fraud. Taylor saw a difficulty in using the English test of "fundamentally dishonest" and concluded that as Scottish case law has provided a definition of fraud, that should form the basis of this exception. Interestingly, the precise definition is found in the English case of *Derry v Peek*,[3] where Lord Herschell held "Fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false".[4] He acknowledges the situation where a pursuer may be unreliable or even incredible but given

[3] *Derry v Peek* (1889) 14 App. Cas. 337.
[4] *Derry v Peek* (1889) 14 App. Cas. 337 at 374.

the often traumatic circumstances of an accident, discrepancies in evidence can and do occur. Hence the high test of fraudulent conduct.

The second is where there has been an abuse of process. This involves a situation where a party deliberately sets out to deceive the court. As Taylor points out, instances of this behaviour are rare.

The third is where there has been unreasonable behaviour on the part of the pursuer. Taylor recommends that the test for unreasonableness is that of *Wednesbury* unreasonableness.[5] The rationale for this is that, if a lower test were imposed, the benefit of QOCS may be lost as pursuers would wish the benefit of an ATE policy to give them the confidence to litigate.

The fourth is where the case is summarily disposed of, i.e. before any hearing on evidence. If the case is so weak that it is dismissed at this early stage, then Taylor felt that the pursuer should lose the benefit of QOCS.

One of the interesting differences between Taylor's recommendation and Jackson is the situation where a pursuer does not beat a tender-Pt 36 offer. Whilst Taylor accepts the general argument that, to have any effect, failure to beat the offer must mean that the tender trumps QOCS, he came to the view that the pursuer is still entitled to retain some of the award made by the court. He has recommended that this be 25 per cent of the damages. Consequently, a defender would be entitled to his or her expenses, where a tender was not beaten, but only up to a value of 75 per cent of the awarded damages.

Referral fees

This area represents one of the major differences between Jackson and Taylor. The Taylor review team considered this in detail. The conclusion that was reached was that while in a perfect system, referral fees would not exist, we have to acknowledge the practical reality they do. In his detailed consideration of the issue, Taylor concluded that they actually may contribute to access to justice, by allowing injured people with justifiable claims to bring these claims when otherwise they may not be in a position to do so.

Taylor accepted that the scale of claims management activity in Scotland was very different to England and Wales and consequently allowed him to look at the issue slightly differently.

He identified the difficulties in defining referral fees, specifically pointing to the situation in relation to insurance companies and trade unions.

The key issues are those of regulation and transparency. In allowing referral fees to be paid, only regulated bodies will be allowed to receive such fees. He specifically recommends the establishment of a regulator of claims management companies.

There are a number of specific recommendations in relation to cases where referral fees are paid.

Solicitors will be under an obligation to provide clients with a written statement which should list all the potential factors which a responsible referring agency might consider relevant when making a referral, and indicate whether such factors played a part in the selection of the particular solicitor. Relevant factors would include, but not necessarily be limited to:

- the particular skill possessed by the solicitor;
- whether there has been a quality control audit of the solicitor or his or her firm;
- whether the result of such an audit is available for inspection by the client; and
- the basis upon which the solicitor is to be remunerated, if legal costs are to be met by the referring agency.

The statement should also indicate that the services provided may be available elsewhere, e.g. from a firm that does not have an arrangement with the referring party. The statement should also set out the means by which the referring part obtains its business.

[5] *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 K.B. 223.

The referring agency should be under an obligation to provide to the solicitors to whom the client is being referred such information as is necessary to enable the solicitors to fulfil their obligations.

Claims management companies, and those acting on their behalf, should not be allowed to cold call prospective clients.

Solicitors should satisfy themselves that claims management companies who refer business to them do not cold call.

Damages based agreements

Solicitors in Scotland have not been able to enter into enforceable contingency fee agreements with clients. Over the last 15–20 years, solicitors have set up their own claims management companies, which Taylor acknowledges has assisted clients to pursue claims which they otherwise may not have been able to do.

As with referral fees, Taylor has acknowledged the practical reality and recommended that solicitors and counsel be allowed to enter into Damages Based Agreements ("DBAs").

He has recommended that there be a cap on the amount to be deducted. In personal injury cases, this will be 20 per cent of the first £100,000, 10 per cent on the balance between £100,000 and £500,000, with 2.5 per cent on any balance over £500,000.

The issue of future losses was carefully considered. As in the Jackson Review, the argument that no deduction from future losses be made was put forward forcefully. Taylor concluded that there ought to be an entitlement to do so. He took into account the argument that such a condition may incentivise a solicitor to delay settling a case in an attempt to maximise the level of past losses. This clearly would not be in the public interest. He was also influenced by the fact that the vast majority of cases settle on the basis of a global figure, and not only would it be unrealistic to require any settlement sum to be divided into specific heads, it would potentially create a conflict of interest between lawyers and their clients if a distinction had to be made between past and future losses. Taylor's answer lies in the tapering of the levels of deduction.

However, he was acutely conscious of the importance of future loss heads to particularly badly injured pursuers, who would require long term care. The position regarding periodical payments in Scotland is different from the rest of the United Kingdom, in that a court order for periodical payments can only be awarded with the consent of the parties. The Scottish Government has consulted in relation to this and it is likely the matter will be dealt with in the forthcoming Damages Bill.[6] Taylor has recommended that should an order for periodical payments be made by the court, the success fee should be calculated by reference to the award excluding the periodical element. He has also recommended that in cases funded by a DBA, and the award or agreed sum contains a future loss element of more than £1 million, the solicitor will require to obtain either the approval of the court or a report from an independent actuary certifying that it is in the best interests of the pursuer that damages should be paid by way of a lump sum as opposed to periodical payments, before any deduction can be made from the future loss element. It is further recommended that the actuary producing the report should meet the pursuer outwith the presence of the solicitor and that the actuary's fee be met by the solicitor, regardless of the report's recommendation.

The position in relation to judicial expenses is different from that in England and Wales. Taylor recommends that pursuers in Scotland be entitled to retain the judicial expenses, in addition to the amount deducted under the DBA. Any unrecovered outlays or counsel's fees would require to be met from the success fee.

Prior to entering into a DBA, the client must be written to, and be informed in clear language what the percentage deduction will be, when and how the client may terminate the agreement, and the client's obligations in the event of termination. The client must also be informed as to how conflicts of interest

[6] This is likely to be published in the Scottish Parliament during 2014.

would be managed, and who would have the responsibility of meeting an award of judicial expenses against the client.

Taylor also recommends a 14-day cooling-off period after a client enters into an agreement, save in circumstances where a client's position would be prejudiced, e.g. where a claim would be time barred if an action were not raised before the expiry of the cooling-off period.

Taylor recommended different levels of deduction in non-personal injury cases. In employment cases, he has recommended a maximum deduction of 35 per cent whilst in commercial actions the maximum deduction is 50 per cent. He has also suggested the introduction of no-win lower fee in commercial actions whereby, in the event that an action is unsuccessful, the solicitor can still charge a fee, albeit at a lower rate than in the situation had the action been successful.

Speculative fee agreements

Historically, Scottish solicitors have always entered into Speculative Fee Agreements ("SFAs"). Over recent years, the practice has developed of entering into agreement whilst taking out an ATE policy. It has never been the position in Scotland that success fees or insurance premiums are recoverable from the defenders. The large majority of respondents to the consultation were in favour of this being retained. Taylor concurred, finding no reason to recommend recoverability.

Once again, Taylor had regard to access to justice in coming to the view that SFAs ought to be encouraged. Views have been expressed that they create potential conflicts of interest but Taylor concluded that any remuneration agreement creates its own risks and incentives and that they are managed by regulatory systems put in place by the appropriate professional bodies.

There are different types of SFA. Taylor was reluctant to interfere, though did recommend that, in an agreement where the success fee is based on a percentage uplift, the maximum uplift should remain at 100 per cent.

The principal recommendations in relation to SFAs were in relation to the maximum level of success fee that may be deducted from an award of damages. The recommended levels of deduction are the same as were recommended for Damages Based Agreements, i.e. 20 per cent from the first £100,000, 10 per cent from any sum between £100,000 and £500,000 and 2.5 per cent on any sum over £500,000.

As with DBAs, a pursuer's solicitor is entitled to retain the judicial expenses. Any unrecovered outlays and counsel's costs require to be met from the success fee.

Again, consistent with the approach to DBAs, the level of deduction in employment cases is set at a maximum of 35 per cent, and in commercial cases, at 50 per cent.

Sanction for counsel

This is increasingly becoming one of the most important issues, not just in relation to the Taylor Review but in the context of the whole plethora of reforms of the Scottish judicial system. One of the fundamental pivots of the Courts Reform (Scotland) Bill is the increase in the exclusive competence of the Court of Session from £5,000 to £150,000. The impact of this is significant, particularly for personal injury cases, which account for around 75 per cent of the Court of Session's business. The new proposed limit will lead to up to 96 per cent of the current 2,800 or so PI cases which are raised in the Court of Session to be transferred into the Sheriff Court. At the moment, counsel in the Court of Session are sanctioned automatically. Specific sanction is required in the Sheriff Court. The test is whether the employment of counsel is appropriate by reasons of circumstances of difficulty or complexity, or the importance or value of the claim.

Of some concern was the reference in the consultation paper accompanying the draft Bill in 2013,[7] which suggested that the test be changed to sanctioning counsel only where a case was truly complex. In particular, the rather startling assertion was made that solicitors were well capable of dealing with even catastrophic cases. Whilst accepting that it would be unusual for a catastrophic injury case to be worth less than £150,000, nonetheless the passage demonstrated a worrying insight into the government's assessment of the use of counsel.

The Notes to the Bill have retreated somewhat, the difference perhaps being the intervening publication of the Taylor Report and Taylor's recommendation that the current test remain the same, with a test of reasonableness to be applied, but with the important rider that specific consideration be given to the issue of equality of arms. Taylor acknowledges that insurers will still be likely to use counsel, even where sanction is unlikely to be granted. He is clear that no party should gain an undue advantage simply due to the resources available to them.

However, there is an underlying assumption that the use of counsel is an unnecessary cost. It is, of course, the case that some relatively low value cases may not need the involvement of counsel. It is difficult to generalise. Some low value cases can be extremely complex. Counsel often add value to cases, effecting settlement when if left to solicitors that may not be achieved or, in those cases which do proceed, ensuring that the cases are run effectively.

The concern for practitioners in England and Wales is whether this is a sign that counsel generally are a target to reduce costs.

Of course, the reality is that the major beneficiaries of any reduction in the use of counsel are the insurance industry. That is why Taylor's emphasis on the equality of arms is so significant and requires being at the forefront of any court's consideration of whether the level of representation is appropriate in each and every case.

Predictability

Taylor's assessment of predictability centred on fixed costs, summary assessment and costs management.

At present, the small claims limit in Scotland is set at £3,000, with a further limit of £5,000 for what are known as summary cause actions. Each of these has specific sets of rules. PI cases do not come under the small claims banner, but rather all PI cases with a value under £5,000 are dealt with as summary cause actions with a particular table of fees applying.

The Courts Reform (Scotland) Bill will provide that all cases with a value under £5,000 will be dealt with by way of a new procedure known as simple procedure.

Taylor has recognised the importance of proportionality in lower value cases, together with the benefit to clients of certainty and predictability, and consequently he has recommended that recoverable costs in simple procedure cases be fixed. He has, however, recognised that PI is a special case. He makes specific reference to the "asymmetric" relationship between pursuer and defender. The level of resource available to defenders is such that they inevitably instruct legal representation. Bearing in mind his key themes of access to justice and equality of arms, Taylor specifically recommends that PI cases should be excepted from the general recommendation.

In relation to summary assessment of expenses, Taylor has taken a similar view to Jackson in concluding that such a measure should be introduced into Scottish procedure. He has decided that an incremental approach ought to be followed with a pilot scheme for commercial actions in the Court of Session and Sheriff Court, which would follow the summary assessment procedure in England and Wales.

Whether this will be extended to PI cases remains to be seen. One of the crucial differences between PI cases, and other cases, notably commercial cases, is that while the latter are subject to a case management

[7] *Courts Reform (Scotland) Bill—A Consultation Paper* (February 2013) para.42.

model, the former are dealt with under the case flow model. This case flow approach is extremely effective in Court of Session PI cases where parties are provided with a timetable at the start of the case, and if the dates are adhered to, the case will take up no judicial time whatsoever until and unless it calls for proof or trial. This can be contrasted with the case management model whereby judicial intervention is present from the start of the case, and, while this has proved to be a successful model, it is highly resource-intensive.

This difference in approach is highlighted in the way in which Taylor deals with expenses or costs management. Once again he draws the distinction with commercial cases where he sees on balance the introduction of such a system would assist predictability, albeit he recognises at least the likelihood of short-term increases in cost as parties require to adapt to the new system. As with summary assessment, he recommends that a pilot scheme be set up, though applicable to commercial actions in the Court of Session and Glasgow Sheriff Court.

Interestingly, he specifically comments that as case flow model cases, such as PI actions, are meant to keep court appearances to a minimum, it would undermine the purpose to introduce costs management to these cases.

Given the developments in this area in England and Wales, particularly post-*Mitchell*, the benefits of the Scottish approach may be instructive.

Conclusion

Overall, the recommendations contained within the Taylor Report are a coherent, logical and well thought out series of measures, which, if implemented, ought to assist the development of civil justice in Scotland. The two recurring themes of access to justice, and equality of arms, underpin the thrust of the report, and in certain respects, provide an interesting distinction with the Jackson recommendations. The Scottish Government are currently considering their response and it is likely that the necessary primary legislation will be introduced during the course of 2015.

What is the Matter with *Mitchell*? It is Reasonable. Seriously!

Steven Akerman*

Case management; Costs budgets; Extensions of time; Non-compliance; Penalties; Procedural irregularity; Relief

Steven Akerman provides a fresh perspective on the decision in Mitchell *and the issue of relief from sanctions. He examines the cross over and interplay between CPR 3.9 (relief from sanctions as considered and applied in* Mitchell*) and CPR 3.10 (error in procedure). He suggests that CPR 3.10 arguably provides a more lenient and flexible framework in the right circumstances. He suggests ways in which litigators may mitigate the potential impact of the* Mitchell *decision by using CPR 3.10.*

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The robustness and force of conviction with which the *Mitchell* decision[1] was given was a shock to the legal system, despite the fact that it was widely assumed that the appeal for relief was doomed before it was even argued before the Court of Appeal. Coupled with the hard line the judiciary was reported to have been instructed to take prior to April 1, 2013, who can fault all the refusals to grant relief at virtually every turn? After all, this course of action appeared to be the message from the powers that be, was it not? Perhaps, one could even argue that the "shock" was needed to wake the legal profession from its slumber and assumption that relief would almost certainly be granted as long as the offending party paid costs. This lax attitude may explain why despite most people agreeing that a less draconian punishment could (and should) have been given, say a 30 per cent reduction in recoverable costs, the solicitors in question were simply in the wrong place at the wrong time. A "nudge" would not have been enough.

Indeed, the Court of Appeal noted from the first instance decision:

> "18. Finally, at [65] she said:
>
> > 'The stricter approach under the Jackson reforms has been central to this judgment. It would have been far more likely that prior to 1/4/13 I would have granted relief on terms, and in view of the absence of authority on precisely how strict the courts should be and in what circumstances, I shall grant permission to appeal to the claimant of my own motion.'"

Hence, the strong and unequivocal message that the "old way" of doing things will simply not be tolerated any longer.

However, moving forward, one has to look at *Mitchell* and subsequent decisions in detail. In particular, one has to examine where relief was granted to see where, I believe, the law on CPR 3.9 will settle in the long term. One's initial reaction to this assertion is that this is wishful thinking. Perhaps, there is an element of such thoughts, but I do not think that the plethora of decisions refusing sanctions can be considered in a vacuum.

It will also be argued here that the strict(er) approach taken for applications under CPR 3.9 is justified when one utilises the provisions in other parts of the CPR that can operate in many situations where CPR 3.9 was erroneously, in my opinion, engaged.

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[1] *Mitchell v News Group Newsapers Ltd* [2013] EWCA Civ 1537.

CPR 3.9—Relief from sanctions

The truth is, when questioning the decision in *Mitchell*, one must not lose sight of the facts in that case. Not only was a budget late; it was late without so much as a reason being given to the court. It also resulted in an aborted hearing. It was this blatant disregard, as there is no other way for characterising the claimant solicitor's behaviour, that the court was simply sick and tired of indulging.

Now let us consider the decisions on how to interpret CPR 3.9 in the light of *Mitchell*, i.e. the interpretations of "trivial" and "good reason" in the process.

In *Mitchell* itself, the Court of Appeal endorses Lord Jackson's view that compliance should not be "trip wires" or a means to itself ([36]). However, "the needs and interests of all court users" ([36]) need to be taken into account. Indeed, umbrage was taken at the fact that a half day hearing was aborted due to the delay, as noted. "Nor has it changed it by turning the rules and rule compliance into the mistress rather than the handmaid of justice." ([38], quoting Lord Jackson).

The court in *Mitchell* goes on to state that "if the non-compliance cannot be characterised as trivial, then the burden is on the defaulting party to persuade the court to grant relief" ([41]). The inference is therefore that the defaulting party does not have such a burden when the breach is trivial. Indeed, the court states that "the court will usually grant relief provided that the application is made promptly" ([40]) as the court endorsed the "*de minimis non curat lex*" in relation to such applications.

"Trivial"

Starting with trivial, the million dollar question is—what is trivial? One would have thought that triviality is dependent on all the facts in the case and not necessarily on time factors alone. Triviality should have regard to the default in the context of any outstanding directions and the claim as a whole. Will the delay cause a whole re-write of the directions? Will it cause an aborted hearing? The latter question is of particular importance as noted again in *Durrant v Chief Constable of Avon and Somerset Constabulary*:[2]

> "42. … the adjournment of a lengthy trial and the need to relist it for another date is detrimental to the efficient conduct of litigation."

Furthermore, one must look at the facts of *Durrant* for more guidance. The court refused relief with regard to two statements that were only a day late. One would have thought that it would be very difficult to say a day late is not trivial, but among other reasons, the COA noted that this one day delay was against a backdrop of failing to comply with previous court orders for disclosure of witness statements ([48]) and the court hearing issue noted above. It therefore must follow that the opposite is true—that a delay of longer than a day is not automatically non-trivial.

Indeed this seems to be supported by the High Court decision of *Adlington v Els International Lawyers LLP (in administration)*.[3] It is noted from the judgment that 'the "nature" of non-compliance cannot, in my judgment, be divorced from the "consequences" of non-compliance. Whether or not a failure to comply with an order is "significant" or "insignificant" must involve having regard to the consequences ([32]). The court goes on to say that with "robust case management", granting relief is unlikely to have any effect at all on the progression of the claim. Hence, where *no* robust case management and the timetable in place is easily kept to, the breach should be deemed trivial. Also, it appears that triviality is considered primarily on the facts of the particular breach in question and its effect on the litigation—see *Lakatamia Shipping Co Ltd v Nobu Su*,[4] discussed below.

[2] *Durrant v Chief Constable of Avon and Somerset Constabulary* [2013] EWCA Civ 1624.
[3] *Adlington v Els International Lawyers LLP (in administration)* [2014] All E.R. (D) 55.
[4] *Lakatamia Shipping Co Ltd v Nobu Su* [2014] EWHC 275 (Comm).

"Good reason"

In the event that the court concludes that the breach is not trivial, *Mitchell* states that good reason is needed to allow relief. Well, what is good reason? The Court of Appeal in *Mitchell* provides general guidance:

> "41. … if the reason why a document was not filed with the court was that the party or his solicitor suffered from a debilitating illness or was involved in an accident, then, depending on the circumstances, that may constitute a good reason. Later developments in the course of the litigation process are likely to be a good reason if they show that the period for compliance originally imposed was unreasonable, although the period seemed to be reasonable at the time and could not realistically have been the subject of an appeal. But mere overlooking a deadline, whether on account of overwork or otherwise, is unlikely to be a good reason. We understand that solicitors may be under pressure and have too much work. It may be that this is what occurred in the present case. But that will rarely be a good reason. Solicitors cannot take on too much work and expect to be able to persuade a court that this is a good reason for their failure to meet deadlines."

The common denominator seems to be whether the cause for non-compliance was the solicitor's own making or not. Also, is this rule absolute or is there some room for manoeuvre for cases that have an element of both?

I refer, again, to the recent High Court decision of *Adlington*. When considering what is a good reason for default the court notes that:

> "33. The Claimant's solicitor does not suggest he overlooked or otherwise disregarded the deadline; on the contrary, he was very acutely aware of it. Nor does he rely on "pressure of work" as an excuse … The real reason for the failure to comply was the fact that Mr Cotter did not realise that a few of his clients would be simply unavailable … The arrangements for holidays made … were outside Mr Cotter's control … I am unable to conclude that … can be contributed to incompetence, even though, as I have said, there is evidence of some general lack of competence in the overall management of the claim."

Was the conduct for which relief is sought slightly incompetent? Perhaps, but the High Court, as noted above, stated that this is not necessarily fatal when considering whether there was good reason for the default.

However, beware of relying on this too heavily as it has its limits. This was borne out in *Lakatamia Shipping Co Ltd v Nobu Su*. A disclosure list was served narrowly past the deadline, due to the solicitors assuming incorrectly that the deadline was 17.00. The court advised that this did not prevent the breach from being considered trivial when taking all the circumstances into account and that relief would usually be granted in accordance with *Mitchell*—see [16]–[25], [40] and [41]. However, the court advised that had "good reason" been utilised:

> "29. It cannot be said that the delay was due to circumstances outside the control of the party in default. It was due to a mistake rather than extraneous circumstances. In accordance with the guidance offered in the *Mitchell* case I accept that no good reason for the default has been made out, although there is an understandable explanation for it."

Once the breach is not trivial, the burden is higher to obtain relief and the court's tolerance for incompetence has its limit. In that case the solicitors did not consult the Commercial Court Guide which, on the face of it, seems innocuous. The court, however, thought otherwise.

Past breaches

Furthermore, and more importantly, the court commented on the effect of previous non-compliance and noted:

> "18. The Claimant submits that the non-compliance cannot be characterised as trivial in the light of the history of earlier defaults by the Defendants. However, what matters is whether the non-compliance which resulted in the sanction is trivial and in my judgment that involves a consideration of the default in question, not other defaults at other times. The history of default may be a relevant general circumstance to take into account but it does not affect the characterisation of the relevant non-compliance or metamorphose a trivial default into a serious default."

Not only is previous non-compliance only relevant with regard to "good reason", once the court acted upon non-compliance, it appears that it will not be taken into account in the future:

> "38. I accept that there has been prior non-compliance and that this is a relevant circumstance. However, to a significant extent it has already been taken into account in the imposition of an 'unless' order with the severe sanction of striking out the defence and counterclaim."

This is especially important in the light of the *Durrant* decision noted above.

It can therefore be seen from *Mitchell* and subsequent decisions that careful reference to these judgments will assist in an application for relief. As noted, one cannot rely too heavily on first-instance decisions where relief was denied; it is easy for a district judge to err on the side of caution, i.e. there is a strict regime for compliance. One must give the judiciary the tools to be confident to grant relief.

Even with the "less strict" approach discussed here, there is no element of sliding back to the way things were. Nothing in these decisions would have altered the outcome in *Mitchell*, had they preceded that decision. If anything, these decisions only justify, and confirm the sound reasoning, behind *Mitchell*.

Indeed, Lord Jackson himself supports the "toned down" approach. As editor of the *White Book* 2014 he notes in para.3.9.5:

> "While the two specified circumstances should always be given great weight, other circumstances may sometimes operate as a make-weight, justifying a grant of relief (i) where the breach complained of is almost but not quite trivial; or (ii) where the good reason offered is not quite good enough on its own; or (iii) despite the fact that there has been *substantial* delay in applying relief." (Emphasis added.)

As noted in the introduction, there is further justification for a hardline CPR 3.9 approach when considered together with other provisions in the CPR.

CPR 3.10—Error in procedure

Due to the laxity in the granting of pre-Jackson relief, practitioners may have lost sight of CPR 3.10. The provisions, and the possible balm to the recent ails that trouble the profession, were recently brought to the forefront in *Integral Petroleum SA v SCU Finanz SA*.[5]

CPR 3.10 reads as follows:

> "Where there has been an error of procedure such as a failure to comply with a *rule or practice direction*—

[5] *Integral Petroleum SA v SCU Finanz SA* [2014] EWHC 702 (Comm).

(a) the error does not invalidate any step taken in the proceedings unless the court so orders; and
(b) the court may make an order to remedy the error." (Emphasis added.)

The obvious benefit to relying on CPR 3.10 is that unlike an application under CPR 3.9, the starting point is that the step taken is valid. The burden is therefore on the opposing party to provide a reason why the court should rule otherwise. This is the polar opposite of CPR 3.9.

However, one must consider the question: What is an error of procedure? Secondly, how is it distinct from CPR 3.9 which reads:

> "On an application for relief from any sanction imposed for a failure to comply with any *rule, practice direction* or court order …"? (Emphasis added.)

What is immediately apparent is that failure to comply with a court order cannot be remedied by CPR 3.10 which omits reference to a court order. However, does non-compliance with a rule or practice direction fall under CPR 3.9 or 3.10? How does one reconcile the seemingly opposing provisions?

Integral Petroleum SA v SCU Finanz AG concerned a case where service was conducted by email without prior authorisation as required by PD 6A. However, it was held that CPR 3.10 and not CPR 3.9 was the operative provision. Popplewell J. stated:

> "31. Returning to the facts of the instant case, in my view the error of procedure in serving the Particulars of Claim by e-mail was a failure to comply with a rule or practice direction which falls within CPR 3.10. Accordingly under CPR 3.10(a) such service is a step which is to be treated as valid, so as to commence time running for the service of the defence …
>
> 34. Service by e-mail is a permitted method of service under CPR 6.20, albeit that what is permitted is service in accordance with the requirements of Practice Direction 6A. The error is therefore more readily characterised as a failure to comply with a practice direction than a rule. But however characterised, the substantive defect is in using a method which English procedural law regards as a permissible method in circumstances where the formalities necessary to make it a permitted method had not been concluded."

Partial delay

On the basis of this, one might be of the impression that CPR 3.10 is only available when there is an actual "error" in carrying out the procedure in question, but when there is an "omission" or partial delay, i.e. non-service of all the relevant documents, CPR 3.9 would apply.

Such is not the case, however. Popplewell J. notes the House of Lords' decision in *Phillips v Symes (A Bankrupt)*.[6] The House of Lords endorsed the view that CPR 3.10 can operate where an English claim form was not served with the particulars. While in this case the error was not the fault of the serving party, the court also endorsed the view that *service of only an acknowledgment of service was enough to effect service under CPR 3.10* (emphasis added). Even in this case, CPR 3.10(b) was not utilised to "undo" the step that had been taken for what, on the face of it, seems a serious deficiency.

Most importantly, however, Popplewell J. notes that:

> "27. the logic of the passage is that CPR 3.10(a) treats as valid steps which fall within the scope of CPR 3.10 automatically, without the need for an order remedying the error under CPR 3.10(b), subject only to an order of the court invalidating the step ('unless the court so orders')."

[6] *Phillips v Symes (A Bankrupt)* [2008] UKHL 1; [2008] 1 W.L.R. 180.

The assumption that the step is valid explains why the decisions under CPR 3.10 have swung completely in the opposite direction of CPR 3.9 decisions where the starting point is that the sanction has taken place.

The truth is that when one thinks about it, Popplewell J.'s judgment actually dovetails nicely with the Court of Appeal's view in *Mitchell*. Popplewell J. has the following to say:

> "37. This case is not concerned with service of originating process but service of particulars of claim. To my mind this is a significant distinction … *Phillips v Nussberger* indicates that even for service of originating process the rule is to be given a wide effect … But the effect to be given to CPR 3.10 is even wider when concerned with documents which are other than those by which the proceedings are commenced. What the rules are concerned with in relation to the service of such subsequent documents is simply bringing them to the attention of the other party in circumstances in which that other party knows or should realise that a step has been taken which may have procedural consequences … CPR 3.10 is particularly apposite for treating as valid a step whose whole function is to bring a document to the attention of the opposing party where such function has been fulfilled. *It prevents a triumph of form over substance*." (Emphasis added.)

Remember what was said from the very outset in *Mitchell*, quoting the Jackson Reforms themselves, about compliance not being "trip wires" or the "handmaid of justice", as noted above?

Failure to verify a statement of case/witness statement etc with a statement of truth

It would appear, then, that the distinction between CPR 3.9 and 3.10 is clear. CPR 3.9 deals with issues of complete or "pure" delay whereas CPR 3.10 operates where delay is not the underlying or complete problem, but the step taken in time was simply deficient (except in relation to a court order, for which CPR 3.10 does not make any provision).

If CPR 3.10 is so wide, why do we hear of so many decisions where relief was not granted in cases such as where there was a failure to sign a costs budget? It is not a case of total delay and should fall under the criteria of CPR 3.10, if the reasoning is sound.

It could simply be that these arguments are not being put forward to the court. If the offending party only argues under CPR 3.9 then CPR 3.9 will be applied. Indeed, Popplewell J. in *Integral* notes, when referred to a purported case as to why CPR 3.10 should not be construed widely, that:

> "33. He was not referred to CPR 3.10 and no issue arose as to the application of CPR 3.10 in that case. I do not find his observation of any assistance in relation to the issues I have to decide."

If one doubts the soundness of the argument that the failure to verify a statement of case with a statement of truth should fall under CPR 3.10 and not 3.9, I refer again to the presumption under CPR 3.9 that the sanction has taken effect. However, CPR 22.2 states that:

> "(1) If a party fails to verify his statement of case by a statement of truth—
>
> (a) the statement of case shall remain effective unless struck out; but
>
> (b) the party may not rely on the statement of case as evidence of any of the matters set out in it."

While a party may not rely on the statement of case without a statement of truth, it remains effective unless struck out. Therefore the starting point is that the sanction, i.e. striking out has not taken effect. Enter CPR 3.10. Should one argue that 22.2(1)(b) is a sanction, I refer to PD 22:

"4.1 If a statement of case is not verified by a statement of truth, the statement of case will *remain* effective unless it is struck out, but a party may not rely on the contents of a statement of case as evidence until it has been verified by a statement of truth.

4.2 Any party may apply to the court for an order that unless within such period as the court may specify the statement of case is verified by the service of a statement of truth, the statement of case will be struck out."(Emphasis added.)

(See CPR 22.3 and 32 PD 3.3 for similar provisions regarding statements of truth for witness and expert evidence respectively.)

The message is clear. One cannot rely on a statement of case not verified by a statement of truth until such verification takes place. This can be done at any time, but an application for strike-out can be made if verification continues to be absent, but until such an order is made the Statement of Care is not struck out.

One can now see the protection CPR 3.10 offers and, in doing so, fully justifies the strictness in which CPR 3.9 has been interpreted, as it may only apply to a subset of breaches.

There is even support for this approach when the court considered CPR 3.9 and *Mitchell* in *Bank of Ireland v Philip Pank Partnership*.[7] The case involved a costs budget that had the words "Statement of Truth" in square brackets. The full statement was not inserted. The court did not even say the breach was trivial. It said:

> "9. I do not accept … that parties must file and exchange budgets 'as required by the rules or as the court otherwise directs'. CPR 3.14 provides for a sanction in the event that a party 'fails to provide a budget' but does not include the additional words 'complying in all respects with the formal requirements laid down by PD 3E' or any other words to similar effect."

There is even a comment on my proposition regarding a failure to verify a statement with a statement of truth:

> "11. If a witness statement were served which was entire and complete save for a Statement of Truth, the Court *might* not permit it to be used in the absence of the witness; but it might well permit the evidence to be given upon the witness affirming the truth of the statement." (Emphasis added.)

Regarding the conclusion as whether a budget was served on time:

> "16. The Claimant did not fail to file and exchange a costs budget on 24 January 2014. It filed and exchanged a budget that was subject to an irregularity that has since been rectified."

This sounds very similar to the interpretation of CPR 3.10 proposed above.

All this should go to alleviate the "climate of fear" (as has been reported and as I have and am experiencing) that has gripped the legal profession. No longer will parties be able to take points for minor or technical breaches, as the majority will fall under CPR 3.10, which is, correctly in my opinion, interpreted widely. At the same time, there is no reason to expect the court's indulgence under CPR 3.9 any longer.

Indeed, support for the judiciary's exasperation with a party taking a bad point can be seen in *Lakatamia Shipping v Nobu Su* where indemnity costs were awarded for the innocent party because an opportunistic point was taken. It was stated at [6] (on costs) that:

> "The CPR is quite clear that parties should conduct litigation in a reasonable and realistic manner, an approach which is echoed in the Commercial Court Guide—see, for example, A1.4. In this court

[7] *Bank of Ireland v Philip Pank Partnership* [2014] EWHC 284 (TCC).

we expect parties so to conduct themselves. In my judgment, in vigorously opposing this application at a hearing, the claimant failed to do so."

But let us not forget that the court has the power under CPR 3.10(b) to order that the step is not taken. This is an important control measure to ensure that the spirit of Jackson is followed and not merely circumvented, while ensuring true justice and the soundness of *Mitchell*.

CPR 3.1(2) (a)—Relief without *Mitchell*?

CPR 3.1(2) (a) reads:

> "2 (2) Except where these Rules 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*)."(Emphasis added.)

On the face of it, how does this provision sit next to CPR 3.9? One would have thought that CPR 3.9 applies to cases where deadlines are missed in their entirety as opposed to CPR 3.10 which, it has been argued, applies to cases of procedural defects to include elements of delay. What is meant by "Except where rules provide otherwise" if all other scenarios are covered by CPR 3.9 and 3.10? Surely, it cannot be superfluous.

SET Select Energy v F & M Bunkering[8] dealt with the time limit under CPR 11(4) for making an application (14 days) to dispute the court's jurisdiction, which in that case was made late. It was held that (with alleged support from the Supreme Court):

> "30. I reject S.E.T.'s submission that the sole route available to a defendant in the position of F&M is an application for relief against sanctions under CPR Pt 3.9. This question is covered by authority. In *The Alexandros T* at [121] cited above, the Supreme Court stated expressly that the time limit under CPR 11(4) 'can in an appropriate case be extended under CPR 3.1(2)(a)'."

The Court of Appeal, however, held in *Sayers v Clarke Walker*[9] that applications under CPR 3.1(2) (a) should consider the criteria under CPR 3.9. This claim dealt with the (missed) time limit to lodge an appeal, which had no express sanction attached. Regarding the distinction between rules where a specific sanction applies, the court noted that:

> "21. In my judgment, it is equally appropriate to have regard to the check-list in CPR 3.9 when a court is considering an application for an extension of time for appealing in a case of any complexity. The reason for this is that the applicant has not complied with CPR 52.4(2), and if the court is unwilling to grant him relief from his failure to comply through the extension of time he is seeking, the consequence will be that the order of the lower court will stand and he cannot appeal it. Even though this may not be a sanction expressly "imposed" by the rule, the consequence will be exactly the same as if it had been, and it would be far better for courts to follow the check-list contained in CPR 3.9 on this occasion, too, than for judges to make their own check-lists for cases where sanctions are implied and not expressly imposed."

The court was of the opinion that from the very fact that a time limit is imposed, there is an implied sanction if one does not adhere to the time limit. The implied sanction was on an equal footing to that of an express sanction. This reasoning was extended to late service of particulars of claim in *Price v Price*.[10]

[8] *SET Select Energy GmbH v F & M Bunkering Ltd* [2014] EWHC 192 (Comm).
[9] *Sayers v Clarke Walker* [2002] EWCA Civ 645.
[10] *Price v Price (t/a Poppyland Headwear)* [2003] EWCA Civ 888.

How do these decisions fit with that of *SET Select Energy*? One might argue that the judgment relied on a Supreme Court authority, which is obviously binding on the Court of Appeal. However, I believe that *The Alexandros T*[11] was misinterpreted, as explained below. Furthermore, even if properly interpreted, there is an express sanction in CPR 11(5) for non-compliance with CPR 11. Therefore, one way or another, the criteria of CPR 3.9 should have been considered.

Turning back to *The Alexandros T*, while the Supreme Court does indeed state at [121] that the deadline under CPR 11 can be extended under CPR 3.1(2)(a), after time for compliance has expired, it does not directly discuss the criteria to follow. However, I refer to the following:

> "108. The sanction referred to was that imposed by CPR Part 11, which provides that a defendant who files an acknowledgment of service and fails to apply to the court within the time allowed … 'is to be treated as having accepted that the court has jurisdiction to try the claim': CPR rule 11(5).
>
> 115. … the Court of Appeal should have held that it had discretion under CPR rule 11(1) to permit an application under the rule to be made out of time but should have refused to exercise it."

The only conclusion is that *SET Select Energy* misinterpreted the Supreme Court and, in the light of the above-mentioned Court of Appeal decisions, any application made under CPR 3.1(2)(a) utilises the CPR 3.9 criteria. This is true with all time limits due to the policy of an "implied" sanction.

This must be right as otherwise the whole point of the Jackson reforms would be a mockery. When it comes down to it, the main issue was delay and this interpretation ensures that time limits across the board are enforced.

If this interpretation is correct, what is the purpose of CPR 3.1(2)(a) in cases where extensions are granted after the fact, if everything is dealt with under the CPR 3.9 criteria by utilising the "implied" sanction rule? CPR 3.9 should, therefore, be operative without the need for CPR 3.1(2)(a). The answer lies in CPR 7.6(3) which allows for a retroactive extension for service of the claim form which has no express sanction for non-compliance with the time allowed for service. Had the CPR not included CPR 3.1(2)(a), the inference would have been that an extension after expiry of a time period without an express sanction for non-compliance could only be allowed for the Claim Form where the CPR has made a specific provision. Other similar deadlines would attract the proposition that the time allotted by the CPR is absolute and not subject to review. CPR 3.9, on the other hand, would operate where an express and outlined sanction has taken effect which gives the court the authority to review the decision. Enter CPR 3.1(2)(a) to say otherwise.

Conclusion—Interplay and application of CPR 3.1(2)(a), CPR 3.9 and 3.10

When viewed in isolation, CPR 3.9 as interpreted by *Mitchell* may seem unduly harsh, unjust even. However, it is eminently sensible and fair when having regard to the appropriate cases to which it applies (or should apply) and when having regard to the other provisions in the CPR that apply (or should apply) to less "severe breaches".

CPR 3.9 should apply where there is any non-compliance with any and all court orders, and in cases where non-compliance with a rule and/or practice direction is a case of "pure" delay where no action whatsoever was taken *and* a sanction for non-compliance is specified or implied (via CPR 3.1(2)(a)), which can take effect automatically without recourse to the court.

[11] *The Alexandros T* [2013] UKSC 70.

However, as the starting point in such cases is that the sanction has taken effect, the party seeking relief has an uphill battle—but not necessarily an impossible one, if the court continues to be firm but fair in its application of CPR 3.9 as noted above.

CPR 3.10, however, will (usually, but not necessarily always) operate where there has not been a total delay in compliance with a rule and/or practice direction only, i.e. some action taken before the deadline.

As the starting point is that the step is valid, the difficulty in making the step invalid should be diametrically opposed to the difficulty in obtaining relief under CPR 3.9. It is submitted that this is desirable to protect either party from taking incessant and petty points for every technical breach of a rule or practice direction.

Case and Comment: Liability

Ford v Malaysian Airline Systems Berhad

(CA (Civ Div), Maurice Kay L.J. (VP CA Civ), Leveson L.J., Aikens L.J., March 27, 2013, [2013] EWCA Civ 1163)

Personal injury—liability—accident: carriers' liabilities—international carriage by air—treaties: bodily injury on flight—meaning of "accident" within Warsaw Convention art.17.1—Montreal Convention on International Carriage by Air 1999

Accident; Carriers' liabilities; Doctors; International carriage by air; Medical treatment; Personal injury

Anne Ford was prone to recurring bouts of cystitis and had bought over-the-counter medication to treat herself. On a long haul flight she experienced an inability to urinate but did not have her cystitis medication on board. The airline crew told her that there was a doctor on board. With Anne Ford's permission, the doctor administered an injection of a diuretic and advised her to drink lots of fluids.

She was not able to urinate for the duration of the flight and was catheterised on a stop-over. The problem of not being able to urinate did not resolve itself until four months later. A doctor who examined her at a later date considered that she had been suffering from urethral stenosis and that the administration of a diuretic was an inappropriate action to take. Anne Ford sued the airline, relying upon the Montreal Convention.[1]

At the trial of a preliminary issue the judge found that the injection could not properly constitute an "unexpected or unusual event or happening" or an "unintended and unexpected happening" and that the facts did not fall within the meaning of the word "accident" in art.17.1 of the Convention.

Ford appealed and submitted that the injection of the diuretic was an unusual event or happening, which was the link in the chain producing the exacerbated fluid retention and associated bodily discomfort that she suffered for at least the rest of the flight, and that that constituted bodily injury. The airline argued that the key issue was the nature of the event, external to the passenger, that had happened and that in the claimant's case the event was not unusual and was not made unusual by the fact that the injection of a diuretic was not successful in dealing with her condition.

The airline also relied upon the *Deep Vein Thrombosis* decision.[2] They argued that the court should pose the same question as that posed in that case, adapted to the circumstances of these facts, which was whether there was, on any recognised meaning of the word, an "accident" in circumstances where a passenger was given an injection in a normal manner during a flight.

The Court of Appeal held that it was clear from case law that there was no distinction in meaning between "event" or "happening". However, there could be a distinction between an event which was "unexpected" and one which was "unusual". It was from the victim's point of view that the event or happening had to be unexpected or unusual and must be the link in the chain which resulted in the bodily injury.

There could be no doubt that the effect of the injection, together with the claimant drinking fluids as counselled by the doctor, was that her kidneys became more active, so that she suffered increased fluid

[1] The Montreal Convention on International Carriage by Air 1999 art.17.1.
[2] *Re Deep Vein Thrombosis and Air Travel Group Litigation* [2005] UKHL 72; [2006] 1 A.C. 495.

retention and increased discomfort. The immediate cause of the alleged bodily injury was her peculiar internal condition. That being so, if a cause that led to the reaction was an event that was external to her and was one that was unusual from her perspective, then that would bring the case within the meaning of the word "accident" in art.17.1.

This meant that the key question was whether the actual act of giving Anne Ford an injection of a diuretic in the circumstances that prevailed could be characterised as an unusual event from her perspective and whether the "unusual nature" of that event was a "cause" leading to the bodily injury.

They held that the circumstances in which the injection was administered by the doctor could not be characterised as "unusual" for the purposes of art.17.1. There was no evidence that the administration of the injection was done in an abnormal way. The only unusual aspect of the injection was that it was carried out in the course of an international flight by a passenger doctor on another passenger, with proper consent, as a result of a request to the doctor for assistance by a crew member.

There was no evidence that any of those characteristics had any causative effect in the chain of events that led to the claimant's bodily injury. The same chain of events would have taken place wherever the injection had been administered. The simple fact that the injection was administered in mid-flight rather than elsewhere could not provide the circumstances with the necessary unusual characteristics so that the event constituted an accident within art.17.1.[3]

The appeal was dismissed.

Comment

The reaction of lawyers who represent claimants in aviation-related claims may well be a sigh of exasperation that, yet again, a court has found against a passenger by considering their event did not fall within the Montreal Convention. Others, though, would be forgiven for thinking that it could never be right for an airline to be held liable to one passenger for the medical negligence flowing from the voluntary actions of another passenger.

To all intents and purposes the Montreal Convention, signed in 1999, replaced the Warsaw Convention in November 2003 and in the United Kingdom since June 2004, incorporated by the Carriage by Air Acts (Implementation of the Montreal Convention 1999) Order 2002.[4] It is the defining regulation of international (and by domestic law) and national air travel claims, for luggage loss, personal injury and death.

Warsaw in 1929 saw a consolidation and worldwide regulation of passenger air travel at a time that passenger flights were in their infancy. The airlines were concerned that a few fatalities could bankrupt the industry. Hence, the Convention traded strict liability for accidents against a limit of compensation levels. However, the strict liability required a strict definition of the relevant circumstances.

Most of the jurisprudence defining the Convention's applicability was made in relation to Warsaw. The definition of accident, as cited in art.17[5] of the Convention, was made by Sandra Day O'Connor J. in the US Supreme Court in *Air France v Saks*,[6] where a claimant claimed damages for deafness in one ear caused by air pressure changes during landing of the aircraft. Article 17 distinguishes between the injury itself and the "accident" by which it was caused, so the injury itself could not be the accident.

Lord Denning had acknowledged in *Corocraft v Pan American Airways*[7] that it was settled law that the domestic courts should follow the international interpretation of conventions. In *Sidhu v British Airways*[8] Lord Hope said:

[3] *Deep Vein Thrombosis* and *Air France v Saks* (1985) 470 U.S. 392 applied.
[4] Carriage by Air Acts (Implementation of the Montreal Convention 1999) Order 2002 (SI 263/2002).
[5] "The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking."
[6] *Air France v Saks* (1985) 470 U.S. 392.
[7] *Corocraft Ltd v Pan American Airways Co Ltd* [1969] 1 Q.B. 616; [1968] 3 W.L.R. 1273.
[8] *Sidhu v British Airways* [1997] A.C. 430.

> "[The Convention] was designed … to define those situations in which compensation was to be available … A balance was struck in the interests of certainty and uniformity … The domestic courts are not free to provide a remedy according to their own law, because to do this would be to undermine the Convention … ."

Aikens L.J. summed up the difficulty in this case and how one has to look at the incident in the context of the definition of "accident":

> "I find this a difficult question, which can be easily argued both ways. The administration of an injection in the course of an international flight by a doctor passenger after a very brief discussion with the patient when neither previously knew the other is not part of the usual, normal or expected operation of the aircraft, although the action of the air hostess in asking the doctor passenger if she could help probably was. On the other hand, the actual administration of an injection by a doctor, in the hope and expectation that it would relieve the condition complained of (cystitis), is quite usual. Therefore, if the act of administering the injection is to be characterised as 'unusual' and this unusual characteristic was a cause leading to Mrs Ford's 'bodily injury', then this must be because the particular circumstances in which the act was performed, viewed from the perspective of Mrs Ford, make it so, whilst excluding from consideration Mrs Ford's actual reaction to the injection, which was the result of her 'peculiar internal condition'."

The Court of Appeal had relatively recently examined the issue of "accident" in *Barclay v British Airways*.[9] Mrs Barclay had slipped on a standard piece of aircraft fitting, the plastic strip running under the seats and covering the tracks where the seats were fitted. The court held that the "slip" arose from the aircraft in its normal state (and not therefore "unusual") and so no "accident" had taken place. A finding that is likely to baffle most airline passengers.

In the event, Aikens L.J. decided the events here were not unusual. The fact that the injection was undertaken in flight did not render it so; it was otherwise a normal event. Thus, it fell outside of the tried and tested international court definition of an accident.

There are many who argue that, with so many failures of claims brought by passengers under what was supposed to be a piece of strict liability, the Convention fails its passengers. The airline industry no longer needs protection; so what basis for capping damages remains? Certainly, questions must be asked as to how so many accidents, that would be routinely paid out for were they to have taken place on the bus, train or indeed the workplace, fail in the aircraft.

Practice points

- Air travel accidents require specialist knowledge.
- The Montreal Convention as incorporated into the law of England and Wales provides the exclusive remedy to an injured claimant.
- When assessing a prospective claimant's claim, one must offer up the facts against the definition of "accident" under the Convention.

Mark Harvey

[9] *Barclay v British Airways* [2008] EWCA Civ 1419; [2010] Q.B. 187.

Robinson v Chief Constable of West Yorkshire

(CA (Civ Div), Hallett L.J., Sullivan L.J., Arnold J., February 5, 2014, [2014] EWCA Civ 15)

Personal injury—liability—negligence—police officers—arrest—damages—duty of care—immunity from suit

Immunity from suit; Negligence; Personal injury claims; Police officers

On July 29, 2008, a man called Williams was dealing in Class A drugs in a busy street in Huddersfield. He was spotted by DS Willan who, with the agreement of a senior officer, decided to make an arrest as quickly as possibl—in particular, whilst Williams was still in possession of the drugs. DS Willan called for backup and concluded the arrest had to be made on the street. The intention was to have two officers approach Williams from the front and two others from the rear in a pincer movement to try to prevent escape. Williams was to be seized, pushed against an adjacent wall, restrained and arrested.

The claimant, Mrs Robinson was walking up the same road. Within a very short time of her passing Williams and his group, two "well built" officers in plain clothes approached, revealed themselves as police and seized hold of Williams. Unfortunately, Williams then struggled so violently, his momentum took the group up the street towards Mrs Robinson. They knocked into her and all fell to the ground with Mrs Robinson underneath. It took three seconds for the other two officers to reach the melee. Others tried to intervene in the arrest and to get rid of the drugs. This was all captured on Closed Circuit Television footage.

Mrs Robinson was injured and, by a claim form dated July 11, 2011, she sued the local Chief Constable for damages for personal injury. The judge found that there had been negligence, although not outrageous negligence, on the part of the police officers involved in the arrest, but that the immunity from suit for officers engaged in the apprehension of criminals applied. Accordingly, despite the finding of negligence, the claim was dismissed. Mrs Robinson appealed.

She argued that the judge was wrong in law to apply the three-stage test in *Caparo Industries Plc v Dickman*[1] where the case involved direct physical harm. She contended that public policy considerations did not arise and there was no need for the court to ask itself whether it was fair, just and reasonable for the action to proceed. She also contended that he was wrong in law to apply a blanket immunity and to find that it required "outrageous negligence" to defeat the principle in *Hill v Chief Constable of West Yorkshire*.[2]

The Court of Appeal confirmed that the basic principle was that, where there was a wrong, there should be a remedy. However, they held that there were cases where it would not be fair, just and reasonable to impose a duty of care and the interests of the public at large could outweigh the interests of the individual allegedly wronged. They held that the *Caparo* test applies to all claims in the modern law of negligence, and is reflected in all the most recent appellate decisions which addressed in turn, whatever the nature of the harm, the issues of foreseeability, proximity and whether it was just and reasonable to impose a duty.[3]

The court further held that the *Hill* principle was designed to prevent defensive policing and better protect the public. They stated that it would fundamentally undermine that objective to make the police liable for direct acts but not indirect acts, and would encourage the police to avoid positive action for fear

[1] *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605.
[2] *Hill v Chief Constable of West Yorkshire* [1989] A.C. 53.
[3] *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605 applied.

of being sued. The general principle was that most claims against the police in negligence for their acts or omissions in the course of investigating and suppressing crime and apprehending offenders would fail the third stage of the *Caparo* test.

They held that it would not be fair, just and reasonable to impose a duty where the courts had concluded that the interests of the public would not be best served by imposing a duty to individuals.[4] However, they confirmed that the *Hill* principle did not impose a blanket immunity. While there was no definitive list of possible exceptions, there were exceptional cases in which the police did owe a duty of care even when suppressing and investigating crime.[5]

In principle, although there was sense in exempting cases of outrageous negligence on the basis no one wished to encourage grossly reckless police operations, such claims would be on the margins. A careful analysis of the case law would provide a sufficient degree of certainty. Accordingly, the *Caparo* test did apply to this case.

They held that it would not be fair, just and reasonable to impose a duty on police officers doing their best to get a drug dealer off the street safely. The judge recognised that there were a number of exceptions to the *Hill* principle and only considered whether outrageous negligence was present because the parties had addressed him on it. He did not find that a finding of outrageous negligence was the only way in which the principle could be defeated. The *Hill* principle did not apply in general to the law of negligence and to the facts of this case. They decided that the findings of the judge that a duty existed and that there was a breach were unsustainable.

The appeal was dismissed.

Comment

The two main issues addressed during the appeal were the extent to which the three-stage test in *Caparo* applied to the facts of this case, and, secondly, the circumstances in which the police immunity arising from *Hill* could be disapplied.

The Court of Appeal decided that the trial judge was right to have applied the *Hill* immunity pursuant to which the claim failed, but wrong to have considered that there was sufficient proximity between the police and Mrs Robinson to impose a duty of care; and wrong to have found that if a duty existed it was actually breached. There was some censure of the trial judge for criticising the officer's handling of the operation when he was not an expert in the arrest and detention of suspects.

For public interest reasons, the court were rather forthright in their support of the immunity afforded generally to the police. They concluded that risk to society from (serious?) crime outweighs risk to unfortunate passers-by. Thus, the case provides significant support for police forces defending negligence claims.

Duty of care and the Caparo test

It should be well known to all personal injury lawyers that in *Caparo* the House of Lords modified the neighbour/foreseeability test for individual cases of breach of duty into a three-stage test, namely a requirement for:

- the foreseeability of damage;
- a relationship of "proximity"; and
- that the court should consider it fair, just and reasonable to impose a duty.

[4] *Brooks v Commissioner of Police of the Metropolis* [2005] UKHL 24 and *Van Colle v Chief Constable of Hertfordshire* [2008] UKHL 50 applied.
[5] *Rigby v Chief Constable of Northamptonshire* [1985] 1 W.L.R. 1242 considered.

In arguing that the third limb of the *Caparo* test did not apply to cases where the claimant suffered *direct physical harm*, counsel for Mrs Robinson sought an interpretation of the law which would have had a wide impact on the law of negligence generally, and which would have been of particular concern to the public sector, including the Emergency Services, Local Authorities, and the MOD, to name a few.

Mrs Robinson's counsel relied, in part, on a recital of first principles to support her argument, stating that *Caparo* was confined to cases of indirect harm, indirect economic loss, or psychiatric harm.[6] It was suggested that the higher degree of moral culpability in cases of direct harm meant that all that ought to be required to impose a duty of care was reasonable foreseeability and proximity. It followed that considerations of public policy did not apply.

Their Lordships were unequivocal in rejecting these submissions, pointing towards the judgment of Lord Steyn in *Brooks v Commissioner for Police*, namely that the distinction between direct and indirect harm was "unmeritorious".[7] It was held that although there was a qualitative difference, this would only operate to "colour the court's attitude to deciding when it is fair, just and reasonable to impose a duty. It will not mean that claims one side of the line must fail and claims on the other may proceed."[8] Their Lordships confirmed that the starting point for *all* claims in the modern law of negligence was the *Caparo* test, and Hallett L.J. swept aside argument to the contrary with irrefutable logic, stating that:

> "the idea that the Common Law would impose a duty, in circumstances where it is unfair unjust and or unreasonable to do so, is to my mind nonsensical."[9]

There is, perhaps, a risk of over-simplification in this statement, as determination of "fair just and reasonable" can clearly be a matter of some complexity, centred as it is on issues of public policy. There are clearly many considerations to be taken into account. As Lord Browne-Wilkinson once said:

> "In English law the decision as to whether it is fair, just and reasonable to impose a liability in negligence on a particular class of would-be defendants depends on weighing in the balance the total detriment to the public interest in all cases from holding such class liable in negligence as against the total loss to all would-be plaintiffs if they are not to have a cause of action in respect of the loss they have individually suffered."[10]

By its judgment, the Court of Appeal put paid to any notion that a different test for the imposition of a duty of care should apply to direct harm as opposed to indirect harm, economic loss, psychiatric harm, or omissions.

As regards "proximity", Hallett L.J. said:

> "'Proximity' in the context of a police officer is intended to reflect some kind of relationship between [the claimant and the police] above and beyond the duty owed by them to the public in general. The most obvious example would be the assumption of care as in the handling of an informant. There is nothing of that kind here."

She did not believe this special proximity existed in this case.

The Hill principle

Coincidentally, the defendant in this appeal (Chief Constable of West Yorkshire) was also the defendant in the *Hill* case. In *Hill*, one of the two grounds upon which the House of Lords dismissed the claim against

[6] See discussion of *Donoghue v Stevenson* [1932] A.C. 562 at [5] and [6].
[7] *Brooks v Commissioner for Police* [2005] All ER 489 at [32].
[8] *Robinson v Chief Constable of West Yorkshire* [2014] EWCA Civ 15 at [44].
[9] *Robinson v Chief Constable of West Yorkshire* [2014] EWCA Civ 15 at [41].
[10] *Barrett v Enfield LBC* [2001] 2 A.C. 550 at [558].

the police was that, as a matter of public policy, the police were generally immune from actions for negligence in respect of their activities in the investigation and suppression of crime (the *Hill* principle). The justification for the *Hill* principle was restated by Hallett L.J., who said that:

> "provided the police act within reason, the public would prefer to see them doing their job and taking drug dealers off the street. It will be little comfort to Mrs Robinson, but the risk to passers-by like her is trumped by the risk to society as a whole."

It was accepted, however, that the police did not enjoy blanket immunity from suit. This was apparent from the previously successful claims of *Knightley v Johns*[11] (where a police inspector's failure to close a tunnel caused an accident when he ordered a subordinate to drive through the tunnel against oncoming traffic) and *Rigby v Chief Constable of Northamptonshire*[12] (where an officer fired a CS gas canister into a shop whereupon a real and substantial risk of fire materialised). However, their Lordships were reluctant to view these cases as providing examples of "outrageous negligence".

Instead, they were framed as cases where a special *assumption of responsibility* by the police had imposed a duty of care.[13] Indeed, one of the appeal court, Arnold J., appeared to doubt that "outrageous negligence" was capable of imposing a duty of care on the police and suggested that any analysis of *Rigby* on that basis was unconvincing.[14] Hallett L.J. was more reserved in her approach, accepting in principle that "outrageous negligence" may justify a departure from *Hill* as there was a public interest in discouraging reckless police operations. However, she expressly declined the opportunity to provide guidance or examples of when such cases may arise, simply stating they would be "on the margins".[15]

It is worth clarifying, however, that the *Hill* principle does not apply to non-core police activities, for example traffic management decisions.[16] The extent to which the combat immunity cases (*Smith v Ministry of Defence*[17]) might have a bearing on such issues has yet to be determined.

In conclusion, this case does not lay down any new principles of law, but clarifies—in case there were any doubt—first, that *Caparo* has become part of the general law and that it is to be applied to cases of direct injury as well as indirect harm; and secondly, that the circumstances in which the police will be deemed to owe a duty of care to individual members of the public in performing their core functions will be rare. No definitive list of exceptions to the *Hill* principle has been given. Practitioners contemplating actions in negligence against the police will need to consider very carefully whether the cause of action arises out of a non-core police activity and/or whether it can be properly argued that there has been a particular assumption of care to the individual—such as to an informer.

Practice points:

- The starting point for establishing a novel duty of care in all claims in negligence is the three-stage *Caparo* test.
- There is no distinction between direct and indirect harm in the application of the *Caparo* test, though the nature of the harm caused may be relevant when determining whether it is fair, just and reasonable to impose a duty of care.

[11] *Knightley v Johns* [1982] 1 W.L.R. 349; [1982] 1 All E.R. 851.
[12] *Rigby v Chief Constable of Northamptonshire* [1985] 1 W.L.R. 1242; [1985] 2 All E.R. 985.
[13] See Hallett L.J. on *Knightley v Johns* [1982] 1 W.L.R. 349 at [50] and Arnold J. on *Rigby v Chief Constable of Northamptonshire* [1985] 1 W.L.R. 1242 at [66].
[14] *Robinson v Chief Constable of West Yorkshire* [2014] EWCA Civ 15 at [66].
[15] *Robinson v Chief Constable of West Yorkshire* [2014] EWCA Civ 15 at [49].
[16] As in *Knightley v Johns* [1982] 1 W.L.R. 349; [1982] 1 All E.R. 851 (see *Robinson v Chief Constable of West Yorkshire* [2014] EWCA Civ 15 at [50]).
[17] *Smith v Ministry of Defence* [2013] UKSC 41.

- Claims in negligence against the police for injury during the performance of core and operational activities will only succeed in very limited circumstances, as in general they do not owe a duty of care to members of the public.
- The *Hill* principle may be disapplied where there has been an assumption of responsibility by the police sufficient to establish the necessary "proximity". Proximity and the fair, just and reasonable test are very much bound together.
- The *Hill* principle does not apply to non-core activities of the police (e.g. traffic management).
- Breach of duty by the police may be hard to establish and there will need to be credible expert evidence as to the standards of care of a reasonably competent police officer.

Nathan Tavares

McEwan v Lothian Buses Plc

(IHCS (IH (Ex Div), Lord Eassie, Lady Clark of Calton, Lord Philip, January 24, 2014, [2014] CSIH 12)

Personal injury—liability—road traffic accidents—negligence—findings of fact—pedestrian struck in the face by bus wing mirror—burden of proof

☞ Expert evidence; Findings of fact; Negligence; Personal injury; Scotland; Witness statements

At about 15.45 on November 9, 2010, Calum McEwan was a pedestrian walking on the south pavement of Gorgie Road, Edinburgh. He walked along the south pavement of the road heading in a westerly direction. He was walking approximately two-thirds of the width of the pavement from the wall. He was wearing a bright yellow jacket.

He moved to the edge of the pavement intending to cross the road to a newsagent on the north side. As he turned to his right to check if it was safe to do so, and while he was still on the pavement, he was struck in the face by the nearside wing mirror of a bus owned by the defenders and driven by their employee. As a result Mr McEwan was injured. His claim for damages was declined and he sued the bus company.

Litigation followed and the bus company denied that the impact was caused by the fault and negligence of the bus driver. At trial there was evidence from Mr McEwan and Mr Seward, a road traffic investigation and reconstruction consultant. There was also a joint minute, agreeing various documents, photographs and CCTV footage, and also damages of £9,000 subject to liability.

One of the documents produced by the bus company was entitled "statement of witness", naming an individual (Mr Brondum), who was not a witness in the case, and giving details of the accident. Mr Seward had seen that document, had referred to it in his report and had been asked about it during evidence, to which the bus company unsuccessfully objected on the basis that Mr Seward could not speak to the evidence which Mr Brondum was going to give.

In her note, the sheriff made certain findings in fact based on various measurements carried out by Mr Brondum and found that the bus driver would not have had time to react to McEwan moving to the edge of the pavement and avoid the accident. The case was dismissed and McEwan appealed.

The appeal court held that the statement of witness of Mr Brondum could not be regarded as evidence in foro about the facts in the case; no evidence had been led about its history and provenance or the circumstances of its creation and by whom, and there had been no agreement between the parties as to its evidential status.

They concluded that certain of the sheriff's findings in fact appeared to be based on information from the statement, part appeared to be based simply on an averment in the bus company's pleadings, one finding appeared to be based on the evidence of measurement given by Mr Seward which in turn appeared to be based on the positioning as described by Mr Brondum, and it was plain that the sheriff had erred in making findings of fact which had no proper foundation in the evidence. Even if the parties thought that the statement was evidence about the facts of the case, and had proceeded on that basis, that erroneous belief did not turn it into such evidence.

Having considered a number of decisions,[1] the court had no hesitation in coming to the conclusion that Mr McEwan had established a prima facie case of negligence on the basis of the facts found by the sheriff which were not challenged. He was on the pavement where, as a pedestrian, he was entitled to be, and prima facie not at risk of being struck by a motor vehicle. It was reasonably foreseeable in the circumstances of this case that a pedestrian walking within about a metre of the edge of a pavement might, at any time, change direction and come to the edge of the pavement. The duty of the bus driver was to take reasonable care by driving at a speed, manner and position to avoid hitting a pedestrian with part of the bus encroaching over the pavement.

In the circumstances, Mr McEwan had established a prima facie case of negligence on the basis of the facts found by the sheriff which were not challenged. The basis upon which the sheriff had concluded that the prima facie evidence had been displaced lacked any proper evidential foundation. The appeal was allowed.

Comment

Calum McEwan was struck by the wing mirror of a bus when he was on the pavement. The case was defended by the bus company who alleged that Mr McEwan was extremely drunk (although no evidence is mentioned which supports this) and stepped onto the roadway into the path of the bus which then struck him. They argued that it was all so fast the driver could not have avoided the collision.

Yet at all times he was on the pavement where, as a pedestrian, he was entitled to be. That single fact should have been all that he needed to establish to win his case. As he was on the pavement he should not have been at any risk of being struck by a passing motor vehicle. Res ipsa loquitur clearly applies.

As long ago as 1942 the Court of Appeal held in *Laurie v Raglan Building Co Ltd*[2] that, in considering whether a prima facie case of negligence has been established, no distinction must be drawn between a case where the wheels of a vehicle actually mount the pavement and one where part of the vehicle overhangs and sweeps across the pavement as happened here.

No room for doubt, you might think, but in *Watson v Thomas S Whitney & Co*[3] it was all considered again. Shortly after midnight on February 2, 1964, Norman Watson was walking along Aigburth Road, Liverpool, in the dark. His wife was with him walking at about the same place, pushing a pram, on his right-hand side. Both were walking on the pavement. Mr Watson was near the edge of the pavement when he was hit by the projecting door handle of a van stopping to drop off a passenger.

At first instance the case failed when the judge held that the pedestrian was wholly to blame for walking too near to the edge of the pavement. On appeal, the court confirmed that the pavement should give security for those using it from vehicles using the road. If a pedestrian is injured by a vehicle overlapping the pavement, the vehicle's driver will normally be liable in negligence. Of course the case was successfully

[1] Including *Osei-Antwi v South East London & Kent Bus Co Ltd* [2010] EWCA Civ 132; *Chapman v Post Office* [1982] R.T.R. 165; *Watson v Thomas S Whitney & Co* [1966] 1 W.L.R. 57; *Ballingall v Glasgow Corp* 1948 S.C. 160; 1948 S.L.T. 261; *Laurie v Raglan Building Co Ltd* [1942] 1 K.B. 152.

[2] *Laurie v Raglan Building Co Ltd* [1942] 1 K.B. 152.

[3] *Watson v Thomas S Whitney & Co* [1966] 1 W.L.R. 57.

appealed. Sellers L.J. referred to it as being without question "the most trivial case which has come in my experience before the Court of Appeal". The damages were only £10, but they got the law right.

End of any arguments, you might think, but no. Next we have the case of *Chapman v Post Office*.[4] Mrs Chapman was standing on the pavement in Tottenham High Road waiting by the kerbside. She was not going to cross the road; she was standing at a bus stop waiting for a bus. In the offside lane a queue of vehicles was held up by the traffic lights. A Post Office van came along the nearside lane next to the kerb. As the van came along the wing mirror hit Mrs Chapman as she stood on the kerb, spinning her round and causing her to fall to the pavement. The judge found that both the driver and Mrs Chapman were to blame. He awarded damages of £348.40: but he halved it and awarded to Mrs Chapman damages of only £174.20.

Again the Court of Appeal sorted it out, with Lord Denning saying:

> "I see no reason why a person standing on the kerb is guilty of negligence at all: even if she leans out or has her back turned to the oncoming traffic. Even if she went an inch or two into the roadway, I cannot see that that would amount to negligence in the slightest. The very fact that a van driver hits with his wing mirror a lady standing legitimately on the kerbside means that he is at fault and she is not."

Nothing could be clearer. She recovered 100 per cent. Surely cases like this all have since then settled following a rapid admission of liability. But that is not the case, as, sadly, *Osei-Antwi v South East London & Kent Bus Co Ltd*[5] confirms.

June 15, 2005 was a lovely summer's day and the claimant was on her way to work in the late afternoon. She took a No.112 double-decker bus to Crystal Palace Parade. She got off the bus and headed down the pavement, intending to cross over the road at the junction of the main road and the bus depot. She stood waiting to cross the road by some safety railings on a designated paved area clearly intended for pedestrians. A bus driver attempted a sharp left hand turn into the depot. As she did so, the rear of the bus mounted the pavement, hit the claimant and crushed her against some safety railings causing a broken ankle and a damaged knee.

She sued the operator of the bus for damages. Their defence was that she had taken an obviously dangerous position on the pavement and failed to keep a proper look out. The judge accepted that she was standing on a designated pedestrian area some inches from the road, but deducted one-third for contributory negligence as she was "not keeping a proper lookout". The Court of Appeal confirmed that there was no basis on which to attribute any blame to her and she recovered in full.

The case law is so clear and the decisions so numerous that it seems to me incredible that Calum McEwan had to actually go to court not once but twice to succeed in his claim. Defending cases like this is quite simply wrong.

Practice points

- Res ipsa loquitur applies to accidents like this.
- When res ipsa loquitur applies there is a presumption of negligence against the defendant.
- There is no reason why a person standing on the kerbside is guilty of negligence at all.
- That applies even if they lean into the road out or have their back turned to the oncoming traffic.
- That applies even if they go an inch or two into the roadway.

[4] *Chapman v Post Office* [1982] R.T.R. 165.
[5] *Osei-Antwi v South East London & Kent Bus Co Ltd* [2010] EWCA Civ 132.

- If any part of a vehicle hits a pedestrian legitimately standing on the kerbside the vehicle driver is at fault and the pedestrian is not.

Nigel Tomkins

Shields v Crossroads (Orkney)

(OHCS, Lord Pentland, August 23, 2013, [2013] CSOH 144)

Personal injury—employers' liability—psychiatric harm—vicarious liability—carers—social workers—personal relationships—scope of employment—duties of care—actionable duties at common law—pleadings—striking out

LT Psychiatric harm; Relationships; Scotland; Social workers; Vicarious liability

In about March 2008, the Community Social Services Department of the local authority referred Helen Shields to the defenders because she was experiencing difficulties in caring for her husband and son. Her husband suffered from severe arthritis and her son from a serious health problem. The defenders are a registered charity and, at the relevant time, had a place of business at the Orkney Carers Centre in Kirkwall. They provide practical and emotional support to carers as well as information and advice to help improve their lives.

The defenders' assistant manager found Mrs Shields to be very stressed and was concerned about her. An assessment was prepared and it was noted that she was suffering from depression and had been on anti-depressant medication for the previous two years. She was having difficulties in coming to terms with the fact that her husband's health was not improving; she was socially isolated and largely confined to the family home. The defenders recommended that she should be provided with respite care, information, support and advocacy services.

In August 2008, Mr Philip Bennett took over the position of manager of the defenders' Kirkwall office. He had been a qualified social worker since 1996 and was trained and experienced in dealing with people who had mental health problems. Mr Bennett was made aware of Mrs Shields' circumstances and of her mental health difficulties. In the summer of 2009, Helen Shields had a brief love affair with Philip Bennett when he was a social worker assigned to her case.

Following the end of the affair, Bennett resigned from his position with the defenders. He was subsequently prosecuted for professional misconduct by the Scottish Social Services Council. He admitted the charge, was found guilty, and his social work registration was removed.

Helen Shields claimed that the affair caused her to suffer serious injury to her mental health and financial losses. Her case was that her former lover owed her a duty of care not to have an affair with her because of the position he was in as her social worker. She also claimed that he deliberately intended to cause her distress and psychological harm by deciding to have an affair with her.

Shields sued the defenders for damages, on the basis that they were under a duty to protect her against their employee's conduct and that they were vicariously liable for what he did to her. The defenders sought to have the case struck out.

The judge held that her pleadings failed to set out any proper factual basis for the existence of the duties claimed to be owed to her by the defenders. In the absence of any averments of practice in the social work profession, and where it could not be said that the duties contended for were obvious, there was no

legitimate basis for the proposition that the employer had been negligent in omitting to do what she blamed it for.

The judge stated that Helen Shields sought to impose duties on the defender with which it would be extremely difficult, if not impossible, for it to comply in practice. The standard of appropriateness in the behaviour of staff towards service users would be difficult to define, and the employer was not in a position to monitor all activities carried out by its staff. It was held that a duty to take reasonable care to prevent staff from engaging in correspondence of a sexual nature with service users would impose unrealistic burdens in practice.

Lord Pentland further held that the pleadings failed to set out any proper factual foundation for the existence of a duty by Crossroads to take reasonable care to investigate and to take adequate steps to prevent or stop the relationship from continuing; they were irrelevant where there was nothing in the factual averments to suggest that Crossroads should have appreciated that an improper relationship had begun between them.

In any event, had Crossroads complied with all the averred duties, the judge concluded that it would have made no difference where Helen Shields accepted that she had willingly agreed to have an extramarital affair with Philip Bennett, at a time when she had not been legally incapacitated. In addition, there was no suggestion that Philip Bennett had forced or induced her to enter into a relationship with him.

Lord Pentland concluded that, in the particular circumstances, there was no basis upon which it would be fair, just and reasonable for the common law to impose a duty on Philip Bennett not to enter into a relationship with Helen Shields as, even taking her case at its highest, the relationship had been one entered into by two consenting adults. Moreover, it would not be reasonable in the sense described by case law; the public interest had been sufficiently served by Bennett's disqualification from practising as a social worker and it would be inappropriate for the court to take the additional step of imposing civil liability on him. In addition, it would bring about a significant extension of the law of negligence for the court to extend it to recognise the duties contended for by Helen Shields.

Helen Shields' case of a deliberate intention by Philip Bennett to inflict harm upon her was also held to be irrelevant. The judge described the averments as no more than bare assertions, and held there was no basis for her allegations.

In obiter comment, the judge said that had it been necessary to consider the case based on the employer's alleged vicarious liability for Bennett's conduct: whatever test or approach was adopted, his conduct in entering into a relationship with Shields was clearly outside the scope of his employment and was not closely connected thereto; therefore, that case was misconceived. The action was struck out.

Comment

"Everything in the world is about sex apart from sex. Sex is about power"—Oscar Wilde

This case illustrates the courts' difficulties with consenting adult sexual relationships. Relationships can of course be founded upon any number of power imbalances—celebrity, wealth, or even looks spring immediately to mind as examples. It is evident too that the breakdown of any sexual relationship can result in psychological distress, anxiety, and depression; as such, relationship breakdown, even between consenting adults, can cause a recognised psychiatric illness. But what about the situation where the parties to a consenting sexual relationship meet as a result of a professional power imbalance: the doctor with a patient, the lawyer with a client, the social worker with a service user? When does this give rise to a breach of a common law duty of care which gives a remedy for the harm caused in damages?

The pursuer in this case felt that she was attempting to establish an "incremental development"[1] to the common law duty of care owed by the defenders, but this was a development that the judge refused to countenance on social policy grounds, as much as on the facts as pleaded by the pursuer.

[1] *Shields v Crossroads (Orkney)* [2013] CSOH 144 at [53].

It is important to note first what this case was *not* about, which clearly made Mrs Shields' case more difficult to make out. There had been no criminal charges brought against the social worker, Bennett. He had not been accused of sexually assaulting Mrs Shields in a criminal sense because, presumably, from the point of view of the prosecuting authorities she had been a willing participant in the relationship. He had not been prosecuted under s.46 of the Sexual Offences (Scotland) Act 2009,[2] which introduced a criminal offence for an adult in a position of trust to engage in sexual activity with a mentally disordered person, presumably because Mrs Shields was not a mentally disordered person within the definition of that Act.[3] Equally this was not a case where the tort (or in Scotland, "delict") of civil assault was raised.[4] Further, this case was not brought under the Prevention of Harassment Act 1997,[5] the course of conduct complained of not being considered sufficiently harassing to bring it within the confines of that Act.[6] Note too that the social worker himself was not named in the pleadings as a defender in his own right. Because this was a strike-out application, no evidence was heard and the court's decision was based on the pursuer's pleaded case only—so the pursuer's case at its highest.

The court considered the sexual relationship between the social worker and the service user was completely consensual, and she was not so mentally ill so as to render her incapable of consent; whilst the service user had had a history of mental illness (in particular bipolar disorder and depression), her symptoms were controlled by medication and she had not had symptoms for 10–12 years. There was no suggestion that the social worker Bennett "forced or induced her to have a sexual relationship by means of threats, duress or subterfuge".[7] There was no intention on the part of the social worker to harm the service user, and he was not reckless as to causing harm.[8] The damage the service user allegedly suffered and the losses she sought to recover flowed from the breakdown of the relationship rather than her decision to enter into it.[9]

Based on those findings, the pursuer's claim was undoubtedly doomed to failure. The judgment emphasises the pursuer's abilities to make choices and to be responsible for the consequences of those choices. The social worker's overtures to Mrs Shields to embark on a sexual relationship with him, which the pursuer's counsel likened to "grooming" in child abuse cases, was given short shrift. The fact that Mrs Shields felt burdened by an emotional dependency on Bennett, and felt pressured to please him sexually was ignored. That the social worker would have known much about the pursuer's background, and was clearly in a position of trust and power over the pursuer by virtue of his job and his duties to support her during a difficult phase of her life, was dismissed as irrelevant.

[2] The equivalent in England and Wales is the Sexual Offences Act 2003.

[3] Possibly the acts complained of preceded the Act coming into force.

[4] The delict (or tort) of assault in Scotland is defined more broadly than in England and Wales: It can be defined as any intentional physical contact with another person without their consent (which would be "battery", not assault, in England and Wales).

[5] The equivalent in England and Wales is the Protection from Harassment Act 1997.

[6] In *Dowson v Chief Constable of Northumbria Police* [2010] EWHC 2612, Simon J. set out six matters which would need to be satisfied for conduct to amount to harassment under the Act: the conduct must occur on at least two occasions; it must be targeted at the claimant; it must be calculated in an objective sense to cause alarm or distress; it must be objectively judged to be oppressive and unacceptable; whether the conduct is objectionable and unacceptable will depend on the social or working context in which the conduct occurs; and a line is to be drawn between conduct which can be said to be unattractive and unreasonable and conduct which has been described in various ways as designed to torment the victim, or be of an order which would sustain criminal liability.

[7] *Shields v Crossroads (Orkney)* [2013] CSOH 144 at [43]. But in fact the pursuer did plead her case on the basis that she felt pressured by Bennett into having a sexual relationship; that he had initially raised the issue, pursued the matter, and when it happened she felt she needed to please him and developed an inappropriate emotional dependency on him; this appears to have been side-lined for the purpose of Lord Pentland's judgment.

[8] The judge was clear on this, but in the circumstances of the social worker instigating the relationship, having sex with the pursuer in his office and very soon afterwards finishing that relationship, one could see the opposite decision being reached on recklessness. Lord Pentland found that it was Bennett's motivation to have a sexual relationship with the pursuer, not to inflict harm (*Shields v Crossroads (Orkney)* [2013] CSOH 144 at [54]). It surely is foreseeable, however, that having a sexual relationship, and then finishing that relationship one week later after the pursuer said she was falling in love with him could indeed have led to the infliction of psychological harm and the social worker being reckless (or even, for the purpose of a duty of care to be established, careless) in the cause of that harm.

[9] This is despite the fact that Mrs Shields attended her GP during the relationship, in June 2009. She said she was confused, distressed and upset, and was prescribed anti-depressants, all of which would appear to suggest that her mental health was declining during the course of the relationship and indeed before the sexual acts between pursuer and defender took place.

There were two limbs to the pursuer's case: one of "systemic negligence" against the defenders as employers, and one of negligence on the part of Bennett for which the employers were vicariously liable. The first limb was brought on the basis that the defenders had not put adequate systems in place to monitor and manage staff, and to investigate whether the relationship was appropriate. The judge found there was no satisfaction of a *Bolam*[10] type test—it was not evident on the face of the pleadings as to what the established practice was amongst social work charities to prevent a sexual relationship between a social worker and a service user, and whether this particular defender had fallen so short of reasonable practice as to give rise to a liability. The outlawing of inappropriate relationships between social workers and service users, as set out in the Codes of Practice for Employers & Social Service Workers, was directed at the social workers themselves and not their employers; the court asked rhetorically what could the defender have done to prevent the situation?[11] Lord Pentland quotes from a 1909 case, *Morton v William Dixon Ltd*,[12] in which Lord President Dunedin said:

> "Where the negligence of the employer consists of what I may call a fault of omission, I think it is absolutely necessary that the proof of that fault of omission should be one of two kinds, either—to show that the thing which he did not do was a thing which was commonly done by other persons in like circumstances or—to show that it was a thing which was so obviously wanted that it would be folly in anyone to neglect to provide it."

Suggestions by the pursuer that, for example, social workers should not use private phones to contact service users, but only work computers or equipment, and that meetings with service users should only take place in the defender's offices were "unrealistic". Imposing a duty to take reasonable care to prevent staff from engaging in conversations or correspondence of a sexual nature with service users "would impose unrealistic burdens in practice".[13] A meeting at the office behind a closed door (obvious to Bennett's co-workers), and a meeting in a café which was witnessed by one of the defender's board members were insufficient to prove that the defenders should have appreciated at a managerial or supervisory level that an improper sexual relationship had begun, and taken steps to stop it.

It seems to the writer that the whole point of the defenders' relationship with the pursuer was lost here, the court dourly advocating the doctrine of personal responsibility for the pursuer's own conduct. On the pursuer's pleaded claim the defenders were engaged to help and support her. In taking her on, they clearly owed her a duty of care. She met Bennett, her social worker, purely as a result of the defender's engagement. In fact, instead of assisting her, by his actions Bennett harmed her. QED? Clearly not!

The second limb concerned whether Bennett was negligent in entering into a sexual relationship with the pursuer, bearing in mind his position of trust and his knowledge of the pursuer's vulnerability. Note that the social worker's regulatory body had found him guilty of professional misconduct and he had been disqualified from practising as a social worker. Lord Pentland felt that:

> "the public interest has been sufficiently served by the imposition of that sanction and it would be inappropriate for the courts to take the additional step of civil liability on him."[14]

The relationship was between two consenting adults—she discussed her sex life with him (at his instigation as her social worker), she willingly went to meetings with him (initially at least as a service user with her social worker), she emailed him privately (Bennett having provided his private email address).

[10] *Bolam v Friern Hospital Management Committee* [1957] 1 W.L.R. 582.

[11] "It is hard to envisage … how the defenders could be expected to see to it that their staff did not behave in an inappropriate manner towards service users or form inappropriate relationships with them"; "I cannot see that any of the duties allegedly incumbent on the defenders could have prevented the parties from seeing through the course on which they each freely and willingly agreed to embark" per Lord Pentland, *Shields v Crossroads (Orkney)* [2013] CSOH 144 at [40] and [43] respectively.

[12] *Morton v William Dixon Ltd* 1909 S.C. 807.

[13] *Shields v Crossroads (Orkney)* [2013] CSOH 144 at [40].

[14] *Shields v Crossroads (Orkney)* [2013] CSOH 144 at [53].

It would not be just, fair and reasonable to impose a duty of care on Bennett not to enter into a relationship with the pursuer. It was a misjudgement, and professionally wrong, but not negligent.

The judge accepted that there is a class of sexual relationship in which there is a common law duty for professionals not to engage—such as with children and "persons suffering from mental handicap".[15] He poses the question: what if the relationship between Mrs Shields and Bennett developed into a happy and enduring one, would he still have been negligent? The judge says that the logic of the pursuer's case is that it would be, but he seems to have forgotten the basic tenet of tort law that there is no negligence without loss.

It followed from the court's findings that there was no vicarious liability as Bennett had not breached any duty of care. Despite these findings, the judge provided his views on the vicarious liability issue. The judge referred to *Vaickuviene v J Sainsbury Plc*,[16] in which the Inner House had recently analysed the authorities, which were not easy to reconcile. The test remains whether the employee's acts or omissions were "within the scope of his employment". However, following Lord Clyde's judgment in *Lister v Hesley Hall Ltd*,[17] this had to be considered from the point of view of a "close connection" to that for which the employee was employed, and broadly construed.

In *Lister*, the employers of a warden who was charged with looking after pupils boarding at a school were liable vicariously when he sexually abused some of them. However, the school would not have been so liable if the abuser had been the groundsman, with no responsibilities for the pastoral care of the children involved. One needs to look at the context of the act complained of, as opposed to the act itself. Clearly no one is employed to sexually abuse children, but if the job involved caring for children, and the abuse was a subversion of that duty, vicarious liability could be established. Where and when the act occurred is relevant but not conclusive, neither is the fact that the employment merely provided an opportunity to the assailant to carry out the act complained of; there had to be more.[18]

Hence *Lister* allowed the courts subsequently to hold employers of teachers, scout leaders and social workers vicariously liable for the acts of their employees in sexually assaulting children in their care. However according to Lord Pentland, Bennett's conduct in entering into a sexual relationship with the pursuer was "clearly outside the scope of his employment" and "an independent personal venture of his own".[19] That cannot be right.

Bennett met Mrs Shields in the course of his duties; he was professionally responsible for helping her; the meetings and discussions which were a precursor to the sexual acts occurred under the guise of him helping her; the sexual acts happened in his office. If the court had found that the social worker had owed a duty of care, then surely the employers would have been vicariously liable in these circumstances, if all the authorities had been considered and the law correctly applied. The fact that the court did not find that a duty was owed makes these comments irrelevant for the purposes of Lord Pentland's judgment in this case, but dangerous for other cases on different facts. Judges should be reluctant to opine on areas of law which are irrelevant to their judgment in such a cavalier and short-form way.[20]

The judge was concerned that extending the law to encompass the pursuer's claim could have far-reaching consequences to social policy best left to Parliament. He talks about the "quick sands of public policy" which should be avoided

[15] *Shields v Crossroads (Orkney)* [2013] CSOH 144 at [46].
[16] *Vaickuviene v J Sainsbury Plc* [2013] CSIH 67.
[17] *Lister v Hesley Hall Ltd* [2001] UKHL 22; [2002] 1 A.C. 215.
[18] In a later case, *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48; [2003] 2 A.C. 366, Lord Nicholls said that the whole concept of close connection was a "value judgment" and this is precisely why it has become such a fertile area of the law, and as Lord Pentland says in *Shields v Crossroads (Orkney)* [2013] CSOH 144, why the authorities are not easy to reconcile.
[19] *Shields v Crossroads (Orkney)* [2013] CSOH 144 at [58].
[20] Lord Pentland deals with this in three short paragraphs at the end of his judgment.

> "in a case such as the present one where the court is not in possession of sufficient information to evaluate the policy considerations that might be relevant to the expansion of the law beyond the boundaries delimited by the legislature under statute".[21]

On the one hand, the court decries the lack of information, and on the other it strikes out the claim on the pleadings without allowing the parties to be put to proof and provide the information that the court considers was lacking. This case should not have been struck out; the court should have allowed the parties to submit evidence and there should have been the opportunity to put sufficient information before the court so that the facts and arguments could be properly ventilated.

Practice points

It's all about the pleadings in this case.

- The importance of the pleadings cannot be underestimated when the court is dealing with an application to strike out, before evidence is advanced and arguments can be developed. It is somewhat ironic that this case was brought under Ch.43 of the rules of the Court of Session which allows for abbreviated pleadings, but that was of no assistance to the pursuer in this case.
- There is no duty of care owed by one party to another to refrain from entering into a consensual sexual relationship, whatever the power imbalances on which that relationship is founded may be.
- In similar cases, practitioners should emphasise the vulnerability of the claimant/ pursuer in such situations, a matter which the judge in *Shields* said was ill-defined in the current case. If possible the evidence should cast doubt on the issue of "real" or "informed" consent.

Jonathan Wheeler

Stalker v Greater Glasgow & Clyde Health Board

(OHCS, Lord Pentland, December 13, 2013, [2013] CSOH 194)

Personal injury—liability—negligence—breach of statutory duty—Workplace (Health, Safety And Welfare) Regulations 1992 reg.12

LT Employers' liability; Health and safety at work; Scotland; Tripping and slipping

Emma Stalker was a senior staff nurse at Stobhill Hospital in Glasgow. She sustained a serious injury to her left wrist in an accident at work on August 12, 2009. She sued her employers. Damages were agreed at £20,964.17, subject to liability.

At the time of the accident, Emma Stalker worked in the ophthalmology department in a new Ambulatory Care and Diagnostic Hospital ("ACH"), which had been constructed on the Stobhill Hospital Campus and which had opened in about June 2009. On August 12, 2009, some construction work was still continuing. At about 14.00 on the day of the accident Emma Stalker left her department to walk to the patients' and

[21] *Shields v Crossroads (Orkney)* [2013] CSOH 144 at [53].

visitors' car park in order to move her car. Having moved her car she then started to make her way back to her department on foot.

It was raining heavily at the time. There were a number of routes she could have taken for her return journey. The one she chose was by means of an uncovered external set of concrete steps leading down from the hill on which the patients' and visitors' car park was situated to the ACH. The stairway formed part of an accepted pedestrian route through the hospital grounds connecting the minor injuries unit at the top of the hill to the ACH at a lower level. As she was descending the stairway she slipped and fell, sustaining her injuries.

The stairway had been constructed about one year before the accident and comprised five flights of concrete steps. The steps were formed from pre-cast concrete sections. Each flight had four or five steps and was separated from the other flights by intermediate tarmac landings. There were 22 steps in all. On either side of the steps there were metal hand rails, which were bolted to the landings and to the steps.

Emma Stalker fell on the first tread of the second flight of steps from the top. She had an open golf umbrella in her right hand and was holding onto the left hand rail with her left hand. She had been wearing flat shoes with a ridged rubber soles. Her case at trial was that the tread on which she fell had not been laid so as to allow for a sufficient downward slope from back to front.

The steps were designed to be self-draining and Emma Stalker's case was that the step on which she fell (as well as some of the other steps) did not have a gradient of a sufficient incline to allow rain water to drain off its surface. The alleged effect was that, in conditions of heavy rainfall, water was liable to accumulate in puddles on the surface of the step, thereby creating a risk of slipping. She alleged negligence and breach of reg.12 of the Workplace (Health, Safety and Welfare) Regulations 1992.[1]

The judge heard from a number of lay witnesses and a liability expert from each side. He preferred the evidence from the defender's expert. He held that, on the expert evidence, the step had a downward incline from back to front of between 1 and 2mm, and, even in heavy rain, the step on which Emma Stalker had lost her footing provided adequate slip resistance, had been laid to provide a sufficient gradient for it to be self-draining to a reasonable degree, and did not give rise to a material risk of a reasonably careful pedestrian losing his or her footing, even in conditions of heavy rain; therefore, she had not proved that the step on which she had fallen lacked adequate slip resistance.

Emma Stalker led no evidence to show the frequency or regularity with which there might be sufficient amounts of rainwater on the steps to give rise to a risk of slipping and that they were in a hazardous condition with such frequency and regularity as to make their surface unsuitable for use. On that basis the judge held that she could not succeed under reg.12(1) or (2). The judge held that reg.12(2)(a) and (b) respectively added nothing to the case brought under reg.12(1) and had no application in the circumstances of the case.

Lord Pentland also held that she had failed to prove that there was a substance, namely rainwater, on the step which might cause a person to slip in the sense in which that phrase had been interpreted in *McGhee v Strathclyde Fire Brigade*,[2] and it followed that her case under reg.12(3) could not succeed.[3]

[1] Workplace (Health, Safety and Welfare) Regulations 1992 (SI 1992/3004) reg.12.(1): "Every floor in a workplace and the surface of every traffic route in a workplace shall be of a construction such that the floor or surface of the traffic route is suitable for the purpose for which it is used. (2) Without prejudice to the generality of paragraph (1), the requirements in that paragraph shall include requirements that—(a) the floor, or surface of the traffic route, shall have no hole or slope, or be uneven or slippery so as, in each case, to expose any person to a risk to his health or safety; and (b) every such floor shall have effective means of drainage where necessary. (3) So far as is reasonably practicable, every floor in a workplace and the surface of every traffic route in a workplace shall be kept free from obstructions and from any article or substance which may cause a person to slip, trip or fall. (4) In considering whether for the purposes of paragraph (2)(a) a hole or slope exposes any person to a risk to his health or safety—(a) no account shall be taken of a hole where adequate measures have been taken to prevent a person falling; and (b) account shall be taken of any handrail provided in connection with any slope. (5) Suitable and sufficient handrails and, if appropriate, guards shall be provided on all traffic routes which are staircases except in circumstances in which a handrail can not be provided without obstructing the traffic route."

[2] *McGhee v Strathclyde Fire Brigade* 2002 S.L.T. 680.

[3] *McGhee v Strathclyde Fire Brigade* 2002 S.L.T. 680 per Lord Hamilton at [12]: "I construe regulation 12(1) (as read with regulation 12(2)) as imposing … a requirement that the constructional state of the floor immediately prior to the pursuer's accident be suitable in the sense of there being at that time no real risk of a person using it as a means of passage from the stairs to the muster room slipping and thereby sustaining injury."

However, he went on to find that, even if there was a substance on the steps which might cause a person to slip, the defenders took all reasonably practicable measures to prevent this.

The judge accepted that the onus of establishing the defence of reasonable practicability lay on the defenders. Citing Lord Mance in *Baker v Quantum Clothing Group*,[4] Lord Pentland held that, like the common law duty to take reasonable care, the defence of reasonable practicability involves consideration of the nature, gravity and imminence of the risk and its consequences, as well as of the nature and proportionality of the steps by which it might be addressed, and the balancing of the one against the other. In his opinion, there were no reasonably practicable measures available to the defenders to prevent rain water from landing on the stairway. He stated:

> "Rain water cannot be compared with a substance which has been spilled, dropped or knocked over. It is a wholly natural phenomenon and its presence from time to time on external steps cannot be avoided. In my opinion, it is quite different from a slippery substance which has been dropped or spilled on a surface."

Lord Pentland held that the defenders had seen to it that the stairway was provided with a good handrail on either side and that the steps had a slip resistant surface. The step on which the pursuer fell did have a slight and sufficient gradient. He accepted the expert evidence that a minimally increased gradient would not have made any practical difference.

In any event, had there been a substance on the steps which might cause a person to slip, the judge held that the defender had taken all reasonably practicable measures to prevent that in providing good handrails on either side of the steps and a slip resistant surface.[5]

The case was dismissed.[6]

This case is very much determined on its own facts. The court heard all the evidence that was given, but accepted the defender's expert evidence. Having accepted that, then the finding had to have been that there was nothing wrong with the steps, which meant there would be no breach of statutory duty. The pursuer's case turned on the slope of the steps. The defender's expert evidence was that there was a slope but it was within acceptable limits. The court went on to say that even the pursuer's expert evidence was, at its best, that the gradient of the step was 1mm less than it ideally should have been:

> "Such an approach appears to me to call for an unrealistic degree of … and to ignore the fact that there are bound to be minor variations in pre-cast concrete steps as a result of normal manufacturing … or the manual processes involved in laying them."

In adopting this approach the court relied on statements by Schiemann L.J. in *Marks and Spencer Plc v Palmer*,[7] in which he said:

> "the ordinary person would not … regard his ordinary walking about in the course of an ordinary day on such a floor as that with which we are presently concerned as exposing him to a risk to his health and safety."

On this basis the court found that there was compliance with regs 12(1) and (2).

The court also considered the Court of Appeal decision in *Ellis v Bristol City Council*,[8] in which the Court of Appeal held that reg.12(1) and (2) applied to states of slipperiness which, though temporary in nature, occurred with a sufficient degree of frequency and regularity as to give rise to a risk to the health

[4] *Baker v Quantum Clothing Group Ltd* [2011] UKSC 17; [2011] 1 W.L.R. 1003 at [82].
[5] *McGhee v Strathclyde Fire Brigade* 2002 S.L.T. 680 applied.
[6] Had there been liability, the judge would have been found her 50 per cent contributory negligent for not taking sufficient care for her own safety in descending the steps.
[7] *Palmer v Marks & Spencer Plc* [2001] EWCA CIV 1528.
[8] *Ellis v Bristol City Council* [2007] EWCA Civ 685.

and safety of the employees using the floor. Regulation 12(3) was intended, on the other hand, to cover transitory conditions which occur less frequently. It was held that reg.12(3) imposed a less onerous duty than an absolute obligation and just required the employer to do all that was reasonably practicable to avoid the presence of the slipping hazard. The court found that these observations applied just as much to the surface of a traffic route as they do to a floor in the workplace, with which *Ellis* was concerned.

In the index case, there was no evidence to show the frequency or regularity with which there might be sufficient amounts of rain water on the steps to give rise to a risk of slipping. It was therefore held that there was no basis in the evidence that would entitle the court to reach any conclusion as to the regularity or frequency with which steps were liable to become so wet as to give rise to a risk of slipping. It was on the basis of this interpretation of the cases on reg.12 that there was a finding that there was no breach.

This is also a useful case on the issue of what "reasonably practicable" actually means. The judge was referred to a number of authorities: *Edwards v National Coal Board*[9]; *Marshall v Gotham & Co Ltd*[10]; *Mains v Uniroyal Englebert Tyres Ltd*[11]; *Baker v Quantum Clothing Group Ltd*[12]; and *Strange v Wincanton Logistics Ltd*.[13] All are well worth remembering. In this case, it was for the defendant/defenders to establish that it was not reasonably practicable to keep the stair free from the substance upon which the pursuer slipped,[14] and in this case they did.

Practice points

- An assessment of what is reasonably practicable involves a balancing exercise, putting on one side the degree or quantum of risk against the sacrifice in terms of loss of money, time or trouble.[15]
- In the assessment of what is reasonably practicable, it is relevant to consider whether or not the incidence and nature of the risk was reasonably foreseeable.[16]
- The assessment of what is reasonably practicable is ultimately a forensic one, to be assessed by the court at a point immediately before the accident.[17]
- The accident in this case happened on August 12, 2009 but was heard on December 13, 2013. The court observed, in respect of the witnesses, that their detailed recollection of events had diminished significantly over the years since the accident. This demonstrates the importance of proceeding to a trial as quickly as possible, particularly where lay evidence is needed and liability is in issue.

Colin Ettinger

[9] *Edwards v National Coal Board* [1949] 1 K.B. 704 per Tucker L.J. at [710] and Asquith L.J. at [712].
[10] *Marshall v Gotham & Co Ltd* [1954] A.C. 360 per Lord Reid at [372], [373].
[11] *Mains v Uniroyal Englebert Tyres Ltd (No.1)* [1995] S.C. 518 per Lord Sutherland at [528], [530] and [531].
[12] *Baker v Quantum Clothing Group Ltd* [2011] UKSC 17 per Lord Mance at [1042]–[1045], [81]–[84] and Lord Dyson at [1058], [1059], [128] and [129].
[13] *Strange v Wincanton Logistics Ltd* 2011 G.W.D. 39-807 —the Opinion of the court given by Lord Eassie at [24].
[14] Lord Sutherland in *Mains v Uniroyal Englebert Tyres Ltd (No.1)* [1995] S.C. 518 at [531].
[15] Per Asquith L.J. in *Edwards v National Coal Board* [1949] 1 K.B. 704 at [712]. Lord Mance's comments in *Baker v Quantum Clothing Group Ltd* [2011] UKSC 17, although obiter, were also considered to be helpful: "the criteria relevant to reasonable practicability must on any view largely reflect the criteria of the common law duty to take care. Both require consideration of the nature, gravity and imminence of the risk and its consequences, as well as the nature and proportionality of the steps by which it might be addressed, and the balancing of one against the other." (At [82].)
[16] Lord Sutherland in Mains at page 528 and Lord Dyson in *Baker v Quantum Clothing Group Ltd* [2011] UKSC 17 at [128], [1059].
[17] Lord Eassie in *Strange v Wincanton Logistics Ltd* 2011 G.W.D. 39-807 at [24] and Lord Oaksey in *Marshall v Gotham & Co Ltd* [1954] A.C. 360 at 370, quoting with approval Jenkins L.J. in the Court of Appeal.

Case and Comment: Quantum Damages

Coles v Hetherton

(CA (Civ Div), Moore-Bick L.J., Aikens L.J., Vos L.J., December 20, 2013, [2013] EWCA Civ 1704)

Road traffic accidents—damages—diminution in value—mitigation—measure of damages—motor insurance—cost of repairs—reasonableness

Car hire; Diminution in value; Measure of damages; Mitigation; Motor insurance; Repairs; Road traffic accidents

This appeal involved 13 cases. In each case, the claimant had motor insurance with Royal & Sun Alliance Insurance Plc ("RSAI") and the claimant's vehicle was damaged as a result of the admitted negligence of the defendant driver, who was insured by either Provident Insurance Plc (Provident) and Allianz Insurance Plc (Allianz). In each case, the claimant's motor policy contained an option whereby the insured could have his vehicle reinstated if the cost of repairs were judged to be less than the vehicle's market value.

If that option was chosen then the insured had a further choice under the policy terms; he could elect to engage his own repairer or elect to use RSAI's system for repairing vehicles. If the policyholder chose the latter, the policy also gave him the option of using a "courtesy car" if he wanted one.

In all 13 cases, the claimant policyholder chose the RSAI repair system option and his vehicle was repaired. In some of the cases, the claimant also decided to take advantage of the courtesy car offer. In each case RSAI, exercising its rights of subrogation as insurer, brought a claim (in the name of the insured) against the negligent driver, claiming the total cost of the repairs paid out by it, which included some ancillary charges and the cost of the courtesy car.

The main question of principle at issue was whether the claimant (in reality RSAI) could recover the full cost of the repairs to the vehicle (as invoiced to RSAI) when it had been repaired using the RSAI repair system, which had been set up through another company in the RSAI Group.

Provident and Allianz argued that the RSAI repair system, as operated, had the effect of inflating by about 25 per cent the total cost of claims for repairs made against the defendant tortfeasor (in reality, his insurer) and that the claimant was not entitled, as a matter of law, to claim that full sum, but only about 75 per cent of it. There was a subsidiary question concerning the right to recover the cost of the courtesy car.

There were three preliminary issues:

(1) where a vehicle is damaged as a result of negligence and is reasonably repaired (rather than written off), is the measure of the claimant's loss taken as the reasonable cost of repair?[1]

(2) if a claimant's insurer has arranged repair, is the reasonableness of the repair charge to be judged by reference to: (a) what a person in the position of the claimant could obtain on the open market; or (b) what his or her insurer could obtain on the open market?[2] and

(3) where a vehicle is not a write-off and an insurer indemnifies the insured by having repairs performed and paying charges for those repairs, and where the amount claimed is no more

[1] Measure of Loss.
[2] Test of "reasonable repair charge".

than the reasonable cost of repair (on the correct legal test determined under (2) above), is that amount recoverable?[3]

On the first issue, the Court of Appeal held that, where a chattel was damaged by negligence, direct loss was suffered as soon as the chattel was damaged. The measure of that loss was the chattel's diminution in value. Events occurring after the damage were irrelevant to calculating diminution in value. Subsequent destruction, a decision to delay repairs, or an ability to have the repairs done at less than cost would not prevent recovery of the diminution.[4] Generally, the courts calculated that diminution by considering the reasonable cost of repair so as to put the chattel back in the state it had been. In general, that was a convenient practice which courts should continue to follow. A claim for diminution in value was one for general damages.

The cost of the repairs was not itself the loss suffered. Provident and Allianz had argued that the claimants could not recover the full cost of repair to RSAI because they had to mitigate their loss by having the repairs done at a lower cost. That was held to be wrong. Mitigation was not relevant in respect of that direct loss.[5]

Accordingly, a claimant's loss was taken as the reasonable cost of repair: that was taken, as a rule of thumb, as representing the diminution in value, although it might not always represent the full amount of the diminution.[6]

On the second issue, the Court of Appeal held that there was no difference between the cases of uninsured and insured chattels. Even where the insurer's rights became subrogated to those of the insured, the cause of action against the tortfeasor remained the claimant's, unless it was assigned. Further, the benefits obtained under the insurance were irrelevant in assessing damages.

Provident and Allianz had argued that these cases were outside those general rules because RSAI had acted as the claimants' agent when arranging repairs so that the contract between RSA-owned MRNM[7] and the repairer was relevant for ascertaining repair costs.

The court held that the argument was unsupported by the facts. The policies did not provide that RSAI would be the insured's agent and the claimants had not given RSAI authority to enter repair contracts on their behalf. Thus the repairer could not recover repair costs from the insured. In addition, Provident and Allianz could not rely on *Copley v Lawn*,[8] which recognised that where a claimant received an offer to make amends, in deciding whether the claimant acted reasonably, the advice he could reasonably have been expected to obtain from other professionals was to be taken into account, but it went no further than that, and did not undermine the general rules.[9] They held that if the claimant's insurer arranged repair, the reasonableness of the repair cost was to be judged by reference to what the claimant could obtain on the open market.

On the third issue, the Court of Appeal held that, if the insurer paid for repairs and the claimant sued for the diminution in value, the court only had to consider whether the sum claimed was equal to or less than the notional sum the claimant would have paid, as a reasonable cost of repair, on the open market. The court would examine the components of the notional overall figure and would then compare that figure with the total actual sum. Accordingly, the court would not have to examine the administrative charges included in the total repair cost paid by RSA-owned MRNM. The question was not whether each item was reasonable, but whether the overall cost was reasonable.

[3] Recoverable amount.
[4] *Dimond v Lovell* [2002] 1 A.C. 384 applied.
[5] *Darbishire v Warran* [1963] 1 W.L.R. 1067 doubted.
[6] *Payton v Brooks* [1974] 1 Lloyd's Rep. 241 followed.
[7] MRNM is the trading name of RSA Accident Repairs Ltd.
[8] *Copley v Lawn* [2009] EWCA Civ 580.
[9] *Copley v Lawn* [2009] EWCA Civ 580 considered.

Dealing with the additional point, the court held that courtesy car costs could not be part of the repair costs. However, the right to a replacement car was set out in the policy and was therefore a contractual benefit; provided that the benefit was at a reasonable rate and was reasonably incurred, it was recoverable.[10] There was no question of mitigation. The claimant exercised rights contracted for before the tort had occurred; that was not mitigating the loss of use of the vehicle.

So, in summary, the court held that where a chattel such as a vehicle was damaged by negligence, the claimant's loss was taken as the reasonable cost of repair, because that was taken as representing the diminution in value. If the claimant's insurer arranged repair, the reasonableness of the repair cost was to be judged by reference to what the claimant, not the insurer, could obtain on the open market: there was no difference between the cases of uninsured and insured chattels.

The appeal was dismissed.

Comment

This case has nothing to do with personal injury claims and litigation; nevertheless it is an important case and one that, I believe, may have quite far-reaching consequences.

In essence, this case is a straightforward commercial dispute between insurers. At one point pretty much the whole market had "ganged up" against RSA, but over the months and years that the matter has been rumbling on, one by one they have fallen away, leaving Allianz and Provident to progress the case on their own.

At risk of sounding like an old, well, you-know-what, I remember the time when motor damage were simple. If you were involved in an accident you went off and got two estimates that you submitted with your claim form and, eventually, an engineer would come and look at your car. If the accident was your fault and your car was not driveable—tough. There was no replacement car or courtesy car.

If, on the other hand, the accident was not your fault you could go and hire a car, pay the cost up front yourself (if you could afford it) and then hope you could recover it later; sometimes much later. Meanwhile, behind the scenes the insurer would confirm the Knock for Knock Agreement and that was that. Life was so simple and all was "apple pie and motherhood".

Then over time, things got more complicated: credit hire started, Direct Line withdrew from the Knock for Knock Agreement and supply chain management approaches meant that insurers would look to control more closely the cost of repairs and so forth. Approved repairer networks were set up, who were obliged to supply replacement vehicles. These changes were introduced to improve market retention or share, improve the customer journey (not that the term had been invented then) or reduce own costs. While the aim of reducing costs was primarily directed at the 50 per cent of claims where an insurers' policyholder was at fault and no recovery would be effected, the attitude was one of reciprocity. If all companies did the same sort of thing, all would benefit. And for a short time that might have been the convention.

That then brings us to *Coles v Hetherton*. OK, I get the logic of the law; I really do, but … Well, frankly it just seems so wrong to me. It seems wrong that an insurer can "profit" out of repairing their policyholder's vehicle and by supplying a courtesy car. But that is where we now are.

The real effect of *Coles v Hetherton* is that, I fear, it will start a sort of judicially-endorsed quasi-arms-race in which an insurer will seek to leverage the greatest cost benefit from its supply chain of repairers and at the same time ensure, or hope, that the open market cost of repairs remains as high as possible. The cost will be passed from one insurer to next and will ultimately feed through to premiums. And that at a time when the politicians expect premiums to come down. Whichever insurer has the biggest market share and can be the slickest and most imaginative in its approach will benefit the most.

[10] *Parry v Cleaver* [1970] A.C. 1 applied.

This type of approach will come as little surprise to some claimant law firms and solicitors, as they have been layering costs into the process for years by having links with credit hire operators, medical reporting agencies, tow trucks and whatever else. *Coles* could yet lead to quasi-credit repair models and heaven knows what else. To me, I'm afraid, it all seems so wrong.

I can also see further ramifications in respect of other types of subrogated claim such as those involving household or commercial insurances. Come back Knock for Knock Agreement; all is forgiven.

My only hope, albeit a forlorn one, is that the Competition Commission will come to the conclusion that it is wrong to profit in these circumstances and do something; quite what that would be I don't know, as primary legislation would seem unlikely.

So what's the answer? Driverless cars; that is the answer, and they are not that far away. Fewer accidents, fewer cars to repair, no rear end shunts, no whiplash. Now that will be a paradigm shift.

Practice points

This is not really the type of case where practice points seem appropriate, especially after my rant, but:

- Damage to property is a general damage.
- The measure of loss to property, or a chattel, is its diminution in value which is fixed at the moment damage is sustained.
- Although conventionally this is determined by market value or reasonable cost of repairs.
- This means that all the court has to decide is whether the amount claimed is in line with the market and reasonable cost of repairs.
- What goes on behind closed doors can stay behind closed doors. If you can get a vehicle repaired cheaper via network, then you can benefit to the extent of the difference between reasonable open market cost and what you have actually paid.

David Fisher

Haxton v Philips Electronics UK Ltd

(CA (Civ Div), Elias L.J., Beatson L.J., Dame Janet Smith, January 22, 2014, [2014] EWCA Civ 4)

Damages—negligence—mesothelioma—dependency claims—life expectancy—measure of damages—claimant contracting mesothelioma through husband's clothing—statutory claim for future dependency based on curtailed life expectancy—recoverabilty—common law—Law Reform (Miscellaneous Provisions) Act 1934—Fatal Accidents Act 1976 s.3(1), s.3(2), s.4

LT Dependency claims; Life expectancy; Measure of damages; Mesothelioma

Both Mr and Mrs Haxton developed mesothelioma as a result of being exposed to asbestos. Mr Haxton was employed as an electrician by Philips Electronics UK Ltd (Philips) for over 40 years until he retired in 2004. In the course of his work, he was subjected to asbestos dust. He began to develop symptoms attributable to mesothelioma in June 2008 and subsequently died from the disease in 2009.

His widow, Monica Haxton, was never employed by Philips, but she washed her husband's boiler suits and work clothes and as a result also came into contact with the dust lodged in the fibres. She developed mesothelioma symptoms in January 2011 and was diagnosed with that disease in January 2012. The

medical prognosis in a report dated February 2013 was that she would live between six and 12 months; in fact, happily, she was still alive at the time of the appeal and attended the appeal hearing.

Mrs Haxton issued two separate proceedings against the same defendant, Philips. One was in her capacity as widow and administratrix of the estate of her late husband. She claimed damages on behalf of the estate under the Law Reform (Miscellaneous Provisions) Act 1934 and also as a dependant under the Fatal Accidents Act 1976 as amended.

The claim, which was issued on June 25, 2012, alleged negligence and breach of statutory duty. Liability was conceded and ultimately damages were agreed and a consent order made on May 13, 2013. The damages for loss of dependency were premised on the assumption that she had a remaining life expectancy of 0.7 years because of her illness.

However, earlier, on February 11, 2012, she had issued proceedings in her own right, also in that action seeking damages for negligence and breach of statutory duty. Liability was again conceded and damages agreed at £310,000, save for one disputed item related to the claim for future dependency arising from her husband's death.

Her case was that, but for Philips' negligence, her life would not have been cut short and the assessment of her dependency claim in the first action would have been significantly greater. Philips should, therefore, compensate her for that loss. It was agreed that, if recoverable, the loss under this head, which resulted principally from lost earnings and pension benefits, was £200,000. The issue was whether this is in law a recoverable head of damage. Mr David Pittaway QC, sitting as a Judge of the High Court, held that it was not. Mrs Haxton appealed.

The Court of Appeal held that there was no reason of principle or policy which deprived Mrs Haxton from recovering damages which represented the loss she had in fact suffered as a result of the curtailment of her life by the admitted negligence of the defendants. The 1976 Act conferred a statutory right to recover for the loss of dependency and in her claim under that Act she cannot recover more than her actual loss. However, they confirmed that there is no reason why the diminution in the value of that right resulting from the negligence could not be recovered as a head of loss in her personal action.

That did not interfere with the principles governing the payment of compensation under the legislation; they were left wholly unaffected. Mrs Haxton's was a common law claim for damages for loss of dependency; it was one for diminution in the value of a valuable chose in action, a statutory right. There was nothing in the language of the 1976 Act or the authorities which suggested that there was any special attribute distinguishing that particular chose in action from any other. That head of loss was recoverable in law.

The Court of Appeal also confirmed that in the same way, a loss or diminution of a contractual right might be recoverable even though it was not directly suffered by a claimant; a fortiori that should be the case where, as in this case, the reduction in the dependency compensation was a loss actually suffered by her when her dependency claim under the Fatal Accidents Act was settled. The fact that the source of that right was statutory and not contractual was not a material distinction.[1]

The court went on to hold that Mrs Haxton's personal dependency claim was not too remote: it was reasonably foreseeable that a curtailment of life might lead to a diminution in the value of a litigation claim and if a claimant had such a claim, a wrongdoer must take the victim as he finds him. It had to have been foreseeable to the defendant that she would have dependency rights which would be diminished as a result of its negligence.[2]

She was entitled to an additional £200,000. The appeal was allowed.

[1] *Fox v British Airways Plc* [2013] EWCA Civ 972; [2013] I.C.R. 1257 followed.
[2] *Lagden v O'Connor* [2003] UKHL 64; [2004] 1 A.C. 1067 followed.

Comment

This is an unusual and tragic case in equal measure. Its singularity derives from a number of factors: First, from the way in which this rare but fatal industrial disease was contracted by a married couple. Mr Haxton sustained mesothelioma from his time at work where he was exposed to asbestos over many years. He had been employed as an electrician and his duties included mixing and removing asbestos lagging on the defendant's premises. Mrs Haxton, the claimant in this case, was exposed in her own home during the weekly wash, as she beat out the asbestos dust from her husband's overalls. Both victims' exposure ultimately derived from the same source, Mr Haxton's employers: Philips Electronics UK Ltd.

Each diagnosis of mesothelioma comes with its own share of tragedy: it is a fatal condition, where death usually follows within a year. In Mrs Haxton's case, she not only had to come to terms with the death of her husband of 45 years, but she also had to cope with the knowledge that she too was doomed to suffer the same agonising end. As though to aggravate matters further, the defendant insurers sought to reap a windfall from her imminent demise by disputing £200,000 of her claim.

It was agreed by all parties that the value of Mrs Haxton's dependency claim under the Fatal Accidents Act 1976 must take into account her own reduced life-expectancy. However, the defendants also contended that this diminution in value did not constitute a recoverable loss in the associated personal injury claim for her own condition. Mrs Haxton wanted to leave her grieving children a financial legacy to help them cope with their double loss. There were no other contentious issues; liability and all other heads of loss were agreed.

The novelty of this single issue meant that there was no obvious legal precedent that addressed this specific point. The defendants succeeded at first instance. It would appear that the trial judge was persuaded, more by intuition than by legal authority, that it was wrong in principle to permit the use of a second action to enable a claimant to recover what she was not entitled to in the first.

The Court of Appeal overturned the first instance decision. It ruled, unanimously, that Mrs Huxton's statutory entitlement to a dependency claim was a chose in action. Furthermore, that as its value had been reduced as a direct result of Mrs Haxton's injury, it was an actionable common law loss caused by the same defendant's negligence. There were no policy considerations that precluded such a claim.

Unusual cases often necessitate a review of basic law concepts and this one was no different. The court's reasoning ran as follows. The starting point is to review the basic restitutional nature of tort law compensation, which is arguably best evoked by Nicholls L.J. in *Livingstone v Raywards Coal Co*:[3]

> "… where an injury is to be compensated by damages, in settling the sum of money to be given … you should as nearly as possible get at the sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong …"

On the face of it, but for Philips Electronics' culpable neglect in exposing her husband in the first place and in permitting him to return home in his work overalls that were covered with this highly toxic material, Mrs Huxton would, on the balance of probability, have lived for much longer. Accordingly, she had a valid common law claim arising out of the personal injury she sustained. It was based on a diminution in value of the chose in action, one that was directly linked to her reduced life expectancy.

The next step is to consider what policy or other considerations, such as remoteness, might prevent such a claim; there were none. On the contrary, the court found a number of analogous cases where similar claims had succeeded: such as the actionability of a loss of chance of suing a doctor in a clinical medical case,[4] and the loss of a death in service benefit resulting from an unfair dismissal.[5] The latter instance

[3] *Livingstone v Raywards Coal Co* (1880) 5 App. Cas 25 at 39.
[4] *Wright (A Child) v Cambridge Medical Group (A Partnership)* [2011] EWCA Civ 669; [2013] Q.B 312.
[5] *Fox v British Airways* [2013] EWCA Civ 972; [2013] I.C.R. 1257.

showed that the loss or diminution of a contractual right is still recoverable even where it is not suffered by the claimant directly.

The defendants' argument that the loss was too remote at law failed. The court simply referred to *Lagden v O'Connor*[6] to the effect that all that is required is that the injury and consequent loss should be reasonably foreseeable; it held that it was. So that was that. The judgment was summed up nicely by Elias L.J., reciting the following maxim: "the wrongdoer must take the victim as he finds him."[7]

Practice points

The case facts are probably unique; fortunately so. However, there are other situations where this ruling may be relevant. Take, for example, the case of a serious road accident where one tortfeasor/driver is responsible for the death of two family members: where the breadwinner dies first and the dependent, though critically injured, survives but only to die later from the injuries sustained in that accident.

- The *Haxton* ruling indicates that in the moments after the first victim's death, the second victim acquires by operation of statute a chose in action as a dependent under the Fatal Accidents Act 1976. In which case any reduction in its value caused by the injury would be a recoverable head of claim; assuming that the dependant's prognosis is such that the period of dependency has been reduced.
- The position is a little less clear where the breadwinner and the dependant are injured by different people in two unconnected accidents. However, Elias L.J. has helpfully opined that the same principles should prevail.[8]
- Liability insurers will need to revise their reserves whenever a surviving victim's reduced longevity is likely to or has already been reduced the value of an existing but as yet unquantified dependency claim.
- Claimant representatives should be wary of settling a surviving dependant's injury claim first.

Nick Bevan

Tasneem v Morley

(Central London CC, H.H. Judge May QC, September 30, 2013, Unreported)

Personal injury—road traffic accidents—damages—exemplary damages—fraudulent claims—investigations—civil procedure—insurance—costs

LT Counterclaims; Exemplary damages; Fraud; Investigations; Measure of damages; Motor insurance; Road traffic accidents

This was the trial of a group of allegedly fraudulent "crash for cash claims" listed for trial together. In fact, by earlier orders made by the court, the claims had in each case been struck out and judgments entered on the counterclaims. The judge permitted amendments to be made to six of the claims to permit the Direct

[6] *Lagden v O'Connor* [2003] UKHL 64.
[7] *Haxton v Philips* [2014] EWCA Civ 4 at [23].
[8] *Haxton v Philips* [2014] EWCA Civ 4 at [23].

Line Group to be added as a claimant to counterclaims to enable that company to pursue a claim for exemplary damages.

Direct Line has set up special teams around the United Kingdom to identify and deal with fraudulent crash for cash claims. The judge said that such claims have reached "epidemic proportions". She continued:

> "Individual claims by, and awards to, claimants are low but the volume is such that when these fraudulent low value claims are added together the losses to insurance companies, and thus to honest insureds in terms of increased premiums generally, is huge."

Many of the sums claimed back by way of a counterclaim related to amounts paid out by Direct Line or their linked companies to the claimant drivers before it became apparent that each of these claims were linked and were all being advanced fraudulently. Much of the money paid out had already been recovered, so there was relatively little to be ordered by the judge in respect of residual compensation.

She was, however, asked to award £1,000 in respect of each claimant as a conservative estimate of investigation costs incurred by Direct Line in identifying, linking and pursuing these cases. She did so, holding that the sum was reasonable and it could be recovered from each claimant.

Exemplary damages had also been sought against the claimants. The judge held that, in principle, they should be awarded. She concluded that a fraudulent insurance claim arising out of a road traffic accident straddled both the first and the second categories identified in *Rookes v Barnard (No.1)*.[1] She held that deliberately causing a crash was outrageous and dangerous behaviour also done for profit; it was also potentially criminal both as a fraud and as careless or dangerous driving.[2] She noted that the police were not taking up the case, so there would be no danger of double jeopardy.

No evidence of the claimants' means had been given, but they had had every opportunity to adduce evidence of their means in response to the claim for exemplary damages. The judge held that it would not therefore be appropriate to take into account the absence of evidence of means as a restricting factor in the awards to be made.

There were major considerations involved in assessing the awards. First, there was the need for deterrence. Claims such as these fraudulent low-value crash claims were widespread. The practice was pernicious and it undermined the openness and honesty which was the foundation for insurance contracts and insurance claims generally.

Secondly, although these were low-value claims, they involved a manufactured crash, which had the potential to be very dangerous indeed. The judge noted that in 2013 there had been a fatality arising out of a crash-for-cash incident.

Thirdly, none of the claimants faced prosecution. Fourthly, the principle appeared to be that one single award was made against multiple tortfeasors. The drivers' claims were higher in value than their passengers' claims. Accordingly, in setting the amount for a single award to be made against all those involved in a particular case, the amount of the lower claims should be taken into account as a restricting factor.

Costs were also relevant. In the lead case, for example, costs of more than £44,000 had been incurred by the insurer. In all cases, the costs exceeded the value of the claim. The court was urged to award exemplary damages in addition to costs in order to send out a message to persons who might otherwise be intending to commit this sort of fraud.

The judge accepted that there was some force in that submission, but felt that the strength of the message was in the overall amount that the fraudulent claimants were obliged to pay. She decided that to load further exemplary damages on the lead case, which was already undertaking the brunt of the costs and where the costs were well in excess of the claim, would be wrong and overly punitive. Accordingly, in

[1] *Rookes v Barnard (No.1)* [1964] A.C. 1129.
[2] *Rookes v Barnard (No.1)* [1964] A.C. 1129 considered.

the lead case, costs were awarded in the full amount sought, but no additional award of exemplary damages would be made.

Nevertheless such an award was made in all the other cases. A figure of £2,000 was payable in respect of each driver and £1,000 in respect of each passenger. For example, in the second action, which involved a driver and two passengers, the award was £4,000.

Comment

The fraudulent scam known as "crash for cash" is most certainly an abuse which threatens to bring the torts system into disrepute, but whether this abuse has reached "epidemic proportions", as indicated by H.H. Judge May in her judgment in this case, is perhaps open to doubt. The Insurance Fraud Enforcement Department, set up by the insurance industry, suggests that one in seven personal injury claims can now be linked to variations of this thoroughly unpleasant racket, but there is not yet much criminological exactitude to do other than guesstimate the true level of these scabrous techniques.

Research by insurers LV attributes more than 300,000 deliberate collisions since 2008 to this fraudulent method of extracting payouts. They assert that these machinations by criminal gangs are now affecting more than 1,000 innocent motorists a week, and necessarily pushing up premiums for all drivers.[3] If that is even remotely a true estimate then this case certainly can do its part to heighten awareness among motorists of the lurking danger.

Variations in methodology for the rogues engaged in deliberate criminality of this sort include a "staged accident" where damage by sledgehammers will mimic a car crash; a "ghost accident" based solely on paperwork; and the "induced accident" where, typically, a vehicle brakes sharply in front of a victim who has no chance to stop.

The modus operandi of this latter "slam on" can often include disconnecting rear brake lights to lessen the chance of the following vehicle being able to stop in time, and it would appear that female drivers and young drivers are a particular target for fraudsters, as they appear less likely to challenge a claim, and perhaps less resilient against vociferous suggestions at the scene that they were solely at fault for the deliberate rear-end shunt.

Warnings last year were given by the motoring organisations about another variation, known as "flash for cash", where a fraudster will induce a victim to proceed by flashing their headlights, and then will deliberately collide with them. There is then little chance of arguing around the Highway Code guideline that use of headlights is solely a warning device.[4] In 2011, the House of Commons Select Committee drew national attention to this whole area of fraudulent practices and recommended the setting up of a national police unit to confront these crimes.[5]

Criminal investigation has certainly been very active recently, particularly so after Baljinder Gill died in Buckinghamshire when her car was hit by a van in a pile-up which had been deliberately engineered. Sweeney J. sentenced three men to terms of 10 years for causing death by dangerous driving and conspiracy to commit fraud. An estimate was given in that criminal trial that staged crashes were costing insurers £392 million per annum.[6] This appears to have been the first British fatality caused by "crash for cash", clearly reckless as to any risk to other innocent road users.

Another criminal case, this time in Sheffield, involved a staged accident when a 12-tonne bus, with 40 passengers on board, deliberately swerved to collide with a car. The ringleader of the gang setting up this "accident" was found to have been behind a series of insurance scams and was sentenced to four years

[3] "Fraudsters behind 1,000 crashes a week", *Sunday Telegraph*, February 16, 2014.
[4] "Motorists warned of new car accident scam 'flash for cash'"*Northern Echo*, August 16, 2013. See *www.rac.co.uk/advice/motoring-news/fraudsters-flash-for-new-car-scam/* [Accessed April 20, 2014].
[5] "Car insurers 'should fund police unit to tackle fraud'", *The Times*, March 11, 2011.
[6] "10 years for claim scam death crash"*Daily Mirror*, February 16, 2013.

for this plot, along with varying sentences for the driver and other accomplices, who had been systematically engaged in a series of fake collisions. The bus "accident" was described in court by H.H. Judge Robinson as but "the most extreme example" of several contrived collisions. Police were alerted to the possibility that this was not a genuine road crash when innocent bus passengers reported that some of their fellow travellers had already filled out claim forms in advance of the collision.[7]

These despicable crimes of fraud and intentional crashes have of course now been caught up in the wider torts debate on whiplash, on which many of these spurious personal injury claims were based. Justice Secretary Chris Grayling MP in 2012 announced a "consultation on reforms to reduce the epidemic of claims", applauded by newspapers such as the *Daily Mail*, which noted it had long "campaigned to end the scandal of bogus whiplash claims from motorists who fake or exaggerate their injuries".[8]

Inevitably, perhaps, the battle lines have been drawn on Mr Grayling's contentious proposals. The Association of Personal Injury Lawyers (APIL) criticised them on the basis that they would "cripple access to justice for vulnerable people" and the Association of British Insurers ("ABI") asserted in support of them that: "For too long, whiplash has been seen as the 'fraud of choice'."[9]

Inevitably too there is a dispute on the exact figures. No-one doubts the presence of fraudulent claims, particularly in a recession, but some figures put out by the Insurance Fraud Bureau ("IFB"), set up in 2006 and which published a study "Crash for Cash; putting the brakes on fraud" in 2012 have little by way of research underpinning. The IFB suggests that there are 2,670 fraudulent claims a week, "costing honest customers £1 billion a year and they then quote the ABI estimate of 'a further £2 billion of undetected fraud".[10]

However, it is clear that the principal area of detected fraud relates to home insurance, of which there were 66,000 bogus or exaggerated claims in 2010, followed by all motor insurance frauds at 40,000,[11] so much of this is speculation. In the absence of detailed research, it is difficult to conjecture the levels of fraud by "crash for cash" schemes or indeed for fraudulent whiplash claims in general. However, there is a clear danger that hysteria whipped up on these topics may deter honest claimants with a genuine soft tissue injury, particularly when pathways to the litigation of their claims are blocked.

In the context of criminal trials, it is perhaps surprising that insurers are exercising a civil right to counter-claim in cases where they suspect "crash for cash" fraud. Police investigations and criminal prosecutions would appear to be making headway in alerting the public to taking greater care on the roads. However, perhaps insurers feel that the publicity effect in tort counter-claims can outweigh the rather more dubious cost-effectiveness of tort claims against fraudsters in relatively low-value cases.

In *Tasneem v Morley*, the addition of Direct Line Group on the nine counter-claims, in an endeavour to recover some of their costs, follows a trend in other unreported county court actions.[12] H.H. Judge May had no difficulty in holding that "deliberately causing a crash is outrageous", and then itemises four issues. Her analysis suggests a "need for deterrents", the egregious intentionality of a "manufactured crash", the fact that none of these claimants now transposed into defendants is facing prosecution, and the technical point in *Kuddus* that it can sometimes be appropriate to make one award against multiple tortfeasors.[13]

One intriguing point is a discussion of exemplary damages in assessing the value of the counter-claims. Such an award is of course a punitive or vindictive assessment of an additional award intended to deter the wrongdoer from evil. With respect to the learned judge, the report of *Tasneem v Morley* which we have may well have been somewhat garbled, as she indicates that the insurers' request for exemplary damages "straddled both the first and the second categories identified in *Rookes v Barnard*". That famous

[7] "Sheffield 'cash for crash' gang jailed", *Sheffield Telegraph*, January 25, 2014.
[8] "Purge on bogus whiplash claims could save motorists £50 a year"*MailOnline*, December 16, 2012.
[9] "Purge on bogus whiplash claims could save motorists £50 a year"*MailOnline*, December 16, 2012.
[10] November 2012.
[11] "Allianz says claim scams have doubled"*Financial Times*, November 8, 2011.
[12] See *AXA v Shaikh*, *AXA v Jerren*, and *Liverpool Victoria v Ghadhda*, quoted in this case.
[13] *Kuddus v Chief Constable of Leicestershire* [2001] UKHL 29.

categorisation by Lord Devlin had, as strand one, any case of "oppressive, arbitrary or unconstitutional action *by the servants of the government* [sic]", which was clearly inapplicable here.[14] However, the second strand of cases in which "the Defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable" was certainly applicable. A classic instance of "calculation" was the libel case of *Cassell v Broome*,[15] where the publishers deliberately went ahead with the publication of a defamatory statement against a naval captain, knowing it to be entirely false and yet calculating that publicity would be useful. They were compelled by an exemplary award to disgorge their profits. *Kuddus* is now of course the critical case on exemplary damages, pointing out that the head of "calculated to make a profit" had been overtaken by the law on unjust enrichment and its restitutionary principles.[16]

However, the assessment of exemplary damages is always a discretionary power in the hands of the judge, and in *Tasneem* there is an apportionment, in particular because of the impact of costs. H.H. Judge May notes that in the lead case costs of £44,000 had been incurred by the insurer, and accepted there was "some force" in a submission to award exemplary damages to "send out a message". However, in considering that option she had come to the conclusion that to heap further exemplary damages on the lead case would be "wrong and overly punitive". She therefore awarded costs in the full amount on the lead case but no additional award of exemplary damages. As to the other cases she considers exemplary damages to be appropriate, and her assessment is for a figure of £2,000 payable in respect of each guilty driver, and £1,000 in respect of each passenger.

Apart from the point that none of the erstwhile claimants was facing prosecution, which certainly seems an unhappy matter given their deliberate fraud, no doubt explicable on de minimis grounds, nothing is particularly controversial in terms of technical law in this case. But the lack of prosecution for fraud or perjury is puzzling. If the authorities will not undertake that, presumably because they have more important things to do, then it is certainly odd to use the torts system to retaliate against "crash for cash" malefactors.

One point here is of course the lower burden of proof in the torts system, but presumably this "naming and shaming" may have some deterrent effect amongst those tempted to engage in this villainy. But this extending of litigation after a strike-out, presumably at the expense once again of the honest motorists who will have to foot the legal bill of relentless pursuit against those very likely to be "persons of straw" would seem to be the proverbial "sledgehammer to crack a nut". It would be very interesting to know if any of the modest "administration cost" damages were ever recovered against the petty criminals who made the bogus claims that set this litigation in train. One rather doubts it.

Practice points

- Litigation arising out of "crash for cash" claims which insurers have demonstrated to be fraudulent may produce a retaliatory response by insurers, using counter-claims to recover administrative costs.
  While it is clear that such fraud takes place, although perhaps not on the "epidemic" scale as is sometimes suggested, the scam is clearly a very considerable danger to innocent motorists, passengers, and bystanders.
- Whether such prolongation of this type of counter-claim litigation is cost effective for insurers is still in doubt, particularly as the wider pool of honest motorists will have to pay for it, although it may serve some deterrent publicity purpose.

Julian Fulbrook

[14] *Rookes v Barnard* [1964] A.C. 1129 at 1221.
[15] *Broome v Cassell & Co Ltd* [1972] A.C. 1027; [1972] 1 All E.R. 801.
[16] See generally *Kuddus v Chief Constable of Leicestershire* [2001] UKHL 29.

Case and Comment: Procedure

Maclennan v Morgan Sindall (Infrastructure) Plc

(QBD, Green J., December 17, 2013, [2013] EWHC 4044 (QB))

Personal injury—civil procedure—case management—measure of damages—witnesses—power to regulate nature and extent of witness evidence—guidance as to exercise of power—CPR 1998 r.32.2(3), Pt 32, Pt 32 r.32.2(3), r.32.2, Pt 38, r.32

Case management; Loss of earnings; Measure of damages; Personal injury claims; Witness statements

The claimant, Donald Maclennan, was a senior employee working for the defendant. He performed the specialist and highly skilled role of a Mechanical Superintendant/Foreman Fitter on the King's Cross Redevelopment Project. On March 28, 2008, he sustained serious injuries when falling from a ladder in a Hub Shaft.

He suffered severe traumatic brain injury in addition to other physical injuries. The defendant admitted liability, subject to 25 per cent contributory negligence. An aspect of quantum concerned lost earnings. The claimant proposed to tender the evidence of 43 witnesses. The trial was estimated to last five days with a trial window starting at the end of March 2014. The 43 witness statements concerned these four broad issues:

- whether, but for the accident, the claimant would have continued to work in the United Kingdom or whether he had the opportunity to work on more remunerative terms abroad, and in particular in Australia or in the Middle East;
- the age at which the claimant would have retired and whether this would have been 65 (as the defendant submitted) or 70 (as the claimant submitted);
- the prospects for promotion of the claimant during the remainder of his working life; and
- the levels of earnings the claimant could reasonably have received over time but for the accident.

The defendant said that these issues were commonplace in relation to the loss of earnings aspect of quantum in a personal injury case of this type. It sought an order pursuant to CPR r.32.2(3)[1] limiting the claimant to calling no more than eight witnesses as earnings comparators.

Green J. held that the 43 witness statements covered a range of matters relating to the four broad issues. They were extremely brief; they did not attach corroborative or supporting documentation; and they included assertions about the availability of work in the United Kingdom and abroad, rates of pay, typical retirement ages, and the claimant's qualities and employment prospects generally. There was material duplication, though the repetition of a proposition by a variety of witnesses could be said to add to its weight, and it was possible that the sum of the evidence might exceed the probative weight of its parts.

Under CPR 32.2(3), which came into effect as a result of the Jackson reforms, the court had the power to deploy a range of possible solutions in order to reduce costs and ensure that the trial was conducted effectively. The following considerations were relevant to the exercise of that power:

[1] CPR 32.2(3): "The court may give directions—(a) identifying or limiting the issues to which factual evidence may be directed; (b) identifying the witnesses who may be called or whose evidence may be read; or (c) limiting the length or format of witness statements."

- CPR r.32 had to be read as a whole. The court had to use all the powers at its disposal to ensure the efficient and fair conduct of the trial, and it would only consider prohibiting the calling of witnesses after less intrusive measures had been considered and rejected;
- a court seeking to regulate the nature and extent of witness evidence would generally wish to do so at an early stage, before the preparation of witness statements. At that stage it might also be possible for the parties to identify matters which might be admitted;
- while the power to exclude or control witness evidence was best exercised before the preparation of witness statements, the court was not precluded from exercising it after statements had been drafted;
- before exercising its power to prohibit the adducing of witness statement evidence, the court had to have the fullest possible information, adequate preparation time, and guidance from the parties as to which parts of which statements were said to be otiose, prolix, or otherwise inadmissible; and
- where the court did exercise its power, it might be necessary to give the parties liberty to vary the order by consent or to apply to the court for a variation. In that regard, the court would be entitled to expect a considerable degree of co-operation and good sense. A lack of co-operation could not be justified by an assertion that the relationship between the parties' legal advisers was not good.

In this case, the judge decided that some form of case management was required. One possibility would be to impose a process which required the claimant to identify the specific facts and propositions relied upon from the witness statements; the defendant to identify which were agreed and disagreed; and the claimant to indicate which witnesses he intended to call.

However, the judge held that was not appropriate in this case. Time was short, the parties had not exhibited any great ability to co-operate, and there was a real risk that a process involving multiple stages could delay the preparation for trial. The directions were as follows:

- the claimant would be permitted to call 14 witnesses to address the issue of comparative earnings. That was the minimum number the claimant considered necessary, and the defendant did not demur. The claimant was ordered to write to each forthwith requesting certain specified details of their earnings, with supporting documentation. If a witness declined to co-operate, the claimant was to write to the defendant's solicitor, setting out the steps he had taken and the response he received;
- the judge directed that the claimant could call 14 additional witnesses to cover matters other than comparative earnings. That was the critical mass the claimant considered necessary, and it was likely that their evidence could be heard swiftly. Any fewer risked causing injustice. The evidence of the claimant and his wife could also be tendered; and
- the claimant was to identify the witnesses and serve any documents as directed; he could not rely on statements from witnesses who had not been identified, though there was nothing to stop him from seeking to rely upon evidence following service of a valid hearsay notice if it was proper to do so. Where any expert evidence relied on the statements of individuals who were not on the list of identified witnesses, the judge ruled that there was no need for the experts to exclude reliance on those witnesses. Finally, both parties had liberty to vary the scheme by agreement or to apply to the court for a variation.

Comment

Introduction

The courts are gradually working out how to implement the various procedural changes made to the CPR in 2013 in ways which accord with the overriding objective. The judgment in this case gives helpful guidance about the proper approach to the exercise of the power now confirmed by Pt 32.2(3), which permits the court to limit the witnesses of fact a party may rely on at trial.

The overriding objective

Like so many of the procedural reforms implementing the Jackson Report, it is essential to approach these through the prism of the overriding objective, so that, whilst at proportionate cost, cases are still dealt with justly, both in the broad sense of that word and by reference, as appropriate in any particular case, to the specific factors identified in Pt 1.1(2).

The judgment in this case is a good example of a thoughtful approach, recognising the need to control costs by careful case management which still allows for a fair trial. That is preferable to the more simplistic approach, sometimes adopted, focusing just on saving costs, which leads to a real risk of case management causing injustice to one party or another.

All of this reflects the importance of careful case management which informs, and should be closely linked with, costs management. As Moore-Bick L.J. observed in *Henry v News Group Newspapers Ltd*:[2]

> "… just as the court has responsibility for managing the proceedings, so also it has a responsibility for managing the costs and that it is expected to manage the costs by managing the proceedings in a way that will keep within the bounds of what is proportionate".

The judgment also properly recognises the need for sensible cooperation between the parties, which the CPR requires in order to help further the overriding objective. That remains an important aspiration although other, contemporaneous, reforms have perhaps had the effect of reducing cooperation between the parties. Indeed some judgments almost encourage parties to await errors made, or difficulties faced, by the opponent which can then be converted into tactical advantage resulting in the determination of an issue, or the claim as a whole, but not in a way that would generally be regarded as just.

The emphasis on co-operation reflects the encouragement given towards ADR, even if that results just in a narrowing of the issues and not necessarily outright settlement, by the Court of Appeal in *PGF II SA v OMFS Co 1 Ltd*.[3]

Limiting the number of witnesses

Consequently, it does not seem appropriate for the power conferred by Pt 32.2(3) to be used as a blunt instrument, simply capping the number of witnesses a party may rely on by focussing solely on expediency.

The German example underpinning the recommendation which led to the introduction of the rule suggests, within the broader context of the CPR, that the parties need, so far as possible, to co-operate sensibly in identifying the issues, and where possible limiting those issues, which the factual evidence will need to deal with. This approach will involve a number of stages:

- proper compliance with relevant pre-action protocols;
- proper compliance with the terms of the CPR, in particular ensuring defences fully meet the requirement that each element of the case be, wherever possible, admitted or denied and, if

[2] *Henry v News Group Newspapers Ltd* [2013] EWCA Civ 19.
[3] *PGF II SA v OMFS Co 1 Ltd* [2013] EWCA Civ 1288.

denied, reasons given along with any alternative version of events. This is particularly important given an unhelpful tendency towards ambiguous defences which, while pleaded very masterfully, do nothing to help identify the real issues and hence limit the evidence that will be necessary to resolve those issues;

- on the basis of the issues being clearly defined under the protocol and/or the pleadings each party then ensuring the factual evidence is limited to that which the court will properly require to determine those issues;
- if, for whatever reason, it is not possible to limit the evidence in that way until statements have been obtained the parties then considering adopting the procedure canvassed by the judge in this case (which would have been applied had that case not about to have been tried). That is the identification of specific facts and propositions from the witness statements and the extent to which these are agreed or disagreed, with a view to reducing those issues and hence the factual evidence necessary; and
- only after all these steps have been taken considering the need for an order under Pt 32.2(3).

All of this chimes with the updated overriding objective which requires the parties to comply with the CPR and Practice Directions. For these purposes relevant Practice Directions include the Practice Direction—Pre-Action Conduct, which confirms the need for compliance with any relevant pre-action protocols. None of this should, however, automatically preclude a party from calling a number of witnesses to deal with what is clearly a substantive issue. Indeed, as the judge noted, even if a number of witnesses give essentially the same evidence that can add weight and gravity to the proposition being advanced.

Limiting the content of witness statements

Although only mentioned in passing in this judgment it is worth noting Pt 32.2(3) might be used not necessarily to exclude a witness of fact altogether but just to limit the evidence given by a particular witness, the Jackson Report having concluded the inclusion of irrelevant or peripheral material in witness statements adds to the cost of litigation.

It is not unusual for witness statements to include pure opinion, or what might sometimes be termed quasi-expert evidence, and this rule may be a very effective, and specific, way of dealing with that problem. A particular example is evidence from witnesses of fact in professional negligence claims which goes beyond explaining why the witness did, or did not, deal with matters in a particular way and makes broad assertions about what a reasonably competent practitioner in the relevant professional field would, or would not, have done.

Safeguards

It is important that, as the judge recognised, the power to control factual evidence at the stage of case management is not exercised in a way that renders the trial unfair because one or other party does not, as a result, have evidence which, in the way the trial develops, would have been of use to the trial judge.

This has been a particular problem with expert evidence, since the introduction of the CPR, because of the need for a party wishing to rely on such evidence to have permission from the court to do so. It is not unknown for a party to argue, at the stage of case management, that the other party does not reasonably require expert evidence of a particular type only, at trial, to contend that without such evidence the opponent cannot establish, or rebut, an important issue.[4] It would be most unfortunate if this practice was allowed to develop with factual evidence because, as well as potentially producing an unjust result at trial, it generates costs, that may well be disproportionate, at the stage of case management.

[4] e.g. *Cassie v Ministry of Defence* [2002] EWCA Civ 838 and *Ellis v William Cook Leeds Ltd* [2007] EWCA Civ 1232.

Variation

Finally, the directions given by the judge suggest a neat way round the problem created by the terms of Pt 3.8(3), which limits the ability of the parties to agree sensible variations to court orders in certain circumstances. That is for the court to expressly provide the parties have liberty to vary directions by agreement. This approach anticipated amendments that may well be made to the model directions and might well be routinely included within case management directions in the future.

Practice points

- The parties must help the court to further the overriding objective, and so sensibly control the need for and scope of factual evidence, by properly identifying the issues.
- Where a party acts unreasonably either in the number of witnesses it is proposed be called or in the content of the evidence contained within witness statements disclosed the other party may wish to rely on the terms of Pt 32.2(3).
- A provision in case management directions giving, perhaps modest, scope for the parties to vary those directions by agreement will often be sensible.

John McQuater

Rehill v Rider Holdings Ltd (2014)

(CA (Civ Div), Lewison L.J., Floyd L.J. January 15, 2014, [2014] EWCA Civ 42)

Personal injury—civil procedure—Pt 36 offers—late acceptance—costs—dishonesty—penalties—CPR Pt 36, r.36.14(4)(c)

LT Costs orders; Dishonesty; Part 36 offers; Pedestrians; Penalties; Personal injury claims; Reasonableness

On December 28, 2005, Mr Rehill was crossing a road at a controlled pedestrian crossing in Bradford city centre. He had been crossing with the red light against him and he stepped off the near side pavement into the path of the bus which struck him. However, the bus did not brake as quickly as it might have done.

Mr Rehill made a claim for damages for personal injury. In response to the claim the bus company initially admitted liability without qualification. It also made a number of offers to settle. On April 23, 2007, the bus company made an offer to settle for a net payment of £75,000. That offer was expressed to expire on June 1, 2007. Mr Rehill did not accept it.

On November 8, 2007, the bus company made another offer to settle, this time for £100,000. That offer was expressed to be made pursuant to CPR Pt 36. Mr Rehill did not accept that offer either. It was withdrawn on January 18, 2008, by which time the bus company said that it would be raising questions of contributory negligence.

Mr Rehill issued his claim on June 17, 2008 and the bus company's defence, denying liability as well as alleging contributory negligence, was filed on August 1.

The case eventually came to trial in May 2011 on liability only. Mr Recorder Miller found that the bus driver had been negligent; but that Mr Rehill had been contributory negligent and reduced liability by 30 per cent. The bus company appealed and on May 16, 2012, the Court of Appeal allowed the appeal in part

and apportioned liability equally between the bus company and Mr Rehill. That left the question of quantum to be determined.

The schedule of loss that accompanied Mr Rehill's claim and which he signed under a declaration of truth was largely unquantified. The only substantial quantified item was a claim for £71,500 plus VAT for the cost of building work. This work was work which Mr Rehill alleged was needed in order to adapt his home to accommodate his impaired mobility.

On June 10, 2009, the bus company made another Pt 36. That was an offer to settle for just under £40,000. The letter making that offer concludes thus:

> "This offer is also open for 21 days and is intended to have the consequences of part 36 CPR. Whilst part 36 CPR stipulates the position following an offer, for the sake of clarity if accepted the defendant will pay the claimant's reasonable costs to be assessed if not agreed."

The bus company made further offers to settle on October 5, 2010, November 2, 2010, March 15, 2011 and November 5, 2011, none of which Mr Rehill accepted. However, eventually, shortly before the scheduled quantum trial, Mr Rehill accepted an offer of £17,500.

The parties could not agree costs, and the recorder held that the June 2009 offer had not been beaten and ordered the defendant to pay the claimant's costs up to July 2009 and for the claimant to pay R's costs from July 2009 on the standard basis. The recorder also noted that the claimant had dishonestly inflated his case, that he had exaggerated his injuries and lied about where he had stepped into the road so as to minimise his culpability, that he had disputed the expert evidence concerning his recovery, had embellished his claim for building work to his home, and that he should have accepted the November 2007 offer.

The recorder did not order Mr Rehill to pay the defendant's costs before July 2009 as, when the April 2007 offer was made, there was uncertainty as to his prognosis which continued until July 2008. The recorder stated that although Mr Rehill's conduct had been reprehensible, it was not so egregious as to warrant a penal costs order.

The bus company appealed and submitted that the recorder was wrong to conclude that it had been reasonable for the claimant to refuse the April 2007 and November 2007 offers. He accordingly erred in not imposing a costs penalty for the claimant's dishonest conduct.

The Court of Appeal held that the question for the recorder was whether the claimant had been reasonable in not accepting the offers. By virtue of r.36.14(4)(c),[1] the court had to have regard to the information available when an offer was made. The recorder had considered the medical evidence available at the time of the offers and noted that in retrospect it had been prudent and reasonable to await claimant's medical progress and that there had been issues of contributory negligence that had yet to be raised.

The court held that if the claimant had indeed misled the lawyers, what was reasonable had to be based on what he knew, and not on what the lawyers knew. He had reached the end of his recovery period when the November 2007 offer was made; he was discharged from hospital in December 2007, and he knew in 2007 that he did not have a genuine claim for adapting his home. The reality was that there was no significant uncertainty concerning his orthopaedic injuries when the November 2007 offer was made, and those injuries formed the bulk of his financial claim.

They concluded that the only uncertainty surrounding Mr Rehill's injuries at that time were his abdominal injuries, which formed a minimal part of his financial claim. In their view, it was clear that the recorder had overlooked the medical evidence and his findings about the claimant's mobility. The recorder had failed to evaluate the consequences of those findings in financial terms which in turn vitiated his conclusions. They decided that it had been unreasonable for Mr Rehill not to accept the November 2007 offer; however, the same could not be said of the April 2007 offer, as there was still uncertainty surrounding

[1] CPR r.36.14(4)(c)—"(4) In considering whether it would be unjust to make the [usual] orders, the court will take into account all the circumstances of the case including (c) the information available to the parties at the time when the Part 36 offer was made."

his orthopaedic injuries at that time. Accordingly, the claimant was ordered to pay the defendant's costs from 21 days after the date of the November 2007 offer.

The court also confirmed that, if the overall effect of the recorder's decision had been that Mr Rehill received his costs for being dishonest, then that would have been wrong; however, that was not its effect.[2] The recorder held that the costs incurred in promoting a dishonest case could not be reasonably incurred. Further, the recorder's observations on the claimant's conduct did not bind the costs judge. Given that the litigation had commenced in July 2008 and Mr Rehill had been ordered to pay the defendant's costs from November 2007, very little remained. Although the recorder had been generous in not imposing a penalty for dishonesty and other judges might have taken a stricter stance, that decision was within the ambit of the recorder's discretion.

The appeal was allowed.

Comment

Introduction

This appeal, and indeed the earlier appeal in the same proceedings, perhaps suggests the lack of a clear and consistent philosophical approach to civil litigation, in the new era, by the Court of Appeal.

The philosophy underpinning the Jackson reforms was referred to expressly by Lord Dyson M.R. when giving the 18th Lecture in the Implementation Programme on March 22, 2013. Indeed, the Master of the Rolls made clear, in that speech, that the philosophy was exactly the same as that which underpinned the Woolf reforms when he said:

> "Dealing with a case justly does not simply mean ensuring that a decision is reached on the merits. It is a mistake to assume that it does. Equally, it is a mistaken assumption, which some have made, that the overriding objective of dealing with cases justly does not require the court to manage cases so that no more than proportionate costs are expended. It requires the court to do precisely that; and so far as practicable to achieve the effective and consistent enforcement of compliance with rules, PDs and court orders."

Read any judgment of the Court of Appeal and the chances are that you will come across the word "rational". Lord Dyson's Implementation Lecture reflected that approach. Rationalism has found expression in utilitarianism and these comments do seem to adopt an approach rooted in that school of philosophy.

Although that lecture was particularly concerned with the need for court orders to be complied with in the new era, it inevitably embraced the impact of amendments to the overriding objective and expressly recognised that this would mean not allowing parties to "expend more than proportionate costs in conducting their own litigation" and ensuring:

> "that parties do not expend more of the court's time and resources than is proportionate given the need to ensure that all other court-users can have fair access to the courts within a reasonable time."

These words need to be reflected by actions: particularly the need for appellate courts to ensure appeals remain reviews not rehearings (except where the latter is specifically provided for). Otherwise there will be an inevitable failure to apply the overriding objective, on the philosophical basis explained by the Master of the Rolls. Moreover, the failure to control more than proportionate expenditure inevitably favours the better-resourced party, who ends up being permitted to expend more than proportionate costs, as that party can more readily seek to challenge a decision by way of appeal, as well as utilising a

[2] *Ultraframe (UK) Ltd v Fielding (Costs)* [2006] EWCA Civ 1660; [2007] 2 All E.R. 983 considered.

disproportionate share of the court's resources by the reconsideration of matters which have already been determined.

Whilst recognising a rationalist may reject the need for proof by physical evidence, arguing reason enough will suffice, it is, perhaps, necessary to ask if there is a disconnect between words and deeds when assessing the implications of any underlying philosophy on real life events. To put the matter another way is there a consistent philosophical approach to the overriding objective, and hence justice itself? To consider this question it is worth reviewing how a case where the damages were ultimately agreed at £17,500 involved two trips to the Court of Appeal.

Contributory negligence

Before the appeal on costs, this case had already reached the Court of Appeal on the issue of contributory negligence.

Assessment of contributory negligence is, in a sense, an exercise of discretion. Hence in *Hannam v Mann*[3] Stephenson L.J. observed:

> "When one considers the proportion of responsibility, this court only interferes if it is satisfied that what must be an approximate assessment is plainly wrong."

True enough, as recognised in *Eagle v Chambers*,[4] the finding that one party is more to blame than the other amounts to a "qualitative difference" but it is, perhaps, stretching the point to suggest there is the same qualitative difference between a finding of one third responsibility and equal responsibility so as to justify interfering with apportionment that has been made by the trial judge. Nevertheless, that is what happened in that first appeal.

The risk, of course, with this approach is that it allows the appellate court to substitute its view for the court of first instance. The dangers of an appellate court acting as if it were a court of first instance was highlighted by Moses L.J. in *Wells v Mutchmeats Ltd*[5] when he observed:

> "Had I been the trial judge, I have little doubt that I would have found the defendants substantially more to blame than the appellant and made an award which reflected that view, but I must be loyal to the learning of this court dating back to a time when there were far more appeals in relation to personal injury litigation than there are now. No doubt prompted by the fear that this court would be flooded by such appeals, the court has traditionally taken the view that such appeals must be restricted. I am unable to say that the Recorder erred in his approach, or that his conclusion fell out of the range of reasonable responses to the issue of comparative blameworthiness."

The approach described by Moses L.J., whilst pre-dating the 2013 reforms to civil procedure, are entirely consistent with that approach, recognising this may not be perfect justice in every case but does give a degree of certainty, at least so far as the prospects of any appeal are concerned. This also helps to keep costs proportionate and prevents exploitation of superior financial resources where there is an imbalance between the parties on these (as so often occurs in personal injury litigation) as well as ensuring parties do not use a disproportionate share of the court's resources.

Costs appeal

When, after the first appeal, the issue of liability was resolved further negotiations took place between the parties on quantum. Eventually the parties were able to agree a figure for damages but not the incidence

[3] *Hannam v Mann* [1984] R.T.R. 252.
[4] *Eagle v Chambers (No.1)* [2003] EWCA Civ 1107.
[5] *Wells v Mutchmeats Ltd* [2006] EWCA Civ 963.

of costs because the defendant had made offers to settle, for more than the claimant eventually agreed to accept, at an earlier stage.

Consequently, this matter came back before the court, and the same recorder who had tried the issue of liability, for a ruling on costs.

The key issue, for the court, was whether the Pt 36 offers made by the defendant in 2007, both of which were subsequently withdrawn, ought to carry costs consequences under Pt 44.

The order made by the judge, based on findings made, reflected the exercise of a general discretion conferred on the court, in relation to costs, by Pt 44, rather than what are sometimes termed the "automatic" costs consequences applicable under Pt 36.

In *Fox v Foundation Piling Ltd*,[6] Jackson L.J. issued a warning, once again entirely in line with the post-April 2013 culture, about appeals on costs, where the order reflected an exercise of the general discretion found in Pt 44, when he said:

> "There has been a growing and unwelcome tendency by first instance courts and, dare I say it, this court as well to depart from the starting point set out in rule 44.3 (2) (a) too far and too often. Such an approach may strive for perfect justice in the individual case, but at huge additional cost to the parties and at huge costs to other litigants because of the uncertainty which such an approach generates. This unwelcome trend now manifests itself in a (a) numerous first instance hearings in which the only issue is costs and (b) a swarm of appeals to the Court of Appeal about costs, of which this case is an example."

Nevertheless, in the further appeal in this case the Court of Appeal, once again, allowed that appeal. This was on the basis that the recorder should have followed the approach in *Trustees of Stokes Pension Fund v Western Power Distribution South West Plc*[7] where Dyson L.J. said:

> "There may be circumstances where the court holds that the claimant acted reasonably in not accepting the offer within the 21 day period and where the offer was withdrawn before the time when the claimant should have accepted it. In that situation the withdrawal of the offer may have a very real effect on the order that should be made in respect of costs but that is very different from the present case."

Consequently, the Court of Appeal held that the question for the recorder was whether the claimant acted reasonably in not accepting one or other of the 2007 offers.

The Court of Appeal went on to observe that in reaching this decision the terms of Pt 36.14(4)(c), which requires the court to have regard to the information available to the parties at the time the relevant Pt 36 offer was made, were relevant. In other words, that rule had to be applied when considering whether an offeree was reasonable in not accepting a Pt 36 offer, subsequently withdrawn, during the time that offer was, to use the phrase applicable to Pt 36 offers, "on the table" and, hence, the significance of that offer when dealing with costs under Pt 44.

On the question of the information available at the relevant time, the Court of Appeal noted medical evidence clarifying the consequences of the injuries was available before the defendant's latter offer was withdrawn. On this basis, therefore, the offer made in November 2007 was held to be effective for costs purposes and the order made by the recorder varied so that the claimant had to pay the defendant's costs from 21 days after the date of that offer.

There are some difficulties with the basis on which the Court of Appeal justified interfering with the exercise of discretion by the recorder, largely because there is no reference to some key authorities on relevant points.

[6] *Fox v Foundation Piling Ltd* [2011] EWCA Civ 790.
[7] *Trustees of Stokes Pension Fund v Western Power Distribution South West Plc* [2005] EWCA Civ 854.

The *Stokes* case was decided prior to the substantial rewrite of Pt 36 in 2007, at a time when the defendant generally had to make a Pt 36 payment to gain costs protection. The decision was an attempt to give effect to a defendant's Pt 36 offer but generated the problem of how to approach withdrawn offers (which had the danger of adding nothing to settlement, being no longer open for acceptance, yet having the potential to frustrate settlement because of the potential costs implications). The solution to this problem, from 2007, was for the new Pt 36 to make clear that a withdrawn offer would not carry Pt 36 costs consequences, though, as subsequent case law has made clear, such an offer may still be relevant under Pt 44.

In the light of these rule changes the Court of Appeal in *French v Groupama Insurance Co Ltd*[8] held:

> "Consequently, it is now harder to formulate an approach to the Part 44 discretion that some offers which are not Part 36 offers should nevertheless be treated as though such offers for the purposes of applying Part 36 consequences. Accordingly, although not necessary for the decision in this case as the relevant offer was not a quasi-Part 36 offer, *Stokes* should be regarded now as dealing primarily with the specific problem where a Part 36 payment was a formal requirement in circumstances that added nothing to the value of the offer."

French was not cited by the Court of Appeal and hence the decision in *Stokes* is, perhaps, given undue weight. Moreover, it is hard to see, particularly in the light of the comments in *French*, the justification for importing the terms of Pt 36.14(4) into the broad exercise of discretion under Pt 44. That is because Pt 36.14(4) deals specifically, in the context of the self-contained code that is Pt 36, with the question of whether it would be "unjust" for the normal costs consequences of a Pt 36 offer to apply under Pt 36.14 (and as case law has confirmed Pt 36.10).

Part 36.14(4) is surely inapplicable where Pt 36 does not apply as the specific purpose of that rule is to moderate the otherwise automatic costs consequences. Those automatic costs consequences are inapplicable when a Pt 36 offer has been withdrawn. Moreover, it is clearly an error of law to equate what is "unjust", the test applicable under Pt 36.14, with what is "unreasonable", probably the appropriate test under Pt 44.[9]

The net result of this approach is to treat a withdrawn Pt 36 offer as an effective Pt 36 offer with the automatic costs consequences applying, unless, as Pt 36 itself provides, these would be "unjust".

All of this may result from the Court of Appeal not citing a further, significant, authority, namely *Widlake v BAA Ltd*,[10] where the Court of Appeal stressed the different nature of the discretion found as to costs under Pt 44 with the specific consequences provided for under Pt 36.

Under Pt 44, it is very much a case of the court conducting a balancing exercise, looking at all relevant circumstances, and exercising discretion. It is interesting that the recorder's use of the word "egregious" picks up the very language of Ward L.J. in *Widlake* and suggests, although not expressly referred to when giving judgment at first instance on the issue of costs, the approach identified in that case was very much in the mind of the recorder.

In *Widlake*, Ward L.J., in very much the same vein as Jackson L.J. in *Fox*, emphasised that costs appeals, when the court had exercised the general discretion under Pt 44, would be difficult to pursue when he observed:

> "Costs being at the discretion of the judge, this Court will not interfere unless the judge has misdirected himself and was guilty of an error of principle or he has taken into account, or failed to take into account, of a fact which should not, or should, have been taken into account or he was plainly wrong in the sense that he has exceeded the generous ambit within which there is reasonable room for disagreement."

[8] *French v Groupama Insurance Co Ltd* [2011] EWCA Civ 1119.
[9] *Matthews v Metal Improvements Co Inc* [2007] EWCA Civ 215.
[10] *Widlake v BAA Ltd* [2009] EWCA Civ 1256.

Whilst the Court of Appeal sought to justify interference on the basis of an error of principle, for not reflecting the factors found in Pt 36.14(4), that is, for the reasons already set out in this commentary, a somewhat difficult basis to justify an error of principle.

For the second time in a single case, which on the value of settlement would have been within the limit for the fast track, the Court of Appeal therefore interfered with the first instance decision which was, essentially, an issue of discretion.

Costs statement

Before drawing together the approach taken on appeal, both in relation to contributory negligence and to costs, it is, finally, worth observing a point that arose in relation to the costs of the appeal.

The Court of Appeal did not have available costs statements, yet as the hearing took less than a day a summary assessment would normally be appropriate. A robust sanction might have been to penalise the party in default by depriving them of costs. The only sanction was to direct the successful defendant to pay the costs of any detailed assessment in any event.

Conclusion

In both appeals the Court of Appeal in this case could be said to have substituted their own views for the views of the trial judge, an approach which is not permissible when the appeal is a review rather than a rehearing. Moreover, returning to the question about consistent application on an underlying philosophy, such an approach hardly seems consistent with the views expressed on the need for proportionality and the impact that has on the concept of justice.

Whilst, on the issues of both contributory negligence and costs, reasons were given for overturning the first instance decisions it might be said that the outcome of each appeal was, at least in part, governed by how the members of the appellate court felt about the original decisions, remembering that apportionment is only ever an "approximate assessment" and costs are very much in the discretion of the judge.

Philosophically the approach taken in this case could, perhaps, be better described as existentialist rather than rationalist; more Kierkegaard than Descartes. In other words, the appellate court may well have disagreed with the first instance judge but clear errors of law are required before appeals, by way of review, should be allowed, particularly in the light of the way "justice" is now defined.

There is ample scope for different philosophical views on what may be just, but consistency is desirable if justice, in the sense that is defined by the overriding objective set out in the Civil Procedure Rules, is to be achieved.

Consistency is, of course, important for the parties but also for those tasked with deciding cases at first instance.

Practice points

Practice points which may be derived from the judgment in this case include the following:

- On the basis of *Eagle v Chambers*,[11] it would seem open to a party dissatisfied with the apportionment of liability to justify an appeal if it is alleged one party has wrongly been held more at fault than another. This case suggests, rightly or wrongly, the same argument could be advanced where it is suggested the proper apportionment is an equal, rather than unequal, division on liability.

[11] *Eagle v Chambers (No.1)* [2003] EWCA Civ 1107.

- When dealing with costs it is essential to distinguish the "automatic" consequences under Pt 36 from the general discretion under Pt 44, particularly with offers that have been withdrawn, and the different concepts of what is "unreasonable" as opposed to "unjust".
- If an offeree cannot form a view on an offer, whether made under Pt 36 or not, it may be best to explain to the offeror why that is so, in case it later becomes necessary to show that a decision could not reasonably be made at that stage.
- If a hearing is likely to last for less than a day it is wise to have a statement of costs available in the event of summary assessment.
- Those sitting as recorders, or otherwise dealing with cases at first instance, who exercise discretion need to have thick skins!

John McQuater

Simmons & Simmons LLP v Hickox

(QBD, Coulson J. June 5, 2013, [2013] EWHC 2141 (QB))

Civil procedure—summary judgment applications—supporting evidence—applications without merit—indemnity costs—requirements for serving defence—CPR 1998 r.12(3)(3)

LT Costs; Expert reports; Indemnity basis; Summary judgments; Wasted costs orders

Simmons & Simmons LLP are a very well-known firm of solicitors. As claimants they issued claims for £305,539.84 for fees and for $2.5 million pursuant to a contingency fee agreement, both of which were said to arise out of litigation in the Caribbean territory of Anguilla.

As the defendant was based in the United States, permission was obtained to serve out of the jurisdiction and proceedings were served in January 2013. The defendant acknowledged service on February 13, 2013. The claimant agreed to an extension of time for the service of the defence to March 25, 2013.

As that extension was about to expire the defendant applied to court for a further extension until April 26, 2013. With some reluctance the claimant's solicitors agreed to that further extension. However, on April 26, 2013, instead of serving the defence, the defendant, without any prior warning or notification, served an application for summary judgment.

The defendant purported to support his summary judgment application with a report by a barrister at the Anguillan bar. However, the report, being based on the thesis that a relevant Anguillan case[1] was wrongly decided, did not support an argument that the claim should be struck out. The claimant pointed that out immediately. However, the defendant did not abandon his application until some weeks later and only then once the claimant had served their own expert report.

The defendant agreed to pay the claimant's costs of the application, but at issue was whether the costs should be assessed on the standard, or the indemnity, basis, and whether costs relating to the experts should be hived off because they might prove not to be wasted.

Coulson J. stated that the defendant's conduct, seen in the round, was indeed out of the norm. There was no explanation in the material before him as to how and why the defendant had such a drastic change of heart resulting in the issuing of the summary judgment application instead of filing a defence.

[1] The Anguillan case was *Watts Associates v George Knowles* [2002].

Coulson J. noted the claimant's observation that this was simply a delaying tactic, and in the absence of any other explanation, he was inclined to believe that this was a reasonable inference.

The judge concluded that the summary judgment application was (and should have been seen to have been) hopeless. There was no explanation in the material as to how and why an application for summary judgment was made when the defendant knew, or should have known, that the report that was provided in support of the application could not justify it. On the balance of probabilities, it was a fair inference that the defendant had not litigated in good faith, and that his hopeless application had resulted in months being lost and extensive costs being wasted.

The court determined that a defendant who had applied for summary judgment on a point of law when he knew, or ought to have known, that his application was not justified should pay the costs of the application on the indemnity basis to include the costs of the experts' reports.

The judge went on to order an interim payment on account of costs in the sum of £40,000. That represented 40 per cent of the costs due, a percentage that was commonly used in the Rolls Building as a guide to the appropriate amount of an interim payment on account of costs.

The judge also held that CPR 12.3(3) does not absolve a defendant applying for summary judgment from having to file a defence. It provides that the claimant may not obtain a default judgment if the defendant has applied for summary judgment and that application has not been disposed of. However, it does not postpone time for filing a defence. It just protects the defendant from the entry of default judgment against him until the summary judgment application is disposed of. The judge ordered that the defence and counterclaim should be provided within a further two weeks, by June 19.

Comment

The outcome of this case is not surprising. The defendant did not have good grounds to support the application for summary judgment. The court reasonably concluded that the defendant had not acted in good faith, and had sought extensions for the filing of the defence solely to ensure that time was secured to launch the summary judgment application. Accordingly, the claimant was successful in its application for indemnity costs.

The case serves as a reminder of the importance of making applications for summary judgment only where these can be justified on the law and evidence. In doing so, a party should ensure that they make the application as soon as possible and then come to court with clean hands, having sought no advantage from the respondent. It is apparent that the judge was of the view that delay and disingenuity have no place in the new legal landscape.

It is also important to note that the application for summary judgment did not absolve the defendant of the responsibility for filing a defence. Following the decision of the Court of Appeal in *Mitchell v News Group Newspapers Ltd*,[2] it would be a brave defendant who ignored a deadline for filing a defence in any circumstances. The courts have adopted a tough line and will not tolerate tactics that are intended to circumvent procedural obligations. Indeed, it is unlikely that a judge would now overlook this failure and allow a further two weeks for the defence to be filed. Another defendant in similar circumstances may well be at risk of the claimant obtaining a judgment in default of defence.

Applying the case to the personal injury arena in the post Jackson world, applications for summary judgment are likely to be deployed more often by defendants in future. Why? Defendants now face qualified one way costs shifting ("QOCS"), the basic concept of QOCS being that the defendant, whether they win or lose at trial, will almost always have to pay their own costs.

[2] *Mitchell v News Group Newspapers Ltd* [2014] EWHC 879 (QB).

Therefore, when faced with the prospect of a case being run to trial and almost certainly incurring the costs, defendants will deploy the opportunity to bring a case to a close at an earlier opportunity by way of seeking summary judgment; thereby circumventing the full force of QOCS.

It is worth remembering that a successful summary judgment application does not trigger any of the exceptions to QOCS in CPR 44.15 and CPR 44.16. QOCS protection may be lost where the claim is struck out on the grounds of abuse of process or conduct issues. The point to note, of course, is that the proceedings must be struck out in order to trigger the costs liability. It is not sufficient that summary judgment has been entered against the claimant—the claimant will remain protected from an adverse costs order.

Post April 1, 2013, the distinction between an application to strike out and an application for summary judgment is, therefore, vital. Indeed, it is likely that defendants will issue both applications to be heard simultaneously. A defendant must also be alive to the prospect that a claimant who is the subject of an application to strike out may discontinue the proceedings in order to avoid liability for costs, knowing the court has no power to re-open the matter to consider any of the striking out grounds that could have triggered a costs liability.

For personal injury practitioners, the introduction of QOCS has brought a shift in behaviour and raises tactical considerations which were arguably outside the scope of the intended objective of this particular reform measure. Whilst QOCS currently applies only to personal injury cases, including clinical negligence matters, it is the government's stated intention to introduce it for all areas of civil litigation. The conundrum that is QOCS and its interplay with summary judgment applications may well, therefore, creep into other areas.

Practice points

- An application for summary judgment must be supported by good grounds on the law and evidence. Failure to do so risks indemnity costs.
- An application for summary judgment should be made as soon as practicable and should not be deployed to seek an advantage from the respondent. Delay and disingenuity will not be tolerated by the court.
- CPR 12.3(3) does not absolve a defendant applying for summary judgment from having to file a defence. It provides that the claimant may not obtain a default judgment if the defendant has applied for summary judgment and that application has not been disposed of.
- Defendants are likely to deploy the opportunity to bring a case to a close at an earlier opportunity by way of seeking summary judgment; thereby circumventing the full force of QOCS.
- A successful summary judgment application does not trigger the exceptions to QOCS in CPR 44.15 and CPR 44.16. The claimant will remain protected from an adverse costs order where summary judgment has been entered against him.

Richard West

Smith v Secretary of State for Energy and Climate Change

(CA (Civ Div), Longmore L.J., Underhill L.J., Floyd L.J., December 5, 2013, [2013] EWCA Civ 1585)

Personal injury—civil procedure—employers' liability—pre-action disclosure—withholding disclosure—level of evidence required to establish jurisdiction—CPR 1998 r.31.16, r.31.16(3)(a), r.31.16(3)(b), r.24, Pt 31r.31.16(3)(d), Pt 31r.31.16(3)(a), Pt 31r.31.16(3)

LT Burden of proof; Discretion; Jurisdiction; Personal injury claims; Pre-action disclosure

From 1964–1994 Mr Smith was employed by the National Coal Board.[1] Until 1979 he worked underground, for one year at Markham Colliery and thereafter at Rossington. From 1979–1984 he had a job which involved him going underground regularly. He believes that the Board did not take adequate steps to protect him from the damaging effects of the noisy environment underground. In particular, he says that he was never provided with any hearing protection and as a result has suffered hearing loss.

On September 2, 2011 solicitors acting for Mr Smith on a CFA basis wrote a letter of claim, in accordance with the Pre-Action Protocol for Disease and Illness Claims. The letter was addressed to the Secretary of State for Energy and Climate Change, who is the statutory successor to the relevant liabilities of Mr Smith's former employers. The letter of claim included a request for disclosure of Mr Smith's work medical records and personnel records, for which provision is expressly made at para.4 of the Protocol.

Those were duly provided. However, the letter also made a much more extensive request for disclosure of documents which might help to establish the levels of noise experienced in the various pits at which Mr Smith had worked underground and his employers' knowledge of those levels and the consequent risks. That request was refused.

On February 8, 2012, the appellant applied to the Leeds County Court for an order for pre-action disclosure in accordance with s.52 of the County Courts Act 1984 and CPR r.31.16. Mr Smith's application for disclosure under CPR r.31.16 was initially granted by a district judge, but then refused on appeal, on the ground that Mr Smith had failed to provide evidence that was more than merely speculative.

Smith appealed again and submitted that the judge below had been wrong to hold that he was required to establish an "arguable" or "prima facie" case in order to establish the jurisdiction for an order. The Secretary of State contended that Smith had provided inadequate evidence to mount a claim, the bare minimum being a screening audiogram or a medical opinion.

The Court of Appeal held that H.H. Judge Langan QC had been wrong to find that CPR r.31.16(3)(a) and r.31.16(3)(b) prescribed any kind of jurisdictional threshold of arguability.[2] However, the same issues needed to be addressed under the second part of the test, that relating to the court's discretion. The language of "arguability" should be avoided, particularly where proceedings had not yet started.

The question should rather be whether the claimant had shown some reason to believe that he might have suffered a compensatable injury and, if so, with what degree of likelihood.[3] It was advisable that potential claimants provided fuller evidence than in this case where, although Mr Smith had provided very little, the district judge had correctly exercised his discretion by allowing the application without the need for an audiogram or a medical opinion. There was no dispute that the burden of disclosure on the secretary of state had not been too onerous.

[1] Latterly the British Coal Corp.
[2] *Kneale v Barclays Bank Plc (t/a Barclaycard)* [2010] EWHC 1900 (Comm) overruled.
[3] *Black v Sumitomo Corp* [2001] EWCA Civ 1819 followed.

The appeal was allowed.

Comment

Lewison L.J., granting permission to appeal in this case, accepted that there was "some confusion"[4] amongst practitioners as to how to approach the test for pre-action disclosure and how to satisfy it. It is fair to say that by this judgment, confusion has given way to clarification.

CPR 31.16, which reflects s.52 of the County Courts Act 1984 (and s.33(2) of the Senior Courts Act 1981) sets out the test. The applicant must be able to demonstrate with evidence that both he and the respondent to the application are likely to be a party to subsequent proceedings,[5] that had those proceedings started the respondent's duty of disclosure under CPR 31.6 would extend to the documents sought,[6] and that disclosure of the documents now is "desirable".[7] In this case, the respondent argued that the appellant's application should fail because he would have to show "some kind of prima facie case which is more than a merely speculative 'punt'", adopting the reasoning of Flaux J. in *Kneale v Barclays Bank*.[8]

Whilst the district judge had felt able to distinguish that case from this one (on the rather bizarre grounds that *Kneale* was not a personal injury claim), the judge below had followed it. The only evidence that had been produced in support of the application was a description of the appellant's working conditions, confirmation of his work history, and his subjective impression that his hearing had deteriorated by more than the average man of 65.

In fact, the Court of Appeal in this case overturned Flaux J., preferring instead to borrow from Rix L.J.'s judgment in *Black v Sumitomo Corp*.[9] He felt that there was no value judgement to be made in considering whether it was likely that the parties to an application would be parties to subsequent litigation. The reason those words appeared in the rule was to exclude applications against a non-party (or a "stranger").[10] If necessary Rix L.J. would construe the word "likely" in this context to mean "may well" (as opposed to "more likely than not").

There is then no high "jurisdictional threshold" to overcome; and as Underhill L.J. puts it in *Smith v Secretary of State for Energy and Climate Change* the rules "say nothing about the applicant having to establish some minimum level of arguability".[11] In the exercise of the court's discretion to accede to a request for pre-action disclosure, the speculative nature of the claim being made is however one of the factors which should be considered. Underhill L.J. prefers to ask "whether the applicant has shown some reason to believe that he may have suffered a compensatable injury and if so with what degree of likelihood".[12] In Mr Smith's case, his failure to disclose any medical evidence to even suggest that he had indeed presented with noise-induced hearing loss was not a bar to his application ultimately succeeding. However, the Court of Appeal did advise future applicants to provide more detail.

One argument put forward by the appellant's favour in submissions concerned the operation of the Pre-Action Protocol for Disease and Illness Claims, but this was roundly rejected by the tribunal: the fact that the Respondent had breached the protocol[13] in failing to disclose documents detailed in the letter before claim was not a short-cut answer to the questions posed by this appeal, even though it was accepted that a potential claimant need not provide medical evidence confirming hearing loss in his initial approach

[4] *Smith v Secretary of State for Energy and Climate Change* [2013] EWCA Civ 1585 at [5].
[5] CPR 31.16(3)(a) and (b).
[6] CPR 31.16(3)(c).
[7] CPR 31.16(3)(d).
[8] *Kneale v Barclays Bank* [2010] EWHC 1900 (Comm); [2010] C.L.T.C. 233.
[9] *Black v Sumitomo Corp* [2001] EWCA Civ 1819; [2002] 1 W.L.R. 1562.
[10] *Black v Sumitomo Corp* [2001] EWCA Civ 1819; [2002] 1 W.L.R. 1562 at [71].
[11] *Smith v Secretary of State for Energy and Climate Change* [2013] EWCA Civ 1585 at [23].
[12] *Smith v Secretary of State for Energy and Climate Change* [2013] EWCA Civ 1585 at [27].
[13] Pre-Action Protocol for Disease and Illness Claims, para.7.3.

to the potential defendant.[14] "Protocols do not have the same status of rules and there is no obligation as such to comply with them," said Underhill L.J.[15] Interesting comments in this era of post-*Mitchell* draconianism.

Practice points

- Do not be put off from making pre-action disclosure applications. This judgment must be seen as a "green light" to applicants and the tests to overcome are perhaps not as onerous as some of us thought. Ensure, however, that your application is properly evidenced to illustrate that yours is not a fishing expedition; that the claim is by no means speculative, and if ordered the disclosure exercise would not be too onerous. Establish also that the order is required to properly plead your client's case.
- Note Longmore L.J.'s comments at the end of the judgment: "Applications for pre-action disclosure are not meant to be a mini-trial of the action and should be disposed of swiftly and economically. Elaborate arguments are to be discouraged …"[16]. Always useful to quote to a recalcitrant defendant who refuses a request for disclosure under this rule.

Jonathan Wheeler

Brownlie v Four Seasons Holdings Inc

(QBD, Tugendhat J., February 19, 2014, [2014] EWHC 273 (QB))

Personal injury—civil procedure—civil evidence—fatal accident claims—tourist services—hospitality and leisure—contracts—allocation of jurisdiction—hotels—offer and acceptance—service out of jurisdiction—witness statements

LT Fatal accident claims; Findings of fact; Hotels; Offer and acceptance; Personal injury claims; Service out of jurisdiction; Tourist services

The claim arose out of a road traffic accident in Egypt on January 3, 2010. The vehicle in which the claimant, Lady Christine Brownlie and her husband Sir Ian were travelling left the road, with the result that she was injured and Sir Ian was killed. At the time the accident occurred, there were other passengers in the vehicle, apart from the driver. Sir Ian's daughter Rebecca was also killed. She was then living in Egypt with her husband and children. The two children were also in the vehicle and survived.

At the time of the accident Lady Christine, Sir Ian and their family were on a tour to see some of the sights of Egypt. They had departed on the tour that morning from the hotel at which they were staying. The hotel refers to itself in its publicity material as the Four Seasons Hotel Cairo at Nile Plaza. Lady Christine and Sir Ian had booked their accommodation at the hotel through Cox & Kings Ltd in London, but that booking did not include the tour. Lady Christine booked the tour by telephoning the concierge at the hotel shortly before she and Sir Ian left England, on December 21, 2009. She was able to do that because they had stayed at the hotel in the previous year, and on that occasion she had picked up a booklet

[14] Pre-Action Protocol for Disease and Illness Claims, para 6.9
[15] *Smith v Secretary of State for Energy and Climate Change* [2013] EWCA Civ 1585 at [35].
[16] *Smith v Secretary of State for Energy and Climate Change* [2013] EWCA Civ 1585 at [39].

from the hotel which advertised the tours that the hotel provided. The brochure was a 12-page document, containing details of 20 different tours.

Lady Christine sued the defendant company as owners of the hotel and claimed that they were liable for her personal injuries and under the Fatal Accidents Act 1976; she also claimed under the Law Reform Miscellaneous Provisions) Act 1934 as the executrix of her late husband's estate.

In a letter before action to the defendants, she sought pre-action disclosure of documents relating to the tour booking. The defendants passed the request to the hotel in Egypt. Egyptian lawyers responded, asserting that the accident was caused by the car company and the driver only, and that the driver was never employed by the hotel, whose role had been merely to relay the claimant's request for a tour to the car company.

Lady Christine failed in her further attempts to obtain clarification from the defendant as to what corporate entity or entities were involved. She issued proceedings and obtained permission to serve the defendant in Canada. The defendant applied successfully for that to be set aside and for a declaration that the court had no jurisdiction to try the claim. The master decided that it was clear that the defendant did not own or operate hotels, and in particular did not own the hotel in Egypt, and that Lady Christine had contracted with the hotel, not the defendant, for the tour.

On appeal, Tugendhat J. held that it was not appropriate for the court, on an application for permission to serve out of the jurisdiction or to set aside permission when given, to try the merits of the claim; yet the master had made findings of fact on issues that would have to be determined at any trial. Moreover, his findings as to the ownership and/or management of the hotel and as to the party with whom Lady Christine contracted for the tour were based on defective witness statements and/or were unsupported by evidence. There was no evidence that any company had been established in Egypt for the purpose of managing the hotel.

Contrary to the master's findings, Lady Christine had a strongly arguable case that the other party to the contract for the tour was most probably an entity with whom the proprietor of the land and buildings had entered into agreements; agreements which were likely to have provided for a licence to use intellectual property including the defendant's logo and its name and for management and advisory services. He held that the master had fallen into error.

As to whether a contract was made by Lady Christine with the defendant, the brochure was held to be the most important evidence. This was because it alone purported to identify the concierge's principal. The judge found that it would lead a reasonable person to understand, as Lady Christine did, that she was contracting with an international company known to trade under the defendant's name and logo. No specific company fitting that description was or could have been known to Lady Christine at the time, because those responsible for the hotel chain chose not to tell their guests who or which company was responsible for the management of the hotels, including, in particular, the guests' safety. However, the defendant fitted that description. Lady Christine was considered to have a strongly arguable case that the defendant was the other contracting party.[1] No other company had been identified as a possible defendant. The defendant could have no complaint if the court did not take into account points it might make or evidence it might call at any trial, but which it chose not to mention at this stage.[2]

The judge also held that contrary to the master's view, this was the most probable analysis of the evidence regarding Lady Christine's conversation with the concierge. After some discussion about the details of the tour she wanted, she told him that she wished to make a firm booking. That comprised her offer, he then accepted the booking. Therefore, Lady Christine heard that acceptance in England, so the

[1] *Antonio Gramsci Shipping Corp v Recoletos Ltd* [2012] EWHC 1887 (Comm) applied.
[2] *VTB Capital Plc v Nutritek International Corp* [2013] UKSC 5; [2013] 2 A.C. 337 followed.

contract was made in England.[3] However, the judge concluded that it was hard to say that either party had much the better of the argument.[4]

Although in light of the preceding findings it was unnecessary to decide, given the finding that Lady Christine had a good arguable case that the defendant was the party to the contract, the applicable law pursuant to Regulation 593/2008 art.4(1)(b)[5] was not that of England.

The judge also held that Lady Christine had a good arguable case that her claims in tort disclosed a serious issue to be tried and on which she had a real prospect of success. In addition, as the most likely live issue at any trial was the amount of special damages, and because people with knowledge of Lady Christine's late husband's professional practice and his health were likely to be in England, it was clearly the most appropriate jurisdiction.

In addition, Tugendhat J. ruled that two witness statements made by solicitors in support of the defendant's application were plainly not compliant with PD32. They failed to say either that they were speaking from their own knowledge, or what the source of their information or belief was; and the substance of one was drafted as a submission rather than a statement of fact. The judge said that it was unacceptable that solicitors should breach the rules in that way. If their instructions did not enable them to make a compliant witness statement, then it was their duty to the court to ask for permission under para.25.2 of the Practice Direction to file a defective witness statement, or not to file a statement at all. In this case the judge said that it might have been better if the court had simply refused to admit the statements pursuant to the underused power in para.25.1.[6]

The appeal was allowed and the order giving permission to serve the claim form on the defendant in Canada was restored.

Comment

This appeal was not so much about identifying the correct legal principles for determining whether service out of the jurisdiction should be permitted: the principles were not in issue. It was the application of them to the facts of the case which posed the problem, facts which were somewhat hard to elicit given the evidence and attitude of the defendant. The three main points to draw from the judgment concern the quality and adequacy of witness statements, conduct of the parties, and the willingness of the court to seize jurisdiction and give English nationals redress in the English courts wherever possible.

Quality and adequacy of witness statements

In order to obtain permission to serve out of the jurisdiction, it may suffice for a claim in contract if the applicant is able to show that the contract was made within the jurisdiction, or that it is governed by English law.[7] For a claim in tort it may suffice to show that the damage was sustained within the jurisdiction.[8] In either case, the standard of proof requires that the applicant has *a good arguable case* that the claim falls within the relevant ground relied upon. Following the *Canada Trust* case,[9] the gloss given to this test is that the applicant should show that they have "much the better of the argument".

[3] *Entores Ltd v Miles Far East Corp* [1955] 2 Q.B. 327 followed.
[4] *Canada Trust Co v Stolzenberg (No.2)* [1998] 1 W.L.R. 547 considered.
[5] Regulation 593/2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6: "To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows: "(b) a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence."
[6] *VTB Capital Plc v Nutritek International Corp* [2013] UKSC 5; [2013] 2 A.C. 337 considered.
[7] CPR PD 6B 3.1(6).
[8] CPR PD 6B 3.1(9).
[9] *Canada Trust Co v Stolzenberg (No.2)* [1998] 1 W.L.R. 547.

The second hurdle to be surmounted is for the applicant to establish that there is a serious issue to be tried on the merits, and the final hurdle is that the court must be satisfied that England and Wales is the proper place in which to bring the claim.[10]

Master Cook, whose judgment was the subject of the appeal, based his decision to refuse service out of the jurisdiction on two witness statements served by the defendant. The statements came from two solicitors employed by the firm of solicitors engaged by the defendant. They purported to provide evidence establishing that the defendant did not contract with the claimant and was not responsible for the safety of her family's tour. Counsel for the claimant argued that neither statement complied with the CPR. In the first statement, the solicitor (Mr Newman) said that the defendant "will contend as follows:" and then proceeded to adumbrate a number of points such as that the defendant "… are a management company and do not own … the Cairo Hotels" and that the defendant "is not a party to any agreement in place with the Cairo Hotel". Tugendhat J. cited the relevant parts of PD 32 and stated:

> "This statement plainly does not comply with the Practice Direction. He does not state that he is speaking from his own knowledge (I assume he was not), nor does he state the source of his information or belief. Although the witness statement contains a statement of truth, the drafting of paragraph 7 is designed not to be a statement of fact at all, but a submission ('the first defendant will contend …'). Mr Newman does not state that the contentions to be put forward are themselves true, nor that he believes them to be true. As a statement of what the [defendant] intends to submit to the court on some future unspecified occasion, it could in principle be true. But if the [defendant] were to contend *that it was true, it would have also to put before* the court the facts relied on in support of these contentions. There are no facts put in evidence."[11]

The second witness statement came from another solicitor acting for the defendant, Mr McManus. The judge criticised him for not giving any specific source for the information tendered; for not identifying any individual from whom he received his instructions; and for not stating what investigations he made in order to form his belief. Though Mr McManus tendered some facts, the judge found them irrelevant because the information given regarding the defendant's relationship with the Cairo Hotel was in the present tense. By contrast it was the situation in 2009—when the tour was booked—which was relevant to the issues under consideration.

In relation to witness statements, the Practice Direction to CPR 32 states:

> "25.1 Where: … (2) a witness statement, … does not comply with Part 32 or this practice direction in relation to its form, the court may refuse to admit it as evidence and may refuse to allow the costs arising from its preparation.
>
> 25.2 Permission to file a defective affidavit or witness statement or to use a defective exhibit may be obtained from a judge in the court where the case is proceeding."

The judge observed that neither party had made an application to the court under the para.25 of the Practice Direction, either that the court should refuse to admit the witness statements, or for permission to file defective witness statements. He said that he would place little weight on the statements because the witnesses did not identify any source for the information:

> "the main reason why a person making a witness statement is required by the CPR to give his source of information is so that the court can assess the weight to attach to the hearsay statement. Since the witness statements of Mr Newman and Mr McManus do not identify the individual who instructed them, the weight I attach to their evidence is negligible."[12]

[10] CPR r.6.37(3).
[11] *Brownlie v Four Seasons Holdings Inc* [2014] EWHC 273 (QB) at [32].
[12] *Brownlie v Four Seasons Holdings Inc* [2014] EWHC 273 (QB) at [74].

He added:

> "Whatever the explanation for the defective witness statements, it is unacceptable that solicitors should breach the rules in that way. If solicitors' instructions from their clients do not enable them to make a witness statement that is in conformity with the rules, then it is their duty to the court to ask for permission (under para.25.2 of the Practice Direction …) to file a defective witness statement. To obtain such permission they would have to give an acceptable explanation for why they need it. If they do not ask for permission it is their duty either to comply with the rules or not to file a witness statement at all. Witness statements that do not comply with the rules are likely to lead to waste of time and costs at the least, and may result in the court being confused and even misled. They are also likely to attract sanctions from the court of one kind or another … It might have been better for everyone if the court had simply refused to admit the witness statements pursuant to the (much underused) power in the Practice Direction para.25.1."[13]

The appeal from Master Cook's decision was ultimately allowed because Tugendhat J. was not prepared to rely upon the witness statements to the extent the master had, and he refused to make inferences about the defendant's lack of involvement with the Cairo Hotel. There was no adequate evidence that any company (other than the defendant) had been established in Egypt for the purpose of managing the Cairo Hotel (and the tour). Contrary to the master's findings, the judge found that claimant had a strongly arguable case that the other party to the contract for the tour was the defendant.

This case provides a lesson (or a reminder) for all litigators regarding the requirements concerning evidence to be given in witness statements, and the fact that parties should not be reticent in challenging defective statements. Indeed, the case provides useful authority for such challenges. It is not just that witnesses must take the greatest care to ensure that their statements are true,[14] but also that they should provide only such evidence that they would be allowed to give orally. In the context of this case, one could not imagine Mr Newman standing up in the witness box stating "I contend that …" without stating the source of his information and belief. And if hearsay is to be given, the receiving party needs to be given particulars sufficient to deal with any matters arising from its being hearsay.[15] Habits may have slipped somewhat since the days when an affidavit was required, and there is no excuse for such a situation given the solemnity of the statement of truth applied to a witness statement.

One further point to note on evidence is that when discussing which law might apply to the claim, English, Egyptian or Canadian, the judge had no evidence before him regarding Egyptian or Canadian law. He was not critical of this, but dealt with it pragmatically by assuming for present purposes that their laws would be similar to English law.

Conduct

The judge held that the defendant was "evasive". He also said that the defendant was determined that the court should not know the answers to reasonable questions that had been asked of it by the claimant's solicitors regarding the defendant's relationship with the Cairo Hotel. In essence, the defendant was hiding behind the corporate veil. This may have been its prerogative, but it did not impress the judge. It was not lost on him that the claimant had booked her family's tour through the defendant, expecting the five-star service associated with that organisation. Instead, the defendant's contention was that she had actually contracted with an Egyptian car company of which she had no knowledge, and the defendant refused to disclose the nature of relationship it had with the Cairo Hotel. He noted that the defendant had initially suggested that, when the claimant booked the tour, the concierge was merely "relaying a message" between

[13] *Brownlie v Four Seasons Holdings Inc* [2014] EWHC 273 (QB) at [133] and [135].
[14] See *ZYX Music GmbH v King* [1995] 3 All E.R. 1.
[15] Civil Evidence Act 1995 s.2.

her and the car company. He described that contention (subsequently abandoned) as an "absurd suggestion" and that the defendant's letters to the claimant's lawyers were "contemptuous".

During the course of the hearing, counsel for the defence argued that the defendant was not to be criticised and that as a matter of principle it was entitled to put the claimant to proof and to keep its powder dry.[16] Tugendhat J. accepted that that was the law, but he said that if the defendant conducted itself as it had it:

> "may appear to readers of this judgment to be a secretive and irresponsible organisation, intent on obstructing access to justice by their widowed guest and (indirectly) their deceased's guest's two orphaned grandchildren, all of whom suffered or died in an allegedly unsafe vehicle provided to them by [the defendant]."

He also said that the right of a defendant to be reticent about its case did not include a right to breach the rules of court, or to confuse the court.

Seizing jurisdiction

As noted above, the judge was strident in his criticism of the defendant's conduct, and his disapprobation was no doubt a factor influencing his findings on the jurisdictional point. It is also interesting to observe that the claim related to Sir Ian Brownlie CBE QC, a distinguished international barrister. Naturally, this latter fact had no obvious influence on the appeal, but the case demonstrates the willingness of the English courts to provide a forum for English nationals where possible. The judge had no trouble accepting that the damage was sustained within the jurisdiction for the purposes of any claim in tort (in any event this was not in issue between the parties subject to the court determining who was the correct defendant). The question of where the contract was entered into was a far more problematic issue however, and here the judge was prepared to construe offer and acceptance in a way most favourable to the claimant. On the final issue of forum conveniens, the judge held that England and Wales was the most appropriate jurisdiction to hear the claim, given that the biggest live issue was likely to be the amount of special damages, which required knowledge of Sir Ian Brownlie's earnings based in England. In passing, however, it is apposite to note, following the recent Supreme Court ruling, that the FAA 1976 does not have extra-territorial effect.[17] As for the issue concerning the identity of the corporate body which contracted with the claimant, this was an issue which would be determined mainly on documents. If there were any hotel managers who could give relevant evidence, the defendant had not identified them. In all the circumstances the claim could be tried in England.

Practice points

- The court will not always take a laid back approach to defective witness statements.
- If presented with a defective witness statement be prepared to apply for the little-used sanctions in PD 32 para.25.1. Scrutinise any statements for proper particulars of knowledge and belief, and the sources of the information.
- If you are submitting a witness statement which does not fully comply with the Practice Direction [PD32], you should ensure that you apply pursuant to para.25.2 for permission to file a defective statement, giving good reasons in support.

[16] Relying on *VTB Capital Plc v Nutritek International Corp* [2013] UKSC 5 at [90] onwards.
[17] *Cox v Ergo Versicherung AG* [2014] UKSC 22.

- If a respondent keeps its powder dry on an interlocutory application and puts the applicant to proof, it can have no complaint if the court does not take into account what points it may make at any trial.

Nathan Tavares

Blankley v Central Manchester and Manchester Children's University Hospitals NHS Trust

(QBD, Phillips J., Master Campbell, Greg Cox, February 5, 2014, [2014] EWHC 168 (QB))

Personal injury claims—legal profession—retainers: solicitors—mental health—legal advice and funding—conditional fee agreements—frustration—persons lacking capacity—Mental Capacity Act 2005 s.7, s.7(2), s.66, Sch.5, s.18, s.18(1)(F)

LT Conditional fee agreements; Costs; Frustration; Personal injury claims; Persons lacking capacity; Retainers; Solicitors

On August 6, 1999, the claimant, Diann Blankley, underwent a suction termination and laparoscopic sterilisation at St Mary's Hospital, Manchester,[1] which resulted in cardio-respiratory arrest and anoxic brain damage. In 2002, the claimant, then a patient acting through her father as her litigation friend, and with the benefit of legal aid, brought these proceedings claiming damages for the alleged negligence of the defendant in relation to the procedure. Linder Myers acted as the claimant's solicitors.

The proceedings were complex and contested, but in February 2005 the parties agreed that judgment be entered for the claimant for damages to be assessed on the basis of 95 per cent liability. By May 2005, the claimant had regained mental capacity and an order was made that she carry on the proceedings without a litigation friend. On July 7, 2005, the legal aid certificate was discharged. The next day, July 8, 2005, the claimant entered into a conditional fee agreement ("CFA") with Linder Myers. There was no dispute that the CFA was valid when executed and covered all work up to February 26, 2007.

On about February 9, 2007, further assessments of the claimant by psychiatrists determined that she no longer had mental capacity to conduct her own affairs and could not provide instructions in relation to her ongoing claim. On February 26, 2007, an application was made to the Court of Protection for the appointment of Mr Cusworth, a trusts partner in Linder Myers, as the claimant's receiver. On April 16, 2007, the Court of Protection duly made such an order, expressly providing that the receiver had authority to conduct the proceedings on the claimant's behalf.

On October 1, 2007, on the coming into force of s.66 of the Mental Capacity Act 2005,[2] and by virtue of the transitional provisions in Sch.5 to that Act, receivers automatically became Court of Protection deputies. It was subsequently confirmed that Mr Cusworth, as such deputy, was entitled to act as a litigation friend of the claimant as of right.

[1] Part of the defendant Trust.

[2] Mental Capacity Act 2005 s.66: "Existing receivers and enduring powers of attorney etc. (1) The following provisions cease to have effect—(a) Part 7 of the Mental Health Act, (b) the Enduring Powers of Attorney Act 1985 (c. 29). (2) No enduring power of attorney within the meaning of the 1985 Act is to be created after the commencement of subsection (1)(b). (3) Schedule 4 has effect in place of the 1985 Act in relation to any enduring power of attorney created before the commencement of subsection (1)(b). (4) Schedule 5 contains transitional provisions and savings in relation to Part 7 of the Mental Health Act and the 1985 Act."

The proceedings were settled three years later. Linder Myers submitted a bill of costs claiming payment on the basis of the CFA. Part of the bill related to costs incurred after March 2007, when the claimant was acting through Mr Cusworth, as her deputy. The Trust argued that no costs were recoverable in relation to that period, because the CFA had automatically terminated on Diann Blankley's loss of capacity in February 2007, leaving Linder Myers without any retainer.

On August 8, 2011, Regional Costs Judge Harris, sitting as a deputy district judge, agreed. He held[3] that Diann Blankley's loss of capacity had terminated the CFA. He held that Mr Cusworth had neither adopted the CFA nor entered into a new one. On the appeal there were four central issues:

- whether supervening incapacity terminated a solicitor's retainer;
- if the CFA had been frustrated, whether Mr Cusworth had adopted it upon his appointment;
- whether the Mental Capacity Act 2005 s.7 entitled Linder Myers to payment for the supply of "necessary" services; and
- whether the Trust was estopped by convention from denying that Linder Myers had authority to act for Diann Blankley.

The court held that it was common ground that the supervening mental incapacity of a principal terminated the actual authority of his agent.[4] However, they confirmed that the termination of a solicitor's authority by reason of mental incapacity did not ordinarily and of itself frustrate the underlying contract of retainer.[5] In particular, a retainer such as that in this case, entered into with a person known to have fluctuating capacity, was not frustrated by any loss of capacity.

The supervening inability of an individual to continue to instruct his solicitor personally, with the likelihood that a deputy would be appointed, did not significantly change the nature of the contract of retainer. In the CFA, the obligation to provide instructions was express, and would be implied in any event. It followed that an inability to provide instructions was not something that was not dealt with by the contract. Supervening incapacity might cause a delay in performance of the obligation to provide instructions, but that would be a matter for the enforcement of the contract terms.

The court further held that even if the delay was not within the scope of the contract terms, it would only amount to a frustrating event if it fell outside what the parties could reasonably contemplate at the time of contracting. In this case, the possibility that Diann Blankley might lose capacity had been within the reasonable contemplation of the parties. To treat the retainer as terminated by what might be a fleeting episode of incapacity would be unjust and unreasonable; the doctrine of frustration was to be confined within narrow limits and was not lightly to be invoked. The court decided that while the decision in *Findley* was highly persuasive authority in the opposite direction, it was based on a misreading of *Yonge*.[6]

However, if contrary was correct, the court accepted that the CFA would have been frustrated. So the question then would have arisen as to the basis on which Linder Myers had acted following Mr Cusworth's appointment. The court noted that Mr Cusworth had full authority to conduct the proceedings on Diann Blankley's behalf. Given that he had either given instructions to Linder Myers or, at the very least, ratified the steps that Linder Myers had taken, it could not be disputed that the conduct of the proceedings by Linder Myers had been authorised by Diann Blankley's duly empowered representative.

The Trust therefore bore the burden of proving that Diann Blankley was not liable for Linder Myers' fees. Had the CFA been frustrated, it would have ceased to exist and Mr Cusworth could not have adopted it. Had it been necessary to decide the point, the court would have found that Mr Cusworth had not implicitly entered a new CFA with Linder Myers.

[3] Relying on *Yonge v Toynbee* [1910] 1 K.B. 215 and *Findley v Jones* [2009] EWHC 90130 (costs).
[4] *Yonge v Toynbee* [1910] 1 K.B. 215 followed.
[5] *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep. 1 applied.
[6] *Findley v Jones* [2009] EWHC 90130 doubted.

The court held that Linder Myers' pursuit of the proceedings fell within the definition of "necessary services" in s.7(2) of the Act. The appointment of a receiver or deputy did not mean that s.7 could no longer be relied upon. In any event, since Linder Myers had been instructed by Mr Cusworth, s.7 had no application.

Linder Myers had been acting with Diann Blankley's authority whether or not the CFA remained in force, and it was not necessary to rely on any estoppel to establish that. However, the court concluded that had Linder Myers been acting without authority, the Trust could not have been estopped from so contending. Solicitors warranted that they had the authority of the party they purported to represent, and the opposing party's reliance on that warranty could not give rise to any form of estoppel if it subsequently proved to have been misplaced.

The appeal was allowed.

Comment

This is a helpful decision for those who represent clients where there may be issues concerning capacity. It is obviously important for the claimant's solicitors to enter into a funding agreement with their client as soon as possible after instructions. There is of course a presumption of capacity. It follows that it is likely that a retainer will be entered into on the basis that the claimant does have capacity.

Subsequently, it may be discovered that the claimant does not have capacity in which case consideration is given as to whether or not to enter into another conditional fee agreement with the litigation friend. This has, very often, been the practice. This has been on the basis that losing capacity frustrates the contract; at least, this was the interpretation given in *Findley v Jones*.

The importance of this case is that it finds that losing capacity does not frustrate the contract that the claimant had with the solicitor. The effect of this is that it is not necessary for a fresh agreement to be entered into between the claimant and their solicitor. Since the induction of LASPO, then if the agreement was entered into, then it is likely that the claimant's solicitor will be charging the claimant where previously, the claimant may well be receiving 100 per cent of their compensation. From this point of view, this decision is extremely welcome for claimants.

Nevertheless, there are now conflicting authorities. Some confidence can be placed in the current decision in that they clearly looked at the issues closely and gave detailed consideration to *Yonge v Toynbee* which, although a 1910 case, is still significant, and as a result it may be considered that the interpretation adopted in this case is to be preferred to that in *Findley*. On considering these two cases, it will be noted that there is a much more detailed consideration of *Yonge* in this case than in *Findley*.

Practice point

- This case is helpful for claimants and their lawyers, but, nevertheless, it flags up just how important it is to keep in mind funding issues whenever there is a change of circumstances involving the claimant which may impact on the retainer.

Colin Ettinger

Integral Petroleum SA v Scu-Finanz AG

(QBD (Comm), Popplewell J., March 14, 2013, [2014] EWHC 702 (Comm))

Civil procedure—default judgments—particulars of claim—service by email—validity—irregularity—setting aside—CPR PD 6A—CPR 3.10—CPR 6.26—CPR 12.3—CPR 13.2—CPR r.13.3—CPR 15.4

Default judgments; Particulars of claim; Procedural irregularity; Service out of jurisdiction; Setting aside; Validity

This was an application by the defendant to set aside a judgment entered in default of service of defence in favour of the claimant for over $1 million plus costs to be assessed.[1] The defendant contended that the judgment had to be set aside as of right pursuant to CPR 13.2;[2] alternatively that the court ought to exercise its discretion to set aside the judgment pursuant to CPR 13.3[3] because it had defences with a real prospect of success. The claimant contended that CPR 13.2 was not engaged, that SCU-Finanz did not have any defence with a real prospect of success, or alternatively if it had, that the court ought not to exercise its discretion to set aside the judgment because the application was not brought promptly.

The claim form was issued in February 2013 and served at the defendant's registered office on March 21. An acknowledgment of service was filed naming the defendant's legal representative as a French advocate. A Paris postal address was provided, but no telephone or email details.

On May 14, having sourced the advocate's email address, the claimant's solicitors emailed the advocate for his consent to an extension of time for service of the particulars of claim to close of business on June 6, 2013. The solicitors mistakenly believed that was the end of the permitted 28-day extension period. The advocate emailed his consent.

The solicitors then realised that the 28-day extension period elapsed on June 10. They emailed the advocate again to seek agreement to the revised deadline of June 10. The advocate did not reply. The particulars of claim were sent to the advocate by email on June 10. They were sent after 16.30 so that service was deemed, under CPR 6.26,[4] to have occurred on June 11. The claimant's solicitors calculated that a defence had to be served by July 9. On July 17, when no defence had been served, they applied for a default judgment, certifying pursuant to CPR 6.17[5] that the particulars of claim had been served in accordance with the rules.

The advocate submitted, in reliance on CPR 13.2, that the purported service of the particulars of claim was defective because it had been five days late and because, under CPR PD6A, email had not been elected as a permitted method of service. The defendant maintained that defective service meant that time had not started running for the service of a defence. The claimant argued, in reliance on CPR 3.10 that the

[1] "Where there has been an error of procedure such as a failure to comply with a rule or practice direction—(a) the error does not invalidate any step taken in the proceedings unless the court so orders; and (b) the court may make an order to remedy the error."

[2] "The court must set aside a judgment entered under Part 12 if judgment was wrongly entered because—(a) in the case of a judgment in default of an acknowledgment of service, any of the conditions in rule 12.3(1) and 12.3(3) was not satisfied; (b) in the case of a judgment in default of a defence, any of the conditions in rule 12.3(2) and 12.3(3) was not satisfied; or (c) the whole of the claim was satisfied before judgment was entered."

[3] "(1) In any other case, the court may set aside or vary a judgment entered under Part 12 if-(a) the defendant has a real prospect of successfully defending the claim; or (b) it appears to the court that there is some other good reason why—(i) the judgment should be set aside or varied; or (ii) the defendant should be allowed to defend the claim. (2) In considering whether to set aside or vary a judgment entered under Part 12, the matters to which the court must have regard include whether the person seeking to set aside the judgment made an application to do so promptly."

[4] "Service of documents other than the claim form in the UK or in specified circumstances within the EEA—A document, other than a claim form, served within the UK is deemed to be served by email or other electronic transmission is sent on a business day before 4.30pm, on that day; or in any other case, on the next business day after the day on which it was sent."

[5] A certificate was filed certifying that the particulars had been served in accordance with the rules.

procedural failures did not prevent the particulars having been "served" for the purposes of commencing time running for the defence.

Popplewell J. held that the claimant's error of procedure in serving the particulars of claim by email was a "failure to comply with a rule or practice direction" within CPR 3.10. Accordingly, under CPR 3.10(a), service was to be treated as valid, so as to commence time running for the service of the defence and to disentitle the defendant from claiming application of CPR 13.2.

The judge held that CPR 3.10 was to be construed as being of wide effect and applicable wherever the defect had had no prejudicial effect on the other party. The particulars had reached the advocate in just the same way as if they had been sent to Paris by post. The claimant's defect was in using a method of service permissible in English law but without adhering to the formalities in PD6A which made it permissible.

While not wishing to endorse any proposition that CPR 3.10 could be used to circumvent service out of the jurisdiction by effecting service on lawyers out of practical convenience without seeking an order for service by an alternative method, the court could not accept that any defect in the method of service was outside CPR 3.10. It was also significant that the case concerned service of particulars, not service of originating process, which fulfilled a different purpose. A narrower approach to CPR 3.10 would be justified in relation to originating documents, but the rules relating to service of subsequent documents were concerned only with bringing them to the attention of the other party in a manner which indicated the taking of a procedural step, not with establishing jurisdiction.

For all of those reasons, the defendant's reliance on CPR 13.2 failed. There was service of the particulars of claim within the meaning of CPR 15.4[6] and CPR 58.10(2) when they were sent by email to the advocate on June 10, 2013, so that the time for service of the defence had expired by the time judgment in default was entered.

The judge also confirmed that it was not material that the claimants had made an erroneous certification under CPR 6.17(2)[7]; CPR 12.3[8] did not make it a requirement, as a necessary precondition to obtaining a default judgment, that any certificate of service be filed. In the end, the point was not decisive. Weighing the factors in the case the judge concluded that the balance of justice was in favour of setting aside the judgment.

Comment

In these dark post-*Mitchell* days sensible decisions seem to be few and far between. However, the commercial court is a source of many important procedural decisions, impacting on all other areas of civil litigation. This is just such a decision. Although the case involves service out of the jurisdiction, that was not relevant to the way the CPR was applied.

In essence, the claimant's solicitors served the particulars of claim by email. CPR 6.20 sets out the methods of service permitted for service of documents other than the claim form in the United Kingdom or in specified circumstances within the EEA. CPR 6.20(d) allows service by fax or other means of electronic communication, as long as it is carried out in accordance with PD 6A.

The PD requires under CPR 4.1(1)(a) that the party who is to be served or the solicitor acting for that party must previously have indicated in writing to the party serving that they or their solicitor is willing to accept service by fax or other electronic means. CPR 4.1(1)(b) requires notification of the fax number, email address or other electronic identification to which it must be sent. There are other requirements,

[6] To trigger the period for filing a defence.

[7] "(2) Where the claimant serves the claim form, the claimant—(a) must file a certificate of service within 21 days of service of the particulars of claim, unless all the defendants to the proceedings have filed acknowledgments of service within that time; and (b) may not obtain judgment in default under Part 12 unless a certificate of service has been filed."

[8] Conditions to be satisfied before the claimant may obtain judgment in default of an acknowledgment of service or in default of defence.

including that if an email address is set out on the writing paper of the solicitor acting for the party to be served it is only valid for service where it is stated that the email address may be used for service.[9]

In this case, the claim form was properly served at the defendant's registered office. An acknowledgment of service was filed naming the defendant's legal representative as a French advocate giving a Paris postal address. However, no telephone or email details were supplied. So the claimant's solicitor searched for and found the advocate's email address.

There were a number of exchanges between the lawyers by email. Later the particulars of claim were "served" on the advocate by email. Subsequently, after a default judgment was obtained by the claimant, the defendant took the point and argued that they had not been served.

The claimant's remedy was a little-used rule CPR 3.10 which states:

> "Where there has been an error of procedure such as a failure to comply with a rule or practice direction—(a) the error does not invalidate any step taken in the proceedings unless the court so orders; and (b) the court may make an order to remedy the error."

In *Phillips v Nussberger*,[10] the House of Lords dealt with a case in which errors had been made by the Swiss authorities in serving English proceedings in Switzerland. They held that the court could and should exercise its power under CPR 3.10(b) to order that the respondents were to be regarded as properly served. They also held that it was appropriate to make an order dispensing with service under CPR 6.9.

Phillips v Nussberger established that CPR 3.10 should be construed to have wide effect so as to be available to be used beneficially wherever a defect has had no prejudicial effect on the other party. This case was considered to be a good example where such beneficial use was called for.

So service by email on the advocate was sufficient to bring the particulars of claim to his attention. He was SCU-Finanz's chosen lawyer appointed for the purpose of receiving the document. The document reached the appropriate destination in just the same way as if it had been sent by post to the Paris address given in the acknowledgement of service which would have constituted good service. The advocate ought reasonably to have known, as a European accepting the burden of acting for a client in English High Court proceedings, that particulars of claim had to be answered by a defence, and that in default judgment might be entered.

It was argued that the effect of treating service of particulars of claim as being valid was no less significant than the effect of treating service of a claim form as being valid. This was because a failure to respond by way of defence or acknowledgement of service respectively can lead to the same consequences of judgment being entered in default without consideration of the merits. Nevertheless, given that the purpose of service of documents subsequent to proceedings having been validly commenced is essentially limited to bringing their contents to the attention of the other party as a procedural step, the judge, rightly in my view, concluded that there was every reason to give CPR 3.10 very wide application so as to be capable of application where that purpose had been fulfilled.

CPR 3.10 is a potentially very useful little rule.

Practice points

- An error of procedure in serving the particulars of claim by email is a "failure to comply with a rule or practice direction" within CPR 3.10.
- Service of particulars of claim by email may still be good service even when it has not been elected as a valid method of service pursuant to CPR PD6A.

[9] An email address is also valid for service if it is set out on a statement of case or a response to a claim filed with the court, although that was not the case here.

[10] *Phillips v Symes (A Bankrupt)* [2008] UKHL 1.

- Defective service by email can be a defect falling within CPR 3.10 and service may therefore to be treated as valid.
- CPR 3.10 can mean that procedural failures do not prevent the particulars having been "served" for the purposes of commencing time running for the defence.
- CPR 12.3 does not make it a requirement that any certificate of service must be filed as a necessary precondition to obtaining a default judgment.
- If a certificate of service is filed, CPR 12.3 does not make it a requirement that it is in all respects accurate and compliant with the rules and prescribed forms as a necessary precondition to obtaining a default judgment.[11]
- An erroneous certificate of service may have an impact upon the discretion to be exercised under CPR 13.3.
- In an extreme case of a deliberately dishonest certificate it might constitute a good reason for setting aside the judgment under CPR 13.3(1)(b) irrespective of the merits of any defence. But it cannot bring the case within CPR 13.2 so as to allow the defendant to set aside judgment as of right.

Nigel Tomkins

Dunhill v Burgin

(UKSC, Lady Hale (Deputy President), Lord Kerr J.S.C., Lord Dyson J.S.C., Lord Wilson J.S.C., Lord Reed J.S.C., March 12, 2014, [2014] UKSC 18)

Civil procedure—personal injury—damages—mental capacity—protected parties—setting aside—settlement—CPR Pt 21

Mental capacity; Personal injury claims; Protected parties; Setting aside; Settlement

Joanne Dunhill was walking across the road at a roundabout in Doncaster and was knocked down by a motorcycle driven by the defendant, Mr Shaun Burgin. She was then 38 years of age. She sustained a severe traumatic brain injury, as a result of which she suffered, against a background of pre-existing psychological vulnerability, significant cognitive, emotional and subsequent psychiatric symptoms including a change of personality. As a result, she needed structured assistance such as sheltered therapeutic employment and ongoing case management and support to enable her to function at a reasonable level. There was a substantial risk of severe deterioration in her mental health unless she received appropriate support and supervision.

She had settled her claim for damages in the sum of £12,500 before the case was called for hearing, but Burgin acknowledged that if the claim had proceeded to a hearing it would have been worth at least £800,000. No-one considered at the time whether Dunhill was a patient within the meaning of CPR Pt 21 and consequently whether she had to have a litigation friend to conduct proceedings on her behalf.

In 2009, Dunhill's litigation friend applied to set aside the consent order on the ground that she had not had capacity at the time. Two issues arose. The first was whether the test to determine Dunhill's mental capacity to conduct the proceedings was to be applied to those which had been brought, or to the proceedings as they might have been brought if she had received different legal advice. The second issue was whether,

[11] See *Henriksen v Pires* [2011] EWCA Civ 1720 at [27].

if it were decided that Dunhill lacked capacity, the consent order ought to have been approved by the court under CPR 21.10.

On the first issue, it was held that capacity was to be judged by reference to the decisions which a claimant had actually been required to take in the action as drafted, not those which she might have been required to take had the claim been differently framed. It was held that there had been no rebuttal of the presumption that Dunhill had had capacity. The Court of Appeal reversed that decision, holding that in order for Dunhill to have had the capacity to approve the compromise, she needed to know what she was giving up, and that she had been unaware of the extent of her injury and potential claim.

The case was remitted for determination of the second issue, namely whether CPR 21.10 was applicable. Around the same time, Burgin received permission to appeal on the first issue. The outcome of the second issue was that the CPR was incorporated into any agreement to settle a civil claim and, irrespective of how things had seemed at the time, the consent order required approval and was therefore void. Permission was given for an appeal on the second issue to be heard at the same time as the appeal on the first. The defendant appealed against the two decisions.[1]

The Supreme Court confirmed that capacity was to be judged in relation to the decision or activity in question and not globally.[2] The wording of CPR 21.2(1) and CPR 21.4(3) suggested a focus on proceedings in general, rather than on "the proceedings" as framed. Furthermore, the requirement for a litigation friend applied from the very start of the proceedings, and CPR 21.10(2) applied to claims settled before proceedings had begun. An action might take twists and turns, but CPR 21 assumed that there would always be somebody with mental capacity conducting it.

The court confirmed that the proper test of capacity was whether the party could conduct the claim which they actually had, rather than the claim as formulated by their lawyers. The quality of the legal advice received had no bearing on the test. It was clear to them that Joanne Dunhill had not had capacity to conduct her claim.

The court also confirmed that Joanne Dunhill ought to have had a litigation friend when the original proceedings began. While every procedural step in an action was capable of retrospective cure, the settlement finally disposing of the claim was not. The purpose of CPR 21.10 was to impose an external check on the propriety of the settlement. Construing the rule as applying only when the protected party had a litigation friend, as contended for by Burgin, would involve writing words into the rule which were not there. Furthermore, if "claim" in CPR 21.10(2) pre-dated the commencement of proceedings, there was no reason why "claim" in CPR 21.10(1) should not also do so. There would be no litigation friend if proceedings had not started.

Burgin's argument was that the rule in *Imperial Loan Co Ltd v Stone*[3] could be deemed applicable to the settlement of civil claims and that once the parties had reached agreement, it was not for the court to interfere in their bargain. In *Dietz v Lennig Chemicals Ltd*,[4] an argument that the predecessor to CPR 21.10(1) was ultra vires had been rejected. That decision had introduced a substantial, but quite specific, exception to the common law rule in *Imperial Loan*, but the court was bound by *Dietz* unless there was good reason to depart from it.[5]

The court concluded that although there was a need for finality in litigation, the policy underlying the CPR was that children and protected parties required and deserved protection, not only from themselves but also from their legal advisers. As the consent order ought to have been approved by the court, it was to be set aside and the case listed for trial. The appeals were dismissed.

[1] *Dunhill v Burgin* [2012] EWCA Civ 397 and *Dunhill v Burgin* [2012] EWHC 3163 (QB).
[2] *Masterman-Lister v Jewell* [2002] EWCA Civ 1889; [2003] 1 W.L.R. 1511 approved and *Bailey v Warren* [2006] EWCA Civ 51; [2006] C.P. Rep. 26 considered.
[3] *Imperial Loan Co Ltd v Stone* [1892] 1 Q.B. 599.
[4] *Dietz v Lennig Chemicals Ltd* [1969] 1 A.C. 170.
[5] *Dietz v Lennig Chemicals Ltd* [1969] 1 A.C. 170 followed, *Drinkall v Whitwood* [2003] EWCA Civ 1547 and *Imperial Loan Co Ltd v Stone* [1892] 1 Q.B. 599 considered.

Comment

In this present manifestation of Ms Dunhill's case before the Supreme Court it was not in contention that:

- the settlement at the door of the court just before the original trial on liability in January 2003 represented an under-settlement of the claim;
- the claimant had been represented by counsel and solicitors at the 2003 settlement;
- it was assumed that the claimant had had capacity at the time to consent to the settlement; and
- that therefore the judge had not been asked to approve it.

In 2008, Ms Dunhill—now acting through a litigation friend—issued proceedings against her former legal advisers on the basis that she had not had capacity to consent to the settlement and they should have appreciated this. That claim has been stayed whilst there was a scramble to attempt to overturn the settlement in the original proceedings—specifically a declaration was requested within those proceedings that Ms Dunhill *in fact* did not have capacity in 2003, and that the settlement be set aside. At a hearing on the preliminary issue of whether in fact the compromise reached in 2003 should have received court approval, the High Court said no[6] (Silber J.) but later the Court of Appeal said yes.[7] There had not been time before Silber J. for the defendant to put forward a legal argument on the "*Imperial Loan* point"; this had been academic as Silber J. had found in favour of the defendant in any event. When Silber J.'s decision was reversed it became a live issue again and fell to be decided by Bean J. in November 2012.[8] By now, the accepted range of likely damages that Ms Dunhill should have recovered was anywhere between £800,000 on the defendant's figures and £2 million on the claimant's. There was (and is) therefore a lot to play for.

The "*Imperial Loan* point" emanates from the decision in *Imperial Loan Co v Stone*.[9] Essentially where a party sought to rely on his "insanity" or unsound mind to set aside a contractual obligation, he could only succeed in this argument if the other party to the contract knew of this at the time of making the contract (and therefore, it is presumably alleged, had attempted to unfairly take advantage of the other). The "*Imperial Loan* point" had been considered obiter in two Court of Appeal cases in relation to personal injury settlements before Ms Dunhill's claim. Chadwick L.J. said in *Masterman-Lister*:[10]

> "RSC Ord 80, r 2 (1) provided that a person under disability might not bring proceedings except by his next friend … A defendant is entitled to expect that he will not be required to defend proceedings brought against him by a person of unsound mind acting without a next friend."[11]

Chadwick L.J. followed that statement by questioning—if that was not the case—whether the rule-making body had power to change the substantive law expounded in *Imperial Loan Co v Stone* and *Hart v O'Connor*:[12] Court rules could not alter the common law. That would then appear to answer the point in Ms Dunhill's case, were it not for the fact that a later Court of Appeal case cast considerable doubt on the efficacy of this judgment. In *Bailey v Warren*,[13] Arden L.J. dealt with Chadwick L.J.'s concerns by distinguishing the substantive case law—the *Imperial Loan Co* case was concerned with a promissory note and *Hart* for a contract for the sale of land. Neither involved the settlement of litigation:

[6] *Dunhill v Burgin* [2011] EWHC 464 (QB).
[7] *Dunhill v Burgin* [2012] EWCA Civ 397; [2012] P.I.Q.R. P15.
[8] *Dunhill v Burgin* [2012] EWHC 3163; JPIL Issue 1 2013, C34.
[9] *Imperial Loan Co Ltd v Stone* [1892] 1 Q.B. 599.
[10] *Masterman-Lister v Brutton & Co* [2002] EWCA Civ 1889; [2003] 1 W.L.R. 1511.
[11] *Masterman-Lister v Brutton & Co* [2002] EWCA Civ 1889; [2003] 1 W.L.R. 1511 at [65].
[12] *Hart v O'Connor* [1985] A.C. 1000; [1985] 3 W.L.R. 214; [1985] 2 All E.R. 880.
[13] *Bailey v Warren* [2005] P.I.Q.R. P15.

> "They are not therefore authority on the question whether a compromise of a claim is also binding unless the other party knew of the patient's lack of capacity."[14]

Dietz v Lennig Chemicals[15] was House of Lords' authority that a compromise of a child's claim agreed between the parties was of no effect before the settlement had been approved by the court. The rule of the court dealing with such issues (then RSC Ord.80) was not ultra vires and not in conflict with the common law. Applying the decision in *Dietz*, it was not the case that a defendant had to be aware of a claimant's true status as a protected party—if it is established later that the claimant was *in fact* under a disability, then settlement of a claim without court approval was invalid. As Ward L.J. noted in *Bailey*,[16] the *Dietz* case had not been drawn to Chadwick L.J.'s attention in *Masterman-Lister*.

The defendant applied to the Supreme Court to adjudicate, and Lady Hale was given the unenviable task of having to grapple with the issues raised by this case.

When Ms Dunhill's case was originally brought and compromised, a "patient" was defined as someone who was incapable of managing their own affairs because of their mental disorder within the meaning of the Mental Health Act 1983.[17] Since the changes brought about by the Mental Capacity Act 2005, "patients" became "protected parties",[18] and someone was a protected party who lacked capacity to conduct the proceedings. The law effectively shifted to emphasise that someone may have capacity to make some decisions but not others, as opposed to a "global test of incapacity" as envisaged by the 1983 Act. CPR 21.2(1) stipulates that a protected party must have a litigation friend. "Proceedings" must be interpreted widely—CPR 21.10 applies to claims settled without proceedings, and Arden L.J. in *Bailey v Warren* specifically related it to the capacity to start proceedings.[19] One cannot have a rule which would require someone to have a litigation friend when some decisions need to be made in the litigation but not others. Ms Dunhill clearly did not have capacity to conduct the claim she in fact had, as opposed to that wrongly formulated by her lawyers. The defendant's argument effectively meant that her capacity should be seen differently depending on whether she received good advice, bad advice or no advice; she would have lacked capacity had she been properly advised, or if she had conducted the claim as a litigant in person. It follows that she lacked capacity also when she received bad advice, as she was unable to evaluate that advice. She lacked capacity and should have had a litigation friend.

Having found for the claimant on that issue, what was the effect of that on the compromise? The defendant argued that in the absence of a litigation friend CPR 21 did not apply. However, as a matter of construction of the rule—which refers to claims brought "by or on behalf of" a protected party—the rule envisages cases being brought "by" a claimant directly. To accede to the defendant's argument would involve writing in additional words to the rule which are not there.

As to the issue of whether the court rules were ultra vires, Lady Hale came down on the side of Arden and Ward L.JJ. in *Bailey*. It was accepted that the court rules cannot amend substantive law, but CPR 21.10[20] did not do so and *Dietz* was House of Lords authority for the rules on compromising the claims of minors or protected parties to be properly within the powers of the rule-making body.[21]

In so reaching her conclusion in the claimant's favour, Lady Hale weighed up the conflicting policy arguments and decided that finality of litigation should be subservient to the protection of vulnerable people who lack the capacity to conduct litigation. So the compromise was set aside, and this case now goes to trial on the actual merits of the claimant's claim, first the subject of court proceedings in 2002.

[14] *Bailey v Warren* [2005] P.I.Q.R. P15 at [131].
[15] *Dietz v Lennig Chemicals Ltd* [1969] 1 A.C. 170.
[16] *Bailey v Warren* [2005] P.I.Q.R. P15 at [161].
[17] CPR 21.(2)(b) Civil Procedure Rules 1998 (SI 1998/3132 (L.17).
[18] Civil Procedure (Amendment) Rules 2007 (SI 2007/2204) (L.20).
[19] *Bailey v Warren* [2005] P.I.Q.R. P15.
[20] Which has effectively replaced RSC Ord.80 as the part dealing with protected parties' settlements.
[21] Lord Pearson at [189] in *Dietz v Lennig Chemicals Ltd* [1969] 1 A.C. 170.

This is of course good news for the claimant but also great news for Ms Dunhill's original legal advisers, who were facing a massive claim for under-settlement.

Practice points:

- As Chadwick L.J. accepted in *Masterman-Lister*, if the court rules:

  > "were to work in practice, the test of mental capacity should be such that, in the ordinary case, the need for a next friend or guardian ad litem should be readily recognised by an experienced solicitor."[22]

  The case of Ms Dunhill is an example of the extraordinary. Whilst claimants are currently protected by this judgment should their legal advisers get it wrong, the advisers could be exposing their (probably former) client to years of litigation by doing so. Get it right the first time, if necessary with expert psychiatric evidence as to capacity at an early stage.
- Commentators have predicted that defendants' behaviour will alter with this judgment, whereby they may insist on court approval of cases even where there is no litigation friend, to ensure they are protected if it later transpires that there was an issue over the claimant's capacity. How our already hard-pressed courts will greet such manoeuvring one can readily guess.

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[22] *Masterman-Lister v Brutton & Co* [2002] EWCA Civ 1889 at [66].

Cumulative Index

This index has been prepared using Sweet & Maxwell's Legal Taxonomy.