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Articles

Case and Comment

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  - Practical guidance on procedure.
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Editorial

Welcome to the September 2014 edition of JPIL.

The theme throughout this edition is the influence the state has on personal injury lawyers and their clients. While the profession continues to grapple with the introduction of the Jackson/LASPO reforms and in particular the procedural issues thrown up by the Court of Appeal decision in *Mitchell* there are a number of other areas where the state and personal injury lawyers are engaged.

On the legislative front we have the deeply worrying and misguided Medical Innovation Bill (the "Saatchi Bill") which, although on the face of it well intentioned, is in danger of rewriting the law of negligence in so far as it relates to clinical negligence claims. *Nigel Poole QC* provides a critique of the legislation (in its various forms) and discusses the potential impact of the Bill.

Two recent High Court decisions call into question the way in which the state deals with its obligations. Former JPIL Board member and MIB expert *Nick Bevan* looks at the decision in *Delaney v Secretary of State for Transport* and considers its impact on the role of the MIB and claims against uninsured drivers. APIL Legal Services Manager *Helen Blundell* considers the decision of the High Court in the *HM Coroner for Liverpool* case regarding the obligation of the state to produce documents for Coroners.

The state's role in providing accommodation and care in the best interest of those who lack capacity and the extent to which there is a deprivation of liberty was considered by the Supreme Court in the *Cheshire West* case. *Yogi Amin* and *Roisin Horan* look at the implications of the decision and the safeguards that are now built required to be met.

As noted above, the implementation of the Jackson/LASPO reforms by the government has had a huge impact on the civil litigation landscape and the Court of Appeal's attempt to provide guidance on the correct approach to applications for relief from sanctions in their decision in *Mitchell* has attracted much criticism. In the last edition *Steven Akerman* analysed the issues arising from *Mitchell* and the use of CPR 3.9. In this edition he considers the further guidance the Court of Appeal has had to issue in the *Denton* conjoined appeals cases.

With the funding issues created by LASPO, the procedural difficulties in litigating cases thrown up as a result of the *Mitchell* decision and the scarcity of judicial resources coupled with ever-rising court fees it is no surprise more litigants are exploring alternative methods of resolving claims. *Tim Wallis* discusses the issues arising from ADR and mediation in PI cases.

Another area in which we are seeing the government take an active interest is that of fraudulent and exaggerated claims. In this edition *James Todd*, *Sadie Crapper* and *David Spencer* look at the latest developments in combating claims where these issues arise.

The impact of the Jackson/LASPO reforms coupled with the introduction of Alternative Business Structures and the SRA's emphasis on deregulation is having a seismic impact on the way in which the legal profession organises itself. The impact on the partners and staff of law firms and the challenges for recruitment and retention are significant. HR expert *Sue Lenkowski* looks at these issues in her article focussing on the people challenges facing law firms.

Lastly, on the article front JPIL Board member *Jonathan Wheeler* contributes an article on non-pecuniary loss in abuse claims based on a paper he presented at the joint APIL/ACAL conference.

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

Muiris Lyons
General Editor

Medical Innovation Bill: Re-Writing the Law of Clinical Negligence

Nigel Poole*

Bolam test; Clinical negligence; Medical research; Medical treatment

Lord Saatchi's Medical Innovation Bill is designed to dispense with the Bolam *test of whether a doctor's treatment is negligent. He believes that the current law mandates adherence to standard practice and is an obstacle to medical innovation which, when removed, will lead to the finding of a "cure for cancer". In the face of opposition from medical and other bodies such as the BMA, MDU, MPS, the NHSLA and the Patients Association, he is driving the Bill through Parliament with the Government's support. If this Bill becomes law, it will provide an indemnity to doctors in certain situations and deprive individuals of a right of redress when they or their loved ones are harmed by treatment which is not supported by a body of responsible medical opinion. Critics believe that the Bill is unnecessary because the current common law does not impede innovation. They are concerned that the Bill will have adverse ramifications for patient safety and even, perversely, for medical innovation.*

The Mission

Lord Saatchi is a man with a mission: to cure cancer by re-writing the law of clinical negligence. Even before the Government had reported on a public consultation on his private member's Medical Innovation Bill, he introduced a further version to the House of Lords where it received its second reading on June 27, 2014. At the time of writing the Government has indicated that it will propose amendments during the committee stage and Lord Saatchi has undertaken to accept them (although no amendments have yet been published).

The advertising guru's late wife, novelist Josephine Hart, died of ovarian cancer in 2011. He has described the crushing experience of watching her deteriorate and die whilst conventional treatments failed to cure her and caused her further suffering. He claims that deaths due to cancers are "executions", treatment for cancer is "torture"[1] and the lives of those who die of cancer are "wasted". He wants to speed up the search for a "cure for cancer" and believes that the greatest obstacle is the common law of clinical negligence. He aims to create an environment conducive to medical advancement by removing the threat of litigation from doctors who decide to provide treatment outwith the existing range of accepted treatments. The Saatchi Bill, as it is commonly known, provides an indemnity for doctors in certain situations. It substitutes the *Bolam*[2] test of clinical negligence, which for decades has been applied flexibly and without undue difficulty, with a battery of statutory criteria which focus on the process of decision making rather than the substance of the treatment given.

Lord Saatchi and his supporters have claimed that opposition to the Bill comes from "greedy lawyers" who put "cash ahead of patients".[3] In fact, opposition to the Bill from outside Parliament has been led by the medical profession, medical defence organisations, research bodies and patient groups. The legal community, perhaps fearing the expected backlash, has been largely silent.[4] The British Medical Association

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[1] Debate on second reading.

[2] *Bolam v Friern Hospital Management Committee* [1957] 1 W.L.R. 582; [1957] 2 All E.R. 118; [1955–1995] P.N.L.R. 7.

[3] *The Sun*, June 22, 2014.

[4] Pace Association of Personal Injury Lawyers, which did publish a strong response as part of the Government's consultation.

("BMA"), The NHS Litigation Authority ("NHSLA"), the Academy of the Medical Royal Colleges, the Medical Defence Union ("MDU"), the Medical Protection Society ("MPS"), AvMA, the Patients Association, the Motor Neurone Disease Association and the Academy of Medical Research, amongst others, have asserted that the Bill is unnecessary and have expressed significant concerns about its ramifications. The MDU has stated that the Bill is:

> "aiming to solve a problem that doesn't exist … it has never known of a case of medical innovation leading to a doctor being sued."

The Patients Association has warned that the Bill is a "huge threat to patient safety".

Undaunted, Lord Saatchi has dismissed the "fewer than 100" negative responses to the consultation by comparing them to the "staggering 18,655 people" who said "yes" to the Bill.[5] In fact that was the number of people who expressed support for the Bill on the Saatchi Bill website and whose support was then channelled to the Government's consultation. On this view, an individual doctor's opinion is given the same weight as that of the BMA.

Within Parliament the Bill is now making rapid progress. Jeremy Hunt, Secretary of State for Health, has supported it, saying:

> "We want to make sure doctors are not held back if they want to use pioneering treatments to offer a lifeline to dying patients."

The intention is to have the Bill enacted before the 2015 general election. In the House of Lords debate, opposition was voiced by Lord Brennan, Baroness Masham, Lord Turnberg and Lord Winston, who described the Bill as being of "colossal importance". But Lords Woolf and Mackay supported it and many other peers expressed great reassurance that such judicial heavyweights were advocates for the Bill.

Whether this Bill is likely to be the saviour of the terminally ill or a misguided and dangerous interference, it is legitimate to ask of it the fundamental question for any proposed legislation: what is the problem to which the Saatchi Bill is the proposed solution?

The current law

Lord Saatchi has exercised all his expertise in PR and media management to promote his Bill. The *Daily Telegraph* has campaigned vigorously in support. At the closure of the Government's public consultation on the draft Bill Lord Saatchi claimed overwhelming approval for it, writing that "In democratic politics, perception is reality. If people perceive there is a problem, there is one".[6]

Lord Saatchi has not stinted in his efforts to encourage the perception that there is a problem with the common law of clinical negligence. Current law, he claims, is preventing medical innovation, specifically in the field of cancer treatment. His article in the Health Service Journal[7] in 2013 was headed: "Lord Saatchi: The law is killing patients". In *The Daily Telegraph* he wrote, "The road ahead to any innovation in cancer is closed by law".[8] Speaking in the House of Lords he claimed that, "Current law is a barrier to progress in curing cancer".[9]

The premise of the Bill is that litigation, or the fear of litigation, discourages innovative treatment. Evidence to support that premise is hard to find. The British Medical Association has said that it:

[5] *Daily Telegraph*, May 1, 2014.
[6] *Daily Telegraph*, May 1, 2014.
[7] Maurice Saatchi, "Lord Saatchi: The law is killing patients" (September 30, 2013) HSJ, *www.hsj.co.uk/opinion/lord-saatchi-the-law-is-killing-patients/5063651.article#.U8HIB9HlqUl* [Accessed July 1, 2014].
[8] *Daily Telegraph*, July 8, 2013.
[9] *Hansard*, HL Deb, col.756 (January 16, 2013).

> "is not aware of any evidence which shows that the possibility of litigation deters doctors from pursuing innovative treatments or that uncertainty exists over the circumstances in which a doctor can safely innovate without fear of litigation."

Cancer Research UK responded to the Government consultation by saying: "We have been unable to find evidence that fear of medical litigation is currently a barrier to innovation in cancer." The Association of Medical Research Charities wrote: "Through speaking to our members we are not aware that fear of litigation is a barrier to innovation."

Notwithstanding these and similar assertions by the National Institute for Health and Care Excellence ("NICE"), the MDU, the MPS, the NHSLA and many other representative bodies, Lord Saatchi has maintained that the current law of clinical negligence has an inherent antipathy to medical innovation:

> "The law obliges the doctor to follow the status quo, even though he/she knows it leads only to poor life-quality followed by death. Science learns nothing from these thousands of deaths. Scientific knowledge does not advance by one centimetre, because the current law requires that the deceased receive only the 'standard procedure' — the endless repetition of a failed experiment."[10]

In support of this thesis Lord Saatchi, speaking in Parliament,[11] quoted case law: not the well-established authorities of *Bolam*, *Maynard* or *Bolitho*,[12] but *Clark v MacLennan*,[13] *Crawford v Governors of Charing Cross Hospital*[14] and a text book on medical negligence authored by Nathan and Barrowclough published in 1957. He described *Clark* as an "important test case". It was a first instance decision in which Pain J. remarked that:

> "It seems to me that … where there is a situation in which a general duty of care arises and there is a failure to take a precaution, and that very damage occurs against which the precaution is designed to be a protection, then the burden lies on the defendant to show that he was not in breach of duty as well as to show that the damage did not result from his breach of duty."

However, Mustill L.J. expressly "dissented from this approach" in the Court of Appeal in *Wilsher v Essex AHA*[15] and few if any clinical negligence lawyers would regard *Clark* as relevant to current clinical negligence practice, let alone an "important test case".

Crawford was a pre-*Bolam* decision which has no relevance at all to current clinical negligence litigation.

Lord Saatchi did refer the House to the more important speech of Lord Diplock in *Sidaway*,[16] saying:

> "I hope that we can agree with Lord Diplock, who was looking for a better balance to be struck between therapeutic innovation and therapeutic conservatism. He warned of the dangers of so-called defensive medicine:
>
> > 'Those members of the public who seek medical or surgical aid would be badly served by the adoption of any legal principle that would confine the doctor to some long-established, well-tried method of treatment only, although its past record of success might be small, if he wanted to be confident that he would not run the risk of being held liable in negligence simply because he tried some more modern treatment, and by some unavoidable mischance it failed to heal but did some harm to the patient. This would encourage 'defensive medicine …'".

[10] *The Telegraph*, July 8, 2013.
[11] *Hansard*, HL Deb, col.756 (January 16, 2013).
[12] *Bolam* [1957] 1 W.L.R. 582; *Bolitho (deceased) v City and Hackney HA* [1998] A.C. 232; [1997] 3 W.L.R. 1151; [1997] 4 All E.R. 771; *Maynard v West Midlands RHA* [1984] 1 W.L.R. 634; [1985] 1 All E.R. 635; (1984) 81 L.S.G. 1926.
[13] *Clark v MacLennan* [1983] 1 All ER 416.
[14] *Crawford v Governors of Charing Cross Hospital*, *The Times*, December 8, 1953.
[15] *Wilsher v Essex AHA* [1987] Q.B. 730; [1987] 2 W.L.R. 425; [1986] 3 All E.R. 801.
[16] *Sidaway v Board of Governors of the Bethlem Royal Hospital* [1985] A.C. 871; [1985] 2 W.L.R. 480; [1985] 1 All E.R. 643.

Had he been an advocate in court, the Judge would have reprimanded Lord Saatchi for not completing the quotation:

> "… The merit of the *Bolam* test is that the criterion of the duty of care owed by a doctor to his patient is whether he has acted in accordance with a practice accepted as proper by a body of responsible and skilled medical opinion. There may be a number of different practices which satisfy this criterion at any particular time. These practices are likely to alter with advances in medical knowledge. Experience shows that, to the great benefit of human kind, they have done so …"

On July 15, 2013 Lord Saatchi said in the House of Lords:

> "Will my noble friend consider the warnings of judges, including that of the noble and learned Baroness, Lady Butler-Sloss, that under current law no innovative work—such as the use of penicillin, or performing heart transplant surgery—would ever be attempted?"

This was an apparent reference to the decision of Butler-Sloss's judgment in *Simms*,[17] which he has often cited in the media as an example of how the current law impedes medical innovation. In fact her judgment demonstrates the precise opposite of what has been claimed. *Simms* was not a clinical negligence action but a "best interests" determination of whether previously untried treatment should be given to two young people who had variant Creutzfeldt-Jakob disease, contrary to the wishes of the NHS Trust. Perhaps controversially, the Judge deployed the *Bolam* test to give permission for the treatment. As Sir Robert Francis QC wrote in his response to the consultation on the Bill:

> "It was not the law that stood in the way of innovative treatment in that case - it facilitated it by explicit reference to the *Bolam* test. Indeed the doctor wanting to provide the treatment was not deterred by the fear of litigation. He was inhibited by his employer."[18]

Whatever else might be said about lawyers, we can spot the misuse of authority to support a bad point.

Lord Blencathra supported the Bill at its second reading on the grounds that patients should be permitted to consent to being guinea pigs for trying new treatments. Of course the current law does not prevent medical trials taking place in which thousands of patients participate. Would the current law protect a doctor from a finding of negligence if he carried out experimental treatment on a fully informed, consenting patient outside an established trial? The answer must be that: (i) a patient could only sue if they suffered avoidable harm as a result of the treatment; (ii) they could not sue on the basis of a failure to obtain informed consent if fully informed consent was given; but (iii) if no responsible body of medical opinion would condone the experimentation, the doctor would have been negligent. Is the law too restrictive in that respect? Even Lord Saatchi doesn't appear to think so because the Bill provides that doctors shall not be permitted to treat patients for the purpose of research unless the treatment is also in the patient's best interests.[19]

One issue of concern raised by Lord Mackay in the House of Lords debate on 27 June was that the *Bolam* test cannot apply where there is no body of responsible medical opinion and that there will be no such body of opinion where treatment is truly innovative—there will be too few doctors who have experience of the treatment. In fact the *Bolam* test has proved to be sufficiently flexible to deal with that situation. In *Waters v West Sussex HA* [1995] 6 Med. L.R. 362 the Court applied the *Bolam* test when dismissing a negligence claim where a neurosurgeon had deployed a "unique" technique and the patient suffered paralysis following the operation. In *Pollard v Crockard*,[20] Mr Justice Holland applied the *Bolam*

[17] *Simms v Simms* [2002] EWHC 2734 (Fam); [2003] Fam. 83; [2003] 2 W.L.R. 1465.

[18] See "Robert Francis QC submits response to the Department of Health" (April 30, 2014)*www.serjeantsinn.com/news/393/robert_francis_qc_submits_response_to_the_department_of_health* [Accessed July 14, 2014].

[19] Clause 1(4)(a).

[20] *Pollard v Crockard* , Unreported, January 22, 1997.

test where another neurosurgeon used a technique which was "previously unknown" in the United Kingdom. Again, the defendant was found not to have been negligent. Innovative treatment can be judged by experts in the relevant field as reasonable or rational, even if it has never before been tried on a patient.

Some of the Bill's proponents have said that it aims to "bring forward" the *Bolam* test to the time when the decision is made. A doctor should know whether his decision is acceptable when he makes it, not years later when a judge considers expert evidence at court. This confuses the purpose of the law of clinical negligence which is to provide redress for harm caused when it ought not to have been caused: it is a compensatory not a punitive process. In any event, redress is afforded not when a doctor falls below an average standard of care, but only when he acts in a way which no responsible body of doctors would support. It might well be in the interests of all if the current law discourages a doctor from giving treatment when he is unsure whether any other doctors would condone it.

In the 57 years since the *Bolam* decision, considerable medical advances have been made. The Saatchi Bill is not the result of a clamour for change from within the medical profession. The fact that some patients suffer terribly and die from conditions such as ovarian cancer is not a ground for criticising the medical profession or the law, let alone for changing the law. Nevertheless, even if the law has worked well, it is worth asking whether it is likely to be improved by the Saatchi Bill. To answer that question it is necessary to examine the detailed provisions of the Bill and their likely impact.

Dispensing with Bolam

The Medical Innovation Bill seeks to bypass the *Bolam* test of whether treatment is negligent. Clause 1(2) of the Bill now provides:

> "It is not negligent for a doctor to decide to depart from the existing range of accepted treatments for a condition if the decision is taken in accordance with a process which is accountable, transparent and allows full consideration of all relevant matters."

The Bill does not apply to all cases of clinical negligence, only to treatment decisions. A surgical error would not be covered, for example. The courts would interpret the Bill's provisions with regard to the purpose of the Bill, stated in cl.1(1) to be to encourage responsible medical innovation. Nevertheless its ambit is wide.

The Bill applies only to doctors, not to nurses or other healthcare professionals, but a "doctor" is a person on the medical register and so includes general practitioners as well as specialists. It applies whether the doctor is acting within the NHS or in a private capacity, whether he is acting within or without a hospital, as part of a team or on his own.

Treatment of a condition is defined as "including a reference to its management (and a reference to treatment includes a reference to inaction)."[21] It clearly covers conservative as well as invasive treatment, elective as well as emergency treatment and treatment of mental as well as physical conditions. "Innovative treatment" is not defined and cl.1(2) appears to apply to all treatment decisions, whether innovative or not.

The meaning of "accepted treatments" is not defined but it is likely to be interpreted as referring to the range of treatments which would be accepted by a responsible body of medical opinion. Treatment decisions currently considered negligent are those which depart from the existing range of accepted treatments. Under the Bill they would no longer be negligent, provided the decisions were taken in the prescribed manner. The Bill is clearly designed to change the law as to when a doctor is negligent.

[21] Clause 1(5)(c).

The Bill's provisions are not restricted to treatment of the terminally ill, to treatments which are experimental or to treatment which is a last resort when "standard" treatments have failed. It was surprising therefore to read Lord Woolf in *The Daily Telegraph*:

> "It is important to understand here that we are talking about a new law that will make a limited, but significant contribution in a small number of difficult cases. Maurice Saatchi, with the support of Health Secretary, Jeremy Hunt, and of the Government, is seeking to introduce legislation that will only apply to: (1) patients who are not responding to conventional treatments; (2) patients who give their consent to such innovation; (3) new treatments that are still at a experimental stage; (4) new treatments that hold out a real prospect of being able to help, both the patient and others in similar circumstances who come after them."

The Saatchi Bill is not targeted in that way.

The decision-making process

Provisions for determining whether the decision to depart from the existing range of accepted treatments has been taken via an accountable and transparent process, which allows full consideration of all relevant matters, are set out at cl.1(3):

> "That process must include—
> (a) consultation with appropriately qualified colleagues, including any relevant multi-disciplinary team;
> (b) notification in advance to the doctor's responsible officer;
> (c) consideration of any opinions or requests expressed by or on behalf of the patient;
> (d) obtaining any consents required by law; and
> (e) consideration of all matters that appear to the doctor to be reasonably necessary to be considered in order to reach a clinical judgment, including assessment and comparison of the actual or probable risks and consequences of different treatments."

Clause 1(3)(a) requires consultation with, but not the agreement of, "appropriately qualified colleagues". The question of what qualifications are appropriate is not answered. In the House of Lords, Lord Mackay stated that the process of consultation necessarily included having regard to others' opinions.[22] With respect, whether or not that is so, what the Bill does not require is agreement or consensus. In any event, indications are that the Government does not agree with Lord Mackay and will table an amendment requiring that treatment decisions must be agreed or supported by other doctors.

A "responsible officer" is defined by reference to Pt 5A of the Medical Act 1983. Clause 1(3)(b) requires notification not authorisation of the responsible officer. Many have questioned what useful purpose would be served by such notification.

Clauses 1(3)(c) and (d) re-affirm the present law of consent. Note that there is no requirement to elicit the opinions of the patient, only to consider opinions and requests they express. Following *Sidaway* the common law effectively applies the *Bolam* test to the issue of consent. So, *Bolam* will continue to apply to the obtaining of consent to treatment but not to the actual provision of the treatment. The impact of this on future litigation is considered below.

Clause 1(3)(e) is a subjective test: a doctor should consider matters he believes to be relevant to the decision in question, but those matters must include consideration of "actual or probable risks and consequences of different treatments". Presumably the "different treatments" to be taken into account

[22] *Hansard*, HL Vol.754, col.1457 (June 27, 2014).

should include the proposed treatment, but the extent to which other options must be considered is not clear.

Clearly the procedural requirements only fall to be considered if, under the current law, the decision to treat would be regarded as negligent. Otherwise, there would be no need for the Saatchi defence to be considered. So, a doctor might well consider all matters that appear to him/her to be relevant, obtain the consent of the patient, notify his responsible officer, consult with colleagues and still make a decision which no responsible body of doctors would support, even that no other doctor at all would support; under the Bill, that doctor would not be negligent.

Finally, cl.1(4) provides that:

> "Nothing in this section—
> (a) permits a doctor to administer treatment for the purposes of research or for any purpose other than the best interests of the patient, or
> (b) abolishes any rule of the common law in accordance with which a decision to innovate is not negligent if supported by a responsible body of medical opinion."

As to cl.1(4)(a), this is again a subjective requirement—did the doctor believe that the treatment was in the patient's best interests? In his guidance on the Bill, the responsible parliamentary draftsman, Daniel Greenberg has written:

> "The policy of the Bill is to support innovative treatment where the doctor is satisfied that it is likely to be in the best interests of the individual patient receiving treatment."

Were this requirement an objective one—was the treatment in fact in the interests of the patient—it would defeat the purpose of cl.1(2). Doctors are not found liable for giving treatment which is in fact in the best interests of the patient.

Mr Greenberg claims that cl.1(4)(b) preserves the *Bolam* test. I do not believe that it does. It preserves the common law rule as to what is not negligent, but not the rule as to what is negligent. Hence, a doctor who is not *Bolam* negligent will not become negligent if he fails to comply with the Bill's process requirements. But a doctor who is *Bolam* negligent in relation to a treatment decision and who does comply with the Bill's process requirements will no longer be negligent.

The impact on patients

If this was a Bill which, whilst unnecessary, would have no impact, it would be of less concern. However, as the Patients Association, AvMA and others have warned, the Bill risks undermining patient safety.

The Bill will prevent patients and their families from obtaining redress when harmed by treatment which no doctor would support, or which is irrational and irresponsible. Adherence to the Bill's process requirements does not guarantee a rational, reasonable and responsible treatment decision. So it is that some critics have referred to the Bill as a "quack's charter". Patients who are desperate to try treatments which are not evidence-based, or are untested or not supported by the medical community, may be the most vulnerable to exploitation. They may be the very patients who need the law's protection; this Bill would significantly weaken that protection and prevent them from seeking compensation if they were exploited and injured. The Bill would provide a defence to doctors who, for reward or otherwise, provide idiosyncratic treatment which has no rational basis and/or no support from other doctors.

As noted, the Bill's protection of irrational or unsupported treatment is not restricted to innovative treatment of the terminally ill. The Saatchi defence provides immunity to doctors giving treatment in all manner of settings and to all manner of patients. There will be great attraction in seeking to rely on the Saatchi defence in a whole range of circumstances. The Bill seeks to ensure that treatment decisions are

"accountable" yet it removes the opportunity for patients to hold doctors to account through the civil courts.

The impact on regulation

If passed, the Bill may also have ramifications for regulatory regimes. In the field of professional regulation, if a doctor is not negligent when providing treatment which no responsible body of doctors would support, then how can he be unfit to practise for doing the same? In its response to the Government's consultation, the General Medical Council ("GMC"), which regulates the conduct of doctors, stated that:

> "Although the Bill aims to clarify and encourage good practice in responsible medical innovation we believe that it could have the opposite effect as well as unintentionally weakening the existing principles which we regard as fundamental to safe, effective patient care."

There is also concern as to how will the Bill sit with the regulation of new treatments, products and procedures? NICE has said the case for the Bill is "weak".

The impact on litigation

If there are greedy lawyers reading this article, who wish to put "cash before patients" they may wish to support the Saatchi Bill. It would be fertile ground for litigation in particular in relation to the interaction of the statute with the common law and the lack of clarity of terms such as "accepted treatment" and "appropriately qualified colleagues". As noted, the Bill seeks to preserve the current common law on consent to treatment. Thus the *Bolam* test remains effective in relation to consent but not in relation to whether the treatment decision was negligent. One can foresee particular focus in future litigation on the process of obtaining a patient's consent to treatment which no responsible body of doctors would support.

Red tape

Responsible doctors making treatment decisions who are concerned about the risk of litigation will be faced with a new list of statutory requirements which they will be expected to meet. It can be foreseen that NHS Trusts and other employers will lay down guidelines for compliance with Saatchi. Authorised officers will be inundated with notifications. Doctors will be required to make a written record of consultations, notifications and considerations. New forms will be generated, filled and filed. New jobs created; new costs incurred. Where there is uncertainty as to whether a treatment is within the existing range of accepted treatments, the safest course will be to treat it as a Saatchi case and to ensure that the procedural requirements are fulfilled and documented. For example, doctors can currently prescribe off-label if it is in the best interests of the patient, and consent is given. Post-Saatchi, doctors prescribing off-label may well have to jump through several new hoops of red tape. This would have particularly serious implications for treatment decisions which have to be made urgently.

The impact on innovation

As several critics of the Bill have pointed out, there are many other more obvious barriers to innovation than the threat of litigation. But the Bill has nothing to say about funding, regulatory oversight of research and the introduction of new drugs and treatments, professional regulation, or about terms and conditions of employment which restrict what doctors may do. Further, the Bill applies only to doctors who treat patients, not to scientists or researchers who are central to the advancement of medical understanding. The idea that, freed from the shackles of threatened litigation, a lone doctor will find a cure for cancer is not one that seems to have chimed with the scientific or medical bodies responding publicly to the Bill.

Indeed the GMC has expressed concern that the Bill may actually "hinder responsible innovation." As the Bill progresses and amendments are made, it is foreseeable that the final Bill will lay more hurdles in the path of the medical innovator than currently exist. The Saatchi Bill may become the unfortunate paradigm of the legislative own goal.

Conclusion

Lord Saatchi has personal reasons for driving this Bill through Parliament but that should not prevent objective analysis of it by others. The Bill, rather like the treatment it seeks to promote, is not based on evidence. There is no substantial evidence that responsible medical innovation is impeded by the common law of clinical negligence. Worse still, the Bill is likely to expose vulnerable patients to increased risk. Whatever "protections" are written in to the Bill, they cannot effectively replace the current requirement that treatment should be rational and supported by a responsible body of medical opinion. If the Bill were revised to require that treatment decisions should be rational and *Bolam* reasonable, it would be rendered pointless.

Earl Howe, speaking for the Government at the Bill's second reading said that "a necessary focus on patient safety must not stifle responsible innovation".[23] By supporting the Saatchi Bill it seems that the Government believes not only that patient safety and responsible innovation are in tension, but also that there has been too much emphasis on safety at the cost of a lack of innovation. The solution proposed by the Saatchi Bill is to prevent patients and their families from obtaining redress when harmed by treatment which no responsible doctors would support. It could soon become law.

[23] *Hansard*, HL Vol.754, col.1489 (June 27, 2014).

A World Turned Upside Down

Nicholas Bevan

Compensatory damages; Criminal conduct; EU law; Exclusion of liability; Failure to fulfil expectations; Motor Insurers' Bureau; Passengers; Road traffic accidents; Uninsured drivers

Mr Justice Jay's judgment in *Delaney v Secretary of State for Transport*[1] ("*Delaney 2*")[2] is probably the most important decision on civil liability insurance for nearly two decades. It raises questions about the proper role of the Motor Insurance Bureau and the extent to which our national law provision for guaranteeing the compensatory entitlement of motor accident victims has been bungled by the Department for Transport ("DfT").

Although this case is concerned with cl.6(1)(e)(iii) of the Uninsured Drivers Agreement 1999 ("1999 Agreement") and whether it is a lawful provision, the clarity with which this task is achieved and explained provides a clear illustration of the approach we should all adopt when interpreting the United Kingdom's statutory and extra-statutory provision consistently with the European Motor Vehicle Insurance Directives ("MVID").[3] This is a necessary task as the rights conferred under our domestic law often fail to meet the basic minimum safeguards imposed under European law.

This decision is made all the more remarkable, because it is a High Court decision that effectively circumvents two directly relevant but unfortunately misleading Court of Appeal rulings[4] that go directly to issues central to this case. So this decision points a way forward to attaining a just compensatory redress but which achieves this without risking an expensive head-on conflict with two unhelpful Court of Appeal precedents that might otherwise obstruct that end.

The reader may be aware that this case burst into the public consciousness on June 3, 2014, within hours of the judgment being delivered, probably as a result of a carefully orchestrated press release. The outcome of the case appears to have attracted almost universal condemnation in the national press: being presented as yet another example of EU law producing absurd results, which in this instance involved compelling an insurer to pay a potentially vast sum in compensation to a drug dealer. Notions of equality before the law and objective and properly researched reportage seem to have been overlooked in the frenzy of moral indignation. However, as this article will show, the decision is not only correct in law but it is also a just one; the concept of outlawry has long since been abolished in this country and for good reason.

Were this insufficient to wet the reader's appetite, the same judgment candidly exposes the DfT for long standing ineptitude of a high order. It will come as no surprise that this escaped notice in much of the recent press coverage. The case also reveals a surprisingly complacent attitude by the DfT in the way it has failed to discharge the Government's Treaty obligation to fully transpose into the United Kingdom law the minimum standards of compensatory protection imposed under the MVID, notwithstanding an almost certain knowledge that this discriminates against thousands of victims injured by motor vehicles, every year; more about that later.

[1] *Delaney v Secretary of State for Transport* [2014] EWHC Civ 1785 (QB); (2014) 164(7610) N.L.J. 18.

[2] As this case featured the same claimant and as the legal issues arise out of the same basic facts that was considered both in the first instance and Court of Appeal decisions in Delaney's personal injury claim, the writer proposes abbreviating the references to the *Francovich* claim that followed with the term: *Delaney 2*.

[3] See below under *The framework of the Motor Vehicle Insurance Directives* for further details.

[4] *Delaney v Pickett* [2011] EWCA Civ 1532; [2012] 1 W.L.R. 2149; [2012] R.T.R. 16, see under the heading *Delaney 1: The Court of Appeal decision below* and *Bristol Alliance Ltd Partnership v Williams* [2012] EWCA Civ 1267; [2013] Q.B. 806; [2013] 2 W.L.R. 1029; see below under the heading: "More bad law from the Court of Appeal".

This article seeks to explain what happened in *Delaney*, why Jay J.'s approach and his interpretation is to be preferred and why this decision, properly understood, should be seen for what it is: a game changer that has the potential to restore the full legal entitlement of thousands of injured claimants.

The case facts

Sean Delaney was seriously hurt on November 25, 2006 when a Mercedes sports car, in which he was travelling as a front seat passenger, was involved in a head on collision with a Toyota people carrier approaching from the opposite direction and on its own side of the road. It was not disputed that Delaney's driver, Shane Pickett, was entirely responsible for the collision. The Mercedes he was driving was owned by his uncle, a car dealer. He was insured under a motor policy with Tradex Insurance Services Ltd; presumably under a group policy with the dealership. Pickett had been putting the Mercedes through its paces and driving very dangerously and at high speed along the B4113 Coventry Road in Nuneaton. At one point, he decided to overtake a car and, in so doing, accelerated onto the opposite side of the road to avoid some bollards. Then, when confronted by a Toyota people carrier approaching from the opposite direction, he lost control and hit it head on.

Delaney sustained life threatening injuries including a severe head injury. By a fortunate coincidence the emergency services happened to be close at hand and so they were able to respond within a minute or so of the accident and treat Delaney. Less fortunate for both Delaney and Pickett was the discovery of a 240g bag of cannabis, the size of a small football, secreted inside the unconscious Delaney's bomber jacket. They also discovered a lesser amount, the size of a tennis ball, tucked inside Pickett's sock. The Police were duly notified.

Pickett did the decent thing and assumed full responsibility for the accident and the contraband. On being questioned by police officers, and no doubt mindful of the severely enhanced penalty for drug dealing, he contended that he had recently purchased all 274g of cannabis for his own personal use. He said he depended on it as an analgesic to qualm the discomfort from an earlier accident injury and to help him cope emotionally with the loss of his mother. According to the Police the haul would have been enough to produce 1,370 spliffs. Sufficient to tide him over for several weeks then! There was no evidence that Pickett had been driving under the influence of cannabis or any other intoxicant for that matter.

Pickett's ruse worked, or at least initially: he only received a 10 month custodial sentence for the offences of dangerous driving and possession combined. Apparently Delaney suffered from a complete, if rather convenient, memory loss that spanned several weeks either side of the incident; one that spared him any prosecution for possession of, or dealing in, cannabis. However, the implications of Pickett's confession returned with a vengeance in the civil proceedings that followed.

With a serious and potentially costly insurance claim in the offing, Tradex were quick to appreciate the significance, first, of Pickett's self-confessed long-term drug dependency and, secondly, on further investigation, they discovered that he was also a diabetic as well as a clinically diagnosed depressive. As all three were relevant to the insured risk and hence the cost of the premium, they were material particulars that should have been declared on the policy application form but, surprise, surprise, they were not. So Tradex promptly applied to the Court for a declaration that the policy was void under s.152 of the Road Traffic Act 1988 ("the 1988 Act") and the order was duly granted.

Delaney 1: The personal injury claim

When Delaney eventually brought his personal injury claim against Pickett, Tradex were joined in as an interested party. They defended the claim on two principal grounds.

The first defence: The public policy bar

First, they contended that Delaney and Pickett were in fact drug dealers and engaged in this activity at the time of the accident. They argued that because the accident was closely connected with this criminal activity, public policy precluded Delaney from recovering any compensation from his accomplice. They cited the well known and much misapplied maxim of *ex turpi causa non oritur actio* by way of justification. By this reasoning, if Pickett was not liable for Delaney's loss, then it followed that there was no liability to indemnify.

The second defence: The exclusion of liability

Tradex's second line of defence was that even if the claim was not barred and Pickett was found fully liable to compensate his passenger for his injuries, Tradex still faced no actual or potential liability.

The reasoning for this proposition is based on Tradex's role as an Article 75[5] insurer that apparently allowed them to rely on an exclusion of liability clause within the 1999 Agreement.

It was common ground that Pickett was to be treated for all relevant purposes as an uninsured driver. That assumption was neither examined nor explained within the Court of Appeal judgment, which is remarkable since, as we shall see, a great deal turned on whether Delaney could rely on the statutory indemnity provisions of s.151(5) of the 1988 Act or was subject to the positively disadvantageous terms of the 1999 Agreement that applies to all victims of uninsured drivers.

Because this is an issue that has important implications for thousands of motor claims every year and because, at least in the author's view, there is a strong case to argue that the assumption made in this case was wrong in law, it might be helpful to posit the arguments that would most probably have been advanced to support this proposition, had it been contested, before explaining why the assumption may be erroneous.

Was Pickett an uninsured driver?

The most plausible line of argument for contending that Delaney should be treated as though he was an uninsured driver claiming under the 1999 Agreement, notwithstanding the fact that at the time of the accident his vehicle was covered by a relevant policy, would seem to run along the following lines:

- As already intimated, at some unspecified anterior stage[6] Tradex obtained a court declaration under s.152(2) of the 1988 Act that it could avoid the policy it had issued under ss.145 and 147 on the grounds that it had been obtained through misrepresentation or non-disclosure of material facts.
- Accordingly, if one then applies a plain and literal interpretation to s.152(2) Tradex is no longer statutorily liable to compensate Delaney under s.151(5). Furthermore, the basic common law precepts relevant to contracts *uberrima fidei*, free Tradex from any contractual liability to indemnify Delaney's claim.
- It then takes but a very short step to conclude that as Tradex is neither a contractual nor statutory insurer, the claim is now properly one against an uninsured driver and as such it falls within the remit of the 1999 Agreement.
- Furthermore, that because Tradex is required to be a member of the Motor Insurer Bureau ("MIB") and to contribute to its central fund as a condition precedent of being authorised by the Secretary of State to underwrite third party liability insurance in the United Kingdom, the insurer is bound by the MIB's constitution. Article 75 of the MIB's Articles of

[5] Motor Insurance Bureau Articles of Association Art.75.

[6] S.152(2) requires the declaration to be obtained either prior to the commencement of the claim or within three months of being notified of the claim being issued.

> Association, requires it to deal with the claim as the MIB's agent and, subject only to the issue of primary liability, to satisfy the claim from its own funds, without calling on the MIB's central fund.

None of this is likely to strike the reader as odd or unusual. After all, this practice has acquired almost universal orthodoxy, over many decades. It is routinely applied to thousands of claims every year. Generally speaking the common assumption is that where there is some insurance in place for the vehicle responsible at the time of the incident giving rise to the third party claimant's loss or injury but, for one reason or another, it is subsequently vitiated and officially avoided under s.152, the "insurer concerned" must deal with the claim as an "Article 75 insurer".

Why the allocation matters

It is often the case that the practical implications of this arrangement are minimal. The Article 75 insurer handles the claim in much the same fashion as it would if it were acting in the capacity of a statutory insurer under s.152.

However this semblance of normality is belied by the extensive range and number of procedural and substantive conditions precedent to *any* liability under the 1999 Agreement[7] that makes a mockery of the overriding objective under the Civil Procedure Rules 1998.[8] These place a claimant at a distinct disadvantage to one pursuing a claim against a contractual or statutory insurer. The same Agreement also purports to confer the MIB or Article 75 insurer with an entitlement to make certain deductions from the victim's compensatory entitlement.[9] It follows therefore that the procedural and substantive law entitlement provisions within the 1999 Agreement are heavily weighted in favour of the MIB/Article 75 insurer. None of this applies to the paradigm insured driver scenario.

For Delaney, the allocation mattered a great deal. Tradex's defence relied on one of a number of exclusion clauses that apply exclusively to passengers who are injured in uninsured vehicles. Clause 6(1)(e)(iii) of the 1999 Agreement excludes any liability to compensate a passenger who, at the material time, had actual or constructive knowledge that the vehicle responsible for his loss was being used in the course of or furtherance of a crime.

Ordinarily the mere possession of a Class B drug[10] would not convert an otherwise lawful use of a vehicle into a criminal use, however it was contended that both Pickett and Delaney were dealers who were using the Mercedes specifically to transport, traffic or otherwise supply the cannabis in furtherance of that criminal endeavour.[11]

Given the significance of this for the claimant it is perhaps surprising that at the first instance trial and subsequent appeal no one thought to ask whether the proper effect of a s.152 declaration should be confined to the insurer and its policyholder, and whether the assumptions made in this regard and set out above are consistent with the MVID and the extensive body rulings by the Court of Justice of the European Union interpreting its meaning and effect. Incidentally, the writer will henceforth refer to that court by its better known title: the European Court of Justice ("ECJ").

[7] See the 1999 Agreement cll.8–13.
[8] For example, see the Civil Procedure Rules Pt 1.1(2)(b): that requires the court to ensure that the parties are on an equal footing.
[9] See the 1999 Agreement cll.6(1)(c), 17(1)(b) and (c).
[10] See the Misuse of Drugs Act 1971 Sch.2 for the relevant classifications.
[11] Under the Misuse of Drugs Act 1971 s.4(3) dealing in Class B drugs can attract a hefty maximum prison term of 14 years and an unlimited fine.

The framework of the Motor Vehicle Insurance Directives

At the time of Delaney's accident, in 2006, compulsory third party insurance requirement for motor vehicle use was covered by three consecutive European MVID: the First,[12] Second,[13] and Third[14] MVID. These are repeated within the consolidating Sixth MVID;[15] cross references will be supplied to the equivalent articles within the Sixth MVID in the footnotes.

It is important to emphasise that the First MVID conferred a wide discretion on the Member States as to how they implemented the obligation to ensure that civil liability cover is provided for the use of motor vehicles. The result was that this introduced wide variations between the different Member States as to the scope and extent of the compulsory third party insurance cover. Accordingly, this discretion was largely if not entirely removed by the Second and Third MVID. Accordingly the MVID are now highly prescriptive both as to the wide scope and nature of the insurance cover imposed.

The key provisions to note are:

- Article 3(1) of the First MVID[16] imposed the basic insurance obligation. It requires Member States to:

  > "… take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance …".

- The Second MVID began the process of tightening up the discretion of Member States. In its seventh recital[17] it stated:

  > " Whereas it is in the interests of victims that the effects of certain exclusion clauses shall be limited to the relationship between the insurer and the person responsible for the accident; whereas, however, in the case of vehicles stolen or obtained by violence, Member States may specify that compensation will be payable by the aforementioned body …".

- Article 1(4)[18] of the Second MVID provided for the creation of a compensating body, in this jurisdiction the MIB. It provided that:

  > "Each Member State shall set up or authorise a body with the task of providing compensation, at least up to the limits of the insurance obligation for damage to property or personal injuries caused by an unidentified vehicle or a vehicle for which the insurance obligation provided for in paragraph 1 has not been satisfied."

- The same article goes on to provide that:

  > "Member States may exclude the payment of compensation by that body in respect of persons who voluntarily entered the vehicle which caused the damage or injury when the body can prove that they knew it was uninsured."

[12] Directive 72/166 on the approximation of the laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability [1972] OJ L1103/1.
[13] Directive 84/5 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles [1984] OJ L43/27.
[14] Directive 90/232 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles [1995] OJ L75/30.
[15] Directive 2009/103 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability [2009] OJ L263/11.
[16] Now art.3.1 of the Sixth MVID.
[17] Now retical 15 of the Sixth MVID.
[18] Now art.10.1 of the Sixth MVID.

- Article 2(1) of the Second MVID, after listing certain void exclusions of liability (featuring persons not authorised to drive the vehicle, persons not holding a driving licence, and persons in breach of the statutory technical requirements concerning the condition and safety of the vehicle),[19] continues by setting out the single instance where insurance cover can be excluded in a policy issued under the First MVID.[20] This is permitted against:

  > "… persons who voluntarily entered the vehicle which caused the damage or injury, when the insurer can prove that they knew the vehicle was stolen."

- The first two MVIDs still left Member States with enough leg room to argue that other exclusions or restrictions in the insurance cover extended to third parties were justified. Consequently, and in order to guarantee that the victims of accidents receive comparable treatment irrespective of where in the Community the accident occurred, the EU Council legislated again, to bolster and harmonise the rights of third parties, with a special emphasis being placed on passengers.
- Accordingly, and with effect from December 31, 1992 in this jurisdiction, the Third MVID declared in recital 5:

  > "… there are, in particular, gaps in the compulsory insurance cover of motor vehicle passengers in certain Member States; whereas, to protect this particularly vulnerable category of potential victims, such gaps should be filled."

- As though to emphasise the imperative nature of this objective, the first paragraph of art.1[21] provides:

  > "Without prejudice to the second subparagraph of Article 2(1) of [the Second MVID],[22] the insurance referred to in Article 3(1) of the [First MVID] shall cover liability for personal injuries to all passengers, other than the driver, arising out of the use of a vehicle."

- The natural implication to be drawn from these three MVIDs is that, subject to the stolen vehicle exception, the legal effect of any exclusion of liability within a policy of insurance should be confined to the policyholder and insurer relationship; not injured third parties.

European Court of Justice rulings interpreting the Motor Vehicle Insurance Directives

It is trite law that the ECJ is the primary source of interpreting the meaning or effect of EU legislation, be that a Treaty, a Regulation or Directive.[23] It is also abundantly clear that Pt VI of the 1988 Act and both MIB Agreements are the United Kingdom's national law implementation of the MVID. Accordingly, any ECJ ruling on the proper meaning and effect of the MVID has precedence over any conflicting interpretation by a national court, including our Supreme Court, so it makes sense to consider next how the ECJ has interpreted the MVID.

The first landmark ruling was in *Bernaldez*[24] back in 1996. That case featured a claim where a drunk driver crashed his car in Spain causing extensive property damage. However, the vehicle's insurance policy excluded cover where the driver was intoxicated and this was permitted under the national law. At

[19] Now in art.13(1) of the Sixth MVID.
[20] Now in art.13(1) of the Sixth MVID also.
[21] Now art.12(1) of the Sixth MVID.
[22] See above for art.2(1) and the stolen vehicle exception.
[23] This principle is transposed into UK law by European Communities Act 1972 s.3(1).
[24] *Criminal Proceedings against Bernaldez* (C-129/94) [1996] All E.R. (EC) 741; [1996] E.C.R. I-1829; [1996] 2 C.M.L.R. 889.

first instance, his insurers were absolved from any liability to indemnify the policyholders' accident damage and so the third party was unable to look to the motor insurers to recover their loss.

That decision was appealed and the case was referred to the ECJ for guidance. It will be recalled that, art.2(1) of the Second MVID[25] expressly provided that certain specific exclusions of liability were void as against a third party claimant. It also set out the single instance where a policy exclusion is permitted by the MVID: namely where the insurer can prove that the passenger knew that the vehicle is stolen.

In essence, what the referring Court sought to establish in *Bernaldez* was whether the list of invalid policy exclusions set out in the Second MVID was exhaustive or illustrative. Put another way, were any other policy exclusions, not specifically made void by art.2(1), permitted by the MVID?

The ECJ ruled, as follows:

- Article 3(1) of the First MVID,[26] as developed and supplemented by the Second and Third MVID, must be interpreted as meaning that compulsory motor insurance must enable third-party victims of accidents caused by vehicles to be compensated for all the damage to property and personal injuries sustained by them.
- That this interpretation precludes an insurer from being able to rely on statutory provisions or contractual clauses to refuse to compensate third-party victims of an accident caused by the insured vehicle.
- That the list of void exclusions merely serves to illustrate the comprehensive nature of the insurance requirement imposed by art.3(1).
- That any other interpretation would have the effect of bringing about disparities in the treatment of victims depending on where the accident occurred, which is precisely what the MVID intend to avoid.
- That this did not preclude the insurer pursuing a claim against its insured.

So according to *Bernaldez*, art.2(1) of the Second MVID did not confine the instance of void exclusions to those specified there. The comprehensive nature of the insurance requirement imposed by art.3(1) of the First MVID was emphasised. So with the single instance of the stolen vehicle exception, insurers are not able to rely on a contractual or statutory exclusion of their liability to compensate a third party victim.

A raft of subsequent ECJ rulings have consistently and uniformly endorsed the general application of the comprehensive principle first propounded in *Bernaldez*. *Bernaldez* has been followed and recited with approval in *Ferreira*;[27] *Candolin*[28] (where it was quoted from extensively); *Farrell v Whitty*;[29] and more recently in *Churchill v Wilkinson*.[30]

Accordingly, if we apply this EU law to the *Delaney* facts, there appears to be a strong case to argue that although the effect of the court declaration under s.152 is to entitle Tradex to avoid their contractual liability to indemnify Pickett, they remain statutory insurers by operation of the EU law so that the 1999 Agreement has no application to this case.

Against this Tradex would no doubt argue that the effect of Pickett's misconduct was to vitiate the policy ab initio, so that in reality there was no binding insurance contract in place at the time of the accident. However, that would ignore the fact that ss.151 and 152 of the 1988 Act already interfere with that common

[25] Now art.13.1 of the consolidating Sixth MVID.

[26] Now the Sixth MVID art.3(1).

[27] *Carvalho Ferreira Santos v Companhia Europeia de Seguros SA* (C-484/09) [2011] R.T.R. 32; [2012] Lloyd's Rep. I.R. 60 and *Ferreira v Companhia Europeia de Seguros SA* (C-348-98)[2000] E.C.R. I-6711 , where the passenger victim was the driver's 12-year-old son.

[28] *Candolin v Vahinkovakuutusosakeyhtiö Pohjola* (C-537/03) [2005] E.C.R. I-5745; [2006] R.T.R. 1; [2005] 3 C.M.L.R. 17, where the passenger victims and the driver were all drunk.

[29] *Farrell v Whitty* (C-356/05) [2007] E.C.R. I-3067; [2007] 2 C.M.L.R. 46, where the passenger victims were seated in the back of a van not fitted with seats.

[30] *Churchill Insurance Co Ltd v Wilkinson* (C-442/10) [2013] 1 W.L.R. 1776; [2012] R.T.R. 10; [2012] C.E.C. 934, where the victims were passengers in, or on, a vehicle that they owned and which was insured for their use but not their drivers. See the writer's case comment on the Court of Appeal decision in *Wilkinson v Churchill Insurance Co Ltd* [2012] EWCA Civ 1166; [2013] 1 W.L.R. 1776; [2013] 1 All E.R. 1146 in [2014] J.P.I.L. 1.

law precept and that properly construed, in a way that conforms with the MVID, once a policy is issued and delivered to the insured, it is good for any use made against a third party claim, subject of course to the stolen vehicle exception considered above.

Delaney 1: The first instance decision

His Honour Judge Gregory, tried Delaney's claim at first instance in January 2011.[31] His long experience as a circuit judge left him in little doubt that, whatever the Police or the CPS might think, both Delaney and Pickett were dealing in drugs at the time of the accident. Accordingly, he found that the claim was barred on public policy grounds, applying the *ex turpi causa* maxim.

Such was his disdain for the claimant's nefarious activities, he went on to opine that even if Delaney's claim was not so barred, it would still fail because Delaney's claim was against an uninsured driver to which cl.6(1)(e)(iii) applied (see above).

As it turned out, he was wrong on both counts. Delaney appealed the decision but he was only partially successful before the Court of Appeal.

Delaney 1: The Court of Appeal decision

Lord Justice Ward delivered the lead judgment in the Court of Appeal.[32]

As to Judge Gregory's finding that Delaney's claim was barred by the operation of the ex turpi causa rule, all three Lords Justices (Ward, Richards and Tomlinson L.JJ.) were unanimous in overturning that decision and upholding the appeal to that extent. They held that as the driver and passenger's criminality had only been incidental to and not causative of the accident, this policy defence did not apply.

However, they ruled by a majority verdict (Ward L.J. dissenting) that as Tradex were handling the claim as Article 75 insurers under the 1999 Agreement, cl.6(1)(e)(iii) operated to excluded any liability for the claim, effectively scuppering Delaney's claim.

Still, no one thought to question whether the s.152 declaration and/or cl.6 of the 1999 Agreement were incompatible with the MVID. The claimant's application for permission to appeal to the Supreme Court was refused.

The Court of Appeal's decision in *Delaney* was roundly criticised by the author in his JPIL case comment[33] but the unfortunate legacy of that erroneous ruling lingered on, unchallenged, save within the confines of this journal.

More bad law from Court of Appeal

It is relevant to note at this point that about 10 months later Ward L.J. delivered another leading judgment in *Bristol Alliance Ltd Partnership v Williams*.[34] That case featured a tragic suicide attempt by an ostensibly insured driver, a Mr Williams. He drove his car at up to 100mph down the M32 in Bristol and aimed it directly into a newly constructed prestigious House of Fraser department store. Mercifully both Williams and an unfortunate third party driver, who happened to be in his way, survived this high impact collision.

[31] As it happens, Judge Gregory was also the first instance judge who, on June 9, 2009, tried Tracy Evan's personal injury claim in *Evans v Equity Claims Ltd* [2009]. It is clear that he failed to interpret the insurer's right of recovery under s.151(8) of the 1988 Act consistently with legislative objective of the MVID and the raft of rulings interpreting them by ECJ. That decision was eventually overturned in August 2012 by the Court of Appeal (after a reference to the ECJ) in the conjoined appeal in *Churchill* [2013] 1 W.L.R. 1776. Unfortunately that ruling came too late to inform the learned judge or to allow him to benefit from its helpful guidance on the correct interpretive approach for cases where our national law provision is influenced by superior European law. See the writer's JPIL case comment on *Churchill* in [2012] J.P.I.L. issue 4.

[32] *Delaney v Pickett* [2012] 1 W.L.R. 2149.

[33] Published at [2012] J.P.I.L. C91.

[34] *Bristol Alliance* [2013] Q.B. 806; see also JPIL case comment by Nicholas Bevan in [2012] J.P.I.L. C91.

Mr Williams was insured with Admiral under a motor policy whose terms purported to exclude liability for road rage or deliberate damage. Admiral contended that by attempting to commit suicide in this way their policyholder's use of the vehicle had fallen outside the contractual scope of the policy, making him effectively an uninsured driver at the time that the loss was sustained.

The key issue to be determined was whether the victims' claims were to be treated as a statutorily insured claims under s.151 of the 1988 Act or whether they were effectively claims against an uninsured driver that were subject to the significantly less advantageous regime under the 1999 Agreement. What was at stake was the recoverability of the extensive property damage to the building. Under normal common law rules that apply to the s.151 statutory indemnity, subrogated loss claims are recoverable; whereas these are expressly excluded under cl.6(1)(c) of the 1999 Agreement. That issue in turn depended on whether the scope of the compulsory third party insurance cover required under s.145 of the 1988 Act was capable of embracing deliberately caused loss.

Admiral's defence was given short shrift at first instance by Mr Justice Tugendhat, who found for the claimant.[35] He cited a number of long established rulings by the Court of Appeal and the House of Lords that indicated that the scope of the third party insurance cover required by what is now s.145 of the 1988 Act includes deliberate and even criminally caused damage.[36] He also held that even if this were not the case, that a proper and purposive interpretation of the scope of the third party insurance cover needed to comply with the EU MVID required cover for *any* damage caused by the use of a vehicle; whether negligently or deliberately inflicted. The judge also relied on the ECJ ruling in *Bernaldez*.[37]

Nevertheless, when the *Bristol Alliance* case came before the Court of Appeal the first instance decision was overturned. Ward L.J. delivered the only reasoned judgment in which he sought to distinguish *Charlton*[38] and at the same time contended that the ECJ ruling in *Bernaldez* did not have a general application. His ruling was endorsed unanimously by the other two Lords Justices. However, they were badly mistaken on the key issue, namely the applicability of *Bernaldez* because, as we have seen, the superior authority of the ECJ has repeatedly approved it and applied the comprehensive principle to a variety of different scenarios.[39]

According to Ward L.J., an inference that policy exclusions are valid against a third party can be drawn from the fact that s.148 only prevents an insurer from relying on a limited number of exclusions that are listed in s.148(2) (such as the invalidation of any restrictions on the age or physical or mental condition of the driver).[40] He drew a similar conclusion for the s.151(3) nullification of any restriction of cover to persons not holding a driving licence. So according to this rationale, whilst some limitations of liability are specifically expressed to be void, the correlative implication is that all other limitations are valid. That being so, it is up to the driver to ensure that the use made of the insured vehicle is consistent with the cover provided. A motor insurer is not obliged to provide cover that is good for any use.

In a telling remark, Ward L.J. admitted that if *Bernaldez* was to be read so as to give a purposive *Marleasing* meaning to ss.151 and 145 of the 1988 Act, "then the way the Road Traffic Act combined with the MIB scheme has always operated is not compliant with the Directive". But that is precisely what this author has been contending for some time now. This ruling was considered at some length in this Journal,[41] and criticised.

[35] *Bristol Alliance Ltd Partnership v Williams* [2011] EWHC 1657 (QB); [2011] 2 All E.R. (Comm) 1113; [2012] R.T.R. 9.

[36] *Hardy v Motor Insurers Bureau* [1964] 2 Q.B. 745; [1964] 3 W.L.R. 433; [1964] 2 All E.R. 742, *Gardner v Moore* [1984] A.C. 548; [1984] 2 W.L.R. 714; [1984] 1 All E.R. 1100 and *Charlton v Fisher* [2001] EWCA Civ 112; [2002] Q.B. 578; [2001] 3 W.L.R. 1435.

[37] *Bernaldez* [1996] All E.R. (EC) 741.

[38] *Charlton* [2002] Q.B. 578, where the insured driver deliberately ran down the victim in a private car park.

[39] See above under the heading: "ECJ rulings interpreting the MVID".

[40] *Bristol Alliance* [2013] Q.B. 806 at [42].

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

Delaney 2: The Francovich claim

Returning once more to the *Delaney* case, after his setback in the Court of Appeal in 2011, the claimant appointed a new legal team: Philip Moser QC and Eric Metcalfe, both from Monkton Chambers. They both enjoy a well established expertise and reputation in handling tricky Human Rights Convention and European law challenges. It is no coincidence that the Court of Appeal's guidance in *Churchill* and *Evans* on the correct approach to interpreting our national law in this area recited a set of principles that were derived from a composite of different rulings concerning both Human Rights and European Law issues. This fresh perspective produced a radically different outcome.

In this action, Delaney sought damages from the State to recompense him for the loss of his compensatory entitlement, caused by its failure to implement the MVID properly. It is worth noting that the question as to whether s.152 of the 1988 Act is compatible with the MVID was not raised as an issue by Delaney's new legal team either, no doubt for sound tactical reasons. The gravamen of the case was confined to contending that the MIB's ability to exclude its liability under cl.6(1)(e)(iii) of the 1999 Agreement is inimical to the Community law obligation imposed under what is now art.1(4) of the Second MVID.[42] This one issue was determinative and such was the strength of the claimant's case, presumably it was considered that no back up position was necessary.

Mr Moser opened his client's case with a clear, simple and admirably concise statement of case along the following lines:

> "A Member State is obliged to provide for a system of compulsory car insurance for damage to property or personal injury; that system must compensate any third party victims, in particular passengers; and further, the system must include a compensatory body as insurer of last resort, in the event that there be a failure or breakdown at an anterior stage. Moreover, whereas the Directives do permit of "certain limited exceptions", these are the exceptions specified in the text of the Second Directive itself, and no more. Given that clause 6(1)(e)(iii) is not one of the certain limited exceptions, the UK (in the guise of this Defendant) is in breach."[43]

The approach adopted

The approach taken by the judge in *Delaney 2* was to look first to the MVID and to the interpretation placed on the relevant articles by the ECJ before attempting a purposive construction of the UK national law implementation of those provisions.

This involved consideration of the MVID listed above under the discussion of *Delaney 1*, as well as the ECJ rulings interpreting them.[44] As these provided a complete answer, it was not necessary to consider any domestic law interpretation on the same points. In adopting this approach, he effectively circumvented the Court of Appeal rulings that conflict with the superior authority of the ECJ.[45] Consequently, it is hoped that both of these rulings[46] can now be safely consigned to obscure obsolescence.

Mr Justice Jay was careful to point out[47] that the claimant was not contending that s.152(2) was incompatible with the MVID. Accordingly, his analysis was restricted to determining whether cl.6(1)(e)(iii) was lawful.

[42] Now art.10.1 of the Sixth MVID.
[43] *Delaney 2* (2014) 164(7610) N.L.J. 18 at [32].
[44] See above.
[45] *Delaney v Pickett* [2012] 1 W.L.R. 2149 and *Bristol Alliance* [2013] Q.B. 806.
[46] *Delaney v Pickett* [2012] 1 W.L.R. 2149 and *Bristol Alliance* [2013] Q.B. 806.
[47] *Delaney 2* (2014) 164(7610) N.L.J. 18 at [21].

The decision

Jay J was in no doubt as to what the relevant MVID meant and accordingly it was not necessary to make a reference to the ECJ. He held as follows:

- That the effect of the First, Second and Third MVID is to require a Member State to provide a compensatory guarantee for damage caused by a vehicle covered by the requisite compulsory third party motor insurance but where the policy has been subsequently avoided by the insurer.
- That the MVID require the UK Government to ensure that compensation is paid in all circumstances save those expressly set out in therein. So an insurer cannot seek to avoid liability to the victim (whether due to the policyholders actions or omission or to some misconduct on the part of the victim) unless it is expressly permitted by the MVID.
- Similarly, that cl.6(1)(e)(iii), not being an exclusion expressly stipulated within the MVID is incompatible with the MVID.
- That the Secretary of State for Transport is liable in damages for a breach of these EU Law provisions.

A point of difference

Mr Justice Jay opined that the effect of the MVID and the raft of ECJ rulings interpreting them meant that "(subject to the specified exceptions) any attempt by an insurer to avoid third party liability is of no effect". Furthermore,

> "… that were it not for the manner in which the MIB operates in this jurisdiction this state of affairs would have the tendency to place the UK in breach of the obligations under the MVID".

He went on to say that this arrangement left the United Kingdom "in a broad measure of compliance with the directives notwithstanding the existence of what is now section 152(2)".[48]

The Judge later revisited this theme when reviewing the ECJ authorities. He cited Advocate General Lenz's opinion in *Bernaldez* case and he seemed to suggest that this justified the way the United Kingdom permits insurers to avoid policies under s.152.[49] He observed that whilst Advocate General Lenz acknowledged that the general rule is that it is the insurer and not the compensating body (the MIB) that should compensate the victim, Member States are free to extend the competence of that body by statute, provided complete protection is ensured for the victims.[50]

A similar argument was deployed by Ward L.J. to justify his position in *Bristol Alliance*:

> " … in my judgment the scheme of the Act coupled with the MIB arrangements satisfy the aim and the spirit of the Directive to 'enable third party victims of accidents caused by vehicles to be compensated for all damage to property and personal injuries sustained by them'."[51]

One obvious point to make here is that whilst an advocate general's opinion is often highly instructive, it is the ECJ ruling that constitutes the binding precedent. Furthermore, as we have seen from the *Bernaldez* ruling itself, the ECJ took a very different line; one that is hard if not impossible to reconcile with that of Advocate General Lenz. On this point the ECJ ruled:

[48] *Delaney 2* (2014) 164(7610) N.L.J. 18 at [21].
[49] *Delaney 2* (2014) 164(7610) N.L.J. 18 at [36]–[39].
[50] Para.51 of Advocate General Lenz's opinion in *Bernaldez* [1996] All E.R. (EC) 741.
[51] *Bristol Alliance* [2013] Q.B. 806 at [68].

> "Article 3(1) of the First Directive precludes an insurer from being able to rely on statutory provisions or contractual clauses to refuse to compensate third-party victims of an accident caused by the insured vehicle."[52]

This is not expressed in precatory words; it is stated in absolute terms. This imperative is qualified only to the extent that the MVID expressly specifies: "persons entering a vehicle which they know to have been stolen".[53] The natural inference here being that it is the insurer that must satisfy the claim; no one else.

This point was driven home in December 2011 when the ECJ addressed this issue head on in its ruling in *Churchill*:[54]

> "… the payment of compensation by a national body[55] is considered to be a measure of last resort, provided for only in cases in which the vehicle that caused the injury or damage is uninsured or unidentified or has not satisfied the insurance requirements referred to in Article 3(1) of the First Directive."[56]

Then, as recently as July 2013 in *Csonka*[57] the ECJ considered what it had said in *Churchill* and concluded that what was meant by the final phrase "or has not satisfied the insurance requirements referred to in Article 3(1) of the First Directive" was that this applied to a situation where there was no insurance policy in place at all for the relevant vehicle.[58]

The combined effect of *Churchill* and *Csonka* is that the MIB should only be involved in cases where: (i) the vehicle responsible has absolutely no insurance in place at all; or (ii) where there is an insurance policy but the insurer has validly exercised its contractual exclusion on the ground that the victim is a passenger with knowledge that the vehicle is stolen.

The corollary of this seems to be that s.152(2), art.75 and the purported application of the 1999 Agreement to vehicles where some insurance was in place at the time of the accident, are all inimical to an EU law compliant regime.[59]

Accordingly, and in the writer's opinion, the proper application of EU law presents us with two basic options:

- If the defendant's vehicle is covered by a motor insurance policy,[60] save for the single exception of the passenger with knowledge that the vehicle is stolen, then the motor insurer is obliged by law to satisfy a relevant judgment under s.151(5) in full.
- The MIB should only become involved in claims where: (i) there was never any insurance in place at all; or (ii) where the stolen vehicle exception applies. It is acting ultra vires in every other scenario. This leaves no place for an Article 75 insurer imposing the terms of the 1999 Agreement on a hapless victim.

As the ECJ put it in *Farrell*:

> "… the Member States are not entitled to introduce additional restrictions to the level of compulsory insurance cover to be accorded to passengers …"[61]

[52] *Bernaldez* [1996] All E.R. (EC) 741 at [20].
[53] *Bernaldez* [1996] All E.R. (EC) 741 at [21].
[54] *Churchill* [2013] 1 W.L.R. 1776.
[55] Referring to the MIB.
[56] *Churchill* [2013] 1 W.L.R. 1776 at [41].
[57] *Csonka v Magyar Állam* (C-409/11) [2014] 1 C.M.L.R. 14.
[58] *Csonka* [2014] 1 C.M.L.R. 14 at [31]: "… that is to say, a vehicle in respect of which no insurance policy exists…".
[59] An infraction made all the more serious by the prejudicial nature of the 1999 Agreement, see the comment above under the heading: "Why the allocation matters".
[60] i.e. has some insurance in place on the vehicle responsible for the third party victim's loss.
[61] See *Farrell* [2007] E.C.R. I-3067 at [29].

There is no third option where a defendant driver is identified. This means that every year thousands of innocent accident victims are being unlawfully discriminated against by having their claims allocated to be handled by statutory insurers under the notoriously unjust and arbitrary provisions of the 1999 Agreement.[62]

Will Delaney be appealed?

The DfT has intimated to the author that it intends to appeal Mr Justice Jay's decision.

This seems to be confirmed by the *Daily Telegraph*,[63] where a DfT spokesman responding to the *Delaney 2* judgment is reported to have said:

> "We are disappointed with the judgment of the court despite the fact its effects will be very limited."
>
> "We are looking closely at the judgment and are minded to appeal. Even if the judgment were to stand, claims will be excluded from compensation where serious criminality and a close connection between the crime and the accident can be shown."

This only goes to prove that old proverb: there are none so blind as those that will not see.

DfT embarrassment

The *Delaney 2* decision cannot be anything other than a major embarrassment to the Secretary of State for Transport. The DfT is currently facing an infringement investigation by the European Commission into its widespread failure to fully implement the MVID.[64]

As recently as July 2013, the Minister was blithely asserting in a statement of intent, in the face of numerous written submissions to the contrary, that "These [MIB] agreements fulfil the UK's obligations under EU motor insurance law …".

Mr Justice Jay's findings

Mr Justice Jay's findings included:

- that the meaning of the relevant provisions within the European Motor Insurance MVIDs was clear and obvious to the point that they were "close to being self-evident";
- that the DfT*would* have taken legal advice;
- that the DfT had made a deliberate decision to add an exclusion of liability in cl.6 of the 1999 Agreement[65] when it was clearly not permitted under European law;
- that the DfT were "guilty of a serious breach of Community law", of such severity as to warrant *Francovich*[66] damages;
- that the DfT's plea that its infraction was somehow inadvertent or excusable should be rejected;
- As to the policy decision, that: "the best that may be said is that the Defendant decided to run the risk, which was significant, knowing of its existence";[67]

[62] For a detailed critique of the failings of the 1999 Agreement, see *Why the Uninsured Drivers Agreement Needs To Be Scrapped*, Nicholas Bevan, [2011] J.P.I.L. issue 2.

[63] D. Barrett, "Drug dealer wins car crash compensation battle" *Daily Telegraph*, June 3, 2014.

[64] *Bevan v The United Kingdom* , August 2013, EU Infringement Pilot Scheme reference 5805/13/MARK.

[65] This was not included in its 1988 predecessor.

[66] *Francovich v Italy* (C-6/90 and C-9/90) [1991] E.C.R. I-5357; [1993] 2 C.M.L.R. 66; [1995] I.C.R. 722.

[67] In this the judge was being rather generous to the DfT. He could have applied the "blind eye" test whereby actual knowledge is imputed to someone who suspects that the relevant facts do exist and who then takes a deliberate decision to avoid confirming that they do exist, see Lord Nicholls judgment in *White v White* [2001] UKHL 9; [2001] 1 W.L.R. 481; [2001] 2 All E.R. 43 at [53].

- the Judge repeatedly expressed his surprise at the "*remarkable*" lack of any relevant documentary records, when

> "A provision of this sort must have been the subject-matter of detailed written discussion and deliberation within the department, and (one would have thought) a Ministerial submission. And yet we have nothing";

- as to the DfT's abject failure to explain its policy position, he described this as a "deafening silence"; and
- he considered whether the DfT's conduct raised an inference of impropriety but refrained from doing so, but only just, or so it would seem.

Implications

If one then turns to examine the wider picture, it becomes readily apparent that the DfT's failings are not confined to the breach of EU law identified in *Delaney 2*; they are systemic. Note for example: the extensive breaches of Community law commented on previously in this Journal[68] and elsewhere.[69] These breaches riddle extensive sections of Pt VI of the 1988 Act,[70] they affect the EC Rights Against Insurers Regulations 2002 and of course they pepper both MIB Agreements. These infractions, almost without exception, serve the interests of motor insurers—at the expense of vulnerable accident victims the regime is intended to protect; why is that?

The DfT has also failed to deliver on its promise to deliver much needed reform: it has refused to enter into any dialogue on that reform, even with those whom it invited to respond to its badly flawed consultation[71] on the Uninsured and Untraced Drivers Agreements back in February 2013. Why?

The DfT has consistently demonstrated, not just in *Delaney 2* but in other legal challenges, a curious inability to explain or justify either its inaction or its unlawful national law provisions; why is that? Could this be in any way connected with the reason why the form and content of the MIB Agreements are redolent of a badly drafted insurance policy (as opposed to the product of a highly trained Parliamentary Counsel or civil servant) and why they are so partial to the business interests of insurers? The UK Government's obligation to transpose the art.10 MVID duty to compensate victims of uninsured drivers is so simple that its operative parts could set out on less than two sides of a single sheet of A4 paper, instead we have over 24 pages of Byzantine insurer legal jargon so complex that not even the Court of Appeal can interpret it consistently.

The DfT has consistently obstructed or resisted much needed reform. When presented with the chapter and verse of over 40 potential infractions of EU law along with constructive proposals for their remedy, it did nothing. When it was informed about the Cabinet Office's *Good Law* initiative and how its own provision in this area fell woefully short, it did nothing. It has even blocked the Law Commission's involvement recently; why is this? Given that even the DfT has conceded that the MIB Agreements need to be reviewed, why has it ignored the opportunity to restore legal certainty by codifying it?

[68] Nicholas Bevan "Reforming the Motor Insurers' Bureau", [2011] J.P.I.L. 39; Nicholas Bevan "Why the Uninsured Drivers Agreement 1999 Needs to Be Scrapped", [2011] J.P.I.L. 123; Nicholas Bevan "Marking the Boundary", [2013] J.P.I.L. 151.

[69] Nicholas Bevan "On the Right Road, Parts I to IV", N.L.J. 2013 (Feb); Nicholas Bevan "Asleep At The Wheel?", N.L.J. 2013 (Apr); Nicholas Bevan "Good Law?", N.L.J. 2013 (Jul).

[70] Section 151(8) was held to be seriously flawed in *Churchill* [2013] 1 W.L.R. 1776). In that case, the defect obliged the Court of Appeal to adopt a bizarre and unprecedented measure: it effectively legislated an amendment to a statutory provision by adding a new "notional" clause to s.151(8) of the 1988 Act as a stop gap measure. See the writer's case comment on the Court of Appeal decision in *Churchill* [2013] 1 W.L.R. 1776 in [2013] J.P.I.L. issue 1.

[71] Department for Transport, *Review of the Uninsured and Untraced Drivers Agreements* (HMSO, February 27, 2013), available online at: *www.gov.uk/government/consultations/review-of-the-uninsured-and-untraced-drivers-agreements* [Accessed July 13, 2014].

The DfT claims that the MIB is no more than a private outsourced contractor. However, it is fairly clear that any properly informed court would be almost bound to conclude that the MIB is indeed an emanation of the state, notwithstanding Flaux J.'s ruling[72] to the contrary;[73] so why perpetuate this fiction?

The DfT has admitted that it does not control or supervise the way the Motor Insurers Bureau operates. As a consequence, it does not know how many injured victims have either had their claims wrongly refused or been undercompensated. By any view this is a serious dereliction of its basic executive responsibility.

In *Delaney 2*, the DfT sought to argue that its infraction was inadvertent and excusable; that received short shrift from the Judge. One is left to wonder what might have been said if the Court had realised that the United Kingdom actively intervened in the *Bernaldez* case back in 1996. The ECJ ruling in that case could have left the United Kingdom in no doubt that its policies were deeply flawed, but three years later it signed off the notorious 1999 Agreement that introduced additional infractions of EU law.

All this is deeply disturbing and causes one to wonder if the DfT is dysfunctional. These extensive failings are probably more indicative of incompetence than bad faith, but such is the muddle that it is difficult to tell the difference. It hard to see how the DfT can be acting in the best interests of individual citizens when it is so closely aligned with the highly influential multi-billion pound motor insurance industry and its commercial interests. It is clear that the DfT regularly meets in private with the MIB and other key representatives from the motor insurance industry in preference to claimant representative bodies. Perhaps there is nothing intrinsically wrong with that—after all the motor insurance industry plays a vital role in delivering tort law compensation—but by the same token, equal if not superior rights apply to the millions of ordinary citizens who fund what is this highly lucrative captive market through their expensive motor premiums. So why, in a representational democracy where precepts of government by consent, transparency and accountability are supposed to count for something, does the DfT chose to cloak its deliberations and discussion in secrecy and give every appearance of slavishly towing a line dictated by the commercial interests of insurers? Furthermore, surely there is something intrinsically wrong with a system of government, let alone its legal system, if the only realistic means by which individual citizens can bring ministers to account and seek to remedy the extensive failings in its national law provision is to file a formal infringement complaint with the European Commission, in the hope that it will exercise its discretion and intervene.

By any measure, the DfT has an abysmal track record in this area. It has failed to safeguard the legitimate interests of a particularly vulnerable group of citizens who, through no fault of their own, suffer the double misfortune of being injured through someone else's fault but where, for purely technical reasons, the insurer is seeking to wriggle out of its responsibility to compensate the victim. They have a legal right to better, fairer treatment; urgent measures are required and now!

Points to take away

- We cannot take any of our national law provision in this area at face value.
- Much of our national law provision for guaranteeing the compensatory safeguards of accident victims is unlawful or misleading because it conflicts with the primary source of law derived from the MVID. The problem infects not only our statutory[74] and extra-statutory provision,[75] but much of the case law interpreting this domestic law provision.
- Our national law provision in this area must *always* be construed in the light of the MVID and the relevant ECJ rulings, not just when the meaning is unclear.

[72] In *Byrne v Motor Insurers' Bureau* [2007] EWHC 1268 (QB); [2008] 2 W.L.R. 234; [2007] 3 All E.R. 499.

[73] If a privatised utility company can be deemed to be an emanation of state, why not the MIB? The excellent judgment of Birmingham J. in *Farrell v Whitty* [2008] IEHC 124; [2008] Eu. L.R. 603 held that the Irish equivalent of the MIB was an emanation of state.

[74] The 1988 Act Pt VI and the EC Rights Against Insurers Regulations 2002.

[75] 1999 Agreement, the Untraced Drivers Agreement 2003 and the so called Article 75 procedure.

- The MVID and the ECJ rulings interpreting them are our primary sources of law. Ironically, it is this EU law that brings us much closer to the original UK parliamentary concept of a comprehensive guarantee scheme envisaged under the Road Traffic Act 1930 than the much adulterated regime we have to contend with now.
- The DfT has been exposed for deliberately flouting EU law for nearly two decades.
- Although the DfT bears the primary responsibly for bungling the transposition of the MVID into UK national law, we lawyers also have our share of the blame for not challenging these infractions more often than we do. If we do not identify and raise these basic breaches of EU law when they compromise our clients' legal rights, then we cannot assume that the courts will pick these points up independently.[76]
- The European Commission is investigating over forty instances where our domestic law appears to infringe EU law.[77] The DfT trenchantly insists that its provision is compliant.
- Whilst reform in this area is likely to follow, it is becoming increasingly clear that the DfT will drag its feet and delay this for as long as it can; however, there is no need to wait for the DfT to act to remedy its defective domestic law provision, as the courts are obliged to construe our national law, in so far as is possible, in conformity with EU law. *Delaney 2*'s legacy is to demonstrate how this is to be achieved. There are some remarkably able first instance judges who understand the issues and how to construe our national law in conformity with EU Law, sometimes better than the Court of Appeal.[78]
- There is no need to defer to the Court of Appeal's inconsistent and sometimes misleading interpretation of the MVID where the superior authority of the ECJ has already provided a clear ruling on the proper interpretation of the MVID. *Delaney 2* illustrates this principle.
- The MIB's role is limited to the dwindling number of cases where there never was any insurance in place for the vehicle responsible for the accident.
- A proper application of EU law has no role for an Article 75 insurer; which is an otiose concept. Consequently, thousands of claims are being wrongly allocated as uninsured driver cases and run under the highly prejudicial terms of the 1999 Agreement, which is riddled with oppressive, unjust and unlawful conditions and limitations of liability.
- The present shambles presents brilliant opportunities for successful legal challenges and for restoring a proper and fair balance between the interests of accident victims and the motor insurance lobby.
- The recent track record of badly pleaded and sadly botched claims and the widespread unquestioning resignation by many claimant practitioners to living with, rather than contesting, the DfT's unsatisfactory national law provision suggests an urgent need for training on the MVID and on basic EU law concepts and remedies. Without this, it is hard to see how claimant lawyers will step up to the plate and robustly safeguard their clients' full legal entitlement to redress.
- The Secretary of State should be routinely joined as a party whenever the DfT's failure to fully implement the MVID prejudices a victim's lawful entitlement. Direct effect applies against ministers of the Crown.[79]

[76] Especially in this Draconian post-*Mitchell* era.

[77] *Bevan v The United Kingdom* , August 2013, EU Infringement Pilot Scheme reference 5805/13/MARK.

[78] Roll of Honour: Jay J., in *Delaney 2* (2014) 164(7610) N.L.J. 18; Blair J., in *Wilkinson v Fitzgerald* [2009] EWHC 1297 (QB); [2010] 1 All E.R. 198; [2010] 1 All E.R. (Comm) 278; and Tugendhat J., in *Bristol Alliance* [2011] 2 All E.R. (Comm) 1113.

[79] Where the claim involves an uninsured or untraced driver, then the MIB should also be joined as a party and described as an emanation of state against which the principle of direct effect applies: see *Foster v British Gas Plc* (C-188/89) [1991] 1 Q.B. 405; [1991] 2 W.L.R. 258; [1990] 3 All E.R. 897; *Farrell* [2007] E.C.R. I-3067; and *Farrell* [2008] IEHC 124.

- Because the UK has little or no discretion in the exclusions or limitations permitted under the MVID, any breach in this regard is likely to be treated as a serious breach.[80]
- A working knowledge of EU law is now an essential requirement for competency in RTA practice. We are all European lawyers now![81]

[80] See Jay J.'s judgment in *Delaney 2* (2014) 164(7610) N.L.J. 18 at [78]–[117].
[81] The author offers his thanks to Colin Ettinger for this phrase.

Quantum Leap: How to be Creative about Claiming Non-Pecuniary Loss

Jonathan Wheeler*

Aggravated damages; Child abuse; Exemplary damages; Loss of amenity; Pain and suffering; Vicarious liability

This is the text of a paper originally presented to the APIL/ACAL Child Abuse Claims Conference in June 2014 by Jonathan Wheeler. Jonathan examines the role that aggravated damages can play in compensating those who have been the victims of abuse including the overlap with damages for pain, suffering and loss of amenity ("PSLA") and reviews recent case law. He also considers the extent to which exemplary damages may be available and reviews the position on vicarious liability. Finally he looks at where the current law on damages could be reformed to improve redress for abuse victims.

Introduction

Tortious damages are generally designed to compensate a victim: to put someone back in the situation in which they would have been, had the tort not been committed. They exist to make good the pecuniary and non-pecuniary losses the claimant has incurred. That is all the law can apparently do; it cannot force a tortfeasor to apologise, it cannot force a claimant to have treatment, and it cannot wave a magic wand to make it all get better, or indeed erase the past. In effect then, the law is a blunt instrument in trying to achieve its aim.

We all know that damages for any injury or harm are not a "lottery win"; claimants would rather the tort had not been done to them, rather than receive financial restitution. Damages can of course also act as a marker of society's disapproval for the tort, particularly the torts of trespass to the person (assault, battery and false imprisonment) which we routinely deal with in abuse claims; but they cannot make the pain go away.

Damages for pain, suffering and loss of amenity ("PSLA") suffered by people who have been abused are in my mind woefully inadequate; we all know clients whose lives have been adversely and permanently altered because of the experiences they went through as children. In abuse cases, there are often causation issues too which come into play to reduce a claimant's general damages award: previous or subsequent traumas caused by other life events may have had an impact on a client's psychological make-up and these somehow need to be taken into account—often as some rude percentage—and "deducted" from the compensation that a court would ordinarily have awarded.

Further, pecuniary losses are difficult to evidence, particularly loss of earnings. Because our clients were abused as children, when their true educational and occupational potential was just that — a potential not a reality—it is difficult to convince a court that: yes, my 35-year-old client, who is now on benefits, would in fact have been an astrophysicist, or a teacher, or even someone capable of working in some capacity, had he not been buggered by his scout leader at the age of 10. The number of abuse cases which attract a multiplier/multiplicand approach to loss of earnings are few and far between. As I explain to my clients, there is not some parallel universe which shows them now—the abused and broken person that they are—and which shows them as they would have been had they not been abused, but that's practically

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what the courts require us to evidence. As a result, in my view, our clients are seriously under compensated by the courts for the wrongs that have been done to them.

Many of us are being creative in the special damages claims we are advancing these days on behalf of our clients to try and redress the balance—claiming damages for wasted expenditure on alcohol for example, where a client is diagnosed with the psychological and ICD10 verifiable label of "alcohol dependence syndrome", but the courts are extremely wary of these types of claims. In addition, there are, of course, policy reasons why a client's illicit drug use, or subsequent criminal behaviour which may be directly related to the abuse suffered in childhood, are not compensatable at all.

What I seek to explore in this paper is not pecuniary loss, but non-pecuniary loss, and not "basic" general damages (by which I mean compensation for PSLA). I want to show that we can be creative in our use of other common law damages to enhance and increase the value of our clients' claims. Here, I am talking about aggravated and exemplary damages. These have their origins in ancient common law remedies and as such we may have more success in claiming them for our clients than we will in advancing some of our more modern and inventive ideas for pecuniary losses.

To briefly introduce these topics: aggravated damages are (since 1964) said to be compensatory damages which can be awarded on top of "basic" general damages to reflect the aggravated nature of the harm caused to the claimant by the tortfeasor. Exemplary damages are, however, essentially punitive in nature: to punish a defendant whose conduct is said to be outrageous or scandalous. I think both have a place in some of the claims we can make on behalf of our clients, and if universally applied, will raise the bar for the awards we can all recover.

So in this paper we will look at definitions, how the law has developed, and how practically we can apply these heads of damages to our cases; I will also give a summary of some recent cases where these issues have been raised.

Aggravated damages

Definition and the development of the recent common law

The modern view of aggravated damages can be found in the judgment of Lord Devlin in the case of *Rookes v Barnard*,[1] a leading case in this area to which we will continue to return. They are only available in cases of trespass against the person and other intentional torts (so not negligence) and need to be specifically pleaded.[2] They exist to compensate for the manner in which the tort was committed although there is some understandable confusion over whether there is also a punitive element to the damages award—which I will come to later.

Lord Devlin judged that an aggravated damages award can be claimed for the tortfeasor's exceptional conduct where this was such as to injure the claimant's feelings of pride and dignity, and give rise to humiliation, distress, insult and pain. The conduct complained of must be offensive, or accompanied by malevolence, spite, malice, insolence or arrogance. This clearly applies to many of the claims we bring for survivors of abuse.

In another leading case, to which we will also return, the House of Lords subsequently suggested that aggravated damages should compensate the claimant for mental distress or "injury to feelings" where the tort has been committed to cause insult, indignity, humiliation, and a heightened sense of injury or grievance.[3]

[1] *Rookes v Barnard (No. 1)* [1964] A.C. 1129; [1964] 2 W.L.R. 269; [1964] 1 All E.R. 367.
[2] CPR r.16.4(1)(c), dealing with the contents of the Particulars of Claim
[3] *Broome v Cassell & Co Ltd (No.1)* [1972] A.C. 1027; [1972] 2 W.L.R. 645; [1972] 1 All E.R. 801.

Dyson J. in the more recent case of *Appleton v Garrett*[4] adopted the Law Commission's definition[5] that there are two pre-conditions for an award of aggravated damages:

1) Exceptional or contumelious conduct or motive on the part of a defendant in committing the wrong or in certain circumstances subsequent to the wrong; and
2) Mental distress sustained by the claimant as a result.

"Contumelious" is defined by the Oxford English Dictionary as being an archaic term: "(of behaviour) scornful and insulting; insolent".

So if the loss that the claimant has suffered is exacerbated or aggravated by the conduct of the defendant, he or she should be compensated for it—there is clearly a link here between the offensive conduct and the claimant's injuries.

It should be noted that—as with all damages awards—the court has discretion as to whether or not to award damages, even if the pre-conditions have been satisfied.

Are aggravated damages compensatory or punitive?

Aggravated damages are compensatory insofar as a "basic" award of general damages would be insufficient to compensate the claimant for the harm suffered, due to the aggravating factors of the case.[6] But they can in a sense be seen as punitive too because of the requirements for "exceptional conduct" on the part of the tortfeasor.[7] Note that the claimant does have to subjectively experience the injured feelings or mental distress to claim the award. Note too, that of course the law can now award damages for mental distress and injury to feelings (in discrimination cases for example) as "basic" general damages, so these improvements in the law since *Rookes* would appear to suggest that aggravated damages are for something more, and are designed to go some way in punishing the defendant. The fact that aggravated damages too are not allowed in cases brought in negligence, and indeed breach of contract, would again suggest the punitive nature of the award, because it can only be made in cases where the tort was intentional.

Conduct complained of subsequent to the tort's commission

Of particular application to abuse claims is that the conduct complained of can be subsequent to the wrong having been committed. Examples include the conduct of the defendant in the process of court proceedings, whether within the proceedings where aggravated damages are claimed, or maybe in criminal proceedings which have taken place previously[8]. Examples include where, for example, the defendant pursued hopeless points with a view to delaying judgment, or if he has engaged in a hostile cross examination of the claimant, or used litigation to intimidate the claimant, or to generate wider publicity to humiliate the claimant. My firm had a case where aggravated damages were claimed for the defendant's conduct in putting our client through cross examination at his Old Bailey trial where he questioned her sanity and integrity, and then sought to re-litigate his unsuccessful defence in the civil proceedings and even counter-claimed against her for malicious prosecution.[9]

[4] *Appleton v Garrett* [1996] P.I.Q.R. P1; [1997] 8 Med. L.R. 75; (1997) 34 B.M.L.R. 23.
[5] Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (The Stationery Office, 1997), Law Com, No.247.
[6] *Rookes v Barnard* [1964] 2 W.L.R. 269.
[7] In *Thompson v Commissioner of Police of the Metropolis* [1998] Q.B. 498; [1997] 3 W.L.R. 403; [1997] 2 All E.R. 762, Lord Woolf MR held that "there can be a penal element in the award of aggravated damages. However they are primarily to be awarded to compensate the plaintiff for injury to his proper pride and dignity and the consequences of his being humiliated".
[8] See for example in cases of false imprisonment: *Warby v Cascarino*, *The Times*, October 27, 1989; *Thompson* [1997] 3 W.L.R. 403.
[9] *CXX v DXX* [2012] EWHC 1535 (QB), which subsequently settled without an apportionment between general and aggravated damages.

Overlap between aggravated damages and pain, suffering and loss of amenity

The defendants will often argue that there is some overlap between general damages for psychiatric injury in abuse cases and aggravated damages, and that a separate award should not be made. Notably Moore-Bick L.J. in *Rowlands v Chief Constable of Merseyside Police*[10] cautioned that:

> "… any injury for which compensation has been given as part of the award of basic damages should not be the subject of further compensation in the form of an award of aggravated damages."[11]

The trick is to differentiate the aggravated damages award from PSLA, and to counter the defendant's arguments, reference should be made to the Judicial College Guidelines which say:

> "Claims relating to sexual and physical abuse usually include a significant aspect of psychiatric or psychological damage. The brackets in this chapter provide a useful starting point in the assessment of general damages in such cases. It should not be forgotten, however, that this aspect of the injury is likely to form only part of the injury for which damages will be awarded. Many cases include physical or sexual abuse and injury. Others have an element of false imprisonment. The fact of an abuse of trust is relevant to the award of damages. A further feature, which distinguishes these cases from most involving psychiatric damage, is that there may have been a long period during which the effects of the abuse were undiagnosed, untreated, unrecognised or even denied. Aggravated damages may be appropriate."[12]

Enlightened guidance to the judiciary there!

Note also the definition in the Civil Procedure Rules: Aggravated damages are: "*additional* damages which the court may award as compensation for the defendant's objectionable behaviour" (emphasis added).

Aggravated damages and negligence

It is interesting to consider the law relating to aggravated damages and negligence. Perhaps a case crying out to be eligible for a claim for aggravated damages was *Kralj v McGrath*,[13] a decision by Woolf J., as he then was, and subsequently approved by the Court of Appeal. The claimant claimed against her obstetrician in negligence and breach of contract. She was giving birth to twins and whilst one had been delivered successfully, the other was in a transverse position. In order to aid the delivery of the second baby, her consultant manually rotated the baby inside the mother's womb without any anaesthetic, causing her intense pain. The child was delivered, but died of its injuries as a result. The Judge described the consultant's treatment of Mrs Kralj as "horrific" and "completely unacceptable". Despite negligence being found against the obstetrician (the facts of the case certainly fit the *Rookes v Barnard* test), the High Court refused to award aggravated damages because the case was one of negligence. It occurs to me that the case could also have been brought in trespass (surely the conduct complained of could have been characterised as assault and battery), and had it been, I wonder if the Court's decision would have been different.

The Court of Appeal approved this decision in *AB v South West Water*,[14] where it struck out the claimants' claims for aggravated damages which were pleaded on the basis of the claimants' indignation at the defendant's tortious conduct in a claim founded on public nuisance (so a non-intentional tort). Feelings

[10] *Rowlands v Chief Constable of Merseyside* [2006] EWCA Civ 1773; [2007] 1 W.L.R. 1065; [2006] Po. L.R. 187.
[11] *Rowlands* [2007] 1 W.L.R.1065 at [26].
[12] Judicial College, *Guidelines for the Assessment of General Damages in Personal Injury Cases*, 12th edn (Oxford: Oxford University Press, 2013) at Chapter 4, "Psychiatric & Psychological Damage".
[13] *Kralj v McGrath* [1986] 1 All E.R. 54; (1985) 135 N.L.J. 913.
[14] *AB v South West Water Services Ltd* [1993] Q.B. 507; [1993] 2 W.L.R. 507; [1993] 1 All E.R. 609.

of anger and indignation were not a proper subject for compensation, the Court said, but of course aggravated damages can be awarded for precisely that in defamation cases, and cases involving assault, battery, false imprisonment and discrimination.

A 10 per cent uplift post-Jackson?

In *Simmons v Castle*,[15] the Court of Appeal gave (revised) effect to Lord Justice Jackson's proposals for a 10 per cent increase in general damages which he felt would ameliorate at least some of the effects of his civil justice reforms: "*Accordingly*" said the Lord Chief Justice, giving the verdict of the court:

> "we take this opportunity to declare that, with effect from 1 April 2013, the proper level of general damages in all civil claims for (i) pain and suffering, (ii) loss of amenity, (iii) physical inconvenience and discomfort, (iv) social discredit, or (v) mental distress, will be 10% higher than previously, unless the claimant falls within section 44(6) of LASPO."[16]

Bearing in mind that aggravated damages are said to be a) compensatory and b) to compensate for mental distress (as defined by the House of Lords in *Broome v Cassell*)[17] does the 10 per cent uplift apply to aggravated damages too? It must surely be arguable.

Relevant cases in which aggravated damages have been awarded

Let's look at some recent cases where aggravated damages have been awarded, relevant to our claims.

G v Williams[18] (1995) was a claim for compensation for rape. General damages were awarded at £50,000 (by a jury), and these were the subject of the appeal by the defendant. The Court of Appeal recognised that this was a high award in the circumstances (and of its time) but upheld the award in total by recognising a PSLA element of £15,000, and aggravated damages of £35,000. It was noted that the defendant had sought to defend the case against him by making allegations about the claimant's character (which would have amounted to defamation, Thorpe J. found) so this subsequent behaviour (as well as the tort itself) was relevant.

Appleton v Garrett[19] (1997) concerned a dentist who had carried out grossly negligent and unnecessary treatment on his patients amounting to intentional physical assaults. Aggravated damages were awarded by Dyson J. who set a figure of 15 per cent of the general damages award for each claimant, which increased their awards by between £1,050 and £2,040.

In *Marriott v Parrington*[20] (1999), the Court of Appeal dismissed an appeal against an award of £30,000 aggravated damages (and £25,000 general damages) in another rape case.

In *Richardson v Howie*[21] (2005), aggravated damages were claimed by the claimant for a vicious assault with a bottle by her boyfriend. The appellate tribunal suggested that it was no longer appropriate to characterise an award for damages for "injury to feelings" as aggravated damages except in wholly exceptional circumstances. Damages for "injury to feelings" may include compensation for indignity, mental suffering, humiliation, distress, anger and indignation at the defendant's conduct. These could be subsumed in a general damages award and an award of aggravated damages was not appropriate on the facts of this case. This seems an odd decision and out of step with previous and subsequent jurisprudence,

[15] *Simmons v Castle (No.2)* [2012] EWCA Civ 1288; [2013] 1 W.L.R. 1239; [2013] 1 All E.R. 334.
[16] *Simmons* [2013] 1 W.L.R. 1239 at [50] (which replaced [20] of the Court of Appeal's earlier judgment in the same case).
[17] *Broome* [1972] 2 W.L.R. 645.
[18] *G v Williams* , The Times, November 24, 1995.
[19] *Appleton v Garrett* [1996] P.I.Q.R. P1.
[20] *Marriott v Parrington* [1998] C.L.Y. 1509.
[21] *Richardson v Howie* [2004] EWCA Civ 1127; [2005] P.I.Q.R. Q3; (2004) 101(37) L.S.G. 36.

but as a decision of the Court of Appeal it has force, and has yet to be disapproved. The best one can do if it is raised by a defendant is confine its remit to the facts of that particular case.

In *AT v Dulghieru*[22] (2009), the court assessed damages for a group of young women who had been trafficked and enslaved in prostitution. On top of general damages awards for what the women had suffered, ranging from £82,000 to £125,000, aggravated damages of between £30,000 and £35,000 were awarded because the defendants' conduct was appalling, malevolent, and utterly contemptuous of the claimants' rights. This was an example of the sort of exceptional conduct which would justify an aggravated award.

In *BJM v Eyre*[23] (2010), a 12-year-old boy had been groomed and sexually assaulted by one defendant, then abducted and "sold" to another for the purposes of prostitution. He was repeatedly raped and subjected to acts of depravity. Swift J. awarded £70,000 in general damages and considered an aggravated award. She noted that the claimant had been treated "as a chattel to be bought, sold and used sexually". He had been threatened with grave physical harm if he did not comply with the defendant's demands, and blackmailed over images taken of him when engaging in sexual acts at the behest of the defendants. The judge found that he had been "terrified". The defendants had sought to deny their wrong doing at the criminal trial for a substantial period of time and the claimant had faced the prospect of recounting his abuse and humiliations in a criminal court. This was such a case where, if an award of aggravated damages were not made, the claimant would not be properly compensated. However, the judge bore in mind that the award was compensatory and not punitive and she was aware of the risk of double recovery. She awarded £20,000.

In *EB v Haughton*[24] (2011) Mrs Justice Slade awarded general damages of £28,000 for abuse suffered in childhood but refused the claimant's application for aggravated damages. She noted that whilst the claimant was distressed at having to give evidence at the criminal trial, the defendant was acquitted on all counts and it would be wrong therefore to take that into account. Whilst in no way minimising the defendant's despicable conduct towards her, not every case warranted an award of aggravated damages and this was the case here. Compensation for the mental distress suffered was reflected in the general damages award.

RAR v GGC (2012)[25] concerned a case of sexual abuse perpetrated by the claimant's stepfather from the age of 7 to 12. The abuse was most serious, and general damages were awarded of £70,000. The Judge (Nicola Davies J) felt it appropriate to award an additional £10,000 by way of aggravated damages to reflect the cruel manner in which the assaults had been committed. She cited the threats to the claimant—a vulnerable girl—to send her to a children's home if she did not comply with the step father's sexual demands, and noted that there was no escape as the claimant was abused in her own home. Further, the taking of photographs of the claimant in compromising positions caused her additional humiliation and distress. The judge made clear in her judgment that this did not represent a "double recovery" with the general damages awarded.

In *GLB v TH* (2012),[26] £67,500 was awarded for PSLA for abuse suffered by the claimant at the hands of her grandfather from the age of 11 to 16. £15,000 was awarded for aggravated damages because the abuse represented an abuse of trust and in recognition of the emotional upheaval caused by the conflict of emotions experienced: the claimant's grandfather was, on the one hand, nice and kind and, on the other, her abuser. There was also a loss of pride and self esteem caused by the abuse that was not compensated by way of the PSLA award.

[22] *AT v Dulghieru* [2009] EWHC 225 (QB).
[23] *BJM v Eyre* [2010] EWHC 2856 (QB).
[24] *EB v Haughton* [2011] EWHC 279 (QB).
[25] *RAR v GGC* [2012] EWHC 2338 (QB).
[26] *GLB v TH* [2012] EWHC 3904 (QB).

X v Cornell (2013),[27] was another child abuse case. £37,500 was awarded by way of general damages, and £5,000 awarded by way of aggravated damages because the test of "exceptional or contumelious conduct" had been met.

We see from these that back in the 1990s, the Court of Appeal was upholding aggravated damages awards in rape cases at well over the amount in fact awarded for "basic" general damages. The most recent clutch of abuse cases in which awards have been made since 2009, reveal aggravated damages figures of between, roughly, 15 per cent and 30 per cent of the PSLA award.

Exemplary Damages

Definition and the development of the recent common law

We return to *Rookes v Barnard*[28] and Lord Devlin, for the beginning of the modern take on exemplary—sometimes called punitive—damages. His lordship described exemplary damages as "anomalous", as they confuse the civil and criminal functions of the law. He felt constrained by precedent from abolishing them altogether but managed to limit their scope by reclassifying many previous exemplary awards as compensatory and therefore more properly renamed them as aggravated damages. There then remained only three classes of case which could qualify for exemplary damages:

1) where there has been oppressive, arbitrary or unconstitutional action by servants of the government;
2) where the defendant's wrongful conduct was calculated by him to make a profit for himself which may well exceed the compensation otherwise payable to the claimant; or
3) where expressly authorised by statute.[29]

In a further effort to limit their application, Lord Devlin decreed that they should only apply to torts for which they had been previously awarded before 1964—which then ruled out more modern torts such as discrimination claims. That ruling has not survived the House of Lords decision in *Kuddas v Chief Constable of Leicestershire*.[30] It follows, therefore, that unlike aggravated damages, exemplary damages can be awarded in cases of intentional *and* non-intentional torts, although it would be a rare case brought in negligence alone which would satisfy the test. They are more likely to be awarded in cases of malicious prosecution, false imprisonment and assault and battery. However, like aggravated damages, they must be specifically pleaded.[31]

We will take these two different kinds of case in turn as either (and sometimes both) may apply to abuse claims.

Oppressive, arbitrary or unconstitutional conduct

This has also been defined by Bingham MR in *AB v South West Water*[32] as "a gross misuse of power, involving tortious conduct, by agents of the government."

[27] *X v Cornell* , Unreported, August 1, 2013 (QB).
[28] *Rookes v Barnard* [1964] 2 W.L.R. 269.
[29] Of no application to the cases under consideration in this paper, but there are statutory remedies for exemplary damages in cases involving conversion of goods and breach of copyright.
[30] *Kuddus v Chief Constable of Leicestershire* [2001] UKHL 29; [2002] 2 A.C. 122; [2001] 2 W.L.R. 1789.
[31] CPR r.16.4(1)(c) again.
[32] *AB v South West Water* [1993] 2 W.L.R. 507.

An important point to note for us as child abuse lawyers is that the three descriptions of conduct are to be read disjunctively.[33] The House of Lords in *Broome*[34] said that "servants of government" should be "widely construed" to include anyone exercising governmental power. We know that a water company, set up under statute to supply water for a profit, does not discharge governmental functions, nor does it act as an instrument or agent of the government (*AB v South West Water*).[35] The fact that in some situations such a body could be judicially reviewed is "unhelpful" (Bingham MR) and the public law test is not the same.

As the authorities will show, we know that exemplary damages can be awarded against police and prison officers. Should they not be claimed in appropriate cases involving social workers, youth workers on the local authority payroll and, for that matter, teachers in state schools? I can find no authorities on this either way. Exemplary damages have however been awarded in cases of wrongful sex and racial discrimination against public employers.[36]

Calculated to make a profit which exceeds the compensatory award

"Profit" can be extended as a definition "beyond money making" in the strict sense (said Lord Devlin in *Rookes*) to include a case where the defendant seeks to make a gain by committing the wrong. "Calculated" is where the defendant cynically pursues a course of conduct knowing it to be wrong, or reckless as to whether it is wrong or not, because the advantages to him of going ahead, outweigh the risk involved. Profits made in the usual course of business per se are insufficient to bring them into this category, but there again they are "not intended to be limited to the kind of mathematical calculations to be found on a balance sheet".[37] Think how this can apply to your cases: defendants who have made money out of prostituting your client, or selling or exchanging pictures of them would definitely be covered here.

What about the head teacher or governors of a private school who cover up child abuse to prevent a scandal, and ultimately save a loss in fee income? *Catnic Components Ltd v Hill*[38] is authority for the proposition that the actions of a defendant in seeking to save himself the loss he would otherwise suffer if he refrained from committing the tort would bring him within the scope of the rule.

There is also authority (from Lord Diplock in *Broome* again) that an award of exemplary damages should not be restricted to the actual financial gain made: they exist to teach the wrong-doer that "tort does not pay".

The risk of "over punishment"

Like aggravated damages, exemplary damages are discretionary, even if a case satisfies one of the tests.[39] Indeed there may be a conflict—or a risk of "over punishment"—if the criminal law, or some other regulatory sanction, has been invoked against the tortfeasor prior to the compensation claim being considered. In *Archer v Brown*,[40] Pain J. felt that any previous punishment under the law in different proceedings would be a matter going to the court's discretion as to whether to award aggravated damages. The Court of Appeal, in declining to award exemplary damages in *AB v South West Water*, referred to the fact that the defendant had been convicted and fined for polluting a water supply. However in *Ashgar v*

[33] See *Huckle v Money* 95 E.R. 768; (1763) 2 Wils. K.B. 206; *Broome* [1972] 2 W.L.R. 645, *Holden v Chief Constable of Lancashire* [1987] Q.B. 380; [1986] 3 W.L.R. 1107; [1986] 3 All E.R. 836.

[34] *Broome* [1972] 2 W.L.R. 645.

[35] *AB v South West Water* [1993] 2 W.L.R. 507.

[36] For a discussion of this topic see *Ministry of Defence v Fletcher* [2010] I.R.L.R. 25, in which in fact an initial award of £50,000 for exemplary damages was overturned on appeal. The EAT gave guidance as to in what circumstances exemplary damages should be awarded in discrimination claims. Interestingly an award of aggravated damages was upheld in that case, but reduced on appeal from £20,000 to £8,000.

[37] *Broome* [1972] 2 W.L.R. 645.

[38] *Catnic Components Ltd v Hill* [1983] F.S.R. 512 at [539]–[540].

[39] *Broome* [1972] 2 W.L.R. 645, per Lord Hailsham.

[40] *Archer v Brown* [1985] Q.B. 401; [1984] 3 W.L.R. 350; [1984] 2 All E.R. 267.

Ahmed[41] the Court of Appeal upheld an award of exemplary damages in a case where the claimant had been unlawfully and forcefully evicted from his home by his landlord. Even though the landlord was in prison for what he had done, there was "a great deal more to the outrageous conduct which followed the eviction which justified the judge's finding".

How to calculate awards of exemplary damages

There has been much more guidance from the courts as to the proper method of calculating exemplary damages, mainly because many of the reported cases involve jury awards, following cases of wrongful arrest and false imprisonment against the Police. Lord Devlin in *Rookes* pleaded for "moderation and restraint" when making any award. Judges do seem to have taken this to heart!

Where two or more tortfeasors are sued together, and they are jointly and severally liable for the damages award, the level of exemplary damages should be fixed to that which is necessary to punish the defendant who bears the least responsibility for the tort.[42] This may be relevant in abuse cases where you are suing the abuser directly as well as their employer or associate abusers. The court will be particularly concerned with unfairness in punishing the least liable tortfeasor with an award of exemplary damages, as he may be unable to reclaim this as against the other tortfeasor(s) by way of a contribution or indemnity, due to their impecuniosity.

In addition, with multiple claimants, only one award is appropriate and later aggregated between all claimants, although if the conduct has affected more than one claimant then that is likely to be taken into account in the size of the award. Again, detailed guidance on this is given in *Broome v Cassell*. This of course assumes that all claimants are represented in the same action. We know that that does not always happen in our cases. There is no guidance about what happens in that situation, save that the Law Commission opines that "the first past the post takes all" and once exemplary damages are awarded for a wrong, such an award cannot be claimed by claimants in subsequent litigation.[43]

Relevant cases in which aggravated damages have been awarded

In *Huckle v Money*[44] (1763) the appeal court refused to upset an award of £300 awarded to a plaintiff who had been falsely imprisoned for six hours, even though whilst he was incarcerated the defendant "had used him very civilly by treating him with beef steaks and beer". So in this case it was merely the wrongful arrest and imprisonment by the defendant (a servant of the Government) which was sufficient in itself to justify an exemplary damages award, confirming indeed that the three examples of bad conduct in the test can be mutually exclusive. Having applied a retail prices index calculation to this sum, this would be worth £38,360 in today's money.[45] The size of such an award for such a wrong (six hours unlawful detention) has not been matched as far as I can make out in more recent cases!

Most exemplary damages cases involve false imprisonment claims against the Police, and we will be discussing those in the context of our next section on vicarious liability. However, also of note is a case I have already mentioned: *AT v Dulghieru* (2009). This was the case where the defendants had trafficked four women from Moldovia and forced them into prostitution to "pay their bond" for getting them to the country. As well as general damages and aggravated damages, Treacy J. awarded the claimants exemplary damages because the defendants had acted without any regard for the claimants' rights with a view to making profits beyond anything that could be subsequently recovered from them by way of the legal process. The sums so far awarded were insufficient to show the defendants that their misdeeds did not

[41] *Asghar v Ahmed* (1985) 17 H.L.R. 25
[42] *Broome* [1972] 2 W.L.R. 645.
[43] Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (The Stationery Office, 1997), Law Com, No.247.
[44] *Huckle v Money* (1763) 2 Wils. K.B. 206.
[45] Using the website *www.measuringworth.com* [Accessed July 15, 2014].

pay, nor did the amount of compensation awarded by way of general and aggravated damages properly mark the Court's disapproval of their outrageous conduct. He awarded £15,000 each to the claimants (so £60,000 aggregated), having had regard to the price charged by the defendants for the women's services, and the amount of the "bond" that each had been required to repay.

Also consider the recent case of *Tanseem v Morley*[46] (2013), where defendant insurers in a road traffic accident case, which was subsequently found to be "crash for cash" fraudulent, were awarded exemplary damages against the fraudsters. The Judge felt that both the first and second categories of the test in *Rookes v Barnard* had been established. It was further noted that the Police were (for some reason) not going to prosecute. She awarded figures of between £1,000 and £2,000 as against each fraudster/defendant.

Vicarious liability

A common response to a claim for aggravated and/or exemplary damages against an institutional defendant is that they cannot be recovered where the claim is brought against them in vicarious liability. That, however, is just nonsense and should be swiftly rebuffed.

Vicarious liability is a doctrine of strict liability which is foisted on a defendant merely by virtue of his relationship with the tortfeasor, i.e. by virtue of the tortfeasor being the employee, servant or agent of the defendant, (or now by being in a relationship akin to employment with the defendant)[47] and by carrying out the tort in a way closely connected to his job.[48] Once a claimant proves the employment relationship and the close connection, vicarious liability is established. This means that the defendant steps into the shoes of the tortfeasor for the purpose of the claim. Any damages which could be awarded against the tortfeasor directly should fall to be paid by the employer. Certainly, that was the view of the Law Commission when it reviewed this area of the law in 1997.[49]

In *Racz v The Home Office*[50] the claimant brought an action in tort alleging ill treatment by prison officers. The question to be decided in that case was whether the Home Office was vicariously liable for the prison officers' actions on the facts which would give rise to a claim in misfeasance. The claimant claimed compensatory damages and exemplary damages and neither the Court of Appeal nor the House of Lords suggest that the doctrine of vicarious liability should not apply to both.

Vicarious liability is also a statutory remedy in certain cases. Section 2(1)(a) of the Crown Proceedings Act 1947 declares that the Crown will be liable for the tortious conduct of its servants or agents. The Police Act 1966 at s.88 states:

> "The chief officer of police for a police area shall be liable in respect of torts committed by his constables under his direction and control in the performance of their functions in like manner as a master is liable in respect of torts committed in the course of his employment and accordingly shall in respect of any such tort be treated for all purposes as a joint tortfeasor."

It could be argued by defendants that these statutory rights go beyond common law vicarious liability and put the Government and chief constables on a different level to other employers, but all those statutes are doing is re-stating the common law. It is, however, pursuant to s.88 of the Police Act that most of the awards of exemplary damages are made. As such, cases can be seen as akin to child abuse cases (involving issues of trespass to the person) and it is worth examining them.

In *Thompson v Commissioner of Police for the Metropolis*[51] the Court of Appeal laid down some detailed guidelines for assessing awards of exemplary damages which, in actions against the Police, were often

[46] *Tanseem v Morley* , Unreported, September 30, 2013 (Central London County Court).
[47] *Various Claimants v Institute of the Brothers of the Christian Schools* [2012] UKSC 56; [2013] 2 A.C. 1; [2012] 3 W.L.R. 1319.
[48] *Lister v Hesley Hall Ltd* [2001] UKHL 22; [2002] 1 A.C. 215; [2001] 2 W.L.R. 1311.
[49] Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (The Stationery Office, 1997), Law Com, No.247.
[50] *Racz v The Home Office* [1994] 2 A.C. 45; [1994] 2 W.L.R. 23; [1994] 1 All E.R. 97.
[51] *Thompson* [1997] 3 W.L.R. 403.

awarded by juries and were subject to reduction on appeal. In giving its judgment, the court did comment that exemplary damages should not be subject to the wrongdoing constable's means as a way of limiting the award. Equally, it was felt that exemplary damages should not be a windfall to the claimant, especially where those damages were being paid out of public funds.

In *Makanjuola v Metropolitan Police Commissioner*[52] the claimant was sexually assaulted by a police officer who had threatened to make a report which was likely to lead to her deportation if she did not comply with his demands. Whilst exemplary damages were awarded, it was felt that the officer was not acting in the course of his employment and so it was only the officer, rather than his employer, who was liable to pay them. Arguably this case would be decided differently today, as it pre-dates *Lister* and the refinement of the doctrine of vicarious liability by way of the close connection test.

More recently, in *Rowlands v Chief Constable of Merseyside Police*,[53] a police officer was found to have wrongly restrained, handcuffed and imprisoned the claimant and given false evidence against her to secure a conviction. £6,000 in aggravated damages and £7,500 in exemplary damages were awarded against the Chief Constable.

The case for reform

The Law Commission in its 1997 paper[54] highlighted the need for reform of both aggravated and exemplary damages which it felt had become so confusing. Why shouldn't aggravated damages apply to negligence and breach of contract cases? It was noted that exemplary damages have been said to be an "anomalous" civil remedy[55] and the power to award them "cries out for Parliamentary intervention"[56]. However, when the Department for Constitutional Affairs published its own consultation paper on damages in 2007[57] it felt that exemplary damages should not be extended beyond the limited class of case in which it is currently available, and aggravated damages also should remain as a compensatory remedy in its present form, within its current narrow remit. There was no appetite for change.

In responding to the Law Commission's request for reforming ideas in 2013, APIL pointed out that the law relating to exemplary damages is "unprincipled and inconsistent".[58] It called for more routine application of these awards in cases involving the health and safety of employees: where an employer can be shown to have operated without due regard for the health and safety of his employees in order to turn a bigger profit, exemplary damages should be awarded routinely. It was noted that the criminal law leaves a gap in such cases, with the Health and Safety Executive lacking the resources to prosecute all but the most outrageous and serious breaches of the criminal code.

Whilst I accept that both aggravated and exemplary damages should have wider application, and would benefit from reform, I hope I have illustrated that they can be properly claimed in many of the abuse cases we deal with, and I recommend we all do so to enhance the awards we can secure for our most deserving clients.

[52] *Makanjuola v Commissioner of Police of the Metropolis* [1992] 3 All E.R. 617
[53] *Rowlands* [2007] 1 W.L.R.1065.
[54] Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (The Stationery Office, 1997), Law Com, No.247.
[55] *Rookes v Barnard* [1964] 2 W.L.R. 269, per Lord Devlin.
[56] *Riches v News Group Newspapers* [1986] Q.B. 256; [1985] 3 W.L.R. 432; [1985] 2 All E.R. 845, per Stephenson L.J.
[57] Department of Constitutional Affairs, *The Law on Damages* (DCA, 2007) CP9/07.
[58] APIL, *The Law Commission's Twelfth Programme of Law Reform: A response by the Association of Personal Injury Lawyers* (October 2013).

ADR, Mediation and How and Why it will be Embraced by Personal Injury Practitioners and Insurers

Tim Wallis*

LT Alternative dispute resolution; Arbitration; Clinical negligence; Mediation; Online dispute resolution; Personal injury claims

In this article Tim Wallis considers the direction of travel of ADR and mediation post-Jackson/LASPO and then deploys the crystal ball to speculate how the personal injury sector will use ADR and mediation in five years' time.

Introduction

In 1990 alternative dispute resolution ("ADR")[1] was barely thought of in this jurisdiction, although by then it had been developing for well over a decade in parts of the United States. Around about this time the ADR Group[2] and Centre for Effective Dispute Resolution ("CEDR")[3] came into being and solicitor Henry Brown[4] delivered a paper on this new subject to the Law Society.[5] By 1995 Lord Woolf gave ADR a prominent position in "Access to Justice" and in 1999 ADR became part of the new Civil Procedure Rules. Since that time mediation[6] has developed strongly in some sectors (although not personal injury) and has received ever increasing support from the judiciary. In May 2014 a CEDR survey reported the civil and commercial mediation market had grown to 9,500 mediations per annum.[7] This is a tiny fraction of the 1,016,801 personal injury claims registered by CRU for 2013/2014.[8] After the implementation of the Jackson reforms a statement was made by Jackson L.J. in his preface to the 2013 White Book Supplement. He said:

> "The aim is that, in general, no case should come to trial without the parties having undertaken some form of alternative dispute resolution to settle the case."[9]

Jackson L.J. reviewed personal injury mediation when preparing his costs report. He said:

> "There is a widespread belief that mediation is not suitable for personal injury cases. This belief is incorrect. Mediation is capable of arriving at a reasonable outcome in many personal injury cases,

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[1] The Civil Procedure Rules define Alternative Dispute Resolution as "Collective description of methods of resolving disputes otherwise than through the normal trial process". The most commonly used form of ADR is mediation but the term includes many other forms of non-adjudicative dispute resolution. *https://www.justice.gov.uk/courts/procedure-rules/civil/pdf/backmatter/glossary.pdf*. [Accessed July 14, 2014.]

[2] *www.adrgroup.co.uk*. [Accessed July 14, 2014.]

[3] *www.cedr.com* [Accessed July 14, 2014], Centre for Effective Dispute Resolution.

[4] *http://www.pimseniormediators.co.uk/2011/henry-brown*. [Accessed July 14, 2014.]

[5] This gave the Law Society a head start in the field which they spectacularly managed to squander, but that is another story.

[6] Mediation: A flexible process conducted confidentially in which a neutral person assists the parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution.

[7] *http://www.cedr.com/news/?item=The-CEDR-Mediation-Audit-2014-launches*. [Accessed July 14, 2014.]

[8] *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/306064/cases-registered-cru-2013-14.csv/preview*. [Accessed July 14, 2014.]

[9] *Civil Procedure*, edited by The Right Honourable Lord Justice Jackson, 2013 edn (London: Sweet & Maxwell, 2013), First supplement, p.ix.

and bringing satisfaction to the parties in the process. However, it is essential that such mediations are carried out by mediators with specialist experience of personal injuries litigation."[10]

This finding is supported by the settlement results of Trust Mediation:[11]

Calendar years	2008	2009	2010	2011	2012	2013	2014
% settlement rate[12]	95%	85%	91%	89%	78%	92%	87%

As the first anniversary of Jackson/LASPO arrived many pundits and practitioners reviewed the impact of the reforms and concluded that it was too early to reach a settled view in many areas. This is my general view in relation to ADR. I believe that the combined effect of proportionality, case management, cost budgeting, qualified one-way costs shifting ("QOCS"), Mitchell procedural issues and the move away from the hourly rate, will result in an increased uptake of mediation and other forms of ADR. Although it would be premature to test that prediction, there are some clear indicators of the direction of travel. In this article I will explore them and then take a look ahead to the five-year horizon.

The direction of travel of ADR and mediation post-Jackson/LASPO

One tangible result of the Jackson report was the publication of "The Jackson ADR Handbook".[13] This is a judicial bench-book (like the Judicial College "Guidelines for the Assessment for General Damages in Personal Injuries")[14] for the judiciary and practitioners which will no doubt focus attention on ADR and mediation during case management and cost management hearings. One of the objectives for the handbook was that it should be authoritative and it was endorsed as such by the Court of Appeal shortly after publication.[15]

Another post-Jackson change is that, when considering directions, the court can now consider making an order that the parties consider ADR (including mediation) using a direction in the form of Standard Directions Model Paragraph A03-ADR.doc. This can be done at the time of giving standard directions or otherwise, in the following terms:

> "(2) At all stages the parties must consider settling this litigation by any means of Alternative Dispute Resolution (including Mediation); any party not engaging in any such means proposed by another must serve a witness statement giving reasons within 21 days of that proposal; such witness statement must not be shown to the trial judge until questions of costs arise."[16]

Such orders are (in the experience of my mediation practice) influential. The combination of "nailing the colours to the mast" within 21 days in respect of the reasons not to mediate, coupled with the prospect of a costs sanction, pushes the parties to do what the court wants them to do, that is to say to give ADR careful consideration in accordance with the authorities. Two recent cases demonstrate what the court is now looking for and what is, and is not, acceptable.

[10] "Jackson Report" (The Right Honourable Lord Justice Jackson *Review of Civil Litigation Costs: Final Report* (HMSO, 2010), Executive Summary, at [3.1(iii)], p.361).

[11] *www.TrustMediation.org.uk* [Accessed July 14, 2014]; Trust Mediation, a specialist personal injury mediation provider, was co-founded by Tim Wallis and others in 2008.

[12] Cases settled at or shortly after mediation. Note, it is generally the case that only difficult claims are referred to mediation, so the settlement rates should be viewed in this context.

[13] Susan Blake, Julie Browne, and Stuart Sime, *The Jackson ADR Handbook* (Oxford: Oxford University Press, 2012).

[14] Judicial College *Guidelines for the Assessment for General Damages in Personal Injuries*, 11th edn (Oxford: Oxford University Press, 2012).

[15] *PGF II SA v OMFS Co 1 Ltd* [2013] EWCA Civ 1288; [2014] 1 W.L.R. 1386; [2014] 1 All E.R. 970 at [30] and [34].

[16] *http://www.justice.gov.uk/courts/procedure-rules/civil/standard-directions/list-of-cases-of-common-occurrence/menu-of-sd-paragraphs* [Accessed July 14, 2014].

In *PGF II SA v OMFS Co 1 Ltd*[17] the Court of Appeal found that silence in the face of an offer to mediate was, as a general rule, unreasonable and, as such, should be visited by a costs sanction. Briggs L.J. said that the Court of Appeal:

> "… sends out an important message to civil litigants, requiring them to engage with a serious invitation to participate in ADR …"

He added that:

> "The court's task in encouraging the more proportionate conduct of civil litigation is so important in current economic circumstances that it is appropriate to emphasise that message by a sanction …"[18]

In *Garritt-Critchley v Ronnan*[19] the Court heard that the defendants consistently refused to mediate. The Court said this was unreasonable and consequently made an order for indemnity costs.

The message from these cases is clear but there is, perhaps, more to them than might at first meet the eye. The judiciary is now "mediation savvy" and well able to sort the wheat from the chaff when evaluating reasons for declining mediation. Gone are the days when an advocate could briefly answer one or two of the *Halsey* tests[20] and have the judge meekly accept, without more, the assertion "this claim is not suitable for mediation". It is informative to review how knowledgeable the judges have become.

The *PGF* case at first instance was heard by Recorder Stephen Furst QC, sitting as a Deputy High Court Judge.[21] The fact that he has had practical experience of mediation can be seen from many points in the judgment. The defendant, seeking to avoid a costs sanction, argued that it would have been too early to mediate at the time suggested on the grounds that its expert evidence was not then available. Recorder Furst responded:

> "Experience suggests that many disputes, even more complex disputes than the present, are resolved before all material necessary for a trial is available. Either parties know or are prepared to assume that certain facts will be established or, during the course of the mediation, such information is made available, often on a without prejudice basis. The rationale behind the Halsey[22] decision is the saving of costs, and this is achieved (or at least attempted) by the parties being prepared to compromise without necessarily having as complete a picture of the other party's case as would be available at trial."

In short, you do not need a trial bundle to mediate any more than you need one to settle a claim.

In *Garritt-Critchley* H.H. Judge Waksman QC analysed and disposed of a series of reasons not to mediate, concluding:

> "It was a continuing failure to engage with the [ADR] process from the word go and the reasons that have been given simply don't stack up and don't accord with the authorities in my view."

Neither of these cases involved personal injury claims, but in light of the following passages from *Garritt-Critchley* it may be difficult to suggest they do not apply to such claims:

- The trial on liability would be a "… very fact intensive and evidence intensive exercise where the court would have to judge the credibility of their witnesses and look at the importance or otherwise of contemporaneous documents and the commercial sense or

[17] *PGF II SA v OMFS Co 1 Ltd* [2014] 1 W.L.R. 1386.
[18] *PGF II SA v OMFS Co 1 Ltd* [2014] 1 W.L.R. 1386 at [56].
[19] *Garritt-Critchley v Ronnan* [2014] EWHC 1774 (Ch), per HH Judge Waksman QC sitting in the Chancery Division, Manchester District Registry.
[20] *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576; [2004] 1 W.L.R. 3002; [2004] 4 All E.R. 920 at [16] et seq.
[21] *PGF II SA v OMFS Co 1 Ltd* [2014] 1 W.L.R. 1386.
[22] *Halsey* [2004] 1 W.L.R. 3002.

otherwise of each side's case. That is classically a case where both parties needed to engage in a risk analysis as to whether their side of the coin would be accepted or not".

- On quantum: "… there was an obvious sliding scale of a compensatory award if the claimants succeeded … This was a case where the services of an expert, therefore a matter of opinion, was required, in order to see what the range of awards would be and … the range was really very considerable indeed."
- Therefore, this was "… a classic matter where mediation should be considered because there is ample room for manoeuvre within the wide range of possible quantum scenarios".

The above describes the issues in many of the personal injury claims that the writer has mediated. It certainly describes the numerous cases seen by Trust Mediation where causation is in issue and where psychiatric evidence is an important feature of the case.

Before leaving *Garritt-Critchley*, it may be useful to give one further demonstration of the response of "mediation savvy" judiciary to "get out of mediation" arguments. It is often suggested, and was here, that, pursuant to the *Halsey* tests,[23] mediation would not have had a reasonable prospect of success because the party rejecting mediation had extreme confidence that it would succeed at trial. In response to this, the Court noted that if the defendant was so confident:

> "… then it is surprising that no application for summary judgment was ever made, which it was not."

That a party thinks it has a watertight case is, said the court, the frame of mind of so many litigants.

The anecdotal evidence from mediators is that, post-Jackson, referrals to mediation are increasing. The matters explored above are not inconsistent with this. The 2014 CEDR audit mentioned above[24] related to the entire mediation market and this reported a nine per cent rise in mediations since the last survey in 2012. The direction of travel seems clear to me, but how will that play out over the longer term?

How will the personal injury sector use ADR and mediation in five years' time?

Five years is a long time, particularly given the quantity and speed of change that we are currently experiencing. It is said that computing power doubles every five years.[25] Some time ago I stopped saying that the pace of change in civil litigation continues to accelerate, because it became a statement of the B******* obvious. In my view, and I say this in broad terms because five years is a long period on which to stick your neck out, there will be a very significant move towards more collaborative and efficient ways of dealing with claims. This move, which will in some ways be seen as a move towards private justice, will be instigated by the parties and their advisers as a result of pressure from three different directions.

First, the impact of the Jackson reforms. This, as mentioned above, is the combined effect of proportionality, case management, cost budgeting, QOCS and damages-based agreements, Mitchell procedural issues and the move away from the hourly rate.

Secondly, the effect of alternative business structures entering the sector, the continuing consolidation of the market and the consequent increase in competition.

Thirdly, the continuing deterioration of the court service as fiscal cuts bite, the court staffing situation becomes more pronounced, court fees increase and judges' lists grow.

These pressures will inevitably place a new commercial focus on the manner in which claims are dealt with. A strongly adversarial approach funded by the hourly rate mechanism may be the best way of dealing with test cases, but is not the most efficient way of routinely dealing with claims. Competition between

[23] *Halsey* [2004] 1 W.L.R. 3002.
[24] *http://www.cedr.com/news/?item=The-CEDR-Mediation-Audit-2014-launches*. [Accessed July 14, 2014.]
[25] *http://en.wikipedia.org/wiki/Moore's_law*. [Accessed July 14, 2014.]

claims organisations will drive them (and will also drive insurers) to find their own solutions and these solutions will probably include several or all of the following.

A facilitated approach to claims handling

Examples of this are the Multi-Track Code,[26] the approach advocated by Bill Braithwaite QC in "Court-free catastrophic claims: management and resolution or catastrophic injury claims without recourse to the courts",[27] and the Dutch Code of Conduct for Handling Personal Injury Claims.[28] These approaches have a common denominator, namely the parties wish to go outside the court system to achieve objectives that system does not enable them to fulfil. Those objectives may be positive (such as the desire to use a facilitator who is a specialist or factors such as control, speed and privacy) or negative (such as the desire to avoid an inefficient court system).

Avoiding the court in this way is not a novel concept. Well established precedents include the Iron Trades Deafness and Coal Workers Pneumoconiosis schemes[29] and the Alder Hey class action relating to retained organs, which was stayed for settlement by mediation.[30] A United States example is a feature of their civil justice system known as the special master.[31]

Arbitration

Andrew Ritchie QC, Chair of the Personal Injuries Bar Association, has suggested that personal injury claims be arbitrated and is consulting on a scheme called PiCARBS.[32] He lists the following advantages:

"Advantages for Claimants, personal injury and clinical negligence arbitration

1. **Justice:**

   You can choose your arbitrator. All PIcARBS arbitrators are experienced personal injury and/or clinical negligence silks. Your arbitration will not be run by a District Judge or higher judge with little or no experience of personal injury law.

2. **Control and flexibility:**

   You can agree the procedure, the timetable, the directions and the issues with the Defendants. You only use the arbitrator when you need to.

3. **No striking out:**

   Your case will not be struck out for minor procedural default. The PIcARBS service is run under the Arbitration Act 1996 guided by the Civil Procedure rules before 1.4.2013, in which the overriding objective was justice between the parties.

4. **Most cases settle:**

   Around 90 per cent of personal injury claims are settled.

[26] *http://www.apil.org.uk/multi-track-code*. [Accessed July 14, 2014.]

[27] Bill Braithwaite QC, "Court-free catastrophic claims: management and resolution or catastrophic injury claims without recourse to the courts", [2013] J.P.I.L. 190–195.

[28] *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=976371* .[Accessed July 14, 2014.]

[29] *http://www.publications.parliament.uk/pa/cm200506/cmhansrd/vo061010/halltext/61010h0010.htm*; *http://www.guildhallchambers.co.uk/files/CONDUCTINGANINDUSTRIALDISEASECLAIM.pdf*. [Accessed July 14, 2014.]

[30] *http://www.cedr.com/solve/studies/?param=105*. [Accessed July 14, 2014.]

[31] *http://www.law.cornell.edu/wex/special_master*. [Accessed July 14, 2014.]

[32] *http://www.picarbs.co.uk/index_files/thearbitrationrules.htm*. [Accessed July 14, 2014]; *http://www.litigationfutures.com/news/pi-firms-could-bypass-courts-agree-arbitrate-wake-mitchell*. [Accessed July 14, 2014.]

5. **Speed:**

   You control the speed of the case by agreement with the Defendants.

6. **Early Neutral Evaluation:**

   When you are ready, ask the arbitrator to make a neutral evaluation of your personal injury/clinical negligence claim then you can decide whether to settle it at that level.

7. **No Court Fees:**

   There are no court costs. The Defendants pay the arbitrators fees until the case is settled or determined.

8. **No costs budget caps:**

   There is no requirement for costs budgeting in advance and no capping of costs at the start of the case. You prepare the case in the best way you can for the claimant.

9. **Lower cost and certainty:**

   You agree your hourly rates (and theirs) with the Defendants at the start.

10. **Defence legal costs:**

    Are capped at 20 per cent of damages.

11. **Limited appeal costs:**

    You agree to be bound by the arbitration decision. Limited appeals are available under the Arbitration Act 1996."

Practitioners and insurers are reticent to voluntarily instigate change and some bold decisions will be required to adopt such a scheme. I submit that whether or not it is used will depend upon the extent to which the pressures that I have listed above come to bear upon the parties and their advisers.

Greater use of mediation

The case reports mentioned above focus on judicial encouragement to mediate and sanctions for failure to do so. During the period 1990 to date, most personal injury practitioners have been reticent about the use of mediation and there has been a tendency to resist opponents' suggestions to mediate and even judicial encouragement to mediate. The result of the pressures outlined above is that a change of approach is highly likely.

There are already a small number of solicitors and counsel (more defendants than claimants) who regularly instigate personal injury mediation and certain types of claims are recognised as particularly suitable for mediation. These include:

- stress claims;[33]
- claims involving a psychiatric/psychological element;
- all or nothing claims;
- claims where there is a very large difference between the figures in the schedule and counter-schedule;

[33] See *Vahidi v Fairstead House School Trust Ltd* [2005] EWCA Civ 765; [2005] E.L.R. 607.

- multi-party (be they multi-claimant, multi-defendant, multi-insurer or any combination of these);
- claims involving a high emotional component (fatal, children claims);
- claims involving a "difficult" party or lawyer;
- the situation where speed or privacy is particularly important to one party; and
- claims which should have settled but have not;

Another indicator of the development of mediation in this field is the fact that the Association of Personal Injury Lawyers ("APIL"), together with the Motor Accident Solicitors Society ("MASS") and the Forum of Insurance Lawyers ("FOIL"), is working on a joint directory of mediators for members.

Looking abroad, some states in the United States started using ADR many years before the idea appeared this side of the Atlantic, which makes it useful to look across "the pond" and see how it is developing there now. New York has recently responded to a backlog of commercial cases by introducing a new scheme which will see one in five new cases automatically referred to mandatory mediation. One of the main drivers for this has been the companies concerned in the litigation and their in-house lawyers. A litigator[34] who helped draft the rules, said:

> "One of the things companies are looking for when assessing where to bring their disputes is how court systems help them resolve those disputes faster. For most companies, the longer a case drags out the more uncertainty and costs they will encounter."[35]

These commercial drivers will not only apply to defendants. The CFA introduced us to risk sharing and as the hourly rate becomes less common all lawyers will be under pressure to look at different ways of doing things. I noticed, during my studies of mediation in the United States over 20 years ago, that half of the personal injury mediations there were instigated by plaintiffs' attorneys working on contingency fees.

(I will not yield to the temptation to divert from the objectives of this article and discuss the access to justice argument that obviously surfaces at this point. Suffice to say: (a) that mediation only works if, absent a fair and reasonable settlement, the party seeking a better settlement than that offered at mediation can proceed to trial; but (b) claimants like mediation and given a free choice usually prefer it rather than trial.)

Online dispute resolution

The growing importance of online dispute resolution ("ODR") has been recognised by the Civil Justice Council ("CJC") which has appointed an ODR Advisory Group, chaired by futurologist Professor Richard Susskind. The group, which is considering civil and commercial claims with a value up to £25,000, is due to report to the CJC late in 2014.[36] Susskind said in 2013:

> "In the long run I expect [ODR] to become the dominant way to resolve all but the most complex and high value disputes."[37]

In 2013 the European Union confirmed its longstanding interest with ADR with the publication of Directive 2013/11 and Regulation 524/2013.[38]

[34] Paul D. Sarkozi, Tannenbaum Helpern Syracuse & Hirschtritt LLP.

[35] Pete Brush "NY Launches Mandatory Commercial Case Mediation Program" (June 25, 2014), Law360, *http://www.law360.com/legalindustry/articles/551719/ny-launches-mandatory-commercial-case-mediation-program*. [Accessed July 14, 2014.]

[36] Catherine Baksi, "Civil Justice Council explores online dispute resolution" (April 25, 2024), Law Gazette, *http://www.lawgazette.co.uk/law/civil-justice-council-explores-online-dispute-resolution/5040975.article*. [Accessed July 14, 2014.]

[37] Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future*, (Oxford: Oxford University Press, 2013).

[38] Directive 2013/11 on alternative dispute resolution for consumer disputes and amending Regulation 2006/2004 and Directive 2009/22 [2013] OJ L165/63; Regulation 524/2013 on online dispute resolution for consumer disputes and amending Regulation 2006/2004 and Directive 2009/22

ODR is a very broad term, which has no agreed definition. It can be described as the use of information and communications technology ("ICT") to help parties resolve their disputes. This description is rather broad, however, because we have to recognise that ICT is also changing traditional dispute resolution. Examples are case management and workflow software, email, court telephone conferences, the County Court Money Claim Centre and the Claims Portal.

ODR includes, but is wider than, online ADR. Online ADR already exists in various forms such as online mediation[39] and online arbitration.[40] Other forms of ADR such as expert adjudication, internal complaints systems and ombudsman services can equally be provided online (and probably are). Online ADR is usually about automating existing (albeit alternative) approaches and using ICT to provide efficiency savings as the quid pro quo for avoiding the cost of face-to-face meetings. It may be easy to criticise this approach, on the grounds that it provides a lower quality of justice, but it should also be recognised that people and organisations are becoming accustomed to the internet (78 per cent of the population 14 years and over are online)[41] which brings with it the ability to complete transactions very quickly. Indeed, the main driver of the growth of online ADR was most probably the need for a solution to disputes which arose from online (and often international) transactions. Examples are the eBay and PayPal dispute resolution services, which are said to resolve around 60 million disputes a year.[42] To anyone who feels this is all a far cry from how we deal with claims now, the questions I pose are: what services do tomorrow's court users want and where are the pressures referred to above going to push us?

Before dealing with those questions we should perhaps take a look at another, more important, aspect of ODR. Neutrals in dispute resolution, such as a judge or a mediator, are sometimes referred to as the third party. The potential role for technology in actively assisting in the dispute resolution process has been recognised by the suggestion that technology be referred to as the "fourth party".[43] Technology can assist with the preparation for dispute resolution and, in some instances, deal with the entire dispute resolution without any third party involvement.

Examples of the former include problem diagnosis, case profiling and analysis, outcome suggestions and heuristics.[44] Algorithms[45] are used so that technology can carry out steps that would otherwise be taken by other means. An example of this is the Juripax[46] online mediation system, which poses a series of questions to the parties for a mediation as part of an intake process. This is a diagnostic phase which enables the parties to specify their issues, concerns and possible suggestions for resolution. The intake forms are laid out as a so-called decision tree. This ensures that only those questions are shown that are relevant for the specific case in question. In the case of a divorce, for example, where the divorcing couple has no children, the questions related to children are automatically excluded.

(Regulation on consumer ODR) [2013] OJ L165/1; *http://www.civilmediation.org/news/eu-directives-on-consumer-adr-in-place-by-2015/80*. [Accessed July 14, 2014.]

[39] *www.modria.com*. [Accessed July 14, 2014]; *www.themediationroom.com* [Accessed July 14, 2014]; *www.odro.com www.juripax.com*. [Accessed July 14, 2014.]

[40] *http://www.wipo.int/amc/en/arbitration/online/index.html* [Accessed July 14, 2014]; *https://www.equibbly.com/* [Accessed July 14, 2014]; *www.modria.com*. [Accessed July 14, 2014.]

[41] William H. Dutton, Grant Blank and Darja Groselj, *Cultures of the Internet: The Internet in Britain. Oxford Internet Survey 2013 Report* (Oxford: Oxford Internet Institute, 2013).

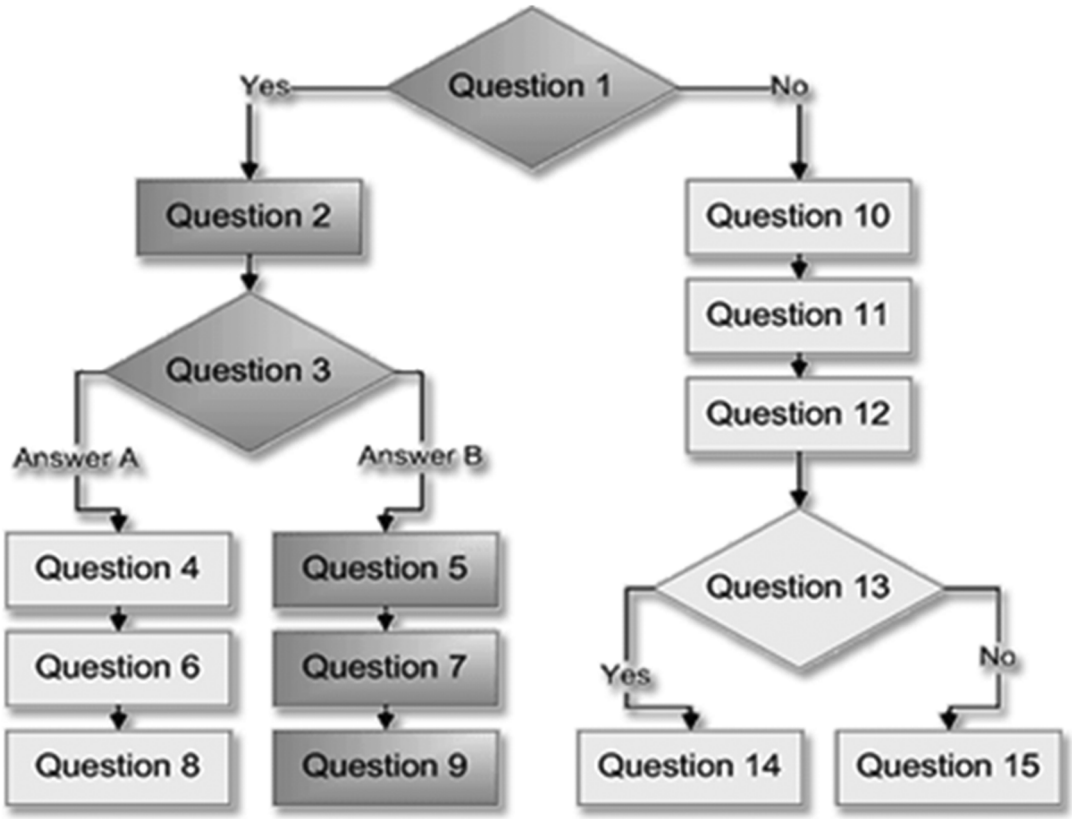
[42] C. Rule and C. Nagarajan, "Leveraging the Wisdom of Crowds: The eBay Community Court and the Future of Online Dispute Resolution", AC Resolution (2010). See also *http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html*. [Accessed July 14, 2014.]

[43] E. Katsh and J. Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, (San Francisco, Jossey-Bass, 2001)

[44] "Heuristic … refers to experience-based techniques for problem solving, learning, and discovery that give a solution which is not guaranteed to be optimal. Where the exhaustive search is impractical, heuristic methods are used to speed up the process of finding a satisfactory solution via mental shortcuts to ease the cognitive load of making a decision. Examples of this method include using a rule of thumb, an educated guess, an intuitive judgment, stereotyping, or common sense. In more precise terms, heuristics are strategies using readily accessible, though loosely applicable, information to control problem solving in human beings and machines." *http://en.wikipedia.org/wiki/Heuristic*.[Accessed July 14, 2014.]

[45] "In mathematics and computer science, an algorithm … is a step-by-step procedure for calculations. Algorithms are used for calculation, data processing, and automated reasoning." *http://en.wikipedia.org/wiki/Algorithm*. [Accessed July 14, 2014.]

[46] *www.juripax.com*. [Accessed July 14, 2014.]



Decision tree

An example of how an ODR platform deals with the dispute resolution as "fourth party", without intervention of any neutral third party, is automated negotiation or "blind bidding." This is an online negotiation process for settling quantum only claims. The parties agree to make settlement bids on the basis that they will only be disclosed under certain conditions. If the bids come within a percentage range (or within a certain amount of money) the claim is settled at the mid-point between the two offers. If settlement is not reached, the bids remain secret and the claim proceeds with neither party having revealed its position. Cybersettle was a leader in this approach which it has used extensively in the United States.[47]

This may seem futuristic, but, in looking ahead five years, it seems to make sense to look at what is already happening in some places. It then becomes a fairly easy prediction that what is already happening elsewhere is quite likely to be adopted here within the next few years.

Conclusion

Those of us working in civil litigation have just been through a time of unprecedented change, the full consequences of which are yet to be felt. This is against the background of an ongoing information technology revolution. Innovation and collaboration are becoming more highly prized. The ability to move outside the comfort zone, both individually and as organisations, is more important than ever. Claims

[47] *http://www.cybersettle.com/about-us*. [Accessed July 14, 2014.]

handling will change very considerably over the next five years. A major feature of this will be seeing resistance to change replaced by a desire to provide for access to justice by finding better ways of doing what our clients demand of us.[48]

[48] I acknowledge the input of the following to my recent learning on the subject of ODR: P. Cortés, "Developing Online Dispute Resolution for Consumers in the EU: A Proposal for the Regulation of Accredited Providers" Int. J. Law Info. Tech. (2011), 19(1): 1–28; *International Computer and Internet Contracts and Law*, (London: Sweet & Maxwell); Graham Ross (presentation to the Civil Mediation Council annual conference, May 2014); and Brian Hutchinson (presentation to the Civil Mediation Committee Academic Committee, October 2013).

Binding the State: Coroner's Powers to Investigate

Helen Blundell*

Confidential information; Disclosure; Duty to undertake effective investigation; Employment records; Inquests; Tax administration

Helen Blundell looks at the decision in R. (on the application of HMRC) v HM Coroner for Liverpool[1] *in which the High Court confirmed HMRC and other state agents' obligations to produce documents for coroners.*

PROCEDURE

In October 2013 Mr Roderick Carmichael died at the University Hospital, Aintree. At his inquest, André Rebello, the Senior Coroner for the City of Liverpool ("the Coroner") noted the history of exposure to asbestos and lung disease and requested that Her Majesty's Revenue and Customs ("HMRC") supply him with details of Mr Carmichael's work history.

When the Coroner's investigation was reviewed in December 2013, it became apparent that HMRC had not responded to the Coroner's direction that it should disclose details of Mr Carmichael's working history.

Unfortunately, HMRC had recently made an abrupt about-turn in its policy on supplying work histories. Since November 2013, it had refused to supply this information to anyone other than the employee without a High Court order, citing s.18(2)(h) of the Commissioners for Revenue and Customs Act 2005 ("CRCA 2005") as the reason.

Officials of HMRC have a duty of confidentiality in relation to information held by them. Section 18 of the CRCA 2005 sets out the exceptions to that duty. In full it states:

"18 Confidentiality

(1) Revenue and Customs officials may not disclose information which is held by the Revenue and Customs in connection with a function of the Revenue and Customs.

(2) But subsection (1) does not apply to a disclosure

- (a) which -
  - (i) is made for the purposes of a function of the Revenue and Customs, and
  - (ii) does not contravene any restriction imposed by the Commissioners,
- (b) which is made in accordance with section 20 or 21,
- (c) which is made for the purposes of civil proceedings (whether or not within the United Kingdom) relating to a matter in respect of which the Revenue and Customs have functions,
- (d) which is made for the purposes of a criminal investigation or criminal proceedings (whether or not within the United Kingdom) relating to a matter in respect of which the Revenue and Customs have functions,
- (e) which is made in pursuance of an order of a court,

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[1] *R. (on the application of Revenue and Customs Commissioners) v HM Coroner for Liverpool* [2014] EWHC 1586 (Admin); [2014] B.T.C. 28. Represented with the defendant were: the Estate of Mr Roderick Carmichael (Deceased) (interested party) and The Association of Personal Injury Lawyers (intervening party).

(f) which is made to Her Majesty's Inspectors of Constabulary, the Scottish inspectors or the Northern Ireland inspectors for the purpose of an inspection by virtue of section 27,

(g) which is made to the Independent Police Complaints Commission, or a person acting on its behalf, for the purpose of the exercise of a function by virtue of section 28, or

(h) which is made with the consent of each person to whom the information relates."

In an apparent re-interpretation of s.18(2)(h) of the CRCA 2005, HMRC indicated that it required "the consent of each person to whom the information relates" before the work history information could be disclosed. As this was unlikely to be possible, due to the lapse of time since many of these employees had worked for the relevant companies or individuals, HMRC needed the protection of a High Court order (CRCA 2005 s.18(2)(e)) before releasing the information, or risk committing a criminal office. For those dealing with employees who had died, this meant that the personal representatives, and now it seemed, even the Coroner, would have to start court proceedings to obtain what had, before November 2013, been supplied upon request.

The Coroner issued a notice under s.32 and Sch.5 of the Coroners and Justice Act 2009 (CJA 2009), requiring HMRC to supply the work history information relating to Mr Carmichael, or to attend to give evidence at the inquest in January 2014. HMRC refused to comply with the notice, arguing that the coroner's notice did not satisfy the provisions of s.18(2)(e) (it was not an order of the court) and so did not bind the Crown at all. HMRC invited the Coroner to withdraw the notice. He declined to do so and HMRC reiterated that in its view, the notice did not bind the Crown and that it would not be attending the inquest. Further Sch.5 notices were issued by the Coroner.

In a remarkable turn of events, HMRC then issued judicial review proceedings against the Coroner and obtained an interim order that the Sch.5 notices issued by the Coroner would have no effect until the determination of the judicial review.

At this point, APIL applied to intervene so that it could make written representations. APIL adopted a neutral stance in the judicial review, outlining the wider implications of HMRC's position and submitting that arts 2 and 6 of the European Convention on Human Rights ("ECHR") were engaged.

Context

The ramifications of what began as one inquest and a request for information were wide. The Coroner indicated in his evidence that there were "2,756 conclusions of Industrial Disease from Inquests in 2012"[2] (nine per cent of inquests) and of course many more where there was a determination of a death by natural causes, but a suggestion of industrial disease at the outset.

Before the implementation of major sections of the CJA 2009 in July 2013, the Coroner's powers to investigate and call witnesses had been limited. All that changed with the CJA 2009 and the emphasis now lies upon investigation rather than simply conducting the inquest. Coroners have new powers to obtain the evidence they need for investigations. The restrictions being that the Coroner cannot require: anything which could not be required by a civil court; evidence incompatible with European Law; and anything which comes under the doctrine of public interest immunity which applies to the Coroner's investigations and inquests.

The Coroner's stance was that the

> "legislative changes were clearly intended to strengthen powers and duties of the coroners in order to ensure that the system was robust and able to play a significant part in satisfying the State's

[2] *R. (on the application of HMRC) v HM Coroner for Liverpool* [2014] EWHC 1586 (Admin) at [52].

> procedural obligation under art.2 ECHR and provide the Coroner with a power to investigate and determine which deaths may have occurred in breach of Article 2".[3]

The courts have held that an inquest can fulfil the art.2 obligation for an effective investigation. By comparison, where there has been a death in police custody, (a public authority), then art.2 is clearly engaged. This analogy had implications for the present judicial review.

The Coroner argued that HMRC is clearly a public authority within the meaning of s.6 of the Human Rights Act 1988: "Acts of Public Authorities". As such, in his view, the CJA 2009 "encroaches on the property, rights, interests and privileges of the Crown" and that being so, then it binds the Crown by necessary implication.

Mr Carmichael's counsel argued in his skeleton that in passing the CJA 2009, Parliament could:

> "be assumed to have legislated so as to advance, rather than to defeat, the fundamental rights inherent in Article 2, including that of investigation."

And, given that Parliament was legislating to address deaths in State detention (amongst other things):

> "that Parliament intended the investigatory power of HM Coroner to extend to such deaths. It cannot have been intended that organs of the State would be immune from producing documents and immune from being called as witnesses, and that the investigatory powers of a Senior Coroner would be limited to dealing with non-Crown persons only."

"Necessary implication"

This powerful argument was accepted by Lord Justice Gross and Mr Justice Burnett in their judgment handed down on May 21, 2014.

In their judgment, they outlined the issues as follows:

- Does Sch.5 to the CJA 2009 bind the Crown so that HMRC was bound to comply with the Notices by virtue of s.18(2)(e) of the CRCA 2005 and, therefore, entitled so to comply? ("Issue (I): The principal issue").
- If the answer to Issue (I) is "no", was HMRC entitled to supply the occupational history requested in the notices under any of the other disclosure gateways contained in s.18(2)(a) and/or s.18(2)(h) and/or s.18(2)(b) read with s.20(1) and (6) of the CRCA 2005? ("Issue (II): Other disclosure gateways").
- Separately, can a disputed notice under Sch.5 of the CJA 2009 be ignored and, if not, what should be done pending the substantive determination of the validity of the Notice? ("Issue (III): The interim position").

All parties agreed that Sch.5 CJA did not expressly bind the Crown, so the question the Court had to consider was whether, instead, Sch.5 binds the Crown by *necessary implication*?

The key to answering this question lies in the history of the coronial system and the recent reforms introduced by Parliament. Having identified in the Home Secretary's 2004 position paper, *Reforming the Coroner and Death Certification Service*,[4] that "the Coroner currently has no statutory power to enter premises or to seize documents,"[5] a draft Bill was published in June 2006: *Improving death investigation in England and Wales*. The foreword indicated that:

[3] Article 2 ECHR provides a right to life and case law imposes an investigative obligation upon the State.
[4] Home Office, *Reforming the Coroner and Death Certification Service: A Position Paper* (The Stationery Office, March 2004) Cm.6159.
[5] *R. (on the application of HMRC) v HM Coroner for Liverpool* [2014] EWHC 1586 (Admin) at [63].

> "the Bill will modernise the processes for coroners' investigations and inquests and give coroners new powers to obtain the evidence they need for investigations."[6]

Those powers, their wording unchanged, are now to be found in Sch.5 of the CJA 2009. By the time the Government had published its 2006 draft Bill, it was clear that the Coroner's investigation and inquest provided the mechanism which enabled the United Kingdom to comply with its procedural obligations under art.2 of the ECHR. (See *McCann v United Kingdom*[7] and *R. (on the application of Middleton) v West Somerset Coroner*[8]). In part, the reforms were designed to ensure that the coroner was better equipped to conduct an art.2 compliant investigation. The *Additional Explanatory Notes* appended to the Bill made this clear: in time, those clauses were enacted within the CJA 2009.

So, back to the issues under consideration by the Court. The arguments put forward by both the Coroner, APIL and Mr Carmichael's personal representatives were:

> "The intention underlying the CJA 2009 was to enable coroners to deal appropriately with matters which may require Art. 2 investigation. Coroners could only do so if the CJA 2009 bound the Crown; if it did not, the statutory intention would be totally frustrated. The test for necessary implication was thus satisfied."[9]

The Court agreed:

> "If the HMRC submissions were well-founded coroners' powers would differ as between investigating deaths in police custody and deaths in the custody of HMRC or the MoD; coroners' Schedule 5 powers applied to deaths in prison would vary depending on whether the prison was part of the public or private sectors; a distinction would be drawn between investigating the death of a patient lawfully detained by an NHS Trust under mental health powers (Schedule 5 would apply) and an individual lawfully detained in (a public sector) prison. There were no cogent reasons for thinking that the legislature had intended to draw any such distinctions."[10]

And in any event, the effect of s.3 of the HRA 1998 and art.2 of the ECHR could not be overlooked: the effect of *McCann* was that there was a procedural obligation to investigate. Furthermore, the Court added,

> "Coroners should not be left to make individual judgments, as submitted by HMRC, using s.3 of the HRA on a case by case basis to read Schedule 5 as binding the Crown."[11]

The test: Is the Crown bound?

The judgment is clear on this:

> "… the test as to whether particular legislation binds the Crown is well settled, remains good law and is not to be whittled down. It can be simply stated: the Crown is not bound by legislation unless either expressly named therein or, if not so named, by necessary implication …"[12]

The Court drew the parties' attention to case law identifying the Court's task:

> "… ascertaining the true intention of the legislature from the terms of the statute understood in context. It does so by emphasising that the implication of a term (in any instrument, whether a contract, articles

[6] *R. (on the application of HMRC) v HM Coroner for Liverpool* [2014] EWHC 1586 (Admin) at [27].
[7] *McCann v United Kingdom* A/324) [1995] 21 E.H.R.R. 97.
[8] *R. (on the application of Middleton) v HM Coroner for Western Somerset* [2004] UKHL 10; [2004] 2 A.C. 182; [2004] 2 W.L.R. 800.
[9] *R. (on the application of HMRC) v HM Coroner for Liverpool* [2014] EWHC 1586 (Admin) at [37].
[10] *R. (on the application of HMRC) v HM Coroner for Liverpool* [2014] EWHC 1586 (Admin) at [37].
[11] *R. (on the application of HMRC) v HM Coroner for Liverpool* [2014] EWHC 1586 (Admin) at [37].
[12] *R. (on the application of HMRC) v HM Coroner for Liverpool* [2014] EWHC 1586 (Admin) at [38].

> of association or a statute) is to be seen as an exercise 'in the construction of the instrument as a whole' …"[13]

Before a term could be implied, the Court had to be satisfied that "it is what the contract actually means".[14]

It was the Court's view that the intention of the legislature in enacting CJA 2009 was plain: that it intended to strengthen the Coroner's powers of investigation, discharging the State's ECHR art.2 obligations to conduct an effective investigation. The Court could see no coherent or cogent reason for those Sch.5 powers to apply to the Police, the NHS and private prisons, but not binding the MoD, HMRC or prisons in the public sector:

> "There is nothing whatever to suggest a legislative intention to draw so curious a distinction. It is thus our clear view that the legislative purpose of schedule 5 would be frustrated if it was not binding on the Crown."[15]

And so, the Court concluded: "Schedule 5 does bind the Crown by necessary implication."[16]

Of course, there were no art.2 considerations in the case before the Court, but that did not affect the decision: "Schedule 5 either does or does not bind the Crown." Any other interpretation would be a "recipe for satellite litigation and delay".[17]

The Court made it clear that it had not been influenced by other arguments put forward which emphasised the "obvious considerations of convenience"[18] of finding that Sch.5 binds the Crown by necessary implication, but it did remark upon the striking levels of inconvenience and costs of the suggested alternative of obtaining a High Court order:

> "Looked at in the round, the realities of the suggested High Court route, far from weakening the argument for necessary implication, fortify us in the conclusion to which we have come."[19]

The effect of being bound?

Because Sch.5 of the CJA 2009 binds the Crown by necessary implication, it follows that the Sch.5 notices constitute "an order of the court" within the meaning of s.18(2)(e) of the CRCA 2005, and are binding upon HMRC. This displaces the duty of confidentiality relied upon by HMRC in s.18(2)(h) of the CRCA 2005. HMRC is entitled to comply with the Coroner's notices to supply work histories for Mr Carmichael and to comply with all other Sch.5 notices issued by coroners up and down the country.

Other disclosure gateways

There was no need for an examination of the other possible disclosure gateways put forward but it is worth noting that one of the alternative arguments, that disclosure of the occupational history was a "function" of HMRC, and thus falling within the ambit of s.18(2)(a) of the CRCA 2005, was dismissed by the Court. Furthermore, the consent of the personal representative did not, the Court held, fulfil the requirements of s.18(2)(h) of the CRCA 2005. The Court accepted HMRC's argument that the occupational history related to the employers of the deceased and they had not consented.

[13] *R. (on the application of HMRC) v HM Coroner for Liverpool* [2014] EWHC 1586 (Admin) at [44].
[14] *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10; [2009] 1 WLR 1988; [2009] 2 All E.R. 1127 at [22].
[15] *R. (on the application of HMRC) v HM Coroner for Liverpool* [2014] EWHC 1586 (Admin) at [48].
[16] *R. (on the application of HMRC) v HM Coroner for Liverpool* [2014] EWHC 1586 (Admin) at [48].
[17] *R. (on the application of HMRC) v HM Coroner for Liverpool* [2014] EWHC 1586 (Admin) at [51].
[18] *R. (on the application of HMRC) v HM Coroner for Liverpool* [2014] EWHC 1586 (Admin) at [52].
[19] *R. (on the application of HMRC) v HM Coroner for Liverpool* [2014] EWHC 1586 (Admin) at [52].

Interim position

The Court had also tasked itself with considering a third issue:

> "Can a disputed Notice under Schedule 5 to the CJA 2009 be ignored and, if not, what should be done pending the substantive determination of the validity of the Notice?"[20]

The Court was firm in its view:

> "If a notice is issued by a Coroner, pursuant to schedule 5 to the CJA 2009, in circumstances where its validity is in dispute, it cannot simply be ignored."[21]

If the Coroner declines to withdraw it, then the party issued with the notice must either "… comply, while preserving its position to challenge the validity of the notice subsequently; or seek interim relief from the Court".[22] HMRC, properly, followed this route.

The CJA 2009 does not explicitly state that Crown application applies and there was concern that had the Court found that Sch.5 notices do not bind the Crown, then it would make it difficult for coroners to carry out their statutory duties. This judgment provides welcome clarity for all who come into contact with the State through the Coroner Service, whether that is as a result of a death caused by industrial disease or a death due to the actions of an organ of the State.

[20] *R. (on the application of HMRC) v HM Coroner for Liverpool* [2014] EWHC 1586 (Admin) at [20].
[21] *R. (on the application of HMRC) v HM Coroner for Liverpool* [2014] EWHC 1586 (Admin) at [59].
[22] *R. (on the application of HMRC) v HM Coroner for Liverpool* [2014] EWHC 1586 (Admin) at [59].

Combating Fraudulent and Exaggerated Claims: A Review of Developments since the Supreme Court Decision in *Summers v Fairclough Homes*

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Abuse of process; Fraudulent claims; Personal injury claims; Striking out

PROCEDURE

In this article of a two-article series considering fraudulent claims, the authors examine progress in the courts' fight against fraudulent and exaggerated personal injury claims since the 2012 decision of the Supreme Court in Summers v Fairclough Homes Ltd.[1] *Three lower court strike-out decisions are analysed in detail and the use of a variety of other anti-fraud tools is considered, including strict deployment of the burden of proof, refusal of interest on damages and costs sanctions. All of these show that the attitude of the courts has, since* Summers*, been considerably less forgiving towards the litigant who attempts to pervert the court process by lies and exaggeration.*

Introduction

> "False claims undermine a system whereby those who are injured as a result of the fault of their employer or a defendant can receive just compensation."

So said Moses L.J. in *South Wales Fire and Rescue Service v Smith*,[2] and the succinctness of these words has meant that they have come to be cited in almost every reported case where a defendant has alleged that a claimant has fabricated or grossly exaggerated his or her claim. In *Summers v Fairclough Homes Ltd*,[3] the defendant's insurer sought to persuade the Supreme Court that the proper response to such attempts to undermine the system of compensation was to employ its ultimate sanction: the striking out of a claim in its entirety. Only such an extreme measure, it was argued, would achieve the twin aims of punishing the dishonest claimant and discouraging the bringing of such claims. No longer should the court indulge the claimant by striving to extract the truth from the lies in order to make an award based on the "genuine" part of the claim, if there were one.

Mr Summers suffered a real injury worth real damages, but after his recovery he embarked on a campaign of deceit that led to the presentation of a lifelong disability claim in which he initially sought an award close to £800,000. He was an accomplished but ultimately unsuccessful liar and, after a trial on quantum, the Judge awarded him about a tenth of that sum. Zurich Insurance had argued throughout that he should get nothing, but recognised that existing Court of Appeal authority[4] held to the contrary. Overruling the

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[1] *Summers v Fairclough Homes Ltd* [2012] UKSC 26; [2012] 1 W.L.R. 2004; [2012] 4 All E.R. 317.
[2] *South Wales Fire and Rescue Service v Smith* [2011] EWHC 1749 (Admin) at [2].
[3] *Summers* [2012] 1 W.L.R. 2004.
[4] *Shah v Ul-Haq* [2009] EWCA Civ 542; [2010] 1 W.L.R. 616; [2010] 1 All E.R. 73.

Court of Appeal, the Supreme Court found that the Court did indeed have the power to strike out a dishonest claim as an abuse of process at *any* stage of the proceedings, including after a full trial in which the claimant's genuine entitlement has been established. However, it also held that Mr Summers' claim was not a case for strike-out.

At the time of publication of the decision in *Summers* some commentators thought that insurers had (over)played their hand and lost in so far as the strike-out jurisdiction was concerned. The law, they said, was effectively unchanged, so that the dishonest claimant could continue to expect the court to award him damages referable to the part or parts of his claim that were not false. They made the point that if Mr Summers' claim were not to be struck out, then any strike-out jurisdiction had no more than theoretical application. This was a perfectly reasonable observation. *Summers* was indeed run by the defendant's insurer as a test case. As such, it was selected for the egregious qualities of Mr Summers' dishonesty and for the fact that it did include a genuine and significant—albeit short lived—injury. Even the most ardent anti-fraud campaigner had reason to fear that if Mr Summers was entitled to keep his £80,000,[5] it was going to be difficult to find a claim where a lying claimant should forfeit his damages altogether.

However, in this article we will show that those commentators were wrong, or at least that they spoke too soon. Not only have there been several widely reported cases of wholesale strike-out of substantially dishonest personal injury claims, but the courts have, since *Summers*, shown much more enthusiasm for the use of the other weapons in the defendants' anti-fraud armoury—costs, interest, contempt etc. As a result the dishonest claimant is at greater risk than ever of losing the damages for any genuine part of his claim. Furthermore, developments since *Summers* have shown that its reach extends to all types of claim and, quite rightly, to dishonest defendants as well.

We shall also look at recent announcements by the Ministry of Justice relating to a proposed change in the law which, if enacted, will achieve a similar result to that for which the defendant contended in *Summers*.

A closer look at the decision in Summers

Having found that to pursue a dishonest claim constitutes an abuse of process and that the court *does* have the power to strike out such a claim at the end of a trial, the Supreme Court went on to consider when the power might be exercised. The answer was only in "very exceptional circumstances" and, more specifically, where the party's abuse was such that he had thereby forfeited the right to have the claim determined.[6] The Court clearly struggled with the idea that strike-out should be available even where the judge had heard all of the evidence and where liability had been established by the claimant in a certain amount. It asked itself the question of when it might be proportionate to strike out such a claim, giving only as a possible example the situation where there had been a massive attempt to deceive but the award of damages would be very small.[7]

Crucially, however, the Supreme Court was careful to emphasise that the refusal to strike-out Mr Summers' claim did not mean that the remedy would not have been available at the interlocutory stage. At [62] of the judgment it was stated that one of the objects of strike-out is to bring a halt to a claim in order to prevent the further waste of resources where the claimant has forfeited the right to have the claim determined. A defendant who can apply for strike-out at the interlocutory stage, when much more work remains to be done to quantify the genuine elements of a claim, should be better placed to argue that the grant of the remedy will save resources, than one who is making the same application at the end of a trial when all the money has been spent.

[5] Although in reality the costs sanctions visited on Mr Summers meant that he received less.
[6] *Summers* [2012] 1 W.L.R. 2004 at [43].
[7] *Summers* [2012] 1 W.L.R. 2004 at [49].

In its judgment, the Supreme Court also made repeated reference to the possibility of strike-out of part of the claim, rather than the whole of it. Overall, the judgment can be taken to establish the remedy as a highly flexible one.

Specific reference was also made, and endorsement given to, alternatives to strike-out as a means of combating fraudulent claims. These alternatives relate to offers, proof of loss, costs orders and interest. We shall examine them in more detail below.

Summers in action

The first significant decision in the personal injury field to follow *Summers* was the heavily publicised case of *Fari v Homes for Haringey*.[8] Mrs Fari claimed that she had suffered life-changing injuries in a tripping accident, leaving her with a permanent 16-hour-a-day need for care, generating a claim for damages of £740,000. Surveillance performed on Mrs Fari saw her ambling to local shops and continuing in her pre-accident role of matriarch of her large family. The genuine element of her claim was probably worth no more than £2,000. The defendant pleaded a *Summers* strike-out which was heard on an interlocutory basis. The application was supported by evidence from the claimant's own orthopaedic expert whose view was that Mrs Fari had "significantly exaggerated her disability". HH Judge Mitchell QC took little persuading that Mrs Fari had so completely and grossly exaggerated her injuries that the "only appropriate order"[9] was to strike out her claim using the power of the court identified in *Summers*.[10]

Next came *Scullion v Royal Bank of Scotland*.[11] Mrs Scullion had been injured in a fall at work and contended that she was unable to work as a result of her injuries. She claimed full loss of earnings for a three-year period as part of a total claim of around £75,000. Although the evidence showed rather inconveniently for Mrs Scullion that she had returned to the workforce within seven months of the accident and had even been promoted twice by the time the strike-out application was heard, this was a modest fraud when judged against *Fari* and *Summers*. Under the pressure of powerful surveillance evidence and an application to strike out her claim, Mrs Scullion finally admitted that she had been untruthful in her claim for loss of earnings and she tried to abandon this part of her claim in an attempt to preserve the remainder. HH Judge Cotter QC noted the breadth of Mrs Scullion's deceit and found that it tainted the whole claim. He made specific reference to proportionality, finding that were the claim to continue all of the medical evidence would effectively have to start from scratch. He also referred to the newly hardened attitude of the court to dilatory progress of claims and breaches of procedural orders, indicating that there must be a concomitant stiffening of the approach to claims which required wholesale reappraisal in light of the claimant's dishonesty. He had regard to the fact that the true value of the claim probably put it in the small claims track but had been enlarged into a "significant multi-track claim". Ultimately, the Judge concluded that the claim was truly exceptional and he had "not the slightest shadow of doubt that [the] claim should be struck out …".[12]

Scullion was followed by *Plana v First Capital East Ltd*.[13] Mr Plana was a bus driver who suffered a blow to the head which he asserted had left him with significant continuing symptoms including black-outs that prevented him from working ever again. A claim for £637,000 was presented, on which judgment was entered and interim payments totalling £125,000 ordered, before two days of surveillance showed Mr Plana working normally in a car washing business owned by his son. HH Judge Collender QC considered

[8] *Fari v Homes for Haringey* , Unreported, October 9, 2012 County Court (Central London).
[9] *Fari* , Unreported, October 9, 2012 at [23].
[10] To add insult to exaggerated injury, Mrs Fari was later found guilty of contempt and committed to a sentence of three months' imprisonment. For his part in the deceit, her husband received a two month sentence, suspended for one year.
[11] *Scullion v Royal Bank of Scotland* , Unreported, May 24, 2013 County Court (Exeter).
[12] *Scullion* Unreported May 24, 2013 at [29].
[13] *Plana v First Capital East Ltd* , Unreported, August 15, 2013 County Court (Central London).

that Mr Plana's was "a fraudulent claim which has been unmasked by the surveillance evidence."[14] He considered that the claim had been brought with "a clear intention to deceive",[15] struck the whole case out and ordered Mr Plana to repay £125,000 of interim payments.

What about cases where the defendant has tried but failed to strike out a fraudulent claim? We are aware of instances when the court has dismissed or refused to deal with such applications, usually on the basis that the dishonesty issues are not sufficiently clear cut so that they are sent on to be determined at trial. Our research for the purposes of this article has uncovered only one reported personal injury case in which a strike-out application was refused: in the High Court of Justice in Northern Ireland. In *Hazlett v Robinson, Loughrey and Ussher*[16] Gillen J. was asked to strike out a personal injury claim brought by Mr Hazlett. The Judge found that he had exaggerated his symptoms, been less than truthful about his work since the accident and lied about whether he was wearing a seatbelt in the accident. However, the Court declined to exercise its power to strike out the claim, saying the plaintiff "clearly has sustained significant personal injuries and must be appropriately compensated for these."[17]

The ripples created by *Summers* have also found their way into other areas of the law. In the past two years we have seen the strike-out jurisdiction invoked in libel claims (see *Joseph v Spiller*,[18] and *Makudi v Triesman*)[19]; breach of confidence claims (see *Abbey v Gilligan*[20]); proceedings in the family division (see *Vince v Wyatt*);[21] and even a chancery claim involving the Financial Services Authority (see *Financial Services Authority v Asset LI Inc*).[22]

A new attitude to fraud?

The post-*Summers* personal injury cases show that an interlocutory strike-out will most likely be granted in cases where the evidence of fraud is overwhelming, the fraud taints the whole claim and the application is made sufficiently early to enable the precious resources of the court to be saved. We make the following additional observations:

- There appears to be continuing judicial jaundice against exercising this power at the pre-trial stage, even in clear cases.
- We have yet to see the jurisdiction exercised by the court in a substantial claim where the genuine element of the claim is large. (Indeed, this remained a concern for Lord Kerr when he spoke at the Insurance Fraud Investigators Group meeting in Northern Ireland on September 11, 2013, saying, "however reprehensible Mr Summers's behaviour, he has suffered a loss from a genuine accident". Echoes of this are heard in the words of Gillen J. when he refused to strike out the *Hazlett* claim.)
- There are no reported decisions in which only part of a claim has been struck out as an abuse of process.
- *Hazlett* is the only occasion known to us where an application to strike out the claim has been pursued *after* trial, as in *Summers*. It seems clear that the Supreme Court's dicta to the effect that strike-out would only be justified after trial in the rarest of cases has served to deter defendants from pursuing such applications.

[14] *Plana* , Unreported, August 15, 2013 at [20].
[15] *Plana* , Unreported, August 15, 2013 at [20].
[16] *Hazlett v Robinson* [2014] NIQB 17.
[17] *Hazlett* [2014] NIQB 17 at [60].
[18] *Joseph v Spiller* [2012] EWHC 2958 (QB) and *Joseph v Spiller (Costs)* [2012] EWHC 3278 (QB).
[19] *Makudi v Triesman* [2013] EWHC 142 (QB).
[20] *Abbey v Gilligan* [2012] EWHC 3217 (QB); 2013] E.M.L.R. 12.
[21] *Vince v Wyatt* 2013] EWCA Civ 934; [2014] 1 F.L.R. 399.
[22] *Financial Services Authority v Asset LI Inc (t/a Asset Land Investment Inc)* [2013] EWHC 178 (Ch); [2013] 2 B.C.L.C. 480.

Some may be disappointed that there is not greater enthusiasm in the lower courts for policing their own process through the use of this strike-out jurisdiction. It could be said that such an approach sits uneasily with the emphasis placed by the Jackson reforms on adherence to the procedural rules, while the impartial observer may be perplexed to learn that in the recent post-*Mitchell*[23] environment, the dishonest litigant who meets court deadlines is more likely to receive his judgment than the honest one who serves vital evidence a few days late.

Further, we notice some tension between this reluctance and comments made extra-judicially by two of the Supreme Court Justices who were on the panel in the *Summers* case. On October 26, 2012, Lord Reed delivered a lecture at the University of Edinburgh on the subject of abuse of process and dishonest litigants in the Scottish courts. He spent some time on the then very recent decision in *Summers*, and, referring to recommendations made in the *Report of the Scottish Civil Courts Review*[24] (on similar lines to the Jackson reforms), said that

> "it makes little sense to be willing to dismiss an action for non-compliance with a procedural rule and the consequent waste of time and money, but to forbear from doing so when a similar or greater waste has been occasioned by a litigant's dishonesty."

He concluded by counselling judges not to be "unduly reluctant" to dismiss cases where it appears that the litigant is determined to subvert the adjudicative process by fraudulent means.

Lord Clarke, when delivering the Bracton lecture at the University of Exeter Law School in November 2013, commented that applications under Summers are likely to be made at an early stage in proceedings (which we interpret to mean at the interlocutory stage) and that: "The correct approach in such cases will have to be left to evolve on a case by case basis."

Thus we have very clear indications from two senior members of the judiciary that this power is there to be used where appropriate.

Other Summers-related considerations

Experience has shown in fraudulent personal injury claims that the mere intimation of a *Summers* strike-out application at the interlocutory stage may be enough to give the defendant the upper hand in the litigation. Of course, such a tactic should only be used where there are genuine grounds for an allegation of dishonesty, supported by good evidence. A defendant who has flimsy or equivocal evidence and is merely trying to scare the other side with the threat of a strike-out application is likely to meet with the court's strong disapproval and punitive adverse costs sanctions. However, where the defendant is able to plead and prove fraud, the addition of an application for strike-out may serve to bring the claimant to the negotiating table earlier than would otherwise have been the case. Solicitors acting for a plainly fraudulent claimant who is funding his claim by a conditional fee agreement will be obliged to inform after the event ("ATE") insurers of the pending strike-out application, with the accompanying prospect that cover may be pulled immediately. This may have the effect of focusing minds on ways of resolving the dispute. Where ATE cover is withdrawn, but the case does not settle, the dishonest claimant may be left in the position of having to continue the claim without the assistance of lawyers.

For the case that does proceed, strike-out is not the court's only means of penalising the fraudulent claimant, as the Supreme Court made plain in *Summers* itself. Perhaps the most frightening prospect for the dishonest claimant is contempt proceedings leading to a prison sentence. This is a substantial topic in its own right and it, together with other punitive actions taken outside the main personal injury proceedings, will be the subject of the next article in this two-article series.

[23] *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537.
[24] *Report of the Scottish Civil Courts Review* (2009) ("Gill Report").

Within the proceedings themselves, there is now the specific threat of adverse inferences being drawn against any claimant whose fraud is proven, such that his evidence will no longer on its own be considered sufficient to prove a head of loss. The fraudster claimant is also likely to find that the court refuses to award interest on proven heads of loss.

As to offers and costs, in *Summers* the Supreme Court recognised that Pt 36 offers offered "no real assistance"[25] in fraud cases and put its stamp of approval on the greater use of Calderbank offers as a means of gaining costs protection and bringing claims to settlement, giving the following guidance as to where the costs should fall:

> "As to costs, in the ordinary way one would expect the judge to penalise the dishonest and fraudulent claimant in costs. It is entirely appropriate in a case of this kind to order the claimant to pay the costs of any part of the process which have been caused by his fraud or dishonesty and moreover to do so by making orders for costs on an indemnity basis. Such costs orders may often be in substantial sums perhaps leaving the claimant out of pocket. It seems to the Court that the prospect of such orders is likely to be a real deterrent."[26]

That approach to costs contrasted with the previous judicial emphasis on the use of Pt 36 offers, most notably by the Court of Appeal in *Fox v Foundation Piling Ltd*.[27] The automatic costs consequences of acceptance of a Pt 36 offer meant that the Pt 36 regime was not much use to a defendant who had just spent many months and thousands of pounds uncovering and proving the claimant's fraud. As a result, the dishonest claimant was often enabled, in the absence of a Pt 36 offer from the defendant, to run his case to trial with only limited risk on costs. No longer is that the case. Safe in the knowledge that the decision in *Summers* supports him, the defendant can now use the *Calderbank* mechanism to offer to settle the genuine claim whilst making offers to settle individual issues of costs, if necessary on an indemnity basis.[28]

This clear guidance on costs has already had a significant effect in resolving large numbers of cases in which we have been involved where fraud is found as, free to deal outside the parameters of Pt 36, the parties are able to reach fairer and more realistic settlements. The defendant's strengthened negotiating power may enable settlement to be on significantly more favourable costs terms than in the pre-*Summers* era. An example would be where a defendant insists on limiting the claimant's recoverable costs to those costs relating only to proof of the honest parts of the claim, while seeking its own costs of proving the dishonesty (surveillance costs, costs wasted on experts, costs of issuing the strike-out application and so on) on an indemnity basis in line with the guidance given in *Summers*.

Conclusion

We believe that events in the two years that have elapsed since the decision in *Summers* was handed down illustrate that it marked a milestone in the way that the courts deal with dishonest claims. Far from being dead in the water, the strike-out jurisdiction is alive and waiting to have its practical limits tested in the courts. As a tool of deterrence, its power is real and, as we have shown above, even where it is not the answer to an individual case, other aspects of the decision in *Summers* have altered the landscape for claims of this kind.

[25] *Summers* [2012] 1 W.L.R. 2004 at [54].
[26] *Summers* [2012] 1 W.L.R. 2004 at [53].
[27] *Fox v Foundation Piling Ltd* [2011] EWCA Civ 790; [2011] C.P. Rep. 41; [2011] 6 Costs L.R. 961.
[28] *Summers* [2012] 1 W.L.R. 2004 at [54], per Lord Clarke.

The Future

In recent weeks, we have learnt that the Rt Hon Chris Grayling MP, Secretary of State for Justice, has finally taken up the baton on fraud by introducing a new s.51 to the Criminal Justice and Courts Bill. The new legislation would enable the court to dismiss personal injury claims where the claimant is found to be entitled to damages but the court is satisfied on the balance of probabilities that the claimant has been "fundamentally dishonest in relation" to his own or a related claim "unless the court is satisfied that the claimant would suffer substantial injustice if the claim were dismissed". Thus the burden will be placed on the fundamentally dishonest claimant to persuade the court that his otherwise proven personal injury claim should not be dismissed. There are clear echoes of s.26 of the Civil Liability and Courts Act 2004 (Republic of Ireland) which was cited before the Supreme Court in the *Summers* case.

Doubtless the Government sees this tougher line on personal injury fraud as a popular measure in a year leading up to a general election, but it is interesting to read Lord Kerr's views on the legislative solution:

> "… let me express a purely personal view on the question whether an all-embracing, universally applicable rule can be applied in order to determine whether a particular species of fraud will bring about dismissal of the action … I should own up immediately to an instinctual aversion to the devising of an overly technical rule for the resolution of most legal issues. But, quite apart from that, I do not believe that such a rule in the present context is likely to prove helpful in the long term. In my experience, such rules promise more than they can deliver on purported application."[29]

Those who criticised the Supreme Court for being too weak in the way it dealt with the issues in *Summers* are bound to be heartened by the prospect of legislation, but the high level expression of such doubts indicates that the task of formulating a system to discourage and deal with fraud in personal injury claims remains a work in progress.

[29] Speaking at the Insurance Fraud Investigators Group meeting in Northern Ireland on September 11, 2013.

People Challenges Facing Law Firms

Sue Lenkowski*

Apprenticeships; Graduates; Human resources management; Law firms; Personal injury

Sue Lenkowski looks at the HR issues facing PI law firms including recruitment, retention and career development.

As the world of law, and particularly the PI world, changes, firms need to radically rethink not only their legal service delivery models but running alongside this their approach to staffing in terms of roles, structures and talent management.

Historically, firms have brought in junior talent at the paralegal, legal assistant and trainee solicitor levels.

Trainee solicitors

At trainee level, firms have had no problem attracting graduate and postgraduate students to apply for training contract vacancies. Some firms still take the costly two-year-in-advance approach, paying large sums of money to fund a student's Graduate Diploma in Law ("GDL"), Legal Practice Course ("LPC") and maintenance grants, and attending law fairs delivering campus-based activities, on the assumption they will attract the "cream of the crop". Others take the more pragmatic, and some might say commercial, approach that the supply-demand imbalance means that they can recruit on a more "just in time" basis without necessarily compromising on quality. Furthermore, it is a slightly less risky decision to recruit post-LPC than assess the potential of a 20- or 21-year-old student with limited work/life experience. However, whatever approach is taken, the major problem remains how to deal with the sheer volume of applications, sifting out the best of what is inevitably a very large and diverse bunch. Whether the response has been to use complex and costly assessment centres, work experience schemes, academic benchmarks or any other method, trainee recruitment remains a costly and often difficult process to manage.

Paralegals/legal assistants

The issues discussed above have led to thousands of LPC graduates working in firms in paralegal roles. The reasons for this are obvious: LPC graduates without a training contract see paralegal work as a means of possibly obtaining a training contract by impressing "on the job", or at the very least gaining CV-building work experience. In addition, they are at least starting to earn money to pay off their substantial student debt (on average £20,000 and set to rise).

From the position of a firm, this staff group are less expensive than trainees (which fits with the substantial pressure to make the practice of PI law commercially viable): there are no Solicitors Regulation Authority ("SRA") requirements to provide the Professional Skills Course ("PSC") and a breadth of exposure to three areas of law, and they are in plentiful supply. On the face of it, this is a very sensible talent management practice.; However, it is potentially a very short-term fix which carries substantial below-the-line costs. Typically, an LPC graduate taking a paralegal position will see the role as a short-term means to an end. Staff turnover can typically run at 30 to 45 per cent for this group (there is only so long that the carrot of a training contract ("TC") can be dangled, at which point a competitor will poach staff

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to dangle the carrot once again).The costs of this are often underestimated, largely because few HR Practitioners fully demonstrate the cost to a firm or, when they do, the firm chooses to accept this as an inevitable consequence of the market. The costs of high turnover in this group include:

- Recruitment—including agency, advertising and fee earner time.
- Training—on average it takes a new recruit at least three months to perform to an acceptable standard and more typically six months.
- Client management—constantly changing the fee earner handling a case ranks high in the reasons why clients feel aggrieved.
- Notwithstanding the fact that recruitment is not an exact science and typically most of us will make recruitment decisions which are likely to only have 30–50 per cent predictive validity,[1] the time and money spent managing square pegs in round holes is something that the busy practitioner can ill afford.

Litigation assistants/fee-earning legal secretaries

In response to these difficulties and the drive to reduce costs, some firms have looked to redefine the traditional secretarial role. Turning their experienced secretarial staff into quasi-fee earners undertaking the more routine process-driven tasks, allows more experienced staff to undertake more complex activities. There are obvious advantages to doing this: many firms have long-serving staff in these roles who know the firm, the PI process, have exceptional client handling skills and are exceptionally IT literate. The business benefits of this approach can be substantial.

The drawback is that this staff group is relatively small and, as the market for legal secretaries has shrunk, the ability of firms to tap into this resource will diminish.

Legal executives

The role and importance of legal executives has grown substantially over the last 10 years and firms have increasingly been taking up this route to provide a highly valuable fee-earning resource. I introduced an in house CILEX Programme at a firm in 2000; the aim was to develop a pool of existing staff who would, as their skill set developed, take on more complex work and more responsibility. In addition this was seen as a strong attraction tool for non-graduates into parts of the business where there was a need to change the cost structure to meet the challenge of delivering work profitably without compromising on quality. The program was there to develop a new talent pipeline well in advance of the scale of changes we have now seen in the PI world. CILEX has the advantage of an "earn and learn" approach, engendering loyalty and commitment. Its simplicity is that it develops an individual as a real expert in their field, rather the broad approach of a traditional training contract. It is modular so individuals may easily step off and on the programme whilst still having a meaningful career and providing a strong contribution to the firm's business and profitability. For others there is a clear transparent route to Fellow and potentially qualification.

So what can firms do to tackle the staffing challenge?

The challenge is quite simply to consider the best talent mix for the work that a firm does. It is important to review current job roles and recruitment strategies and critically evaluate the costs of these and also to consider some alternatives which are growing in importance. For me there is a need to consider two major areas: legal apprenticeships and alternative graduate career paths and entry roles.

[1] To put it simply: for every 10 people we recruit only 3–5 will actually come up to scratch.

Legal apprenticeships

In the last three years there has been considerable progress made to develop legal apprenticeships. The accountancy profession has understood for years the idea that the professions can benefit from non-graduate entry and development routes. Law, as is often the case, has lagged behind but this is changing.

There are now apprenticeship frameworks in place to bring young people into law firms at a variety of levels from post-GCSE and A-level.

In essence, an apprenticeship will involve developing skills and competence on the job, which is rigorously assessed and evidenced, alongside development of knowledge via off-the-job education/distance learning and exams.

Many practitioners I speak to are very sceptical about the value of the learning and qualifications which underpin apprenticeships. There is a feeling that these qualifications are of a lesser quality than the academic rigour of university-based education. Nothing could be further from the truth: the qualifications have been developed by the sector, they are robustly assessed and monitored, and are in many cases more fit for purpose than the LPC.

Bringing in apprentices alongside the traditional mix of fee-earning roles has the following advantages:

- The start-up costs are relatively low and the Government funds all the training for under 19s and provides a 50 per cent subsidy for those between 19 and under 24.
- The qualifications that apprentices take are nationally developed and recognised, and in many cases involve sitting exams set within the CILEX framework. They are assessed against competencies that have been developed by employers and represent real skills which PI fee earners need to do their job.
- Young people given the opportunity to join a law firm as an apprentice are, in this author's experience, a highly motivated and loyal group of staff.
- There are now more students questioning the automatic move from sixth form to university. I have recruited apprentices who have received offers from the top universities but for whom the high cost of tuition and depressing graduate unemployment figures means they are looking for an alternative entry route into the profession. Given the opportunity to join a firm as a legal apprentice means a firm is likely to benefit from a more stable workforce, trained from an early age by the firm and who can be a real source of future talent.
- Youth unemployment is a huge concern for many families and the positive image an apprenticeship programme can present to clients should not be underestimated.
- There is also widespread support from the Government and the business community to contribute to the diversity of the profession by providing vocational education and non-graduate routes. As current take up in the sector is still relatively small, this can help a firm to build client relationships and win business.
- The apprenticeship talent pipeline provides the ability for firms to retain and develop junior staff over many years, helping a firm to adjust work to the correct level and contributing to its commercial viability.

In 2009, I worked with Skills for Justice to undertake some initial employer research prior to the development of legal apprenticeships. I met many firms who were very sceptical about the utility of bringing in young and very inexperienced staff. Although these concerns are understandable, my experience recruiting 22 legal apprentices into two very different firms over the last two years suggests that these fears are largely unfounded. In many ways the apprentices I have helped firms recruit have been a "breath of fresh air"; a blank canvas. They have all approached the opportunity with enthusiasm and, despite their lack of work experience, have very quickly made an effective contribution. Many are now undertaking

work which would previously have been the domain of the paralegal and in many cases doing it equally well.

Finally on the topic of apprenticeships, there are plans to develop higher level apprenticeships.[2] These apprenticeships, which are being referred to as "solicitor apprenticeships", will provide an alternative route to qualification, similar to the CILEX "earn and learn" route. This development will provide an interesting route into the profession and will certainly provide a signal to those currently on the lower levels that the apprenticeship route has a future and status in the profession.

Alternative graduate entry schemes

I do not want the reader to think that I see legal apprenticeships in their current post-GCSE/A-level position as the total answer to the staffing challenge. Alongside consideration of using these more junior apprenticeships I believe that firms need to look at alternative graduate-level career opportunities.

If you have read Susskind, *Tomorrow's Lawyers*[3] you will be familiar with his assertion that the future will see an entirely different set of job roles. Many of these roles will require an entirely different set of skills from the traditional law graduate.

Although Susskind says that the evolution of these roles will take many years, there is a real opportunity for firms to bring in graduates from a wide variety of disciplines providing them with the basic file and client handling skills, but look to manage their expectations away from the traditional solicitor route into alternative and business critical career paths, such as: legal process, legal project management, consultancy, legal IT development, team management and leadership. Many postgraduate students are quite rightly reluctant to relinquish their career ambition to become a solicitor having spent considerable time and money on their studies. But the current crop of undergraduates are all too aware of the graduate and postgraduate employment statistics and are much more open to the opportunity which an alternative well-defined career path in the legal profession can present. In addition, the advent of alternative business structures ("ABS") can provide a way to sell a career in law without qualification to graduates.

Types of alternative graduate career paths which I am involved with developing include: a team leadership pathway (which provides a two-year traineeship involving on the job training and Institute of Management qualifications), legal project manager pathway and niche legal technical analyst pathway. These pathways provide a real and tangible alternative career path to trainee solicitor but more importantly are developing staff who can deliver the business critical roles which the legal world of the future requires.

Where do we go from here?

Ultimately, every firm will come to its own conclusions regarding the best people solutions to meet their needs. My message is that a firm that takes the time to review its current staff matrix and consider the new roles and routes will be better able to make decisions which may assist them to meet the challenges of the new legal world. I recognise that some of these decisions may seem quite bold and in some circumstances revolutionary, but there has never been a greater imperative to do this than in the changing PI market place. Those that do this will see the bottom-line benefits; those who continue to run with the more traditional will, at best, fail to capitalise on the benefits and, at worst, lose the battle for survival.

[2] In the jargon: apprenticeships at levels 5, 6 and 7.
[3] R. Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (Oxford: Oxford University Press, 2013).

There Can Be Only (CPR) 1: The Reasonableness of *Mitchell* (and Litigation generally) is Confirmed

Steven Akerman*

Case management directions; Non-compliance; Overriding objective; Relief from sanctions

Following on from his critique of the decision in Mitchell *and its consequences for litigators and their clients*[1]*, Steven Akerman reviews the decision of the Court of Appeal in the conjoined appeals of* Denton, Decadent and Utilise*. He considers the way in which the Court of Appeal has sought to provide clarification of their earlier guidance in* Mitchell*. He considers how the whole issue of relief from sanctions should now be approached after this second (more sensible) Court of Appeal judgment and looks at the practical implications of the clarified guidance for litigators. ML*

On July 4, 2014, I was sitting in my office on a summer's day with the windows open. In the early afternoon I felt what I initially thought to be a cool summer's breeze. However, on further reflection it was actually the collective sigh of relief (from sanctions in more ways than one) following the Court of Appeals decision in *Denton, Decadent and Utilise*[2] (hereafter simply referred to as *Denton* unless referred to the facts of the other joint appeals). The Court of Appeal fine-tuned, or as others would have it, corrected the erroneous and mistaken judgment given in *Mitchell*.[3]

Suffice it to say that while I am grateful for the judgment given in *Denton*, I am firmly in the latter camp. I believe that the harshness that followed *Mitchell* was a direct result of the way that decision was handed down which was only magnified by the "guidance" the judiciary was given in the wake, and preparation, of the Jackson "reforms".

On a plain reading of *Mitchell* and, when taken at face value, the court took the simple view that once a breach has taken place and a sanction imposed, there is evidence that the overriding objective has been fulfilled.

All that seemed to matter was that there are rules which are conducive to a just and proportionally run claim. The very fact that there was a breach was the gravest of sins and flew in the face of the civil justice reforms. Such conduct had to be eradicated for the greater good of compliance—in a near vacuum of the circumstances surrounding the actual litigation in question. Anything more than the slightest deviation from strict compliance with rules would be catastrophic to the civil justice system. Mere lip service was paid to the other criteria as set out in the overriding objective.

To quote *Mitchell* itself:

> "45. On an application for relief from a sanction, therefore, the starting point should be that the sanction has been properly imposed and complies with the overriding objective.
>
> 46. The new more robust approach that we have outlined above will mean that from now on relief from sanctions should be granted more sparingly than previously."

While the court did allow "trivial" breaches to be granted relief as a matter of course, "trivial" was interpreted very narrowly in many instances as the word itself suggests.

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[1] "What is the Matter with Mitchell?" [2014] J.P.I.L. 119.

[2] *Denton v White and others; Decadent Vapours Ltd v Bevan and others; Utilise TDS Ltd v Cranstoun Davies and others* [2014] EWCA Civ 906.

[3] *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537.

Once one could not rely on triviality, one had to have "good reason" for the breach to be granted relief. This too was given narrow guidance (despite what the COA stated in *Denton*):

> "41. For example, 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* (emphasis added), that may constitute a good reason."

If there is a possibility that a debilitating illness will not be a "good reason", one struggles to come up with what would constitute a "good reason" in more mundane and everyday circumstances.

It will be argued here, however, that the court now takes a completely different approach. CPR 3.9 is merely the prism through which the overriding objective, *and all its components*, are viewed. The overriding objective has many competing interests and the particular circumstance presented to the court will determine which criteria have prominence, but this would not be to the exclusion of the remaining criteria.

The breach itself is not inherently wrong (and the sanction is not inherently "right"). If the situation as a whole when considering the overriding objective through the CPR 3.9 lens warrants relief, such will be granted. The fact that the sanction was imposed in the first place will not in of itself be held against the offending party.

Lord Jackson himself notes (in *Denton*)that:

> "94. Recommendation 86 [Relief from Sanctions] needs to be understood in its proper context. It is part of a large package of interlocking reforms which were designed to promote access to justice at proportionate cost. Recommendation 86 was necessary for two reasons. First, the culture of delay and non-compliance was one of the (numerous) causes of high litigation costs. This cause needed to be tackled along with all the others. Secondly, …the (then anticipated) package of civil justice reforms would not bring any benefit unless the new rules were actually enforced.
>
> 96. The rule becomes an aid to doing justice. The new rule 3.9 is intended to introduce a culture of compliance, because that is necessary to promote access to justice at proportionate cost. It is not intended to introduce a harsh regime of almost zero tolerance, as some commentators have suggested."

This view is echoed in the main judgement:

> "81. It is clear that the guidance in *Mitchell* needs to be clarified and further explained. It seems that some judges have ignored the fact that it is necessary in every case to *consider all the circumstances of the case*."(Emphasis added.)

Therefore when a sanction is imposed, one does not have to request mercy. The court will not hesitate in granting relief when appropriate and the court will not simply penalise a party for the sake of merely breaching a rule. It will be discussed below that the court will refer back to the overriding objective, CPR 1.1, when considering whether relief should be granted. For ease of reference CPR 1.1 reads:

> "(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.
>
> (2) …
>
> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and
>
> (f) enforcing compliance with rules, practice directions and orders."

(I have only recounted those criteria most pertinent for the purposes of this article.)

I will now go on to analyse the criteria as set down in *Denton*, a *three-limbed test*, and demonstrate how breaches requiring relief are only considered problematic in so far as they hinder the overriding objective. I will suggest that other case management situations, such as in time applications for extensions of time and errors in procedure (CPR 3.10) follow the same pattern. It will be demonstrated that the only difference between each case management situation is simply on where the *emphasis* is placed in respect of the overriding objectives competing criteria. Finally, I will discuss how the COA's decision in *Denton* is likely to affect the interaction between the parties in relation to an opponent's breach of a rule and requests for extensions of time.

(For the purposes of this article, I do not intend to consider how the court should approach specific breaches on which the CPR comments such as late service of the claim form (CPR 7.6) and setting aside default judgment (CPR 13).)

CPR 3.9 Relief from Sanctions

Test 1: A serious and significant breach (formerly triviality)

The COA maintained that the guidance given in *Mitchell* was sound. The COA simply changed the terminology as it was thought that the word "trivial" by its very definition led to a narrow interpretation:

> "21. [T]he 'triviality' test amounts to an 'exceptionality' test which was rejected by Sir Rupert Jackson in his report and is not reflected in the rule. It is unjustifiably narrow.'
>
> 26. [I]t has given rise to arguments as to whether a substantial delay in complying with the terms of a rule or order which has no effect on the efficient running of the litigation is or is not to be regarded as trivial. *Such semantic disputes do not promote the conduct of litigation efficiently and at proportionate cost*.
>
> 28. If a judge concludes that a breach is not serious or significant, then relief from sanctions will usually be granted and it will usually be unnecessary to spend much time on the second or third stages."(Emphasis added.)

Therefore, the serious or significant terminology indicates that one has to consider the *effect the breach* has had on efficiency of the litigation as opposed to considering whether the *breach itself* was trivial.

However, one caveat must be mentioned in relation to:

> "26. [T]hose breaches which are incapable of affecting the efficient progress of the litigation, although they are serious. The most obvious example of such a breach is a failure to pay court fees. We therefore prefer simply to say that, in evaluating a breach, judges should assess its seriousness and significance."

Therefore, a breach so egregious, say a blatant disregard for an unless order, may cause a seeming non-serious and insignificant breach to become a serious and significant breach. At the same time the opposite is true. A more than minimal delay will not automatically turn a breach into a serious or significant breach.

This balancing act is demonstrated nicely in *Decadent* where there was a *13*-day delay in notifying the court of the outcome of settlement negotiations. The court acknowledged, however, that in the grand scheme of things the breach was "neither serious nor significant" (at [79]).

Such an open policy could not be the case if having a sanction imposed was problem in of itself. However, with minor breaches, it is just, proportionate and at proportionate cost to "let it slide" in accordance with all the criteria in the overriding objective and to not even need to consider tests 2 and 3 (at [28]). If the breach itself, divorced from the litigation in question, was problematic then an apparent

windfall to the non-opposing party should be justified. However, this is clearly rejected by the court and squarely in keeping with CPR 1.1 in its *entirety*.

Test 2: Good Reason

Should the court find that the breach was serious and significant, the next step is to look at the reason behind the breach. If there is good reason then "relief is *likely* [emphasis added] to be granted. Where the breach is not serious or significant, relief is also likely to be granted [35]". Not only does the court fully endorse the view that serious and significant breaches with good reason should be granted relief, the court mentions this policy in the same breath as granting relief for non-serious breaches, which as described above, will almost always be granted relief.

However, one caveat to note is that "[t]he more serious or significant the breach the less likely it is that relief will be granted unless there is a good reason for it" (at [35]).

Again, it is crystal clear a breach is not an independent problem. As long as it is just i.e. there is a "good reason" for the breach, relief will likely be granted. The more serious the breach, the harder it will be to justify that it is just and proportionate to allow relief.

When one thinks about this in a little more detail, this reasoning is very appealing. The more serious and/or significant the breach, the more important it is to enforce the need for compliance and the harder it is to justify such a breach with a "good reason". After all, if such a breach is not enforced, it could lead to a slippery slope where less important rules are not heeded thereby causing litigation to be run inefficiently and at disproportionate cost (due to unneeded delays, aborted hearings etc.). This carefully balances the criteria in CPR 1.1(1) and CPR 1.1(2) regarding justice, compliance and court resources.

Unfortunately, the COA did not give any guidance on what constitutes "good reason". Instead the court relied on the guidance given in *Mitchell* (at [41] of *Mitchell* specifically). This is rather disappointing and strange given the fact that the court felt that some further guidance was needed due to the "misinterpretation" and "misapplication" of *Mitchell*. Surely, to avoid further error, guidance should be given on one of the key criteria in consideration of whether to grant relief from sanctions? Even more problematic is that in relation to "good reason" in particular, the guidance from Mitchell was anything but in keeping with the theme of *Denton*. The *Mitchell* guidance gave the impression of a quite draconian approach, see above.

Adjourning Scheduled Hearings

A specific example of a serious breach is one which affects a court hearing. In relation to *Denton* it is noted that:

> "54. This was a significant breach, because it caused the trial date to be vacated and therefore disrupted the conduct of the litigation."

The court also noted that:

> "45. We should say something about … the consequences of scarce public resources. It does…make it all the more important that court time is not wasted and hearings, once fixed, are not adjourned."

At the same time, the court has this to say:

> "64. It only affected the orderly conduct of the litigation, because of the approach adopted by the defendants and the court.
> 65. In our judgment, the defendants ought to have consented to relief being granted so the case could proceed without the need for satellite litigation and delay."

Clearly, the court holds a scheduled hearing to be almost sacrosanct and that a very good reason will be required to justify relief where one has to be vacated/adjourned. At the same time, if the breach itself does not give rise to the aborted hearing, but instead it is due to the unreasonable response of the other side, the party seeking relief will not be held responsible. This will prevent the opposing party from taking a point thereby forcing a delay and creating a *fait accompli*, which would hardly be just and proportionate. Among other criteria, this approach gives careful consideration to CPR 1.1(2) (e) when considering the effects of the breach against the need to enforce compliance.

Test 3: Consider all the circumstances

It is at this stage that CPR3.9 (1) (a) and (b) come into play to be considered along with "all the other circumstances". For ease of reference, CPR 3.9 reads:

> "(1) … the court will *consider all the circumstances of the case*, so as to enable it to deal justly with the application, including the need -
> (a) for litigation to be conducted efficiently and at proportionate cost; and
> (b) to enforce compliance with rules, practice directions and orders."[Emphasis added.]

It is at this point where one sees very clearly that a breach is not an inherent problem:

> "31. The important misunderstanding that has occurred is that, if (i) there is a non-trivial (now serious or significant) breach and (ii) there is no good reason for the breach, the application for relief from sanctions will automatically fail. That is not so …
> 38. It seems that some judges are approaching applications for relief on the basis that, unless a default can be characterised as trivial or there is a good reason for it, they are bound to refuse relief. This is leading to decisions which are manifestly unjust and disproportionate."

Yes there was a breach, but the COA is of the opinion that it is not the be all and end all when considering whether to grant relief as such a course would be "manifestly unjust and disproportionate" or in contravention of the overriding objective. Thus relief can be granted even in cases where the breach was serious and significant without good reason if the situation deems it so.

When considering "all the circumstances" and how best to ensure a just and proportionate outcome, there seems to be a divergence of opinion between the main judgment and Lord Jackson as to whether the specific criteria mentioned in CPR 3.9 have more weight than "all the other circumstances".

Lord Jackson opines that:

> "85. The rule does not require that factor (a) or factor (b) be given greater weight than other considerations … The weight to be attached to those two factors is a matter for the court having regard to all the circumstances … Ultimately what rule 3.9 requires is that the court should 'deal justly with the application'.
> 86. The reason why the rule has been amended to require courts to give specific consideration to factors (a) and (b) is that previously courts were not doing so."

In the main judgment, however, it is held that factors (a) and (b) have more weight than other considerations (at [32] and [33]. When one thinks about it, this is an appealing proposition. Why would one need relief from sanction? Obviously, because a rule was not followed. Therefore, when considering the overriding objective through CPR 3.9, the focus is on (a) and (b) which deals specifically with following rules and the effect non-compliance has on litigation e.g. causes it to be run inefficiently and at disproportionate cost. At the same time, however, the COA still requires everything else to be considered as a safeguard against unjust and disproportionate outcomes in consideration of those factors not mentioned specifically in CPR 3.9.

Either interpretation demonstrates without question that no matter the breach, if after taking into account all the circumstances, relief should be granted then it will be granted. Again, the breach in isolation is not damning in keeping the overriding objective in its entirety.

Past Breaches/Conduct

It is at this stage (Test 3) that the court takes into account past conduct:

> "27. We accept that the court may wish to take into account, as one of the relevant circumstances of the case, the defaulter's previous conduct in the litigation (for example, if the breach is the latest in a series of failures to comply with orders concerning, say, the service of witness statements). We consider that this is better done at the third stage."

When considering the overriding objective, this is undoubtedly correct. If the breach is neither serious nor significant, how can it ever be just to refuse relief based on past conduct? The breach was inconsequential. The parties should therefore just carry on.

However, if the breach is serious then part of the overriding objective is to enforce compliance. Therefore, how can the court consider a serious and significant breach in isolation? Frequent (serious and significant) rule breakers, and others, sometimes need to be taught a lesson to encourage the smooth running of litigation in the claim in question, which would mean it can be just in some circumstances to refuse relief when considering past breaches.

At the same time, previous bad conduct by the "innocent" party can go in favour of granting relief. Commenting on the case of *Chartwell*:[4]

> "19. It was also a factor in the claimant's favour that the defendant had also failed to comply."

This is undoubtedly correct. How can it be just to punish one party for non-compliance which, in effect, is a gain to the "innocent" party who also did not follow the rules?

Decadent is a fantastic illustration as to how the third test works in practice. The offending event revolved around the lateness of paying a court fee which is "near the bottom of the range of seriousness" (at [62]). However, it was more complicated that simply paying the court fee late. The fee was put in the post on the day of the deadline meaning that it was inevitably going to be received late. Therefore, the breach was serious without a good reason as there was no way the cheque could have arrived on time.

Relief, however, was still granted because:

> "64. At the third stage, however, the judge should have concluded that factor (a) pointed in favour of relief, since the late payment of the fees did not prevent the litigation being conducted efficiently and at proportionate cost. Factor (b) also pointed in favour of the grant of relief since the breach was near the bottom of the range of seriousness: there was a delay of only one day in sending the cheque and the breach was promptly remedied when the loss of the cheque came to light.
>
> 65. On a consideration of all the circumstances of the case, the only reasonable conclusion in this case was to grant relief. If relief were not granted, the whole proceedings would come to an end It is true that the claimant had breached earlier court orders (as indeed had the defendants)… Nevertheless, even taking account of the history of breaches in the *Decadent* litigation, this was not a case where, in all the circumstances of the case, it was *proportionate* to strike out the entire claim."(Emphasis added.)

[4] *Chartwell Estate Agents Ltd v Fergies Properties SA* [2014] EWCA Civ 506.

It should also be noted the cheque was not actually received the next day. It never arrived for some unknown reason. Although the court recognised that sending a cheque by post entails this risk, it was not held against the offending party. While one may argue that this indicates that a party cannot be faulted for taking a minor risk that may result in non-compliance, I would argue otherwise.

I would argue that the specific risk in question (a cheque getting lost in the post) should have no bearing whatsoever in such an application. Had the offending party put the cheque in the post allowing for arrival on time, there is still the risk of the cheque going astray. Would such a risk be held against the 'offending' party in the event of the risk materialising? I think not. Surely, a solicitor has the right to rely on the Royal Mail. Why should it be any different when CPR 3.9 is involved?

Cost Sanctions/ Agreeing Relief between the Parties

Finally, the way the court has given guidance on how the parties should deal with breaches amongst themselves really says it all about the revised approach to relief from sanctions:

> "41. In a case where (a) the failure can be seen to be neither serious nor significant, (b) where a good reason is demonstrated, or (c) where it is otherwise obvious that relief from sanctions is appropriate, parties should agree that relief from sanctions be granted without the need for further costs to be expended in satellite litigation.
>
> 43. The duty of care owed by a legal representative to his client takes account of the fact that litigants are required to help the court to further the *overriding objective* … It is as unacceptable for a party to try to take advantage of a minor inadvertent error, as it is for rules, orders and practice directions to be breached in the first place. Heavy costs sanctions should, therefore, be imposed on parties who behave unreasonably in refusing to agree extensions of time or unreasonably oppose applications for relief from sanctions. An order to pay the costs of the application under rule 3.9 may not always be sufficient. The court can … record … that the opposition to the relief application was unreasonable conduct to be taken into account … when costs are dealt with at the end of the case. If the offending party ultimately wins, the court may make a substantial reduction in its costs recovery … If the offending party ultimately loses, then its conduct may be a good reason to order it to pay indemnity costs. Such an order would free the winning party from the operation of CPR rule 3.18 in relation to its costs budget."(Emphasis added.)

The court does not care about breaches per se. The court is concerned with ensuring that litigation is run in accordance with the overriding objective. If the breach does not affect the running of the litigation, the court is not interested. The parties should just [never]mind the breach and carry on.

The truth is that the extremely severe costs penalty of possibly freeing the innocent party from its costs budget will be an immense deterrent from litigation being delayed unnecessarily. What party would want to risk the wrath of the court unless it was absolutely certain of being successful in taking issue with a breach?

This approach must be correct. If the breach could have been side-lined, but for a party trying to take an opportunistic point, the resulting delay in the running of the litigation is all the more inexcusable. Whereas the initial breach was likely unintentional (even if inexcusable), the opportunistic party is taking an action with full knowledge that it will be in direct opposition of the overriding objective. Such conduct warrants such a costs sanction. The punishment truly does fit the crime.

I have seen that some practitioners are concerned that there will be satellite litigation on the costs issue, or satellite litigation on satellite litigation. Honestly, I cannot see it. If there is a risk of such a draconian costs penalty on taking a poor point on an issue in the CPR, can one imagine the court's approach to the

party that seeks to take issue with the punishment for taking the heavily criticized bad point? I would be fearful of even being a fly on the wall in such a scenario.

Ratio of *Mitchell* = Ratio of *Denton*

What was one of the main purposes of the Jackson reforms? Was it not to enforce the following of timetables, rules etc. to ensure cost effective litigation that was run orderly and without undue delay? To achieve this outcome, one would initially think to throw the book at the offending party, which is what was done in *Mitchell*. This policy, however, had the unintended consequence of actually having the opposite effect. While rules were being enforced with absolute zealotry (to make even the most ardent supporters of such a policy blush), litigation was coming to standstill when the purpose of enforcing the rules was to have the opposite effect. The reason for this was because there was no longer any cooperation between the parties. Every minor breach was taken on the hope that the "innocent" party would obtain a windfall. As a consequence, countless applications were made thereby flooding the courts and preventing the actual core litigation to continue and in actuality bringing the core litigation to a standstill.

In response, the court has now applied the same unbending commitment to the Jackson reforms. However, instead of pointing the guns at the offending party, the court has the parties who take ridiculous and petty points in their sights. The COA has threatened the imposition of the most "serious and significant" costs sanctions—indemnity costs on the whole action awarded to the "offending" parties - if the "innocent" parties take a point without "good reason". Such a sanction is surely just "in all the circumstances".

Therefore, the Ratio of *Mitchell* = the Ratio of *Denton*. The only difference is to which party the *ratio* is directed.

New Developments in Litigation

The matter of *Denton* revolved around the fact that further witness statements were prepared on the basis that new information came to light after the time of exchange for witness statements, which were exchanged on time.

Now before I go further, I would like to comment on the fact that this was dealt with as a relief from sanctions application which I simply cannot understand. The parties kept to the court order and exchanged witness statements on time. On any understanding, how could one deal with an issue that was not known at the time for compliance? I am not saying that the court's permission would not be necessary. All I am suggesting is that such a scenario should not engage CPR 3.9 as there was no non-compliance.

Either way, the court does offer some helpful guidance on how to deal with such issues. Furthermore, I believe the guidance given is helpful whether CPR 3.9 is engaged or not. The guidance is especially helpful as *Denton* also involves a trial being vacated by the granting of "relief":

> "54. This was a significant breach, because it caused the trial date to be vacated and therefore disrupted the conduct of the litigation. The next question was whether there was good reason for the breach. There was not, because the issue … had been known … in 2012.
>
> 56. There was very little to weigh in the balance on the other side under the heading of "all the circumstances of the case" and the need to deal with the application justly. The claimants had had ample opportunity to serve their additional evidence long before December 2013 … It was the claimants' own fault that they had not chosen to serve such evidence earlier, and to admit such evidence at that late stage necessitated the adjournment of the 10 day trial … An adjournment would result in the protraction of proceedings which had already dragged on for far too long. It would cause a waste of court resources and generate substantial extra costs for the parties. It would cause inconvenience to a large number of busy people."

Despite the massive inconvenience adjourning the trial would have caused, this was not the cause for refusing "relief". It was because the issue was not dealt with as soon as possible. The strong inference is that if new (pertinent) information came to light just before a trial, there would be an adjournment if there were no opportunity to deal with these issues at an earlier date. There is no compliance question as the new information could not be acted upon if it were not known. It would therefore be just and proportionate to adjourn the trial. However, I do accept that the weight and importance of the new information will have to be considered against whether it is "just" to vacate a trial.

Clearly the COA simply considered the overriding objective in its entirety as described above which I submit would have been the case even if the request for further witness statements was considered outside the scope of CPR 3.9. The only real difference could be in those borderline cases. If the CPR 3.9 criteria is considered, more of an emphasis may be placed on the compliance aspect (at least according to the main judgment—see above). This would result in a borderline request being denied relief. Whereas a non-CPR 3.9 application may place greater weight on the just and proportionality issues resulting in a successful borderline request—similar to an in-time application (see below).

Agreeing Extensions of Time in Excess of 28 Days

There was absolute panic in the legal world following the decision of *Lloyd*[5] in which the court decided that the long running practice of the parties agreeing to extensions of time amongst themselves was a symptom of the pre-Jackson era lack of respect for court timetables and directions. It was therefore decided that the court's permission was required for any and all extensions. No doubt this was in keeping with the tone of *Mitchell*, as noted above. The decision, however, led to the amendment of CPR 3.8 which allows the parties to agree up to a 28-day extension as the court was inundated with applications.

The compliance landscape, however, is different following *Denton*. No longer do the courts want to enforce compliance by way of micromanagement. As noted above, the COA has now directed the parties to cooperate by agreeing to those breaches where relief is likely to be granted. The COA has warned of the consequences should the court become involved unnecessarily.

When discussing what would constitute serious breaches, the COA was of the opinion, as noted above, that those breaches that impacted the court (e.g. adjournment of hearings and non-payment of court fees) were serious and significant. In fact, the court noted that:

> "45. We should say something about the submissions that have been addressed to the consequences of scarce public resources. This is now sadly a fact of life, as much in litigation and in the courts as elsewhere. No judicial pronouncement can improve the position. It does, however, make it all the more important that court time is not wasted and hearings, once fixed, are not adjourned."

The COA also discussed the case of *Chartwell* noting that:

> "19. [B]oth parties failed to serve their witness statements for *several weeks* (emphasis added) after the due date … Nevertheless he granted relief … noting that both parties were ready to exchange and the *trial date could still be maintained*."(Emphasis added.)

Furthermore, it was noted above the post-*Denton* the parties hould agree relief where appropriate ([41] of *Denton*).

It can therefore be argued that the Parties should be free to agree to any extension that does not prejudice the court's involvement. If the court has delegated the power *of the court* to agree releif (in certain circumstances) to the parties, why should the parties not be free to agree extensions longer than 28 under

[5] *M A Lloyd v PPC International Ltd* [2014] EWHC 41 (QB).

similar circumstances? If there is six months before the next CMC and the directions call for the disclosure of witness and expert evidence, why bother the court with any extension that does not jeopardise the scheduled CMC? After all, the litigation will still run efficiently and at proportionate cost. An application to the court would simply take up the court's limited resources in a time of overall scarce public resources. Is this not exactly what the COA requested of the Parties to litigation so that they may comply with the overriding objective?

In Time Applications for Extensions

Post-*Mitchell* and Pre-*Denton* there was great relief when it was decided that in-time applications for extensions of time would not be subject to the CPR 3.9 criteria—*Kaneria v Kaneria*.[6]

Mr Justice Nugee noted that the relevant binding authority[7] to this effect indicates that the overriding objective in its entirety, or purest form, is considered. It was noted, however, that *Robert* was actually decided under the old overriding objective. Therefore, the new (current) overriding objective would have to be considered for all future in time applications as *Robert* did not determine the criteria in the overriding objective only that it should be considered—in the form that was in place at that time.

Mr Justice Nugee goes on to note the relevant alterations to the overriding objective to the effect that cases have to be dealt with at proportionate cost and the insertion of CPR 1(2) (f), quoted above.

Although the latter is also a requirement of CPR 3.9, Mr Justice Nugee noted that:

> "37. Unlike the new CPR r 3.9 however, it can be seen that the reformulated overriding objective does not give the same prominence to the considerations set out in the new sub-paragraph (f). The guidance given by the Court of Appeal in *Mitchell* as to the effect of these matters being singled out for specific mention (namely that they should be regarded as 'of paramount importance' and 'given great weight': see paragraph 26 above) therefore does not, it seems to me, apply. They are doubtless important considerations, but they do not have the same paramount status.
>
> 76. However I accept that the new culture … means that parties cannot expect to get an extension simply by asking for it. They do have to explain to the Court why they need it, and the Court will scrutinise the reasons put forward. Here that means looking at why the extension was sought."

Mr Justice Nugee clearly accepts that the same criteria are considered in relief from sanctions applications as in in time applications. However, it is the emphasis on the competing criteria of the overriding objective that is the difference between the two.

This is exactly in keeping with the main judgment in *Denton* which held when considering whether to grant *relief from sanctions*, it is *then* that the specific criteria in CPR 3.9 (one of which is similar to CPR 1(2)(f)—regarding compliance) hold more weight than the other criteria in the overriding objective.

Even according to Lord Jackson who is of the opinion that "all the circumstances" means that all criteria are given equal weight, as noted above, there is still a difference between the two applications as can be seen from what Mr Justice Nugee also stated:

> "54. Rather the policy, as I understand it, is one of requiring parties to take orders seriously. As Mr Harty put it, the addition of sub-paragraph (f) to the overriding objective is about respect for rules and orders: it is intended to promote a culture of compliance … But making an in-time application for an extension where necessary is respecting the rules: it is recognising that unless such an application is made, the party will be in default and treating this with

[6] [2014] EWHC 1165.
[7] *Robert v Momentum Services Ltd* [2003] EWCA Civ 299.

> the seriousness that it requires. It is not the same as indifference to compliance, or non-compliance."

Therefore when considering "all the circumstances" the court will note the respect of the rules when an in-time application is made which will go in favour of granting the request. The opposite is therefore true as well. The disregard for the rules will be taken into account when considering a relief from sanctions application and will be held against the offending party.

CPR 3.10: Error in Procedure.

In a previous article, I put forward a proposition on the interplay between CPR 3.9 and CPR 3.10. I do not intend to put the argument forward here in any great detail. However, to summarise, I proposed that as long as any step is taken within the prescribed time limit, even if that step is deficient due to not following a rule and/or practice direction (but not a court order—see CPR 3.10 and my last article), the operative provision in the CPR should be CPR 3.10 and not CPR 3.9.

The benefit of relying on CPR 3.10 as opposed to CPR 3.9 is that the court considers the step taken e.g. service of any particular (deficient) document—as having been done in accordance within the time limit prescribed. For example, the service of witness statements, medical evidence and/or statements of case on time, but without verifying the same with a Statement of Truth.

There is no doubt that this theory is not of as great necessity as it was in the dark days of *Mitchell*. Such "errors" are likely to be neither serious nor significant if rectified promptly which would mean relief would be granted as a matter of course. However, one may still wish to rely on CPR 3.10 so as not to run the risk, however small, of an adverse judgment. More importantly, CPR 3.10 would be of great assistance if there is an error of procedure in respect of an unless order. The argument can certainly be made under CPR 3.9 that such a breach is both serious and significant, much like paying a court fee one day late that is considered serious and significant—see above. As in the case of late payment of court fees, it is unlikely that there could be good reason for not following a rule and/or practice direction in relation to an unless order. Finally, one can see a judge taking the view that when considering the overriding objective and "all the circumstances", the need to enforce rules weighs heavily against granting relief on the basis that the breach involves an unless order. This presumption would be compounded if there were previous breaches to be considered as well.

In such a scenario, CPR 3.10 would come to the rescue. The step is presumed to have been taken and no approval from the court is required. I would submit that this reasoning is very sound in the light of *Denton*. The court is no longer interested in petty squabbles. The court just wants litigation to move along in an orderly fashion with as little delay as possible, to be dealt with justly and with respect for rules/timetables. CPR 3.10 deals with a scenario when timetables were respected (just as with in-time applications, discussed above), albeit with a (hopefully) inadvertent tardiness to a particular rule. It is therefore submitted that CPR 3.10 is there to state that such a scenario should not be held against the offending party even if it may fail under the CPR 3.9 test.

This differentiation between non-compliance resulting in a delay requiring the assistance of CPR 3.9 as opposed to non-compliance without a delay is supported, I believe, by the COA in *Denton*. When discussing the purpose of enforcing compliance with rules and practice directions, the court stated that:

> "40. Litigation cannot be conducted efficiently and at proportionate cost without (a) fostering a culture of compliance with rules, practice directions and court orders, and (b) cooperation between the parties and their lawyers … This was part of the foundation of the Jackson report.

> 41. We think we should make it plain that it is wholly inappropriate for litigants or their lawyers to take advantage of mistakes made by opposing parties in the hope that relief from sanctions will be denied and that they will obtain a windfall strike out or other litigation advantage."

Enforcing compliance is a means to an end—so that litigation can run efficiently and at proportionate cost. If there is a free for all, there will be needless delay and needlessly incurred costs. However, at the same time petty points should be overlooked. Therefore, notwithstanding the fact that a breach may have been "serious and significant" with no "good reason", CPR 3.10 instructs the court to be of the view that "all the circumstances" deem that the litigation should carry on without further comment. At the same time, the court can punish the offending party, if appropriate, under CPR 3.10(a) Perhaps it would be appropriate for a serial rule breaker and/or a particularly egregious lack of consideration for a particular rule and/or practice direction? In any event, this demonstrates once again the careful balancing act in relation to the competing interests of the overriding objective.

The (CPR) 1 and Only

When all is said and done, it seems that the proper balance between the competing, and sometimes diametrically opposed, criteria of the overriding objective has been struck. This is in stark contrast to what was thought to be the case after *Mitchell*, where lip service was paid to most of these criteria and the only real test enforced was compliance with rules and practice directions.

Post-*Denton*, however, in a case dealing with relief from sanctions, the requirement to enforce compliance will have more weight than some of the other factors, but at the same time the need for compliance will not weigh so heavily that an unjust and disproportionate outcome will result. For this very reason the COA has encouraged cooperation between the parties so as not to involve the courts in relation to those breaches where relief is likely to be granted.

Similarly, in other case management situations where compliance is concerned, the overriding objective will be considered through the lens of the particular situation at hand such as in cases of in-time applications and where there has been an error in procedure. In such cases, compliance will not have as much weight when compared to relief from sanctions for the very reason that compliance was taken seriously by the offending party.

The decision in *Denton* should also have the effect of restoring cooperation between the parties thereby ensuring the smooth and proportionate running of litigation by involving the court only when it is absolutely necessary to do so.

Therefore, what is abundantly clear is that the overriding objective reigns supreme and courses through the CPR. The truth is that when one stops to ponder such a proposition, one notes that CPR 1.1 deals with the *overriding* objective. By its very definition it is considered above all else.

P v Cheshire West and Chester Council: What is a deprivation of liberty?

Yogi Amin*

Roisin Horan**

Best interests; Deprivation of liberty safeguards; Local authorities' powers and duties; Persons lacking capacity; Right to liberty and security

Yogi Amin looks at the Supreme Court decision in the P v Cheshire West *case and considers what the judgment means in relation to issues of deprivation of liberty and the role of the Court of Protection and/or local authorities. He then considers the implications of the decision for personal injury lawyers acting on behalf of clients who lack capacity to make decisions about residence and care arrangements.*

ML

The Supreme Court's decision in *P v Cheshire West and Chester Council*[1] (the "Cheshire West Decision")[2] provided much needed clarity on the law relating to deprivation of liberty and extended further the legal protection afforded to vulnerable individuals who lack the mental capacity to make decisions regarding their residence and care.

This was achieved by the Supreme Court establishing a widely drawn acid test for determining whether the living arrangements of an individual who lacks mental capacity, amounts to a deprivation of liberty. Where an individual is found to be deprived of their liberty, the arrangements must be authorised either by the Court of Protection or the local authority under the statutory Deprivation of Liberty Safeguard ("DoLS") scheme and this therefore provides an independent check and regular reviews to ensure that the arrangements are the least restrictive and in that individual's best interests.

Facts

P was 38 years of age and was diagnosed with cerebral palsy and down's syndrome. P was initially living at home with his mother and the local authority was concerned that this was not in his best interests. Court of Protection proceedings were subsequently issued and the parties reached agreement that P lacked the mental capacity to make decisions about his residence, care and contact with others and that it was in P's best interests to move into a supported living placement.

When P moved into a supported living placement he required 24 hour care, including assistance with personal hygiene. P had a habit of pulling at his incontinence pads and would occasionally ingest their contents. In an attempt to prevent this, he wore all-in-one underwear but on occasions still required physical intervention to manage his challenging behaviour. P was not given any tranquillising medication.

The parties to these proceedings disagreed on whether P's supported living placement amounted to a deprivation of his liberty and, therefore, whether it needed to be authorised by the Court. This became the

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[1] *P (by his litigation friend the Official Solicitor) v Cheshire West and Chester Council*; *P and Q (by their litigation friend the Official Solicitor) v Surrey County Council* [2014] UKSC 19.

[2] The authors acted on behalf P's mother in *P v Cheshire West* (2014).

subject matter of the subsequent court proceedings alongside a determination of what particular arrangements and contact restrictions were in P's best interests.

Proceedings

Mr Justice Baker heard the matter in the Court of Protection. During the course of proceedings expert evidence was heard which shaped the changes to the care arrangements which would in due course be authorised as being in P's best interests. It was found that P was completely under the control of the staff at the bungalow and the steps required to deal with P's challenging behaviour, including physical restraint, led Baker J, to decide that overall, P was deprived of his liberty, though it was in his best interests.

This decision was appealed by Cheshire West Council and the Court of Appeal found that P was not deprived of his liberty. In reaching this decision, Munby L.J. applied the "relevant comparator" concept so that P was to be compared to "an adult of similar age with the same capabilities of P, affected by the same condition or suffering the same inherent mental and physical disabilities and limitations" to assess whether he was deprived of his liberty.

The Official Solicitor on behalf of P, applied to the Supreme Court to appeal the decision of the Court of Appeal. On review of European case law, it was agreed that the three elements required for a deprivation of liberty are:

a. The objective element of a person's confinement to a certain limited place for a non-negligible length of time;
b. A lack of valid consent to the confinement;
c. The fact of the confinement being imputable to the State.

It was the first element (a) which was in dispute between the parties.

The consequence of Munby L.J.'s judgement was that the protection afforded by art.5 of the European Convention of Human Rights of physical liberty would not be the same for everyone and that consideration would be given to P's disabilities and difficulties when determining whether he was deprived of his liberty. The Official Solicitor and P's mother firmly rejected this view and argued that this approach confuses "the concept of deprivation of liberty with the justification for imposing such a deprivation". Whilst it may have been in P's best interests to be deprived of his liberty, this did not negate the fact that P is deprived of his liberty. Furthermore, pursuant to article 1 of the European Convention, the rights set out are to be guaranteed to everyone and are "premised on the inherent dignity of all human beings whatever their frailty or flaws".

The local authority argued that whether a person is deprived of their liberty is a matter of "fact and degree" where a number of factors may be relevant including "the type, duration, effects and manner of implementation of the measures in questions". Asking if an individual is confined is not sufficient to determine the "concrete situation".

In contrast to this, the Official Solicitor and P's mother argued that the question is simply whether P is "under continuous supervision and control and not free to leave".

Decision

The appeal was allowed and the Supreme Court held that P was deprived of his liberty.

Lady Hale rejected the relevant comparator test finding that it was "inconsistent with the view that people with disabilities have the same rights as everyone else". The Supreme Court found that instead, the "acid test" for determining whether an individual is deprived of their liberty is whether that person is "under continuous supervision and control and was not free to leave".

The effect of the relevant comparator test laid down by Munby L.J. was that a significant number of incapacitated adults would not benefit from the procedural safeguards provided in the Mental Capacity Act 2005. Lady Hale found that due to the vulnerability of individuals such as P, "we should err on the side of caution in deciding what constitutes a deprivation of liberty in their case. They need a periodic independent check on whether the arrangements made for them are in their best interests". Under the acid test laid down by the Supreme Court, any incapacitated adult who is in a placement arranged by the state who is under continuous supervision and control and who is not free to leave that placement must be considered to be deprived of their liberty and will be afforded the essential safeguards to ensure that the arrangements are in their best interests. For individuals in registered care homes or hospitals, this means an authorisation issued through the DoLS regime. For individuals in other types of placements, such as P who was in a supported living placement, this will mean an authorisation by the Court of Protection.

The new acid test has resulted in a greater number of individuals being afforded the protection under the DoLs regime. Lady Hale suggested that the checks afforded by that regime "need not be as elaborate as those currently provided for in the Court of Protection or in the Deprivation of Liberty safeguards (which could in due course be simplified and extended to placements outside hospitals and care homes)".

Impact

The Association of Directors of Adult Social Services ("ADASS") conducted a survey of local authority adult social care departments who indicated that they expect the number of DoLS referrals from hospital and residential settings to rise from 10,050 in 2013/2014 to 93,900 in 2014/2015. The number of DoLS requests from domestic settings for which the state has a responsibility and which will need to be authorised by the Court of Protection are likely to rise from 134 in 2013/2014 to 18,633 in 2014/2015.[3]

There have been serious concerns regarding the local authority's ability to respond to this sudden increase. The local authority are required under the statutory scheme to complete detailed assessments prior to granting authorisations, requiring input from both best interest assessors and often from medical professionals, and the local authority or NHS Clinical Commissioning Group has limited resources to complete the necessary assessments. The anticipated additional cost following the decision in Cheshire West is £49.195 million for 2014/2015, according to ADASS.[4]

When the DoLS were first introduced in April 2009, the number of applications to authorise deprivations of liberty, were only one third of what had been predicted by the Government. The Mental Health Alliance completed an initial review of the implementation of the DoLS and found that there was a "widespread lack of understanding of the Mental Capacity Act" and that this was "compounded by the absence of a proper legal definition of 'deprivation of liberty' or clear guidance about what it actually means in practical terms".[5] Whilst the number of DoLS applications increased over the following years, the Care Quality Commission reported serious concerns that use of the safeguards was "mixed" and that individuals may still be deprived of their liberty without legal protection.[6]

A Select Committee was formed in May 2013 to establish whether the Mental Capacity Act 2005 was working as Parliament had intended. The findings were that professionals involved in caring for the vulnerable were not aware of the Mental Capacity Act 2005 and were failing to implement it. The DoLS were described as "not fit for purpose" and the Select Committee indicated that the "evidence suggests that the Deprivation of Liberty Safeguards are frequently not used when they should be, leaving individuals

[3] ADASS "DoLS referrals rise tenfold since Supreme Court ruling", June 6, 2014—*http://www.adass.org.uk/number-of-dols-referrals-rise-tenfold-since-supreme-court-ruling-jun-14/.*

[4] ADASS "DoLS referrals rise tenfold since Supreme Court ruling", June 6, 2014—*http://www.adass.org.uk/number-of-dols-referrals-rise-tenfold-since-supreme-court-ruling-jun-14/.*

[5] See Roger Hargreaves *Mental Health Alliance, Briefing Paper 1, Deprivation of Liberty Safeguards: an initial review of implementation* May 2010 p.2.

[6] See *Care Quality Commission, Monitoring the use of the Mental Capacity Act Deprivation of Liberty Safeguards* 2012/2013.

without the safeguards Parliament intended".[7] There has been, in effect, a postcode lottery in respect of these important protections for vulnerable individuals.

The Cheshire West decision has gone some way in improving this situation by providing a simple test of what amounts to a deprivation of liberty and raising awareness of the DoLS. It is hoped that there will now be a more consistent approach throughout the country regarding the application of the DoLS which allows vulnerable individuals to challenge the lawfulness of their deprivation of liberty in court. Whilst there is provision in the Mental Capacity Act 2005, for incapacitated individuals to bring before the court challenges to best interest decisions which do not amount to a deprivation of liberty, it is not as robust as the provision made under the DoLS. For example, incapacitated individuals currently have the benefit of non means tested legal aid funding to challenge the lawfulness of any deprivation of liberty authorisation and this is not the case where there is a dispute concerning best interests only. As a result, it is essential that where individuals are deprived of their liberty, that it is properly authorised to allow individuals to access the DoLS.

The Government responded to the Lords Select Committee Report in June 2014 acknowledging that "implementation of DoLS are not at the level we would have expected" and that the implications of the Cheshire West decision "could have a significant positive effect — both in raising awareness of DoLS and the need for deprivations of liberty to be authorised but also in empowering individuals and protecting their rights".[8]

The Government has committed itself to reviewing and streamlining the DoLS forms that are completed to assess whether a DoL should be authorised, and publishing up to date guidance on deprivation of liberty case law by the end of 2014. The Government will also consult on and potentially draft a new legal framework to allow "for the authorisation of a best interests deprivation of liberty in supported living arrangements" due to the substantial burden now placed on the Court of Protection which is considered to be unsustainable following the Cheshire West decision.[9] Consideration will also be given to any improvements that can be made in relation to the DoLS.[10]

The impact on an injured client

As a personal injury practitioner you may have clients who do not have capacity to make decisions regarding their residence, care arrangements and contact with others. If your client's living arrangements are imputable to the state and your client is under continuous supervision and control and is not free to leave, they are deprived of their liberty and this will need to authorised either by the local authority or the Court of Protection[11]. This can cause both the individual concerned and their family a great deal of concern due to a lack of understanding of the purpose of the DoLS. Your client may need reassurance that the DoLS were created to protect individuals who do not have the mental capacity to make decisions for themselves and who may be deprived of their liberty. The European Convention of Human Rights states that everyone has the right to liberty and security of person and that no one shall be deprived of their liberty save in accordance with a procedure prescribed in law. The DoLS ensures that the human rights of vulnerable individuals are respected by establishing that procedure which allows individuals to appeal to the Court of Protection where they are concerned that they are being deprived of their liberty unlawfully. This may be because the individual, or their family members do not believe that the arrangements are in

[7] *House of Lords Select Committee on the Mental Capacity Act 2005* Report of Session 2013–2014 para.256.

[8] *Valuing every voice, respecting every right: Making the case for the Mental Capacity Act, The Government's response to the House of Lords Select Committee Report on the Mental Capacity Act 2005* June 2014 paras 7.6 and 7.15.

[9] *Valuing every voice, respecting every right: Making the case for the Mental Capacity Act, The Government's response to the House of Lords Select Committee Report on the Mental Capacity Act 2005* June 2014 para.7.27.

[10] *Valuing every voice, respecting every right: Making the case for the Mental Capacity Act, The Government's response to the House of Lords Select Committee Report on the Mental Capacity Act 2005* June 2014 para.7.29.

[11] Residential care homes registered with the CQC looks to the DOLS scheme for putting in place lawful authorisations. Supporting living schemes (not registered as residential care) look to the Court of Protection for lawful authorisation of a deprivation of liberty.

their best interests or that they are the least restrictive. An individual may also appeal the authorisation where they are of the view that they have the capacity to make their own decisions regarding their residence. If the deprivation of liberty is not authorised, the avenues for appealing to the court are more limited.

Where your client's incapacitated state is related to a personal injury claim, you will also need to consider the financial implications of the Mental Capacity Act and the DoLS for your client. Public Funding is only available in a very small number of cases where clients are eligible having satisfied both the means and merits tests of the Legal Aid Agency. These tests change year on year as public funding availability is limited based on the overall need in society. On April 1, 2013 further changes were made to the rules on eligibility for public funding. As a result, those applying for legal aid will now have their capital assessed regardless of the welfare benefits they are receiving. Therefore it can reasonably be anticipated that public funding will not be available to your client following settlement of a substantial personal injury claim for any future Court of Protection Applications or for legal work to resolve welfare or medical disputes outside of Court. At present individuals applying for legal aid funding for deprivation of liberty appeals under s.21A of the Mental Capacity Act 2005 are not means tested. There is no guarantee that non-means testing for these cases will continue given further restrictions on legal aid. Given the considerable costs associated with Court of Protection proceedings and costs in engaging with the DoLS process, consideration will need to be given to whether your client should seek to recover the anticipated costs as part of their personal injury claim.

Liberty is a precious thing. Even when care arrangements are made on an individual's behalf with the best of intentions—his/her liberty must continue to be protected.

Case and Comment: Liability

Thomson v Scottish Ministers

(IHCS, Clerk (Carloway) L.J., Lord Menzies, Lady Dorrian, June 28, 2013, [2013] CSIH 63)

Liability—negligence—murder—prison service—duty of care—release on licence—proximity—right to life—European Convention on Human Rights 1950 art.2

LT Duty of care; Murder; Proximity; Release on licence; Right to life; Scotland; Scottish Prison Service

On August 27, 2002 John Campbell was sentenced to eight years' imprisonment having been convicted of two charges of assault to cause severe injury and permanent disfigurement committed against his estranged wife and her friend within his wife's home. At the time of sentence the trial judge noted in his report that Campbell had 20 court appearances in respect of 36 offences over the period between December 3, 1987 and July 6, 2001.

In particular, he had been convicted on January 20, 1998 of an assault and robbery and a contravention of s.17(2) and (5) of the Firearms Act 1968 and was sentenced to four years' and three years' imprisonment concurrently in respect of each offence. That offence had been committed while Campbell was released on licence in respect of a previous custodial sentence, which offence itself had been committed on licence.

Campbell was released on licence from his four-year sentence on March 8, 2001. His licence was revoked on the May 8, 2001 following his appearance at Glasgow Sheriff Court on charges of breach of the peace and possession of a lock knife. He was again released on licence on May 1, 2002. On May 10, 2002 while on licence he committed the offences for which he was sentenced in August 2002.

However, on August 22, 2005 Campbell was temporarily at liberty, having been granted the privilege of short leave from prison. That day he murdered Catherine Thomson when he stabbed her on the right side of her neck. The blade penetrated the jugular vein and Catherine bled to death.

Ann Thomson was Catherine's mother. She sued the Scottish Ministers who were representing the Scottish Prison Service. She alleged that the death of her daughter was caused by negligence on the part of responsible officers who made the series of decisions that resulted in Campbell being temporarily released from prison on August 19, 2005 for a period which included August 22, 2005. She also alleged that the Scottish Prison Service, in contravention of art.2 of the European Convention on Human Rights, failed to protect her daughter's life.

On September 24, 2002 Campbell was assessed in terms of the Rules as being subject to high supervision. Ann Thomson alleged that Campbell should have remained at the high supervision level and that it was not safe to allow him to be released on short-term leave as if released he would be likely to commit serious acts of violence upon members of the public.

In fact in July 2005 Campbell was transferred to an open prison. On arriving he applied for short-term leave. This leave would allow him to visit his home or other approved place for a period not exceeding three days. A prisoner with a low supervision level is entitled to make such an application. Ann Thomson's case was that if the Rules had been properly applied to Campbell he would not have been entitled to make such an application.

In any event, on receiving such an application the Governor should obtain such reports as are necessary in order to consider the prisoner's suitability for leave and assess the risk of the prisoner presenting a

danger to the public. The Governor is supposed to record the reasons for his decision in writing. On August 8, 2005 the Governor approved Campbell's application for short-term leave. No assessment was carried out by or on behalf of the Governor, which assessed the risk that Campbell might pose to the public if released from prison at this time. The Governor did not record the reasons for his decision to grant leave in writing as he should have done.

Ann Thomson's case was that at the time of his release, Campbell presented a real and immediate risk of danger to the public, and the Scottish Prison Service ought to have known of that risk, that he would come into contact with family members and their associates, and that he would be violent to those with whom he would be expected to have dealings over the course of his leave.

She also alleged that the Scottish Prison Service might have created a risk or danger by releasing Campbell. Her case was in essence that the Governor ought to have appreciated "Campbell could well kill someone". She contended that they owed a duty of care to her daughter not to release violent and dangerous prisoners and had negligently breached that duty by releasing Campbell in breach of the rules and directions governing short leave.

The defence said that the Scottish Prison Service did not owe a duty of care to a member of the general public who was killed by a prisoner on short leave where there was no special relationship between the prison service and the deceased which exposed the deceased to a particular risk of damage as a result of the prison service's negligence in the context of that relationship. On that basis they successfully sought to have the action dismissed.

The pursuer appealed. Her art.2 case proceeded upon the basis that the defenders, as a public authority, had failed to protect her daughter's right to life. The defenders accepted that in addition to its obligation to refrain from taking life the State had an obligation to take appropriate steps to safeguard life within its jurisdiction.[1] That required the putting in place of a criminal law backed by a system for law enforcement but it also required the provision of operational measures to protect someone whose life was at risk from another. However, not every threat to life engages art.2. The obligation on the state to take preventive action only arises where there is a real and immediate risk to life.

The Court held that the art.2 claim was bound to fail as the pursuer had failed to specify the requisite degree of risk of life either to her murdered daughter, or to the wider class of persons with whom Campbell would have been expected to have dealings.[2] They further held that it would not be appropriate to adapt or lower the threshold derived from *Osman* when the state was alleged to have created the relevant risk.

In their view to succeed, Ann Thomson needed to establish a special relationship which exposed her daughter to a particular risk of damage as a result of the Scottish Prison Service's negligence in the context of that relationship. Applying the dicta of the relevant authorities, even if she could have proved all of her averments, she was still bound to fail. There was no relevant case which could justify the conclusion that Catherine Thomson and the Scottish Prison Service were in a special relationship with each other such that the actions of the Scottish Prison Service in relation to Campbell placed her at greater risk than that to which the general public were exposed. There was no proximity between the parties.

The pursuer had failed to identify the requisite degree of risk of life either to her daughter, or to the wider class of persons with whom Campbell would have been expected to have dealings.[3] They also held that it would not be appropriate to adapt or lower the threshold derived from *Osman*[4] when the state was alleged to have created the relevant risk. The appeal was dismissed.

[1] *Osman v United Kingdom* (23452/94) [1999] 1 F.L.R. 193; (1998) 29 E.H.R.R. 245; 5 B.H.R.C. 293

[2] *Osman* [1999] 1 F.L.R. 193 applied.

[3] *Osman* [1999] 1 F.L.R. 193 applied.

[4] In *Osman* [1999] 1 F.L.R. 193 at [116], the court defined the circumstances in which the obligation arises: "it must be established to [the court's] satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk."

Comment

Following cases such as *Osman v United Kingdom*,[5] and *Van Colle v Chief Constable of Hertfordshire*[6] it has generally been held that for there to be a valid claim, there needs to be a risk to the life of an identified individual which was both real and immediate. When I initially saw the reported outcome of this appeal I was not at all surprised. However further reading led me to the conclusion that this was a case with merit and some hope of success. That is because Mrs Thompson argued that the answer lay in *Mastromatteo v Italy*[7] and *Maiorano v Italy*.[8]

In *Mastromatteo* what was in issue was "the obligation to afford general protection to society against the potential acts of one or of several persons serving a prison sentence for a violent crime and the scope of that protection".

On November 8, 1989 Raffaele Mastromatteo's son was murdered by three criminals who were making their getaway after robbing a bank. The son had been driving a car which had crossed the robbers' path. The robbers had attempted to take control of the car. When the son tried to accelerate away, he had been shot at point-blank range.

It was subsequently proved that two of the three had been serving prison sentences pursuant to final criminal convictions for repeated violent offences. At the material time one of these two, who had fired the fatal shot, had been released on prison leave; the other was subject to a semi-custodial regime. The judges responsible for the execution of their sentences had granted prison leave and the semi-custodial measure on the ground that, according to the prison authorities' reports on their conduct in prison, they were not a danger to society. The three criminals were later sentenced to lengthy terms of imprisonment. The applicant applied for compensation under a law which made provision for aid to be paid to the victims of terrorism and organised crime, but his claim was refused, first by the Minister of the Interior and then by the President of Italy.

The Court recognised, following *Osman*:

> "67. … Article 2 may … imply in certain well-defined circumstances a positive obligation on the authorities to take preventative operational measures to protect an individual whose life is at risk from the criminal acts of another individual.
>
> 68. That does not mean, however, that a positive obligation to prevent every possibility of violence can be derived from this provision.
>
> … not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. A positive obligation will arise … where it has been established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to … life …"

Until the decision in *Mastromatteo*, the Court had gone no further than finding there to be such an obligation where there was a risk to the life of an identified individual or individuals. However, in *Mastromatteo* albeit without finding it necessary to engage in much by way of discussion, the Court was prepared to take a further step. Clearly if the criminals had been in prison on November 8, 1989, Mr Mastromatteo's son would not have been murdered by them.

However, to engage the responsibility of the State under the Convention, they confirmed that it must be shown that the death resulted from a failure on the part of the national authorities to "do all that could reasonably be expected of them to avoid a real and immediate risk to life of which they had or ought to

[5] *Osman* [1999] 1 F.L.R. 193.
[6] *Van Colle v Chief Constable of Hertfordshire* [2008] UKHL 50; [2009] 1 A.C. 225; [2008] 3 W.L.R. 593.
[7] *Mastromatteo v Italy* (37703/97) October 24, 2002.
[8] *Maiorano v Italy* (28634/06) December 15, 2009.

have had knowledge" (*Osman* at [116]), the relevant risk in *Mastromatteo* being a risk to the life for members of the public at large, rather than for one or more identified individuals.

Even so, on the facts the Court in *Mastromatteo* found there to have been no breach of art.2 as "there was nothing in the material before the national authorities to alert them to the fact that the release of [the prisoners] would pose a real and immediate risk to life"

However in *Maiorano* the Court went further and found that there was a contravention of art.2 where a prisoner, Angelo Izzo, with a long and significant criminal career, which included abuse of home leave from prison by using the opportunity to plan the murder of the President of the Court which had the jurisdiction to supervise his sentence, had been liberated on parole and had murdered the wife and daughter of a fellow prisoner.

Angelo Izzo had originally been sentenced to life without parole for crimes described of being of exceptional cruelty. Thereafter his conduct was, as the Court observed, "far from irreproachable". In 1977 Izzo attempted to escape from prison by taking a prison guard hostage; in 1978 he committed crimes concerned with drugs; in 1983 he was found in possession of a knife; in 1993 Izzo escaped and obtained false identity papers, a gun, ammunition and cash; in 1996 he declared to a prison guard that if he came in contact with a fellow prisoner he could not be responsible for his actions; and in 2003 he broke the terms of a temporary release.

In 2004, while on day release, Angelo Izzo planned and carried out the murder of two women with the help of two accomplices. He was given a further life sentence. In May 2005 the Minister of Justice opened an administrative inquiry to determine whether, on account of the procedure which had led to Mr Izzo being granted day release, the Judges of the sentence-execution Court were liable to disciplinary penalties. In March 2008 the National Council of the Judiciary issued the Judges concerned with a reprimand. In September 2007 the applicants, who are relatives of the victims, filed a criminal complaint against the Judges, but the proceedings were discontinued.

In *Maiorano* the Court did find the state to have been in breach of art.2 where a prisoner on day release had murdered two female relatives of a criminal associate "for the simple pleasure of killing" on the basis that, distinguishing *Osman* and following *Mastromatteo* the case was "to do with the obligation to insure a general protection of society against the possible actions of a person condemned to be imprisoned for violent crimes".

However, the finding proceeded on "a certain and immediate threat to life of which [the national authorities] were or should have been aware". That did not apply here.

Here it was alleged that the Scottish Prison Service knew Campbell "posed a real and immediate risk of danger to the public". That is not the same as a real and immediate risk of the "death" of a member of the public. On the basis of the findings of the Fatal Accident Inquiry into the death of Catherine there was no realistic basis for that to be alleged. The Court confirmed the first instance decision that the art.2 claim was bound to fail.

Practice points

- The State has a positive obligation to take preventative measures to protect an individual whose life is at risk from another, provided that they knew or ought to have known that there was a real and immediate threat to that individual's life.[9]
- In order to succeed, in most cases the risk factors must be greater than those in *Osman*, in which no violation of art.2 was found.

[9] *Osman* [1999] 1 F.L.R. 193.

- However, the State may also have a positive obligation to insure the general protection of society against the possible actions of a person condemned to be imprisoned for violent crimes.[10]

Nigel Tomkins

Thompson v Renwick Group Plc

(CA (Civ Div), Rimer L.J., Tomlinson L.J., Underhill L.J., May 13, 2014, [2014] EWCA Civ 635)

Liability—personal injury—health and safety at work—negligence—asbestos—assumption of responsibility—duty of care—holding companies—parent companies—subsidiary companies

LT Assumption of responsibility; Duty of care; Health and safety at work; Parent companies; Subsidiary companies

Mr David Thompson, aged 60, was seriously incapacitated by diffuse pleural thickening almost certainly caused in whole or in part by exposure to asbestos dust. He was also at increased risk of mesothelioma and lung cancer. Mr Thompson had been employed by two companies between 1969 and 1978. The companies were acquired by a subsidiary of the defendants in 1975. Shortly after that, a new director took over the running of the depot where Mr Thompson worked. It was likely that the new director had been nominated by the defendants. Mr Thompson's work involved handling raw asbestos.

Neither of his employers had liability insurance and neither would be able to meet any award for damages. He therefore brought proceedings against their parent company, the Renwick Group Plc, a holding company which was at material times the parent company of both of his relevant employers.

The parties agreed that the question whether the parent holding company owed a direct duty of care to Mr Thompson should be determined as a preliminary issue. The issue was tried by H.H. Judge Platts on the basis of exiguous evidence in the course of a single day in the Manchester County Court. The judge decided in Mr Thompson's favour that the parent company had indeed assumed such a duty. They appealed.

The Court of Appeal had to determine two issues:

1) whether the parent company assumed a duty of care to employees of its subsidiary in health and safety matters by virtue of appointing an individual as director of its subsidiary company with responsibility for health and safety matters; and
2) if not, whether the evidence was sufficient to justify the imposition of a duty of care on the parent company to protect the subsidiary company's employees from the risk of injury arising out of exposure to asbestos at work.

David Thompson's case was that after Renwick acquired the subsidiary, paperwork and lorries bore their logo, and the subsidiaries shared resources with their other businesses.

The Court of Appeal held that the answer to the first question was no. In running the day-to-day operation of the subsidiary the new director was not acting on behalf of the parent group. He was acting pursuant to his fiduciary duty owed to the subsidiary and pursuant to no other duty.[1] It followed that the basis upon which the judge determined that Renwick owed a duty of care to Thompson was unsupportable. There

[10] *Mastromatteo v Italy* (37703/97) October 24, 2002 and *Maiorano v Italy* (28634/06) December 15, 2009.

[1] *Hawkes v Cuddy* [2009] EWCA Civ 291; [2010] B.C.C. 597; [2009] 2 B.C.L.C. 427 applied and *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1991] 1 A.C. 187; [1990] 3 W.L.R. 297; [1990] 3 All E.R. 404 considered.

was no evidence of any relationship between the new director and Renwick beyond his inferred nomination by Renwick as director of the subsidiary.

On the second issue the court confirmed that a duty of care would only be imposed if the threefold test enunciated in *Caparo Industries Plc v Dickman*[2] was satisfied, namely the test of foreseeability of damage and proximity where it was fair, just and reasonable to impose a duty of a given scope upon the one party for the benefit of another. In *Chandler v Cape Plc*[3] it was stressed that the critical question was "whether what the parent company did amounted to taking on a direct duty to the subsidiary's employees".[4]

They held that the factors relied upon by the claimant were far removed from *Chandler*. In their view taken individually, the points did not withstand scrutiny. Co-ordination of operations between subsidiaries was just that, unless it was demonstrated that the group holding company assumed control in such a manner as to demonstrate an assumption of duty to the employees of the subsidiaries. There was no evidence that Renwick carried on any business apart from that of holding shares in other companies. Accordingly the Chandler test was not satisfied.

The court was looking for a situation in which the parent company was better placed, because of its superior knowledge or expertise, to protect the employees of subsidiary companies against the risk of injury and, moreover, where, because of that feature, it was fair to infer that the subsidiary would rely upon the parent deploying its superior knowledge in order to protect its employees. They concluded that there was no basis upon which it could be asserted that Renwick had, or should have had, any knowledge of the hazards of handling raw asbestos superior to that which the subsidiaries could be expected to have.

The judge's findings on the intermingling of the businesses, the interchangeable use of depots and the shared use of resources were considered to amount to no more than a finding that the companies were operating as a division of the group carrying on a single business. That did not mean that the legal personality of the subsidiaries separate from that of their ultimate parent was not retained and respected. They held that the evidence fell far short of what was required for the imposition of a duty of care on Renwick and the appeal was allowed.

Comment

This case on asbestos exposure falls on the non-liability side of the demarcation line established by the Court of Appeal in the leading case of *Chandler v Cape Plc*.[5] In the circumstances prevailing in that previous case, the courts had been prepared to "pierce the corporate veil" by establishing a direct duty against a parent company when taking over a subsidiary. But there were some important controls on that "incremental" extension of liability, and indeed this commentator gave a warning at the time that *Chandler* might turn out to be quite "Cape specific" on the facts.[6]

Key points in *Chandler* were that Cape employed group medical and safety officers who oversaw the health and safety issues of employees right across the subsidiary companies. This was corroborated by documentary evidence that parent and subsidiary companies shared directors who were fully aware of what was happening at the sites of subsidiaries, and well knew the risks of asbestos exposure.

As is so often the case, the crux of this latest asbestos exposure litigation in *Thompson*, was the total absence of insurance cover in the subsidiary company. Ever since the "separate legal entity" concept was established in *Salomon* in 1897,[7] there have been innumerable unsuccessful litigants who have not been able to overcome this doctrinal hurdle of separate corporate personality.

[2] *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605; [1990] 2 W.L.R. 358.
[3] *Chandler v Cape Plc* [2012] EWCA Civ 525; [2012] 1 W.L.R. 3111.
[4] *Caparo* [1990] 2 A.C. 605 and *Chandler* [2012] EWCA Civ 525 followed.
[5] *Chandler* [2012] EWCA Civ 525.
[6] Julian Fulbrook, "*Chandler v Cape Plc*" [2012] J.P.I.L. C135–C139.
[7] *Salomon v Salomon & Co Ltd* [1897] A.C. 22.

As to Mr Thompson's grievous exposure, which caused his diffuse pleural thickening and put him at serious risk of death from mesothelioma and lung cancer, there was little if any doubt at all as to the cause. He had been "hand baling" raw asbestos in his occupation as a haulage company labourer in Manchester. Tomlinson LJ noted forcefully that the conditions in which Mr Thompson was expected to work were "really quite shocking and should be a cause for shame".[8] However, he had been employed at the time by two companies, which only later became subsidiaries in The Renwick Group. Neither of those two companies had any insurance cover to deal with his subsequent incapacitation.

A significant factor in this case is that The Renwick Group Plc, a company based in South Devon, appears to have been acquiring shares in several spheres of commercial life, notably in yachting, but certainly could not be said to have expertise in the exploitation of asbestos products.[9] Size and scope of both the parent company, as well as the nature of the Group and the industry, will inevitably all be germane to a discussion as to whether a parent company should be "directly liable" for the omissions of a subsidiary company. Any "assumption" of a duty of care by a parent company has necessarily to be judged in the context of a constellation of these factual circumstances.

The first question asked by the Court of Appeal, was "whether a parent can be held to have assumed a duty of care to employees of its subsidiary in health and safety matters by virtue of that parent company having appointed an individual as director of its subsidiary company with responsibility for health and safety matters".[10] The answer of the Court of Appeal in *Thompson* was "plainly no".[11] The appointment of a director to a subsidiary is routine, but in this case there was no expertise, actual or constructive, as to health and safety matters. An ancillary point here is that the fiduciary duty owed by the appointed director was to the subsidiary. That too is settled law.[12]

Counsel for the claimant then urged a second trajectory, "in sustained but succinct submissions of great skill and moderation",[13] as to whether the facts nonetheless justified the imposition of a duty of care on the parent company to protect employees of the subsidiary company from exposure to the horror of asbestosis. The talismanic mantra invoked here was of course the *Caparo* test, with an emphasis on the third strand of whether it would be "fair, just and reasonable" to impose a duty in these exceptional circumstances.[14]

Opinions might vary on this possibility, given the historical catastrophe of asbestos, but in examining the previous decision of *Chandler v Cape Plc* in some detail Tomlinson L.J concludes that the "facts there however are far removed from those which are under consideration in this appeal".[15] In particular there was no evidence that The Renwick Group carried on any business apart from that of holding shares in a wide swathe of other companies. As a parent company Renwick was certainly not in the commanding strategic position that Cape occupied for over a century in the international asbestos industry, amassing detailed and serious "superior knowledge" of the health risks and the need for preventative measures to be taken to protect workers in the mining and manufacture of asbestos and its related products. Owning shares in disparate companies is significantly different from having expertise in the precise nature of a business.

This case turns on its facts. While *Chandler v Cape Plc* demonstrated that in certain circumstances there may also be a direct duty of care owed by a parent company when the employer is a subsidiary company in a group of companies, this is highly dependent on the evidence. A dual duty of care on the

[8] *Thompson v Renwick Group Plc* [2014] EWCA Civ 635 at [1].
[9] See for a discussion of its takeover of Princess Yachts International Plc, "Firm with a 'family spirit' built a global reputation", *Plymouth Evening Herald* (June 4, 2008).
[10] *Thompson* [2014] EWCA Civ 635 at [24].
[11] *Thompson* [2014] EWCA Civ 635 at [25].
[12] See generally the advice of Lord Lowry in the Privy Council in *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1991] 1 A.C. 187; [1990] 3 W.L.R. 297; [1990] 3 All E.R. 404 at 217G.
[13] *Thompson* [2014] EWCA Civ 635 at [27].
[14] *Caparo* [1990] 2 A.C. 605.
[15] *Thompson* [2014] EWCA Civ 635 at [29].

basis of the two companies being joint tortfeasors is not an automatic right, but may arise when the parent company exercises a relevant degree of control, particularly where the parent company employs specialist medical and safety officers who are involved in aspects of health and safety in the subsidiary company and could be taken to have "superior knowledge" of the hazards. Nevertheless, as Cicero noted, "the exception confirms the rule" (*exceptio probat regulam in casibus non exceptis*).

What was a useful legal precept in republican Rome has been generally accepted as a valuable analytical tool ever since, so that *Thompson v Renwick*, unsuccessful litigation though it is for the claimant, nevertheless confirms the rule in *Chandler v Cape Plc*; that, when company documentation demonstrates a close, and co-mingled, attention by the boards of the parent and subsidiary companies to health and safety issues, then a presumption arises that this will allow tortious liability against the parent company.

Practice points

- A direct duty can exist against a parent company when taking over a subsidiary.
- A dual duty of care may arise on the basis of the two companies being joint tortfeasors when the parent company exercises a relevant degree of control.
- Such a duty will generally arise where the parent company has "superior knowledge" of the hazards.
- "Superior knowledge" is likely to include the parent company employing specialist medical and safety officers who are involved in aspects of health and safety in the subsidiary company.
- It remains difficult to "pierce the corporate veil" and success or failure will be fact specific.

Julian Fulbrook

Smith v Bluebird Buses Ltd

(OHCS, Lord Boyd of Duncansby, April 25, 2014, [2014] CSOH 75)

Liability—road traffic accidents—negligence—contributory negligence—pedestrians—alcohol—duty of care

LT Contributory negligence; Drivers; Duty of care; Pedestrians; Road traffic accidents; Scotland

On April 27, 2010, Kyle Smith was badly injured in an accident which occurred on the A944 Lang Stracht, Aberdeen. The accident happened when a Stagecoach single-decker bus owned and operated by the defenders, Bluebird Buses Ltd, struck Mr Smith. He sued the bus company. Quantum was agreed at £25,000. There was a trial on liability.

As the name implies Lang Stracht is a long straight road running generally east to west within the city of Aberdeen. It is a four-lane road with two lanes in either direction. The accident occurred in the vicinity of its junction with Stronsay Drive. The junction is controlled by lights. There is a pedestrian crossing at the lights as well as a number of other crossings nearby. On the day of the accident it was dry and overcast. The road was dry.

At about 15.30 that day a Citroen Picasso saloon car was stopped at lights in the eastbound offside lane on Lang Stracht. It was intending to turn right into Stronsay Drive. The car was being driven by John Corall, an Aberdeen City Councillor. There were four other occupants including two other councillors, Calum McCaig and Joanna Strathdee. The car was being used as a campaign vehicle for the SNP in the

general election campaign. It had two saltire flags on either side flying from the exterior of the car. The flags were on short poles. These were attached to the car by a hook which slips over the top of the window. The window is then wound up securing the flag in place. The flags flew above the roofline of the car.

While the car was stopped at the lights Kyle Smith approached the car on the passenger side. He had crossed Lang Stracht close to but not at the pedestrian crossing from south to north from the direction of Stronsay Drive. He admitted that he had consumed alcohol. He went to the front passenger side of the car. Joanna Strathdee was in the front passenger seat. She wound down the window. Smith asked for a flag. She looked for one on the floor of the car but they did not have one to spare. Ms Strathdee told Smith that they did not have one but he said that he would take one anyway.

The lights turned to green. Smith grabbed at the flag flying from the nearside of the car breaking it off. He turned quickly and suddenly to make his way to the pavement. That involved crossing the eastbound nearside lane. He did not check that it was safe to continue crossing. The route he took was not direct but diagonally away from the junction towards the traffic. As he did so he was struck by the bus which was travelling at between 5 and 10mph when the accident happened. The judge found that the driver had little opportunity to avoid the collision.

The driver had about five years' experience as a bus driver. He had trained on that route and had been driving it for several months, usually three or four times a day, five days a week, depending on shift patterns. It was a quiet route. Just before the accident he had taken the bus from the outside into the inside lane. He was approaching the junction with Stronsay Drive. He had a clear view in front of him and saw Smith at the passenger side of a car on the outside lane seemingly having an argument with the occupants.

At that point the bus was doing between 10 and 20mph. However, the driver took his foot off the accelerator. That action brakes the bus speed. He also drove towards the left in towards the pavement to give Smith more room. His intention was to manoeuvre the bus past him.

Smith was bent over with his head at the passenger window and a hand up at the flag on the side of the car. The lights changed to green and the Citroen car started to move off. Smith then turned and walked a few steps towards the bus hitting the windscreen. He fell and his head came to rest about 3.3m in front of the bus. The driver immediately stopped the bus.

Smith's case was that the bus driver was negligent in not keeping a good lookout on the road ahead of him and there was no reason for him to have failed to notice him. Smith also argued that the bus driver was negligent for lifting his foot off the accelerator and continuing forward until it was not possible to avoid colliding with him instead of braking as soon as he saw his unusual behaviour in the middle of the road. Smith contended that his contribution was limited to 20 per cent.

The defenders pointed out that the Court of Appeal in *Eagle v Chambers*[1] had qualified the statement that it would be rare for a pedestrian to be found more responsible than a driver by adding "unless the pedestrian has suddenly moved into the path of an oncoming vehicle",[2] Which was what they said had occurred here. They submitted that this case was on all fours with the circumstances in *Birch v Paulson*.[3]

In *Birch* a pedestrian who appeared to have been under the influence of drink was observed to stand at the verge of a kerb at a traffic island. He was seen to stand at the kerb for about 15 seconds but he made no attempt to cross the road. The defendant was driving her car along the road. When she was a few metres from the man he suddenly stepped out in front of the car. An eye witness said in her witness statement that the driver had no chance of avoiding hitting the man. The judge found that given the speed of the car and reaction times the accident could not have been avoided. The judge found no fault on the part of the driver and that was upheld on appeal. Davis LJ commented that drivers are not required to give absolute guarantees of safety towards pedestrians.[4]

[1] *Eagle v Chambers* [2003] EWCA Civ 1107; [2004] R.T.R. 9; (2003) 100(36) L.S.G. 43.
[2] *Eagle v Chambers* [2003] EWCA Civ 1107 at [16].
[3] *Birch v Paulson* [2012] EWCA Civ 487.
[4] *Birch v Paulson* [2012] EWCA Civ 487 at [32].

They also relied upon *Stewart v Glaze*.[5] In that case a man who had been sitting at a bus stop got up and walked to the kerb and then stepped out in front of the defendant's car. Coulson J. found there was no liability on the defendant.

However, the judge confirmed that there is always a heavy onus on drivers to look out for pedestrians on the road even when they were behaving with a disregard for their own safety. The judge held that exercising due care and attention, the bus driver should have brought the bus to a stop rather than try and pass Smith, and if he had done so the accident would not have occurred.[6]

Nevertheless, Smith had to bear the heaviest responsibility for what had happened. He paid no heed for his own safety. He crossed the road away from pedestrian crossings. He approached the car in the outside lane when it was stopped at lights, which was inherently dangerous. He stole the flag from the car and turned quickly without looking and walked a few steps into the path of the bus. Smith's contributory negligence was assessed at 85 per cent.

Comment

The courts constantly remind us that a car, let alone a single-decker bus as was the case here, is a potentially dangerous weapon[7] and that a high standard of care is required from those that drive them. Similarly we are reminded that, having regard to the "destructive disparity" between a pedestrian and a motor vehicle that:

> "It is rare indeed for a pedestrian to be found more responsible than a driver unless the pedestrian has suddenly moved into the path of an oncoming vehicle".[8]

That is exactly the situation here.

Stating the obvious, this is a decision from the Outer House of the Court of Session in Scotland. The Court of Session, though it has concurrent jurisdiction with sheriff courts, is a court of first instance for most civil matters even of modest value or complexity in Scotland. It can hear cases with the aid of a jury though in this instance it did not do so.

Decisions from the Outer House are not binding on English courts, though can be cited if other authority is lacking. In this context, the decision in *Smith v Bluebird Buses Ltd* can be regarded as persuasive precedence. It could therefore be used along with a whole tranche of other similar cases where the issue of contributory negligence on the part of a pedestrian arises. It is in this context that the decision is interesting as it exceeds by some margin the findings of contributory negligence in similar English cases. I am thinking primarily of *Belka v Prosperini*[9] where the Appeal Court also considered *Eagle v Chambers*.

Belka v Prosperini bears some comparison to *Smith v Bluebird Buses*. Belka and a friend had been out drinking and in the early hours of the morning were walking home in the outskirts of Newcastle. Belka does not seem to have been drunk; it said that they had only drunk about four pints of beer. They came to a point where they needed to cross an urban dual carriageway at its junction with a roundabout. Belka and his friend had crossed the road where it entered the roundabout and were standing on an island waiting to cross the second half of the dual carriageway.

A taxi, driven by Prosperini, was negotiating the roundabout with the intention of going down the dual carriageway that Belka and his friend were in the process of crossing. As the taxi approached, Belka ran into the road into the path of the taxi and was inevitably hit. In evidence, Prosperini admitted to seeing

[5] *Stewart v Glaze* [2009] EWHC 704 (QB); (2009) 153(16) S.J.L.B. 28.
[6] *Birch v Paulson* [2012] EWCA Civ 487 and *Stewart v Glaze* [2009] EWHC 704 (QB) distinguished.
[7] *Lunt v Khelifa* [2002] EWCA Civ 801 at [20], per Lathom L.J.
[8] *Eagle v Chambers* [2003] EWCA Civ 1107 at [16], per Hale L.J.
[9] *Belka v Prosperini* [2011] EWCA Civ 623.

one person on the island separating both parts of the dual carriageway when he was some 25–50m away. He did not see Belka before impact.

At first instance the judge found that Prosperini should have seen both men on the island at a distance of about 30m and that even on seeing just one pedestrian he should have taken his foot off the accelerator as a precaution against any untoward movement by the pedestrian. The judge concluded that "with a better look out, and a slight easing of speed I am satisfied that the accident would have been avoided" because Belka would have been able to cross the road safely in front of the taxi.

The apportionment at first instance was that Belka, the pedestrian, was two thirds to blame for the accident as he deliberately ran into the path of the oncoming taxi when it was unsafe to do so. This apportionment was upheld on appeal where, having regard to the dicta in *Eagle v Chambers*, Lord Hooper said in the lead judgement:

> "In my view this is a case where on the judge's findings, the pedestrian 'has suddenly moved into the path of an oncoming vehicle'. Or, to use the words of Lord Reid[10], this is a case where the appellant's conduct of deliberately taking the risk of trying to cross the road in front of the taxi contributed more immediately to the accident than anything the respondent did or failed to do."

Drink was a minor feature in both *Eagle v Chambers* and *Belka v Prosperini*. It is also a feature in the present case of *Smith v Bluebird Buses*, though seemingly more so, as Smith had no recollection of the accident and declined to give any evidence at trial. However, being drunk (or under the influence of drink) as a pedestrian is not evidence of a failure to have regard for one's own safety or of negligence. Drink does not affect blameworthiness but how a pedestrian behaves when drunk does. Smith was described as staggering and as Lord Boyd says in his judgement:

> "His manner and demeanour at the window of the car, his stealing of the flag, and his walking without looking into the path of the bus demonstrated that his mind was far from the task of crossing the road."

However, despite his finding, Lord Boyd was also critical of the bus driver. He emphasised that although the bus driver saw Smith and swerved so as to avoid him and took his foot of the accelerator, he could have done more. Had he braked the collision would have been avoided. Similarly in *Belka*, had Prosperini taken his foot off the accelerator, collision would have been avoided.

Personally, comparing *Belka* and *Smith*, I am surprised that the finding of contributory negligence was as high as 85 per cent. I think Smith's actions are more blameworthy than those of Belka, but not to the extent that the respective apportionments would suggest. Perhaps Smith's stealing of the flag and his not giving evidence did not endear him to the court. Nevertheless, I have little doubt that defendants south of the border as well as those in Scotland will be seeking to rely on *Smith v Bluebird Buses* in appropriate cases.

Practice points

- It is a truism that any motor vehicle is a potentially dangerous weapon. This places a high duty of care on all drivers.
- The courts consistently emphasise the additional steps or evasive action that a prudent driver could have taken to have avoided impact. Despite the high duty on drivers, there are, however, some notable exceptions where it is possible to defend pedestrian claims.

[10] Lord Reid in *Stapley v Gypsum Mines Ltd* [1953] A.C. 663; [1953] 3 W.L.R. 279; [1953] 2 All E.R. 478.

- Nevertheless, pedestrians also owe a duty of care not only to themselves but also other road users,[11] which means that often contributory negligence is at issue in pedestrian claims.
- A defendant must remember that if contributory negligence is alleged, the burden of proof shifts to them.
- Although drink is sometimes a feature of such claims, for a pedestrian to be drunk is not evidence of contributory negligence; it is the actions while drunk that are the decisive factor.
- A simple point: it is always worth looking at the Highway Code and other Driving Standards Agency publications as to all intents and purposes they set the standard of care required for all road users.

David Fisher

Pringle v Nestor Prime Care Services Ltd

(QBD, Michael Harvey QC, May 2, 2014, [2014] EWHC 1308 (QB))

Liability—personal injury—clinical negligence—causation—but for—material contribution—diagnosis—medical services—meningococcal septicaemia—out-of-hours clinical triage telephone service

LT Amputation; Clinical negligence; Diagnosis; Meningitis; Nurses

Chantelle Pringle was two years old when she became unwell one evening, with a high fever, vomiting and other symptoms. Shortly after midnight her mother telephoned her general practitioner and was given the defendant Nestor Prime Care's number to call. She had a 15-minute conversation with a triage nurse Philip Owen who expressed the view that Chantelle was probably suffering from an upper respiratory tract infection. Mr Owen did not arrange for Chantelle's admission to hospital or for a doctor to make a home visit.

Chantelle remained unwell during the night and in the morning her mother observed a non-blanching rash on her body. An ambulance was called and Chantelle was admitted to hospital at 11.10. Despite proficient treatment at the hospital Chantelle developed gangrene in both feet leading to amputation of one and partial amputation of the other. A claim was made and litigation followed.

Chantelle Pringle's case was that Nestor had been negligent in not arranging for her immediate admission to hospital or for a home visit by a doctor. Nestor admitted negligence in not arranging for a home visit and admitted that if a doctor had visited he would have arranged for Chantelle's admission to hospital. The child's case was that if she had been admitted to hospital in the middle of the night, or the early hours of the morning following a doctor's visit, the treatment she then received would have avoided the amputations.

The judge noted that from his conversation with Chantelle's mother Philip Owen had assessed Chantelle as "lethargic". However, he had failed to record that assessment on the software system used by the defendants. Having concluded that Chantelle was lethargic, Owen fell below the standard of a reasonably competent triage nurse by failing to record that condition on the computer system.[1]

[11] As per Lord Denning in *Davies v Swan Motor Co (Swansea) Ltd* [1949] 2 K.B. 291; [1949] 1 All E.R. 620; 65 T.L.R. 278: "When a man steps into the road he owes a duty of care to himself to take care for his own safety".

[1] *Taaffe v East of England Ambulance Service NHS Trust* [2012] EWHC 1335 (QB); [2013] Med. L.R. 406; (2012) 128 B.M.L.R. 71 considered, *Bolam v Friern Hospital Management Committee* [1957] 1 W.L.R. 582; [1957] 2 All E.R. 118; [1955-95] P.N.L.R. 7 applied.

The judge held that if Owen had entered "lethargic", the system would have prompted him to arrange for Chantelle to be taken immediately to hospital, and Owen would have done so. Had that happened Chantelle would have been admitted to hospital at about 01.00. If Philip Owen had arranged a doctor's visit, a competent GP would have arranged for her admission to hospital and she would have been admitted by about 01.30.

The judge then turned to causation and further held that if Chantelle had been admitted to hospital during the middle of the night she would have shown sufficient symptoms to justify a diagnosis of bacterial sepsis. Although the progression of her disease after the development of the rash at about 09.15 or possibly earlier had been rapid, progression of the disease was not linear. A rapid deterioration from 09.15 onwards did not presuppose such a rapid deterioration earlier. Treatment would have commenced at about 04.00 and that treatment would have prevented the amputations, although it would not have prevented scarring and hospitalisation, which she would have endured in any event.

The causation issue had been established on the balance of probabilities applying *Bolitho v City and Hackney Health Authority*[2] *and Wright (A Child) v Cambridge Medical Group (A Partnership)*.[3] However the claimant had asked the judge to determine, if necessary, whether causation was established by showing that the defendant's negligence materially contributed to her adverse outcome applying the principles set out by the Court of Appeal in *Bailey v The Ministry of Defence*.[4] He concluded that it had and that it would have been sufficient for her case to have succeeded had it been necessary.

Judgment was entered for the claimant.

Comment

This case is a reminder of the need to consider how causation will be established so far as *each* allegation of breach of duty is concerned, and the need to have arguments, soundly based on evidence, available to deal with causation consequent upon any finding the court might make on breach. The *Bolam* test will be applied according to the standard of the relevant practitioner, in this case a nurse dealing with telephone enquiries and using a computerised system. The situation will be different if one professional was effectively acting as another type of professional, when the standard to be applied would be that of the latter. In this case, even though the service was described as a "doctor's deputising service", it was clear the standard applicable was that of a nurse dealing with enquiries to that service.

The judgment usefully identifies the standard of care to be expected from a nurse operating a telephone triage system. This was described by the judge in the following terms:

> "His duty was to make a proper record of his assessment in the computer system so that the computer algorithm would be able correctly to determine the recommended course of action."

Here the defendant's *Bolam* defence, although the reasons for this were not fully spelt out in the judgment, could properly be rejected. This was because although the defendant's expert expressed the view that some competent general practitioners might not have called for an ambulance, in other words have treated the appropriate course of action as "immediate" under the computer triage system, the need for that opinion to have a logical basis inevitably required the risks and benefits to be weighed. In this context that would be done by the computer system, hence failing to make a proper record of the assessment, in breach of the specific duty the nurse owed, meant the analysis did not happen.

Without that analysis of risk and benefit the rationale of the *Bolam* defence was wholly undermined. In this sense the judgment is similar to that in *Taaffe v East of England Ambulance Service NHS Trust*[5]

[2] *Bolitho (Deceased) v City and Hackney HA* [1998] A.C. 232; [1997] 3 W.L.R. 1151; [1997] 4 All E.R. 771.
[3] *Wright (A Child) v Cambridge Medical Group (A Partnership)* [2011] EWCA Civ 669; [2013] Q.B. 312; [2012] 3 W.L.R. 1124.
[4] *Bailey v Ministry of Defence* [2008] EWCA Civ 883; [2009] 1 W.L.R. 1052; [2008] LS Law Medical 481.
[5] *Taaffe v East of England Ambulance Service NHS Trust* [2012] EWHC 1335 (QB).

where paramedics failed to understand, and follow, relevant guidance and so, similarly, failed to make a decision which weighed risks and benefits.

It is, therefore, no answer to say that some practitioners in the relevant field might have done what the clinicians involved in the claimant's treatment did, at least if those clinicians did that for the wrong reasons and/or in an environment where, had they fulfilled their duty, events would, more likely than not, have taken a different turn.

Before the court finds a professional has been negligent it will usually be necessary to have expert evidence to that effect in the relevant field of expertise. However, that may not be essential, provided the relevant expert can speak with authority about the standard to be expected and remembers to apply the standard applicable to the particular professional where that is not in the same field of expertise as the expert.

In this case the service being provided was described as a "doctor's deputising service" and breach of duty was considered by general practitioner expert. However the judge was clear that the standard to be applied was not that of a GP but that of a nurse working in such a service. Claims arising from out of hours telephone services are now very prevalent in the NHS.

There are a number of points relating to the evidence worth remembering. First of all, the conversation is almost certain to be recorded and as exactly what is said is so crucial it will be important to get a transcript. In addition, the algorithms of any computerised system need to be known and are likely to be part of disclosure sought from the defendant.

The central duty of the clinician inputting the information is to do so accurately; given that those algorithms are very sophisticated, getting the right information is essential to delivery of the correct advice and hence appropriate treatment. These systems, like any computer systems, will only be as good as the information that system is given.

When the court is considering issues of past fact, even if hypothetical, these will generally be determined, one way or the other, on a balance of probability. If the breach of duty has been an omission, factual evidence from those who would have been involved in treating the claimant, had there been no breach of duty, may be highly relevant in deciding, on a balance of probability, what would have happened if there had been no breach.

For example, in *Goldsmith v Mid Staffordshire General Hospitals NHS Trust*[6] the Court of Appeal confirmed it is no answer to contend that "*Bolam*" compliant treatment would have meant the claimant suffered the same outcome if the actual treatment the claimant would have received, in the absence of the relevant breach of duty, would have prevented that outcome. An additional point confirmed by *Goldsmith*, is that a defendant cannot escape liability for a breach of duty by contending the damage would have occurred, in any event, because the defendant would have committed some other breach of duty.

An interesting point is how the court should approach the potential actions of a third party, if that is relevant to causation in a case based on breach by omission. In the context of a professional negligence claim not involving injury, the Court of Appeal concluded that should be decided not on a balance of probability, one way or the other, but on a loss of chance basis.[7] If such evidence is not available, however, the court may have to fall back, as occurred in this case, on standard practice. That is a topic experts are likely to be able to give evidence on. The court will determine what was most likely on the basis of such standard practice rather than, necessarily, what might have actually happened to the claimant.

Depending on any difference between standard practice and what might have happened to the claimant it may be either the claimant or the defendant who needs factual evidence from those who would have provided hypothetical treatment if events had taken a different turn. More generally, when a party does not call a witness who might be thought to be capable of giving relevant evidence the court is entitled to

[6] *Gouldsmith v Mid Staffordshire General Hospitals NHS Trust* [2007] EWCA Civ 397; [2007] LS Law Medical 363.
[7] *Allied Maples Group Ltd v Simmons & Simmons* [1995] EWCA Civ 17; [1995] 1 W.L.R. 1602; [1995] 4 All E.R. 907.

draw an adverse inference.[8] That may, as in this case, be relevant to breach of duty but may also be relevant to inferences drawn on causation.

This case also emphasises the significance of a causation finding based on material contribution, as adopted in *Bailey v Ministry of Defence*.[9] Moreover, like *Popple v Birmingham Women's NHS Foundation Trust*[10] and *Leigh v London Ambulance Service NHS Trust*,[11] this is a case where the uncertainly is generated by issues about timing of injury, resulting from breach, rather than a combination of discrete negligent and non-negligent causes (though in a sense it could be said delay caused by breach of duty is a negligent cause and another inevitable lapse of time is a non-negligent cause).

Helpfully, the case also confirms that the "material contribution" and traditional "but for" approaches are not necessarily mutually exclusive. The claimant may be able to assert the latter should the court make certain findings of fact on breach, whilst reserving the right to argue the former should other findings on breach be made.

When considering causation based on the test of material contribution it is worth remembering, with cases involving breach of duty by delay, many conditions are not linear or "dose related", but more complex in terms of aetiology. Consequently, there are many situations in which medical science cannot properly answer the "but for" test, on a balance of probability, as illustrated by the claimant's condition in this case or, for example, the development of PTSD by the claimant in *Leigh*.

The "waterfall analogy" adopted by an expert in this case, and accepted by the judge, is a good one and perhaps applicable in a number of circumstances, hence of use to a claimant seeking to persuade the court it is appropriate to adopt the "material contribution" rather than "but for" approach to causation.

Where the proper approach to causation will depend upon findings the court makes on breach, it is essential to have explored these issues with experts and, as happened in this case, for specific points to be put to the experts and raised in any agenda prepared ahead of the meeting convened for the purpose of preparing a joint statement. For this it is of course critical that the lawyers involved in the case appreciate the different approaches that may be adopted towards causation by the court, depending on findings made in relation to breach and the nature of the evidence on causation.

That reflects the care that is always necessary to be taken by the lawyers in identifying the legal arguments that will need to be developed, based on medical matters emerging from the expert evidence, and hence the points to be covered by experts in reports and, crucially, joint statements.

Practice points

- The *Bolam* defence requires, to be a responsible body of opinion, an analysis of risks and benefits not just happenstance.
- Both parties need to carefully analyse how causation may be approached, depending upon the findings made on breach of duty.
- Great care is necessary on the part of the lawyers pursuing or defending a clinical negligence claim to ensure, having analysed the likely issues, these are fully addressed by the experts and opinion given on all matters that the court will need to know about to reach sound conclusions on liability.

John McQuater

[8] *Wiszniewski v Central Manchester HA* [1998] P.I.Q.R. P324; [1998] Lloyd's Rep. Med. 223.
[9] *Bailey v Ministry of Defence* [2008] EWCA Civ 883; [2009] 1 W.L.R. 1052; [2008] LS Law Medical 481.
[10] *Popple v Birmingham Women's NHS Foundation Trust* [2012] EWCA Civ 1628; [2013] Med. L.R. 47.
[11] *Leigh v London Ambulance Service NHS Trust* [2014] EWHC 286 (QB); [2014] Med. L.R. 134.

Personal Representatives of the Estate of Biddick (Deceased) v Morcom

(CA (Civ Div), Arden LJ, McCombe LJ, Vos LJ, February 27, 2014, [2014] EWCA Civ 182)

Personal injury—liability—torts—negligence—apportionment—assumption of responsibility—causation—construction projects—duty of care—occupiers' liability—offers—proximity—reliance

LT Assumption of responsibility; Breach of duty of care; Contributory negligence; Occupiers' liability; Personal injury; Proximity; Reliance

Mark Morcom, a multi-skilled tradesman, had been seriously injured while fitting insulation in the loft at the home of the late Mr Cyril Biddick. Entry to the loft was via a ladder through a hinged hatch door, which opened by being pulled downwards with a long pole. A hook in the pole could be used to lock the door. Mr Biddick, who was 80 years old, suggested that while Mr Morcom was insulating the inside of the hatch door, he, Mr Biddick, would stand underneath, keeping the door in the locked position with the pole to prevent the mechanism working itself loose from the vibrations of Mr Morcom's drill.

Mark Morcom did not consider it ultimately necessary, but agreed to Mr Biddick's proposal. However, Mark Morcom fell through the loft aperture when Cyril Biddick left his position to answer the phone.

Mr Morcom claimed against Mr Biddick seeking damages for his injuries which, he alleged, were caused by breach of statutory duty under the Work at Height Regulations 2005 and/or negligence at common law. Morcom's primary case was that the hatch opened as a result of vibration. H.H. Judge Denyer QC rejected that claim.

The judge also rejected the possibility that Morcom had fallen on the door. He thought it most likely that when Mr Biddick left his post to answer the phone he inadvertently partially disengaged the lock when removing the pole and that this coupled with Morcom overreaching himself, applying a degree of force to a hatch door that was only partially supported caused him to fall through the hatch when the lock disengaged entirely. He concluded that if Mr Biddick had not involved himself in the work performed by Morcom, there would have been no basis for a finding of negligence, but that he had brought himself into close proximity with Morcom by virtue of his proposal. Leaving his position to answer the phone, Biddick had failed to exercise his duty of care to the requisite standard and was liable to the extent of a third. Both parties appealed.

On appeal the issues on appeal were the cause of Mark Morcom's fall, the alleged duty of care by Cyril Biddick, and the extent of contributory negligence by Mr Morcom. On behalf of the defendant it was submitted that the judge had failed to consider that the accident could have been caused simply by the claimant overreaching himself, causing excessive weight to be transferred through the screwdriver onto a fully secured hatch. His evidence was that he was fixing insulation with screws on inside of the hatch at the time. Accordingly, as the judge had considered an incomplete range of causal possibilities, the appeal court was free to re-determine the cause of Morcom's fall.

It was also submitted that the danger to which the claimant had been exposed was that the hatch door would not take his weight and would burst open. That was a danger that did not arise from the limited extent of Cyril Biddick's involvement, and which would have been obvious to an experienced workman.

The Court of Appeal held that on the evidence, it was impossible to say that the judge had arrived at a conclusion regarding the cause of the claimant's fall which had not been open to him. Furthermore, Cyril Biddick had assumed responsibility, not for bearing Morcom's weight if he happened to fall on the hatch

door, but for undertaking to ensure that the latch remained closed—i.e. not making a safe scenario dangerous.

In involving himself in a potentially hazardous activity, Mr Biddick put himself in a degree of proximity to Mr Morcom such that it was foreseeable that if he neglected his task, the hatch might work itself open and cause Morcom to fall and suffer injury. It was fair and reasonable to find that a duty of care had arisen. Even though Mr Biddick's concern had been vibration, and vibration had not been found to be the cause of the hatch opening, Mr Biddick had nevertheless chosen to abandon his post and in doing so partially disengaging the lock, which was a breach of his duty of care.

While reliance was a prerequisite in economic loss cases, it did not matter that the claimant had not relied on Mr Biddick's input. Once Mr Biddick had undertaken to ensure that the hatch remained closed, he had a duty to perform that task carefully even if the claimant did not see his role as an element in his own safety.[1]

The court also concluded that the Judge's reasoning for the apportionment of liability was entirely sound. Cyril Biddick had been negligent in failing properly to perform the small task which he undertook, but Mark Morcom was principally to blame for the unsafe method of work which he chose to adopt.

The appeal and cross-appeal were dismissed.

Comment

The defendant's appeal on the question of what caused the claimant's fall was founded on the argument that there was insufficient evidential basis to justify finding in favour of the "partial disengagement theory". This was a theory first advanced by the defendant's expert and referred to on a number of occasions throughout his report and during his oral evidence. On behalf of the claimant, leading counsel observed that there was a danger with such appeals of the appellant cherry picking the evidence and failing to acknowledge the wider picture which had been available to the Judge.

The Court of Appeal effectively accepted that while the Judge at first instance had not specifically referred to all of these references in concluding in favour of this scenario, it was reasonable to assume that he had them in mind and that there was a wide ambit of discretion available to the trial Judge in drawing such factual conclusions upon the evidence before him. That being so, the Court had to consider some very interesting areas of the law on duty of care.

Mr Biddick put himself in a degree of proximity to Mr Morcom in the performance of the work in circumstances in which it was foreseeable that, if his task was neglected, the hatch might work itself open, with a risk of causing Mr Morcom to fall and sustain injury. As the Court recognised there could be no doubt that, in such circumstances, that it would normally have been fair and reasonable to find that a duty of care arose.

Here Mr Biddick had assumed a responsibility for the safety of Mr Morcom. The court considered the principles of assumption of responsibility and reliance which gave rise to a duty of care in *Watson & British Boxing Board of Control Ltd*,[2] a case where a boxer injured in a bout claimed damages from the defendant Board for negligence in failing to ensure that prompt medical attention was available to him. There, Lord Phillips concluded[3] that:

> "It seems to me that the authorities support a principle that, where A places himself in a relationship to B in which B's physical safety becomes dependant upon the acts or omissions of A, A's conduct can suffice to impose on A a duty to exercise reasonable care for B's safety. In such circumstances

[1] *Watson v British Boxing Board of Control Ltd* [2001] Q.B. 1134; [2001] 2 W.L.R. 1256; [2001] P.I.Q.R. P16; *Wattleworth v Goodwood Road Racing Co Ltd* [2004] EWHC 140 (QB); [2004] P.I.Q.R. P25 and *Perrett v Collins* [1998] 2 Lloyd's Rep. 255; [1999] P.N.L.R. 77 considered; and *Tomlinson v Congleton BC* [2003] UKHL 47; [2004] 1 A.C. 46; [2003] 3 W.L.R. 705 distinguished.

[2] *Watson & British Boxing Board Of Control Ltd* [2001] Q.B. 1134.

[3] *Watson & British Boxing Board Of Control Ltd* [2001] Q.B. 1134 at [49].

> A's conduct can accurately be described as the assumption of responsibility for B, whether "responsibility" is given its lay or legal meaning."

The Court here accepted that Lord Phillips' conclusion, quoted above, did not rule out a duty of care on the part of Mr Biddick in this case. Here however, added into the equation was that Mr Morcom expressly denied that he was relying upon Mr Biddick to take any weight or that he regarded Mr Biddick's position as being "safety critical". It was the defence case that the absence of such reliance was critical in negating a duty of care in here.

However, while reliance was important in the *Watson* case, the Court here approved the comments of Davies J in *Wattleworth v Goodwood Road Racing Co Ltd*[4] who did not think a lack of specific reliance of itself was dispositive of the question of whether a duty of care was owed. Further support for that view was found in *Perrett v Collins*.[5] In *Perrett*, the claimant was injured when a "kit built" light aircraft, in which he was a passenger, crashed shortly after take-off. The owner had carried out alterations to the aeroplane, replacing its gearbox but without changing its propeller as he ought to have done. The claimant sued the owner, a technical inspector, and the company who had appointed the inspector whose responsibility it was to inspect and approve the aircraft to enable it to obtain its certificate of airworthiness. This Court upheld the trial Judge's finding that the inspector, and the company appointing him to carry out the inspection, owed the injured man a duty of care.

Perrett presumably did not know of or rely on the inspection before agreeing to fly in the plane; it was enough that he was entitled to assume, and would have assumed, that all due care had been exercised by the persons—whoever they be—who had undertaken responsibility for safety matters. There was sufficient proximity between the passenger and those defendants to give rise to the duty of care. Here the court concluded that the duty would have still existed even if the aircraft passenger had been intent on carrying out an additional hazardous activity such as "wing walking", against the dangers of which no careful inspection could have protected him.

The claimant asked the court to consider the analogous situation of a window cleaner who carefully sets up his ladder on a gentle slope, inserts a chock of wood under one foot for balance and is then approached by the householder who offers to foot his ladder for him. The window cleaner at first declines saying that this is not necessary but eventually goes along with the suggestion in the face of the householder's persistence. The tradesman places no reliance upon the assistance given by the householder.

But what if the householder in his enthusiasm to volunteer this service accidentally kicked the chock of wood away or shook the ladder causing the cleaner to fall? Would the express absence of reliance absolve the householder of all liability? The claimant said this argument was misconceived and an attempt to overcomplicate a simple case; a case based upon breach of the ordinary duty of care owed by anyone who involved themselves in a potentially hazardous activity being undertaken by another. This analysis appears to have been accepted by the Court of Appeal.

Even so, clearly Mr Biddick's careful performance of his task could not have protected Mr Morcom if he had fallen with his full weight upon the hatch door. This was a real additional risk in the circumstances of this case, as the experts recognised, because of the method of work that Mr Morcom adopted. There was bound to be a finding of contributory negligence.

However, the additional hazard undertaken, against which Mr Morcom acknowledged Mr Biddick's role could not protect him, did not negate the existence of the duty of care in the task which Mr Biddick did in fact undertake. That was sufficient to establish some liability.

[4] *Wattleworth v Goodwood Road Racing Co Ltd* [2004] EWHC 140 (QB).
[5] *Perrett v Collins* [1998] 2 Lloyd's Rep. 255; [1999] P.N.L.R. 77.

Practice points

- An assumption of responsibility can create a duty of care.
- Such a duty can exist without positive acceptance.
- If proximity and foreseeability are satisfied, such a duty of care may be owed by a volunteer.
- A lack of specific reliance is not critical in negating such a duty of care.

Colin Ettinger[*]

[*] My thanks to Anushea Ahmadi, from Irwin Mitchell LLP, who represented the claimant and assisted with this comment.

Case and Comment: Quantum Damages

Zambarda v Shipbreaking (Queenborough) Ltd

(QBD, John Leighton Williams QC, July 13, 2013, [2013] EWCA 2263 (QB))

Personal injury—damages—mesothelioma—pain, suffering and loss of amenity—care—dependency claims—fatal accident claims—future loss—Law Reform (Miscellaneous Provisions) Act 1934—Fatal Accidents Act 1976

Carers; Dependency claims; Fatal accident claims; Future loss; Loss of amenity; Measure of damages; Mesothelioma; Pain and suffering

Mr Zambarda worked with the defendants between 1966 and 1986. He was exposed to asbestos fibres from burning lagging off pipe work. He contracted mesothelioma, and died at the age of 70 on September 14, 2011. He left a widow and five non-dependent children. The defendant admitted negligent exposure to asbestos and on November 21, 2012, judgment was entered on liability with damages to be assessed.

Mrs Zambarda had a history of complex, long-standing medical problems and chronic ill-health. She had undergone an ileostomy and had had a colostomy bag since 1970; she had a parastomal hernia; degenerative changes to the lumbar spine and suffered from vertigo. The deceased had been her primary carer. He had retired at the age of 61 and since that time had attended to his wife's increasing needs and performed many of the household chores. Problems with Mrs Zambarda's colostomy bag had increased over time, including regular leakage and the deceased had provided her with assistance and support.

Prior to Mr Zambarda's death a case manager had appointed a commercial carer for his wife for four hours a day. The children provided further care. Mrs Zambarda's claimed 39.5 hours of professional care a week. There was a conflict in the expert evidence as to how long her husband would have been able to care for her, had he lived. But for his exposure to asbestos, it was agreed that he would have lived for a further 9.6 years. At the date of assessment, the widow's life expectancy was agreed to be 12.6 years.

The case manager's roll was essentially paying bills and the Judge concluded that there was no reason to employ one for that purpose. However, as there was a risk that one might be necessary in the future an award of £5,000 was made to cover likely costs.

Mr Zambarda had provided care and services to his wife going far beyond what a husband would normally provide and that care had been a necessity given her disabilities. It was not confined to physical assistance but also to providing necessary companionship, support and comfort. The widow's claim for 39.5 hours of professional care a week was accepted by the judge as a reasonable estimate of the care that her husband had provided. Her very significant health problems put her at serious risk of requiring significantly more care as she aged. However, at the same time, had he lived, the deceased's health might well have affected his continuing ability to care.

The judge recognised that the care the deceased had provided was essentially light in nature and something he would have been likely for the most part to continue to provide, subject to some serious setback in his health. Should his wife's mobility have declined then she might have required physical care that he could not have provided. Faced with all those uncertainties, the court considered that Mr Zambarda would have been able to continue providing the comparatively light care for a further six years, thereafter

his ability to provide would decrease by seven hours a week in each of the following three years until he was aged 79, when for practical purposes his ability to care would have ceased.

The judge accepted that loss of intangible benefits was a recognized head of loss but noted that it was also recognized that awards should be modest. However, he was satisfied that Mr Zambarda provided far more intangible benefits than the conventional husband, largely because his wife needed those benefits for her wellbeing. An award of £4,000 was made for this head.

Dr Rudd, a respiratory consultant, found that symptoms of chest pain, related to the condition, commenced in February 2011. They quickly developed in to shortness of breath upon exertion, and thereafter, the progress of the illness sadly mimicked that of other sufferers. Mr Zambarda underwent the following investigations and treatment:

- a chest x-ray, which showed a right-sided pleural effusion;
- a thoracotomy;
- drainage of the effusion with talc pleurodesis;
- surgical removal of part of the pleura;
- insertion of a pleural drain;
- radiotherapy causing nausea; and
- medication in the form of morphine.

Unsurprisingly, layered on top of his physical pain was a level of mental distress, leading to depression. From May 2011 he didn't leave his home. From July, he spent most of his time in bed, becoming more distressed as his condition worsened. He died on September 14, 2011, seven months after his symptoms commenced.

In assessing the damages for pain, suffering and loss of amenity, the judge referred to the Judicial College Guidelines,[1] which list a number of factors to be considered, and a bracket of damages of £50,000 to £90,000. To these, he added that "I consider age, and the extent of life lost, are also relevant factors". He cited other authorities identifying that most involved longer periods of suffering, and found that the decision *inMason-Cave v Massey Plastic Fabrications*[2] was the "closest" on the facts. The present-day value in that case was £75,223. The claimant's representatives had sought the sum of £80,000 for this head of damages; the defendants had offered £70,000. An award of £77,500 was made.

The award made under the Law Reform (Miscellaneous Provisions) Act 1934 totalled £95,685 (including damages for PSLA of £77,500). The award made under the Fatal Accidents Act 1976 totalled £332,376 (including £71,694 for past dependency on services and £171,065 for future dependency on services, including case management). Total damages awarded were £428,061.

Comment

Malignant diffuse mesothelioma is a tumour arising from the mesothelial or submesothelial cells of the pleura, peritoneum, or pericardium, but over 80 per cent originate in the pleura[3] (the lining of the lungs). Whilst research suggests that there are other causative factors, including SV-40 viruses, innovative nanomaterials, and genetic predisposition, exposure to asbestos fibres is the primary cause. The predictive peak incidence year in the United Kingdom is 2016, with predicted deaths of 2,040.[4]

[1] Judicial College, *Guidelines for the Assessment of General Damages in Personal Injury Cases*, 11th edn (Oxford: Oxford University Press, 2012).
[2] *Mason-Cave v Massey Plastic Fabrications Ltd* [2008] C.L.Y. 2897.
[3] V. Delgermaa, K. Takahashi, E. Park, G.V. Le, T. Hara, T. Sorahan, "Global mesothelioma deaths reported to the WHO between 1994 and 2008", Bull World Health Organ. Oct 1, 2011; 89(10): 716–724C.
[4] E. Tan, N. Warren, A.J. Darnton, J.T. Hodgson: "Projection of mesothelioma mortality in Britain using Bayesian methods", British Journal of Cancer (2010) 103, 430–436.

Life expectancy from onset of symptoms differs, but the median survival times vary from 4 to 12 months,[5] influenced by prognostic factors such as age, sex, tumour sub-type, and tumour stage. Whatever the length of life, as with Mr Zambarda, the deterioration can be "speedy", the last months and weeks are invariably painful, and the death " a horrible one".[6] As the prognosis is always bleak, with imminent death inevitable, how are the general damages assessed?

His Lordship referred to the Judicial College Guidelines[7] ("Guidelines"). In the 12th edition the bracket of damages is £56,650–£78,650 (applying the increase of 10 per cent from *Simmons v Castle*[8] with reference to the following:

> "Mesothelioma causing severe pain and impairment in both function and quality of life. This may be of the pleura (the lung lining) or of the peritoneum (the lining of the abdominal cavity); the latter being typically more painful. There are a large number of factors which will effect the level of award within the bracket. These include, but are not limited to the duration of pain and suffering, extent and effects of invasive investigations, extent and effects of radical surgery, chemotherapy and radiotherapy, whether the mesothelioma is peritoneal or pleural, the extent to which the tumour has spread to encase the lungs, and where other organs become involved, causing additional pain and/or breathlessness, the level of the symptoms, domestic circumstances, age, level of activity and previous state of health."[9]

This extract reflects the direction of more recent authorities, which have sought to move away from the prejudicial influence of the single factor of the duration of symptoms, to examine the sufferer from a wider and more subjective perspective, to assess how the illness affects/affected their life. This is best exemplified by the judgment of Swift J in *Ball v The Secretary of State for Energy and Climate Change*[10] in which, listing a number of factors to be considered, her Ladyship was at pains to avoid "pigeon holing" of claims "by reference to duration of symptoms alone". She stressed that the previous editions of the Guidelines have a misplaced emphasis on "the primacy of duration of symptoms when determining the appropriate award of PSLA in a mesothelioma claim". Instead, her Ladyship considered a wealth of factors, including:

- the extent and effects of invasive investigations undertaken by the sufferer;
- the level of symptoms;
- the fear of the "painful and distressing end which lies in store";
- the previous state of health and level of activity of the sufferer; and
- the age of the sufferer.

Mr Ball's was a particularly sad case, for he was a 92-year-old widower living alone in a flat, leading a "somewhat isolated life". Despite having this life-ending condition, and feeling sick "all the time", being unable to speak for more than a sentence due to breathlessness, and feeling depressed, he continued to pay the rent on his flat because he was clinging to the hope that one day he may return there. He likely never would. What a particularly sad end to a life.

The approach in *Ball* contrasts starkly with that applied in the period from 2007–2010, in which a number of decisions were made, commencing with HH Judge Walton's findings in *Gallagher v Vinters Armstrong*.[11] Judge Walton was heavily influenced in his assessment of damages at £20,000 by the fact

[5] A. Scherpereel, P. Astoul, P. Bass et al, "Guidelines of the European Respiratory Society and the European Society of Thoracic Surgeons for the management of malignant pleural mesothelioma", Eur. Repir. J. 2010; 35: 479–495.
[6] Master Whitaker: *Smith v Bolton Copper Ltd* Unreported July 10, 2007 (QBD).
[7] Judicial College, *Guidelines for the Assessment of General Damages in Personal Injury Cases*, 12th edn (Oxford: Oxford University Press, 2013)
[8] *Simmons v Castle* [2012] EWCA Civ 1039; [2013] 1 W.L.R. 1239; [2013] 1 All E.R. 334.
[9] Judicial College, *Guidelines for the Assessment of General Damages in Personal Injury Cases*, 12th edn (Oxford: Oxford University Press, 2013) pp.25–26.
[10] *Ball v Secretary of State for Energy and Climate Change* [2012] EWHC 145 (QB).
[11] *Gallagher v Vinters Armstrong* Unreported January 17, 2007 Newcastle County Court, per H.H. Judge Walton.

that the Guidelines referred to "symptoms that extend over a period that can be categorised in months rather than weeks", and the deceased in that instance only survived for about six weeks.

Holland J.[12] referred to the "relative brevity (six weeks) of the period of suffering" in awarding £35,000, despite adopting the point made by David Foskett QC that it is "an invidious exercise to draw fine distinctions between the suffering of victims of mesothelioma".

Hamblen J[13] awarded £72,000 for "severe pain and impairment of function and quality of life throughout the 17 months" of the deceased's condition.

In *Kirk v Vic Hallam Holdings Ltd*,[14] an award of £62,500 was made for 10 months of symptoms; a case notable for the contention of the defendants that the deceased did not suffer during the last eight days of his life because of a period of unconsciousness.

It was in *Fleet v Fleet*[15] that MacKay J. signalled a change in direction when he stated that:

> "although there is a tendency to assess general damages in the case of this disease by reference principally to the duration of the fatal symptoms, Mr Burton QC for the claimant, rightly argues that it is the quality of life at this time that ought to be the critical factor."

Finally, in *Najib v John Lang Plc*,[16] Nicola Davies J., in awarding £80,000 (now £86,757), considered not only the 19 months' duration of symptoms, but the history of the "terrible time" the claimant had to suffer, his "significant pain", and the "the level of suffering" that the clinicians were at the time of the hearing still striving to control.

I have previously called for a single lump-sum award for general damages in mesothelioma claims. Whilst it is evident from reading of the progression of the illness in the judgments referred to above, that each claimant suffers to a differing degree, the outcome is the same. Furthermore, it is distasteful to have lawyers arguing in a public court, and in front of the claimant—if, unlike Mr Najib, he is fit enough to attend the hearing—or the surviving spouse, about the extent, duration, and level of the pain endured.

The approach of the Court in *Zambarda* was correct. Consideration was given to a number of relevant factors applicable to the circumstances of the deceased with no unfair weighting applied to the duration of his suffering. The Guidelines also properly adopt that approach.

Practice points

Whilst the award is dependent on an assessment of the facts of each case, it is critical that practitioners address the following:

- Preparation of a schedule detailing the history of the medical investigations and treatments undertaken by the claimant.
- Preparation of a proof of evidence from the claimant (if alive), and/or the surviving spouse in respect of the mental aspects of the claim. All too often, this aspect can be underplayed. 80 per cent of mesothelioma sufferers are male, and of a generation that was stoical. There is a tendency to underplay their anxieties.
- Preparation of the claimant's proof of evidence by reference to the factors set out in the judgment in *Ball*.

[12] *Cameron v Vinters Defence Systems Ltd* [2007] EWHC 2267 (QB); [2008] P.I.Q.R. P5.
[13] *Beesley v New Century Group Ltd* (2008) EWCH 3033 (QB).
[14] *Kirk v Vic Hallam Holdings Ltd* (2009) EWHC 3166 (QB).
[15] *Fleet v Fleet* (2011) EWHC 1016 (QB).
[16] *Najib v John Laing Plc* [2011] EWHC 1016 (QB).

- Application of inflation to the amount of previous awards. It is noteworthy that Mr Zambarda's case was valued at £77,500 in July 2013 but was worth £78,896 in February 2014.

Simon Allen

Stott v Thomas Cook Tour Operators Ltd

(UKSC, Lord Neuberger (President), Lady Hale (Deputy President), Lord Reed JSC, Lord Hughes JSC, Lord Toulson JSC, March 3, 2014, [2014] UKSC 15)

Damages—injury to feelings—passengers aviation—human rights—carriage by air—causes of action—disability discrimination—The Civil Aviation (Access to Air Travel for Disabled Persons and Persons with Reduced Mobility) Regulations 2007—Montreal Convention 1999—Regulation 1107/2006—Regulation 2027/97 art.3(1)

LT Damages; Disabled persons; EU law; Injury to feelings; International carriage by air

The claimant, Christopher Stott, who was severely disabled and a permanent wheelchair user, depended on his wife to manage all his bodily needs when travelling by air. In 2008 he booked return flights for himself and his wife between the United Kingdom and Greece with Thomas Cook Tour Operators Ltd, an air carrier which operated under licence granted by a member state of the European Union and was therefore subject to obligations imposed on Community air carriers by Regulation 1107/2006.[1]

On booking he arranged for his wife to be seated next to him on both flights and the defendant assured him that such arrangements would be put in place. However, when checking in for the return flight the defendant informed them that they would not be seated together but that the matter would be sorted out at the departure gate. When they got there they were told that other passengers had already boarded and that seating allocations could not be changed. On boarding the claimant's wheelchair overturned and he fell to the cabin floor, suffering humiliation and distress. Cabin staff did not assist in attempting to obtain adjoining seats and in consequence he was not seated next to his wife with the result that she encountered considerable difficulties in attending to his personal needs.

At first instance the recorder found that Thomas Cook had breached its duty, but concluded that he had no power to make an award of damages by reason of art.29 of the Montreal Convention for the Unification of Certain Rules for International Carriage by Air 1999 ("the Convention"). That decision was upheld by the Court of Appeal.

In the Supreme Court it was Stott's argument that since the Convention had effect within the European Union via Regulation 2027/97,[2] it was a question of European law whether the courts had been right to hold that his claim for damages was incompatible with the Convention. He argued that the subject-matter of his claim was outside the substantive scope of the Convention. In addition he argued that it was outside the temporal scope of the Convention, as Thomas Cook's failure to make all reasonable efforts to seat him next to his wife began prior to embarkation.

The Supreme Court held that there was no dispute about the meaning of the 2006 or 2007 Regulations, or their compatibility with the Convention. The case was not about the interpretation or application of a

[1] Regulation 1107/2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air [2006] OJ L204/1 ("The EC Disability Regulation").

[2] Regulation 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air [1997] OJ L285/1.

European regulation, and it did not involve a question of European law, notwithstanding that the Convention had effect through the 1997 Regulation. The question at issue was whether the claim was outside the substantive scope and/or temporal scope of the Convention, and that depended entirely on the proper interpretation of the scope of that Convention.

The temporal question could be answered by reference to the facts pleaded and found. Stott's claim was for damages for the humiliation and distress suffered in the course of embarkation and flight. The particulars related exclusively to events on the aircraft. Accordingly, his subjection to humiliating and disgraceful maltreatment was squarely within the temporal scope of the Convention. It was no answer to the application of the Convention that the operative causes began prior to embarkation. To hold otherwise would encourage deft pleading in order to circumvent the purpose of the Convention.[3]

The court held that a claim for damages for ill-treatment in breach of equality laws as a general class should not be regarded as outside the substantive scope of the Convention. Nor should a claim for damages for failure to provide properly for the needs of a disabled passenger. What mattered was not the quality of the cause of action but the time and place of the accident or mishap.

They confirmed that the Convention was intended to deal comprehensively with the carrier's liability for whatever might physically happen to passengers between embarkation and disembarkation. Although the Civil Aviation Authority could decide what methods of enforcement, including possible criminal proceedings, should be used following a breach, it seemed to the Court unfair that a person who suffered ill-treatment of the kind suffered by Stott should be denied any compensation; a declaration that the carrier was in breach was recognised as likely to be a small comfort.

The underlying problem was that the predecessor of the Convention, the Warsaw Convention, long pre-dated equality laws. They agreed that there was much to be said for the argument that it was time for the Convention to be amended to take account of the development of equality rights, but any amendment would be a matter for the contracting parties. Nevertheless the appeal was dismissed.

Comment

Article 17 of the Convention deals with liability for death or injury to passengers as a result of an accident sustained on board the aircraft or in the course of embarkation or disembarkation. One feature of the Convention[4] limits the type of injury or damage which is compensable and the amount of compensation recoverable. Bodily injury (or lesion corporelle) has been held not to include mental injury, such as post-traumatic stress disorder or depression.[5] The same would apply to injury to feelings.

A second feature is an exclusivity provision. Lord Hope made this exclusivity clear in *Sidhu v British Airways*:[6]

> "(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 … It would lead to the setting alongside the Convention of an entirely different set of rules which would distort the operation of the whole scheme. I see no escape from the conclusion that, where the Convention has not provided a remedy, no remedy is available."

This appeal was brought with the support not only of the Equality and Human Rights Commission but also of the responsible department of the United Kingdom Government. The decision exposes a grave injustice. However it has long been established that the Convention provides the exclusive remedy, so it

[3] *Abnett v British Airways Plc* [1997] A.C. 430; [1997] 2 W.L.R. 26; [1997] 1 All E.R. 193 followed.
[4] And the Warsaw Convention before it.
[5] See *King v Bristow Helicopters Ltd* [2002] UKHL 7; [2002] 2 A.C. 628; [2002] 2 W.L.R. 578.
[6] *Sidhu v British Airways Plc* [1997] A.C. 430; [1997] 2 W.L.R. 26; [1997] 1 All E.R. 193.

is no surprise that this attempt to circumvent the Convention failed. The unfairness of the present position can only be addressed by the parties to the Convention.

Practice points

- Claims against air carriers arising out of air travel are determined solely by the Convention.
- The domestic courts are obliged to apply the Convention.
- The Convention provides clearly defined and limited remedies.

Nigel Tomkins

Brown (Widow and Executrix) v Hamid[1]

(QBD, Jeremy Baker J, December 19 2013, [2013] EWHC 4067 (QB))

Personal injury—measure of damages—clinical negligence—acceleration—bereavement—fatal accident claims—non-pecuniary loss—pre-existing condition—respiratory diseases—failure to diagnose—acceleration of pre-existing condition—awareness of reduction of life expectation—Fatal Accidents Act 1976 s.1a(3) and s.3(5)

LT Acceleration; Bereavement; Clinical negligence; Funeral expenses; Measure of damages; Pre-existing condition; Respiratory diseases

The claimant, Christine Brown, the widow and executrix of her late husband Ronald Brown, pursued a claim for damages on behalf of the estate and brought an action on her own behalf arising from the clinical negligence of the defendant. Ronald Brown had died in August 2012 at the age of 76 from the effects of pulmonary hypertension. In 2007 he had commenced an action for damages against Hamid, who admitted that his failure to diagnose pulmonary embolism and to prescribe the appropriate treatment amounted to clinical negligence.

Mrs Brown claimed that, although Ronald might have died from pulmonary hypertension in any event, its onset had been accelerated and the rate of progression of the symptoms had been exacerbated. According to the medical evidence adduced by the claimant, a lack of Warfarin treatment in 2007 had led to the onset of severe pulmonary hypertension causing considerable symptoms of pain and discomfort over the years leading to his death.

At that time, aged 71, it was claimed that Ronald's life expectancy would have been a further 13 years had he received appropriate treatment, with no significant reduction despite his pre-existing condition. That evidence was based in part on Ronald Brown's previous history of responding well to Warfarin treatment.

Hamid's case was that, in 2007, Ronald Brown was already suffering from pulmonary hypertension and that the disease would still have progressed, albeit at a slower rate, had he received treatment at that time. According to the defendant, death would have been delayed only by a period of 3–12 months with treatment.

The judge held that, on the medical evidence, Ronald was suffering from pulmonary hypertension in 2004. The characteristics of that condition was that once it had been established, it caused progressive

[1] *Christine Brown (Widow and Executrix of the Estate of Ronald Brown Deceased) v Shahid Hamid.*

damage to the remaining healthy blood vessels and led to a rapid decline. Given the stage at which Ronald's disease had reached in 2007, although the provision of Warfarin might have prevented the development of further emboli, the pre-existing damage was such that it would not have had the same level of benefit on his overall condition as it had had in previous years.

The judge concluded that on the evidence, the non-provision of Warfarin in 2007 had accelerated the onset of the more severe symptoms associated with Ronald's pre-existing condition by a period of about 12 months. Although damages for loss of expectation of life were not recoverable, in assessing damages for pain and suffering the court was entitled to take into account any suffering likely to have been caused to Ronald by his awareness that his expectation of life had been reduced. He had suffered significant distress and anxiety as a result of the impact of the delayed diagnosis on his health. The appropriate award of general damages was held to be £8,500.

An award of £11,800 was also made for bereavement under s.1A(3) of the Fatal Accidents Act 1976 plus an award of £2,000 for loss earnings based on a period of five years and four months with a further sum of £25,000 for loss of DIY skills. The first of the consultation fees incurred with the defendant was recoverable because Ronald Brown had received no benefit from it.

Although damages for funeral expenses were usually recoverable under s.3(5), it was not considered appropriate to make such an award in this case because of the acceleration of symptoms associated with a pre-existing condition by a relatively short period of time. In addition no award was made in respect of care, medical fees, accommodation or travel as there was no evidence that these had been increased as a result of the defendant's negligence.

While accepting that the principle of loss of special consortium had been recognised in a husband and wife relationship, the judge was conscious that there was a distinct overlap with the award of damages for bereavement. Moreover, he concluded that the case law demonstrated substantially longer periods of time over which such a loss had taken place. In the circumstances, he concluded that it was not appropriate to found a separate head of damages on that basis in this case.[2]

Comment

The interesting aspect of the judgment relates to how the judge dealt with the relatively short period of acceleration (12 months) when assessing the damages. The award of £8,500 for PSLA seems entirely reasonable. The anxiety experienced by Mr Brown in knowing that the delayed diagnosis had reduced his life expectancy was a significant feature, and the judge took it into account as he was entitled to do pursuant to s.1(1)(b) of the Administration of Justice Act 1982.[3] Reference was made by the Judge to sections of the Judicial College Guidelines[4] dealing with asbestos and asthma.

The relatively short acceleration caused the Judge to refuse an award for funeral expenses which he noted would have been incurred in any event within a short period. Whether claimed under the Law Reform (Miscellaneous Provisions) Act 1934 or the Fatal Accidents Act 1976, the court "may" award damages for funeral expenses. Hence there is a discretion afforded to the court. Precisely how that discretion should be exercised is not entirely clear, and it seems arbitrary to say that an award should not be made where death is accelerated by one year but would be made where the acceleration period is longer. Such a decision may seem somewhat inconsistent with the statutory bereavement award which is made in full regardless of when the deceased would have died, so long as the negligence caused the death.

The claim for the loss of love and affection (special consortium) which Mr Brown would otherwise have provided to the claimant was also rejected due to the relatively short acceleration period. The Judge

[2] *Devoy v William Doxford & Sons Ltd* [2009] EWHC 1598 (QB) considered.

[3] "if the injured person's expectation of life has been reduced by the injuries, the court, in assessing damages in respect of pain and suffering caused by the injuries, shall take account of any suffering caused or likely to be caused to him by awareness that his expectation of life has been so reduced."

[4] Judicial College, *Guidelines for the Assessment of General Damages in Personal Injury Cases*, 12th edn (Oxford: Oxford University Press, 2013).

reasoned that there was a distinct overlap with the bereavement award and with the award he made for DIY services, though he accepted that special consortium could be awarded in appropriate husband and wife cases. Hence the quid pro quo for receiving the full bereavement award despite the short acceleration was the denial of the special consortium.

This case was commenced during Mr Brown's lifetime, and hence was converted to a fatal accident claim after his death. When representing potential claimants with a short life expectancy there is always an issue as to whether it is best to issue before or after death. Whichever is decided upon it is obviously vital to obtain a comprehensive witness statement from the injured party as soon as possible. The decision regarding when to issue will ultimately boil down to one of quantum including that fact that quite often the remainder of the injured party's life can be significantly enhanced with an early interim payment. That may only be obtainable with the commencement of proceedings.

In mesothelioma claims there are established procedures for expedited hearings. It is incumbent upon practitioners and the courts to try and ensure the same expedition when dealing with other living claimants with short life expectancies.

Practice points

The decision on when to issue in cases such as this will usually depend on the answer to two questions:

- Will the living claimant who is able to recover damages for the "lost years", be able to recover more damages than his estate and dependants after his death?
- Is interim funding urgently required?

Nathan Tavares

McAleer v Chief Constable of the PSNI

(QBD (NI), Gillen J, April 11 2014, [2014] NIQB 53)

Personal injury—damages—police—apportionment—contributory negligence—provocation—reasonable force—trespass to the person—Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1948—Law Reform (Contributory Negligence) Act 1945

LT Apportionment; Assault; Contributory negligence; Measure of damages; Police officers; Reasonable force

On the Saturday evening of September 30, 2012, Nicola McAleer had been in Omagh town with some friends from about 22.00. Between 22.00 and approximately 02.30 she had taken approximately five or six gin and tonics and was "tipsy" but not drunk. Emerging from a local pub, she noticed that Mr O'Neill, a male friend of one of her companions, was being arrested by the police and was on the ground with handcuffs.

Her case was that she had crossed over to see what was happening and that a police officer, Constable Simpson, had stepped towards her and hit her twice with a baton on the right upper thigh. McAleer suffered pain for one to two weeks and she was anxious and emotionally affected. Constable Simpson contended that McAleer had been shouting and very aggressive and about 1–2ft away from her, trying to get over

her when she shouted for McAleer to get back and when she continued to come on top of the officer, she struck McAleer's left calf/thigh twice with her baton.

According to the Constable Simpson, it was a very aggressive situation. There were about 15–20 people around approximately four police officers. She claimed that she had felt she was going to be assaulted and had used minimum force. Nicola McAleer sued for damages for personal injury alleging trespass to the person by members of the PSNI. On September 30, 2012 Deputy County Court Judge Rodgers dismissed the plaintiff's claim. The plaintiff appealed.

Mr Justice Gillen confirmed that it is lawful to use force towards another in defence of one's own person or of others. Such force as was reasonable in the prevention of crime, or in effecting or assisting in a lawful arrest, could be used. However, reasonable force was a question of fact. The minimum force had to be used to accommodate the permitted objective and the court would balance the harmfulness of the damage sought to be avoided against that of the force needed to prevent it.

The Judge had no doubt that the incident had been highly charged and that the police officers had been subjected to gross and obvious hostility. In such circumstances, their actions "could not be measured with a jeweller's scale" if they were to protect their own safety and secure the arrest of those breaking the law. Nicola McAleer's behaviour was held to be unacceptable and had been fuelled by an over-consumption of alcohol and perhaps sympathy for Mr O'Neill.

However, the judge held, notwithstanding that Constable Simpson was a much more impressive witness than Nicola McAleer, that Constable Simpson had exercised excessive force. Use of the baton ought to have been applied to the lower legs and not to the upper thigh. Despite the clear abuse to which Constable Simpson had been exposed by Nicola McAleer, she had not sufficiently controlled her wielding of the baton to ensure that the minimum force had been applied to an appropriate area of the plaintiff's body. The response to the plaintiff's actions had been disproportionate and unlawful.

Turning to the question of apportionment, the Judge confirmed that contributory negligence was unavailable in proceedings concerning trespass to the person and the Police could not rely on the partial defence of contributory negligence under the Act.[1] The Judge had no doubt that McAleer had contributed to the incident in large measure and, in the circumstances, held that it would be just and equitable if her damages could be reduced. However, the law did not permit that.

That left the issue of provocation, which Gillen J described as a "vexed area of law". He was inclined to the view that it might still serve to reduce compensatory damages in some cases. He thought that if the law was to maintain public confidence, legal integrity demanded that where a plaintiff provoked a defendant into excessive force, he should not be permitted to recover full damages. In his view, the focus should be on the defendant's role and his excuse for the behaviour, as opposed to contributory negligence, where the emphasis was on the role of the plaintiff and his behaviour. He stated that it was not fair, reasonable or just that a plaintiff's provocation should be ignored. Where there was a synergistic interaction between the behaviour of a plaintiff and a defendant, he said that it might be appropriate to proceed on the basis that both caused the damage suffered.[2]

However, in this case the Judge concluded that Constable Simpson had a difficulty in invoking the defence of provocation. In criminal law, the concept of provocation connoted a measure of loss of control. Constable Simpson had eschewed any suggestion of loss of control, anger or retaliation. She had taken a measured decision of crowd control in light of the contemporary conditions, albeit that the force used had been excessive. The Judge held that she had not been "provoked" in the true or legal sense of the word.

Turning to quantum, the Judge held that as an assault and battery resulted in physical injury to the plaintiff, damages would be calculated as for any other personal injury. However, beyond that the tort of assault afforded protection from the insult which might arise from interference with a person; a further

[1] *Co-operative Group (CWS) Ltd v Pritchard* [2011] EWCA Civ 329; [2012] Q.B. 320; [2011] 3 W.L.R. 1272 applied.
[2] *Co-operative Group (CWS) Ltd v Pritchard* [2011] EWCA Civ 329 considered.

important head of damage could be injury to feelings. Even so, the Judge concluded that the circumstances of the incident and the plaintiff's behaviour rendered the case wholly unsuitable for an additional award of aggravated or exemplary damages. Nicola McAleer had suffered bruising and swelling to the upper thigh and to her mid-thigh with bony tenderness; had taken paracetamol regularly; had been extremely upset and unable to sleep for a week; had suffered from anxiety levels and although her physical injuries were now recovered, she remained hyper anxious with sleep disturbance.

The appeal was allowed and general damages of £3,000 were awarded.

Comment

The decision of the Court of Appeal in *Co-operative Group (CWS) Ltd v Pritchard*[3] was that it is clear from s.1(1) of the Law Reform (Contributory Negligence) Act 1945[4] ("the 1945 Act") that its purpose was not to reduce the damages which would have previously have been awarded against defendants[5] before it became law. There was no case before the 1945 Act which held that there was such a defence in the case of an intentional tort such as assault and battery.

The Court of Appeal made it clear that insofar as there were cases since the 1945 Act that suggested that it could be used to reduce damages awarded for the torts of assault or battery in a case where it was found that the claimant was contributorily negligent, they were unsatisfactory and could not stand with statements of principle made in two subsequent House of Lords decisions.[6] As a matter of law, therefore, the Co-op could not rely on contributory negligence to defeat Pritchard's claim or to reduce the damages otherwise to be awarded to her. That applied here too: the PSNI could not rely on contributory negligence to defeat Nicola McAleer's claim or to reduce her damages.

In *Pritchard* Aikens LJ's analysis of the law necessarily starts with the 1945 statutory transformation of contributory negligence, from it being an absolute defence to one, ultimately, of judicial apportionment, but he noted ruefully that:

> "as is so often the case in the common law, one has to delve into legal history to find the answer to a modern day question."

Ranging across Australian and New Zealand authorities, as well as an examination of the academic literature, and the key British and Irish cases, he concluded that:

> "There is no case before the 1945 Act which holds that there was such a defence in the case of an 'intentional tort' such as assault and battery."

Aikens L.J. confirmed that:

> "Insofar as there are cases since the 1945 Act that suggest that the Act can be used to reduce damages awarded for the torts of assault or battery in a case where it is found that the claimant was

[3] *Co-operative Group (CWS) Ltd v Pritchard* [2011] EWCA Civ 329

[4] "(1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage: Provided that- (a) this subsection shall not operate to defeat any defence arising under a contract; (b) where any contract or enactment providing for the limitation of liability is applicable to the claim, the amount of damages recoverable by the claimant by virtue of this subsection shall not exceed the maximum limit so applicable".

[5] *Standard Chartered Bank v Pakistan National Shipping Corp (No.2)* [2002] UKHL 43; [2003] 1 A.C. 959; [2002] 3 W.L.R. 1547 followed—In that case Lord Hoffmann said that the conclusion that a claimant cannot be at *"fault"* within the meaning of the 1945 Act unless his conduct gave rise to a defence of "contributory negligence" at common law was in accordance with the purpose of the 1945 Act. He said that purpose was to relieve claimants whose actions would previously have failed. The 1945 Act's purpose was not to reduce the damages which would have previously have been awarded against defendants. He said this was clear from the opening sentence of s.1(1) of the 1945 Act.

[6] *Lane v Holloway* [1968] 1 Q.B. 379; [1967] 3 W.L.R. 1003; [1967] 3 All E.R. 129 and *Murphy v Culhane* [1977] Q.B. 94; [1976] 3 W.L.R. 458; [1976] 3 All E.R. 533 considered, *Reeves v Commissioner of Police of the Metropolis* [2000] 1 A.C. 360; [1999] 3 W.L.R. 363; [1999] 3 All E.R. 897 and *Standard Chartered Bank* [2002] UKHL 43 followed

> 'contributorily negligent' they are unsatisfactory and cannot stand with statements of principle in two subsequent House of Lords cases."[7]

Smith L.J. agreed, although noting that she reached that conclusion with regret because she thought that apportionment *ought* to be available to a defendant who had committed the tort of battery where the claimant had, by his misconduct, contributed to the happening of the incident, for example by provocative speech or behaviour.

Gillen J. picked up on this, suggesting that it might well be that when juries were left to award damages in civil actions for assault or battery they made a reduction if they thought there was some "fault" on the side of the claimant, even if there was no warrant for doing so in law, either before or after the 1945 Act.

However, he also made it clear that subsequently if judges purported to apportion on the basis of the 1945 Act, they were in error. Furthermore he was unaware of anything to suggest that any other basis for apportionment is available at common law. That is probably because there is none!

Gillen J. also recognised that whether apportionment should be available in cases of battery where the claimant has been "at fault" in the colloquial sense and that "fault" is one of the causes of his injury, is a question of policy. As such, any change in the law will require the intervention of Parliament.

Practice points

- A defence of "contributory negligence" is unavailable in a case of intentional torts such as assault and battery.
- No such defence was available prior to the 1945 Act, so that on a true construction of that statute it is not available subsequently, despite decisions to the contrary.
- The defence of "contributory negligence" is only available in a personal injuries action based on the tort of negligence.
- Any change will require intervention by Parliament.
- The law is the same throughout the United Kingdom.

Nigel Tomkins

Leigh v London Ambulance Service NHS Trust

(QBD, Globe J, February 20 2014, [2014] EWHC 286 (QB))

Personal injury—damages—negligence—ambulance service—delay—psychiatric harm—PTSD—causation—material contribution—cumulative cause

LT Ambulance service; Causation; Delay; Material consideration; Measure of damages; Negligence; Post-traumatic stress disorder; Psychiatric harm

At about 19.00 on November 17, 2008, the claimant, Ceri Leigh, boarded a bus at Wimbledon station on her way home from work. She was aged 45 years old at the date of the incident and 50 at the date of trial. As she went to sit down on a seat towards the back of the bus, she dislocated her right kneecap and as a result found herself trapped between the seats and was unable to move. She experienced severe pain.

[7] See *Commissioners of Police for the Metropolis v Reeves (Joint Administratix of the Estate of Martin Lynch Deceased)* [1999] UKHL 35 and *Standard Chartered Bank* [2002] UKHL 43.

Several well-meaning passengers went to her aid, held her down and called an ambulance. She was informed that an ambulance was on its way on several occasions but no help arrived until 50 minutes after the incident. A number of calls were made during that 50 minutes before an ambulance arrived. Upon arrival paramedics were able to provide pain relief and manipulate the dislocation back into place.

The first emergency call was made at 19.02. The defendant has admitted that there was a negligent delay in the attendance of an ambulance, which should have attended by 19.33 at the latest. No ambulance arrived until 19.50, which was a delay of 17 minutes. Breach of duty was admitted in respect of the 17 minutes, which was about one third of the total period between the dislocation and the arrival of the paramedics. The claimant suffered pain and suffering from the dislocation and consequential psychiatric and psychological damage arising from the incident.

As a result of the events on the bus, Ceri Leigh went on to develop PTSD. This primarily characterised itself through flashbacks where she felt she was back on the bus and trapped, nightmares and a high level of anxiety and depression. Within a few months, she also began to suffer dissociative seizures where she would physically collapse and be unable to move or speak, but she could still hear and see her surroundings. Those symptoms occurred most days but over time their frequency and intensity varied. The seizures were not diagnosed by psychologists until around 18 months after the incident.

Having previously worked and lived in London, Ceri Leigh was forced to leave her job working at a museum, which she described as a job that she loved doing, and relocate with her family to Wales. She was unable to travel outside on her own and was largely housebound. When she went out with her family she might suddenly collapse in the street. She found it difficult to concentrate, plan and action ordinary activities such as housework and mentally tended to go round and round in circles. She became easily overwhelmed.

She claimed damages for the psychiatric and psychological damage. It was agreed that, arising from the incident, she had suffered PTSD. It was also agreed that, from a date that is in issue, she had suffered dissociative seizures.

There were three issues for determination:

1) Whether there was a causative link in law, if any, between the defendant's admitted negligence and the claimant's PTSD.
2) Whether there was a causative link in law, if any, between the defendant's admitted negligence and the claimant's dissociative seizures?
3) The assessment of damages for any such causative link or links.

The Judge held that there was no injury that was caused on the bus. There were merely circumstances that arose which later led to the onset of the PTSD. He accepted that there are innumerable variables in the circumstances that will give rise to the development of such a disorder and in the people who are likely to suffer it. It is impossible to predict on any scientific or mathematical basis the moment after which someone will go on to suffer it.

There was no dispute as to the legal framework of the case. The parties agreed that it is a "cumulative cause" type case in respect of which there should be the application of the principles summarised by Lord Justice Waller at [46] of the Court of Appeal case of *Bailey and The Ministry of Defence*:[1]

> "… I would summarise the position in relation to cumulative cause cases as follows. If the evidence demonstrates on a balance of probabilities that the injury would have occurred as a result of the non-tortious cause or causes in any event, the claimant will have failed to establish that the tortious cause contributed. *Hotson*[2] exemplifies such a situation. If the evidence demonstrates that 'but for' the contribution of the tortious cause the injury would probably not have occurred, the claimant will

[1] *Bailey v Ministry of Defence* [2008] EWCA Civ 883; [2009] 1 W.L.R. 1052; [2008] LS Law Medical 481.
[2] *Hotson v East Berkshire AHA* [1987] A.C. 750; [1987] 3 W.L.R. 232; [1987] 2 All E.R. 909.

(obviously) have discharged the burden. In a case where medical science cannot establish the probability that 'but for' an act of negligence the injury would not have happened but can establish that the contribution of the negligent cause was more than negligible, the 'but for' test is modified, and the claimant will succeed."

Adopting the *Bailey* test, Globe J. was unable to find on the balance of probabilities that the PTSD would have occurred in any event before 19.33, which was the time by which the ambulance should have arrived. He was satisfied that this was a case where medical science could not establish the probability that "but for" the negligent failure of the ambulance to arrive before 19.33, the PTSD would not have happened. However, he held that it had been established that the contribution of the negligent failure was more than negligible. It made a material contribution to the development of the claimant's PTSD. The claimant therefore succeeded on the first issue.

During the trial the claimant gave evidence via video link. After about two and a half hours of questioning, Ceri Leigh had a seizure. It came completely without warning. One moment she was answering questions. The next, she was detached from reality. It manifested itself by her remaining seated in the video-link chair while appearing to be oblivious to what was going on around her. She was waving her hands as if to push something or someone away from her body. Her son was asked to enter the room to help her. He attempted to gain her attention. Suddenly, she collapsed in her seat and fell forwards onto the table in front of her.

The Judge had no doubt at the time from what appeared before him on the screen that what occurred was genuine. The proceedings were adjourned for further evidence the next day and with re-examination to take place two days later due to the unavailability of a video-link slot the following day. What happened, as the judge put it "proved to be illuminating". It helped him to gain a better understanding of the claimant's continuing psychiatric and psychological injury and assisted him greatly in reaching a conclusion over the second issue. His conclusion was that the dissociative seizures were all part of the claimant's PTSD and consequent upon it and were not related to her other life stressors as the defence had argued.

The evidence of the claimant's psychiatrist was that that her PTSD should be categorised as severe in accordance with Ch.4(B)(a) of the *Judicial College Guidelines*.[3] The psychiatrist was of the opinion that there were permanent effects that would prevent Ceri from working at all, or at least from functioning at anything approaching her pre-trauma level. He concluded that all aspects of her life were badly affected and only a small response to additional psychological therapy was expected. The expert's evidence was accepted by the Judge who awarded general damages of £60,000.

Comment

Though there has been some criticism in academic circles of Lord Justice Waller's judgment in *Bailey*, which applied an exception to the "but for" test in cases of indivisible injuries, both parties rightly accepted that the claimant's PTSD was the subject of "cumulative cause" pursuant to which the *Bailey* principles should apply. There are relatively few cases in which the application of *Bailey* has been reported, the principle ones being the clinical negligence birth defect cases of *Canning-Kishver v Sandwell & West Birmingham Hospitals NHS Trust*,[4] and *Popple v Birmingham Women's NHS Foundation Trust*.[5]

A similar approach to *Bailey* has been adopted in other psychiatric injury claims however, principally *Dickins v O2 Plc*.[6] In that case the claimant had suffered an indivisible injury (her seriously damaged mental state following mental breakdown) but with more than one cause. It was not possible to say that,

[3] Judicial College, *Guidelines for the Assessment of General Damages in Personal Injury Cases*, 12th edn (Oxford: Oxford University Press, 2013).
[4] *Canning-Kishver v Sandwell & West Birmingham Hospitals NHS Trust* [2008] EWHC 2384 (QB).
[5] *Popple v Birmingham Women's NHS Foundation Trust* [2011] EWHC 2320 (QB).
[6] *Dickins v O2 Plc* [2008] EWCA Civ 1144; [2009] I.R.L.R. 58; (2008) 105(41) L.S.G. 19.

but for the tort, she would probably not have suffered the breakdown, but it was possible to say that the tort had made a material contribution to it.

In the present case, counsel for the defendant sought to prove that the ingredients of the claimant's PTSD were complete by the 19.33 hours, which was the time the ambulance would have arrived but for the defendant's breach of duty. His argument was that at 19.00—in the immediate moment before the claimant's knee became dislocated—the chance of developing PTSD was 0 per cent, but that by 19.50—the time the ambulance actually arrived—the chance was 100 per cent. This represented a period of 50 minutes and each minute beyond 19.00 amounted to an additional two per cent chance of the PTSD occurring. Hence, it was argued that by 19.33 hours there was a greater than 50 per cent chance of the PTSD occurring.

This clever argument might have found favour if there had been an evidential basis for the mathematical approach adopted. Unfortunately there was no reliable evidence to support the defendant's linear mathematical model (and had there been the "but for" test, rather than the *Bailey* exception, could have been applied). The defendant's expert psychiatrist (Dr Latcham) was able to offer no statistics, papers, studies or research work to support the contention that the claimant had experienced all the ingredients of her PTSD before 17.33 hours, and there was no guidance in the DSM-IV or DSM-V definitions of PTSD that assisted.

The judge preferred the view of the claimant's expert (Dr Sumner) that this was an indivisible injury which did not occur at any fixed time. Moreover, the PTSD did not occur on the bus, it was a disorder which developed as a consequence of one indivisible event on the bus as to which the whole time spent there was relevant. In the circumstances the Judge accepted that this was a case where medical science could not establish the probability required for the "but for" test. Instead, there was a material contribution to the PTSD from the defendant's delay and causation was duly established.

The time/exposure method of calculating degree (dose) of contribution is by no means a new concept. It can often be applied to divisible injuries which are dose related such as asbestosis. Quite rightly, however, the Judge rejected the application for an indivisible injury. One of the real issues in the present case had been whether PTSD was truly indivisible.

In relation to causation of the dissociative seizures, the defendant's expert psychiatrist had, in his report for the Court and in the experts' joint statement:[7]

> "concluded with absolute certainty that the claimant's dissociative seizures were not related to her PTSD and were solely related to the other life stressors."

This conclusion was completely undermined by the seizure the claimant experienced during her cross examination. The defendant's expert was forced to accept that the seizure was a dissociative flashback related to her PTSD. Thus he had to concede that not all of her dissociative seizures were unrelated to her PTSD.

In discussion, the Trial Judge said that the evidence of the defendant's expert required "the closest possible scrutiny" because of the fact that his conclusions regarding the cause of the claimant's PTSD were not supported by statistics, papers, studies or research. And the scrutiny was all the more necessary given his "abandonment" of part of his conclusions about the dissociative seizures. The Judge said that in contrast he found the claimant's expert to be a compelling expert witness, and he preferred his evidence. He therefore accepted that the dissociative seizures were all part of the claimant's PTSD which he had already decided was caused (or materially contributed to) by the defendant's breach of duty.

This case reminds us of the degree to which experts need to investigate and research the state of medical knowledge regarding the cause of the medical condition in issue. The defendant's expert came unstuck because he adopted a position not supported by any epidemiological data, but sought to apply what he termed "logic".

[7] *Leigh v London Ambulance Service NHS Trust* [2014] EWHC 286 at [53].

We are also reminded of the uncertainties involved in going to trial. The fact that the claimant experienced a full-blown seizure live in front of the Judge during evidence seriously undermined the defendant's case in a way that probably could not have been predicted.

Practice points

- The situations in which the *Bailey* exception to the "but for" test can be applied will remain extremely limited.
- In a case of indivisible psychiatric injury, it is inappropriate to apportion damages between negligent and non-negligent causes.
- If there is a proper evidential basis upon which the claimant's condition can be categorised as "divisible" and it is possible to determine the relative contributions made for different sources to its development, the "but for" test should be used.
- An approach based on common sense, while appropriate in an accident case, will prove unsatisfactory in cases where there may be a number of mechanisms by which a medical condition could have arisen, or where scientific knowledge remains uncertain.
- It is unwise to try and over-simplify the cause of medical conditions when such cause is not supported by the medical literature. The defendant attempted to apply a linear time/exposure mathematical approach to a condition caused in a non-linear and uncertain way.
- Trials pose the risk of the unknown.

Nathan Tavares

Kadir[1] v Mistry

(CA (Civ Div), Laws LJ, Davis LJ, Ryder LJ, March 26, 2014, Unreported)

Personal injury—damages—clinical negligence—cancer—general damages—life expectancy—mental distress—pain and suffering—Fatal Accidents Act 1976—Law Reform (Miscellaneous Provisions) Act 1934—Administration of Justice Act 1982 s.1(1)(b)

Cancer; Clinical negligence; Life expectancy; Measure of damages; Medical treatment; Mental distress; Pain and suffering

For several months Saleha Begum had been visiting the defendant GP complaining of various stomach-related symptoms until, in March 2008, she was diagnosed with stomach cancer. She was advised that the cancer was too advanced to treat and thereafter she received only palliative care until she died in August 2008. She was 32 and had 4 small children.

Saleha Begum's husband claimed against the GP on behalf of himself and the children under the Fatal Accidents Act 1976 and on behalf of his late wife's estate under the Law Reform (Miscellaneous Provisions) Act 1934 ("the 1934 Act"). The doctor admitted liability for the delay in Saleha Begum's diagnosis and the consequent delay in her treatment.

[1] Personal Representative of the Estate of Saleha Begum, Deceased.

The husband gave evidence that in March 2008 the family was told by doctors that his wife might have survived if she had been diagnosed sooner, and that during a home visit in May 2008 Saleha Begum asked the doctor why she was not diagnosed earlier and whether she would have survived if she had been.

The Trial Judge found that if the GP had not been negligent Saleha Begum would have been diagnosed in June or July 2007 and would probably have lived until July or August 2010. He found that if she had been diagnosed earlier she would have suffered the same symptoms as she did, albeit later, and would have had to endure intensive and gruelling treatments, so he awarded no damages for pain, suffering and loss of amenity. He also rejected the claim under s.1(1)(b) of the Administration of Justice Act 1982 ("the 1982 Act") for damages in respect of mental anguish caused or likely to be caused by her awareness that her life expectation had been reduced.

The claimant appealed, submitting that the Judge, when assessing damages for pain and suffering, should have discounted the pain of treatment and the fact that even without the GP's negligence there would have been some suffering.

The Court of Appeal held that it was important to bear in mind that there were no special rules for the assessment of damages in cases under the 1934 Act: the Court was required to undertake the conventional exercise, namely decide what pain was occasioned by the negligence. If the Court was looking at a living claimant facing an early death, like Saleha Begum, the Court inevitably had to compare the facts as they occurred with the likely facts if there had been no negligence.

On that basis, they held that the fact that Saleha Begum would have had the same symptoms two years later was relevant, as was the pain of treatment. The Judge had accordingly been correct on the evidence to refuse the claim for pain, suffering and loss of amenity.

Turning to the second issue they held that "awareness" in s.1(1)(b) of the 1982 Act did not mean strictly certain knowledge. As a matter of ordinary humanity, if there was good reason for the anguish, then it could be inferred that the sufferer would have suffered some.

Mr Kadir had given evidence that his wife had believed that the delay had caused the cancer to spread. The issue of why she was not diagnosed earlier was a live question during her last months. There was plainly material that gave rise to the proper inference that Saleha Begum feared on good objective grounds that her life expectancy had been reduced by the delayed diagnosis. It was necessary to prove that she knew that it was reduced.

No cases had been found that were relevant to the assessment of damages under s.1(1)(b) of the 1982 Act for Saleha Begum's suffering occasioned by her awareness of her reduced life expectation. On the evidence her mental anguish was proved for the three-month period from May 2008 until her death. The court pointed out that it was important to recognise that there was no psychiatric injury, but there were other important elements: Saleha Begum was a young woman with four small children. Her anguish must have been exacerbated by her knowledge that they would be left without her and that she would not see them grow up. It was proper to take those factors into account.

Adopting a broad-brush approach, they decided that £3,500 would do justice and that sum was awarded under s.1(1)(b) of the 1982 Act for her mental suffering resulting from her awareness for the last three months of her life that her life expectation had been reduced.

Comment

Sometimes the law can be a harsh mistress and this case at first instance demonstrates just that. Fortunately, the Court of Appeal saw their way to doing some small justice in the case and at the same time have provided useful guidance on how to deal with such cases going forward.

This is a tragic case: the deceased had attended at the GP surgery on several occasions complaining of persistent stomach pain and other related issues. She had stomach cancer but this was not diagnosed until much later. Treatment eventually followed which was painful and difficult but sadly she died. Her GP

admitted breach of duty in failing to diagnose, treat or refer. Causation was also admitted and it was accepted that earlier diagnosis would have lead to earlier treatment. While this would not have cured the deceased it would have prolonged her life for an additional two years—no small matter for anyone let alone the mother of four small children.

So with breach of duty and causation admitted all that remained was for damages to be assessed. The claim was formulated under the 1934 Act and as the Court of Appeal confirmed there are no special rules for the assessment of damages in cases under the 1934 Act. The Court was therefore required to undertake the conventional exercise: what pain was occasioned by the negligence? Where the situation involved a living claimant facing an early death, it was necessary to compare the facts as they occurred with the facts as they would have been but for the negligence. Here it was relevant that the deceased would have experienced the same symptoms including the pain of treatment, they would have just occurred two years later than they did. As the experience would have been the same regardless of the negligence, there was no claim for pain, suffering and loss of amenity under the 1934 Act.

That left the claim under the 1982 Act, which provides:[2]

> "(1) In an action under the law of England and Wales or the law of Northern Ireland for damages for personal injuries—
>
> (a) no damages shall be recoverable in respect of any loss of expectation of life caused to the injured person by the injuries; but
>
> (b) if the injured person's expectation of life has been reduced by the injuries, the court, in assessing damages in respect of pain and suffering caused by the injuries, shall take account of any suffering caused or likely to be caused to him by awareness that his expectation of life has been so reduced."

The issue is therefore what constitutes "awareness" and the Court of Appeal confirmed that it did not mean strictly certain knowledge. Indeed, the Court held that as a matter of ordinary humanity, if there was good reason for the anguish, then it could be inferred that the sufferer would have suffered some. The Court recognised that the issue of why the deceased was not diagnosed earlier was a live question during the last few months before her death and she plainly feared that her life expectancy had been reduced by the delayed diagnosis. The Court stated that it was necessary to prove that she knew that it was reduced and the Court concluded that her mental anguish was proved for a three-month period from May 2008.

The Court also stated that it should be recognised that there were other important elements in this case: in particular that she was a young woman with four small children. Her anguish must have been exacerbated by her knowledge that they would be left without her and she would not see them grow up. On that basis the Court of Appeal concluded that it was proper to take those factors into account and that adopting a broad-brush approach an award of £3,500 was considered to be sufficient to ensure "justice" was done.

This approximates at roughly £1,000 for each month that she was held to have awareness which is hardly generous but is plainly better than no award at all.

Practice points

- Where there is claim for pain, suffering and loss of amenity under the 1934 Act it is necessary to establish that there was additional pain and suffering caused by the negligence, over and above that which would have been experienced in any event.
- Where there is a claim for awareness of reduction in life expectancy under the 1982 Act then awareness does not mean strictly certain knowledge and it can be inferred from the circumstances.

[2] Administration of Justice Act 1982 s.1.

- Damages, albeit modest, can be awarded to recognise awareness of reduction in life expectancy.

Muiris Lyons

Case and Comment: Procedure

National Westminster Bank Plc v Lucas

(Ch D, Sales J, March 11, 2014, [2014] EWHC 653 (Ch))

Procedure—personal injury claims—succession—administration of estates—executors—expenses—court's sanction of agreed scheme to deal with claims against estate—Insolvency Act 1986

Administration of estates; Executors; Expenses; Personal injury claims

Jimmy Savile, the television presenter died on October 29, 2011. On October 4, 2012 a television programme was broadcast on ITV accusing Jimmy Savile of being a serial child abuser and sex offender. As a result of that programme, the publicity, and further investigations into Jimmy Savile's activities which followed, a large number of people came forward to make claims that they were abused by Savile.

These proceedings related to the administration of Jimmy Savile's estate. Savile left a will. The executor of the will and Savile's personal representative was National Westminster Bank Plc. The value of his estate, after allowing for a range of expenses, was then £3.3 million. Various individuals were named in the will as beneficiaries with the residue of the estate left to the Jimmy Savile Charitable Trust.

By the date of the hearing, 139 people had intimated to the Bank that they had personal injury claims against Jimmy Savile and his estate in relation to such abuse ("the PI claimants"). Some of the PI Claimants had also indicated that they had claims against other defendants with whom Jimmy Savile was associated: the BBC, certain NHS hospital trusts and the charities Barnardo's and Mind ("the third party defendants").

The claims which the PI Claimants brought forward had not been the subject of determination in court proceedings, and in that sense remained untested allegations. However, there was no serious dispute that some, perhaps many, of the claims might be well-founded and meritorious. If such claims were substantiated, there was a serious possibility that they would exhaust the money remaining in the estate, leaving the individual beneficiaries and the Trust with nothing.

The bank as executor applied for the court's approval of a scheme to facilitate the resolution of the personal injury claims against Jimmy Savile's estate and for the ratification of expenses incurred in the execution of his will and the administration of his estate. In order to resolve those personal injury claims in a speedy and inexpensive manner the bank had agreed a scheme with the PI claimants and the third party defendants and sought its approval as a suitable mechanism for dealing with claims that had been, and which might be, brought. The time period within which notice of any potential claim could be received was 12 months from the date of the scheme's advertisement, after which the estate would be wound up and any beneficiaries' entitlements would be distributed.

There were three issues:

1) whether the scheme ought to be sanctioned;
2) whether the bank should be replaced as executor; and
3) whether legal expenses the bank had incurred in relation to the ordinary course of the administration of the estate, and legal expenses involved in dealing with personal injury claims, should be validated under s.284 of the Insolvency Act 1986.[1]

[1] "Restrictions on dispositions of property".

Sales J. held that it was just and appropriate to approve and sanction the bank entering and operating the scheme. They had been entitled to negotiate the scheme with the PI claimants and third party defendants, and it was lawful and appropriate for the bank to enter and operate the scheme with a view to securing fair scrutiny of the personal injury claims being brought forward and their settlement to the greatest extent possible.

The Judge accepted that notice of the scheme to be given by advertisement would be long enough to give a fair opportunity to all who thought they had a claim against the estate, but who had not yet come forward, to do so. It was also held to be likely that, after the scheme was brought into operation, the court would sanction payments to be made out of the estate and for the estate to be wound up in accordance with the timetable under the scheme.

The Judge concluded that it would not be appropriate for the court to take the further step of removing the bank as executor unless there was a real risk that it would not act fairly and conscientiously or if it could not be expected to carry out the administration of the estate in an effective and proper manner.[2] The Trust and the individual beneficiaries had failed to show that there was any real risk that the bank would not act fairly and conscientiously as executor. The fact that the bank had waived its usual fees for acting as executor, had negotiated the scheme in a responsible way and had even subsidised the administration by agreeing to pay out of its own resources for certain expenses amounting to about £20,000 were all strong indicators that the bank had acted, and would continue to act, fairly and conscientiously as executor.

The points on which there had been conflicts of view between the Trust and the bank, or when the Trust had felt badly treated, were the result not of hostility but of the bank's proper and reasonable judgments about the best way to administer the estate, having regard to the interests of all who might prove to have an interest in it. Moreover, friction or hostility between trustees and the possessor of the trust estate, or beneficiary, was not of itself a ground for removal of the trustee; something more was required.[3] The judge concluded that on a fair and proper analysis, all that had happened in this case was the former. The case was also not one in which an executor had refused to resign without any reasonable ground; on the contrary there were good grounds, based on the fair and effective administration of the estate, to justify the bank's decision to remain executor.

On the third issue the Judge held that all expenses incurred in the ordinary course of the administration were clearly proper expenses and it was appropriate to grant a full validation order in respect of them. It was also appropriate to make a validation order in relation to the second class of expenses; the bank had acted properly, and for the due administration of the estate, in seeking agreement in relation to the scheme, and was in principle entitled to recoup the proper and reasonable legal expenses involved, without prejudice to any person with an interest in the estate to make an objection in due course.

Judgment was entered accordingly.

Comment

When he was alive, Jimmy Savile was to all intents and purposes an eccentric showman and a national treasure, using his celebrity to do great works for charity. In death, he has been dubbed "a prolific, predatory sex offender" by the Metropolitan Police,[4] without him having stood trial for any crimes committed. He was able to "hide in plain sight" while abusing his victims.[5] Some of our most revered institutions—the NHS, the BBC, the charities Barnardo's, and Mind—are reeling from credible accusations that they failed in their duties to protect children and staff from Savile's depraved acts, and that, indeed, the establishment

[2] *Letterstedt v Broers* (1884) 9 App. Cas. 371; [1881–1885] All E.R. Rep. 882 applied.
[3] *Letterstedt* (1884) 9 App. Cas. 371 followed.
[4] Metropolitan Police and NSPCC, *Giving Victims a Voice: Joint report into sexual allegations made against Jimmy Savile* (January 11, 2013).
[5] Metropolitan Police and NSPCC, *Giving Victims a Voice*.

turned a blind eye to the problem. In many institutions it seems that Savile's behaviour, which went unchecked, was common knowledge.

The lid of this scandal is about to be lifted as enquiries are underway at the BBC, 33 hospitals, and 21 children's homes and schools in England.[6] Meanwhile 140 of the large number of people Savile is thought to have assaulted[7] have come forward and instructed lawyers to claim compensation for what they went through at Savile's hands. Their first target is Savile's estate, of which £3.3 million remains undistributed. If litigated, the victims' claims would be brought against the estate in trespass against the person for assault, battery and false imprisonment. The Nat West Bank as executor felt the best way to discharge their duties to the estate was to seek court approval for a scheme to compensate the victims as cheaply as possible,[8] in the face of opposition from Savile's beneficiaries under his will. Mr Justice Sales approved the scheme which—it has been reported in the press—would see pay-outs capped at £60,000 each for the most serious assaults.[9] It is estimated that such a scheme and the legal costs involved in getting it up and running and administering it, are likely to exhaust the estate's residual assets.

Further parties in the case in support of the executors' position were the Secretary of State for Health and the BBC as other potential defendants. They could be sued either because they were vicariously liable for Savile's actions[10] or were negligent in failing to act on reports of his abuse. If successfully sued, they would have a right of indemnity against Savile's estate, although it was accepted in the judgment that this was "potentially worthless"[11] in view of the limited assets available and the extent of the claims and the costs of running the scheme.

The scheme will be open for 12 months to take applications for compensation, and will be advertised in national newspapers both here and in the Channel Islands, to which Savile was a regular visitor. Applicants will have to provide credible evidence of the abuse in order to qualify. Those who get through will obtain compensation on a tariff system which is likely to be much less than typical court awards, but on the basis that a limitation defence is not being taken against them. That would have been a very real problem for the claimants if they had decided to litigate through the courts.[12]

The scheme will not be binding—the claimants can litigate their cases—but the likelihood is that the scheme will be the only chance for victims to obtain any compensation from Savile's estate. Mr Justice Sales likened the scheme's operation to the portal claims for road traffic accidents, employers' liability and public liability claims "which likewise seek to promote fair scrutiny of claims and settlements at the least cost which can be achieved".[13]

There is, of course, a broader picture to be drawn here. What is being called "the Savile effect" is having a huge impact on reported crime statistics and the number of people approaching lawyers with cases for compensation. The Office for National Statistics published its annual report "Crime in England & Wales" for last year.[14] There was a 17 per cent increase in reported sexual offences, with reported rapes up 20 per cent, the highest figure since the survey was first published in 2002/3. Sexual offences against children under 13 were up by 32 per cent, of which half were deemed "historical" offences.

[6] Reports into 28 of the hospitals were published on June 26, 2014, revealing that Savile had sexually assaulted victims aged between 5 and 75 in NHS hospitals, having been afforded unrestricted access within them. There were credible accounts of him having assaulted children and adults in bed, recovering from operations, and even claims that he abused corpses in a hospital morgue.

[7] The NSPCC estimate at least 500 people were abused by Savile, most of them children, and some as young as two. The Metropolitan Police have recorded more than 200 separate sexual offences against Savile as part of Operation Yewtree.

[8] Sales J. was keen to avoid what counsel had described as "a feeding frenzy for the lawyers", *National Westminster Bank PLC v Lucas* [2014] EWHC 653 (Ch); [2014] W.T.L.R. 637 at [20].

[9] Reported by *BBC News*, April 22, 2014.

[10] If Savile could be proved to have been in a relationship with them 'akin to employment' (see *Catholic Child Welfare Society v Various Claimants* [2012] UKSC 56; [2013] 2 A.C. 1; [2012] 3 W.L.R. 1319), and that the opportunity to carry out the assaults was in some way "closely connected" to that relationship (see *Lister v Hesley Hall Ltd* [2001] UKHL 22; [2002] 1 A.C. 215; [2001] 2 W.L.R. 1311).

[11] *National Westminster Bank Plc v Lucas* [2014] EWHC 653 (Ch)); [2014] W.T.L.R. 637 at [53]

[12] *A v Hoare* [2008] 1 A.C. 844.

[13] *National Westminster Bank Plc* [2014] EWHC 653 (Ch) at [49].

[14] Year ended December 31, 2013.

The publicity surrounding Jimmy Savile's behaviour, and that of other high profile celebrities who are actually facing their alleged victims in criminal trials, has prompted many survivors of abuse to reveal their stories and disclose abuse which had otherwise been long-buried for reasons of humiliation, embarrassment, anger, shame and guilt. The pure scale of abuse and its reporting in the media has meant that it is perhaps more acceptable today to disclose what one went through as a child, and certainly those allegations are now more likely to be believed and taken seriously by the prosecuting authorities as well as the civil courts when assessing later claims for compensation.

Practice points

- Personal injury claims for damages arising from historic allegations of abuse can survive the death of the alleged perpetrator.
- Victims' claims will usually be brought against the estate in trespass against the person for assault, battery and false imprisonment.
- In addition to claims made against the alleged perpetrator's estate claims could also be pursued against institutions which failed in their duty of care to protect such victims.
- Claims against such institutions could proceed on the basis of vicarious liability for the abuse or direct negligence for failing to act on reports of the abuse.
- This scheme provides an alternative route to compensation with "fair scrutiny of claims and settlements at the least cost which can be achieved" thus maximising the funds available for compensation payments.

Jonathan Wheeler

Rogers v Hoyle

(CA (Civ Div), Arden L.J., Treacy L.J., Christopher Clarke L.J.), March 13, 2014, [2014] EWCA Civ 257)

Civil evidence—admissibility—reports—negligence—aviation—air accidents—plane crashes—CPR Pt 32—CPR Pt 35—Civil Evidence Act 1995—Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 1996

LT Admissibility; Air accidents; Expert evidence; Hearsay evidence; Negligence; Reports

Mr Hoyle agreed to take Mr Rogers and another acquaintance, Mr Diamond, on a short pleasure flight in a vintage Tiger Moth propeller bi-plane manufactured in 1940. The aircraft had room for only one passenger. Mr Diamond went first. During the first flight, two loops were performed—one at an altitude of 1,200ft and one at 1,600ft.

For the second flight, Mr Rogers replaced Mr Diamond as the passenger in the aircraft. The claimants say that Mr Hoyle intended to give Mr Rogers the same experience as Mr Diamond by performing aerobatic loops. They allege that in the course of the flight Mr Hoyle pulled up into a loop at an altitude of about 1,400ft but lost control of the aircraft, which entered into a spin from which Mr Hoyle was not able to recover. The aircraft crashed into a field and Mr Rogers suffered fatal injuries. Mr Hoyle survived the crash.

The claimants' case was that Mr Hoyle was negligent in that he attempted to perform a loop: (a) when he had no, or not sufficient, training and expertise in aerobatic flying or spin recovery; and (b) at a dangerously low altitude such that there was insufficient airspace to recover from a spin. The defendant's case was that he was not attempting to perform a loop when the accident occurred. He says that the rudder pedals jammed and that he was not able to prevent the aircraft from stalling and flipping over into a spin from which, because the pedals were jammed, he could not recover.

A report was produced by the Air Accident Investigation Branch ("AAIB") of the Department for Transport. The defendant sought a declaration that the report was inadmissible as evidence. The claimant argued that the report constituted admissible opinion evidence.

Leggatt J. held that the AAIB report contained statements of fact as well as statements of opinion. On any view, the factual evidence in the report was admissible, as the evidence was relevant and the fact that it was hearsay was not a ground for its exclusion, nor was there any other rule of law which prohibited its reception.

The opinion evidence in the report was also in principle admissible insofar as the opinions stated were those of qualified experts on subjects involving special expertise. Many of the opinions stated in the report on subjects such as aeronautical engineering, the piloting of aircraft, meteorology, pathology and the interpretation of flight-track logs and other data clearly fell into that category.

As to the findings in the report, as they involved inferences drawn from facts they fell into the category of opinion evidence. The opinions expressed, however, were not those of a lay person. The AAIB was a body which was specifically established by statute and charged with responsibility for the investigation of air accidents and in consequence had very considerable experience and expertise in determining the circumstances and causes of such accidents.

The findings in an AAIB report were therefore informed by knowledge gained from past investigations as well as the general aeronautical knowledge of the inspectors and the inspectors' own observations in carrying out the particular investigation. That knowledge and experience gave the findings in the report a special value as opinions of experts who were entirely independent of the parties to the action. Looking at the matter in principle and apart from authority, the AAIB report was admissible.

However it was necessary to consider the controversial case of *Hollington v F Hewthorn & Co Ltd*.[1] The Judge concluded that properly analysed, it expounded the principle that the responsibility of a judge to make his own independent assessment of the evidence in a case entailed that weight ought not to be attached to conclusions reached by another judge, all the more so where the party to whose interests the conclusions were adverse was not a party to the earlier proceedings.

However, the rule in *Hollington* did not apply where the findings were those of an expert investigator, not a judge. AAIB inspectors did not act as judges whose role was limited to evaluating evidence put before them. As well as the evidence of others, the inspectors were able to take into account their own first-hand observations, their own technical knowledge and their own experience gained from other accident investigations. Those characteristics gave the opinions of the AAIB a value for a court seeking to determine the cause of an air accident which could not and should not in principle be accorded to the opinions of another judge, *Hollington* distinguished.

That was not to say that all the findings in the AAIB report were of equal significance. To the extent that they reflected or might be taken from their nature to reflect matters of expertise, the Court would accord them weight. To the extent that they consisted of inferences drawn from factual evidence which involved no special expertise and which the Court was equally well qualified to draw, the Court would not accord weight to the findings over and above the evidence on which they were based. The whole of the AAIB report was admissible as evidence, with it being a matter for the Trial Judge to make such use of the report as he thought fit. In that respect, the Court had both an inherent jurisdiction to control its

[1] *Hollington v F Hewthorn & Co Ltd* [1943] K.B. 587; [1943] 2 All E.R. 35.

own procedure and express powers under the Pt 32 of the Civil Procedure Rules to control the evidence it would receive.

Leggatt J. granted the declaration in favour of claimants.[2] Hoyle appealed and argued that the report could not be admitted as expert evidence. In addition the intervener, Secretary of State, and Air Transport Association submitted that there should be a presumption against admitting AAIB reports, as admissibility would inhibit investigators from carrying out their role and discourage witnesses from assisting investigators.

The Court of Appeal held that Hoyle's suggestion that the report's authors had not been shown to have the necessary credentials to be experts was not well founded. The identity of the principal investigators was known and their expertise was readily discoverable. The bar to be surmounted to be an expert was not particularly high; the degree of expertise went largely to the weight to be given to the evidence rather than its admissibility. Nor was it any objection that several experts had contributed to the report. That was inevitable in a field such as air crash investigation. The case for exclusion of the report was not as compelling as it was in respect of the matters excluded in *Hollington v F Hewthorn & Co Ltd*[3] and *Calyon v Michailaidis*.[4]

The report was not a bare finding: its statements of fact were evidence which the Trial Judge could take into account as he could any other factual evidence.[5] Its expressions of opinion were ones to which a court was entitled to have regard. It was open to an expert to express an opinion based on the facts insofar as his conclusion was informed by his expertise. The AAIB was a body with the requisite expertise. Insofar as an expert's report opined on facts which required no expertise of his to evaluate, it was inadmissible, but there was nothing to be gained from excising opinions in that category. The Judge had correctly held that the Trial Judge should see the whole report and leave out of account any part of it that was inadmissible.

Hoyle's submission that the Civil Evidence Act 1968 and Pt 35 of the Civil Procedure Rules comprised a comprehensive code regarding expert evidence which excluded evidence such as the report was not well founded. Section 3 of the Civil Evidence Act did not purport to be all-embracing or to alter the position at common law. Part 35 of the Civil Procedure Rules was concerned with persons who had been instructed to give expert evidence for the purpose of proceedings; the expert evidence in the report did not fall within Pt 35. Accordingly, the report was prima facie admissible and the claimant did not require the Court's permission to adduce it.

The Court also refused to exercise its discretion to make a presumption against the admission of AAIB reports. The report was admissible evidence. It was of particular potential value on account of the AAIB's independence, the fact that it was the product of an investigation by experts who were not concerned to attribute blame, and the fact that the AAIB had greater ability than anyone else to obtain and analyse relevant data. The exercise of discretion was to be carried out in accordance with the overriding objective, which tended to favour the inclusion of evidence such as the report: many litigants would find it very difficult to access the relevant information.

Parliament had provided for reports to be made public and had not legislated, as it could have done, to make them inadmissible. Further, such a presumption would impose an onus on the party to deploy admissible evidence when the onus should be on the party seeking to exclude such evidence. There was no reason why admissibility of the report should inhibit inspectors in their work. Inspectors were professionals who were not concerned with establishing civil liability and had no need to be circumspect because someone might want to use the report in litigation. Even if reports were not admissible, they were available and could be used, even if not evidentially, as the foundation of a claim or defence; AAIB reports had in any event been used as evidence in past cases. Further, reports were made public; the fact that they

[2] *Rogers v Hoyle* [2013] EWHC 1409 (QB).
[3] *Hollington* [1943] K.B. 587.
[4] *Calyon v Michailaidis* [2009] UKPC 34.
[5] *Hollington* [1943] K.B. 587 and *Calyon* [2009] UKPC 34 considered.

were also admissible was unlikely to be of critical inhibitory significance. Admissibility was unlikely to significantly affect the willingness of people to assist the AAIB. The appeal was dismissed.

Comment

It is surprising in the era of "cards on the table" litigation that information which, as the judge noted, would leave a non-lawyer "astonished" if not taken into account by a court might be the subject of an application, taken all the way to the Court of Appeal, to have that information excluded as evidence.

The application and the subsequent appeal have, however, generated a thoughtful analysis, and comprehensive review, of various issues relating to the admissibility of evidence. These offer guidance to practitioners in a variety of situations in which issues may arise about the admissibility of, and case management directions relating to, the evidence. When considering whether reliance can be placed on evidence at trial there are a number of considerations for practitioners preparing the case, as this judgment confirms.

The first consideration will be whether information is admissible as evidence under the general law. When considering admissibility the primary rule is that of relevance: evidence will only be admissible if it is relevant. Relevance is defined as tending to prove or disprove, in the sense of making more or less probable, any fact in issue in the proceedings. For these purposes, evidence will be relevant if it is of more than minimal relevance.

A report, such as the AAIB report in this case, will often contain evidence of fact as well as opinion on matters of expertise and evidence of mixed fact and opinion. Furthermore, based on the experience of those carrying out any such investigation, this type of report will contain conclusions about the probable cause of the accident which is the subject of the investigation. Presenting the whole story in this way, even if the evidence underlying the conclusions might be obtained from other sources, ought to mean the report is admissible because it is relevant in the sense that anyone wanting to establish the cause of the accident would look to the conclusions in the report. Indeed, investigators, such as those employed by the AAIB, bring knowledge and experience which gives the findings a special value as a result of that expertise.

In these circumstances a report such as that prepared by the AAIB will be admissible evidence, and will remain admissible even though, in theory, the evidence underlying the report could be obtained and adduced, not least because that would involve substantial time and cost.

The judgment is a reminder of why opinion evidence is generally inadmissible. That is not on the basis of irrelevance but because of the nature of the judicial role which requires the trial judge to form an opinion by making an evaluation of the evidence and not deferring to the opinion of anyone else. There are, however, some circumstances in which opinion evidence is, nevertheless, admissible:

- A judge should have regard to the opinion of a person better placed to form an opinion than the judge, for example an expert in a subject involving specialised knowledge.
- Even where the witness does not have special expertise that witness may be in a privileged position to express an opinion because the witness has observed relevant events, for example a person's age or the speed of a vehicle. These are inferences, and therefore opinion, but inferences the witness is peculiarly well placed to draw and cannot reasonably be expected to separate from the observed facts.
- Similarly, a witness can give evidence of what that witness would have done in a hypothetical situation, because through self-knowledge the witness may be better able than others to form an opinion as to what he or she would have done.
- Indeed, the court may need to have expert opinion evidence to decide a case because one aspect of the judge's duty to reach a decision based on evidence before the court is that a

judge is not expected to have, nor strictly permitted to use, technical knowledge of the subject matter of the case.

A judge may acquire technical knowledge, perhaps from hearing other cases, but cannot properly take judicial notice of that knowledge and use it to reach or justify findings. There is, hence, a distinction between judges who reach conclusions based on the evidence adduced in the case and experts who are entitled, and expected, to reach conclusions by applying previously acquired knowledge. This is a point of particular relevance to cases where the court does not consider expert evidence is required, with the consequent risk the judge has to decide issues, not on the basis of evidence before the court, but on matters such as:

- the judge's own knowledge (when this is not something judicial notice can properly be taken of);
- what might be termed quasi-expert evidence (when a witness of fact strays beyond what is properly admissible as matters of opinion for such a witness); or
- where the judge conducts some experiment or observation of his or her own, which is tantamount to the judge then using this as his or her own specialist knowledge as a basis for justifying findings (when it is not strictly part of the evidence at all).

A judge may, nevertheless, reject expert evidence provided the findings are supported by other evidence.[6] That is a reflection of the judge's duty to decide the case rather than the duty of the expert who is there just to help inform the judge's decision.

Where expert opinion is available but has not been prepared for the purpose of the proceedings, rather as a result of a separate inquiry, there is an issue of admissibility on the basis that, because of the duty of a judge to independently evaluate the evidence, earlier judicial findings, at least in civil proceedings, should be excluded.[7] The judgment is a reminder that this rule excludes judicial findings but not earlier expert opinions, even though not prepared specifically for the proceedings in which it is now proposed to rely on those opinions.

Whilst opinion evidence is, generally, excluded, an exception is evidence given by an expert on matters within the expertise of that witness. However, even where opinion evidence is given by those with expertise that does not necessarily make this expert evidence for the purposes of Pt 35 and thereby require permission from the court.

Evidence of this kind, whilst it inevitably involves a degree of expertise, is not "expert evidence" for the purposes of Pt 35 if it has not been obtained by a party for the purpose of the proceedings, which obviates the need for permission for any party to rely on that evidence. Moreover, the evidence will not be excluded because it does not comply with the requirements of Pt 35 and the associated Practice Direction including the Protocol for the Instruction of Experts to Give Evidence in Civil Claims.

The decision, in a narrow sense, confirms that an AAIB report will be admissible in civil proceedings arising out of the accident that has been investigated. In a broader sense the judgment indicates similar investigations, unless excluded by statute such as investigations into marine accidents, will, similarly, be admissible and ought, as a matter of discretion, to be allowed as evidence.

That raises questions about a variety of reports or investigations across the spectrum from highly detailed reports prepared by those with considerable expertise, such as the AAIB, to what might loosely be termed quasi-expert evidence, where witnesses of fact express matters of opinion. For example:

[6] *Armstrong v First York Ltd* [2005] EWCA Civ 277; [2005] 1 W.L.R. 2751; [2005] C.P. Rep. 25; *Montracon Ltd v Whalley* [2005] EWCA Civ 1383.

[7] *Hollington* [1943] K.B. 587 at 594.

- **Health and Safety Executive reports:**

  In most respects these would seem very similar to, and hence admissible on the same basis as, the AAIB.

- **Police accident reports:**

  Conventionally these have excluded matters of opinion but issues might arise as to the extent to which a police officer might be able to draw conclusions about the cause and circumstances of an accident (this may depend on the expertise of the individual officer and the extent to which it could be characterised as having the value and weight of a report such as that compiled by the AAIB).

- **Investigations or reports by Health and Safety Officers:**

  Again this may depend on the level of expertise of the individual, and admissibility might also turn upon whether or not this could be regarded as independent.

One party or another might apply to exclude the evidence on the basis it is, on proper analysis, inadmissible opinion or, even if admissible, should still be excluded under Pt 32. However, subject to the above considerations reports of this kind are, as is made clear, likely to be admissible without the need for permission from the court at the stage of case management. That is a sensible approach entirely consistent with the overriding objective, especially when one of the parties may not be as well resourced as the other and less able to meet the cost of an investigation.

It is also worth remembering that evidence of fact given by a witness who happens to have expertise will not be expert evidence, for which the party seeking to rely on that evidence would need permission to rely upon.[8]

The Court of Appeal gave some useful guidance on the proper approach to expert evidence in a number of respects.

- The bar is not set "particularly high" before a witness acquires the expertise necessary to give, where permission to do so is granted, expert evidence. That reflects the wide range of experts from whom the court is, in appropriate circumstances, willing to hear evidence from.
- Whilst an expert is entitled to give an opinion on facts, as understood or assumed by the expert, and may reach conclusions which are informed by, or are a reflection of, that expertise, it is not the function of an expert to express a view on disputed issues of fact which do not require any expert knowledge to evaluate and it is, of course, always for the court, not the expert, to decide such matters.
- The decision also confirms that expert evidence expressing an opinion drawn on a number of sources remain admissible, on the basis any issues about those sources once again goes to weight rather than admissibility. That suggests the contrary approach taken in the *Humber Oil*[9] case was wrong.
- Where there are issues about the expertise of the witness, and hence the ability to give opinion evidence, or whether the report exceeds the remit of an expert these are matters that go to weight, rather than admissibility. In other words, the evidence will be admissible but the judge can only attach such weight to that evidence as is appropriate. It will generally be disproportionate to start excising parts of an expert's report, the better approach being to leave the trial judge to attach proper weight to appropriate parts of the report.

[8] *Blair-Ford v CRS Adventures Ltd* [2012] EWHC 1886 (QB).
[9] *Humber Oil Terminals Trustee Ltd v Associated British Ports* [2012] EWHC 1336 (Ch); [2012] L. & T.R. 28.

The situation is likely to be different if the expert evidence goes outside the remit of the pleaded case of the party relying on that expert. In that situation it is surely appropriate for the court to strike out such parts of the expert's report, or at least to do so unless the party elects to amend the relevant statement of claim to encompass the matters covered by the expert.[10]

If evidence is admissible under the general law it is then necessary to consider whether that evidence needs to be the subject of specific case management directions and in particular whether the court should:

- give permission to rely on that evidence if it can be properly characterised as expert evidence; or
- if the evidence is properly characterised as factual evidence, whether that should, nevertheless, be excluded under Pt 32.

The distinction between expert evidence and other evidence is significant in the sense that, if expert evidence, a party seeking to rely on it will need to obtain permission from the court, whereas otherwise it will be necessary for the party who objects to obtain an order excluding the evidence.

There is no basis for saying that because a claim is of modest value it is somehow proportionate to subvert the laws of evidence. If the issues are such that evidence of this kind is required, then it is required. Case management is not about excluding relevant evidence but assessing and identifying the issues so that these can be resolved in the most proportionate way.

That approach is also a reminder of the little used power under Pt 35.9 of the Civil Procedure Rules, that where a party has access to information which is not reasonably available to another party, the court may direct the party who has access to the information to prepare and file a document recording the information and serve a copy of that document on the other party. This rule might usefully be used to redress any imbalance in resources, which the court recognised when concluding evidence, such as that prepared by the AAIB, should be admissible.

The court still has discretion under Pt 32 to exclude non-expert evidence. This power may be used to a greater extent following the introduction of case and cost management in April 2013 but, generally, if evidence has any relevance it will usually be appropriate for that evidence to be admitted and for the trial judge to attach such importance to it as may be appropriate. On the same principle where evidence is mixed opinion and fact the proper course is for the whole evidence to be before the court and the judge disregard the inadmissible at trial.

The discretion to exclude evidence which is otherwise admissible should be used sparingly, and the power to do that exercised in accordance with the overriding objective. An important factor, when applying the overriding objective in these circumstances, is whether it would be difficult, or perhaps disproportionate, for one of the parties to obtain the evidence. In such circumstances the overriding objective may best be served by admitting the evidence.

Practice points

- The issues considered in this case should be considered when the claim is being investigated and when evidence is obtained.
- Once obtained, admissibility should be assessed.
- When case management directions are being given the court considers, in particular, whether permission to rely on expert evidence should be sought and/or granted, or whether non-expert evidence should be excluded.

[10] *Upton McGougan Ltd v Bellway Homes Ltd* [2009] EWHC 1449 (TCC).

- At trial when determining the extent to which witnesses can give oral evidence the judge should take account of documentary evidence.

John McQuater

Wall v Mutuelle de Poitiers Assurances

(CA (Civ Div), Longmore L.J., Jackson L.J., Christopher Clarke L.J., February 20, 2014, [2014] EWCA Civ 138)

Damages—civil evidence personal injury—road traffic accidents—conflict of laws—france—negligence—applicable law—expert evidence—measure of damages—Rome II—CPR Pt 35

LT Applicable law; EU law; Expert evidence; Personal injury claims; Road traffic accidents

Steven Wall is English. In July 2010 he went to France for a holiday with his motorcycle. On July 14, 2010 a collision occurred between himself and a car driven by a Mr Clement who is French. There was no dispute that the collision occurred as a result of the negligence of Mr Clement. Mr Wall sustained very severe personal injuries. After emergency treatment in a French hospital, he returned home to England.

On December 22, 2011 he issued a claim form naming the French driver's motor insurers as defendant. There was no dispute that he was entitled to do so following the Brussels Regulation 44/2001[1] ("Brussels I") and the "*Odenbreit*"[2] case. In the past he would have been obliged to pursue any claim through the French courts. On May 21, 2012 judgment was entered for the claimant for damages to be assessed.

During the course of a case management hearing the claimant applied for permission to call a number of experts, as was customary in such English litigation. The Master ordered the trial of whether the issue of which expert evidence the Court should consider fell to be determined by English law[3] on the basis that it was an issue of "evidence and procedure" within Regulation 864/2007 ("Rome II")[4] or by reference to French law[5] on the basis that that was an issue falling within art.15.

The insurer submitted that the "law" within the meaning of art.15(c) included the practices, conventions and guidelines regularly used by judges in assessing damages in the courts of the state whose laws was the applicable law. The only way in which the legislative purposes of Rome II would be achieved was by rejecting the English panoply of experts and permitting only a single expert of the kind customarily appointed by French courts, so as to arrive at a figure that would actually be awarded in France. They argued that any other interpretation would give undue weight to the law of a claimant's domicile.

There was no dispute between the parties that Pt 35 of the Civil Procedure Rules applied, on the footing that the rules as to expert evidence it contained were plainly matters of procedure. Tugendhat J. held that Pt 35 did not provide for the Court to give permission to a single expert to convey to the opinions of other experts whom he had consulted on matters which were not within his expertise.

There was no evidence before the Court as to what level of damages would be awarded by a French court if the French court were seized of the case. Without such evidence there were no means by which the Court could endeavour to reflect the level of damages. The judge held that the Court was not required

[1] Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1.
[2] *FBTO Schadeverzekeringen NV v Odenbreit* (C-463/06) [2007] E.C.R. I-11321.
[3] The law of the forum.
[4] Regulation 864/2007 on the law applicable to non-contractual obligations [2007] L199/40 art.1.3.
[5] The applicable law.

to put itself in the position of a French court and decide the case as that court would have, or to adopt new procedures.

Mr Justice Tugendhat's view[6] was that it was clear that the questions of what expert evidence the Court should order and in particular whether or not there should be one or more experts pursuant to Pt 35 fell to be determined by reference to the law of the forum (English law), on the basis that that was an issue of "evidence and procedure" within art.1.3.[7]

The insurers appealed and argued that, on the true construction of Rome II, the English court must arrive, as nearly as possible, at the amount of damages which the French court would have awarded if the action had been tried in France, and the best way to secure that outcome was to have a French-style single joint expert.

The Court of Appeal held that nothing in Rome II mandated a court, trying a case to which a foreign law applied pursuant to Rome II, to award the same amount of damages as the foreign court would. They stated that it could not be the case that Rome II envisaged that the law of the place where the damage had occurred should govern the way in which evidence of fact or opinion was to be given to the court which had to determine the case. Longmore L.J. made their view clear when he stated[8] that:

> "An English court is ill-equipped to receive expert evidence given in the French manner. First, our rules of disclosure will not be the same as they are in every foreign country. It would be very odd if the rules of disclosure were not matters of "evidence and procedure"; but on the assumption that they are, how do they apply to a French-style single expert report? Not only would a French expert not regard himself as bound by any English rule; neither would he be able, in any sensible way, to take advantage of the English rules if he wished to do so.
>
> Second, our rules of evidence contemplate the giving of oral evidence by a procedure of examination-in-chief, cross-examination and re-examination of witnesses. Even if the author of a French-style expert report were prepared (as he would have to be) to submit to such a procedure, it would be meaningless, to the extent that his or her report incorporated material outside his or her personal expertise.
>
> Third, I have little doubt that in the reverse situation, a French court would think it unhelpful (to put it mildly) to be presented with English-style expert evidence about the consequences of an English accident to a French driver or motorcyclist, in the form of reports from experts in (say) 10 disciplines presented by each party and having to choose between them without resort to its own method of dealing with expert evidence."

They concluded that it was inevitable that the same facts tried in different countries might result in different outcomes and they were unable to accept the insurer's starting point that the English court must strive to reach the same result as a French court would, let alone their finishing point that evidence must be given to the English court in the form of a French-style expert report. Mr Justice Tugendhat was accordingly right to conclude that the issue of which expert evidence the court should order fell to be determined by reference to English law.

They went on to confirm that in the context of Rome II, which was intended to have international effect, a narrow view of the words "applicable law" in art.15 was inappropriate. The words "applicable law" should be construed broadly and included practices, conventions and guidelines regularly used by foreign judges in assessing damages under their law. Mr Wall is entitled to recover all heads of recoverable loss which are recognised in France. The Judge assessing his non-pecuniary losses should have regard to the

[6] *Wall v Mutuelle De Poitiers Assurances* [2013] EWHC 53 (QB); [2013] 1 W.L.R. 3890; [2013] 2 All E.R. 709.

[7] Dicey, Morris and Collins, *The Conflict of Laws*, 15th edn (London: Sweet & Maxwell, 2012) paras 7-022, 7-050, 34-036 and 34-056; Andrew Dickinson, *The Rome II Regulation: The Law Applicable to Non-contractual Obligations* (Oxford: Oxford University Press, 2008), paras 3.39, 14.19, 14.34 and 14.61 considered.

[8] *Wall v Mutuelle de Poitiers Assurances* [2014] EWCA Civ 138; [2014] C.P. Rep. 23; [2014] R.T.R. 17 at [12].

Dintilhac guidance and any prevailing tariffs for damages used in France to the extent that a French judge would.

Jackson L.J. stated that the words "evidence and procedure" in art.1.3 should be given their normal meaning, and so the normal English procedure should be followed in determining the extent of Mr Wall's injuries and financial loss. Giving the words "evidence and procedure" their natural meaning accorded with the natural meaning of art.1.3. It was unrealistic and inefficient to expect courts to adopt the evidential practices of a different jurisdiction when determining questions of fact. Accordingly, the Court in this case should follow English evidential practices, including in relation to receiving expert evidence concerning the extent of Mr Wall's injuries and his financial loss.

The appeal was dismissed.

Comment

Until Rome II came along, a satisfactory position had been reached under the law of England and Wales by which generally speaking damages were awarded to a British claimant for an accident that had occurred abroad, they would receive those damages under the law of England and Wales even if liability had been decided under foreign law.[9] It was held by the court that the actual assessment of damages was a matter of procedure and not substantive law. This meant that whilst the applicable law in relation to liability could in certain situations be foreign law, damages would always be dealt with in a matter more comfortable to the British parties and their representatives.

Though in an early draft form Rome II was expected to maintain that position, (that the applicable law should be that of the claimant's domicile) the final version reversed this. The result now is that for accidents where the cause of action took place after January 11, 2009, save for certain exemptions, the general rule is that the damages awarded in an overseas accident case will be those of the accident location. One obvious reason for that was to protect insurance companies in jurisdictions with lower damages awarded in their courts. On the basis that the insurance fund would have been set with those often lower levels of damages anticipated, to then be required to meet the damages of a much higher value jurisdiction such as England and Wales, would have a significant adverse impact upon the insurance available.

A side issue, which has now been examined by the court following Rome II, is that this has thrown up a potential conflict in determining how the damages are assessed. In this case it was agreed by both parties that the Judges would be awarding damages having regards to the French law, but where there was a difference was that the insurers contended that they must produce exactly the same amount of damages as would be awarded in a French court, whilst the claimants argued that it would be close but not necessarily identical. The parties further agreed that Pt 35 of the Civil Procedure Rules would continue to apply, within that the defendant argued that the court must follow the French procedure.

There was a unanimous dismissal of the defendant's appeal with the Court deciding that Civil Procedure Rules should be applied to all matters of evidence and procedure and this would include the manner in which the expert evidence was to be adduced. This meant, therefore, that, subject to the usual consideration under Pt 35 in granting permission for experts to be called, the claimant would be calling several experts to deal with the various injuries and heads of damage. This would be in contrast to the French appointment of a single expert who may in turn seek the opinions of other experts from those disciplines.

However, perhaps unusually, all of the Judges who gave their opinions decided to go further than dealing with the absolute point of the appeal and to offer their own opinions in relation to what "evidence and procedure" meant within the appeal. In fact this was essential to try and assist judges facing increasing numbers of foreign law based claims following Rome II and particularly direct rights against insurer claims and European road accidents. Jackson L.J. decided that the defendant's suggestion was "strained

[9] *Harding v Wealands* [2006] UKHL 32; [2007] 2 A.C. 1; [2006] 3 W.L.R. 83.

and artificial" and that it would be both unrealistic and inefficient for courts across Europe to adopt the evidential practices of a different jurisdiction when determining factual questions.

So whilst that dealt with the practice and procedure in assisting a court in determining the level of damages, there then remained the question of the manner in which the damages would be assessed. There are often local issues that have to be taken into account, for example the per cent to which compensation received from an insurance company may or may not dovetail with compensation provided by the country's social security system. Damages are awarded in different ways in different European courts. For example, damages under German tort law are settled as closely as possible for what the claimant has lost according to the economic damage incurred. In Spain, by contrast, a lump sum is used with compensation tables in a form of statutory tariff called the *baremo*. It was this form of approach with a tariff that occupied this court's mind in determining how compensation be awarded according to French Law.

The other key issue for the judges was whether or not the concept of judicial conventions in practice in the foreign jurisdiction could be regarded as law which under art.4(1) of (ii) the domestic court will be bound to apply. In France the court has regard to an informal tariff known as the *Dintalhac Headings*.[10] The medical expert must reply to questions put to them based on this list to enable the court to determine the loss suffered by the victim. Jackson L.J. in his opinion commented:

> "The trial judge in the present case, with the assistance of expert evidence, should apply the Dintalhac guidance and any prevailing tariffs for non-pecuniary damage, subject to the same margin of discretion as the French judge would have".[11]

He went on to neatly summarise the position for a judge determining damages:

> "… the claimant is entitled to recover all heads of recoverable loss which are recognised in France. The judge assessing non-pecuniary losses should have regard to the Dintalhac guidance and any prevailing tariffs for damages (such as those issued by the Paris Court of Appeal) to the same extent that a French judge would do so".[12]

Judges having to deal with this difficult situation (as is happening all too frequently going forward because of Rome II) would benefit from the guidance of Clarke L.J. in his opinion:

> "In assessing damages in accordance with French law the English judge should endeavour to decide how, in practice, a French judge would assess damages. If that is, as it appears to be, by reference to the Headings, the English court should adopt the same approach, although, to the extent that French judges have a discretion to adopt a different approach, an English judge will be similarly entitled. For that purpose it would be helpful to know the circumstances in which they would or might consider it appropriate to do so in order to see whether they are applicable to the present case."

These set out various heads of recoverable loss. The Paris Court of Appeal uses a tariff and guideline figures. Not surprisingly, the Court here decided that this was a judicial practice which was very similar to what happens in the courts of England and Wales where they may have regard to the *Judicial College Guidelines*.[13] It was the claimants' case that as they were only guidelines and that the French courts were not required to follow them religiously, then the English court similarly could approach them in that way and therefore not necessarily follow them. The courts were referred to academic publications such as

[10] A list of losses drawn up by M.Dintalhac, President of the Second Civil Chamber of the Court of Cassation, which sets out what compensation is payable distinguishing between personal and non-personal items and temporary and permanent losses.
[11] *Mutuelle de Poitiers Assurances* [2014] EWCA Civ 138 at [35].
[12] *Mutuelle de Poitiers Assurances* [2014] EWCA Civ 138 at [38].
[13] Judicial College, *Guidelines for the Assessment of General Damages in Personal Injury Cases*, 12th edn (Oxford: Oxford University Press, 2013). The Judicial College was formerly known as the Judicial Studies Board.

Private International Law[14] where the authors contend that: "judicial conventions or guidelines are not law at all".[15]

However the defendant followed *The Conflict of Laws*:[16]

> "… it appears that the English courts should endeavour to consider the rules of the *lex causae* together with the relevant judicial practices and guidelines as to their application, so as to endeavour to apply the law of damages so as to reflect, as accurately as possible, the level of damages that would actually be awarded in the courts of the country whose law is applicable."

Justice Longmore said:

> "It seems to be that in the context of the Regulation (or Convention) intended to have international effect, a narrow view of "law" is inappropriate. If there are guidelines, even if they can be disapplied in an appropriate case, judges will tend to follow them. No doubt one can call this "soft law" rather than "hard law" but it is law nevertheless. Any foreign judge having to apply English law on the assessment of damages would find the Judicial College Guidelines helpful as a starting point. If therefore the French law had the equivalent of these guidelines, I would hold that the master could permit evidence for them to be given by an English court."[17]

> "… The decision as to what evidence should be permitted is, of course, in the first instance for the master to make by reference to the actual reports for which permission is sought."[18]

It is to be hoped therefore that this important decision, the latest in a series which have been required to interpret the challenging drafting of Rome II, brings some certainty to the manner in which a claim is to be prosecuted for compensation. It is likely, however, to produce some difficult quantum judgments which will likely then be the subject of further appeals and guidance. Going forward, a claimant bringing proceedings in England in which foreign law is going to apply know that they will be following the Civil Procedure Rules in the usual way. They are still going to need to rely on the advice of lawyers or other experts from the relevant foreign jurisdiction to assist them in determining not only the heads of loss that would be reclaimable in that jurisdiction but the likely quantum that would be awarded in that jurisdiction by a judge from there.

Practice points

- An assessment should be made as to the advantages and disadvantages of pursuing a foreign law based claim within the jurisdiction of England and Wales.
- If a claim is to be pursued in this jurisdiction then prompt and detailed advice should be taken from a suitably qualified lawyer or expert from the foreign law jurisdiction and advise both as to liability and quantum.
- The guidance will need to encompass the heads of loss that will be recoverable if the claim was pursued in that jurisdiction together with details as to how a judge would make that assessment.

Mark Harvey

[14] James Fawcett and Janeen Carruthers, Peter North (ed) *Cheshire, North & Fawcett: Private International Law*, 14th edn (Oxford: Oxford University Press, 2008).
[15] Para.23.
[16] Lord Collins of Mapesbury, Professor C G J Morse, Professor David McClean, Professor Adrian Briggs, Professor Jonathan Harris, Professor Campbell McLachlan, Professor Andrew Dickinson, and Professor Peter McEleavy (eds), *Dicey, Morris & Collins on the Conflict of Laws*, 15th edn (London: Sweet & Maxwell, 2012).
[17] *Mutuelle de Poitiers Assurances* [2014] EWCA Civ 138 at [24].
[18] *Mutuelle de Poitiers Assurances* [2014] EWCA Civ 138 at [55].

Allen v Depuy International Ltd

(QBD, Stewart J., March 18, 2014, [2014] EWHC 753 (QB))

Civil procedure—personal injury—consumer law—product liability—conflict of laws—defective products—medical implants—applicable law—European Union—third country nationals—Private International Law (Miscellaneous Provisions) Act 1995—Regulation 864/2007—Consumer Protection Act 1987

LT Applicable law; Defective products; Medical implants; Personal injury claims; Product liability; Third country nationals

The defendant is a company registered in England. It manufactured prosthetic hip implants in England. None of the claimants, had, at any material time, been resident in England. The claimants represented a few hundred overseas residents who had been implanted with the devices. Three had prosthetic hips implanted in New Zealand. Another claimant's hip was implanted in Australia and six in South Africa.

After experiencing problems with the implants from an adverse reaction to metal debris, the claimants issued proceedings in England, as defendant's country of domicile, alleging that the devices were defective.

As the defendant was domiciled in England, the claimants were entitled as of right to bring their claim here, whether or not England was otherwise the appropriate forum. The dispute concerned preliminary issues on the applicable law and, if English law applied to any claim, did the Consumer Protection Act 1987 apply?

It was common ground that, for the purposes of determining the applicable law under s.11(2)(a) of the Private International Law (Miscellaneous Provisions) Act 1995,[1] the claimants had sustained injury in the country in which they first suffered the alleged symptoms.

Mr Justice Stewart held that where a manufacturer faced a claim of liability for a defective product, the place of the event giving rise to damage ("EGRD") was that where the product in question was manufactured.[2] The EGRD should therefore be the date of the manufacture or distribution of the defective prostheses or, if that was incorrect, the date of implantation. There was no other intervening or proximate cause of the claimants' injuries. Any date other than that of the manufacture, supply, or implantation would present substantial practical problems. It was considered undesirable for the EGRD to depend upon an individual's reaction to an implant: that would be contrary to the desirability of legal certainty contained in the recitals to the Regulation.

The Judge further held that under the 1995 Act, the general rule was that the applicable law was the law of the country where the individual was when he sustained the injury. There was no reason to displace that rule under s.12[3] of the Act. English law was not, therefore, applicable. The applicable law was that of New Zealand, Australia or South Africa, as appropriate.

In addition the Judge held that even if English law had been applicable to the claims that the Consumer Protection Act 1987 would not have applied to them. This was because the Act had no territorial effect beyond the United Kingdom, European Union or European Economic Area. Consumers who suffered damage outside the EEA and who had no connection with it, and defective products whose marketing and supply was outside the EEA, were not within the scope of the Act.

[1] Where elements of events occur in different countries, the applicable law for a cause of action under the general rule in respect of personal injury caused to an individual or death resulting from personal injury is taken as being, the law of the country where the individual was when he sustained the injury.

[2] *Kainz v Pantherwerke AG* (C-45/13) [2014] 1 All E.R. (Comm) 433; [2014] I.L.Pr. 16 followed.

[3] *This allows displacement of general rule.*

Comment

The Consumer Protection Act 1987 ("CPA") incorporated into the law of England and Wales the European Products Liability directive.[4] In simple terms this legislation was designed to harmonise product liability across the European Union and to assist manufacturers and suppliers in their ease of transacting business. As a side benefit for the consumer it removed the requirement of a fault-based regime where a remedy was sought where loss occurred as a result of a defect in a product.

Despite what would seem at first review to be a major advance for consumers, remarkably few reported decisions relating to the directive and its emanations exist. In the more straightforward cases settlements, frequently confidential, have arisen, and more often than not the court cases record victories for defendants. Much of the product based claims of the last two decades have arisen from products generally designed and manufactured outside of Britain and indeed the EU.

Unusually the DePuy ASR hip prosthesis was manufactured by DePuy International Ltd, a Leeds-based company. It was the first of the so-called metal on metal hip prostheses to be withdrawn from the market because of safety issues. In 2010, after being the subject of a medical device alert issued by the Medicines Healthcare Regulatory Authority ("MHRA"), the parent company voluntarily issued a worldwide recall of this device.

The ASR was a large head metal implant, designed to reduce the risk of dislocation and to last longer than other devices. It was aimed at younger, active individuals. Whilst many patients did indeed enjoy a good result with their mobility, some metal bearings wore abnormally. This caused metal debris to leech into the bloodstream and then into surrounding tissue and muscles. This more often than not caused a soft tissue reaction with the surrounding tissue and muscles leading in some cases to hip muscles being destroyed and meaning the hip had to be revised again. At the time of the recall the failure rate with this device was considerably higher than acceptable.

Instead of hordes of claimants going off to the United States courts to join class actions there, usually unsuccessfully, the claims are being brought here. DePuy, having paid over $2.5bn in damages to US victims, not only denied the claims here but further argued that each foreign claimant's own local law was the applicable law. This was on the basis that it was either the country in which each first suffered their injury, or where they received their prosthesis, that determined forum.

This decision was based on the determination of a series of preliminary issues which in turn would then lead to the resolution of the liability, causation and only then, damage issues. Prior to this case, in January 2014, the European Court of Justice gave a ruling on jurisdiction in another products case following a referral from the Austrian courts: *Kainz v Pantherwerke AG*.[5] Mr Kainz, an Austrian resident, had an accident on a bicycle bought from an Austrian retailer. The bicycle had been manufactured by Pantherwerke AG in Germany and was sent out to be sold from there, or "put into circulation" as the Directive portrays this.

Mr Kainz claimed under Directive 85/374 concerning liability for defective products which was the directive from which the United Kingdom derived the Consumer Protection Act 1987. The European Court was asked to interpret art.5(3) of Regulation 44/2001[6] ("the Brussels Regulation"), which is the authoritative statement as to which member states' courts can deal with disputes.

Article 5(3) states that a person domiciled in a member state may be sued in another member state, "in the courts for the place where the harmful event occurred or may occur". In the *Kainz* case this posed three potential questions: is it the manufacturer's domicile, where the product is put into circulation, or lastly where the product is purchased? The answer was the place where the manufacturer is established;

[4] Directive 85/374 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] OJ L 210/29.

[5] *Kainz* [2014] 1 All E.R. (Comm) 433.

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

the Court considered this to be logical in the sense that the courts for the place of manufacture were assumed to be best placed to rule on whether the product was defective or not.

Allen went to the next stage, jurisdiction having been accepted here, in determining what law is applied by the Court.

The first of the preliminary issues was whether the event giving rise to damage to each claimant arose before or after January 11, 2009. This date is derived from Regulation 864/2007 ("Rome II")[7] and so would determine whether Rome II applied or not. If the event occurred before that date so that Rome II did not apply then the applicable law would be determined under the Private International Law (Miscellaneous Provisions) Act 1995 ("PILA").

The second issue was to determine what was the law to be applied to each individual claim? And if English law applied to any of them, could the claimants pursue a claim under the CPA? So this became the first case to consider both the application of Rome II to product liability cases and the application of PILA and the territorial scope of the CPA.

Under s.11 of PILA the general rule is that the applicable law is that of the country where the injury was sustained. Commonly it would be assumed that this would mean the same country where the operation to implant the allegedly defective device took place. However, that was not necessarily so in the individual circumstances of a case as the injury itself (in the case of a prosthesis the later tissue damage leading to the device failure and requirement for early revision) may well happen at a later date and therefore elsewhere.

Section 12(2) of the PILA[8] may be used to displace the s.11 general rule in exceptional cases. The court considers the relevant factors and to displace the rule the balance must weigh in favour of the other country. In this case the Court reviewed the connecting factors, including:

- where the hip implant operation(s) took place—in each case this was outside England and Wales, being New Zealand and South African for nine out of the ten claimants, and Australia for one;
- that the claimants' injuries first occurred outside of England—being in New Zealand, South Africa and Fiji;
- That the claimants' revision operations and other treatment took place outside England—in either New Zealand or South Africa; and
- the objective expectation of the parties at the time of implantation and when revision operations took place—which was that the local law applied, not English law.

The outcome was that the Court accepted the defendant's argument: namely that the relevant law applicable was that of New Zealand in four claims and South Africa in six claims, notwithstanding that one of the claimants received his hip implant in Australia and another was found to have first suffered his injury in Fiji. In fact, in this latter case the Court decided the s.12(2) exception did apply here because the case had sufficient connections to New Zealand by reason of the marketing implantation and revision surgery all taking pace there.

Stewart J. held that:

[7] Regulation 864/2007 on the law applicable to non-contractual obligations [2007] L199/40 art.1.3.

[8] Choice of applicable law: displacement of general rule … (1)If it appears, in all the circumstances, from a comparison of—(a) the significance of the factors which connect a tort or delict with the country whose law would be the applicable law under the general rule; and (b) the significance of any factors connecting the tort or delict with another country, that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country, the general rule is displaced and the applicable law for determining those issues or that issue (as the case may be) is the law of that other country. (2) The factors that may be taken into account as connecting a tort or delict with a country for the purposes of this section include, in particular, factors relating to the parties, to any of the events which constitute the tort or delict in question or to any of the circumstances or consequences of those events.

- For the purposes of Rome II, and its temporal application, the date of the relevant 'event giving rise to damage' in a product liability case is the date of manufacture/circulation. This in each case long proceeded January 2009 and hence PILA applied to all the claims.
- The applicable law of each claim under PILA was where the injury was sustained, (save in the one case mentioned above where New Zealand was preferred to Fiji).
- The judge decided there was not one claimant's case where the appropriate law was that of England and Wales and in reaching that view he did not consider the existence of hundreds of other cases in this jurisdiction pleading similar injuries or claims to be influential.
- Even if English law had applied, the claimants would not have had the benefit of the CPA.

Here the claimants were all non-European Union or even European Economic Authority ("EEA") consumers who suffered damage outside the EEA, in relation to products which had been marketed and supplied outside the EEA. The claims fell outside the territorial scope of the CPA. In fact this is this Judge's obiter opinion, but many observers will disagree with this. Indeed the Judge acknowledged that the facts of individual cases may affect this.

The case raised two other incidental but interesting issues. In the case of the South African claimants losing this issue and not getting the law of England and Wales mean that owing to a law change that only came into force in 2010, they would have to prove negligence rather than have the benefit of the strict liability regime of the CPA. Whilst this is not likely to deter them, it will serve to prolong the litigation and extend the costs burden.

For the New Zealanders it is commonly assumed that they go into a no man's land as it is commonly reported that there is no tort law in New Zealand. In 1972, New Zealand introduced a no-fault insurance scheme for all accident victims, which provides for victims to benefit from a government-run Accident Compensation Corporation. However, it has been reported that the government never actually discharged the pre-existing legislation that provided for negligence claims and this may mean that the New Zealand claimants may be able to pursue their claims in the English and Welsh courts using the old negligence law from New Zealand.

For now at least there is a considerable degree of clarity to previously unexamined important issues of jurisdiction and law in product liability related litigation.

Practice points

- Choice of jurisdiction in a product liability case is a multi-factorial process and may require taking advice from lawyers in other territories to determine the best, if not the actual, venue.
- It cannot be assumed that because a defendant pays compensation for their actions in one jurisdiction that they shall necessarily do so in the courts of England and Wales, and lawyers seeking to prosecute similar fact cases here should prepare for contested litigation and a trial regardless of the stance taken by a defendant elsewhere.

Mark Harvey

Secretary of State for the Department of Energy and Climate Change v Jones

(CA (Civ Div), Patten L.J., Gloster L.J., Sharp L.J., March 27, 2014, [2014] EWCA Civ 363)

Personal injury—civil procedure—costs—disbursements—interest—appropriate rate of pre-judgment interest on disbursements

LT Credit; Disbursements; Interest rates; Personal injury claims; Pre-action costs

This matter concerned the cases of eight lead claimants in group litigation known as the Phurnacite Workers Group Litigation ("PWGL"). The claims were made in respect of men who were formerly employed at the Abercwmboi Phurnacite Works, Aberaman, Cynon Valley, South Wales. A group litigation order ("GLO") was made in the PWGL on July 22, 2009. Approximately 250 claimants registered claims under the PWGLGLO for damages for respiratory disease and/or various types of cancer which they allege were caused by the exposure to dust and/or fumes containing carcinogenic substances in the course of work at the Phurnacite Plant.

On October 23, 2012, Swift J. handed down judgment in the eight lead PWGL claims. On December 21, 2012 Swift J. handed down judgment on costs which provided that the defendants should pay 80 per cent of the claimants' costs of the action as agreed or assessed. The parties agreed that the costs and disbursements to be paid by the defendants would be subject to interest from the date of the judgment in the usual way. However, the claimants sought an order that the defendants should also pay interest on the disbursements that had been paid from the date of payment of the relevant sums to the date of the judgment, i.e. an order for pre-judgment interest on disbursements.

Each of the conditional fee agreements entered into by the lead claimants contained a provision that the claimant was liable for the payment of any disbursements incurred on his behalf, whether or not the claim was successful. The disbursements, which consisted mainly of payments for experts' and counsel's fees, amounted in total to more than £787,500. The disbursements were paid by the claimants' solicitors, Hugh James, pursuant to an arrangement which, at least in the sphere of personal injury actions, was described by the Judge as "somewhat novel".

Hugh James entered into a "credit agreement" with each of the individual lead claimants whereby Hugh James undertook to provide credit in such sums as were required from time to time to pay disbursements relating to that claimant's claim up to a maximum of £5,000 in return for payment of a credit charge. The charge for credit was agreed at four per cent above base rate. The credit agreement provided that Hugh James could increase that maximum sum if it proved necessary for the progression of the claim. It further provided that, if the claim was successful, the credit charge would be paid by the claimant out of his/her damages whilst, if the claim was unsuccessful, the credit would be paid under the terms of the claimant's policy with his/her after the event ("ATE") insurance provider.

The Judge held that the determination of the rate of interest payable on disbursements was a matter for the exercise of the Court's discretion, having regard to all the circumstances of the case and in particular the requirement to do justice as between the parties. The starting point was the fact that it was essential, if the claims were to proceed, that the necessary disbursements should be paid as the case went along. It was quite clear to her that the claimants would not have been in a position to fund the disbursements from their own pockets. The credit agreements provided a means by which they could obtain funding for their disbursements without being required to advance any monies themselves. It was also without financial

risk, as the agreements provided that, in the event of a claim failing, the disbursements would be paid by the ATE insurers.

The Judge recognised that it was likely that the interest demanded by a third party for an unsecured loan in order to fund disbursements would have been significantly in excess of the four per cent above base rate agreed with the solicitors. In addition, such loans would not have been contingent, as were the credit agreements. Although the Court had no information about the likely terms of a disbursement funding agreement with a third party it seemed highly unlikely to have been as advantageous to the claimants as the credit agreements with their solicitors.

The Judge held that the rate of interest agreed between the solicitors and their clients could not of itself be determinative of the rate which should be awarded. The credit charges specified in the credit agreements provide only prima facie evidence of the cost to the claimants of obtaining the credit necessary to fund their disbursements, and that prima facie evidence would plainly be displaced by evidence that the charges were excessive.

In fact no direct evidence had been given about the likely cost to the claimants of funding their disbursements by alternative means. Nevertheless the Judge held that there could be no doubt that the cost of unsecured borrowing to a private individual would be considerably higher than would be paid by a large company litigating in the Commercial Court. The defendants had not argued that the claimants would have been able to obtain the necessary funding at a more advantageous rate of interest than four per cent above base rate, let alone on a contingency basis. Nor had they argued that the rate of interest charged by the solicitors was excessive or unreasonable.

Swift J. held[1] that Hugh James had fulfilled the role of a bank but on terms more advantageous to the claimants than those which would have been offered by any bank. In the circumstances, the appropriate rate of interest on pre-judgment disbursements was four per cent above base rate and judgment was entered accordingly.

The defendants appealed conceding that pre-judgment interest was payable on the disbursements but submitting that the appropriate rate was one per cent above base rate. They also argued that Hugh James' means should have been taken into account rather than the claimant's means.

The Court of Appeal held that the power to award interest on costs, including pre-judgment interest on costs, was derived from r.44.2(6)(g) of the Civil Procedure Rules. The purpose of the award was to compensate a party who had been deprived of the use of his money, or who had had to borrow money to pay for his legal costs. The discretion conferred by the rule was not fettered by the statutory rate of interest under the Judgments Act 1838, but was at large.

This meant that the Court had to conduct a general appraisal of the position having regard to what was reasonable for both the paying and receiving parties. In commercial cases the rate of interest was usually set by reference to the short-term cost of unsecured borrowing for the relevant class of litigant. The rate might differ depending on whether the borrower was classed as a first class borrower, an SME or a private individual. Historically, first class borrowers had generally recovered interest at base rate plus one per cent, unless that was unfair. SMEs and private individuals tended to recover interest at a higher rate to reflect the real cost of borrowing to that class of litigant.

The claimants here were of modest means who had brought personal injury actions for their own benefit. They needed to fund their claims, and they borrowed to finance their disbursements at what the defendants conceded was a reasonable interest rate for private individuals in their circumstances. Under cl.5 of the disbursement funding agreement, payment of the interest was contingent on the claim being successful and damages actually being received.

That did not mean that the arrangements were unreal or notional. The claimants had borrowed money from Hugh James, which had funded disbursements of over £787,500. The claimants won their claims

[1] *Jones v Secretary of State for Energy and Climate Change* [2013] EWHC 1023 (QB); [2013] 3 All E.R. 1014.

and recovered damages. Their interest liability had therefore crystallised. The Judge had therefore been entitled to make the order that she did as the relationship between the claimants and their solicitors was governed by the agreement and it gave rise to a real liability on the claimants as borrowers.

The appeal was dismissed.

Comment

This is a progressive judgment in defining a further opportunity for claimants to seek access to justice.

Where the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LAPSO") and the Jackson reforms have reduced the return for solicitors in cases funded by Conditional Fee Agreements, the funds available for large, disbursement heavy cases will have substantially reduced for many claimant solicitors.

Whilst before the implementation of LAPSO many solicitors were prepared to accept instructions for disbursement heavy cases, there has been concern about the viability of such cases post-April 2013 as a result of the cap on success fees, and whether the return merits the risks involved.

This judgment will be welcomed by claimants and their solicitors as it establishes that a mechanism can be put in place which increases the opportunity for solicitors to continue to take on challenging cases which require considerable disbursement outlay post-LAPSO.

Group litigation often requires substantial expert evidence. The costs of this and other disbursements can have a significant impact on the cash flow of many law firms. However, even in high value unitary cases or where there are complex liability arguments, law firms may have to fund significant disbursements which can have a detrimental effect on cash flow.

The provision of credit by a law firm to a claimant enables the risk vs return ratio to become more balanced through the provision of interest being payable on the credit. The significance of the judgment establishes that the interest claimants are liable to pay their lender (the law firm) is recoverable from the defendants in a successful case inter partes from the date the disbursement is incurred. This will result in such cases becoming more economical for some firms, increasing the available choice of solicitor for claimants, competitiveness within the market and, of course, access to justice.

Further benefits to claimants are highlighted in this judgment, noting that with the combined use of credit from law firms and ATE insurers, the risk to the lending law firm is lower than if a third party funder or high street bank funded the disbursements. This has been reflected in what has been deemed to be a reasonable rate of interest at four per cent.

The judgment further highlights that whilst the law firm may be providing credit, the indemnity principle prevails and it is the claimants who are liable not only for the disbursements incurred but the interest payable on the credit facility.

A word of caution should be raised, however. Should law firms consider adopting a model similar to this, there are wider considerations, such as complying the regulatory obligations concerning the provision of credit to consumers.

Practice point

- This is a very helpful decision to assist practitioners representing claimants in easing their cash flow, which can assist with the conduct of a case that may otherwise be stymied due to lack of funds.

Colin Ettinger

Haynes[1] v Department for Business Innovation and Skills

(QBD, Jay J., March 10, 2014, [2014] EWHC 643 (QB))

Civil procedure—personal injury—asbestos related diseases—costs between the parties—multi-party disputes—Pt 36 offers—action against several defendants—offer from one accepted and claims against others abandoned—division of costs

LT Costs; Costs between the parties; Multi-party disputes; Part 36 offers; Personal injury claims; Several liability

The claimant was the widow and personal representative of the estate of Mr Brian Haynes who died of lung cancer on March 12, 2009. Exposure to asbestos dust was a material cause of death. Upon investigation, 10 employers were discovered to have employed Mr Haynes, and proceedings were issued against all 10 of them. The Department for Business Innovation & Skills ("BIS") was the eighth defendant.

On June 11, 2012 those acting for the claimant made what they described as a Pt 36[2] offer to BIS to settle the claim in the sum of £18,000 plus costs. The total value of the claim against all 10 defendants was placed at £195,000, and that liability could only be several, not joint and several.

BIS accepted the Pt 36 offer to settle her claim against it for £18,000 plus standard costs. The claimant subsequently abandoned her claims against the other nine defendants, proceedings having been issued but never served. She then lodged a bill of costs amounting to £58,000. BIS argued successfully before a costs officer, and afterwards before the Costs Judge, that as its liability for the injury to the claimant's husband was several, rather than joint and several, that principle should apply to the costs it was to pay.

The widow appealed again submitting that under r.36.10(1) of the CPR,[3] where a Pt 36 offer was accepted, the claimant was entitled to "the costs of the proceedings", which would mean the costs against all 10 defendants. She also argued that it was arbitrary to divide the common costs by the number of defendants.

Mr Justice Jay held that the costs of the proceedings, within the meaning of r.36.10(1), meant the costs of the proceedings against whom the deemed order had been made. Any broader definition would achieve obvious injustice and violate the language of the rule as seen in its proper contextual setting.

The Judge also held that common costs fell into two categories: non-specific costs which would have been incurred in any event, regardless of the number of other defendants, and specific costs, which were, in principle, capable of identification and division.[4]

In this case, the Costs Judge had not treated the non-specific common costs as a separate category which the claimant was entitled to on a 100 per cent basis. The matter would be remitted to him to identify those non-specific common costs. As regards the specific common costs, whilst the Costs Judge's approach had been arbitrary, the claimant had failed to submit any evidence which would have enabled him to be more precise, and so it could not be concluded that his decision was perverse.

The appeal was allowed in part.

[1] Jean Mary Doris Haynes (Personal Representative of the Estate of Brian Haynes (Deceased).
[2] Civil Procedure Rules ("CPR") Pt 36.
[3] CPR r.36.10(1) states: "Subject to r.36.10A and to paragraphs (2) and (4)(a) of this rule, where a Part 36 offer is accepted within the relevant period the claimant will be entitled to the costs of the proceedings up to the date on which notice of acceptance was served on the offeror".
[4] *Dyson Technology Ltd v Strutt* [2007] EWHC 1756 (Ch); [2007] 4 Costs L.R. 597 applied.

Comment

The case illustrates the pitfalls for a claimant who brings a claim against multiple defendants, not least in relation to offers to settle and consequent costs issues if such an offer is accepted. It is yet another reminder of the need to comply with the rules as to form and content found in r.36.2 of the CPR as, if not, there is a real risk the opponent will contend, if it suits, the offer does not carry the "automatic" costs consequences whether this be on acceptance, under r.36.10 of the CPR, or on judgment, under r.36.14 of the CPR.

There is a view, as illustrated by the judgment in this case, that should any point on form not be taken at the time of the offer there will be a waiver. However, that is, at least arguably, inconsistent with the very clear statements by the Court of Appeal about the strict approach to the rules on form and content in which waiver really forms no part.[5]

Nevertheless, where the offeree does challenge the efficacy of an offer for the purposes of Pt 36, on the basis of form and content, it is obviously better to make that clear at the time to avoid any arguments about waiver (particularly when the offeror may later argue the offer did not comply as occurred.[6]

The case is also a reminder of the significance of acceptance of a Pt 36 offer within the relevant period as, under rr.36.10(1) and 44.9 of the CPR, this generates a deemed costs order in favour of the claimant, moreover a costs order which requires the defendant to pay all the costs assessed in accordance with the order. Whilst that does not prevent, on assessment, the paying party arguing costs have been unreasonably incurred, it does preclude the paying party from arguing, for example, costs should be limited to a particular issue, a particular period of time or even a particular percentage.[7]

However, the case illustrates that the position is not as straightforward when there are multiple defendants and the relevant offer is not made on behalf of all those defendants. The issue then becomes: what does the term "costs of the proceedings", which the relevant defendant will have to meet in full once assessed, mean? In such circumstances not all the costs are going to be "costs of the proceedings", which here Jay J. defined as meaning "the costs of proceeding against the defendant against whom the deemed order has been made".

The ruling on what "costs of proceedings" means is, perhaps, the most important ruling in the judgment as it confirms that where there is a deemed costs order in a case involving multiple defendants that order will not fix the defendant against whom the order is deemed to have been made with a liability for the costs of proceeding against other defendants, at least where that defendant does not purport to make the offer on behalf of other defendants as well.

In those circumstances it then becomes necessary to analyse how costs payable by the particular defendant, against whom the deemed costs order has been made, can be identified. That process involves a number of stages.

First, it is necessary to distinguish common, or generic, costs from those costs which clearly relate to a particular defendant:

- Costs relating specifically to the particular defendant against whom the order is deemed to have been made will, of course, be payable by that defendant.
- Costs which can be identified as relating to other defendants will not be payable by the defendant against whom the deemed costs order has been made.

Secondly, it is necessary to identify, within the common costs, two types of such costs:

[5] *PHI Group Ltd v Robert West Consulting Ltd* [2012] EWCA Civ 588; [2012] C.P. Rep. 37; [2012] B.L.R. 329 and *F&C Alternative Investments (Holdings) Ltd v Barthelemy (Costs)* [2012] EWCA Civ 843; [2013] 1 W.L.R. 548; [2012] 4 All E.R. 1096.
[6] For example as in *C v D* [2011] EWCA Civ 646; [2012] 1 W.L.R. 1962; [2012] 1 All E.R. 302.
[7] *Lahey v Pirelli Tyres Ltd* [2007] EWCA Civ 91; [2007] 1 W.L.R. 998; [2007] C.P. Rep. 21.

- **Non-specific common costs:**

  These are costs which would have been incurred in any event regardless of the number of other defendants and, accordingly, will be paid in full by the defendant against whom the deemed costs order has been made.

- **Specific common costs:**

  These costs should be divided, though not apportioned, with the appropriate division only payable by the defendant against whom the deemed costs order has been made. When making a division of specific common costs the court should not, unless the evidence presented is insufficient to do otherwise or it would be disproportionate to do so, adopt a rough and ready approach and divide on a purely mathematical basis, for example according to the number of defendants. Rather the court should adopt an evidence-based approach which will involve a careful review of relevant files.

This approach to the division of specific common costs between defendants is precisely the same as that which would be adopted when dealing with common costs as between claim and counterclaim. Indeed the leading authority on this point, effectively applied by the Judge in this case, deals with that very situation.[8] In that case the main claim failed, so the defendant obtained an order for costs against the claimant, but the counterclaim also failed, so the claimant obtained an order for costs on that counterclaim against the defendant. Drawing a distinction between the "apportionment" and the "division" of costs Viscount Haldane held:

> "… (the Taxing Master) takes an item, a single fee on the plaintiff's brief for example, and splits it into two notional fees, the one attributable to the claim, the other to the counterclaim. This is not an apportioning, in which the payment is treated as a single item and the question is to what it is attributable. It is in reality a notional division of what on the face only of it is one item."

All of this reflects the difficulties of dealing with multiple claims, whether a claim and counterclaim, in the same proceedings or where there are multiple defendants. There are many reasons why a claimant should try to avoid having more than a single defendant, unless it is clear those defendants blame each other whether directly or indirectly, as not only does the action become more complicated, and there is a risk of the defendants aligning against the claimant, but real difficulties can arise in the event of Pt 36 offers and/or any costs orders which are not specific about how these should apply as between defendants.

So what about solutions? Where there are multiple defendants the claimant can take one or more steps to guard against difficulties in the recovery of costs, whether because those costs are not held to be common costs or are common costs but of the specific variety and subject to division:

- If the claimant makes a Pt 36 offer that, in appropriate circumstances, should be made to all the defendants. Where that is not appropriate, mindful of the costs issues that can arise where the claim is settled against only one of a number of defendants, the claimant may wish to at least consider whether an offer outside Pt 36 should be made which deals specifically with the proposed costs consequences. That is because the courts generally take the view that if a party invokes Part 36 that party is taken to appreciate all the consequences, including costs consequences, of the rule. For example, in *Onay v Brown*[9] Carnwath L.J. observed:

[8] *Medway Oil and Storage Co Ltd v Continental Contractors Ltd* [1929] A.C. 88; [1997] Costs L.R. (Core Vol.) 5.
[9] *Onay v Brown* [2009] EWCA Civ 775; [2010] 1 Costs L.R. 29.

> "The moral of this story is that someone who writes a letter headed 'part 36 offer', and which is stated as 'intended to have the consequences of that rule', should make sure that he knows what those consequences are."

- The claimant should ensure, or seek appropriate clarification, that any Pt 36 offers are made on behalf of all defendants (in effect leaving the defendants to sort out between themselves their contribution to damages and costs).
- Rather than relying on a deemed costs order under Pt 36, or a general order simply providing for payment of costs, the claimant may wish to ensure there is express provision as to what will happen with costs on settlement of the claim. That might be by confirming, expressly, the relevant defendant is to pay costs including the costs of proceeding against other defendants and excluding any division (so at least all specific and as well as non-specific common costs can be recovered) or identifying, when dealing with costs, any specific costs excluded from the general terms of the costs order.
- By, ideally, an express provision, the costs of proceeding against all defendants are to be paid by a particular defendant, or defendants, or a joint costs order against all defendants.

A further difficulty for the claimant under Pt 36, where there are multiple defendants, is the risk of having to discontinue against remaining defendants where the claim as a whole is effectively settled on acceptance of a Pt 36 offer which has not been made by on or behalf of all the defendants. Under Pt 38.6(1) discontinuing generates a deemed costs order against the claimant. This may, to some extent, be moderated if the claim is subject to qualified one-way costs shifting ("QOCS") but is still an important factor to bear in mind.

If a claimant wishes to recover costs from a particular defendant it will be essential to have available, at the detailed assessment, relevant files so that the court can determine which category costs fall into and hence the extent these can be recovered from a particular defendant. If that is not done there is the risk of the court adopting a broad brush approach which, although generally not appropriate, is, in appropriate circumstances, permissible as the judgment in this case confirms.

The same considerations can apply in other circumstances, notably when there are both claims and counterclaims in the same proceedings. Once again, if a party does not want the court to approach costs on the basis identified in *Medway Oil* it will be necessary to reach agreement, reflected in a final order, or seek an appropriate order from the court. This can be a particular issue in claims arising out of road traffic accidents where each party is partly to blame and therefore responsible, to some extent, for the injuries that negligence has caused the other party. In those circumstances each may wish to recover, in full, assessed costs on the claim or counterclaim respectively, whilst accepting the corresponding obligation to meet the costs of the other party (which are likely to be covered, in such claims, by the paying party's insurers).

Practice points

- The rules on form and content of Pt 36 offers are crucial.
- The deemed costs provisions under Pt 36 can be very effective but may also be a trap, so care is always necessary before placing reliance on the terms of Pt 36.
- Claimants should try to avoid, wherever possible, multiple defendants.
- If there are multiple defendants, great care is necessary when making or receiving Pt 36 offers, at least where those are not made to or received from, or on behalf of, all defendants.
- Remember the need to reach express agreement, where possible, on costs in cases involving multiple defendants.

- Remember the same considerations apply where there are claims and counterclaims.

John McQuater

Cox v Ergo Versicherung Ag (formerly Victoria)

(SC, Lord Neuberger (President), Lord Mance J.S.C., Lord Sumption J.S.C., Lord Toulson J.S.C., Lord Hodge J.S.C., April 2, 2014, [2014] UKSC 22)

Civil procedure—damages—applicable law—dependency claims—fatal accident claims—maintenance—measure of damages—mitigation—territorial application—Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters art.11—Fatal Accidents Act 1976—Regulation 864/2007 art.15(c)—Private International Law (Miscellaneous Provisions) Act 1995

Applicable law; Dependency claims; Fatal accident claims; Maintenance; Measure of damages; Road traffic accidents

On May 21, 2004, Major Christopher Cox, an officer serving with HM Forces in Germany, was riding his bicycle on the verge of a road near his base when a car left the road and hit him, causing injuries from which he died. The driver was Mr Gunther Kretschmer, a German national resident and domiciled in Germany. He was insured by the defendant, a German insurance company, under a contract governed by German law.

Major Cox's widow Katerina was living with him in Germany at the time of the accident. After the accident, she returned to England where she has at all relevant times been domiciled. Since then, she had entered into a new relationship and had had two children with her new partner.

It was common ground that the liabilities of Mr Kretschmer and his insurer were governed by German law. It was also common ground that under para.3(1) of the Pflichtversicherungsgesetz,[1] Mrs Cox had a direct right of action against Mr Kretschmer's insurer for such loss as she would have been entitled to recover from him. That being so, the combined effect of arts 9 and 11 of Regulation 44/2001[2] was that she was entitled to sue the insurer in the courts of the member state where she is domiciled. She had availed herself of that right by suing the insurers in England for bereavement and loss of dependency.

Liability was not in dispute, but there were a number of issues relating to damages. Their resolution depended on whether they were governed by German or English law, and if by English law, whether by the provisions of the Fatal Accidents Act 1976 ("the 1976 Act") or on some other basis. Mrs Cox relied on both English and German law. The question of which law applied was ordered to be tried as a preliminary issue, together with other issues which were no longer in dispute.

The Supreme Court held that the 1976 Act provided for a measure of damages substantially more favourable to the widow than the corresponding provisions of the German Burgerliches Gezetzbuch ("BGB"). In particular, damages under the BGB took account of rights to maintenance from subsequent relationships, whereas s.3(3) of the 1976 Act excluded remarriage as a relevant consideration. In addition, the 1976 Act awarded a solatium for bereavement but the BGB did not, although a widow might be entitled to compensation for her own pain and suffering if it went beyond normal grief and amounted to a psychological disturbance comparable to physical injury.

[1] The law on compulsory insurance for motor vehicle owners.
[2] Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1.

The death of Major Cox occurred before Regulation 864/2007[3] came into force, and any cause of action arising out of it was governed by ss.9–15 of the Private International Law (Miscellaneous Provisions) Act 1995 ("PILA"),[4] which partially codified the choice of law in tort. The combined effect of ss.9, 11 and 12 of the PILA was that issues in respect of personal injury were to be determined according to the law of the place where the victim suffered the injury, unless that law was displaced on the ground that the tort had substantially more significant connection with England.

Those rules were subject to the proviso in s.14(3)(b)[5] of the PILA which preserved the distinction between substance and procedure. Questions of procedure were governed by the law of the forum and questions of substance were governed by the lex causae.

The relevant German damages rules were substantive because they determined the scope of the liability. English law would regard it in the same light: questions of causation were substantive. Such questions included questions of mitigation because they determined the extent of the loss for which the defendant ought to be held liable.[6] It was not necessary to decide whether the rules under 1976 Act were procedural or substantive as they did not apply under their own terms. They did not lay down general rules of English law on the assessment of damages, but only rules applicable to actions under the 1976 Act itself. Therefore, an action to enforce a liability whose applicable substantive law was German law was not an action under the Act to which the Act could apply. The German rules on damages applied.

The widow was entitled to damages for the loss of her legal right of maintenance from Major Cox. Credit had to be given for maintenance from her subsequent partner since the birth of their child, but credit did not have to be given for maintenance received from her partner before they had a child, when he was under no legal obligation to maintain her.

It was also necessary to determine whether the choice of law arrived at in accordance with s.11 of the PILA was displaced by some mandatory rule of the forum. They concluded that there was nothing in the language of the 1976 Act to suggest that its provisions were intended to apply irrespective of the choice of law derived from ordinary principles of private international law. It was possible for such an intention to be implied if the purpose of the legislation could not be achieved unless it had extra-territorial effect, or if the legislation gave effect to a policy so significant that Parliament had to be assumed to have intended it to apply to anyone resorting to an English court.

However, the question of extra-territorial application could not have been an issue at the time the 1976 Act was passed. Further, the whole purpose of s.1 of the 1976 Act was to correct an anomaly in the English law of tort. Foreign laws were unlikely to exhibit the same anomaly. There was no reason why Parliament should have intended the 1976 Act to apply to foreign fatal accidents with no connection to England or English law. It did not have extra-territorial effect.

Lord Mance noted that it made no difference to the outcome of the appeal whether the provisions of ss.3 and 4 of the 1976 Act were substantive or procedural. If substantive, they were irrelevant to a tort subject to German substantive law. If procedural, they could not expand a defendant's liability under the substantive principles of the relevant governing law.

The widow's appeal was dismissed.

Comment

The simple message from this case is that in any case involving a fatal accident where foreign law is to be applied by the court, the 1976 Act will not apply because it is substantive law and not procedural.

[3] Regulation 864/2007 on the law applicable to non-contractual obligations [2007] OJ L199/40 ("Rome II").
[4] Part III choice of law in tort and delict.
[5] *Transitional provision and savings.*
[6] *Harding v Wealands* [2006] UKHL 32; [2007] 2 A.C. 1; [2006] 3 W.L.R. 83, *Boys v Chaplin* [1971] A.C. 356; [1969] 3 W.L.R. 322; [1969] 2 All E.R. 1085 and *Kuwait Airways Corp v Iraqi Airways Co (No.6)* [2002] UKHL 19; [2002] 2 A.C. 883; [2002] 2 W.L.R. 1353 considered.

Germany was the country in which the tragic accident occurred so, under the general rule[7] in the PILA, German law was the applicable law for liability. In real terms it is actually the applicable law for all of the substantive issues. This would mean that the heads of damages would be determined by German law. The claimant argued though that the assessment was under the law of England and Wales as a matter of procedure.

In 2001 the European Union set a target for its member states of reducing road related fatal accidents by 50 per cent in 10 years. Many countries have not met this target although there has been significant progress. Nevertheless there were 14,500 deaths in 2012 and road accidents remain the largest cause of death among youths and young adults.[8] The cost is large for insurers and the increasing internationalisation of claims is a challenge for them. There remain remarkable differences of approach in the various jurisdictions. The same *Gen Re* paper makes the point in the difference in the approach to fatal damages:

> "… an enormous difference between two compensation systems can be seen immediately: on the one side, Italy and Spain, where compensation for non-economic damage is the predominant claim item (differentiated between economic and non-economic damages). This category plays only a secondary role in the other countries (UK and France) or is lacking entirely (Germany). On the other hand, consideration must be given to the fact that survivors in Spain also receive a state annuity without inception of any recovery claim against the tortfeasor or the liability insurer. Moreover, these amounts have no bearing on the calculation of economic damage claims.
>
> The methods for calculating economic damages are similar in all systems — with the exception of Spain, where a statutory table, the so-called Baremo containing the individual claim compensation items, has been in use for some years. The differences in the calculation are due to peculiarities of the respective national laws, such as the use of mortality tables (very up to date in Germany and France, somewhat outdated in Italy) as well as the application of different criteria derived from case law, e.g. the calculation of maintenance needs for dependent survivors.
>
> In Germany a portion of the total income which would be necessary in any case for the family's daily needs (so-called fixed costs) is deducted prior to calculating the survivors' maintenance. This amount is then added to the claim items due to the spouse and children. Compared to a proportional allocation of total income or a lump sum approach in Spain …, this leads to a needs-oriented and more realistic calculation of the maintenance claim.
>
> The main difference between the compensation systems is found in the area of non- economic damages. Such a difference is particularly apparent in Italy, where the measurement for pain and suffering is based on tables, prepared by the regional courts, especially the Milan Regional Court. This approach has developed into its own and, in a manner, very distinct from the rest of Europe, especially with regard to the value of the prescribed payments."

Rome II, which did not apply to this cause of action as it post-dated the accident, was to harmonise the laws of the European member states in non-contractual claims. Liked or not, and its application remains a mystery in some areas, it has gone some way to standardising the approach to damages in the European courts.

The difference in a fatal case between the English and German law is considerable and had a substantial effect on the dependency claim because under the law of England and Wales dependency is fixed at the moment of death. As a result re-marriage of the widow(er) is ignored for the purpose of the damages calculation. That would seem to accord with the fundamental principle of compensation, namely putting

[7] PILA s.11(1).

[8] Lorenzo Vismara, "A Comparison of Compensation for Personal Injury Claims in Europe" (January 2014) Gen Re, *http://www.genre.com/knowledge/publications/claimsfocus-pc-201309-en.html*.

the victim back into the position they would have been had the tortious act not occurred. Remarriage would not have been an issue.

However in German law where remarriage is accounted for, a greater emphasis is placed on the eventual and actual position, but curiously Lord Sumption thought this was proper restitution:

> "German law on the damages recoverable for a fatal accident corresponds to the general principles applied at common law to the recoverability of damages in tort, which require the claimant to be put into a financial position equivalent to that which she would have been in but for the wrong."[9]

The claimant argued that a dependency claim could only be brought under the 1976 Act and relying on the established case of *Harding*[10] the assessment of damages was a procedural matter for the law of the country where the court was situated. This meant the court had to apply the 1976 Act even though the applicable law otherwise was German.

The Court of Appeal had overturned the first instance decision that German law should decide the damages; effectively reaffirming its views in *Harding*. Nevertheless, in a majority decision they still barred the use of the 1976 Act and ruled that the damages should be assessed, as a matter of English law, but based on s.844 of the BGB. This was akin to the common law assessment of damages but without the 1976 Act anomaly of ignoring the true position at the time of assessment.

The Supreme Court Judges ruled that the 1976 Act did not have extra-territorial effect and was not a mandatory rule under the law of England and Wales to be followed and applied in assessing damages in foreign fatal claims brought in the home courts. In giving judgment there was criticism of *Harding* and its delineation of what was substantive law and what was procedural.

This case pre-dated Rome II but it seems clear that this makes no difference and the 1976 Act cannot be applied in a foreign law claim. The court will consider the heads of loss identified in the relevant foreign jurisdiction and how they would have been quantified there.[11]

Practice points

- Foreign law fatal accident claims must ignore the Fatal Accident Act 1976.
- The court will award damages on the applicable law heads of loss and by reference to the foreign court's quantification.
- Foreign law advice is essential when calculating and prosecuting the claim.

Mark Harvey

[9] *Cox* [2014] UKSC 22 at [6].
[10] *Cox* [2014] UKSC 22.
[11] As to which see *Wall v Mutuelle de Poitiers Assurances* [2014] EWCA Civ 138; [2014] C.P. Rep. 23; [2014] R.T.R. 17.

Cumulative Index

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