JOURNAL OF PERSONAL INJURY LAW

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# JOURNAL OF PERSONAL INJURY LAW

Issue 4 2014

## Articles



## Case and Comment



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- The *Journal of Personal Injury Law* provides
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  - Analysis of developments by experienced practitioners.
  - Practical guidance on procedure.
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- The Editor welcomes articles on any personal injury topic of current interest (we cannot of course guarantee that they will be published). Please submit articles to:

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# Journal of Personal Injury Law

**December 2014**

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# Editorial

Welcome to the December 2014 edition of JPIL.

The "myth" or perception of a compensation culture is still the preferred weapon of choice of insurers seeking to further restrict the rights of those injured through no fault of their own. Unfortunately their aggressive anti-claimant message continues to receive a sympathetic hearing.

In this edition we examine in detail the influence insurers have on the tort system and the tactics they use to lobby and influence the Government, the courts and the media and to control the civil compensation process.

Professor Richard Lewis, the leading academic in this field from Cardiff University, reviews the "compensation culture" and examines the most recent developments and their influence on levels of claims brought and damages recovered.

In an extract from his new book *The Importance of Being Ethical*, APIL President John Spencer looks at the unethical personal injury sector and in particular at the behaviour of insurers.

In a follow up to his detailed analysis of the Medical Innovations (or "Saatchi") Bill in the September edition of the Journal, Nigel Poole QC brings us up to date with the fourth version of the draft Bill and the various proposed amendments thereto.

Also in our liability section, cycling lawyer Paul Kitson provides a comparative overview of the issues relating to cycling liability in the UK and Europe.

On the quantum front, Edward Tomlinson looks at the present state of play regarding the Lord Chancellor's prolonged review of the discount rate. He looks at the options available to the Lord Chancellor and the implications of each one, bearing in mind the significantly different economic conditions that claimants today are faced with.

As ever, I am indebted 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*

# Compensation Culture Reviewed: Incentives to Claim and Damages Levels[1]

## Richard Lewis[*]

Measure of damages; Personal injury claims

*This article reviews some recent developments which have affected the debate concerning "compensation culture". It focuses upon the number of claims and the cost of claims, looking especially at the level of damages. The role of insurers and the changing nature of personal injury practice are also discussed. The conclusion is that issues arising from the debate will continue for some time to come.*

This article considers some of the problems, real or imagined, that have given rise to the usually pejorative term "compensation culture".[2] In focusing upon personal injury litigation, it looks first at the rate at which claims have increased. What might be the reasons for a greater propensity to sue following certain types of injury? Attention then turns to a topic which has been less often examined: the rising cost of each claim. Why are insurers and health authorities, among others, having to pay out more for each successful claim? Overall, the focus is upon the allegation that society has had to bear an increased burden as a result of the rising cost of personal injury litigation.

In looking at the propensity to claim, recent developments with regard to the procedures adopted by insurers, claims management companies and claimant law firms are examined to illustrate how these institutions have influenced whether an action is brought. The rapidly changing structure of the legal profession conducting personal injury claims is especially highlighted.

In looking at costs, the article summarises the key changes in tort damages that have taken place in recent years. Reforms have been made not only of the method by which damages are computed, but also of the form in which damages are paid: periodical payments are now common in cases involving serious injury. Damages for pain and suffering have been raised substantially without appreciating the full policy implications, whilst damages for financial loss have had to be revised to match the realities of the financial world. These various changes are placed in a wider context which sees the increasing cost of claims as an inevitable result of closer adherence to the principle of restoring the claimant to the financial position that was enjoyed before the injury took place. Following proposals to reinforce that principle still further, it is concluded that there will be concern about compensation culture for some time to come.

[1] This article was developed from a presentation made at the *Conference on Compensation Culture and Comparative Tort Law Reform in the 21st Century* which was held in Ireland at the University of Limerick in May 2014. For their comments I wish to thank the participants at that conference and Kevin Williams.

[*] Richard Lewis is Professor of Law at Cardiff University. He can be contacted by email at LewisRK@cardiff.ac.uk.

[2] For academic discussion of compensation culture generally see R. Lewis and A. Morris, "Tort Law Culture: Image and Reality" (2012) 39 J. Law & Society 562; J. Ilan, "The Commodification of Compensation: Personal Injury Claims in an Age of Consumption" (2011) 20 Social & Legal Studies 39; J. Hand, "The Compensation Culture: Cliché or Cause for Concern?" (2010) 37 J. Law & Society 569; A. Morris, "Spiralling or Stabilising? The Compensation Culture and our Propensity to Claim Damages for Personal Injury" (2007) 70 Modern Law Rev 349; R. Lewis, A. Morris and K. Oliphant, "Tort Personal Injury Statistics: Is There a Compensation Culture in the UK?" (2006) 14 Torts Law J. 158 and [2006] JPIL 87; K. Williams, "State of Fear: Britain's "Compensation Culture" Reviewed" (2005) 25 Legal Studies 499; R. Mullender, "Negligence Law and Blame Culture: A Critical Response to a Possible Problem" (2006) 22 *Professional Negligence* 2; D. Lloyd, "The Compensation Culture: A New Legal Paternalism?" in E. Lee (ed), *Compensation Crazy: Do We Blame and Claim Too Much?* (London: Hoder and Stoughton, 2002); F. Furedi, *Courting Mistrust: The Hidden Growth of the Culture of Litigation in Britain* (Centre for Policy Studies,1999).

## Compensation culture disease: The dangers of new diagnosis

As the medical profession is aware, merely giving a name to an abnormal condition, whether physical or mental, can be a very significant event. It can help patients accept and come to terms with their illness. However, official recognition may also encourage doctors, patients and others to attribute symptoms too readily to the newly recognised condition. For example, it may be that children are prematurely labelled as suffering from attention deficit hyperactive disorder or dyslexia. The naming process makes some individuals too prepared to place the illness or disability into the new category. Examples especially relevant to personal injury litigation include whiplash injury and various states of mental upset, including post-traumatic stress disorder.[3] As a result of an accident, claimants may be presumed to be suffering from these conditions without there always being sufficient foundation for this belief. The condition, and the risk of developing it, have both been found too easily. This constitutes one of many "compensation culture" concerns.

If we examine the term "compensation culture" itself we can make a similar analysis. The phrase has a very wide range of meanings. It has come to be used as a broad catch-all term to encompass a variety of concerns, including many which are based upon misinformation about the litigation system and prejudice about lawyers.[4] At its heart, as we shall see, there is indeed evidence which supports the need for careful monitoring of what actually happens in our tort system. However, the identification of potential and actual problems in that system has enabled all sorts of accusations to be levelled, many of them without empirical foundation. The ills have been too easily laid at the door of exploitative lawyers, fraudulent claimants or unscrupulous claims companies. One of those ills is that an increased burden has been placed upon society from the rising cost of personal injury litigation and this is the meaning associated with "compensation culture" that will be examined in this article. The following analysis of the overall cost is divided into two sections: the number of claims is examined first, and this is followed by an evaluation of the cost of the individual claim.

## (A) The number of claims

### *Trends in the rate of claiming*

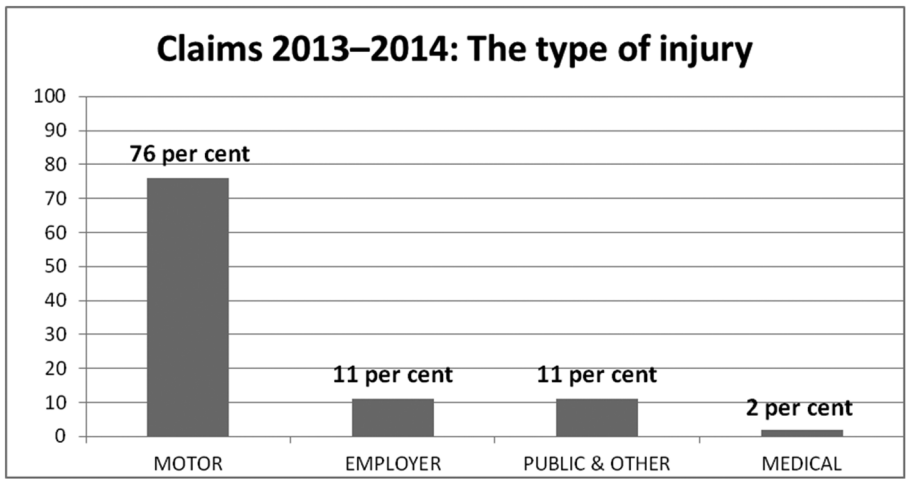
A claim in tort is now made each year by about one person in every 60 in the UK. In each of the last two years the total number of claims has exceeded one million. As revealed in the table below, which is derived from the official statistics,[5] road and work accidents predominate. They loom large over the practice of tort even though they constitute, at best, only about a half of all accidents.[6]

[3] There is a marked difference in the practical importance of these two injuries. Whereas PTSD is a factor in less than 5,000 claims a year, whiplash accounts for about 480,000 claims and neck injury is a factor in 87 per cent of all motor claims. See the *Cost of Motor Insurance: Whiplash: Further Government Response to the Committee's Fourth Report of Session 2013–14*, Eleventh Special Report (Transport Committee, 2013–2014) HC 902, 4 and Annex B. Despite its lesser importance, mental injury receives extensive discussion in tort textbooks whereas the effects of whiplash claims upon various aspects of the system are hardly considered.

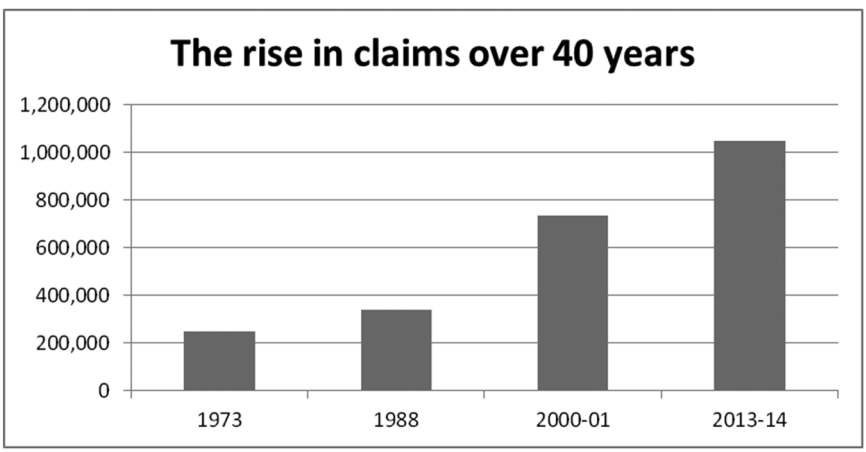
[4] W. Haltom and M. McCann, *Distorting the Law: Politics, Media, and the Litigation Crisis* (Chicago: University of Chicago Press, 2004); P. Almond, "The Dangers of Hanging Baskets: 'Regulatory Myths' and Media Representations of Health and Safety Regulations" (2009) 36 J. Law & Society 352.

[5] In 1989 the Compensation Recovery Unit was set up by Government in order to recover from damages certain social security benefits that the claimant receives as a result of his injury. Reliable data has been generated on the number of claims, no matter whether successful or unsuccessful, and irrespective of whether the claim was settled or disposed of by a court hearing. See Department for Work and Pensions, *Compensation Recovery Unit — Performance Statisticshttp://www.dwp.gov.uk/other-specialists/compensation-recovery-unit/performance-and-statistics/performance-statistics*. The reliability of the figures is discussed in R. Lewis, A. Morris and K. Oliphant, "Tort Personal Injury Statistics: Is There a Compensation Culture in the UK?" For more detail on the current figures see R. Lewis and A. Morris, "Tort Law Culture: Image and Reality", fn.2.

[6] Lord Pearson, *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (1978) cmnd 7054, Vol.2, table 57. In Australia road and work accidents are less than a fifth of the total. H. Luntz and D. Hambly, *Torts: Cases and Commentary*, 5th edn (Sydney: LexisNexis, 2002), p.4.




Whilst historical data are in short supply, those which are available support the view that over the long term there has been a very substantial increase in claims. They appear to have risen four-fold since the 1970s. In 1973 the Pearson Commission estimated that there were about 250,000 claims.[7] In 1988 it was thought that claims had grown to around 340,000.[8] This figure then doubled by the new millennium. Now claims are a third more than they were at the start of the millennium, the figure of one million being exceeded in 2012, and it has continued at that level ever since.[9]



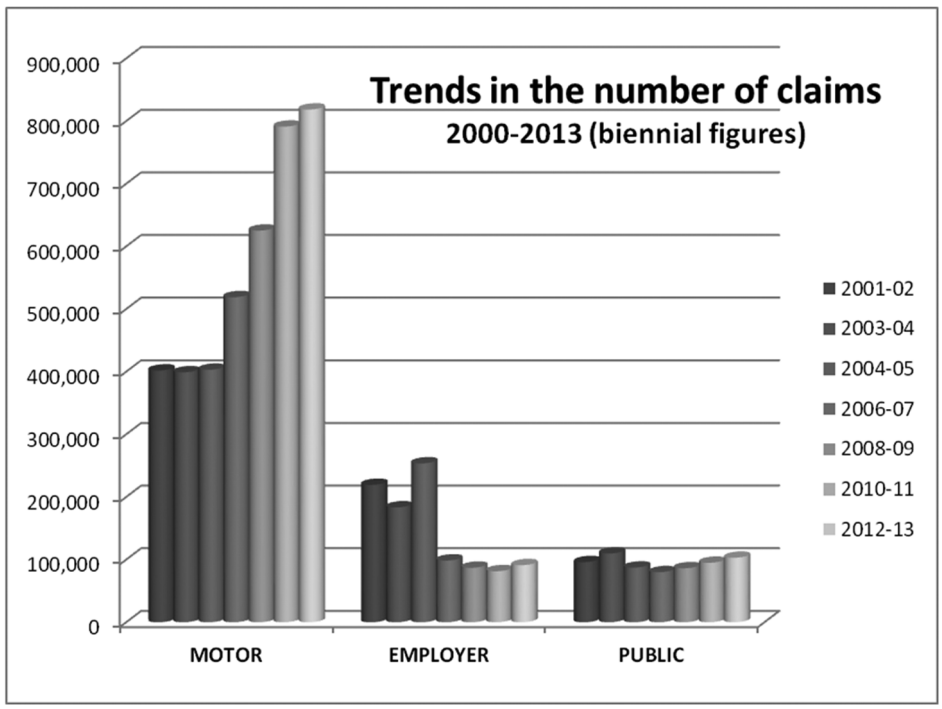

This rising trend in claims has not been a consistent one. Indeed the total number of claims actually fell slightly between 1998 and 2006 although it has risen in each year since. However, overall claims figures disguise major changes which have taken place in relation to particular kinds of injuries. These are revealed in the following table.[10]

[7] Lord Pearson, *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (1978) cmnd 7054, Vol.2, para.59.

[8] Lord Chancellor's Department, *Report of the Review Body on Civil Justice* (HMSO, 1988) Cmnd.394) para.391. This estimate is given with no indication of the facts upon which it is based and seems not to be derived from the research from Inbucon Management Consultants, *Civil Justice Review: Study of Personal Injury Litigation* (Lord Chancellor's Department, 1986).

[9] See the Compensation Recovery Unit figures, above fn.5.

[10] The figures have been compiled by the author using the annual statistics published by the Compensation Recovery Unit, above fn.5.




As can be seen, public liability claims in recent years have remained fairly constant, hovering around 100,000 a year. By contrast, between 2000 and 2007 the number of employers' liability claims fluctuated considerably, reaching a peak of 291,000 in 2004. This was largely due to the creation of temporary special schemes of compensation for coalmining diseases.[11] These schemes closed in 2004 and since then the annual number of employers' liability claims has fallen by almost two thirds to around 100,000. Although in the last four years claims have increased by a third, there are still fewer today than there were in 1973. They have declined in relative importance to such an extent that they now account for only 11 per cent of all claims, whereas in 1973 they represented 45 per cent.[12]

In stark contrast to the other types of claim, there has been both a long-term and short-term increase in the number of road traffic accident ("RTA") claims involving personal injury. Between 2000 and 2004 such claims actually fell, but since 2004 there has been an increase every year except for the last two with the result that the total over the last 10 years has doubled to 772,000. This increase is largely responsible for the long-term rise in the total of all personal injury claims. In 1973 RTAs constituted 41 per cent of all personal injury claims. By 2001 this had increased to 54 per cent, and by 2014 RTAs constituted 76 per cent of all claims. A notable feature has been the growth of claims involving whiplash injuries which

[11] The claims of miners in respect of, first, respiratory disease, and secondly, the use of vibrating tools led to settlement schemes which were called "the biggest personal injury schemes in British legal history and possibly the world." From 1999–2004 about 760,000 claims were registered. Department of Trade and Industry, *Coal Health Claimshttp://www.dti.gov.uk/coalhealth/01.htm* [Accessed October 24, 2014].

[12] Only one in seven workers suffering disease or injury make a claim according to the Trades Union Council and the Association of Personal Injury Lawyers *Compensation Myth* (2014).

now constitute well over half of all claims made.[13] Supposedly, by 2004 the UK had substantially more whiplash cases than any other European country and since then the number of claims has doubled.[14]

This rapid expansion in the overall number of claims can be explained by a combination of factors that relate, first, to the institutions which play a leading part in personal injury practice, and secondly, to the individual that makes the claim. The following account does not seek to deal with these factors in detail, but does highlight some of the more recent developments.

## Institutional and personal factors encouraging claims

Our propensity to claim is very much affected by the institutions involved in personal injury practice. For example, the important role of trade unions in encouraging and facilitating claims for work accidents and diseases has long been recognised.[15] The regular referral of trade union-assisted claims to particular law firms led to the first specialised personal injury representation for injured claimants. This made a considerable difference to whether a claim was brought and for how much it was settled. Today around 6.5 million employees in the UK are trade union members, constituting 26 per cent of the workforce.[16] They enjoy free access to lawyers to enable them to bring a tort claim. Three other institutions which also affect the propensity to claim are discussed below. These are liability insurers, claims management companies and claimant law firms.

### *1. Liability insurers*

In recent years a fact which has always been well known to practitioners has begun to attract more attention from academics: it is increasingly appreciated that insurance companies are fundamental to tort and the operation of the personal injury system.[17] They are its "lifeblood." What they do very much affects whether a claim is made, how it is processed and the amount of damages gained. Liability insurance is not merely an ancillary device to protect the insured, but is the "primary medium for the payment of compensation, and tort law [is] a subsidiary part of the process".[18]

Although the great majority of claims are brought against defendants who are individual people, they almost all are insured. In nine out of 10 cases the real defendants are insurance companies, with the remainder comprising large self-insured organisations or public bodies such as local authorities.[19] A handful of insurers dominate the market so that in motor claims four companies only are responsible for over half the premiums collected.[20] Insurers are the paymasters of the tort system being responsible for 94 per cent

[13] There were 480,000 whiplash claims in 2012–2013 constituting 58 per cent of all motor personal injury claims. However, the increase in motor personal injury claims has also been driven by claims with a description of "neck or back" injuries. Over the last five years, these claims have almost trebled to around 270,000. Claims which would have previously been labelled as "whiplash" are now instead being labelled as "back or neck" injuries. This means that neck injuries which include whiplash account for 87 per cent of all road traffic claims. Transport Committee, *Cost of Motor Insurance: Whiplash: Further Government Response to the Committee's Fourth Report of Session 2013–14*, Eleventh Special Report (2013–2014) HC 902, p.4.

[14] European Insurance and Reinsurance Federation (CEA), *Minor Cervical Trauma Claims* (2004), p.4. In its response to the Ministry of Justice Consultation CP17/2012, APIL emphasised the European data is unreliable and outdated, and in its response the Law Society similarly doubts the insurers' figures. For more detail see K. Oliphant, "The Whiplash Capital of Europe? European Perspectives on Compensation Culture", paper presented at the conference, above fn.1 and forthcoming article.

[15] G. Latta and R. Lewis, "Trade Union Legal Services" (1974) 12 British J. Ind Rel 56. For an account of the emergence of the former leading trade union law firm see S. Allen, *Thompsons: A Personal History of the Firm and its Founder* (Merlin Press, 2012).

[16] Department for Business, Innovation and Skills, *Trade Union Membership 2012: Statistical Bulletin* There are now only half the number of trade union members that there were when membership was at its peak in 1979.

[17] R. Merkin and J. Steele, *Insurance and the Law of Obligations* (Oxford: OUP, 2013), R. Lewis, "Insurance and the Tort System" (2005) 25 *Legal Studies* 85, R. Lewis, "Insurers and Personal Injury Litigation: Acknowledging 'The Elephant in the Living Room'" [2005] J.P.I.L. 1.

[18] P. Cane, *Atiyah's Accidents, Compensation and the Law*, 6th edn (Cambridge: Cambridge University Press, 1999), p.191.

[19] Even where local authorities fund damages awards directly, they may still employ private insurance company personnel to handle the claims made against them. S. Halliday, J. Ilan and C. Scott, "Street-Level Tort Law: The Bureaucratic Justice of Liability Decision-Making" (2012) 75 Modern Law Rev 347 at 356.

[20] Based on market share in 2012 these were Direct Line, Admiral, Aviva and AXA. Evidence of Thompsons solicitors to House of Commons Transport Committee, *Driving Premiums Down: Fraud and the Cost of Motor Insurance*, First Report of Session 2014–2015 (2014), HC 285.

of tort compensation for personal injury.[21] They fund not only the damages award itself but also most of the administrative and legal costs of the system. They provide legal representation not only for most defendants but also many claimants. The reason for this lies in the rapid expansion in recent years of before-the-event ("BTE") insurance. This form of legal expenses insurance covers almost three in five adults.[22]

The influence of insurers inevitably permeates the system. Intuitively it might be expected that, out of self-interest, insurers would act as the system's gatekeepers and policemen. This might involve them discouraging certain claims being made in the first place, carefully examining those that are brought and paying up only when evidence of legal liability is clear. However, the reality has been far from this. In recent years insurers have actually encouraged claims in a number of ways and they have made payments, albeit usually of low amounts, very readily.

An insurer's desire to defend a case has always had to be tempered by cost considerations. A heroic defence denying that a driver has been negligent in a marginal case may prove not only to be a risky but also a very costly tactic. This is especially the case where the damages claimed are small. Legal costs, then, can easily exceed the sum being claimed.[23] This danger is present in the majority of cases because the average payment of damages is less than £5,000.[24] As a result, it is unusual for insurers to contest liability: one study of insurers' files revealed that they "contained remarkably little discussion of liability," finding it initially denied in only 20 per cent of cases.[25] In fact claimants succeed in more than nine out of 10 cases.[26] Because insurers make some payment in this great majority of cases, in effect, they encourage claims to be made.

Insurers also encourage claims by providing BTE insurance in motor and home policies to enable claimants to have ready access to a lawyer. Not only do insurers profit from this by including an additional cost in the motor premium charged, but they also used to receive a referral fee from solicitors for each personal injury case they forwarded to their associated law firm. Referrals earned insurers about £700 per case[27] and constituted a substantial income. For example, Admiral insurance company received over £18 million in referrals in 2012, being about £6 for each vehicle it insured and constituting about 6 per cent of its profit.[28] A related practice of insurers was to collect information about all potential claimants in an accident and again sell those details to law firms. The result was the development of an ultimately flawed business practice: profit was sought from these individual cases but in doing so a more febrile claims atmosphere resulted. Insurers in general eventually suffered.[29]

Gradually insurers became increasingly concerned about the problems which they had in part created. These included not only the rising number of claims but also the increasing legal costs to which they

[21] Lord Pearson, *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (1978) cmnd 7054, Vol.2, para.509.

[22] R. Lewis, "Litigation Costs and Before-The-Event Insurance: The Key to Access to Justice?" (2011) 74 Modern Law Rev 272. FWD Group, *The Market for "BTE" Legal Expenses Insurance* (2007) para.3.3.

[23] Lord Justice Jackson found evidence of disproportionately high costs in R. Jackson L.J., *Review of Civil Litigation Costs: Final Report* (London: Judiciary of England and Wales, January 2010). Data collected for one survey showed that for 280 cases which had come before the District Court the claimant costs alone amounted to £1.80 for every £1 of damages paid. On average, costs exceeded damages for cases settled up to £15,000 in the "fast track" procedure.

[24] In a survey of conditional fee claimants in 2011 half of them received less than £5,000. Insight Delivery Consultancy, *No Win No Fee Usage in the UK*appendix 5 of the Access to Justice Action Group, *Comments on Reforming Civil Litigation Fundinghttp://www.accesstojusticeactiongroup.co .uk/home/wp-content/uploads/2011/05/NWNF-research.pdf* [Accessed October 24, 2014]. P. Fenn and N. Rickman, *Costs of Low Value Liability Claims 1997–2002* record average damages of only £3,000 for employers' liability accident claims.

[25] T. Goriely, R. Moorhead and P. Abrams, *More Civil Justice? The Impact of the Woolf Reforms on Pre-Action Behaviour* (2002), p.103.

[26] As a rough estimate, based on Compensation Recovery Unit figures, above fn.5, the average ratio of RTA settlements to claims made for the last six years is 90 per cent. There is a time lag between claims and settlements which, given the steep recent rise in claims, makes the actual success rate somewhat higher than 9 out of 10 despite the suspected growth of unmeritorious actions which are likely to be unsuccessful.

[27] Otterburn Legal Consulting, *Personal Injury Marketing and Referral Fees*, Report for the Association of Personal Injury Lawyers (2012).

[28] *Admiral Annual Accounts* 2013. J. Hyde, "Admiral still cashing in on PI referral fees" (2013) *Law Society Gazette*, March 4. It had long been recognised that referral fees constituted a major part of the profits from providing BTE. See FWD, *The Market for "BTE" Insurance* (Ministry of Justice, 2007) at 4A II 4.

[29] J. Straw, "Dirty secret that drives up motor insurance; Companies are selling drivers" details to claims firms exploiting no-win no-fee system" *The Times*, June 27, 2011.

became subject. Legal aid for personal injury was largely abolished in 2000 and this stimulated the use of conditional fee agreements.[30] Under these agreements claimant lawyers could secure an increase in their fees in each case that they won. They could recover up to double their costs if successful. In seeking to avoid or reduce these costs, insurers adopted practices which again, in the longer term, had the opposite effect of that originally intended. For example, one tactic still used today is "third-party capture." This is where the insurer makes a direct approach to any injured party who is not their own insured and does so before they have contacted a lawyer themselves. Insurers seek a quick settlement of the potential claim before any legal costs can be incurred. This has resulted in many people with only a very minor injury from the accident in which they were involved (or often no injury at all) being offered sums to settle cases which they had no previous intention of bringing.

Another tactic, which also has the unintended effect of encouraging claims, has been the making of "pre-med offers." These are offers made to claimants very early in the proceedings, often immediately on receiving notice of a claim, and before any medical report has been obtained. They are pitched at a low level, usually less than £1,500, and are aimed at removing the nuisance value of a small claim together with its potentially disproportionate legal and disbursement costs. For example, until recently, a quick offer could save an insurer paying up to £700 (now reduced to a maximum of £180) for the cost of a medical report, even though these are often standard form and produced by a mere GP.[31] Commonly made in whiplash cases, these pre-med offers have been heavily criticised on the one hand as attempts to buy off claims for derisory amounts[32] and, on the other hand, as encouraging claims where injury is non-existent and thus feeding the compensation culture.[33] There have been proposals that a medical examination and report should be made compulsory before settlement.[34] Although the Ministry of Justice wants to discourage pre-med offers it has opted against making such a ban.[35]

Criticism of insurers making very ready offers was voiced by a solicitor interviewed as part of the author's forthcoming contribution to an empirical project investigating personal injury practice in several European countries and funded by the European Centre of Tort and Insurance Law. He stated:

> "… if it becomes known, as I think it did with whiplash, that all you have to do is say: 'I was in a car accident' and really the insurers just pay you some money, I'm not sure that's necessarily a good message to be sending out to the public. I think that insurers have got caught … If they're going to make those sort of offers, they can expect people just to have a go all the time."

The conclusion of a parliamentary committee was that "a highly dysfunctional market" has been created:

> "in which the pursuit of profit by the different firms involved has led to higher prices for consumers and, in some cases, business practices which are not in the consumer interest."[36]

Overall it is clear that certain routine institutional practices of insurers in processing claims have contributed to some of the problems now identified as part of compensation culture.

## *2. Claims management companies*

Claims management companies ("CMCs") first emerged about 20 years ago. They made money by trawling for accident victims and seeking quick settlements from which they extracted high fees from claimants.

[30] The Access to Justice Act 1999 ss.27 and 29.
[31] *https://www.gov.uk/government/news/fee-cut-for-whiplash-medical-reports* [Accessed October 24, 2014].
[32] For example, J. Spencer, "Pre-med offers result in injustices" (2014) *Law Society Gazette* 11.
[33] Ministry of Justice, *Reducing the Number and Cost of Whiplash Claims: A Government Response to Consultation* (October, 2013), Cmnd.8738.
[34] See the recommendation in the House of Commons Transport Committee, *The Cost of Motor Insurance: Whiplash*, Fourth Report of Session 2013–2014, HC 117, and the especially the evidence of the Motor Accidents Solicitors Society. The Association of Personal Injury Lawyers has similarly opposed such offers.
[35] Above fn.31.
[36] The House of Commons Transport Committee, HC 285, above fn.20, para.38.

Alternatively, they passed on their clients to solicitors and received a referral fee in return. Today they also offer services such as vehicle repair and credit hire, and some can arrange accident reports and evidence from medical experts. To recruit clients, CMCs have used a variety of tactics from mass-media advertising to direct approaches to individuals in the street.[37] Over three quarters of the population have reported being contacted about making a claim.[38]

The growth of CMCs was fuelled especially by the removal of legal aid in 2000 which led to the more extensive use of conditional fee agreements. Under these agreements claimant lawyers could secure an increase in their fees in each case that they won. They could recover up to double their costs if successful but nothing at all if they lost. This potential for increased profit added to the incentives to obtain referrals. One problem solicitors faced was that conduct rules prevented them from paying CMCs for these claims. However, these rules were flouted on such a regular basis that the ban on referral payments was eventually lifted in 2004.[39] The development of an efficient, high volume claims department founded upon referrals and advertising proved to be a successful business strategy for a number of law firms.

However, there was growing concern about the abuses that resulted from CMCs being given such a free rein. The press, in particular, used CMC:

> "to describe anything and anyone who is perceived as promoting 'compensation culture', ripping off consumers, stealing from them and ultimately 'mugging' the most vulnerable in our society."[40]

There continues to be foundation for such stories: only recently CMCs have been found guilty of helping to arrange "crash-for-cash" scams and of bribing policemen to steal details of accident victims from a police computer.[41] To combat some of the more extreme practices, the Government began to regulate the operation of CMCs in 2007.[42] In response to attempts to prevent them making approaches in person, the companies adapted by sending unsolicited text messages and making unsolicited phone calls.[43] Although these practices were later banned, other tactics continued to prove successful, as evidenced by the fact that the largest increases in claims are found in areas where CMCs are concentrated.[44] By 2010 the turnover of CMCs from personal injury work was almost a fifth of that of solicitors' firms.[45] The number of CMCs continued to grow, reaching a peak in late 2011 when there were 2,553 companies operating in the personal injury claims sector. However, following increased regulation and, in particular, the banning of referral fees in 2013[46] they have been halved in number to around 1,125. This resulted in a similar reduction in their turnover which fell from £455 million to £238 million.[47]

As discussed under the next heading, this decline in CMCs does not necessarily indicate a commensurate reduction in marketing and the aggressive pursuit of potential claimants. At the same time that referral fees were banned, claimant law firms also found that they were no longer able to recover their success fee from insurers.[48] These two changes are having a major effect upon the structure of personal injury law firms and the business models they now adopt. It is to these changes that we now turn.

[37] National Association of Citizens Advice Bureaux, *Door to Door: CAB Clients' Experiences of Doorstep Selling* (2002).
[38] ABI, *News Release 29/12*, June 19, 2012.
[39] A. Higgins, "Referral Fees — The Business of Access to Justice" (2012) 32 *Legal Studies* 109.
[40] A. Wigmore, "The Death of Claims Management Companies" [2013] J.P.I.L. 248, fn.40.
[41] Ministry of Justice, *Enforcement Actions Carried Out by CMR* (The Stationery Office, 2014).
[42] The Compensation Act 2006 s.4 and the Compensation (Claims Management Services) Regulations 2006.
[43] M. Boleat, (2010), Ministry of Justice, *Claims Management Regulation Annual Report 2010/2011* (2011).
[44] Especially Manchester, Liverpool and Birmingham. D. Brown and S. MacDonnell, *Update from the Third Party and PPO Working Parties* (Faculty of Actuaries, 2012). "Liverpool is whiplash capital of Britain" *Financial Times*, May 27, 2012.
[45] It amounted to £377 million compared to about £2 billion received by solicitors. London Economics, *Access to Justice: Learning from Long Term Experiences in the Personal Injury Legal Services Market* (Report for the Legal Services Board) (2014) pp.4 and 59.
[46] The Legal Aid, Sentencing and Punishment of Offenders Act 2012 s.56 prevents the payment of referral fees. However, the Claims Management Regulator has continued to issue warnings about the companies failing to comply.
[47] As at March 2014. Ministry of Justice, *Claims Management Regulation: Annual Report 2013–14*.
[48] The Legal Aid, Sentencing and Punishment of Offenders Act 2012 s.44 makes claimants liable to pay the uplift in fees out of their damages.

## *3. Claimant personal injury law firms*

Initially solicitors' firms were very reluctant to become involved with what was considered the distasteful business of claims gathering. By the late 1990s, however, following the relaxation of the rules on advertising, specialist personal injury firms were actively seeking clients.[49] They still avoided the brash techniques of CMCs but many were prepared to pay referral fees to these companies; many were content to "turn a blind eye" in order to secure a regular flow of work.[50] Eventually more law firms recognised that the work being done by CMCs could be replicated by them perhaps in a more respectable form. Some have offered inducements to sue including free iPads, shopping vouchers and even cash promises of up to £2,000.[51] Although CMCs were banned from making such gifts, solicitors continued to be able to do so until 2014.[52] For a variety of reasons, in effect, solicitors now have supplanted many CMCs. According to the policy director of the Claims Standards Council:

> "In 2013, over 90 per cent of law firms now practice what they used to criticise. They market and advertise very efficiently spending over £60 million a year, which is double the spend of two years ago. They have marginalised the traditional CMC to such an extent that less than 70,000 claims from a total of 600,000 claims are generated by traditional CMC activity. That figure will decline and so will CMCs."[53]

Further changes have occurred following the relaxation of the rules relating to the ability of law firms to form business relationships with other enterprises. Since 2011 non-lawyers have been able to own and manage legal practices as part of an "alternative business structure" ("ABS") which can involve a multi-disciplinary partnership. Over 240 licences for such arrangements have been granted by the Solicitors Regulation Authority in the last two years. The ABS is a particularly attractive vehicle for conducting personal injury work. The wider organisation can include within it, for example, a medical reporting agency that is able to give evidence on claims, or a financial department that gives advice on how a damages award should be invested. For present purposes, however, the significant advantage of an ABS is that it enables personal injury firms to avoid the difficulties caused by the prohibition of referral fees by making such payments "in house." As a result we have seen leading personal injury firms merge with CMCs or insurance companies. For example, Admiral Insurance has taken over the legal firms of Lyons Davidson and Cordner Lewis, whilst Ageas insurance is now in partnership with New Law Solicitors. Similarly, trade unions have also entered into associations with law firms.[54]

The growth of ABS practices has been dramatic. Perhaps the best example involves the prominent trade union linked firm of Russell, Jones and Walker, which acquired the notorious CMC, Claims Direct, only for it then to be merged with the very large international ABS firm of Slater and Gordon. This took place in 2012 and was the first UK acquisition of that ABS firm, which originates from, and has its shares listed in, Australia. Since then Slater and Gordon has aggressively expanded in this country. Its share price and profits have risen sharply following its takeover of other key claimant firms such as Fentons and Pannone. It now has almost 2,000 UK employees spread around 18 locations. ABS firms accounted for a fifth of the turnover of personal injury solicitors' firms in 2012–2013. That figure will rise sharply as more

[49] R. Abel, *English Lawyers between Market and State: The Politics of Professionalism* (New York: Oxford University Press, 2003) and H. Kritzer, "The Fracturing Legal Profession: The Case of Plaintiffs' Personal Injury Lawyers" (2001) 8 *International Journal of the Legal Profession* 225.

[50] For more details see A. Wigmore, "The Death of Claims Management Companies", fn.40.

[51] C. Budsworth, "Should solicitors be able to offer financial inducements to claimants?" (2014) 158 (17) *Sol J*.

[52] Plans to ban the practice were announced by the Ministry of Justice in May 2014 and contained in the Criminal Justice and Courts Act 2014. *https://www.gov.uk/government/news/bogus-claims-to-be-thrown-out-as-government-steps-up-insurance-fraudcrackdown* [Accessed October 24, 2014]. This measure was strongly supported by House of Commons Transport Committee, (HC 285).

[53] A. Wigmore, "The Death of Claims Management Companies".

[54] Morrish has formed an association with the Transport Salaried Staffs' Association. The refusal of Thompsons, the best known trade union firm, to enter into a similar arrangement with the GMB trade union resulted in it being dropped from its panel of solicitors in 2014.

alternative practices are established. Their expansion, and especially that of Slater and Gordon,[55] continues apace.

To secure economies of scale there have also been a series of mergers of traditional personal injury firms outside of the ABS umbrella. Mergers of whatever kind have been accompanied by a drive for efficiency in order to deal with the mass of small claims which dominate the system. Partly because of funding constraints, much of the work involving smaller run-of-the-mill claims in these firms is now being carried out by unqualified or paralegal personnel.[56] They are working in what has been identified in the USA as "settlement mills", where the assembly line resolution of claims "represents quite a departure from the intimate, individualized, and fact-intensive process thought to underlie the traditional process of tort."[57]

The funding reforms and new business opportunities have convinced a former president of the Association of Personal Injury Lawyers that firms should "get big, get niche or get out".[58] In other words, they need to either become larger and more efficient, or develop specialist skills in order to deal with the minority of claims where more serious injury is suffered, otherwise they will fail. These views are echoed by the head of Slater and Gordon who predicts that in the near future just three firms will control up to 40 per cent of personal injury claims.[59] Some may think this a dramatic claim, but there have been more firms closing their doors than ever before and "run-off" insurance is now a favoured topic for seminars.

All this cost-cutting and consolidation in the market is matched by the continued aggressive searching for potential clients and the further encouragement of claims in tort, albeit in a regime which now has reduced funding because of the loss of the ability to reclaim success fees and insurance premiums. It is a time of very rapid change. The focus of attention has been upon how claims are funded and what rules of civil procedure should apply. However, it is perhaps even more important to appreciate the changes that are taking place in the structure of the legal profession and the personnel now involved in personal injury litigation. The reforms are thus having a considerable effect upon how tort actually operates in practice; they will help determine how compensation culture is perceived in the future.

## *Personal factors encouraging claims*

Apart from these institutional influences, there are factors which are personal to the individual claimant which can account for the increase in claims. These are not discussed in detail here, partly because the analysis of "naming, blaming and claiming" is well known.[60] That is, the individual first has to recognise that he has suffered an injury, then he needs to attribute responsibility, and only finally does he seek formal recompense for his loss.[61] The increase in claims is the result of a complex mix of changing personal factors which affect all three parts of this analysis.

It is certainly the case that we are less prepared to put up with misfortune than in the past. Today we are more likely to recognise that we have suffered from wrongdoing. We are better able to identify, for example, the work-related factors that are the cause of our injury or disease, and we are also more willing to sue our employer, partly because we have much less fear of recrimination. Social norms may even encourage us to seek such compensation as if it were a consumer right. Artful advertising can make lawyers

[55] Its acquisition of the Cardiff based firm of Leo Abse in 2014 was its seventh in just over a year. *The Lawyer*, September 25, 2014. Its turnover in the UK during the 2013–2014 financial year increased by 119 per cent and amounted to over £100 million.

[56] Association of Personal Injury Lawyers, *The Impact of the Jackson Reforms on Costs and Case Management* (Evidence to the Civil Justice Council) (2014). D. Evans, "Shifting Strategy in the Personal Injury Market" [2014] J.P.I.L. 85.

[57] N. Engstrom, "Sunlight and Settlement Mills" (2011) 86 New York University LR 805 at 810 and by the same author, "Run-of-the-mill Justice" (2009) 22 Georgetown J. of Legal Ethics 1485.

[58] David Marshall (2013) 157 Sol. J. October 16.

[59] J. Hyde, "Slater Chief Predicts Rapid Consolidation in PI Market" (2014) *Law Society Gazette*, May 1.

[60] W. Felstiner, R. Abel and A. Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming and Claiming" (1981) 15 Law & Soc. Rev. 631.

[61] See A. Morris, "Spiralling or Stabilising? The Compensation Culture and our Propensity to Claim Damages for Personal Injury" at 372 et seq.

appear not just accessible but even friendly, and their hourly charges do not hold the fears they once did. The claim appears risk-free, stress-free and involving merely an administrative process. It is legitimised by the routine, de-personalised and non-adversarial nature of the mass of litigation for minor injury.

When the individual weighs up the pros and cons of claiming, a major element will be the risk of incurring legal costs against the level of potential reward. The fear of being out of pocket should the claim fail has been largely removed by the "no win, no fee" mantra, and is supplemented by the availability of litigation insurance. The possibility of getting nothing from the process seems remote. The utility of claiming, therefore, seems high. This is accentuated by the increasing level of damages on offer. This brings us to consider the second part of this article, which focuses upon the rising cost of claims.

## B. The rising cost of claims

### *The changing form of payment: periodical payment orders*

A significant cause of the increased cost of claims has been the change made in the way in which damages may now be paid: periodical payments have replaced lump sums in many cases where serious injury is involved. The lump sum system survived almost intact until about 25 years ago. Damages almost always took the form of one large payment made on a "once and for all" basis. However, that system imposed upon claimants an enormous responsibility for their future: they had to manage the lump sum in order to ensure that it would continue to meet their needs for the rest of their life. Unfortunately, inflation and the vagaries of the returns upon investment often resulted in the rapid erosion of the compensation. In addition, the damages were bound to be insufficient where losses continued for a longer period of time than that forecast in the settlement or in the court judgement. This frequently happened where the compensation depended upon an assessment of life expectancy, for then the money was bound to run out if the claimant lived longer than forecast. Recipients of damages awards thus not only had the risk of investment thrust upon them but also the risk presented by their own mortality. Accident victims who did not die prematurely inevitably found that their compensation eventually would prove too little.

To counter these criticisms, the concept of a structured settlement was developed.[62] It enabled seriously injured claimants to receive regular annuity-based payments which could be guaranteed to last for their lifetime. In addition, the payments were free of tax and could be protected against inflation in prices. Claimants receiving structured payments were relieved from the stress of having to invest and be responsible for a lump sum far greater than most people encounter in their lifetime. In spite of these benefits, expansion of structured settlements was hindered by a variety of factors, including the refusal of many professionals to give proper consideration to the merits of the alternative form of payment. This was aided by the fact that either of the parties could unilaterally veto any proposed settlement based on periodical payments. The result was that, largely through inertia, the lump sum retained its dominance.

However, this was changed by legislation which came into force in 2005. The Courts Act 2003 removed the parties' veto and gave judges the power to impose a periodical payments order ("PPO") even if it was against the wishes of either, or both, of the parties.[63] A former president of the Association of Personal Injury Lawyers concluded that the legislation was "the most important development ever relating to the law of damages".[64] Judges are now required to consider making a PPO in any personal injury case which comes to court if it involves future pecuniary loss. Although only a small percentage of cases involve such

[62] R. Lewis, *Structured Settlements: The Law and Practice* (London: Sweet & Maxwell, 1993), N. Bevan, T. Huckle and S. Ellis, *Future Loss in Practice: Periodical Payments and Lump Sums* ((London: Butterworths, 2007) and the International Underwriting Association of London, *Periodical Payments Order Study* (2011)*http://www.iua.co.uk/IUA_Test/Documents/Circulars_2010/Circulars_2011/Periodical_Payment_Orders__PPO__Study.aspx* [Accessed October 24, 2014].

[63] Courts Act 2003 ss.100 and 101 amending the Damages Act 1996. R. Lewis, "The Politics and Economics of Tort Law: Judicially Imposed Periodical Payments of Damages" (2006) 69 Modern Law Rev 418.

[64] Colin Ettinger (2005) 155 New L.J. 525.

future loss, these claims are responsible for a substantial amount of the overall damages bill: insurers have estimated that the top one per cent of cases account for 32 per cent of total monies paid to claimants.[65]

Defendants and their insurers are now faced with a much higher bill in these periodical payment cases. There are two reasons for this. The first relates to the way in which most of these arrangements are funded. To safely guarantee the lifetime payments, liability insurers usually purchase annuities from life offices. This can prove much more expensive than paying lump sum damages, partly because of lack of competition in supplying the annuities required. Arranging for PPOs could be costing liability insurers up to a third more than under the lump sum regime.

The second reason for the increased bill relates to the radical changes made to the way in which periodical payment damages are now assessed. Claimants have been given considerable incentives to choose PPOs over lump sums. The advantages derive from the fact that there is now no need to calculate what lump sum would be required in order to work out the value of the periodical payments to be made. Instead, using a "bottom-up" approach, the court must assess the claimant's needs for the future and then order that periodical payments matching those needs be paid irrespective of their capital cost. These annual payments do not have to be adjusted to take account of speculative estimates of the claimant's life expectancy. Nor do returns have to be forecast of the income that arises upon investment of the damages because the lump sum is simply not there to invest. Instead, the defendant must comply with the order to make the specified regular payments no matter how the market performs and even if the claimant lives longer than forecast. In contrast to the traditional lump sum system, therefore, it is the defendant rather than the claimant who is now exposed to an uncertain financial future by being burdened with the twin risks of investment return and mortality.

This can be explained further by noting that in the calculations needed for a PPO there is no place for the "Ogden Tables".[66] That is, multipliers and discount rates are not used: no multiplier is required to reflect the period of years of the loss in order to convert it into an immediate capital amount and no discount rate is needed to convert the future stream of financial losses into a capital sum representing present day values. As considered under a later heading, the discount rate continues to operate very harshly against claimants if they seek a lump sum. The rate has been set far too high and expects claimants to obtain an unrealistic return on their damages. By contrast, for PPOs, defendants cannot take advantage of the artificially high estimate of investment return embedded in the discount rate for lump sums. Instead, they can be ordered to provide annual payments irrespective of what this might cost as an equivalent capital sum. Furthermore, the order extends for an uncertain period—the rest of the claimant's life. The risks that arise which relate to both the investment return and the longevity of the claimant are thus entirely transferred to the defendant, and this carries with it a substantial additional cost.

The final advantage of a PPO over a lump sum is that, following a key appellate decision, periodical payments can now be inflation-proofed by being tied, not just to the future rise in prices, but to the rise in earnings.[67] This is of considerable importance in ensuring that a claimant's care costs will continue to be met. This is because, in general, the wages of carers over time will significantly exceed price inflation and will considerably increase the bill for future care. As a result of the case which allowed for this wage inflation, the number of cases involving PPOs has increased substantially. The additional care costs which defendants must now bear, together with those costs arising from the new investment and mortality risks described above, account for the considerable rise in the true value of damages in these serious injury cases.

[65] Lord Chancellor's Department, *Courts Bill: Regulatory Impact Assessment* (2002), table 1.

[66] Government Actuary's Department, *Actuarial Tables For Use In Personal Injury And Fatal Accident Cases*, 7th edn (London: The Stationery Office, 2011), and subsequent updates.

[67] *Thompstone v Tameside and Glossop Acute Services NHS Trust* [2008] EWCA Civ 5; [2008] 2 All ER 553. R. Lewis, "The Indexation of Future Payments in Tort: The Future Assured?" (2010) 30 *Legal Studies* 391. R. Lewis, *Deducting Benefits from Damages for Personal Injury* (Oxford: Oxford University Press, 2000).

## *Recovery of state benefits from damages*

Since 1990, defendants and their insurers have had to pay more for claims because they have had to reimburse the State for certain benefits received by the claimant as a result of the injury suffered.[68] The State has been able to recover some of the cost of its social security expenditure and health care costs: public finances have thus been replenished. There are limits on the amounts that can be recovered. For example, money can only be sought for benefits received up to the date that a case settles; social security and NHS treatment provided later are at public expense. Another limit is that there is a maximum sum payable for health treatment. However, over the years the recovery scheme has proven effective in clawing back increasing amounts of money, especially following the inclusion of health service charges in 1999. By the new millennium, the amount of social security recovered had risen steadily and had reached £201 million per annum. Since then, caused partly by a marked decline in work accidents, the amounts recovered have fallen by a third, so that in 2013–2014 only £134 million was recouped.[69] To this must also be added the health service charges recovered for that year of £223 million, so that in total £357 million was repaid to the public purse. Unlike social security, these health service costs have increased year on year and now constitute the more important source of revenue. However, they represent but a tiny fraction of the actual expenditure on the NHS.

The recovery scheme has clearly increased the cost of claims, added to the premiums charged by insurers and thus contributed to one of the concerns about compensation culture. However, its effect upon the number of claims brought varies. Because the NHS is freely available, claimants are not directly affected by charges made to compensators for health costs. By contrast, the recovery of social security benefit has affected them. This is because the scheme enables compensators to reduce the damages that claimants can obtain from them by the amount of social security benefit that has to be repaid to the state. Damages have thus been reduced and, as a consequence, the incentive to claim.

However, the incentive was restored somewhat when the scheme was changed to exempt the claimant from any reduction in that part of the damages award which is paid for non-pecuniary loss. This means that no reduction in damages is to be made, even if a claimant receives benefits, provided that no financial loss has been suffered because, for example, earnings have been unaffected and there has been no need to pay for treatment or care. The compensation then is for pain and suffering alone and there can be no reduction. This is so even though the compensator remains liable to repay the social security benefits the claimant has received. In effect, such claimants have the whip-hand in negotiations and can force advantageous settlements. They can emphasise that the longer the claim remains unpaid the larger will be the bill for benefits, even though this will not reduce the amount of damages to be paid. The result is that insurers are encouraged to settle certain claims promptly and at the higher end of the potential scale of payment. Predominantly these claims involve minor injury such as whiplash where it is often the case that the only compensation to be awarded is for pain and suffering. The recovery of benefits scheme can thus affect aspects of compensation culture.

## *Non-pecuniary loss and increasing the price of pain*

In practice, it is the compensation paid for pain and suffering that often provides the financial incentive to claim. In many cases it is the only head of personal injury damage that is sought. In recent years this compensation has increased significantly. There are a number of reasons for this, the most important being the changes made as a result of the test case of *Heil v Rankin* [2000] EWCA Civ 84; [2001] Q.B. 272.[70]

[68] R. Lewis, "Recovery of State Benefits from Tort Damages: Legislating for or against the Welfare State?" in T. T. Arvind and J. Steele, *Tort Law and the Legislature* (Oxford: Hart Publications, 2012), p.285.
[69] Above fn.5.
[70] *Heil v Rankin* [2000] EWCA Civ 84; [2001] Q.B. 272.

The judges in that case took the opportunity to raise awards for pain, suffering and loss of amenity in two ways: first, they increased payments for more serious injuries by up to a third and, secondly, they tied all awards in future to the rise in the Retail Prices Index. This second measure has accounted for a further rise in damages of about one quarter since the test case was decided. Irrespective of whether the policy reasons given in the case justified these increases,[71] it is clear that damages for non-pecuniary loss have risen substantially as a result. For example, at the top end of the scale, damages for severe brain damage or tetraplegia have increased from £150,000 at the turn of the century to about £330,000 today.

Damages have also risen as a result of the introduction and extensive use of the Judicial College's *Guidelines for the Assessment of Damages in Personal Injury Cases*.[72] This is a book to be "packed in every judge's lunch bag"[73] for it provides the parameters within which awards for pain and suffering are to be assessed. It is a two-way process in as much as it informally guides courts but also tries to reflect their most recent decisions on quantum. First issued in 1991, it has been revised almost every two years and is now in its twelfth edition. It has become increasingly detailed. The booklet has been very helpful to practitioners and has removed some of the uncertainty that traditionally clouds the negotiation process. However, there can still be major disputes on the facts of cases, for example, in deciding which of the nine specified levels of neck injury the claimant has actually suffered. Subject to notable exceptions, the regular revision of the booklet has generally resulted in a real increase in the scale of awards for particular injuries. In addition, the inflation update has ensured that practitioners have recent figures ready to hand, which was not always the case in the past. On the whole, claimants have benefitted. To counteract this, insurers now want practitioners to be forced to assess pain and suffering by using computer software which values claims by incorporating information about the mass of settled claims instead of only the few that are adjudicated in court.[74] Despite the successful political lobbying by insurers in recent years, the prospect of displacing the *Judicial Guidelines* with a calibration tool that insurers have devised seems very remote.

A final cause of increasing damages in this area relates to the changes in funding introduced as a result of Jackson reforms.[75] Claimants have been compensated for no longer being able to recover from defendants two items of expenditure: first, the success fee charged by their solicitor and secondly, the premium that was paid for ATE insurance which was bought to protect against the risk of costs should the case be lost. In return for claimants bearing these extra pecuniary costs themselves, their damages for non-pecuniary loss have been increased by 10 per cent.[76] On the surface this seems an odd method of compensation for it substitutes apples for the loss of pears: that is, it increases the pain and suffering award when it is a financial loss that has been suffered. Even though the rough justice involved in devising this equivalent has some empirical support, it emphasises the peculiar prominence that pain and suffering now occupies within the tort system.

Let us take this point further. The overall increase in this head of claim is especially significant because the largest component of damages for personal injury is the payment made for pain and suffering: two thirds of the total damages awarded by the system are for non-pecuniary loss.[77] The reason for this dominance lies in the fact that the tort system overwhelmingly deals with small claims, the great majority

[71] R. Lewis, "Increasing the Price of Pain: Damages, the Law Commission and Heil v Rankin" (2001) 64 Modern Law Rev. 100.

[72] Judicial College *Guidelines for the Assessment of Damages in Personal Injury Cases*, 12th edn (Oxford: Oxford University Press, 2013).

[73] Tony Weir, *A Casebook on Tort*, 9th edn (London: Sweet & Maxwell, 2000), p.637.

[74] Association of British Insurers, *Evidence to Transport Committee*. Similarly in its evidence the Forum of Insurers Lawyers wanted to limit the rise in low value claims in the *Judicial Guidelines*.

[75] R. Jackson L.J., *Review of Civil Litigation Costs: Final Report* (London: Judiciary of England and Wales, January 2010), and R. Jackson L.J., *Civil Litigation Costs Review — Preliminary Report by Lord Justice Jackson* (London: Judiciary of England and Wales, May 2009).

[76] Confirmed by *Simmons v Castle* [2012] EWCA Civ 1039.

[77] Lord Pearson, *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (1978) cmnd 7054, Vol.2, table 107. The Health and Safety Executive similarly estimated that the cost of including pain and suffering would increase payroll costs from 1 per cent to 2.5 per cent in an integrated compensation scheme for work injury. Greenstreet Berman, *Changing Business Behaviour - Would Bearing the True Cost of Poor Health and Safety Performance Make a Difference?* (2002).

leading to damages of less than £5,000.[78] In these cases claimants suffer very little, if any, financial loss from their bodily injury. They make a full recovery and have no continuing ill effects. The typical injury involves a whiplash, these constituting almost half the claims in the system. Apart from recovering the cost of damage to the vehicle, the claim is usually only brought to recover the compensation for pain and suffering. In many cases, therefore, non-pecuniary loss provides the only incentive to sue for personal injury. It is the engine that drives the tort system. By contrast, it also accounts for much of the disproportionate cost of the litigation system and it provides opportunities for exaggeration of losses and fraudulent claims. As such, it is the root cause of many of the concerns about compensation culture.

## *Pecuniary loss, discount rates and the real financial world*

The final reason accounting for a rise in the level of damages is that the tort award is wedded to the principle of returning the claimant to the position enjoyed before the injury took place insofar as it is possible to do so.[79] In trying to give practical effect to this often merely rhetorical aim, judges have been forced in recent years to confront the realities of the financial world. This has led to a substantial increase in damages, especially in cases of serious injury. Various examples of this are given below.

One of the most notable ways in which the practice of personal injury litigation differs from that of a generation ago is in the extensive use of expert evidence. In serious injury cases, experts have been employed in areas which extend far beyond the traditional medical fields. They now consider all aspects of the injured person's life and future needs. This relates to a second change in litigation practice: claim schedules are now much more comprehensive than they once were, partly because of the involvement of these experts. Lawyers have been able to specify in considerable detail what the claimant will require in the future. With expert help, they have been able to place more precise monetary figures on what it costs to meet these needs. This level of detail and accounting, prompted by the avowed aim of making full reparation, has inevitable led to an increase in the value of claims.[80]

One group of experts who have been crucial in the construction of these detailed schedules are the financial analysts. Actuarial evidence is now accepted in courts in ways not thought possible years ago.[81] It was not by accident that forensic accountants proved more important in establishing and developing structured settlements than lawyers or judges.[82] Very recently, labour market economists have been added to the personal injury financial team. Their role has been pivotal, for example, in establishing that periodical payments can be tied, not merely to the rise in prices, but to wages, thus adding considerably to the value of such an award.[83]

A major contribution of these financial experts has been to refine the "Ogden Tables,"[84] the actuarial tables devised especially for personal injury cases in order to compute pecuniary losses. Two recent examples will suffice to illustrate how changes to these tables have led to further increases in damages. First, successive reforms have been made to allow for projected increases in mortality. We now live significantly longer than our forebears and this improvement is expected to continue into the future. Future mortality figures, rather than those based on historic mortality, are now used and these substantially

[78] In a survey of conditional fee claimants in 2011 half of them received less than £5,000. Insight Delivery Consultancy, No Win No Fee Usage in the UK, Appendix 5 of the Access to Justice Action Group, *Comments on Reforming Civil Litigation Fundinghttp://www.accesstojusticeactiongroup.co.uk/home/wp-content/uploads/2011/05/NWNF-research.pdf* [Accessed October 24, 2014]. The average payment for non-pecuniary loss for cases settled within the claims portal was reported as £2,300 in January 2014.

[79] "The only principle of law is that the claimant should receive full compensation for the loss he has suffered as a result of the defendant's tort, not a penny more but not a penny less," (*Simon v Helmot* [2012] UKPC 5 at [60] per Lady Hale).

[80] Ipsos Mori Research Institute, *Personal Injury Discount Rate Research* (2013) 24, Ministry of Justice Analytical Series.

[81] Such evidence was made admissible by the Civil Evidence Act 1995. Contrast *Auty v National Coal Board* [1985] 1 W.L.R. 784 where Oliver L.J. stated that "the predictions of an actuary could be only a little more likely to be accurate (and would almost certainly be less entertaining) than those of an astrologer".

[82] R. Lewis, "Structured Settlements: An Emergent Study" (1994) 13 *Civil Justice Quarterly* 18.

[83] Above fn.67.

[84] Above fn.66.

increase damages, for example, for loss of pension rights especially where the claimant is young. These life expectancy gains can have a considerable effect in certain serious injury cases. Advances in medicine and support services have been such that paraplegics, for example, can today generally expect only a small reduction in their life expectancy. As a result, lifetime awards of damages have had to be increased to continue to allow for such matters as the length of time that future care will be needed.

A second change made to the tables relates to the allowance made for the prospective potential earning capacity of a disabled claimant. Research has demonstrated that people with disabilities spend more time out of employment than previously thought.[85] As a result, a higher discount is now applied to increase their damages so as to account for their particular difficulties in the labour market. Acceptance of the value of such economic and social science data has been an important factor in raising damages awards.

In spite of the increase in damages which has taken place this century, it remains the case that claimants are very unlikely to receive "full" compensation: they are not returned to the position they were in before the accident. The experience of past decades has proven that, for those who need long-term care and support, the lump sum will prove insufficient. Few claimants injured in their youth have any compensation left when they enter old age today. There are several reasons for this, but perhaps the most important is that too much allowance has been made for the potential return which can be obtained by a claimant by investing the damages. A discount rate is used to allow for the fact that the claimant receives compensation earlier than he would have done so, for example, if he had been required to work for the wages now lost. The discount recognises that investment income can be obtained from this accelerated receipt of money. However, the rate used to calculate the damages has consistently been wrongly set; the figure has never reflected the true investment return that the claimant can actually achieve.[86]

For thirty years, until 1998, the discount rate was fixed at 4.5 per cent in spite of a myriad of changes which took place in the financial world during that time. No matter when claimants invested, it was nearly always impossible to obtain the set return. Net interest and capital gain fell well short of what was required and this led to rapid depletion of the long-term value of the compensation. Today, the legal system expects a claimant to achieve a real rate of return above inflation and after taxation of 2.5 per cent. With inflation at 2 per cent and taxation costs at a further 1 per cent, in effect the claimant must obtain a return of 5.5 per cent at a time when the best secure savings rate is far below that figure. It is inevitable that any lump sum awarded will be eroded much more quickly than the court presumes.

| Year | ILGS Percentage Yield after inflation | Real Yield after tax & inflation |
|---|---|---|
| *2001* | 2.4 | 2.11 |
| *2003* | 1.7 | 1.33 |
| *2007* | 1.6 | |
| *2009* | 1.4 | |
| *2011* | 0.6 | |
| *2013* | 0.0 | |

The present discount rate was set by the Lord Chancellor in 2001 and was based on the return on index linked government stocks ("ILGS"). Since then there has been a severe decline in the return from these gilt investments. Despite this, the 2.5 per cent discount rate has remained unchanged and has become

[85] R. Lewis, R. McNabb and V. Wass, "Court Awards of Damages for Loss of Future Earnings: An Empirical Study and an Alternative Method of Calculation" (2002) 29 J. Law & Society 406.

[86] See also the above discussion of periodical payment orders. The introduction to the Government Actuary's Department, *Actuarial Tables for use in Personal Injury and Fatal Accident Cases* (5th ed 2004) para.15 noted that the set discount rate had never been within 0.5 per cent of the correct rate of return. The resulting substantial under-compensation is illustrated in the introduction to R. de Wilde et al, *Facts and Figures* (13th ed 2008–2009).

increasingly anachronistic. The real rate of return after inflation is traced in the table. Even making no allowance for liability to tax, the returns have been far below 2.5 per cent.

To illustrate the dramatic effect a change in the discount rate can have upon an award of damages let us take the case of injury to a young person and an earning loss calculated to last for 40 years:

- Applying the old 4.5 per cent rate, the multiplier for the annual loss would be 18.4.
- For the present 2.5 per cent rate it is 24.85, an increase in damages of 35 per cent.
- If the discount rate is reduced to nil, so as to reflect the real investment return today on ILGS, the multiplier is 38.85, an increase in damages of 111 per cent since the 4.5 per cent rate was last used in 1998.[87]

For many years claimant lawyers lobbied for the discount rate to be revised, but they had little success. However, in 2012 the Ministry of Justice issued a consultation paper asking how the rate should be set.[88] Insurers were particularly alarmed by the prospect of a change in the discount rate and emphasised that in practice claimants did not actually invest in ILGS. After effective lobbying, the Ministry were persuaded that further investigation was required and a second consultation paper was issued dealing with the legal framework.[89] Although this may have the effect of limiting any downward pressure upon the discount rate, it is the change threatened in this area that could potentially have the greatest effect on defendants and the overall cost of the tort system. The Ministry at present is sitting on its hands and, as yet, has not responded to the consultation and evidence obtained.[90]

## Conclusion

In reviewing compensation culture, this article has focused upon the number of claims and the cost of claims. Although motor claims have doubled this century, largely because of institutional factors and a "dysfunctional insurance market", other claims have remained relatively stable. By contrast, the cost of claims has continued to increase, albeit for reasons which many supporters of the tort system would endorse. Much of the increase in compensation can be attributed to the overall aim of returning the claimant, as far as possible, to the position enjoyed before personal injury was suffered. As that principle is developed further, with courts increasingly using financial expertise to assist in the calculations, it can be anticipated that levels of damages in serious injury cases will continue to rise. As a result, current compensation culture issues, together with the reforms in the legal profession which influence them, will continue to be debated for some time to come.

[87] *Simon v Helmot* [2012] UKPC 5 dramatically illustrates the potential effect of lowering the discount rate. It concerned the long-term care of a young victim of a Guernsey road accident. Because of the jurisdiction, the court was not bound by the specified 2.5 per cent discount rate and instead based the decision upon common law principles. As a result the total award was almost £14 million and the difference between the cost of future care using a 2.5 per cent discount rate and the minus1.5 per cent rate actually used was £5.25 million. See A. Lewis "Discount Rates" [2012] J.P.I.L. 40.

[88] Ministry of Justice, *Damages Act 1996: The Discount Rate — How Should it be Set?* (2013), CP12/2012.

[89] Ministry of Justice, *Damages Act 1996: The Discount Rate — Review of the Legal Framework* (2013), CP3/2013.

[90] In a letter to the Association of Personal Injury Lawyers in August 2014 the Justice Secretary, Chris Grayling, saw no reason to publish a timetable setting out when the decision might be taken.

# An Unethical Personal Injury Sector[1]

## John Spencer[*]

Damages; Insurance; Media; Motor Insurer's Bureau; Personal injury

*In this extract from his book* The Importance of Being Ethical—Essays on Ethics: A Solicitor's Perspective,[2] *APIL President and JPIL Board Member John Spencer looks at what he describes as the unethical personal injury sector and considers the extent to which the behaviour of government, insurers, lawyers, claims management companies and others, depart from what might be considered to be an ethical standard. He concludes that insurers are largely responsible for the most unethical behaviour and that ironically their own behaviour has created the perception of the "compensation culture" which they vehemently complain about.*

> "What is tolerance? It is the consequence of humanity. We are all formed of frailty and error; let us pardon reciprocally each other's folly—that is the first law of nature."[3]

In this, my final essay, I turn to the area of law in which I have worked since I first qualified as a solicitor—the personal injury sector. Regrettably, it is an area that is far from free of problems.

In the US, the ambulance-chasing personal injury lawyer is a staple of press vilification and television caricature. The metaphor itself goes to the heart of ethical dissonance in what ought to be a reasonably simple area of life—the business of being compensated for suffering wrongs through no fault of one's own. To imagine an injured person being ferried carefully into an ambulance, only to espy a lawyer running towards him—a lawyer intent on serving the victim, but only because there is money in it—is to behold in one fell swoop behaviour which is ethically suspect. The lawyer is capitalising on misfortune and being far too eager to profit.

In Britain the portrayal of personal injury lawyers isn't quite as negative and all-pervasive, but the business of compensation is no less fraught. Ours is the country where we have a perceived "compensation culture", a place bedevilled by meretricious claimants and money-grabbing lawyers. The truth is otherwise, but let's examine the received "wisdom".

## What's wrong with redress?

To read the press today, to listen to government ministers on television and radio, to type in the words "compensation culture" to a search engine, even to spend five minutes talking to the law's arbiter of common sense (the legendary man on the Clapham omnibus)—each of these activities is to discover that Britain has a big problem with injured people obtaining redress.

Time and again, across all media, in pubs and yes, on buses, the received wisdom seems to be that we are awash with spurious claim after spurious claim. We're brainwashed into thinking that our society is crippled by manipulative scroungers on the make, by professional victims who think nothing of wildly exaggerating their injuries—if they even suffered any in the first place. We, the taxpayer, are told that we pay for the unscrupulousness of the bad apples: our car insurance premiums go up and up, our moral fibre is corroded, we can't trust anyone. Welcome to 21st century Britain and the unwelcome phenomenon of

[1] This article is based on a chapter from the book John Spencer, "The Importance of Being Ethical — Essays on Ethics: A Solicitor's Perspective".

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[2] Available on Amazon: http://www.amazon.co.uk/dp/13260281461.

[3] Voltaire.

"compensation culture", a term first coined by the late *The Times* columnist Bernard Levin in an article entitled "Addicted to Welfare" in 1993.

A report by the Better Regulation Task Force, published in May 2004,[4] succinctly summed up the prevailing view:

> "It is a commonly held perception that the United Kingdom is in the grip of a compensation culture'. Newspapers complain that the UK is becoming like the United States with stories of people apparently suing others for large sums of money, and often for what appear to be trivial reasons. Media reports and claims management companies encourage people to 'have a go' by creating a perception, quite inaccurately, that large sums of money are easily accessible."[5]

And yet the report, entitled "Better Routes to Redress", quickly went on to reveal the so-called "compensation culture" as an urban myth. As its authors wrote:

> "Redress for a genuine claimant is hampered by the spurious claims arising from the perception of a compensation culture. The compensation culture is a myth; but the cost of this belief is very real."[6]

Nearly a decade on, the tragedy is that the urban myth seems only to have become more embedded. If David Arculus and Teresa Graham, the writers of the Task Force's report, could cite any number of loaded headlines from the press in 2004—for example, "The culture that is crippling Britain"[7] and "Postman sues customer who sent too many letters"[8]—the same is true today. The most cursory scan of media analysis of this vexed subject reveals that "Compensation culture [is] costing motorists"[9] and that "Prisoners complain about cold cells and missing cards", thanks to an inflated sense of their "rights" as a consequence of "compensation culture".[10] The *Daily Mail* seems especially fond of stories about outlandish civil litigation claims, reporting in July 2012 on a council teacher who was allegedly "awarded thousands of pounds in damages" for stumbling over a mop and, in November the same year, regaling readers with the tale of a teaching assistant who had apparently been awarded £800,000 for a finger and elbow injury sustained when she tripped over the waist strap attached to a wheelchair. The *Daily Mail* made its position abundantly clear:

> "The award, which sparked fury among war veterans and victims of crime who received substantially less for their injuries, is part of a burgeoning compensation culture among teachers who last year claimed a record £25million following accidents and employment disputes."[11]

Many examples come squarely from the personal injury arena, but bogus notions of compensation culture fuel the closely related human rights debate. As well as tabloid scaremongering blaming the banning of games of conkers from primary school playgrounds on bureaucrats from Brussels, government ministers—those should know better—like to play this game. Think especially of Theresa May's speech to the Conservative Party faithful on October 4, 2011, in which the Home Secretary excoriated the Human Rights Act 1998 for enabling an illegal immigrant to evade deportation because he owned a cat called Maya. Here is what Ms May said:

> "We all know the stories about the Human Rights Act. The violent drug dealer who cannot be sent home because his daughter—for whom he pays no maintenance—lives here. The robber who cannot

[4] Better Regulation Task Force, "Better Routes to Redress" (May 2004).
[5] Better Regulation Task Force, "Better Routes to Redress".
[6] Better Regulation Task Force, "Better Routes to Redress".
[7] *Daily Mail*, 2004.
[8] *Daily Telegraph*, 2004.
[9] (February 2013) *www.moneyfacts.co.uk* [Accessed October 24, 2014].
[10] *The Lancashire Evening Post*, February 2013.
[11] *Daily Mail*, July 2012.

> be removed because he has a girlfriend. The illegal immigrant who cannot be deported because—and I am not making this up—he had a pet cat."[12]

In fact, a considered look at the judgment of Senior Immigration Judge Gleeson of December 1, 2008, presiding at an Immigration and Asylum Tribunal appeal, reveals that if May didn't think she was making up the story about the cat, she wasn't on firm factual ground. Judge Gleeson's ruling requires some interpretation, but its essence was clear to Justice Secretary Kenneth Clarke. Clarke was quick to say that he would be "surprised" if an illegal immigrant had persuaded the courts that he should be allowed to stay in Britain by dint of owning a cat. For good measure, he added:

> "In my opinion [May] should really address her researchers and advisers very severely for assuring her that a complete nonsense example in her speech was true."

And so it proved: the immigrant in question was entitled to stay in the UK not because he owned a cat but because he had lived with his partner for over two years "in a genuine relationship akin to marriage".

I digress into Theresa May's notorious speech about Maya the cat to illustrate just how pervasive the tendency to misappropriate the law and its principles has become. Time and again, those who should know better pedal untruths in the interests of a good sound-bite or congenial headline. The result is that those who are genuinely injured, whether because of an accident or an infringement of their human rights, are made to feel that they are dining with the devil in seeking redress. But they're not. They are simply exercising a right which is a fundamental part of our democracy and its evolved legal system.

## Back to the beginning

Let's remember what lies behind the concept of damages in English law. The main idea behind damages for personal injury is to put the claimant in the position he or she would have been in had the accident or injury not occurred. This is something learnt by all lawyers when they study tort law. Here, we're dealing with *ex delicto* damages. The Latin term means "from a wrong" or "from a transgression" (tort itself is French for "wrong"). It's to be contrasted with damages for breach of contract (*ex contractu*, for those who like their Latin words), where compensation is determined with reference to what would have happened had the contract been performed.

In other words, damages in tort law look backwards to the imaginary situation of the wrong not having happened; damages in contract look forwards to the equally imaginary position of the contract having been duly completed.

Informed by these principles, lawyers seek to assess where a victim would be, had an accident not occurred. Take, for example, an IT executive on her way to work in a car. She stops at a set of traffic lights, only to be shunted from behind by a driver who has elected to send a text message rather than watch the road ahead. It's a cut and dried case—the woman driver is innocent, the driver who hit her is not. The lady suffers a terrible jolt to her neck. This whiplash-caused injury—simply "whiplash" (as it is colloquially known)—is typical in such incidents; it's a simple matter of physics. Her neck hurts for days, weeks, months, making it difficult or perhaps even impossible to work or carry out everyday tasks. Understandably, she feels hard done by. Her ability to enjoy life and earn a living has been compromised, through no fault of her own. She instructs a personal injury solicitor. His task is to obtain redress for the woman which places her in the position she would be in if the accident had never occurred. A number of factors need to be considered, including the age of the claimant, the nature and extent of her injuries, gender (women generally obtain higher levels of compensation where an accident causes scarring) and personal characteristics. These are known as "general damages". Beyond this, the law compensates victims for

[12] Theresa May, speech to the Conservative Party (October 4, 2011).

what are called "special damages"—quantifiable monetary losses. Here repair costs, replacement of property costs and loss of income will be relevant.

The law should not be used in the way which was implicit in one notorious advertisement by a claims management company. This depicted a young woman looking longingly at a sports car and saying: "I've always wanted one of those and now that I have had an accident I can have one."

But so far, so straightforward. A person is injured; that person is innocent; that person ought reasonably to be entitled to compensation. Sadly, systemic failings in the personal injury sphere now come into play. The claimant will face an uphill struggle to achieve satisfaction, especially if whiplash is suffered, because a cabal of government and insurers is intent on eliminating the existence of whiplash as a medical condition.

The essential point is this: if a victim suffers an accident, and another party is at fault, that person has the right to bring a claim. Doing so does not guarantee success. There are legal hurdles to overcome: proving that the defendant owed a duty of care, proving that the duty was breached, proving that losses were caused by the breach and that the damage sustained is not too remote. In other words, the nuts and bolts of a claim for negligence need to be present before anyone will receive any kind of compensation, and thereafter there are guidelines as to the correct level of damages (or "quantum", as the courts call it). But to what extent are the courts taking the "accidents just happen" view, emboldened by hysteria about the so-called compensation culture? There may be occasions when this view is appropriate and acceptable. Unfortunately, though, there is an awful lot of misinformation out there. Could it influence judicial thinking?

## The spin which drives compensation culture

The Government was not, in 2004, persuaded by the Better Regulation Task Force's report. In November that year, the Government issued its own paper. Entitled "Tackling the 'Compensation Culture'",[13] the line from on high was abundantly clear:

> "The Government is determined to scotch any suggestion of a developing 'compensation culture' where people believe that they can seek compensation for any misfortune that befalls them, even if no-one else is to blame. This misperception undermines personal responsibility and respect for the law and creates unnecessary burdens through an exaggerated fear of litigation."[14]

Many people now believe that compensation culture is alive and well—notwithstanding what ought to be the persuasive views of no less a figure than Lord Dyson, the Master of the Rolls, whose annual lecture to the Holdsworth Club (Birmingham University's student law society) stated unequivocally that we are faced with a *perceived* compensation culture, not an actual one. As to what the dread term actually means, the Better Regulation Task Force report said that it

> "… implies that a decision to seek compensation is wrong. 'Compensation culture' is a pejorative term and suggests that those who seek to 'blame and claim' should be criticised. It suggests greed; rather than people legitimately enforcing their rights."

Or, as the former minister Stephen Byers once put it: "A compensation culture of 'blame, claim and gain' is a growing threat to the public services".[15]

How, though, have we got here?

Undoubtedly, media spin is a factor (as also expressly said by Lord Dyson). Shock stories of injured claimants receiving huge amounts of money make for good copy. The more apparently outlandish the

[13] "Tackling the 'Compensation Culture'" (2004).
[14] "Tackling the 'Compensation Culture'" (2004) at ?.
[15] *FT*, March 2004.

claim, the better, hence the media's delight over the infamous case of Stella Liebeck and the spilling of a cup of McDonald's coffee.[16]

On February 27, 1992, Mrs Liebeck, a 79-year-old woman from Albuquerque, New Mexico, ordered a cup of coffee from the drive-through window of a McDonald's restaurant. Thereafter, sitting in the passenger seat of her grandson's stationary car, she went to add cream and sugar to her coffee. In the process, things went disastrously wrong. The coffee ended up being spilled on Mrs Liebeck's lap, scalding her thighs, buttocks, and groin. She was hospitalized for eight days and disabled for two years with third degree burns. No wonder, for the coffee had been served at 88°C (190°F); any temperature above 65°C will cause serious burns.

Mrs Liebeck did not wish to litigate, but was forced to by McDonald's conduct. The fast-food giant dug its heels in, offering just $800 in full and final settlement when Mrs Liebeck asked for $20,000, this to cover her medical expenses and a modest loss of income. Perhaps the company had settled the 700 or so prior complaints against its super-hot coffee for sums in this region, but it came to regret its decision: at trial in August 1994, an American jury awarded damages of $160,000 to cover medical expenses and compensatory damages—and $2.7 million in punitive damages. The trial judge reduced the final amount to $640,000, although that which came Mrs Liebeck's way remains confidential—the parties agreed a final figure before an appeal.

The Liebeck case was picked up by media on both sides of the Atlantic. ABC News called it "the poster child of excessive lawsuits",[17] while Vanessa Feltz, writing in *The Daily Star*, labelled Mrs Liebeck an "American plonker who gulped her coffee and took Ronald McD to the cleaners".[18]

This kind of sensationalism obscures the truth. The fact is that McDonald's should not have been serving coffee that was scalding hot. The potential for harm was obvious. The spilling of the coffee may have been Mrs Liebeck's fault, but she could not have expected the consequences. In all the circumstances, she had every right to sue.

Regrettably, though, a measured report of the Liebeck case—with a headline such as "Scalded Woman Wins Damages"—would be of little interest to the majority of newspaper editors. They seem all too wedded to the well-known aphorism: "never let the facts get in the way of a story". This was even more evident in the notorious story about the US driver who obtained compensation when his Winnebago motor home crashed. The man had apparently left the driver's wheel to enter the motor home part of the vehicle and make a cup of coffee. He had put the vehicle on cruise control, having wrongly thought that the Winnebago's auto-pilot facility meant that it would drive itself. The result? His injuries led to an award of over $1 million—and the manufacturer rewrote the owner's manual.[19] Needless to say, this story had any number of people jumping up and down and lamenting how compensation culture was endemic in the US and shortly to arrive in Britain, but it had a significant flaw: it was complete fiction. The *LA Times* estimably set the record straight in a 2005 article entitled "Legal Urban Legends Hold Sway".[20]

## Time for some common sense

The *Liebeck* and *Winnebago* cases may have set editors and journalists off on a bandwagon of claimant-bashing, but, as the Better Regulation Task Force report noted, they were soon joined by others in positions of influence, whether in government or senior public roles.

Senior commentators, who are frequently reported, also perpetuate the perception of a "compensation culture". They make speeches decrying the compensation culture without offering any solutions. Such

[16] *Liebeck v McDonald's Restaurants* N.M. Dist., August 18, 1994.
[17] ABC News.
[18] Vanessa Feltz, *The Daily Star*.
[19] *Grazinski v Winnebago*.
[20] *LA Times*.

speeches also give the impression that there are dual standards being applied to people litigating. Commentators are fond of criticising "ordinary" people, but rarely criticise big companies or well-known figures for litigating. This gives the impression that there is something wrong if "ordinary" individuals exercise their rights. People should be able to claim redress when rights have been infringed. Absolutely so, though as an aside, it is tempting to wonder about the impact of Britain's libel laws here. Could it be that criticism of corporate lawsuits, or those brought by individuals with means, is fettered by what libel practitioners habitually call the "chilling effect" of the threat of being sued for defamation?

Undoubtedly, there are those in our society who milk their misfortune. Advertising by claims management companies and some solicitors' firms has fuelled a "have a go and see what you might get" mentality, which, in turn, has resulted in a fear of litigation. Local councils would be negligent if they did not now factor in the possibility of claims, and a fair proportion of their annual budget goes on dealing with them. Better risk management in the first place is an obvious retort to those who say that things have gone too far, but more eloquent—in places, at least—was a report published by Lord Young, the Prime Minister's advisor on the alleged prevalence of a compensation culture as well as health and safety law and practice, on October 15, 2010. First, though, let's consider a 2002 report published by Datamonitor. Its findings chime with those of Lord Young, some eight years on.

The Datamonitor Group bills itself as "an independent, premium business information and market analysis company that assists clients with operational and strategic decision-making". It's fair to say that its reputation as a provider of business intelligence is among the best around. As such, plenty of people in the PI sector were heartened by the common sense underlying its 2002 report, entitled "UK Personal Injury Litigation: The Compensation Culture Myth Exploded". Here is a Datamonitor's précis of the report:

> "Fears that Britain is moving towards a US-style love of lawsuits appear unfounded. Datamonitor's new report, "UK Personal Injury Litigation 2002" reveals that although claims for injuries have increased in frequency over the last few years, this is now beginning to tail off. It is forecast that there will be 627,000 accident claims a year by 2007, signalling a total increase of just 2.1%. The cost of claims could be as much as GBP11 billion by 2007, meaning a GBP7.3 billion pound increase from 2002, adding further pounds to the cost of insurance. However, the UK is not expected to imitate the US because of improvements to roads and pavements, vehicle safety and working environments reducing the number of accidents and injuries. Also compensation awards handed out in the US are much higher than in the UK, meaning that Brits are less likely to take the time for small sums of money. Finally, British people are willing to hold onto the idea of the accident, unlike the US where the blame culture is rife."[21]

Lord Young of Graffham, himself a practising solicitor for many years, was charged with investigating compensation culture, alongside Britain's health and safety regime, by David Cameron while he was the leader of the opposition. Lord Young's report, entitled *Common Sense, Common Safety*, came out a few months after Cameron had assumed office as Prime Minister. In many ways, it appeared to echo the Datamonitor report of 2002. Take this paragraph, for example:

> "The problem of the compensation culture prevalent in society today is, however, one of perception rather than reality. The number of claims for damages due to an accident or disease has increased slowly but nevertheless significantly over recent years. Furthermore, there is clear evidence that the public believes that the number of claims and the amount paid out in damages have also risen significantly."[22]

[21] "UK Personal Injury Litigation: The Compensation Culture Myth Exploded" (The Datamonitor Group, 2002).
[22] Lord Young, *Common Sense, Common Safety* (Cabinet Office, 2010).

Lord Young emphasised the factors which had contributed to the perception of a compensation culture. Among them, he cited media spin, the development of "blame culture" (in which somebody else is always at fault), the advent of Conditional Fee Arrangements ("CFAs") in our civil litigation landscape, the endemic payment of referral fees and misconduct by claims management companies.

The *Common Sense, Common Safety* report made a number of recommendations to combat the so-called compensation culture. They included the introduction of a simplified claims procedure for PI claims similar to that which, since April 2010, had been in existence for road traffic accidents ("RTA") under £10,000 on a fixed cost basis, with recommendations that extending the framework of such a scheme to cover low-value medical negligence claims and increasing the upper limit for RTA PI claims to £25,000 should also be explored. Beyond this, Lord Young was clear that the recommendations made by Lord Justice Jackson in his review of civil litigation costs be implemented, so that there be greater restrictions on the payment of referral fees and the ability of claims management companies and PI law firms to advertise.

Lastly, he stated that, by means of legislation if necessary, people should not be held liable for any consequences of their well-intentioned voluntary acts.

In many ways, Lord Young's rebuttal of the existence of a compensation culture was welcome. Here, at last, was an eminent figure, charged by the man who went on to become Britain's prime minister, rejecting the notion that the country was awash with spurious claims. And yet *Common Sense, Common Safety* itself is not a document of immaculate clarity. For example, albeit that he unequivocally stated that "compensation culture was a problem of perception rather than reality", much of Lord Young's report focuses on what he describes as the unintended consequences of the Access to Justice Act 1999. This, says Lord Young, ushered in CFAs, after-the-event ("ATE") insurance and the proliferation of claims management companies, which in turn fostered "the public's increased awareness that it was possible to sue without any financial risk". Furthermore, the changes:

> "encouraged the belief that claiming compensation for even the most minor of accidents is quick and easy, while at the same time incentivising lawyers to rack up high fees in the knowledge that they will be covered by the losing party."[23]

On the one hand, then, Lord Young says that compensation culture doesn't exist. On the other, he fuels the belief that it is alive and well. The contradiction was articulated at a press conference to launch *Common Sense, Common Safety*, as reported by James Dean for *The Law Society Gazette*. As Dean wrote, on October 18, 2010:

> "'The problem of the compensation culture prevalent in society today is one of perception rather than reality,' the report states. If that is his belief, why did Young say at Friday's press conference that compensation was 'a cash cow for lawyers and referral agencies'? Why, at the Conservative party conference, did he speak of being 'ashamed' of the advertising done by personal injury firms; and why did David Cameron talk last week about 'the spectre of lawyers only too willing to pounce with a claim for damages on the slightest pretext'?"[24]

Not only did David Cameron talk about this spectre, he wrote about it, too—in the foreword to the very report in which Lord Young suggests that the so-called compensation culture is a problem of perception, not reality. "A damaging compensation culture has arisen", writes the Prime Minster:

> "as if people can absolve themselves from any personal responsibility for their own actions, with the spectre of lawyers only too willing to pounce with a claim for damages on the slightest pretext."

[23] Lord Young, *Common Sense, Common Safety*.
[24] James Dean *The Law Society Gazette* (October 18, 2010).

There it is, in black and white: the belief that the compensation culture exists, and that Lord Young's review must be a "turning point".

No wonder, though, that Mr Cameron wrote and spoke as he did: *Common Sense, Common Safety* is rife with contradictions, and attacking the compensation culture makes for good copy. It makes him sound tough and authoritative, a man of action who believes we should all stand on our own two feet and take responsibility for whatever happens in our lives. The truth is indeed that "compensation culture" is myth rather than reality. Lord Dyson is absolutely correct. The term should be reclaimed, in the interests of truth and accuracy, to describe those who have no scruples, and act beyond the law. It should not be hi-jacked by lazy headline writers and politicians who prefer sound-bites to facts.

## What really makes for "compensation culture"?

Back in 2005, Tony Blair gave a speech in which he called for "common sense culture, not compensation culture". In a sound-bite picked up with typical alacrity by the media, Blair said:

> "Public bodies, in fear of litigation, act in highly risk-averse and peculiar ways. We have had a local authority removing hanging baskets for fear that they might fall on someone's head, even though no such accident had occurred in the 18 years they had been hanging there."[25]

Blair helped set in train a backlash against a fundamental tenet of tort law: that the claimant should, if he or she has proved negligence and causation, and if the resultant damage is not too remote, be placed in the position he or she would have been in had the accident or injury not occurred. Ever since, the media has delighted in stories of absurd claims supposedly brought by solicitors acting unethically and claimants on the make. We are told that school trips have been cancelled, for fear of accidents happening and children, through their parents, then suing, and yet, as the law firm Leigh Day found:

> "Research conducted by The Countryside Alliance Foundation demonstrates very clearly that of the millions of school trips taken over the past 10 years, only 364 ended in legal action and in only 156 of those cases were the schools found to be culpable. Between 1998 and 2008, the total amount of compensation paid, on average, by local authorities in relation to school trips was just £293.44 a year."[26]

The truth is certainly contrary to media spin. The vast majority of solicitors continue to adhere to the basic principles of tort law: if someone has been injured, they take up the cudgels on that person's behalf and seek redress. They do so with the usual hurdles to overcome—proving negligence, for a start—and because it is right that our democracy allows this to happen. It is a sign that we are civilised, and that we care. Those who may need to bring claims should not fear obstruction by insurers or vilification by third parties who insist they're making the most of their misfortune. They should be emboldened in their conviction that they are entitled to right the wrongs inflicted on them.

But if we are in danger of forgetting, rather than praising, the fact that we have a developed judicial system that allows injured people to bring claims, we also live in a world where there is a truth that dare not speak its name.

Insurers are a major reason for "compensation culture". Their practices encourage and foster it.

It is here that ethical dissonance sounds loudest—and it is because of this that the Office of Fair Trading ("OFT") referred the UK's private motor insurance industry to the Competition Commission. The referral followed a study by the OFT in May 2012, which found that there were reasonable grounds to suspect that there are features of the insurance market that prevent, distort or restrict competition. In June 2014

[25] Tony Blair.
[26] Leigh Day.

the Commission published its provisional decision on remedies, which includes a cap on charges an insurer can pass on to the at fault driver, the provision of better information to consumers on their post-accident rights and no claims protection, a ban on price agreements between price comparison websites and insurers, and stopping insurers making products available more cheaply. In September 2014 the Commission will publish its final findings; it is to be hoped that it sticks to its guns.

In a nutshell, then: there is reason to think the insurance industry is not serving its customers well.

The OFT, in its summary of the referral, put it thus: in focusing on "the provision of replacement vehicles and vehicle repairs", it was thought that "the insurers of drivers responsible for an accident ('at-fault' drivers) appear to have little control over the way repairs and replacement vehicles are provided to the 'not-at-fault' driver." The OFT added that this:

> "may enable the insurers of not-at-fault drivers, and others such as insurance brokers, credit hire organisations and repairers, to engage in practices which appear to result in the cost of replacement vehicles and vehicle repairs provided to not-at-fault drivers being higher than they might otherwise be."

What is meant by the use of the word "practices"? Let me be clear. This means the payment of fees—which are often knowingly and deliberately inflated. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") may have banned the flow of referral fees between solicitors, claims management companies ("CMCs") and insurers, but they are alive and as insidious as ever when it comes to garages, credit hire companies, leasing vehicles to drivers after accidents and recovery companies.

It's not easy to discern in the terms of the OFT referral but there is clearly a huge question mark over the conduct of insurers and their representative body, the Association of British Insurers ("ABI"). The ABI has proved adept at spinning the yarn that "compensation culture" fuels hikes in insurance premiums and makes our lives a hostage to unscrupulous bounty hunters who will issue a claim at the drop of a hat—and yet it is the ABI's very members who cause the "blame and claim" syndrome in the first place.

These thoughts lead inevitably to a consideration of the ethical standards—or absence of them—at play among insurers. Time and again stories of outlandish litigation in the media turn out to be bogus or wildly exaggerated; time and again we encounter insurers blaming the increase in the cost of premiums on everyone but themselves.

In truth, investment income—which is what our premiums are used for—has flattened out because of the global recession, and so insurers seek to ramp-up their profits through a back door which has become nothing but a conduit for backhanders. It's a vicious cycle: as one insurer ups the ante, passing on costs to another, so does its competitor. And so on, and on—until, hopefully, the Competition Commission will do something about it when it delivers its final report in September 2014.

Meanwhile, insurers continue to fall short when it comes to acting ethically. For example, a survey, by CSR Europe and KPMG, of five European insurers and five European banks found that 80 per cent had no ethical objectives or targets of any kind, while only another 10 per cent had a qualitative target.

## How did we get here?

For personal injury solicitors some 20–30 years ago, acting for insurers was technically exacting and challenging. Insurer clients were knowledgeable and would quickly expose poor logic through their own extensive experience and exposure. The task of advising on liability, quantum and tactics, with the occasional foray into procedure, was appealing to a great many litigators, including myself.

Then, on the flipside, there was what it was like to be a claimant solicitor. This was even more appealing: it was a privilege to act for the claimant, an injured person, to try to obtain restitution. Solicitors love engaging in the professional evidence of others, which is so essential to bringing a personal injury claim; this, too, was one of rewards of the job.

But take a look at the legal landscape in personal injury now; from what heights we appear to have fallen. There are exaggerated claims; aggressive marketing. Ancillary businesses, from credit hire to costs companies, are seemingly everywhere. They range from medico legal agencies to rehabilitation specialists, and they are all usually more concerned about the bottom line than about the injured people whose ill fortune keeps them in business. Solicitors are not exempt from charges of sharp practice. Some firms induce the making of claims where there might be none, and settle cases for their commercial benefit rather than in their client's best interest. Others string them out knowing that the longer they keep going, the more money will come in. Charles Dickens captured this regrettable aspect of legal practice perfectly in *Bleak House*, in the fictional case of *Jarndyce v Jarndyce*, a Chancery dispute that drags on for so long that the lawyers' costs devour the whole of the estate in issue. One particular passage in *Bleak House* is always worth reading:

> "Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated, that no man alive knows what it means. The parties to it understand it least; but it has been observed that no two Chancery lawyers can talk about it for five minutes, without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce, without knowing how or why; whole families have inherited legendary hatreds with the suit. The little plaintiff or defendant, who was promised a new rocking-horse when Jarndyce and Jarndyce should be settled, has grown up, possessed himself of a real horse, and trotted away into the other world. Fair wards of court have faded into mothers and grandmothers; a long procession of Chancellors has come in and gone out; the legion of bills in the suit have been transformed into mere bills of mortality; there are not three Jarndyces left upon the earth perhaps, since old Tom Jarndyce in despair blew his brains out at a coffee-house in Chancery Lane; but Jarndyce and Jarndyce still drags its dreary length before the Court, perennially hopeless."[27]

Today, though, increased court management of cases and a raft of procedural changes have, thankfully, made it more and more difficult for lawyers to ape the *Jarndyce* model. Indeed, the primary problems with today's personal injury sector lie not with lawyers but with insurers.

A highly dubious landscape has come to pass, but it's time to speak up, and look at how this has come to be. It's time to take an up-close-and-personal look at the insurance industry, where we find not just the covert encouragement of the often nonsensical "compensation culture" spin but any number of shady practices, unprofessional conduct and unethical customs. Moreover, it transpires that insurers have a pronounced tendency to seek to control bodies that are ostensibly set up as independent.

## The Motor Insurers Bureau: Hijacked by the men in black?

A good place to start is with the creation of the Motor Insurers Bureau ("MIB")—a classic case of insurer hi-jacking.

The MIB has been with us for quite some time now. One of the most learned commentators on the MIB, Nick Bevan, has explored its origins in depth, writing in 2011 in the *Journal of Personal Injury Law*. As Bevan says:

> "[The MIB] plays a vital role in the framework of protective measures designed to ensure that road accident victims recover their full compensatory entitlement. The service it provides is crucial—especially for those unfortunate enough to be victims of the estimated one million (and possibly more) uninsured drivers that plague our roads. Without this safety net many injured victims

[27] Charles Dickens, *Bleak House* (Hertfordshire: Wordsworth Editions Ltd, 1993).

would be unable to recover their compensatory entitlement because most uninsured drivers have little or no means to satisfy a judgment themselves."[28]

So far, so good—but strip away the veneer and all is not what it seems. There are growing calls for an overhaul of the MIB, because it is not fit for purpose. A number of observers believe that what started out as a laudable and sensible initiative has become almost wholly underwritten by the insurance industry—which means that those who suffer an accident at the hands of an uninsured driver are not getting the right level of compensation.

The MIB has its genesis in the Road Traffic Act 1930. This made it obligatory for the user of a motor vehicle on a road in Great Britain to be insured against liability for personal injury caused by or arising out of that use (a requirement now contained within ss.143–145 of the Road Traffic Act 1988). As Bevan explains, almost as soon as the 1930 Act had been passed failings were noted:

"The first was that many drivers were simply failing to purchase the third party motor insurance. The second problem was that even where such insurance cover existed, any material breaches by the policy holder entitled the insurer to avoid its contractual liability to indemnify. In either case, the social policy aim of ensuring that victims would recover their full compensatory entitlement from the responsible party's insurer, regardless of the financial circumstances of the defendant, was being frustrated."[29]

Accordingly, the well-known and highly respected jurist, Felix Cassel, was asked to investigate matters. He chaired the Board of Trade committee on compulsory insurance from 1935 to 1937. In 1937, the Cassel Committee made two key recommendations:

1) There should be further legislation to regulate motor insurance contracts more stringently.
2) A National Guarantee Fund should be set up to compensate victims of uninsured drivers.

Before the Fund could be set up by the government, along came the Second World War. But in its aftermath, insurers seized the initiative, proposing a statutory scheme that insurers would administer (a tactic which is now all too familiar). This, then, is how the MIB came into being on 1 July 1946—as a private company, established to allow the motor insurance industry to contract with the State to deliver a compensatory scheme for victims of negligent uninsured and untraced motorists. The MIB then implemented a succession of schemes, beginning with the Uninsured Drivers Agreement 1946 (modified in 1972, 1988 and 1999). It also created the Untraced Drivers Agreement in 1969, updating this to its current form in 2003.

In 1973, Britain's entry into the European Community made for a fresh set of European obligations. There are many reasons to doubt the MIB's compliance with them, but the key issue is the way in which the MIB has evolved—and the power it now wields. As can be seen from how it came into being, it is not the product of altruism or largesse. Today it is an impressive, and large, organisation: as Bevan notes:

"In 2009, MIB employed about 320 staff and handled approximately 60,000 uninsured and untraced driver claims from its premises in Milton Keynes."[30]

It has gone on to pursue any number of commercial activities both here and in Europe, paid for by the public. Bevan again succinctly summarises what we have got, in the form of the MIB:

"… every penny expended by the MIB in satisfying claims under the Uninsured and Untraced Drivers Agreements and in managing the seemingly ever widening role of the MIB is eventually recouped

[28] Nick Bevan, J.P.I.L. 2011.
[29] Nick Bevan, J.P.I.L. 2011.
[30] Nick Bevan, J.P.I.L. 2011.

> from the premium paying public. The State has in effect empowered the representative body of a commercial consortium to impose indirect taxation in order to implement its social policy aims."[31]

Today's MIB, then, is not quite as straightforward as insurers would have us believe (indeed, its procedures are so Byzantine as to symbolise powerfully everything that is wrong with it).

It is as if it has been designed to confound and obfuscate.

If major insurers control the MIB, and the compulsory provision of insurance, what else do they control? Quite a lot, is the unfortunate answer.

## The claims portals: Portals to the insurers' best interests

Another instance of insurers' preoccupation with control—dressed up as something for the injured person's good—comes in the form of insurers' approach to the various claims portals that have come into being in recent years. The Ministry of Justice, as part of the seemingly endless drive to reform the civil litigation landscape (until, perhaps, there are no claims left, or so a cynic might say) decreed that Road Traffic Act 1991 ("RTA 1991") claims of up to £10,000 in value ought to be conducted via a new pre-action protocol, and routed and managed through a new electronic claims portal. This meant the swift electronic processing of claims—and their quicker settlement (a laudable objective). The first portal, for claims under the RTA 1991, was set up in 2010. It was followed by another portal again dealing with so-called "low value" claims (now set at up to £25,000), those involving employer liability ("EL") and public liability ("PL"), set up in July 2013.

These kinds of claim make up the bread and butter of personal injury claims. They're not glamorous—if "glamour" can ever be said to accrue to claims which only arise because someone has been injured—but they are vitally important. They affect a vast number of people; people who have been injured, and need legal representation to obtain redress. Initiatives to speed up claims of this nature are welcome; the notion of a fast track is good. But what is not so welcome is the way in which insurers try to control the portals, from their administration to questions of over-arching policy.

Perhaps one thing distils this better than any other—the fact that claimant representatives were kept in the dark by insurers and the Government during the creation of the portals. At the outset, what should have been an amalgam of stakeholders saw insurers, and insurers alone, select the management company for the first portal. Management of the first portal was by an insurance sub-contractor and then moved to a wholly-owned subsidiary of the MIB—which, as we have seen, is an organisation controlled by insurers. It is now Claims Portal Ltd, a not-for-profit company comprised of 13 non-executive directors, including an independent chairperson. The directors represent the Association of Personal Injury Solicitors ("APIL"), the Motor Accident Solicitors Society ("MASS"), the TUC, the Law Society, the MIB and, of course, insurers. While its board is balanced between claimant and compensator directors it remains the case that he who pays the piper calls the tune, added to which the portals are managed by staff of the MIB. To date the claims portal remains funded by insurers notwithstanding a joint venture agreement to move to a different system in which users pay, which would mean de facto freedom from insurer control in terms of funding. At the time of going to print, some progress to user pays (away from insurer funding control) is being made—a full four years after it was agreed to move to the user pays model.

I was an inaugural claimant representative, serving as a director representing MASS and continuing in that capacity until April 2012, when I became Vice-President of the Association of Personal Injury Lawyers. I can say with authority, then, that the committed Claims Portal Board has gone a significant way towards ensuring a balanced approach. However, implementing the user, rather than insurer pays, model is a necessary and overdue further step.

[31] Nick Bevan, J.P.I.L. 2011.

In addition, insurers have lobbied for the portals to be extended and, at the same time, for recoverable legal costs for claims in the portals to be driven down—to date, with great success. The financial limit for claims has risen from £10,000 to £25,000; recoverable costs have been slashed by up to 58 per cent. The result is inimical to justice, turning claims into commodities—and very low value ones at that. It is commercially unviable for many solicitors even to contemplate acting for a claimant in portal claims—and that's just how the insurers like it. But the truth is this: these kinds of small claims are what happens *in life*. Thankfully, the majority of us have to find solicitors to handle injuries from which we will recover, in time, rather than catastrophic, life-changing injuries. However, everything is relative: awards up to £25,000 (the upper limit in the portals) include injuries of significant and permanent impact. With a young person on the minimum wage earning not much over £7,500, a claim up to £25,000 is a huge amount of money, and of commensurate significance. Given the importance of these claims, surely the body administering them should be truly independent?

## The cancer of referral fees

I can vividly recall giving evidence on Tuesday October 10, 2011 to the House of Commons Transport Committee, which sat to take oral evidence on the rising cost of motor insurance. It was the second time I had attended a select committee meeting. In November 2010, I gave evidence before Louise Ellman MP, who is the very able chair of the Commons Transport Select Committee. Then, as now, I found that the experience of engaging with Parliament has its Kafkaesque moments.

As in the Czech novelist's great novel, *The Trial*[32]—which sees Joseph K search fruitlessly for justice, having been arrested for a reason that is never specified—the splendour of the surroundings is inescapable. The Palace of Westminster, which is where I also gave evidence in 2010, is awe-inspiring, both in its sense of history and architecture. Portcullis House, where the October 10, 2011 hearing took place, is rather less grand but still has an august flavour, perhaps because of its name: it is so called after the chained portcullis used to symbolise the Houses of Parliament on letterheads and official documents.

But for all the grandeur, the business of actually appearing to give evidence is not easy. In 2010, it seemed as if I was asked to wait interminably outside an apparently limitless number of doors, rather than being ushered directly to the Committee. It was only by dint of determination that I managed to find the room in the Palace of Westminster in which the Committee was sitting. In 2011, the venue had changed (from the Palace to Portcullis House) at the last minute—but no one thought to tell me. It's almost as if because everyone within Parliament knows the drill, they forget to tell the rest of us.

Jack Straw MP, the former Lord Chancellor and Secretary of State, is a man who knows Parliament like the back of his hand. Perhaps this gave him the confidence to breeze into the hearing a few minutes after it had started; certainly, I was in the midst of introducing myself when he arrived.

Attending a hearing in the company of a heavy hitter such as Jack Straw means that one has to be determined to be heard. Fortunately, my previous Select Committee experience stood me in good stead. Representing MASS as I then was, I felt I made MASS's point: that unless the Government tackles systemic failings within the personal injury industry, its proposed ban on referral fees alone may do more harm than good.

At around this point, I was conscious of a curious atmosphere. Portcullis House seemed possessed of uncertainty. And then I realised: the MPs to whom I and others were giving evidence simply had no idea of the extent of dysfunction of the personal injury and motor insurance market when it came to referral fees. Granted, the Ministry of Justice was, at this time, proposing a ban on them, but the nitty-gritty of what went on by way of metaphorical brown envelopes was almost entirely unknown to the world at large.

[32] Franz Kafka, *The Trial* (Oxford: OUP, 2009).

Extraordinarily—or not, depending on the extent of one's cynicism—insurers knew full well about referral fees—after all, they were the ones paying them—and yet said nothing. The system was rife with corruption. As I gave evidence to the Committee, it would be a fair bet to suggest that somewhere in the country a personal injury lawyer was signing off a payment which secured drivers' details from an insurer, a garage or, most probably, a claims management company. En route, data protection laws would almost certainly have been breached—customers almost certainly *did not* really consent, when they had that minor, now happily forgotten accident a couple of years ago, for their mobile phone numbers to end up on an accident claim marketer's database. The bottom line was this: backhanders were everywhere—and insurers were actually selling claims to solicitors.

No wonder that Lord Justice Jackson, in his Review of Civil Litigation Costs, described the paying of referral fees as "abhorrent". No surprise that the Chairman of the Bar, Peter Lodder QC, agreed wholeheartedly. For him, referral fees were "bribes and add an unnecessary cost to litigation … [they have] no place in a fair and open justice system." More to the point, selling claims for fees means, inevitably, that claims will be made. And yet who makes the loudest noise about the so-called "compensation culture", and who asks its clients to pay ever-bigger premiums?

The Ministry of Justice went on to ban referral fees—a good move, albeit one that was rushed through, poorly executed and left plenty of loopholes. For their part insurers, having played dumb initially, performed a volte-face when they realised the cat was out of the bag, themselves calling for reform and playing the "everyone's at it" card (as if to say, "what choice did we have? We only played the game because we had to."). Reform, though, was bitter-sweet: along came the Alternative Business Structure ("ABS"), much trumpeted following the passing of the Legal Services Act 2007 and duly authorised by the Solicitors Regulation Authority. ABSs came formally into being in early 2012 and set the scene for a revolution in the way solicitors run their businesses, allowing non-lawyers to own and invest in law firms. The media tended to focus on the "Tesco law" implications of this—understandably, for can a Tesco conveyancing service, predicated on high volume transactions conducted at breakneck speed, match that of the traditional conveyancing solicitor? But there was another, just as worrying and arguably more insidious aspect to the brave new ABS regime. Put simply, insurers and claims management companies could now own law firms. How's that for a way around the referral fee ban? And meantime, the raft of ancillary fees paid by those outside the legal profession—the likes of medico-legal companies, garages, reporting engineers and towing companies—continued unbridled. These bodies all habitually pay referral fees; to date, they are not properly regulated.

## Pre-medical offers: Another surprise for the Transport Committee

Summer 2013 saw the publication of the eagerly anticipated report by the cross-party House of Commons Transport Committee on the cost of motor insurance. As one would hope and expect, a number of sensible points were made. There was, though, a sentence that stood out. It illustrated the endemic malpractice in the insurance sector: MPs on the Committee were surprised to find that insurers sometimes made an offer to personal injury claimants even before they had received their medical report.

The MPs may have been surprised—incredulous, in truth—but those of us working at the coalface in the personal injury sector have long objected to the practice of what is laughably known as "third-party assistance".

Third-party assistance happens when insurers make direct contact with people who have potential claims. According to the Association of British Insurers (which has a voluntary code for its members on the practice), insurers contact people in this way for benign reasons. As the ABI put it in 2009, in a statement which, at the time of writing, remains on its website:

> "If an insurer contacts an injured third party it will be to ensure that they get fair compensation and the best possible rehabilitative care more quickly than through the legal process. In doing so, insurers will ensure that the person is fully aware of their legal rights and options.
>
> The FSA's guidance, combined with our own code of practice which we will be publishing shortly will ensure that claimants get the best possible deal as quickly as possible. It will also reduce legal costs, which all customers end up paying for through higher premiums."[33]

Does this bear scrutiny? Hardly. In fact, not to put too fine a point on it, the notion of "third-party assistance"—something practised by insurers for the greater good—is ridiculous. What actually happens in third-party assistance is that an injured person is contacted by an insurer before he or she has obtained legal advice, and before any medical evidence exists. If conducted skilfully by an insurer's representative, the ensuing phone call means that an injured person's claim is settled in the absence of a medical report as to the extent and ramifications of the injuries—and before legal advice has been obtained. As such, while third-party assistance might result in a quick cash fix, it only ever renders justice and better rehabilitative care inadvertently. Its sole aim is to buy-off claims cheaply and before the injured person instructs a lawyer.

The insurance industry hated it, but the Law Society hit the nail on the head with its "Don't get mugged by an insurer" advertising campaign in 2013. Law Society research showed that people who seek a solicitor's advice receive two to three times more compensation than those who accept an insurer's first offer. Insurers contend this is down to the bogus notion of "compensation culture", that we live in a society where everyone is on the make; but it is their very conduct in the first place that fuels this. If they insist on ringing people up as soon as there is an accident, they create, by word of mouth, the expectation that there must be some money to be had.

Among its recommendations, the Transport Committee urged insurers to put their own house in order. Needless to say, insurers have carried on exactly as before, making pre-medical offers under the guise of "assistance" and, into the bargain, trying to find a scapegoat. That which sprang most obviously to their attention was whiplash (a colloquial term to describe soft tissue injuries to the spine), a painful and debilitating condition for anyone unfortunate enough to suffer it but, to insurers, a myth. James Dalton, the ABI's head of motor and liability, summed up the insurer perspective in March 2014, calling for damages for whiplash to be abolished altogether (suggesting instead that claimants should have their rehabilitation paid for). Worse, insurer-driven spin has been swallowed hook, line and sinker by the Government (one wonders why), with the result that higher premiums are blamed on Britain having become "the whiplash capital of the world". Because so many of us are rushing to solicitors' offices and issuing proceedings at the merest twinge in our necks, the poor, beleaguered and altruistic insurance industry has no choice but to put up its premiums. As it happens, whiplash exists. It hurts. And more to the point, the latest statistics from the Compensation Recovery Unit (a civil service department which has been collating annual statistics on the number of claims made each year for over 20 years) show that whiplash claims are actually *falling*. That ought to be good news for everyone, but it is not for insurers: at this rate they might have to look in the mirror and confess that what they see isn't very pleasant. In any event, they'll need another scapegoat. Anyone for mesothelioma?

## Mesothelioma: A death sentence which insurers do nothing to ameliorate

Mesothelioma is an asbestos-related cancer. Approximately 2,200 people currently die in England and Wales each year from the disease, with sufferers having an average life expectancy of only seven to nine months from diagnosis. Some 50 per cent of claims for compensation for mesothelioma take over 12 months to settle, which means that sufferers may die before their claims are paid out.

[33] *https://www.abi.org.uk/* [Accessed October 24, 2014].

The Government acted to help mesothelioma victims by introducing the Mesothelioma Bill 2012, which was passed as the Mesothelioma Act 2014. Its aim was laudable: to provide compensation for sufferers of mesothelioma by setting up a lump-sum payment scheme funded by insurers to meet claims where the original insurer is untraceable. The Act will therefore establish a mesothelioma payments scheme as well as guidance about the resolution of certain insurance disputes for those affected by mesothelioma. Its introduction was long overdue, given what we know about mesothelioma: that it is a disease caused by exposure to asbestos, with a long delay between exposure and developing the disease (often 40–50 years). It is nearly always fatal. Over the years sufferers have faced a massive battle to obtain compensation, owing either to the difficulty of tracing employers or, indeed, insurers. Hence, then, the sensible and commendable advent of the Mesothelioma Act 2014 (though it is regrettable to note that the scheme would only pay out 75 per cent, not 100 per cent, of the dying person's claim).

But the Act was manipulated by insurers in the most subtle and underhand fashion. Even insurers know they cannot contend that mesothelioma sufferers are malingerers or fantasists, as they say of whiplash sufferers. But they could look into their crystal balls and see an awful lot of money going into mesothelioma claims. How, then, to stop this from happening?

The answer came in the form of a government consultation on the pre-action protocol for mesothelioma—which led to a government U-turn. In its wisdom, uninfluenced, of course, by insurers, the Government decided to revoke the exemption of mesothelioma claims from the irrecoverability of the success fee and ATE premium elements on behalf of such claimants under the LASPO. What does this mean, in plain English? It means that mesothelioma sufferers—people who are dying—have to pay for the inherent risks of legal action (a consequence that is now subject to a judicial review). Callously, this was presented by the ABI and the Government as advantageous to claimants, because it enables them to enjoy an additional 10 per cent in damages, knowing full well that this does not begin to compensate for the loss of recoverability. Thanks to this sinister bit of behind-the-scenes manoeuvring by insurers, those subject to the death sentence of mesothelioma have extra stress and anxiety in their last few months alive—and they may well die before their claim even gets off the ground.

On Valentine's Day in 2012, there was a motor premium summit of insurers and the Government at 10 Downing Street. The guest list was impressive, with any number of figureheads from the insurance sector including the Association of British Insurance Director General Otto Thoresen, Aviva UK Chief Executive Trevor Matthews and AXA UK CEO Paul Evans. Remarkably, though, not a single claimant solicitor, representative or claimant was present. None was invited.

This little love-in tells us a lot about the ethical standards underpinning the insurance sector—itself the primary cause of our so-called "compensation culture", willingly aided and abetted by those with vested interests, aka, the Government.

# Liability Issues in Cycling Claims: A Comparative Analysis of Civil Liability in European Jurisdictions

**Paul Kitson***

Comparative law; Contributory negligence; Cycling; Road traffic accidents; Standard of care

*Paul Kitson looks at the liability issues arising out of claims on behalf of cyclists. He reviews the position in England and Scotland and contrasts that with the more generous systems for awarding compensation in Europe where the concept of presumed liability is adopted. He also looks at the issues of contributory negligence that can be alleged against cyclists.*

## Introduction

It may come as a surprise to many people that when it comes to the question of considering liability the UK is probably the worst place in Europe for a cyclist to be injured by a motorist.

Under English law (the position is the same under Scottish law), a claimant cyclist must prove, on the balance of probabilities, that a defendant driver was negligent. Many safety campaigners, including the UK's national cycle charity, the CTC, have called for a new system of "presumed liability" whereby the defendant driver would be presumed to be at fault unless they can prove otherwise.

In most European jurisdictions an injured cyclist does not need to establish fault on the part of the motorist. The UK is one of only five countries in Europe, the others being Cyprus, Malta, Romania and Ireland, which have not adopted the "presumed liability" system. As an English cycle injury lawyer, establishing liability is often a difficult challenge, especially if the cyclist is unable to give evidence (e.g. he/she was killed or suffered serious brain injuries) and/or if there are no independent witnesses.

The presumed liability system recognises that the liability of one's actions should be proportionate to the degree of danger which they impose on other road users. In the UK around 19,000 cyclists were killed or injured in 2013. Of these just over 3,000 were killed or seriously injured ("KSI").

**Cyclist Casualties, 2013**[1]

| | Child | Adult | All |
|---|---|---|---|
| Killed | 6 | 103 | 109 |
| Seriously injured | 276 | 2,867 | 3,143 |
| Slightly injured | 1,676 | 14,510 | 16,186 |
| Total | 1,958 | 17,480 | 19,438 |

The data from the Department of Transport excludes incidents which were not reported to the police, even if the cyclist's injuries necessitated a visit to hospital, so the true figures are likely to be far higher than this.

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[1] "Reported Road Casualties Great Britain: 2013: Main Results", Department for Transport, 2014*https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/324580/rrcgb-main-results-2013.pdf*

Cyclists and pedestrians accounted for 29 per cent of road fatalities. Cyclists accounted for around 6 per cent of fatalities and 3,143 reported serious injuries ("KSI") even though only around 2 per cent of trips were made by bicycle. By contrast, cyclists do not pose much of a risk to other road users. According to the Department for Transport, in 2013 only 442 pedestrians were hit by cyclists, of which there were 90 serious injuries and 6 fatalities.[2]

The concept of presumed liability is not new. In 1934 Lord Danesfort[3] introduced the Road Traffic (Compensation for Accidents) Bill 1934 which proposed that cyclists or pedestrians killed or injured as a result of a road collision with a motor vehicle should automatically be able to recover compensation without the need to prove that the driver was at fault. In the reading of this Bill to the House of Lords, Lord Danesfort[4] observed that pedestrians and pedal cyclists are often unable to obtain compensation because:

> "they very seldom can get adequate evidence. If a pedal cyclist is killed he is not there to give evidence; if he is seriously injured it is quite impossible for him to give complete or satisfactory evidence of the circumstances in which he was injured."

Unfortunately this Bill did not make its way into the statute books. Similarly the 1978 Royal Commission recommendation that road traffic crash victims should benefit from a no fault insurance system was also rejected. The Safer Streets Coalition, which included the CTC, unsuccessfully proposed that provisions relating to driver liability in collisions with non-motorised users be incorporated into the Road Safety Act 2006. There is strong support for a strict or a presumed liability system north of the border in Scotland.

Cycling is a rapidly growing activity in the United Kingdom and British cyclists often suffer injuries whilst on cycle tours in Europe. Cross-border litigation, now increasingly commonplace following the implementation of the Fifth Motor Insurance Directive on the June 11, 2007, has underlined the significant differences between English law and the rest of Europe. The Directive provides a framework to enable an injured person to bring a direct action against the insurer in the UK but, if the defendant driver is resident outside of the UK, the substantive law applicable in the foreign jurisdiction where the accident occurred will usually apply in terms of liability, quantum and limitation. In *FBTO Schadeverzekeringen NV v Jack Odenbreit*[5] the European Court of Justice ruled that the insurance provisions of the Brussels Regulation are to be interpreted to permit road traffic victims injured in another Member State to bring direct actions against European-domiciled insurers in the court of the victim's own domicile.

Regulation 864/2007[6] deals with the law applicable to non-contractual obligations (Rome II). This was intended to harmonise the choice of law rules throughout the EU regarding the applicable law for non-contractual obligations. Article 4, which deals with torts, states:

> **"General rule**
>
> 1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of the tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

[2] Table RAS40004 "Reported accidents, vehicle user and pedestrian casualties by area type and combination of vehicles involved, Great Britain" (Department for Transport, 2013), *https://www.gov.uk/government/statistical-data-sets/ras40-reported-accidents-vehicles-and-casualties*.

[3] Lord Danesfort — John George Butcher, 1st Baron Danesfort QC, Conservative MP for York and later Peer,

[4] *Hansard*, Vol.92, Cols 925–950 (June 7, 1932).

[5] *FBTO Schadeverzekeringen NV v Jack Odenbreit* [2008] I.L.Pr. 12.

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

2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when damage occurs, the law of that country shall apply.
3. Where it is clear from all of the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of the country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract that is closely connected with the tort/delict in question."

This Directive took effect from the January 11, 2009.

It is not the scope of this paper to examine all the jurisdictions in Europe but only the legal systems of our nearest neighbours in France and the Netherlands, which offer far greater protection to vulnerable road users and are seen by cycle safety campaigners as the examples to be followed in the UK.

## The Law in England and Wales

The courts have long recognised that all road users owe each other a duty of care:

> "All persons, paralytic as well as others, have a right to walk on the road and are entitled to the exercise of reasonable care on the part of persons driving carriages upon it."[7]

This case was decided before the advent of motorised vehicles but the same principles apply today.

It is often a difficult task to determine liability in road traffic collisions. Each case will turn on its own facts. Even if there are lay witnesses the evidence it is often contradictory. Sometimes it is only possible to establish the cause of a collision with the use of accident reconstruction evidence: for example, when the claimant is deceased, has sustained brain damage or has no recollection of the incident.

The standard of care that is expected is of the "ordinary, skilful, average motorist".[8]

If a driver has been charged and convicted of careless or dangerous driving then the civil courts will take this into account. Section 11 of the Civil Evidence Act 1968 provides that proof of a criminal conviction can be adduced as evidence of a motorist's negligence. Unfortunately quite often bad driving is not adequately dealt with by our jurisdiction.

Section 38(7) of the Road Traffic Act 1988 states:

> "A failure on the part of a person to observe a provision of the Highway Code shall not of itself render that person liable to criminal proceedings of any kind, but any such failure may in any proceedings (whether civil or criminal) be relied upon by any party to the proceedings as tending to establish or negative any liability which is in question in those proceedings."

In *Wakeling v McDonagh* [2007] EWHC 1201 (QB),[9] Judge Mackie stated: "any breach of the Highway Code is relevant but not determinative."

Rules 204 and 211–213 of the Highway Code recognises the vulnerability of cyclists:

> "The most vulnerable road users are pedestrians, cyclists, motorcyclists and horse riders. It is particularly important to be aware of children, older and disabled people, and learner and inexperienced drivers and riders.
>
> …
>
> It is often difficult to see motorcyclists and cyclists, especially when they are coming up from behind, coming out of junctions, at roundabouts, overtaking you or filtering through traffic. Always

[7] *Boss v Litton* 172 E.R. 1030.
[8] *Nettleship v Weston* [1971] 2 Q.B. 691.
[9] *Wakeling v McDonagh* [2007] EWHC 1201 (QB).

look out for them before you emerge from a junction; they could be approaching faster than you think. When turning right across a line of slow-moving or stationary traffic, look out for cyclists or motorcyclists on the inside of the traffic you are crossing. Be especially careful when turning, and when changing direction or lane. Be sure to check mirrors and blind spots carefully.

…

When passing motorcyclists and cyclists, give them plenty of room (see Rules 162 to 167). If they look over their shoulder it could mean that they intend to pull out, turn right or change direction. Give them time and space to do so.

…

Motorcyclists and cyclists may suddenly need to avoid uneven road surfaces and obstacles such as drain covers or oily, wet or icy patches on the road. Give them plenty of room and pay particular attention to any sudden change of direction they may have to make."

In the UK judges are often tough on cyclists even though they are vulnerable road users. The harsh realities of the English legal system (tort law is similar north of the border in Scotland) are starkly illustrated in the case of *Streeter v Hughes*.[10] Craig Streeter, a 14 year old boy, was seriously injured when, as a cyclist, he was involved in a collision with a car driven by Darren Hughes. In the collision he suffered a spinal cord injury which rendered him tetraplegic. The collision occurred on the September 1, 2004 in Wexham, near Slough. As Hughes proceeded around a shallow right-hand bend, Streeter, who was cycling towards him along the nearside pavement, cycled on to the road and collided with Hughes. Streeter, who had no recollection of the incident, had emerged from behind a white van which was parked on the nearside verge. Hughes argued that he was driving within the 30mph speed limit and was keeping a proper look out.

In a detailed analysis of the expert and lay evidence, the trial judge, Judge Baker, found that Hughes was travelling within the speed limit and that he was keeping a proper look out. Streeter's case failed and he was thus left uncompensated for his severe injuries.

Establishing primary liability is not the only difficulty facing an injured claimant cyclist. Defendants will often seek substantial reductions for contributory negligence for a variety of reasons including failing to wear a cycle helmet, not wearing high visibility clothing and/or failing to use a cycle path. A cyclist is not legally obliged to do any of these things yet defendants will vigorously seek to reduce a cyclist's damages award even though their cycling is beyond criticism.

The Law Reform (Contributory Negligence) Act 1945 provides that where a person suffers damage as a result partly of his own fault, then 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.

In 2005, Robert Smith was taking a short cycle ride from his home in Brightlingsea, Essex, when he was struck by a motorcyclist sustaining a severe brain injury. Mr Justice Griffith Williams in *Smith v Finch* [2009] EWHC 53 (QB)[11] held that the motorcyclist was carrying out a dangerous overtaking manoeuvre as well as travelling at excessive speed and accordingly held that Finch was primarily liable to compensate Mr Smith for his severe injuries. However, Smith was not wearing a cycle helmet and Finch argued that he was therefore partly responsible for his own injuries.

On the facts of the case the trial Judge held that the defendants failed to prove that the wearing of a helmet would have made any difference to the outcome. However, subject to proving causation, Griffith Williams J. stated (arguably obiter) that it was appropriate to reduce an injured cyclist's damages for not wearing a helmet. He said:

[10] *Streeter v Hughes* [2013] EWHC 2841 (QB).
[11] *Smith v Finch* [2009] EWHC 53 (QB).

> "… in my judgment the observation of Lord Denning MR in *Froom v Butcher* should apply to the wearing of helmets by cyclists. It matters not that there is no legal compulsion for cyclists to wear helmets … there can be no doubt that the failure to wear a helmet may expose the cyclist to greater risk of injury, such failure would not be a sensible thing to do and so, subject to the issues of causation, any injury sustained may be the cyclists own fault and he has only himself to thank for the consequences.""[12]

Following this judgment, defendants routinely seek substantial reductions for contributory negligence in brain injury cases where a cyclist was not wearing a helmet: usually 15 per cent but sometimes 25 per cent. There has been much debate on the efficacy of bicycle helmets. A leading neurosurgeon, Mr Henry Marsh, based at the St George's Hospital in Tooting, London, was recently widely quoted saying that he has treated a number of patients involved in cycle accidents whose helmets were "too flimsy" to provide any real protection. Helmets are certified to the European Standard at impact speeds of only 12mph. Mr Marsh who has been cycling for forty years chooses to wear a cowboy hat while riding his bike. Research carried out by Dr Ian Walker from the University of Bath found that drivers are twice as likely to get close to cyclists, an average of 8.5cm, when they are wearing a helmet.[13]

There can be little doubt that the wearing of seatbelts substantially increases the safety of the users, however protection provided by cycle helmets is debateable and strongly divides opinion. Nevertheless, defendants continue to vigorously argue that there are parallels between non-use of seat belts and non-use of cycle helmets. It is inconceivable that defendants in European jurisdictions would succeed with such arguments, yet in the UK there is a significant risk that the approach of Griffiths Williams J. will be followed by other first instance judges.

## The law in France[14]

France is, of course, a country with a long history of cycling. Twice as many journeys are made by bike in France compared to the UK. In France, art.1382 of the French Civil Code is applicable to many situations: "any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred to compensate it". Law 85-677[15] was introduced to provide greater protection for victims of road traffic collisions and to fast track the procedures for compensation. The law known as the "5 July 1985 law" or more commonly "the Badinter law" introduced strict liability for drivers of motor vehicles.

Under the Badinter law the non-driver victim, save for a few exceptions, is compensated in full for his or her injuries (arts 3 and 1) regardless of their own fault, unless it was "inexcusable and constituted the sole cause of the damage". However, the driver remains liable for his/her own faults (art.4) and so depending on the extent of his/her fault, compensation can be reduced by a certain percentage or even withheld.

The French courts have interpreted the concept of "inexcusable fault" extremely narrowly. For example, in an organised cycle race only one side of the road was used. The cyclist was struck by a motor vehicle whilst on a downhill decent on the wrong side of the road. This was not considered an inexcusable fault.[16]

In another example of the operation of the inexcusable fault clause a cyclist collided with a motor vehicle at a cross roads. The cyclist was killed and the relatives pursued a civil claim. The defendants attempted to invoke the inexcusable fault clause on the basis that the deceased was cycling the wrong way down a one way street without lights and had cut across the path of the motor vehicle at the cross roads.

[12] *Smith v Finch* [2009] EWHC 53 (QB).
[13] Dr Ian Walker, University of Bath press release. *http://www.bath.ac.uk/news/articles/archive/overtaking110906.html* [Accessed October 24, 2014].
[14] Kindly provided by Sebastian van Teslaar, French advocate.
[15] Law 85-677 of July 5, 1985 aiming at the improvement of the position of the victims of traffic accidents and the acceleration of compensation procedures (France).
[16] *Case 92-12539*, Cassation Court, November 8, 1993.

The Court upheld the strict liability of the driver on the grounds that the cyclist had not committed an inexcusable fault.[17]

Certain victims are compensated irrespective of whether or not they committed an inexcusable fault:

- victims less than 16 or more than 70 years old; and
- victims permanently disabled or incapacitated by at least 80 per cent.

If a victim commits suicide, or attempts to do so, this is not an inexcusable fault and compensation thus does not follow.

## The law in the Netherlands[18]

Like the French system, the Dutch system also provides strong legal protection for cyclists. The Netherlands is very much a cycling nation with an excellent infrastructure for cyclists. Almost every inhabitant owns a bicycle and 27 per cent of journeys in the Netherlands are made by bike.[19]

Article 185 of the Wegenverkeerswet ("WVW") introduced the concept of presumed liability in circumstances where there is a collision between a motor vehicle (that is being driven) and a cyclist/pedestrian on a public road. The exception to presumed liability is a deemed "force majeure" of the motor vehicle. This is where the motorist had no fault whatsoever, in which case there is no liability. In practice the courts rarely conclude that there has been a force majeure. If there is no force majeure then the claimant cyclist or pedestrian will recover at least 50 per cent liability. If a child is younger than 14 then 100 per cent liability will be established unless there has been deliberate recklessness. Liability is apportioned between the parties and then can be adjusted further by "an equitable correction".

In practice, and in comparison to courts in the UK, a cyclist involved in a collision with a motor vehicle will almost certainly recover damages. In cases which would have failed in the UK, a Dutch court would only make a relatively small finding of contributory negligence. An example of this is the decision of the Court of Amsterdam of January 18, 2012. In that case, a cyclist lost control of his bike, fell onto the road (not because of a collision) and was then struck by a motor vehicle. The Court held that there was no force majeure. The Court determined that there should be a 50/50 split finding of liability. After an equitable correction, taking into account the serious injuries sustained, there was an apportionment of 70 per cent—30 per cent resulting in the cyclist recovering 70 per cent of the full award.

In a decision of the Court of Utrecht of December 23, 2009, a cyclist was involved in a collision with a bus. The cyclist was not visible to the bus driver as he came off the pavement. It was held that the bus driver was 75 per cent at fault and the cyclist 25 per cent. The Court then made an equitable correction of 15 per cent which was added to the 75 per cent finding in favour of the cyclist, equating to a 90 per cent award. This case bears remarkable similarities to the *Streeter v Hughes & the MIB*[20] case but with starkly different outcomes for the injured claimants.

## The law in Spain[21]

Cyclists are provided with protection in the Traffic, Motor Vehicle Circulation and Road Safety Act[22] and the General Rules and Regulations for Traffic.[23]

[17] *Case 92-15863*, Cassation Court, March 28, 1994.
[18] Kindly provided by Hanneke Comans-Diesfeldt, Dutch advocate.
[19] John Pucher and Ralph Buehler, "Make Cycling Irresistible: Lessons from the Netherlands, Denmark and Germany" (2008). Buehler and Pucher, "Make Cycling Irresistible: Lessons from the Netherlands, Denmark and Germany".
[20] *Streeter* [2013] EWHC 2841 (QB).
[21] Kindly provided by Jon Sutton and Janvier Florido Martin of De Cotta Law.
[22] Royal Legislative Decree 339/1990 of March 2, 1990 (Spain).
[23] Royal Decree 1428/2003 of November 21, 2003, approving the general traffic regulations (Spain).

In respect of cyclists arts 15, 18, 20, 23, 33, 34, 42 and 45 of Royal Legislative Decree 339/1990 specifically apply.

Article 23.5 of the Articulated Text (Texto Articulado) on traffic, driving and road safety[24] provides that:

> "riders of bicycles have right of way over motor vehicles:
>
> a. When travelling in a bicycle lane, bicycle way or shoulder duly authorised for use only by riders of bicycles.
>
> b. When to enter another street, the motor vehicle has to turn right or left, in the circumstances permitted, and there is a cyclist in the vicinity.
>
> c. When bicycle riders are travelling in a group, and they shall be treated as a single mobile unit for the purposes of passing. In urban traffic this will be provided by the municipal byelaw in question."

Article 34 of the Texto Articulado indicates that:

> "1. During the execution of the overtaking manoeuvre, the driver overtaking must take the vehicle to a speed significantly higher than that of one being overtaken and allow a separation between them enough to do it safely.
>
> …
>
> 4. All motor vehicle drivers intending to overtake a cycle or moped, or group of them, should where appropriate occupy part or all of the adjacent lane of the road, keeping a safety distance of at least 1.5m. It expressly forbidden to overtake if this would hinder or endanger cyclists travelling in the opposite direction even if they are cycling on the shoulder of the road."

Article 1 of Royal Decree 8/2004[25] provides:

> "1. The motor vehicle driver is responsible, for the risk created by driving such vehicle, damage to persons or property caused through his driving.
>
> In the event of personal injury to others, the driver is relieved of this responsibility *only* when it is proven that the damage was due solely to the conduct or negligence of the injured party or force majeure not caused either by driving or correct functioning of the vehicle, defects or failure of any parts or mechanisms of the vehicle shall not be considered a force majeure.
>
> If there is concurrence of the negligence of the driver and the injured party, there will be an equitable sharing of responsibility and of the amount of compensation, taking into account of the respective negligence of the parties."

This article provides a rebuttable presumption in favour of the culpability of the driver of a vehicle in the event of an injury. As such, presumption may be rebutted by evidence to the contrary. It also provides the possibility of a contributory fault between the driver and the injured, in which case they will have to share the degree of fault of each.

In respect of the possibility of making a claim directly against the insurer, this is dealt with in art.76 of the Insurance Contract Act 1980 (Spain),[26] injured parties, or their heirs, may initiate direct action against the insurer to demand their compliance with their obligation to compensate, without prejudice to the insurer's right to recover against the insured party in the event that the damage or the damage caused to a third party was due to wrongful conduct on behalf of the insured party. Direct action is immune from

[24] Royal Legislative Decree 339/1990 of March 2, 1990, as amended by Law 6/2016 of April 7, 2014 (Spain).
[25] Royal Decree 8/2004 of October 29, 2004, Text of the Law on Civil Liability and Insurance on motor vehicle traffic (Spain).
[26] Ley del Contrato de Seguro, Ley 50/1980.

any exceptions that the insurer may be entitled to against the insured party. Nevertheless, the insurer may defend on the basis of the exclusive fault of the victim and any individual defences that the insurer may have against the latter. For the purposes of exercising the direct action, the insured party shall be obliged to declare the existence of an insurance policy and its contents to the damaged third party, or his or her heirs.

When the Spanish courts consider negligence claims they take into account all the circumstances of the accident and especially the nature of the user or victim and the time and place of the accident, statements of witnesses and the police report.

## Other European jurisdictions

In Denmark, another country with a long tradition of cycling, the Danish government recognised the need to protect cyclists by introducing a system of presumed liability in 1986. A driver of a motor vehicle is automatically liable unless they can prove that the accident was unavoidable and not due to the negligence on their part. The Danish system of presumed liability only applies to personal injuries and is restricted to motor liability whilst property damage remains fault-based. There are similar no fault or strict liability systems in Italy (art.2054 of the Civil Code (Italy)[27] creating a no fault liability for damage caused by a vehicle in motion) and Germany (IS7 of the Road Traffic Act (Germany)[28] makes a keeper of a vehicle strictly liable for damaged caused by its operation unless he can prove that the accident was caused by force majeure). In Sweden the Traffic Damage Act (Sweden)[29] creates a no fault compensation system for road traffic accidents meaning that the person who suffers injury as a result of a motor car accident has the right to compensation regardless of fault or negligence by the driver or owner of the car. Liability must be covered by compulsory traffic insurance. The concept of contributory negligence has been almost completely abandoned and is only permitted as a defence in exceptional cases where the victim is guilty of an intentional gross negligence.

## Conclusion

The UK Government recognises the considerable environmental and health benefits of promoting cycling and accordingly recently announced £62 million of funding to improve the cycling infrastructure in this country. One of the major obstacles preventing people taking up cycling is safety. Clearly cycling would be considerably safer if cyclists were segregated from other traffic, but this will take years to achieve. Our densely populated cities with narrow roads pose many challenges to road designers. However, changes to the law to improve the legal position of vulnerable road users with a strict or presumed liability system could be achieved relatively quickly with legislation which would put the UK in line with its European counterparts. Such changes would be unpopular with motor insurers and many motorists, but in all probability would substantially increase cycle awareness on the part of all road users and ought to reduce the number of casualties on our roads.

The principles of strict tortious liability are often associated with stringent insurance requirements which exist in countries such as Sweden or France. Compulsory insurance along with strict liability principles removes the problem of proof for cyclists (and pedestrians) and compensation is awarded automatically.

In 1982, the year of his retirement, Lord Denning, recognising the difficulties faced by vulnerable road users, called for a strict liability system. He said:

> "in the present state of motor traffic I am persuaded that any civilised system of law should require, as matter of principle, that the person who uses this dangerous instrument on the road dealing death

[27] Codice Civile.
[28] Straßenverkehrsgesetz ("*StVG*").
[29] Trafikskadelagen.

> and destruction all round should be liable to make compensation to anyone who is killed or injured in consequence of the use of it. There should be liability without proof of fault. To require an injured person to prove fault is the gravest injustice to many innocent persons who have not the wherewithal to prove it."

Over 3,000 cyclists are killed or seriously injured each year (of whom approximately 300 are children). As Lord Denning observed, it is unfair that many of these people are unable to bring claims as they are unable to prove fault on the part of the other road user. A change in the law would promote cycle awareness and would be a step towards reducing casualty numbers on our roads. Changes in the civil law ought to go hand-in-hand with the tightening of the approach to the criminal law. Bad driving ought to result in tougher sentencing with longer driving bans. Changes to the legal framework need to be implemented along with practical steps to improve cycle safety, such as segregated cycle lanes and improvements to dangerous junctions and roundabouts.

The Government needs to look at the Netherlands as an example of what can be achieved. The presumed liability system introduced in the Netherlands along with an extensive network of bicycle infrastructure has meant that Dutch cyclists are amongst the least likely to be injured anywhere in the world. It is five times as safe to cycle in the Netherlands as it is in the US and three times as safe as in the UK.[30] The presumed liability system is accepted within Dutch society and has heightened cycle awareness on the part of Dutch motorists, many of whom are also cyclists.

[30] See fn.11

# Amending the Medical Innovation Bill

## Nigel Poole QC*

Clinical negligence; Doctors; Innovation; Medical treatment

*In a follow up to his previous article[1] on the Saatchi Bill, Nigel Poole QC considers the current batch of proposed amendments to the proposed fourth version of the Bill.*

Amendments to the Medical Innovation Bill proposed by Lord Saatchi will create a new test for the liability of doctors. First the court will consider, as now, whether a doctor's treatment was in accordance with a responsible body of medical opinion. If so, then the doctor is not negligent. If not, the court will have to examine how the doctor made the decision to treat. Will new rules on consultation create clarity or cause confusion?

The Medical Innovation Bill is Lord Saatchi's private member's Bill. He believes that clinical negligence law is the main obstacle to medical innovation and intends to change the law to relieve innovative doctors of the fear of litigation. The Bill does not define innovation but does define treatment as including management and "inaction". It therefore applies to all treatment decisions, whether innovative or not, and whether they are decisions to withhold treatment or to give treatment. Its importance is evident.

By the time this is published, but not at the time of writing, the Medical Innovation Bill (No.4) will have passed through the committee stage in the House of Lords. Lord Saatchi has proposed a series of amendments which have been drafted after consultation with the Department of Health. It can be presumed, therefore, that they have the government's backing. They re-write the Bill's procedural requirements with which doctors who would otherwise be negligent must comply in order to avoid a negligence claim.

### *Lord Saatchi's amendments*

Clause 1(2) of the draft Consolidated Bill provides that:

> "It is not negligent for a doctor to depart from the existing range of accepted medical treatments for a condition if the decision to do so is taken responsibly."

Clause 1(3) sets out the new provisions for determining whether a decision has been taken "responsibly".

> "1 (3) for the purposes of taking a responsible decision to depart from the existing range of accepted medical treatments for a condition, the doctor must in particular—
>
> (a) obtain the views of one or more appropriately qualified doctors in relation to the proposed treatment,
>
> (b) take full account of the views obtained under paragraph (a) (and do so in a way in which any responsible doctor would be expected to take account of such views),
>
> (c) obtain any consents required by law to the carrying out of the proposed treatment,
>
> (d) consider—
>
> (i) any opinions or requests expressed by or in relation to the patient,

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[1] Nigel Poole QC, "The Medical Innovation Bill — Re-writing the Law of Clinical Negligence" (2014) J.P.I.L. 129.

(ii) the risks and benefits that are, or can reasonably be expected to be, associated with the proposed treatment, the treatments that fall within the existing range of accepted medical treatments for the condition, and not carrying out any of those treatments, and

(iii) any other matter that it is necessary for the doctor to consider in order to reach a clinical judgement, and

(e) take such other steps as are necessary to secure that the decision is made in a way which is accountable and transparent."

An appropriately qualified doctor is defined by cl.1(4) as one who has "appropriate expertise and experience in dealing with patients with the condition in question".

## A choice not to meet the Bolam test

Sensitive to objections that this will re-write the common law, the amendments include a new clause:

"2 **Effect on Existing Law**

(1) Nothing in section 1 affects any rule of the common law to the effect that a departure from the existing range of accepted medical treatments for a condition is not negligent if supported by a responsible body of medical opinion.

(2) Accordingly—

(a) where a doctor departs from the existing range of accepted medical treatments for a condition, it is for the doctor to decide whether to do so in accordance with section 1 or in reliance on any rule of the common law referred to in subsection (1);

(b) a departure from the existing range of accepted medical treatments for a condition is not negligent merely because the decision to depart from that range of treatments was taken otherwise than in accordance with section 1."

The new cl.2(1) is a partial statement of the common law. It does not fully reflect the *Bolitho* test of whether the view of a responsible body of medical opinion is rational or logical. More obviously it does not refer to the common law rule that a departure from accepted treatments is negligent if not supported by any responsible body of medical opinion. That rule is affected.

Section 2(2)(a) envisages doctors making conscious decisions to act in a way which no responsible body of medical opinion would support but instead to rely on cl.1 of the Bill. Whether this is a realistic approach to the way treatment decisions are made or not, it at least has the merit of recognising that the Bill is directed at changing the existing law in relation to doctors whose treatment does not have such support. At present those doctors are negligent. Under the Bill they may "choose" to comply with cl.1(3) and thereby avoid liability in negligence when their patients suffer harm.

## The requirements for consultation

It is important therefore that doctors, their employers, patients and the courts will be clear as to whether in any particular case a doctor has acted in accordance with cl.1(3). Lack of clarity will be liable to cause confusion and may even hinder the deployment of innovative treatments.

Unfortunately cl.1(3) is far from clear. In assessing whether there has been compliance a number of questions would arise including:

- What constitutes "appropriate experience and expertise in dealing with patients with the condition in question"? If innovative treatment of an aggressive prostate cancer is being considered, is it sufficient for the other doctor to be an oncologist, or must they be an oncologist specialising in prostate cancer? What if he or she were a urological registrar who has dealt with patients with prostate cancer, or a histopathologist?
- Was the other doctor expert and experienced not only in the condition but in the mode of treatment proposed? Would it comply with the Bill to consult an oncologist about a new surgical technique, or a surgeon about a new form of chemotherapy?
- Were the other doctor's views sought in relation to the particular patient or generally in relation to the proposed treatment—were they giving generic or specific views?
- What information did the other doctor have? Was that information put in writing? Did he have sight of the full medical records? Had he examined the patient?
- Did the other doctor discuss the case and options with the patient?
- Did the other doctor support or oppose the proposed treatment decision? Did they give their opinion in writing or orally?
- Was the other doctor's opinion rational?
- Was the other doctor's opinion one which would be supported by any responsible body of medical opinion, or would not be supported? Ought the treating doctor to have known whether the other's views were those of a responsible body of doctors or otherwise?
- What published research or data did the treating doctor and the consulted doctor rely upon?
- Was the other doctor wholly independent of the treating doctor? Is he or she in the same hospital team or at the same private clinic?
- Did the other doctor have any financial or professional interest in the decision to treat the patient in the way proposed?
- Was the other doctor in a position of authority over the treating doctor or vice versa?
- Was the treating doctor more or less experienced and expert in the condition being treated, than the other doctor?
- What was the time between the other doctor giving his views and the treatment being given, and what happened of relevance in that time? Having regard to the patient's condition, was there time to consult further or in more depth?
- Was it, or ought it to have been, evident that the views of experts in more than one field should have been taken into account (e.g. surgery, oncology and radiology)? The Bill only requires one other doctor to be consulted, but could a doctor reasonably take into account the views of only one doctor when other specialist opinions are relevant?
- Were the other doctor's views communicated to the patient before the patient's consent was obtained? Did informed consent involve telling the patient about the other doctor's views?
- If the other doctor's views were against giving the treatment but the treatment was nevertheless given, what reasons did the treating doctor have for not accepting the other's advice, and were those reasons rational and justified?
- Would any responsible body of doctors have so treated the patient having taken into account the views of the other doctor?
- What other steps were necessary to take to secure that the decision to treat was transparent and accountable?

It might be said that it would be easier for a doctor to be satisfied that he is acting in accordance with a responsible body of opinion than to be satisfied that he has complied with the requirements of cl.1(3) of this Bill. Worryingly for the promoters of the Bill, it might be easier for a doctor simply not to try any new treatment than to seek to comply with cl.1(3). Certainly, any NHS trust worried about being sued if

a doctor failed to comply with cl.1(3) would have to develop some quite sophisticated protocols or rules to ensure compliance.

## Responsible innovation

Lord Saatchi's Bill has certainly provoked a debate about medical innovation. Many believe that the debate would be better focused on issues such as the conduct and funding of research and the regulation of new treatments.

Responsible innovation should be based on a relationship of trust between doctor and patient. Whatever the nature of a patient's condition, he or she would surely want to know that their doctor is providing treatment which has a rational justification. And which patient wants to know that their doctor has actually chosen to act in a way which no responsible body of doctors would support: cl.2(2)(a)?

Responsible innovation involves introducing new treatments in a controlled way where information gained is useful for further development, is recorded and shared. This Bill is directed at the individual doctor who is not acting as part of a team of responsible doctors. It includes no requirements to record, publish or share information about the treatments given. Lord Winston and Lord Turnberg have proposed amendments seeking to introduce such requirements. They, along with Lord Pannick, have also tabled an amendment which would require that doctors departing from the existing range of accepted treatments shall act reasonably and proportionately. That looks rather like an attempt to preserve something similar to the *Bolam* test. It will be interesting to see who will be prepared to oppose an amendment requiring all doctors to act reasonably.

One view is that any amendments to this Bill are attempts to cure the incurable. The Bill is fundamentally flawed—the British Medical Association, NHS Litigation Authority, Academy of Medical Sciences, Medical Defence Union, Medical Protection Society and many other bodies have said that they do not recognise the premise of the Bill that clinical negligence litigation is a barrier to medical innovation. Patient safety and medical innovation are not necessarily opposing forces, but where they are in tension, the *Bolam*/*Bolitho* test of negligence holds a flexible and practical balance. Lord Saatchi's attempts to change and codify the doctor-patient relationship are proving to be fraught with difficulty.

# The Discount Rate: What Options Does the Lord Chancellor Have?


## Edward Tomlinson*



Damages; Discount rate; Personal injury claims



*Edward Tomlinson reviews the current position regarding the ongoing review of the discount rate and considers the options available to the Lord Chancellor.*


The discount rate is the single largest factor that determines the size of a lump sum personal injury settlement for a claimant's ongoing losses. In 2001, the Lord Chancellor made the Damages (Personal Injury) Order 2001 and set the discount rate under the Damages Act[1] at 2.5 per cent. On July 27, 2001, the Lord Chancellor provided a statement[2] setting out his reasons:

> "Having considered all the material available to me, including the accurate, corrected average yield figure, I have come to the conclusion that a discount rate of 2.5 per cent was the appropriate rate to be set."[3]

The Lord Chancellor stated that he had followed the legal principles that were laid down by the House of Lords in *Wells v Wells*[4] which confirmed the principle of 100 per cent compensation, no more, no less, and that claimants should not have to bear investment risk for the benefit of defendants. To calculate the discount rate, the Lords used the average gross redemption yield on Index Linked Gilt Stock ("ILGS") over a three-year period. ILGS were chosen by the Lords because they provided a risk-free, inflation-proof investment. In July 2001 the simple average of the gross redemption yields of ILGS at an assumed inflation rate of 3 per cent, was 2.46 per cent. After allowing for tax, rounding to the nearest 0.5 per cent, and having "… taken into account *matters* which I consider are relevant to the setting of a discount rate which is just as between claimants as a group and defendants as a group …" [5] the Lord Chancellor set the rate at 2.5 per cent. The *matters* which are included in the statement are:

- inflation would be lower than 3 per cent due to government policy and therefore the rate of return on ILGS in the future would be higher than 2.46 per cent;
- the minimum funding requirement introduced by the Pensions Act 1995 had created an additional demand for ILGS which had supressed yields and this trend would be reversed as the Government had announced plans to abolish the minimum funding requirement;
- claimants under the Court of Protection had not chosen to invest in ILGS and continued to be competently advised to invest in multi-asset portfolios; and
- real claimants who sought investment advice would not be advised to invest solely in ILGS.


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

[2] Irvine of Lairg, Lord Chancellor, *Setting the Discount Rate: Lord Chancellor's Reasons* (July 27, 2001).

[3] Irvine of Lairg, Lord Chancellor, *Setting the Discount Rate: Lord Chancellor's Reasons* (July 27, 2001).

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

[5] Irvine of Lairg, Lord Chancellor, *Setting the Discount Rate: Lord Chancellor's Reasons* (July 27, 2001). Emphasis added.

Whilst all of the above points played a part in setting the discount rate, it is clear that, with a yield on ILGS of 2.46 per cent and a discount rate of 2.5 per cent, the *matters* did little more than to convince the Lord Chancellor to round up, rather than round down. Primarily the discount rate is based on ILGS.

Since 2001, as the Lord Chancellor envisaged, the Government has managed to keep inflation low and the minimum funding requirement was abolished in the Pensions Act 2004. However, the average gross redemption yield on ILGS has not increased, rather it has been in steady decline. During the last 13 years there has been the significant economic upheaval of the credit crunch and the quantitative easing program that followed. Both of these events have had a large impact on the yield of ILGS and in November 2011 the yield dropped below 0 per cent. As at July 31, 2014 the average gross redemption yield on ILGS was -0.157 per cent.

## Reviewing the discount rate

> "Therefore whilst I remain ready to review the discount rate whenever I find there is a significant and established change in the relevant real rates of return to be expected, I do not propose to tinker with the rate frequently to take account of every transient shift in market conditions."[6]

If the current Lord Chancellor undertook the same process as his predecessor did in 2001, the discount rate would change significantly and make a very large difference to lump-sum settlements. Rounding up to the nearest 0.5 per cent from the current yield of -0.157 per cent produces a discount rate of 0 per cent.

The effect of this reduction in the discount rate to a lump sum settlement depends on the duration of the future loss. The table below provides the percentage increase in the lump sum for different periods of future loss using Table 28 "Fixed Term Multipliers" from the Ogden Tables.[7]

| Duration of Future Loss | Percentage Increase in Lump Sum | 2.5 per cent | 0.0 per cent |
|---|---|---|---|
| 10 Years | 12.9 per cent | 8.86 | 10.00 |
| 20 Years | 26.7 per cent | 15.78 | 20.00 |
| 30 Years | 41.6 per cent | 21.19 | 30.00 |
| 40 Years | 57.4 per cent | 25.42 | 40.00 |
| 50 Years | 74.1 per cent | 28.72 | 50.00 |
| 60 Years | 91.8 per cent | 31.29 | 60.00 |
| 70 Years | 110.2 per cent | 33.31 | 70.00 |

The above increases are large and have rightly raised concerns with responsible defendants, not just because of the potential to significantly increase the claim size but also because it is likely to reverse the trend of the last 10 years that has seen an increase in Periodical Payment Orders ("PPOs"). In large personal injury claims with motor and liability insurers, settlements including PPOs have increased from less than 10 in 2005 to close to 100 in 2010, 2011 and 2012.[8]

The first sign that a change to the discount rate may be possible was in September 2010 when the Privy Council approved the Guernsey Court of Appeal decision[9] to award a claimant damages for future recurring non-earnings-related heads of loss using a discount rate of 0.5 per cent. This was followed by a letter to

[6] Irvine of Lairg, Lord Chancellor, *Setting the Discount Rate: Lord Chancellor's Reasons* (July 27, 2001).

[7] Government Actuary, *Actuarial Tables for use in Personal Injury and Fatal Accident Cases*, 7th edn (The Stationary Office, 2011), commonly referred to as the "Ogden Tables".

[8] Figure 2.2 of the Periodical Payment Orders Working Party *GIRO 2013 report* (January 24, 2014).

[9] *Helmot v Simon* [2012] UKPC 5; [2012] Med. L.R. 394.

the Treasury Solicitor from the Association of Personal Injury Lawyers ("APIL"). In November 2010, the Treasury Solicitor replied to APIL stating that a review of the discount rate by the Lord Chancellor would commence shortly. One threat of a judicial review,[10] two consultations[11] by the Ministry of Justice ("MoJ"), numerous judgments[12] and one research paper by Ipsos MORI,[13] and the discount rate remains at 2.5 per cent and no review has taken place. The latest development was confirmed in August 2014 in a letter to APIL from the MoJ who confirmed that:

> "The Lord Chancellor has decided, given the complexity of the issues, that it would be appropriate to ask a panel of three experts to provide investment advice to assist him in that review. An actuarial advisor, an expert on the financial management of investments, and an academic with knowledge of relevant financial services market issues are being sought for the panel. The Lord Chancellor anticipates that the panel will report by the spring of 2015."

When the Lord Chancellor and his panel review the discount rate, it occurs to me that they have three options:

1) keep the risk-free principle and keep the link to ILGS;
2) keep the risk-free principle but abandon the link to ILGS; or
3) abandon the risk-free principle

## Keep the risk-free principle and keep the link to ILGS

The two main arguments against using ILGS as a reference point with which to set a risk-free discount rate seem to be:

- that it is not possible in practice to implement a portfolio of ILGS that exactly meets a claimant's needs; and
- evidence that claimants do not invest their money solely into ILGS.[14]

ILGS are fixed term investments held with the UK Government with a guaranteed return. An investor places funds with the UK Government who promise to pay a fixed interest rate each year linked to the Retail Prices Index ("RPI") and to return the investor's original capital at the end of the fixed term plus an increase equal to the rise in RPI. ILGS can be bought and sold at any time during the fixed term, however any sale before the redemption date is at market value which could be higher or lower than the notional value.[15] Furthermore, although the UK Government has consistently issued stock since they were introduced in 1981, the ILGS in issue do not finish neatly one year after another. This means there are gaps in redemption periods. This is often quoted as mismatch risk. Over the next 30 years there are ILGS maturities in 16 out of 30 years.[16]

If a claimant had invested solely in ILGS and required income in a year when an ILGS did not mature, then they would need to sell one of their ILGS in the previous year at the current market rate (not the notional value), which could mean a gain or a loss compared to what they might have needed to achieve.

[10] Judgment was given by the Honourable Mr Justice Holman on 16 August 2011 refusing the application for a judicial review on the grounds that the Lord Chancellor had announced that he will be issuing a public consultation

[11] *Damages Act 1996: The Discount Rate — How should it be set?* (Ministry of Justice, 2012), CP12/2012, response due on the January 22, 2013; and *Damages Act 1996: The Discount Rate — review of the legal framework* (Ministry of Justice, 2013), CP3/2013, response due on the July 29, 2013.

[12] *Love v Dewsbury* [2010] EWHC 3452 (QB) and *Harries v Stevenson* [2012] EWHC 3447 (QB).

[13] *Personal Injury Discount Rate Research* (Ipsos MORI Social Research institute, September 10, 2013).

[14] Paragraph 6.4 of *Personal Injury Discount Rate Research* (Ipsos MORI Social Research institute, October 29, 2013) a revised version, prepared for the Ministry of Justice, states: *"Claimants using financial advisors typically took on a mixed portfolio of investment, chosen to meet the needs of the individual."*

[15] The notional value of ILGS is the initial purchase price plus the move in the RPI from issue to the present day

[16] Source: *www.dmo.gov.uk* [Accessed October 24, 2014].

Furthermore, there are difficulties, for investors, to purchase ILGS, with only the largest institutional buyers able to purchase stock at issue, with all other purchases required on the secondary market.

Whilst undoubtedly there are issues in implementing and maintaining an investment portfolio that is solely invested in ILGS, there are clear advantages. Investment in ILGS is very low risk (they are guaranteed by the UK Government who have never defaulted on a payment), inflation-proofed (both capital and income) and partly tax free (part of the income is taxed but gains are not).

Whether the very low risks associated with ILGS matters, depends on what you believe the Lord Chancellor's reason was for linking the discount rate to ILGS. If you believe it is because he thought that all investors should invest in low risk assets, then consideration should be given to other low risk assets to ascertain whether they are a better match and if claimants are actually investing into them. However, if you believe that what claimants actually do with their money is irrelevant and the basis for setting the discount rate to ILGS is simply to provide a risk-free benchmark for which to calculate the discount rate, then the minor risks of actual investment into ILGS do not matter. The latter view is supported by comments made in the judgment of *Wells v Wells*:[17]

> "How the claimant or the majority of claimants in fact invest their money is irrelevant. The research carried out by the Law Commission does not suggest that the majority of claimants in fact invest in equities and gilts, but rather in a building society or a bank deposit."
>
> "More importantly, the court cannot be expected to investigate what plaintiffs, who are not a homogenous group, will or will not do with their damages. The correct approach is to concentrate on the objective question, namely what is the type of investment that plaintiffs can reasonably be expected to make."
>
> "One clear principle is that what the successful plaintiff will in the event actually do with the award is irrelevant. As Lord Fraser of Tullybelton observed in *Cookson v Knowles* [1979] A.C. 556, 577D it is for the plaintiff to decide how the award is to be applied. Whether he is proposing to invest it or spend it, or, more particularly, exactly how he is going to invest it or spend it, does not affect the calculation of the award. No distinction is recognised here between misers and spendthrifts. While it may be evident that there are certain ways in which he could prudently invest the award and other ways in which he could be imperilling his own future comfort by his employment of the award, the quantification of the sum to which he is entitled in compensation takes no account of the course which he may in the event choose to adopt."[18]

Also, by the Lord Chancellor's reasons statement provided on the July 27, 2001:

> "Third, I consider that it is likely that real claimants with a large award of compensation, who sought investment advice and instructed their advisers as to the particular investment objectives which they needed to fulfil (as they could reasonably be expected to do) would not be advised to invest solely or even primarily in Index-Linked Government Securities, but rather in a mixed portfolio, in which any investment risk would be managed so as to be very low. This view is supported by the experience of the Court of Protection as to the independent financial advice they receive. It is also supported by the responses of the expert financial analysts whom I have consulted. No one responding to the consultation identified a single case in which the claimant had invested solely in Index-Linked Government Securities and doubts were expressed as to whether there was any such case. This suggests that setting the discount rate at 2.5 per cent would not place an intolerable burden on claimants

[17] *Wells v Wells* [1999] 1 A.C. 345.
[18] *Wells v Wells* [1999] 1 A.C. 345 per Lord Lloyd of Berwick, Lord Steyn and Lord Clyde.

> to take on excessive, i.e. moderate or above, risk in the equity markets, and would be a rate more likely to accord with real expectations of returns, particularly at the higher end of awards."[19]

For claimants who have received a lump sum personal injury settlement in the last 10 years it cannot be expected that they would have invested 100 per cent in ILGS. This is because they received settlements based on a discount rate of 2.5 per cent and the yield on ILGS has remained significantly below this level over the last 10 years. If a claimant had invested in ILGS they would be guaranteeing that they would not be able to meet their needs as claimed. Only when the discount rate is equal to the current yield on ILGS would a 100 per cent investment into an ILGS strategy produce the returns required to meet the need as claimed.

## Keep the risk-free principle but abandon the link to ILGS

If ILGS are abandoned as the reference point to set the discount rate then it is necessary to find a new one. If we are to keep the risk-free principle, then the desired investment needs to provide returns that are as close to guaranteed as possible, provide automatic inflation-proofing (otherwise the claimant will have inflation risk on their investment) and ideally be tax free.

Two major asset classes that investors can invest in are stocks and shares (equities), and property (either residential or commercial). Neither of these asset classes can be described as risk free, as there are times when prices rise and times when prices fall. Whilst it is also true that the prices of ILGS rise and fall, the difference is that ILGS have a guaranteed price at maturity, whereas equities and property do not. Furthermore, the returns from equities and property are not linked to inflation.

National Savings & Investments ("NS&I") Index Linked Certificates are a potential candidate. Index Linked Certificates provide index-linked returns, are tax free and are backed 100 per cent by the UK Government. Unfortunately the maximum you can invest into them is £15,000 per tranche and there are no tranches currently on sale. For large settlements they have to be ruled out.

Another option is inflation-linked corporate bonds issued by UK companies. Like ILGS they provide inflation- linked returns, they are generally issued by strong financial institutions and have the same tax treatment as ILGS. Unfortunately as they are issued by UK companies they have to be considered as being more risky than ILGS as the issuing company may become insolvent, also the market for these investments is relatively small and illiquid which creates a more concentrated version of the mismatch associated with ILGS.

Finally, inflation linked bonds from other nations, for example US Treasury Inflation Protected Securities ("TIPS"), could be considered. The market for US TIPS is much larger than the UK ILGS market, which helps our claimant plan for maturities and minimises mismatch risk. However, TIPS are denominated in US dollars and linked to US inflation. By investing in TIPS our claimant may be avoiding investment risk, but in return they are accepting inflation risk and currency risk.

It is clear that the obstacles and risks associated with other types of potentially suitable investment dwarf the obstacles and risks associated with ILGS. If it is agreed that the risk-free principle should remain, using ILGS as a reference point remains the best approach.

## Abandon the risk-free principle

If the risk-free principle is abandoned then the discount rate will need to be set with reference to a risk based approach. The long-term returns from different asset classes can be found in the latest Barclays Equity Gilt Study 2014.[20] The data in the study shows that long-term averages from different asset classes

[19] Irvine of Lairg, Lord Chancellor, *Setting the Discount Rate: Lord Chancellor's Reasons* (July 27, 2001).
[20] Barclays, *Equity Gilt Study 2014*, 59th edn (London: Barclays, 2014).

have provided returns in excess of the current discount rate over certain time periods, and returns below the current discount rate over certain time periods. No one asset class has over every time period always provided returns in excess of the current discount rate, this remains true if you assume a portfolio with a mix of assets.[21]

Claimants are not interested in the historic long term average return of mixed asset classes over a certain time period; they are interested in what their return will be from the date they invest until the date they no longer need the funds. A claimant might invest their funds just before a market crash or a market surge. If the market surges the claimant will have received an instant windfall, however if the market crashes a claimant may be left in a position where they are now not able to meet their need. Market crashes and market surges are extreme examples of a claimant investor's biggest enemy: volatility of return. Volatility will occur because, regardless of what the discount rate is set at, it has to be acknowledged that the return the claimant investor receives will not be uniform. For example, those looking to achieve a real return of 2.5 per cent per annum, will not achieve 2.5 per cent in a single year but rather they might achieve returns of +6.5 per cent one year and -1.5 per cent the next. The volatility of return is less important to investors who do not require access to their investment for a number of years, however for those who require an income paying from their investments, volatility can have a huge impact.

For example, in 2008 the returns from equities, gilts and corporate bonds were -30.5 per cent, 11.7 per cent and -11 per cent[22] respectively. Assuming a client with a portfolio that was invested a third in each (which is a low-risk portfolio), the portfolio return (ignoring charges and inflation) would have been -9.9 per cent. The claimant investor cannot wait for their portfolio to recover as they need to take income to meet their need in 2009. The effect of the withdrawal at this time is to crystallise the loss which means that for this part of the fund the return will never be made back.

Predicting future investment returns is impossible. Any investment method or rate of return chosen by the Lord Chancellor will be open to attack when it is inevitably wrong. Therefore, rather than look at past actual returns, or any financial model that aims to predict future returns, it would be better if the Lord Chancellor reviewed the framework of those advising claimants on how to invest and aligned the discount rate accordingly.

All financial advisers and investment managers advising claimants in the UK must be authorised and regulated to provide advice by the Financial Conduct Authority ("FCA"). They must adhere to the FCA Code of Conduct and the rules and regulations in the various handbooks. One rule that must be adhered to is the *Conduct of Business (COBS) Sourcebook*, Pt 13, Annex 2 Projections 1.1.[23]

> "1.1 A standardised deterministic projection must:[24]
>
> (1) include a projection of benefits at the lower, intermediate and higher rates of return;
>
> (2) Be rounded down; and
>
> (3) show no more than 3 significant figures."

The current standardised deterministic projection rates of return are 1.5 per cent, 4.5 per cent and 7.5 per cent.[25] These figures are ultimately a best guess as to what rates of return may be in the future. The figures are taken from an 85 page report from PricewaterhouseCoopers[26] that was commissioned by the Financial Services Authority ("FSA" who became the FCA) and includes peer review. The figures are used by the entire financial services industry and are regularly reviewed to ensure they are fit for purpose. The standardised deterministic projection rates of return are net of tax but do not include inflation or

[21] *www.imassetmanagement.com* [Accessed October 24, 2014].
[22] Barclays, *Equity Gilt Study 2014*, 59th edn (London: Barclays, 2014).
[23] *http://fshandbook.info/FS/html/handbook/COBS/13/Annex2* [Accessed October 24, 2014].
[24] A projection which is either a generic projection or a personal projection produced in accordance with the assumptions contained in COBS 13 Annex 2.
[25] COBS 13, Annex 2 Projections 2.2
[26] PricewaterhouseCoopers, *Rates of Return for FSA prescribed projections* (Financial Services Authority, April 2012).

charges. The current discount rate is net of tax, charges and inflation, and therefore, in order to obtain a figure that could be used as the discount rate from the standardised deterministic projection rates, it is necessary to allow for charges and inflation.

Charges in the financial services industry vary widely between different advisers and different investment solutions. On a substantial sum of money an overall charge[27] of 1 per cent per annum would not be uncommon, and could be as high as 2 per cent per annum. Assumptions for inflation are included in COBS 13 Annex 2 Projections and again they are expressed as a lower, intermediate and higher rate. The current rates are 0.5 per cent, 2.5 per cent and 4.5 per cent. In the below table, I have deducted charges and inflation from the rates of return to obtain a net rate. It is the net rate that could be used as a discount rate.

| | **Low** | **Intermediate** | **High** |
|---|---|---|---|
| Projection rate | 1.5 per cent | 4.5 per cent | 7.5 per cent |
| Less charges | 1 per cent | 1 per cent | 1 per cent |
| Less inflation | 0.5 per cent | 2.5 per cent | 4.5 per cent |
| Net rate | 0 per cent | 1 per cent | 2 per cent |

Knowing our claimant is not the *ordinary investor* it is hard to imagine that a discount rate should be set assuming a claimant will achieve returns in line within the high bracket.

## Summary

The current discount rate does not reflect the rate of return that can be achieved from ILGS. The rate is significantly lower and should, if the criteria for a review set down by the Lord Chancellor had been followed, already have been reviewed. This creates unfairness in the eyes of claimants. Defendants argue that the current discount rate is unfair because claimant investors do not invest in ILGS, but rather they are correctly advised to invest in mixed portfolios.

The current situation is that we have a discount rate that requires claimant investors to take risk to meet their needs. To end the perceived unfairness it is necessary for the Lord Chancellor to decide whether a claimant can be expected to take risk with their settlement.

If the risk-free principle is abandoned and the discount rate is set using a risk-based approach, then claimants will have a stark choice. If a claimant takes risk with their settlement funds then they either will achieve a rate of return higher than the discount rate, or they will not. It is nonsensical to think that all claimants can take risk with their settlement funds and all will achieve the required returns, if this were the case then it would not be a risk-based approach it would be a risk-free approach. This leaves three possible outcomes for a claimant whose settlement funds are calculated using a risk-based discount rate:

1) Claimant decides to take risk and achieves returns equal to, or in excess of, the discount rate—claimant can meet need.
2) Claimant decides to take risk and achieves returns below the discount rate—claimant cannot meet need.
3) Claimant decides not to take risk—claimant cannot meet need.

Under a system where we have a discount rate set by reference to a risk-free approach if a claimant chooses to take risks, any win or loss is borne by them and they live with the consequences.

Under a system where we have a discount rate set by reference to a risk approach, those claimants who do not wish to take risks will not be able to meet their needs as claimed.

[27] To include all financial advice and investment management fees and all third party fees

# Case and Comment: Liability

## DSD v Commissioner of Police for the Metropolis

(QBD, Green, J., [2014] EWHC 436 (QB))

*Liability—human rights—victims of drug-facilitated sexual assaults—police—criminal investigations—duty to undertake effective investigation—inhuman or degrading treatment or punishment—police powers and duties*

Duty to undertake effective investigation; Inhuman or degrading treatment or punishment; Police powers and duties; Rape; Sexual assault

This case concerned a claim for declarations and damages brought by two victims of the now convicted "black cab rapist"—John Worboys—who over the course of 2002–2008 committed well in excess of 100 drug and alcohol assisted rapes and sexual assaults on women whom he had been carrying in his cab. DSD and NBV[1] sought declarations and damages against the defendant commissioner for an alleged failure to conduct an effective investigation into their allegations of sexual assault. Both DSD and NBV complained to the police, who commenced investigations, but failed to bring Worboys to justice until 2009.

The issue was whether the Human Rights Act 1998 imposed a duty on a public authority, such as the police, not to act in a way which was incompatible with a convention right. The commissioner maintained that the Act did not provide a remedy to victims of crimes committed by private parties where the allegation was that the police had failed properly to investigate and there could be could be no liability in the absence of direct responsibility or complicity. The claimants submitted that the commissioner had failed to conduct an adequate investigation which amounted to a breach of their rights under art.3 of the European Convention on Human Rights 1950 ("ECHR").[2]

Green J. held[3] that art.3 imposed a duty upon the police to investigate, the purpose of which was to secure confidence in the rule of law in a democratic society. The investigation had to be independent, impartial, and subject to individual scrutiny. The duty was not conditional upon the state being guilty, directly or indirectly, of misconduct itself. It was triggered where there was a credible or arguable claim, by the victim or a third party, that a person had been subjected to treatment at the hands of a private party which met the description of torture or degrading or inhuman treatment in art.3.

The judge accepted that allegations of crime that were "grave" or "serious" amounted to torture, or degrading or inhuman treatment. He held that rape and serious sexual assault fell within that category. Furthermore, where a credible allegation of a grave or serious crime was made, the police had to investigate in an efficient and reasonable manner, which was capable of leading to the perpetrator's identification and punishment. The duty was one of means and not results, and the breach could occur regardless of whether the investigation lead to an arrest, charge and conviction. Whether a breach had occurred was measured by viewing the police's conduct over a relevant timeframe.

[1] As victims of sexual offences are entitled to anonymity during their lifetimes, the two claimants were referred to as "DSD" and "NBV".

[2] "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

[3] Green J. accepted that under the common law the police do not owe a duty of care in negligence in relation to the investigation of crime: See *Hill v Chief Constable of West Yorkshire* [1989] A.C. 53 per Lord Keith at 63A–64A and per Lord Templeman at 65C–65E; *Brooks v Commissioner of Police of the Metropolis* [2005] UKHL 24; [2005] 1 W.L.R. 1495; and *Van Colle v Chief Constable of Hertfordshire* [2008] UKHL 50; [2009] 1 A.C. 225.

Green J. held that the assessment of the efficiency and reasonableness of an investigation took account of its promptitude and whether an offender was adequately prosecuted. A successful prosecution within a reasonable time would render operational failures irrelevant and non-justiciable. Accordingly not every failing attracted liability. The mere fact that a civil claim against an offender succeeded, or that disciplinary measures had been taken against defaulting officers, was not sufficient to expunge liability. Failings could be investigative or operational. The process of determining whether an investigation was reasonable or capable of leading to a result was a fact-sensitive exercise. The judge recognised that the law must not impose a heavy burden on the police.[4]

However, the court concluded that the commissioner was liable to the claimants for a breach of the 1998 Act. That breach arose in relation to the period between 2003, which coincided with the complaint to the police, and 2009 when Worboys was tried. There had been a series of systemic failings which went to the heart of the failure to apprehend Worboys and to cut short his five–six year spree of violent attacks. Five different areas of systemic failings could be accounted:

1) failure properly to provide training;
2) failure to supervise and manage;
3) failure properly to use available intelligence sources;
4) failure to have in place proper systems to ensure victim confidence; and
5) failure to allocate adequate resources.

In addition to those systemic failures, the judge held that there were numerous individual omissions in the specific cases of the two claimants which reflected the wider systemic failings but which, when viewed in isolation could also be said be of sufficient seriousness such that had they not occurred, the police would have been capable of capturing Worboys earlier.

The judge made it clear that the conditions laid down by the law pursuant to which the police might be liable are relatively stringent. A series of exacting hurdles have to be overcome before liability can be imposed. However, the failings in this case were held to be sufficiently serious to pass, by a considerable margin, the applicable test of liability.

The defendant was liable to DSD for the failure to investigate and for such damage as can properly be attributed to this failing. She was also entitled to a declaration that the defendant was in breach of duty towards her in respect of the failure to properly to investigate her complaint of sexual assault.

The defendant also was liable to NBV upon the basis that its prior systemic and operational failures to investigate caused her to be raped. The defendant was liable for the period of time that ensued following the defective investigation into her case when her case was wrongly closed and before the point in time when it was reopened. NBV was also entitled to a declaration that the defendant was in breach of duty towards her in respect of the failure properly to investigate generally in the period prior to her assault and also in relation to her complaint of sexual assault.[5]

On July 23, 2014,[6] having assessed damages, Green J. awarded DSD the sum of £22,250 and NBV the sum of £19,000.

## Comment

That art.3 of the ECHR—the right not to be subjected to torture or inhuman or degrading treatment—covered the type of sexual assaults committed on both the claimants, was not in dispute.

[4] *Osman v United Kingdom* (23452/94) (2000) 29 E.H.R.R. 245; *Z v United Kingdom* (29392/95) (2002) 34 E.H.R.R. 3; *Menson v United Kingdom (Admissibility)* (47916/99) (2003) 37 E.H.R.R. CD220; *MC v Bulgaria* (39272/98) (2005) 40 E.H.R.R. 20; *Szula v United Kingdom (Admissibility)* (18727/06) (2007) 44 E.H.R.R. SE19; *Milanovic v Serbia* (44614/07) (2014) 58 E.H.R.R. 33 considered.

[5] Liability having been established, quantum was left to be assessed later.

[6] *DSD v Commissioner of Police of the Metropolis* [2014] EWHC 2493 (QB).

Section 6 of the Human Rights Act 1998 holds it unlawful for a public authority to act in a way incompatible with a convention right. The apparently new point here (which as we will discover is in fact not so new within Strasbourg jurisprudence) is that art.3 imposes a duty on the State to investigate and the purpose of that duty is to secure confidence in the rule of law.[7] That duty is not conditional on the State being guilty, directly or indirectly, of misconduct itself.[8] The success of a compensation claim will depend on whether on the facts the claimant can establish that the State's investigation has been carried out in a way that was inefficient, unreasonable and failed to lead to the *prompt* identification and punishment of the perpetrator.[9] Investigative failings can be systemic or operational.[10]

The oft quoted *Osman v United Kingdom* (23452/94) (2000) 29 E.H.R.R. 245[11] says nothing about the State's duties to investigate. That case concerned the State's responsibility to protect its citizens from the threat to life posed by private individuals under art.2 of the ECHR, and in circumstances where the State was not complicit in the threat. DSD's case was made possible because of an extension of subsequent Strasbourg jurisprudence: *Z v United Kingdom* (29392/95) (2002) 34 E.H.R.R. 3[12] applied *Osman* (23452/94) (2000) 29 E.H.R.R. 245 to art.3. *Edwards v United Kingdom*[13] established a duty on the State to investigate art.2 breaches, where an act was committed by a private party towards a victim in the custody of the State, but the key decision is *MC v Bulgaria*[14] where a duty to investigate extended to acts committed by private parties under art.3 and this has since been followed by the European court in a number of cases very relevant to DSD's situation.[15] So this apparently novel point is perhaps not so novel at all. As Green J noted:

> "the duty on the State to investigate under Article 3 the conduct of private parties which amount to torture or degrading or inhuman treatment is established in a long line of consistent case law stretching back well over a decade. The principle is not a stray or maverick line of thought which having briefly emerged has been (and should be) forgotten."[16]

Throughout the judgment, the opening of the floodgates is clearly ever present on Green J.'s mind. Notwithstanding his judgment, the law must not impose an excessive burden on the police.[17] The conditions which need to be in place before a liability finding against the police can be made in such circumstances "are relatively stringent" and it follows that claimants in similar cases will have "a series of exacting hurdles" to overcome.[18]

The police still enjoy absolute immunity in negligence as established in *Hill v Chief Constable of West Yorkshire* [1989] A.C. 53,[19] but it is fair to say that this extremely thorough and thought provoking judgment opens a door which was previously thought to be closed to claimants, and leaves it slightly ajar. There is no doubt that solicitors specialising in assault and rape cases, or actions against the police, will be contacted by other potential claimants, complaining about police investigations and seeking compensation pursuant to this judgment following its publicity. It is important to recognise that whilst the judgment of Green J. is compelling, it is a first instance decision and permission to appeal has been granted. Further, it would appear to be important when risk assessing such cases that a complaint to the Independent Police Complaints



[7] *DSD v Commissioner of Police for the Metropolis* [2014] EWHC 436 (QB) at [212].
[8] *DSD* [2014] EWHC 436 (QB) at [213].
[9] *DSD* [2014] EWHC 436 (QB) at [216], thus distinguishing *Menson* [2003] E.H.R.R. CD 220.
[10] *DSD* [2014] EWHC 436 (QB) at [223].
[11] *Osman* (2000) 29 E.H.R.R. 245.
[12] *Z* (2002) 34 E.H.R.R. 3.
[13] *Edwards v United Kingdom* (46477/99) (2002) 35 E.H.R.R. 19.
[14] *MC* (2005) 40 E.H.R.R. 20.
[15] See for example *Szula* (2007) 44 E.H.R.R. SE19; *Ali v Turkey* (42942/08), unreported, April 8, 2008 ECHR; *Vasilyev v Russia* (32704/04), unreported, December 17, 2009 ECHR, *Milanovic* (2014) 58 E.H.R.R. 33; *Sizarev v Ukraine* (17116/04), unreported, January 17, 2013 ECHR.
[16] *DSD* [2014] EWHC 436 (QB) at [229].
[17] *DSD* [2014] EWHC 436 (QB) at [224].
[18] *DSD* [2014] EWHC 436 (QB) at [14].
[19] *Hill* [1989] A.C. 53.

Commission has been made, and certain failings identified.[20] Technically, practitioners should also bear in mind that there is a one-year limitation period within which to take proceedings pursuant to the Human Rights Act 1998, although this does not seem to be a point taken by the defendant in this case, and there was no argument on the issue.

## *Police failings*

To assist practitioners in understanding the sort of failings which could give rise to a similar claim in the English courts pursuant to this judgment, it may be helpful to set out the facts which led Green J. to find for the claimants.

DSD was assaulted in 2003, and she was the first of Warboys' victims to complain to the police. After he had assaulted her, Warboys had actually driven this lady to the police station with a concerned third party. She had been drugged by Warboys to facilitate his assault, but the police thought she was drunk and were dismissive of her complaint. They did not take down Warboys' cab details, nor details of the third party. It was argued that the police were not trained properly on the guidance that was available on this subject from 2002. The police did not interview the third party who went with the victim and so it was alleged that there was a failure to identify key witnesses. The victim's handbag was not forensically examined for DNA and the investigation was closed about a year later. The victim was not, in fact, interviewed about the assault until 2008 when, having learned of Warboys' arrest, she got back in touch with the police. In the meantime between 2003 and 2008, numerous allegations were made to the police by different women and all were saved on a database, but the jigsaw was not pieced together.

NBV was assaulted in July 2007. Her underwear and bed clothes were not seized and forensically examined. The police recognised the registration plate of Warboys' taxi from CCTV footage but when they called at Worboys' house to arrest him he was not there. No further attempts were made for a search of the house, and instead the police made a request that he attend the police station. No steps were taken to prevent Worboys from returning home and destroying evidence.

It took police nearly three months to obtain CCTV footage from the club that the victim had left to show the time she left, but even then it was footage of the incorrect date. The police failed to realise this, and so the correct CCTV footage was never reviewed. The inconsistencies in Worboys' statement were not investigated, nor was he re-interviewed, or a search of his home or vehicle made. Toxicology tests were deemed to be inconclusive by the investigating officers and they decided they could go no further with the case. However, the tests had actually revealed two substances in the victim's blood, even though the victim said she had only taken a contraceptive pill; the police did not question that. Because it was felt that there was no direct evidence of sexual assault, the case was not put to the Crown Prosecution Service. It was only in 2008, when news agencies carried a report of Warboys' arrest, that a clinic passed on the victim's details to the police.

In 2008 officers conducted a routine computer check of allegations for rape and assault; they identified four similar allegations. Within eight days Worboys was arrested and a search conducted of his home where a "rape kit" was found as well as incriminating notes. The speed with which Worboys had been identified, arrested, and a search conducted, was a clear indication that had similar focus been applied to the investigation during the previous years, Worboys might have been prevented from committing a very significant number of the assaults. He was jailed for life in 2009, it having been accepted that he had carried out more than 100 rapes and sexual assaults using alcohol and drugs to stupefy his victims.

Green J. characterised the facts as:

[20] Whilst failings were identified in this case by the IPCC, Green J. did note that "the conclusions of the IPCC are often highly superficial and frequently do not make clear what appears to be a strong prima facie case of failure is accepted as such", *DSD* [2014] EWHC 436 (QB) at [128].

> "a series of systemic failings which went to the heart of the failure of the police to apprehend Worboys and cut short his five- to six-year spree of violent attacks."[21]

He berated senior officers for failing to train relevant officers in the intricacies of drug-facilitated sexual assaults and failing to supervise junior detectives. He also attacked detectives for not making use of intelligence sources to find links between the cases. Other failures included losing the confidence of victims and not creating an environment where victims felt comfortable to express their ordeals.

### *Damages*

The judge in these cases held that there was a link between the victims' post assault mental state and the failings identified in the conduct of the police investigation. Psychiatrists were instructed to prepare reports on this link. The fact that the victims were not believed and thought to be lying, caused further depression. In the case of DSD, the expert concluded that she had developed a depressive episode precipitated by the approach taken by the police in 2003, rather than by the rape she had endured. As the first complainant, she felt responsibility for the ordeals of the other women who were sexually assaulted subsequently, because she had not been believed. NBV claimed she had suffered serious distress, anxiety, guilt and an exacerbation of post traumatic stress disorder and depression because of her treatment by the police in 2007. Causation was shared between the assault itself and the conduct of the police. The assaults also left both women unable to sustain sexual relationships.

The police argued that the women should not receive compensation because both had secured damages from Worboys direct in previous proceedings (£10,000 each) and payments from the Criminal Injuries Compensation Authority—DSD was paid £13,500 and NBV £2,000. However the judge felt further compensation should be awarded, focusing on the harm specifically caused by the Metropolitan Police's failings.

## Practice points:

Harriet Wistrich, the solicitor at Birnberg Peirce & Partners who represented the claimants, has emphasised the importance of this case to the issue of police officers investigating rape:

> "as recent research shows that little has changed in terms of attrition rates and the police ability to translate policy into practice leaves a great deal to be desired … what was clear in this case is that the policies and practice guidance were sound but officers on the ground weren't trained or supervised to implement them."[22]

There are also some interesting points for personal injury practitioners:

- The police's general immunity from negligence claims remains unchanged. However, it is not in fact such a novel point that the Human Rights Act 1998 applies to police investigations even where threats to a citizen's right to life, or where a citizen has been subjected to inhuman or degrading treatment, have been perpetrated by a third party and where the State is not implicated in the crime. Who knew?
- The facts behind any successful case will need to illustrate grave failings by the police—the hurdles that the claimant will have to overcome are high.
- For risk assessment purposes, it seems that an IPCC investigation which identifies some failings will be a pre-requisite.

[21] *DSD* [2014] EWHC 436 (QB) at [13].

[22] From Guest Blogger, "Is this the end of negligence immunity for the police?" (LexisNexis, March 25, 2014), *www.lexisnexis.co.uk*, *http://blogs.lexisnexis.co.uk/dr/is-this-the-end-of-negligence-immunity-for-the-police/*. [Accessed October 17, 2014.]

- Practitioners may not need to be too phased by the technical one-year time limit for pursuing claims under the Human Rights Act 1998.
- Medical causation in such cases is tricky, although here the judge felt able to direct himself to the harm caused by the police failings, rather than the harm caused by the assaults themselves. This is, however, often a rather difficult and artificial exercise, and detailed instructions need to be given to experts to focus on the issues on which the court must decide.

**Jonathan Wheeler**

## Sloan v Rastrick High School Governors

(CA (Civ Div), Moore-Bick L.J., Ryder L.J., David Richards J., July 29, 2014, [2014] EWCA Civ 1063)

*Personal injury—employers' liability—health and safety at work—employers' powers and duties—Manual Handling Operations Regulations 1992 reg.4(1)*

☞ Burden of proof; Employers' powers and duties; Manual handling; Personal injury; Risk assessment; Teaching assistants; Wheelchairs

Mrs Helen Jean Sloan was employed by the defendants as a learning support assistant. Her work involved pushing pupils between classrooms in their wheelchairs. She began work on September 1, 2008 and spent her first five days training and shadowing. She started working on her own on September 6, 2008. On September 17 she experienced pain in her shoulder and back after pushing one particular student in her wheelchair. She saw her GP about this on Monday September 22 and was off work for the whole of that week. She was prescribed pain relief and muscle relaxants.

Mrs Sloan returned to work on September 29, 2008 and arrangements were made so that she was not required to push wheelchairs, although she may have done so on one or two occasions. She was off work for unrelated health reasons for the period October 13–20, 2008. She returned to work on October 21, 2008 but gave one week's notice on October 23, and left the school's employment.

Mrs Sloan's case was that she suffered a soft tissue injury in her cervical spine and in her right, dominant, shoulder as a consequence of pushing one or more students in their wheelchairs, resulting in chronic pain in her shoulder and back which continued down to the trial. She claimed that, in breach of duty under reg.4(1)[1] of the Manual Handling Operations Regulations 1992, the school had failed:

- to avoid the need for her to undertake a manual handling operation which involved risk of injury;
- to make any suitable and sufficient assessment of any such manual handling operations; and
- to take any or any appropriate steps to reduce the risk of injury arising out of such manual handling operations to the lowest level reasonably practicable.

Mrs Recorder Stocken found that Mrs Sloan had suffered a strain injury on September 17, resulting in symptoms over the next couple of weeks, and that any further symptoms arose from unconnected degenerative changes. She found no breach of the Regulations and ordered Mrs Sloan to pay the defendant's costs.

The claimant appealed and submitted that the recorder:

[1] "Duties of employers".

- misdirected herself on the burden of proof;
- failed to make a clear finding about whether the defendant could have provided pupils with powered wheelchairs and thus avoided the need for her to undertake manual handling operations involving a risk of injury;
- failed to make a clear finding that the defendant had carried out a suitable and sufficient risk assessment;
- failed to make a clear finding that the defendant had proved that they had taken steps to reduce the risk of injury to the lowest level reasonably practicable;
- failed to find that the defendant had provided information on the combined weight of each wheelchair and student;
- erred in disregarding evidence about the school's layout and gradients;
- erred in preferring the evidence of the defendant's medical expert; and
- should have awarded the defendant their costs only from the date they disclosed their risk assessment.

The Court of Appeal reaffirmed that under reg.4(1) the employer had to prove that it had taken appropriate steps to reduce the risk of injury to the lowest level reasonably practicable, and that the employee's injury had not been caused by any failure to do so.[2] The recorder had misdirected herself by saying that Mrs Sloan had to prove that the school had breached their reg.4(1) duties; however, they decided that was not a basis for setting aside her order.

Mrs Recorder Stocken had reached her conclusions on the evidence, without any reliance on the burden of proof. She found that while Mrs Sloan was selective in her memory and prone to exaggeration, the defendant's witnesses were impressive and credible. With that in mind, she made firm findings of fact and reached firm conclusions, correctly applying the burden of proof at that stage.

They noted that pupils used their own wheelchairs in school, and their choice of wheelchair was based on medical and therapeutic considerations. There was no evidence about the cost to the school of providing powered wheelchairs. However, there was evidence that requiring manual-wheelchair users to use powered wheelchairs would be contrary to their interests. The recorder addressed that, correctly finding that it was not reasonably practicable to avoid the use of manual wheelchairs.

The school prepared an annual risk assessment for each pupil who used a wheelchair, and the recorder found those assessments to be suitable. Mrs Sloan's complaint that she had not also said they were "sufficient" was nit-picking. It was clear that she considered, and was entitled to consider, that they satisfied the requirements of reg.4.

The court said that clearly, risk assessments had to be prepared by somebody with the necessary training and experience. Although the employee who prepared the assessments for the school was not a health and safety officer, she was experienced and properly trained.[3]

They accepted that the school had sought to reduce the risk of injury by training, regularly rotating staff and keeping slopes to acceptable gradients. The training, which the recorder found to be full and adequate, covered the practicalities of safe moving and handling in some detail. They pointed out that the safe pushing of wheelchairs was neither difficult nor complex, and concluded that the evidence justified the recorder's conclusion that the school had not breached its reg.4(1)(b)(ii)[4] duty.

They also confirmed that it was neither necessary nor appropriate for the school to provide the combined weight of each student and his wheelchair. In any event, their failure to do so was not causative of Mrs Sloan's injury. The recorder was considered to have correctly disregarded the evidence about the school's

[2] *Egan v Central Manchester and Manchester Children's University Hospitals NHS Trust* [2008] EWCA Civ 1424; [2009] I.C.R. 585 and *Ghaith v Indesit Co UK Ltd* [2012] EWCA Civ 642; [2012] I.C.R. D34 followed.

[3] *Swain v Denso Marston Ltd* [2000] I.C.R. 1079 considered.

[4] Take appropriate steps to reduce the risk of injury to those employees arising out of their undertaking any such manual handling operations to the lowest level reasonably practicable.

layout and gradients. Once she rejected the claimant's case that the injury was a cumulative one, that evidence was irrelevant. The court also held that the recorder was fully justified in her findings as to the nature and extent of Mrs Sloan's injury.

Finally they turned to costs. They said that Mrs Sloan could not complain that the recorder failed to take account of relevant matters. The challenge to the order for costs could only be put on the basis that the only reasonable order would have been, in effect, to impose a penalty on the school for its late disclosure of the risk assessment.

They accepted that the court can make orders for costs in order to mark its displeasure of particular aspects of the conduct of a case by a party. However, they held that this was certainly not a case in which it could be said that the only reasonable response to the late disclosure of the assessment report was to deprive the school of its costs prior to that time. This was notwithstanding that it probably had no effect on the claimant's determination to pursue her claim. This challenge to the order for costs also failed.

## Comment

> "The employer will not normally order dangerous loads to be handled, and an employee is too skilled and sensible to do it off his own back".[5]

This Pathé News description of life in industry was prevalent prior to the introduction of the Workplace (Health, Safety and Welfare) Regulations 1992. The basis of liability was contained in a number of statutes, including the Factories Act 1961, of which s.72 referred to "lifting, carrying, or movement of the load", and the Offices, Shops and Railway Premises Act 1963 which in s.23 referred to "a load likely to cause an employee injury". At that time the courts were almost exclusively concerned with the weight of the load to be lifted, as evidenced by the Court of Appeal's finding that a worker lifting 145lb (65.77kg) was not in breach of the 1961 Act.[6]

The Manual Handling Directive of 1990[7] states:

> "Where the need for manual handling of loads by workers cannot be avoided, the employer shall take the appropriate organisational measures, use the appropriate means or provide workers with such means in order to reduce the risk in the manual handling of such loads …"

The Directive does *not* require that all risk is to be eliminated, no matter how impracticable it would be to do so. It is noted that the Directive does not refer specifically to "reasonable practicability", but that is what taking "appropriate means" must mean in this context.

The Manual Handling Operations Regulations 1992 put the movement of loads into a wider context with avoidance of manual handling as the primary objective. "Manual handling" means the transporting or supporting of a load (including the lifting, putting down, pushing, pulling, carrying, or moving thereof) by hand or by bodily force.[8] In this context, a load can include a human being. In *Egan* , unreported, August 9, 2002 CC[9] a police officer found an old lady who had been reported missing. She was driven home in a police car. On arrival at her property the "old lady had to be extracted from the back of the police vehicle". This entailed the officer lifting the old lady out of her seat, and in doing so she felt a pain in her back. She successfully sued her employer arising from a breach of the regulations.

Regulation 4(1) of the Manual Handling Operations Regulations 1992 states:

> "(1) Each employer shall —

[5] Lord Kilbrandon in *Brown v Allied Ironfounders Ltd* [1974] 1 W.L.R. 527.
[6] *Kinsella v Harris Lebus Ltd* (1963) 108 S.J. 14.
[7] Directive 90/269 on the minimum health and safety requirements for the manual handling of loads where there is a risk particularly of back injury to workers (fourth individual Directive within the meaning of Art.16(1) of Directive 89/391 [1990] OJ L156/9 Pt 3.
[8] Manual Handling Operations Regulations 1992 reg.2(i).
[9] *Egan v The Chief Constable of West Midlands Police* , unreported, August 9, 2002 CC (Birmingham).

(a) so far as is reasonably practicable, avoid the need for his employees to undertake any manual handling operations at work which involve a risk of their being injured; or

(b) where it is not reasonably practicable to avoid the need for his employees to undertake any manual handling operations at work which involve a risk of their being injured —

(i) make a suitable and sufficient assessment of all such manual handling operations to be undertaken by them, having regard to the factors which are specified in column 1 of Schedule 1 to these Regulations and considering the questions which are specified in the corresponding entry in column 2 of that schedule.

(ii) take appropriate steps to reduce the risk of injury to those employees arising out of their undertaking any such manual handling operations to the lowest level reasonably practicable, and

(iii) take appropriate steps to provide any of those employees who are undertaking any such manual handling operations with general indications and, where it is reasonably practicable to do so, precise information on —

(aa) the weight of each load, and

(bb) the heaviest side of any load whose centre of gravity is not positioned centrally."

In short, the task of the employer is to *avoid* manual handling by employees where reasonably practicable. If that is not practicable, then to *assess* the operation in question, and finally to *reduce* the risk of injury from carrying out that operation.

It should be noted that the Court of Appeal has held that it is only in respect of reg.4(1)(a) and (b) that reasonable practicability is a defence. Common sense demands that some tasks do not lend themselves to anything other than manual handling. In *Swain v Denso Marston Ltd*,[10] a case cited by the appellants in the instant case, Lord Justice Robert Walker made it quite clear that the concept of reasonable practicability only applies to reg.4(1)(a), not to the subsequent obligation to do a risk assessment or provide information about the load to the employee. Those parts of the regulations are unqualified.

Finally, the importance of a risk assessment in a manual handling case had been addressed with some ambivalence and confusion by the Appeal Court. The judgments of Hale L.J. (as she then was) in *Koonjul v Thameslink Health Care Services*;[11] Kennedy L.J. in *Allsop v Sheffield CC*;[12] and Staughton L.J. in*Hawkes v London Borough of Southwark*[13] are on point.

A number of members of the Appeal Court have taken the view that where the task is an "everyday task",[14] or where nothing more could have been done by the employer in any event,[15] the lack of a risk assessment by the employer is not damning.

Mrs Sloan suffered injury as a result of pushing a student in a wheelchair. Importantly, the court at first instance found that the musculoskeletal injuries to her back and shoulder were the result of a single event on September 17, rather than an accumulation of assaults to her musculoskeletal system since commencing employment 11 days earlier. At the time of the accident she was pushing a pupil, who, the appellant described as "a tiny little thing", along a flat surface within the school grounds.

[10] *Swain v Denso Marston Ltd* [2000] I.C.R. 1079.
[11] *Koonjul v Thameslink Health Care Services* (2000) P.I.Q.R. 123.
[12] *Allsop v Sheffield CC* (2002) EWCA Civ 429.
[13] *Hawkes v London Borough of Southwark* , unreported, February 20, 1998.
[14] *Koonjul* (2000) P.I.Q.R. 123 per Hale L.J.
[15] *Allsop* (2002) EWCA Civ 429 per Kennedy L.J.

The case was always going to be decided on the basis of an analysis of reg.4(1) of the Manual Handling Operations Regulations 1992. The Appeal Court's judgment is set out in a wholly logical pattern analysing the subsections of the regulation in order.

## *Avoidance*

The first task was to consider whether it was reasonably practicable to avoid the appellant pushing the pupil in the wheelchair. The appellants had argued that powered wheelchairs would have avoided the need for this manual activity. The judgment suggests that there was no analysis of the practicality of providing powered wheelchairs, but this was something of a red herring. The pupils provided their own wheelchairs. Part of the school's intention towards its eight wheelchair-bound pupils was to assist them in their progression towards rehabilitation and independence including mobility. Imposing on the pupil an obligation to use a powered wheelchair at the school was contrary to their best interests. There were other manual handling operations involved in the care of the pupils including toileting and feeding. Avoiding the manual handling task involved in transportation would, therefore, not have removed the obligation on the respondent to address manual handling more generally in relation to each pupil. Within what appears to have been a very extensive risk assessment, it would have been advisable for the school to have addressed this issue specifically. It failed to do so and, therefore, left open an opportunity for the applicant to argue the point. The finding that it was not reasonably practicable for the school to avoid the use of manual wheelchairs is proper.

## *Assessment of the risk*

As it was not practicable to avoid the manual handling operation, the school was under an obligation to assess the risks that may flow from its employees pushing students in wheelchairs.

The importance of a risk assessment was set out in clear terms by Clark L.J. in *Griffiths v Vauxhall Motors*[16] when he stated:

> "the whole point of a proper risk assessment is that an investigation is carried out in order to identify whether the particular operation gives rise to a risk to safety and, if so, what is the extent of the risk, which, of course includes the risk of any injury and what can and should be done to minimise or eradicate the risk."

This is, in my opinion, a better starting point than Staughton L.J.'s suggestion that the need for a risk assessment is "merely an exhortation with no sanction attached".[17]

A risk assessment was carried out on each pupil. It was a detailed 11-page document assessing the pupils' daily functional ability and capabilities. It included a "moving and handling plan" which identified 23 separate tasks which the school had addressed. Unsurprisingly, perhaps, the risk assessment was classed as "suitable" both in the court at first instance, and by the Appeal Court.

## *Reduction of the risk*

The school addressed the risk from pushing a wheelchair by introducing task rotation amongst staff within each day, moving and handling training for staff, and a requirement that staff should be fully fit to undertake their duties. It was identified that the pushing of wheelchairs was for no longer than five minutes in any one operation, and within the school premises there were only two sections of the school walkways which

[16] *Griffiths v Vauxhall Motors* (2003) EWCA Civ 412.
[17] *Hawkes* , unreported, February 20, 1998.

had a gradient which the engineers in the case classed as too steep. The claimant did not suffer her accident in either of those areas.

The appellants then sought to shift their attack to argue that the risk assessor wasn't suitably qualified. The Management of Health and Safety at Work Regulations 1999 are not prescriptive as to how risk assessments should be carried out. However, the assessment should be conducted properly and thoroughly. In *Denton Hall Legal Services v Fifield*[18] the claimant's risk assessment of her operation of a keyboard was defective, in that it was limited purely to the work equipment that she operated, was rather remarkably conducted in her absence, and by a person with limited training or knowledge of the risks of injury from such work. The employers then failed to discuss the health risks with the employee, and were judged by the court as treating the risk assessment as "an unfortunate waste of time". Lastly, they failed to action the findings of the assessment. The judgment provides a useful educational tool for those who conduct risk assessments in what *not* to do in addressing one's responsibility under the regulations.

This was not the case in this instance. Mrs Walker had been trained, attending a five-day training course which involved four days at a special school. She was held to be experienced in providing risk assessments in relation to handling and movement of students. Whilst she may not have been employed as a health and safety officer, that was not essential, as there was no "specialised plant and machinery" with which she was concerned. The regulations do not specify particular categories of person who must prepare risk assessments, and the court quite rightly gave short shrift to the respondent's argument in this respect.

By reg.4(1)(b)(iii) the employers have a responsibility to ensure that employees are made aware of the risks from any task that they are asked to perform. The appellants argued that Mrs Sloan had not been advised of the combined weight of each wheelchair and pupil. This should have been ascertained. Unfortunately, from her perspective, in evidence she accepted that she was able to make a visual assessment of each student, and that she described the student in question as "a tiny little thing". The judgment identifies that the combined weight of the student and the wheelchair was no more than 57kg. The court held that the lack of information to Mrs Sloan was not causative of her injury.

Finally, the appellant was unable to provide any evidence as to what more the employee could have done in this case. It is not the injured party's responsibility to design the system of work. She cannot be criticised for not doing so. However, it benefits claimants to identify issues with their employers, and proffer solutions, for as Smith L.J. stated[19] in the context of reg.4(1)(b)(iii):

> "Once a risk of injury has been identified and a suggestion has been advanced which would reduce the risk and is reasonably practicable, it is difficult to see how it could be argued that the step was not appropriate within the regulation."

## *Conclusion*

> "When all is said and done, the safe pushing of manual wheelchairs is not a difficult or complex task."

So held David Richards L.J. This mimics the approach of Hale L.J. in *Koonjul*[20] when she referred to "an everyday task" and the "very modest" force used to move the bed Mrs Koonjul was required to move in the course of her duties as a care assistant.

The employers could not reasonably practicably avoid their employee having to push the wheelchair. They fully risk assessed the task and set in place practical solutions to reduce the risk to the lowest level reasonably practicable. Advice and training was given to their employee. Many employers adopt a similar

[18] *Denton Hall Legal Services v Fifield* (2006) EWCA Civ 169.
[19] *Egan* (2008) EWCA Civ 1424.
[20] *Koonjul* (2000) P.I.Q.R. 123.

approach, but come unstuck when they fail to provide any refresher training. In *Walsh v TNT UK Ltd*[21] the injured person was a collection and delivery driver who suffered injury whilst moving packages and boxes from the rear of the van during the course of a delivery. The employers had instituted training courses in manual handling, provided a handbook detailing the safe lifting practice, which was kept in the vans, and had achieved a five star accreditation from the Health and Safety Executive in the claimant's depot. They had also set up refresher courses, but these had not been carried out to the extent that the claimant had not received any further training on safe lifting techniques in the seven years prior to his accident. Unfortunately for Mrs Sloan, she had only worked with her employers for 11 days.

In *Hughes v Grampian Country Food Group Ltd*[22] Lord Philip, in reviewing the definition of a manual handling operation, stated that:

> "moving of any object manually would, if done by an employee, involve a manual handling operation. That would include a seamstress lifting and replacing a needle, a librarian turning the page of a book, and employee switching on or off an electric switch."

This is undoubtedly true. Lady Justice Hale and Lord Justice David Richards, specifically identify a concern about extending the regulation to the mundane, routine everyday tasks of life. In *Koonjul*[23] her Ladyship stated that it would be "beyond the realms of practicability" to precisely evaluate each of the tasks carried out by the claimant in that case—which would include lifting bedding and, moving beds around—and provide precise warnings to her as to how each of those tasks was to be done. With the introduction of the Enterprise and Regulatory Reform Act 2013, and the watering down of statutory breach, one can foresee an expansion of her Ladyship's "element of realism" approach in the analysis by the judiciary of the responsibility of employers in relation to the manual handling operations carried out by their workforce.



## Practice points:

The Manual Handling Operations Regulations 1992 apply to this case. Of "the six pack", these regulations best set out the pathway that a claimant has to complete in order to succeed in a claim for damages. In looking at a manual handling claim one should, therefore, consider the following:

- Within the context of the observations of Hale L.J. is the task that the claimant had to perform an "everyday" task. Is it one that the general population will likely carry out rather than being discreet to a type of employment?
- The need to see the defendant's risk assessment is critical. In this case there was a delay of 10 months from the date when disclosure should have been completed (July 2012) and the date when the risk assessment was disclosed (May 2013). No explanation was given. To the claimant's legal representatives the risk assessment document is critical to stage 2 of reg.4(1), namely assessment of the risk. In the instant case the risk assessment was extremely thorough and complete.
- Compare and contrast the risk assessments carried out in the instant case with that in *Denton Hall*[24] to understand what a "suitable" risk assessment should entail. A reassessment of the prospects of success should have been done on disclosure.
- Consider the qualifications of the risk assessor. Once more contrast the assessors in *Sloan* and *Denton Hall*.[25]

[21] *Walsh v TNT UK Ltd* (2006) CSOH 149; 2006 S.L.T. 1100.
[22] *Hughes v Grampian Country Food Group Ltd* (2007) CSIH 32; 2007 S.L.T. 635.
[23] *Koonjul* (2000) P.I.Q.R. 123.
[24] *Denton Hall* (2006) EWCA Civ 169.
[25] *Sloan v Rastrick High School Governors* [2014] EWCA Civ 1063 and *Denton Hall* (2006) EWCA Civ 169.

- Consider whether, and how, the findings of the risk assessment were communicated to the claimant.
- Consider whether the employer has provided refresher training in respect of manual handling/lifting within a reasonable period.
- Lastly, consider whether the facts of your case are likely to result in the trial judge commencing his judgment with words to the effect of "when all is said and done …" in relation to the manual handling operation on which your client's claim is based.

**Simon Allen**

## Beaumont v Ferrer

(QBD (Manchester), Kenneth Parker J., July 16, 2014, [2014] EWHC 2398 (QB))

*Personal injury—road traffic accidents—negligence—taxi passengers—causation—duty of care—ex turpi causa—making off without payment—Theft Act 1978, s.3*

Causation; Ex turpi causa; Making off without payment; Passengers; Personal injury; Taxis

David Ferrer was a very experienced, self-employed licensed taxi driver in Salford. He owned and drove a Nissan Serena minivan. He received work from Swan Taxis. In the early evening of July 27, 2009 Ferrer received a call from his control room, asking him to collect a fare from 109 Tootal Drive, Salford.

The booking had been made from the house of the parents of Connor Emery, then aged 11. David Ferrer arrived at the address, and found six youths waiting for him at the bus stop across the road. They were the first claimant, Joseph Beaumont, then aged 17, the second claimant, Lewis O'Neill, also then aged 17 plus two boys aged 13, one aged 14 and another 17 year old, Luke Bullcock. Ferrer was asked to take the youths to "Urbis", in Manchester city centre.

The six youths had, in fact, already agreed among themselves that none of them would pay the eventual taxi fare. The plan was to "jump the taxi", at an appropriate opportunity at, or near, their destination and make off without paying the fare.

When they reached the city centre, three of the youths got out of the taxi and ran off without paying. Ferrer then drove on. Beaumont and O'Neill exited from the taxi as it was moving, fell and sustained serious injuries. The two claimants brought a claim in negligence against the defendant taxi driver. Their case was that Ferrer owed a duty of reasonable care to his passengers, all comparatively young people, to ensure their safety and well being.

The claimants also argued that the doctrine of ex turpi causa did not apply, as there was no relevant turpitude: no offence under s.3 of the Theft Act 1978[1] had been committed, as Ferrer left the scene before he gave the group time or opportunity to pay the fare. Finally they stated that even if they were engaged in criminal conduct leading to their injuries, the doctrine of ex turpi causa did not apply in the circumstances of the case, in particular because their offending was not of such gravity that it should engage the public policy of ex turpi causa.

The judge held that Ferrer had done nothing to put either claimant in the position where they were poised to exit the taxi and he did nothing to lead to their decisions to leave the moving taxi. He accepted that the execution of the criminal joint enterprise, with three youths already having left the taxi and run

[1] "Making off without payment".

away, put Ferrer in a dilemma. He concluded that he drove on partly because he wanted to do something to impede the youths who were left in the taxi from exiting and making off without payment. However, fear also played a part (he had been stabbed during an attack by another group of youths).

For the claimants it had been argued that at that point Ferrer should have allowed all the youths to leave the taxi and resigned himself to the inevitable loss of the fare and the great unlikelihood of any of the offenders being apprehended and sanctioned for their wrongdoing. The judge held that even if he should have followed that course and in not doing so was at fault, the failure followed from the criminal intentions and actions of the youths. His view was that any degree of fault was simply overwhelmed by those intentions and actions.

In addition the judge found that even if Ferrer was in breach of his duty of care by driving on as he did, that breach did not cause the injuries suffered by the claimants. The conduct of each of them in jumping or stepping out of the taxi broke the causal connection between such fault and the damage. He concluded that this was a case where justice was served by holding that the claimants in substance brought about the injuries themselves.

The judge also held that the two claimants had committed an offence under s.3 of the 1978 Act by participating in a joint enterprise pursuant to which their co-conspirators had already taken off without payment. He concluded that the correct approach to deciding whether the doctrine of ex turpi causa applied was to ask whether the criminal act was no more than the occasion for the damage or whether the damage was caused by the criminal act, in which case the doctrine would apply.[2]

Mr Justice Kenneth Parker concluded that this was a plain case where the damage was caused by the criminal conduct of the claimants. That conduct was not carried out on the spur of the moment. There was a plan jointly to "jump" the taxi, and that plan was put into effect. Three of the group had already left the taxi and taken off before the defendant drove on. Both claimants had at that point every opportunity to recognise their dishonest intent, to reseat themselves in the taxi and to travel on safely. Instead, they deliberately chose to follow their companions in the carrying out of the joint criminal enterprise and, in each case, chose to jump or step out of the moving taxi. Their only reason for doing so was to evade payment of the fare.

The judge held that applying ex turpi causa here tended strongly to promote the public policy that underpinned the doctrine. Dishonest evasion of a taxi fare should not be dismissed as just another inevitable expense of the driver, but should be seen for reasons of public policy as a pernicious and reprehensible practice that tended to erode the efficiency, and raise the costs, of a service that was valuable to the community. It could also risk public disorder if taxi drivers, responding to a crime that was easily perpetrated but difficult to police, resorted to their own countermeasures.

Unsurprisingly, he concluded that in the circumstances, both claimants were in any event precluded by the doctrine of ex turpi causa from succeeding in their claims. The claims were dismissed and judgment entered for defendant.

## Comment

The judge found that the claimants' injuries were not caused by any breach of duty on the part of the taxi driver. They were caused by the conduct of each claimant in jumping or stepping out of the taxi whilst it was moving. These actions broke any chain of causation.

The judge also accepted the taxi driver's defence of ex turpi causa. Counsel for the claimant had tried to neutralise that special defence with a number of arguments. First, on the basis that there was no relevant "turpitude" to underpin the defence, essentially because there was no crime committed. The claimants' argument was that because the driver drove off, he was in breach of contract and therefore the claimants

[2] *Gray v Thames Trains Ltd* [2009] UKHL 33; [2009] 1 A.C. 1339 and *Joyce v O'Brien* [2013] EWCA Civ 546; [2014] 1 W.L.R. 70 considered.

had no obligation to pay, so how could they be guilty of any theft-related offence? The judge cleverly satirised this argument by framing it in a way that illustrated the absurdity of what was being proposed:

> "It is true that our original plan was to 'jump' your taxi. That is probably why you drove on when three of our co-conspirators jumped out and ran off without paying and we were of course trying to do the same. However, by driving on from the end of … the street at the time when we were still trying to 'jump' your taxi, you fundamentally broke your contract of carriage with us, and we are fully entitled to pay you nothing. Goodbye."[3]

In the circumstances he had no difficulty concluding that a crime had been committed (conspiracy to steal/attempted theft) which was capable of invoking the doctrine.

The claimants' second main argument on ex turpi causa was that the gravity of the offending was not such as to invoke the policy (there were no prosecutions and any sentence would only have been a fine or a community sentence), and the degree of the claimants culpability was insignificant compared to the driver's conduct. The judge rejected these arguments. As stated above, he found the application of ex turpi causa in this case to strongly promote the public policy that underpins the doctrine. Moreover, he considered the claimants' criminal conduct to overwhelm any fault on the part of the driver. He did, however, review more generally the role, if any, proportionality had to play in the doctrine of ex turpi causa.

The degree and culpability of a claimant's criminality has in some cases been weighed against the conduct of the defendant. Mere evidence of some degree of participation in crime will not result in denial of a remedy where the defendant's conduct is by far the more culpable. By way of example: breaking the skull of an assailant who struck the first blow. In such circumstances a plea of ex turpi causa will be unlikely to succeed. This was the result in *Lane v Holloway*[4] where an elderly man provoked a fight with a younger neighbour who then violently battered him.

Having regard for the defendant's conduct at all is, arguably, a recipe for trouble. As the authors of Clerk & Lindsell argue:

> "taking into account the relative conduct of defendant and claimant creates the real possibility that in one case the defence will succeed (where the defendant is comparatively 'innocent') and in another the defence will fail (where the defendant is also seriously culpable) where the claimants' conduct is identical."[5]

The most important consideration must be the claimant's conduct. This then begs the question whether the court should consider proportionality between the claimant's conduct and the seriousness of the loss he will incur if his claim is not allowed. In the present case, the claimants' counsel relied upon the dictum of Ward L.J. in case of *Hewison v Meridian Shipping*[6] to support such a proposition, arguing that the claimant's loss was huge compared to the degree of criminality involved and should therefore overcome the ex turpi causa defence. The trial judge dismissed this submission. He could find no further support for it in the authorities, and considered that it had inherent difficulties. He assumed that the principle was founded on distributive justice, and if so, he considered that the economic position of the putative defendant would need to be considered as well. In other words, if the loss to the claimant was so great compared to his wrongdoing that the ex turpi causa defence was neutralised, how would this be fair for the defendant who may himself be uninsured and who may face financial ruin if the claimant's claim succeeded? The judge therefore found the proportionality argument unattractive, and said it would be a matter for the legislature if they wanted to alter the law in this way rather than for the judiciary.



[3] *Beaumont v Ferrer* [2014] EWHC 2398 (QB) at [32].
[4] *Lane v Holloway* [1968] 1 Q.B. 379.
[5] *Clerk & Lindsell on Torts*, edited by Michael A. Jones and Anthony M. Dugdale, 20th edn (London: Sweet & Maxwell, 2010), pp.3–37.
[6] *Hewison v Meridian Shipping Services Pte Ltd* [2002] EWCA Civ 1821; [2003] I.C.R. 766.

The claimants' arguments on proportionality in this case seemed bound to fail on the merits, even if the principal of proportionality had been accepted by the judge. His treatment of the issue was bold but probably right. Weighing the conduct of the claimant against either the measure of his own loss, or the conduct of the defendant is bound to lead to problems and is against the thrust of previous authority. Having said that, when determining if ex turpi causa should bar the claim, the court has to have an eye to proportionality more generally, as between the claimant's conduct and application of the public policy. As the authors of Clerk & Lindsell state:

> "the concept proportionality is relevant, in the sense that the court should look at the seriousness of the claimant's wrongdoing in deciding whether it is appropriate to compensate him for damage sustained in the course of that wrongdoing. Minor offences can readily be disregarded, but there comes a point at which the courts should not entertain the claims to compensation of those injured whilst engaged in serious criminal activity, to do so risks bringing the legal system into disrepute."[7]

## Practice points:

- Claims involving illegality are high risk. The application of ex turpi causa is such a "jury issue" it is often hard to predict what an individual judge will decide in any particular case. This makes litigation risky for both parties where ex turpi causa is pleaded. Therefore, if one has a case where there is a good reason for suggesting that the ex turpi causa defence should not apply, it may be worth considering applying to strike out that part of the defence under r.24.2 of the CPR. Even if the application is not successful, one may get useful insight into the judiciary's impression as to whether the defence has merit.
- Criminal conduct which is incidental to the accident in question will not invoke the *ex turpi causa* defence, for example the recent case of *Delaney v Pickett*[8] where the fact that the parties were transporting prohibited drugs at the relevant time did no more than set the scene for the defendant's negligent driving.
- It should also be remembered that ex turpi causa is not a defence which is there for the benefit of a defendant. It is public policy for the court not to lend its aid to the immoral or illegal claimant.

**Nathan Tavares**



# Rainford v Lawrenson

(QBD, Patterson J., April 15, 2014, [2014] EWHC 1188 (QB))

*Personal injury—road traffic accidents—liability—standard of care—appropriate steps—children—contributory negligence*

LT Children; Contributory negligence; Road traffic accidents

On March 13, 2007, at about 8.00, Charlotte Rainford was walking, with her sister Vicky, from her home to a bus stop on the A588, otherwise known as Carr Lane in Hambleton, Lancashire, to catch a bus to

[7] *Hewison* [2002] EWCA Civ 1821.
[8] *Delaney v Pickett* [2011] EWCA Civ 1532; [2012] 1 W.L.R. 2149.

school. The speed limit was 60mph. It was a sunny day. Charlotte was aged 14 years and 8 months and Vicky was 16 years and 4 months. They were each wearing school uniform which included a blue blazer, a navy blue skirt and blue and yellow tie. Vicky was about 5ft 2ins tall. Charlotte was, then, slightly shorter. They met up with their friends Thomas and Beth Chadwick who lived on the same road. They were wearing school uniform which consisted of a burgundy jumper with either grey pants or skirt. All the children were aware of the Green Cross Code and were very familiar with this particular road as they used it most days.

Charlotte, her sister and one of the friends, were waiting to cross the road from west to east to the bus stop. The other friend was not crossing the road. On the western side of Carr Lane was a bus stop for northbound buses, about 20m further north than the bus stop on the eastern side. The western bus stop was to the south of a tarmacked area which led to a dropped kerb onto Carr Lane. Directly opposite on the eastern side was a reciprocal dropped kerb from which a tarmacked path led to the bus stop on the eastern side.

The children waited at the western dropped kerb until their side of the road was clear. They then stepped into the road and waited to allow two cars on the other side to pass. Charlotte's sister Vicky spotted a car approaching and pulled her friend back to the pavement. Out of the corner of her eye she saw Charlotte move forward and run towards the centre of the road where she was knocked over by a Ford Fiesta motorcar driven by the defendant, Kay Lawrenson. Charlotte sustained severe injuries including a serious head injury. There was a trial on liability.

Having considered evidence about Charlotte's movement from a variety of sources, Mrs Justice Patterson found that Charlotte walked into the road and did not run. At the moment Kay Lawrenson came around the bend in the road and began to head north on the straight section of Carr Lane the judge found that she was driving in a way which was cautious and prudent. The defendant was to the south of, but on the immediate approach to, the bus stop sign on the western side of Carr Lane when Charlotte stepped out into the carriageway.

That was consistent with expert opinion that the damage to the Ford Fiesta was consistent with it striking an upright pedestrian when the pedestrian was either stationary or moving slowly across its path. The damage to the vehicle showed that the claimant was about one-third of the way across the width of her vehicle. The distance between the nearside of the car and the kerb as it was passing the bus stop would have been about 0.9m for a centrally positioned car.

The judge considered a number of legal authorities on the issue of liability including *Foskett v Mistry*[1] where May L.J. said:

> "The root of this liability is negligence, and what is negligence depends on the facts with which you are to deal. If the possibility of the danger emerging is reasonably apparent then to take no precaution is negligent: but if the possibility of the danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions."

She recognised that she must not be influenced by 20/20 hindsight and had to apply to Ms Lawrenson's actions the standard of care which ought, in the circumstances, to be expected of a reasonably competent and alert motorist not the standard of the ideal driver.[2] She reminded herself that in carrying out that exercise it was important that she bear in mind that, as was recognised in *Lunt v Khelifa*,[3] "a motorcar is potentially a dangerous weapon".

[1] *Foskett v Mistry* [1984] 1 R.T.R. 1.
[2] *Stewart v Glaze* [2009] EWHC 704.
[3] *Lunt v Khelifa* [2002] EWCA 801.

The judge also noted what Clarke J. (as he then was) stated in *Toropdar v D*[4] when he quoted from a series of earlier judgments which distilled the relevant principles. In determining whether a child is at fault:

> "the standard by which a child's conduct is to be measured is not that to be expected of a reasonable adult but that reasonably to be expected of a child of the same age, intelligence and experience."

Patterson J. found that the defendant was aware of the group of children from rounding the bend and on her approach to the bus stop. She was not travelling at an excessive speed. The judge found that it was more likely than not that the defendant was travelling at a reasonable speed for this particular road, in the region of 34mph. She was aware of a group of children at a bus stop. She had been past school children on both sides of the road that morning. It was a road that she knew well and travelled on a daily basis. It was a straight road and visibility was clear. As such, the judge held that she ought to have been aware of the presence of bus stops on each side of this stretch of Carr Lane.

The presence of children on both sides of the road ought to have alerted her to the prospect that some children might cross the road. In those circumstances, in addition to the normal obligations under the Highway Code, the judge concluded that there were locational factors present which meant that the defendant should have been alert and anticipated that there was a real risk of one of the group of children stepping out into the carriageway.

The judge held that a reasonably prudent motorist in these particular circumstances would have considered that there was a risk that one of the group of school children might step into the road so as to make it necessary to take precautionary measures. The judge pointed out that a motorist is taken to know the principles of the Highway Code, including para.146,[5] which advises anticipating what pedestrians, particularly children, might do, namely, that they may step out into the road without seeing an oncoming vehicle if they are looking the other way.

The judge held that a reasonably prudent motorist having observed all that the defendant did ought to have assessed the risk that one or more of the children might step into the road or attempt to cross to the opposite dropped kerb to gain access to the other bus stop as one that was real. The congregation of children in such a location presented a risk of imprudent action on their part against which it was not unreasonable for a reasonably competent driver to take precautionary steps. A reasonably prudent driver, on the immediate approach to the bus stop, would have reacted to that risk assessment accordingly, and repositioned herself closer to the centre line and/or reduced her speed and/or covered her brakes. In addition had the defendant used her horn the audible disruption of teenage reverie could have forewarned Charlotte of the approaching vehicle being driven by the defendant.

Accordingly, the defendant failed to keep a proper lookout and take appropriate steps to react to the real risk that presented itself to her. Primary liability was established.

The defendant contended for a significant deduction for contributory negligence and referred the judge to the cases of *Paramasivan v Wicks*.[6] She was also referred to *Foskett*[7] and *Toropdar*.[8] All of those cases involved child claimants where contributory negligence varied from 75 per cent to 33 per cent depending upon the circumstances. The defendant submitted that if the claimant was on the pavement and stepped into the road the amount of contributory negligence should be 75 per cent. The claimant submitted that

[4] *Toropdar v D* [2009] EWHC 2997.

[5] Adapt your driving to the appropriate type and condition of the road you are on. In particular: do not treat speed limits as a target—it is often not appropriate or safe to drive at the maximum speed limit; take the road and traffic conditions into account; be prepared for unexpected or difficult situations, for example the road being blocked beyond a blind bend; be prepared to adjust your speed as a precaution; where there are junctions, be prepared for road users emerging; in side roads and country lanes look out for unmarked junctions where nobody has priority; be prepared to stop at traffic control systems, road works, pedestrian crossings or traffic lights as necessary; try to anticipate what cyclists or pedestrians might do—if pedestrians, particularly children, are looking the other way, they may step out into the road without seeing you.

[6] *Paramasivan v Wicks* [2013] EWCA Civ 262.

[7] *Foskett* [1984] 1 R.T.R. 1

[8] *Toropdar* [2009] EWHC 2997

there was some guidance in the case of *Eagle v Chambers* [2003] EWCA Civ 1107; [2004] R.T.R. 9[9] which was cited in the *Toropdar* case, where the court substituted 60 per cent as a finding of contributory negligence on the part of a 17-year-old claimant struck by a car going at 30–35mph. All were fact sensitive.

In this case, the claimant was at an intended crossing point by virtue of the dropped kerbs on both sides of the highway opposite each other. Although Charlotte, at the age of 14 years and 8 months, was clearly aware of the Green Cross Code and was of a certain maturity, the judge came to the conclusion that the proper percentage reduction in this case was 50 per cent.

## Comment

The Judge held that given the facts sensitive nature of the case, it was not necessary to embark upon an extensive review of legal authorities. Nevertheless, there have been many cases which have reached courts involving vehicles and pedestrians, including younger pedestrians. Some principles can be drawn from these. It is worthwhile reciting from *Foskett v Mistry*[10] the principle enunciated by May L.J.:

> "The root of this liability is negligence, and what is negligence depends on the facts with which you are to deal. If the possibility of the danger emerging is reasonably apparent then to take no precaution is negligent; but if the possibility of the danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions."

The issue in this case was therefore whether there was a "danger emerging" that was "reasonably apparent".

Expert evidence was available and on the basis of this it was found that the defendant was not travelling at an excessive speed, which was about 34–35mph. This established that the defendant would have had a clear view of the three girls for a distance of about 100m. The judge found that action could have been taken, which included slowing down, sounding her horn, covering her brakes, or moving to her offside. The Court found that the expectation to take those steps was not a counsel of perfection but a reasonable expectation of a driver in these circumstances. On this basis the judge found that the defendant was negligent.

What is interesting about this is that it does confirm the position that where children, including teenagers, are at or near the road, then action should be taken by the driver. Reference was made to para.146 of The Highway Code, which advises anticipating what pedestrians, particularly children, might do, namely, they may step out into the road without seeing an oncoming vehicle if they are looking the other way.

A more extreme version of this approach is to be found in *Paramasivan v Wicks*.[11] In that case, whilst the Court of Appeal reversed the High Court decision, it still found that the driver was negligent when he struck a 13-year-old boy who had suddenly run into the road in front of his car. Whilst it was found that the speed at which the judge at first instance found the car should have been travelling was a counsel of perfection, the Court of Appeal nevertheless found that the defendant should have seen the claimant and taken some evasive action.

With regards to the extent of contributory negligence, again, the Court held that the issue of contributory negligence is very much facts sensitive. However, we can take some guidance from the courts. I would refer to two Court of Appeal decisions in particular. Lady Justice Howe (as she then was) in *Eagle v Chambers* [2003] EWCA Civ 1107; [2004] R.T.R. 9[12] held:



[9] *Eagle v Chambers (No.1)* [2003] EWCA Civ 1107; [2004] R.T.R. 9.
[10] *Foskett* (1984) 1 R.T.R. 1.
[11] *Paramasivan* [2013] EWCA Civ 262.
[12] *Eagle* (2003) EWCA Civ 1107.

> "It is rare indeed for a pedestrian to be found more responsible than the driver unless the pedestrian has suddenly moved into the path of an oncoming vehicle. That is not this case. The Court has consistently imposed upon the drivers of cars a high burden to reflect the fact that the car is potentially a dangerous weapon."[13]

In *Eagle v Chambers* [2003] EWCA Civ 1107; [2004] R.T.R. 9 there was little doubt that the claimant's actions were negligent but she was only found 40 per cent to blame.

This was a case where the claimant did walk into the road, failing to observe the vehicle and was found 50 per cent to blame. Clearly there was some significant blameworthy conduct on the part of the claimant, as found by the court. In the *Paramavisan* case, the claimant, who was 13, was found to be 75 per cent to blame. He had run out into the road and, it was clearly felt by the Court of Appeal, was highly culpable.

## Practice points:

- Succeeding in cases involving drivers and pedestrians is not inevitable.
- Nonetheless, the onus placed upon drivers in the Highway Code and, indeed, endorsed by the Court of Appeal, places a high duty on drivers.
- In any such cases, scrutiny must be made of the driver's conduct to see whether they could reasonably have taken evasive action.
- If they could, then liability should usually be inevitable.

**Colin Ettinger**



# Gray v Botwright

(CA (Civ Div), Jackson L.J., McCombe L.J., Macur L.J., July 9, 2014, [2014] EWCA Civ 1201)

*Personal injury—road traffic accidents—negligence—breach of duty of care—causation—traffic signals—contributory negligence*

LT Breach of duty of care; Contributory negligence; Road traffic accidents; Traffic signals

Gray had been driving towards a complicated junction which had 11 traffic lights controlling the flow of traffic. He was familiar with the junction. He turned right across the carriageway at a time when he knew that the traffic lights for oncoming vehicles would be red. He therefore did not check to see whether any cars were approaching. However, the defendant Botwright was approaching and drove through a red light and a collision occurred. Gray suffered neck and back injuries and brought proceedings alleging that the accident had been caused by the defendant's negligent driving.

The district judge found as a fact that the defendant had driven through a red light but that he had not been travelling significantly in excess of 30mph. The judge concluded that the accident had been solely caused by the claimant's negligence in failing to check for vehicles when turning right.[1] He relied on *Whittle v Bennett*[2] and found that the coincidence of location fallacy applied whereby, by his negligent

[13] Quoting Latham L.J. in *Lunt* [2002] EWCA Civ 801.

[1] In *Potts v Director of Public Prosecutions* , unreported, July 17, 2000 DC, the divisional court held that the driver of a motor vehicle intending to turn right at a road junction controlled by a right-turn filter light was not entitled to proceed in the direction of the arrow showing green in his favour, without keeping a lookout for other vehicles entering the junction.

[2] *Whittle v Bennett* [2006] EWCA Civ 1538; (2006) 150 S.J.L.B. 1467.

act, a person was in a position where an accident occurred but the occurrence of the accident was not within the scope of the duty of care which he breached when acting negligently. Gray's appeal was dismissed by a circuit judge and he appealed to the Court of Appeal.

The Court of Appeal held that the claimant, Gray, had made a positive decision not to check for traffic when he turned right because he inferred that the traffic light would be red and he assessed that no vehicles would be approaching. His decision to cross the carriageway without looking was an act of "sheer folly". It was not sensible to assume without checking that no car was approaching. Accordingly, Gray had been negligent in failing to check for oncoming traffic.

However, Gray's actions had not been the sole cause of the accident. The defendant should not have been where he was at the moment of impact. This case differed from *Whittle* as the whole purpose of the 11 traffic lights was to ensure a regular flow of an appropriate number of vehicles through the junction at each stage.[3] By entering the junction when he did, the defendant created the danger which the lights were designed to prevent. The damage that the claimant sustained was within the scope of the duty which Botwright owed to other road users when he crossed the red light.

Botwright had been found to have been travelling at just over 30mph, but he should have slowed down when he saw vehicles in his path. The onus was on Botwright to be particularly careful when driving through the junction as he should not have been there at that time. The facts were distinguishable from *Radburn v Kemp*[4] because that case involved a green light.[5] The defendant was at fault in failing to slow down as he approached the junction. The Court of Appeal concluded that both parties had driven badly and liability was apportioned 50:50. The appeal on liability was allowed.

## Comment

### *Introduction*

In this case the Court of Appeal had to delve into the mysteries of causation, as that subject applies to the law of England and Wales. The Court of Appeal judgment also makes an interesting, but far more prosaic, observation about quantum.

### *The forensic approach to causation*

The difficulties in applying some aspects of the law on causation are reflected by this being a second appeal, in which the Court of Appeal unanimously took a different view on liability to both the trial judge and the judge who heard the first appeal. Consequently, a claim where the damages awarded were less than £2,500 involved a trial followed by two appeals.

Lord Justice Jackson, one of the judges who heard the appeal in the Court of Appeal, has recently observed, in another context, that proportionality requires the law not to be a mystery but capable of reasoning. It is, therefore, worth analysing the issues on causation and the proper forensic approach to this subject.

Difficulties with the concept of causation are nothing new. Causation was a subject of interest to the Greek philosophers, notably Aristotle who considered the topic in his work "Metaphysics". That thinking does not, however, dictate the modern judicial approach to causation, as Lord Salmon explained in *Alphacell Ltd v Woodward*[6] when he said:



[3] *Whittle* [2006] EWCA Civ 1538 distinguished.
[4] *Radburn v Kemp* [1971] 1 W.L.R. 1502.
[5] *Radburn* [1971] 1 W.L.R. 1502 distinguished.
[6] *Alphacell Ltd v Woodward* [1972] A.C. 824 at 847.

> "What or who has caused a certain event to occur is essentially a practical question of fact which can best be answered by ordinary common sense rather than by abstract metaphysical theory."

The difficulties are compounded when the cause of action relied on by the claimant is the tort of negligence because the cause of action requires at least some damage to have been caused by the breach of duty, hence these are issues of liability. That was explained by May L.J. in *S v Gloucestershire CC*[7] where he said:

> "A negligence claim is habitually analysed compartmentally by asking whether there was (a) a duty of care; (b) breach of that duty and (c) damage caused by the breach of duty. But damage is the essence of a cause of action in negligence and the critical question in a particular case is the composite one, that is whether the scope of the duty of care in the circumstances of the case is such as to embrace damage of the kind which the plaintiff claims to have suffered."

Moreover, there is a degree of overlap between the constituent elements of duty, breach, causation and damage. Consequently, the courts can categorise the reasons for finding liability, or otherwise, under any one of these individual elements of the tort. That was recognised by Lord Hoffmann in *Jolley v Sutton LBC*[8] when he observed:

> "But the present law is that unless the injury is of a description which was reasonably foreseeable, it is (according to taste) 'outside the scope of the duty' or 'too remote'."

Whilst the Court of Appeal, in this case, determined liability on the basis of the scope of the duty owed by the defendant, and hence whether the damage suffered by the claimant fell within the scope of that duty, it may be easier to analyse the case in terms of causation, although, given the composite nature of the tort of negligence, any analysis is equally valid.

The linkage between breach and damage, and hence an integral element of the cause of action in negligence, is causation. Causation, itself, can be said to comprise two elements, as explained by Lord Nicholls of Birkenhead in *Kuwait Airways Corp v Iraqi Airways Co*[9] where he said:

> "How, then, does one identify a plaintiff's 'true loss' in cases of tort? … I take as my starting point the commonly accepted approach that the extent of a defendant's liability for the plaintiff's loss calls for a twofold inquiry: whether the wrongful conduct causally contributed to the loss and, if it did, what is the extent of the loss for which the defendant ought to be held liable. The first of these inquiries, widely undertaken as a simple 'but for' test, is predominantly a factual inquiry.
>
> The second inquiry, although this is not always openly acknowledged by the courts, involves a value judgment ('*ought to be held liable*').
>
> The law has to set a limit to the causally connected losses for which a defendant is to be held responsible. In the ordinary language of lawyers, losses outside the limit may bear one of several labels. They may be described as too remote because the wrongful conduct was not a substantial or proximate cause. The defendant's responsibility may be excluded because the plaintiff failed to mitigate his loss. Familiar principles, such as foreseeability, assist in promoting some consistency of general approach. These are guidelines, some more helpful than others, but they are never more than this."

The first inquiry is sometimes termed factual causation whilst the second often described as legal causation.



[7] *S v Gloucestershire CC* [2001] Fam. 3013 at 337.
[8] *Jolley v Sutton LBC* [2000] 1 W.L.R. 1082 at 1091.
[9] *Kuwait Airways Corp v Iraqi Airways Co* [2002] UKHL 19; [2002] 2 A.C. 883 at 1091.

The concept of remoteness, in this sense the antithesis of causation, is another way of determining whether the tort of negligence can be established. Remoteness as a concept can be applied, though in slightly different ways, to both factual causation and legal causation.

## *Factual causation*

The first part of the test identified by Lord Nicholls is the identification of a chain of events, which the law regards as unbroken, between breach of duty and damage. An antecedent breach of duty may be regarded by the law as too remote from the damage, and hence not part of an unbroken chain of events.

The "coincidence of location" fallacy referred to by the Court of Appeal is an example of something that—whilst recognising there was a breach of duty which was an integral part of the chain of events, in the sense that the claimant's damage would not have occurred without that breach—the law nevertheless regards as too remote from, and therefore not a legal cause of, the claimant's damage.

Jackson L.J. explained what that fallacy meant in the following passage of his judgment:

> "A defendant acts negligently and, as a result of that negligence, he is in a position where an accident of some sort occurs, but the occurrence of that accident was not within the scope of the duty of care which the defendant breached when acting negligently. Suppose, for example, a motorist drives at excessive speed between point A and point B. The motorist then slows down to a proper speed and is involved in a collision which is not his fault. The motorist would not have been at the point of impact if he had not driven too fast on an earlier occasion, but that earlier negligence of driving too fast is not causative of the collision. This is because once the motorist had passed point B, he was at a location where the impact would not be within the scope of any duty of care which the defendant had breached."[10]

This is but one example of a general principle the scope of which was analysed by Lord Wright in *Smith Hogg & Co Ltd v Black Sea and Baltic General Insurance Co Ltd*[11] when he observed:

> "[Counsel] has strenuously contended on behalf of the appellants, that the master's action, whether or not negligent, was 'novus actus interveniens', which broke the nexus or chain of causation, and reduced the unseaworthiness from 'causa causans' to 'causa sine quâ non'. I cannot help deprecating the use of Latin or so-called Latin phrases in this way. They only distract the mind from the true problem which is to apply the principles of English law to the realities of the case. 'Causa causans' is supposed to mean a cause which causes, while 'causa sine quâ non' means, I suppose, a cause which does not, in the sense material to the particular case, cause, but is merely an incident which precedes in the history or narrative of events, but as a cause is not in at the death, and hence is irrelevant. English law can furnish in its own language expressions which will more fitly state the problem in any case of this type. Indeed the question what antecedent or subsequent event is a relevant or decisive cause varies with the particular case. If tort, which may in some respects have its own rules, is put aside and the enquiry is limited to contract, the selection of the relevant cause or causes will generally vary with the nature of the contract. I say 'cause or causes' because as Lord Shaw pointed out in *Leyland Shipping Co. v. Norwich Union Fire Insurance Co.* [1918] A.C. 350, causes may be regarded not so much as a chain, but as a network. There is always a combination of co-operating causes, out of which the law, employing its empirical or common sense view of causation, will select the one or more which it finds material for its special purpose of deciding the particular case."

[10] *Gray v Botwright* [2014] EWCA Civ 1201 at [2].
[11] *Smith Hogg & Co Ltd v Black Sea and Baltic General Insurance Co Ltd* [1940] A.C. 997 at 1003.

The same approach has been taken to help the sometimes problematic analysis of when the defence of ex turpi causa is available. In *Gray v Thames Trains Ltd*[12] Lord Hoffmann held:

> "This distinction, between causing something and merely providing the occasion for someone else to cause something, is one with which we are very familiar in the law of torts. It is the same principle by which the law normally holds that even though damage would not have occurred but for a tortious act, the defendant is not liable if the immediate cause was the deliberate act of another individual. Examples of cases falling on one side of the line or the other are given in the judgment of Judge LJ in *Cross v Kirby* [2000] CA Transcript No 321. It was Judge LJ, at para 103, who formulated the test of 'inextricably linked' which was afterwards adopted by Sir Murray Stuart-Smith LJ in *Vellino v Chief Constable of the Greater Manchester Police* [2002] 1 WLR 218. Other expressions which he approved, at paras 100 and 104, were 'an integral part or a necessarily direct consequence' of the unlawful act (Rougier J: see *Revill v Newbery* [1996] QB 567, 571, [1996] 1 All ER 291, [1996] 2 WLR 239) and 'arises directly *ex turpi causa*': Bingham LJ in *Saunders v Edwards* [1987] 2 All ER 651, [1987] 1 WLR 1116, 1134. It might be better to avoid metaphors like 'inextricably linked' or 'integral part' and to treat the question as simply one of causation. Can one say that, although the damage would not have happened but for the tortious conduct of the defendant, it was caused by the criminal act of the claimant? (*Vellino v Chief Constable of the Greater Manchester Police* [2002] 1 WLR 218). Or is the position that although the damage would not have happened without the criminal act of the claimant, it was caused by the tortious act of the defendant? (*Revill v Newbery* [1996] QB 567."

More recently, in another case involving ex turpi causa, Ward L.J. observed in *Delaney v Pickett*[13] that:

> "Here the crucial question is whether, on the one hand the criminal activity merely gave occasion for the tortious act of the defendant to be committed or whether, even though the accident would never have happened had they not made the journey which at some point involved their obtaining and/or transporting drugs with the intention to supply or on the other hand whether the immediate cause of the claimant's damage was the negligent driving."

A different way of analysing this aspect of factual causation was adopted by Lord Reid in *Stapley v Gypsum Mines Ltd*,[14] although this approach has some overlap with the idea of events being "inextricably linked".

The background to *Stapley* was that two miners, neither senior to the other, were instructed to bring down a dangerous part of the roof of the mine. Both understood they should not resume work until this task had been completed. However, despite failing to bring down the roof the miners decided to resume work. The roof fell and the claimant's husband suffered fatal injuries. The claim was based on the failure of the other worker, for whom the defendant was vicariously liable, to follow the instructions given.

Lord Reid, giving judgment in the House of Lords, held that:

> "In these circumstances it is necessary to determine what caused the death of Stapley. If it was caused solely by his own fault, then the appellant cannot succeed. But if it was caused partly by his own fault and partly by the fault of [the other worker], then the appellant can rely on the Law Reform (Contributory Negligence) Act 1945. To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation,

[12] *Gray v Thames Trains Ltd* [2009] UKHL 33; [2009] 1 A.C. 1339 at [54].
[13] *Delaney v Pickett* [2011] EWCA Civ 1532; [2012] 1 W.L.R. 2149 at [37].
[14] *Stapley v Gypsum Mines Ltd* [1953] A.C. 663.

> it is quite irrelevant in this connection. In a Court of Law, this question must be decided as a properly instructed and reasonable jury would decide it."[15]

He continued:

> "The question must be determined by applying common sense to the facts of each particular case. One may find that, as a matter of history, several people have been at fault but if anyone of them had acted properly the act of it would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."[16]

Lord Reid then applied this test to the facts:

> "Was [the other worker's] fault 'so much mixed up with the state of things brought about' by Stapley that 'in the ordinary plain common sense of this business' it must be regarded as having contributed to the accident? I can only say that I think it was and that there was no sufficient separation of time, place or circumstance between them to justify its being excluded. [The other worker's] fault was one of omission rather than commission and it may often be impossible to say that, if a man had done what he omitted to do, the accident would certainly have been prevented. It is enough, in my judgment, if there is a sufficiently high degree of probability that the accident would have been prevented. I have already stated my view on the probabilities in this case and I think that it must lead to the conclusion that [the others worker's] fault ought to be regarded as having contributed to the accident."[17]

Approached in this way it becomes easier to see how, in the claimant's accident at Beccles, the defendant's breach of duty was, to use the language of Lord Wright, "in at the death" or, to adopt the terminology of Lord Reid, the defendant's fault was "so much mixed up with the state of things brought about" by the claimant that the defendant's breach was a contributing cause of the accident and too remote in space and time.

The issue can, as the Court of Appeal did in this case, be identified as one about the scope of the defendant's duty and hence whether that encompassed the damage suffered by the claimant. However, as Lord Hoffmann observed in *Jolley*,[18] it may be a matter of taste whether the focus is on duty or damage. Moreover, where the defendant clearly owes a duty of care, and damage has been suffered, it is, perhaps, easier to distinguish when liability is, and is not, established by focusing on factual causation and the issue of remoteness just in that specific context.

## *Legal causation*

When, as in this case, the issue of remoteness is about looking back in time from the moment the claimant suffered damage, to determine whether the antecedent breach of duty was too remote, the issue is one of factual causation.

On other occasions, where there was a breach of duty which, as a matter of factual causation, caused some damage that was foreseeable, then, in the event of yet further damage occurring at a future stage, responsibility for such damage will again be determined by remoteness, but now in the sense of legal causation.

[15] *Stapley* [1953] A.C. 663 at 681.
[16] *Stapley* [1953] A.C. 663 at 681.
[17] *Stapley* [1953] A.C. 663 at 681–682.
[18] *Jolley* [2000] 1 W.L.R. 1082.

Here the court must consider the second inquiry identified by Lord Nicholls in *Kuwait Airways Corp*.[19] An example is *Spencer v Wincanton Holdings Ltd*[20] where, on this point, Sedley L.J. held:

> "Fairness, baldly stated, might be thought to take things little further than reasonableness. But what it does is acknowledge that a succession of consequences which in fact and in logic is infinite will be halted by the law when it becomes unfair to let it continue. In relation to tortious liability for personal injury, this point is reached when (though not only when) the claimant suffers a further injury which, while it would not have happened without the initial injury, has been in substance brought about by the claimant and not the tortfeasor."

### *Quantum*

The injuries suffered by the claimant, although an exacerbation, were of the sort suffered by many claimants involved in accidents of this kind and hence the sort of injuries for which both practitioners and the courts frequently have to assess the appropriate level of compensation.

The district judge, although not finding for the claimant on liability, expressed the view that damages for pain, suffering and loss of amenity, on full liability, would have been £2,800.

In the Court of Appeal the claimant challenged this assessment, suggesting an appropriate award would be in the region of £4,300. On this point Jackson L.J. held:

> "In my view, the award of general damages made by the district judge was low. It was very much towards the bottom of the bracket, but it was not so low that this court should intervene. It is not the function of the Court of Appeal to carry out a fresh assessment of quantum of damages unless the judge has gone into the wrong bracket."[21]

These observations do offer some useful guidance for practitioners and courts in the future when assessing damages for this kind of case.



## Practice points:

The case is a useful reminder of the nature of the tort of negligence and the need for careful, and logical, analysis of the constituent elements to determine whether the defendant is liable and, if so, for what damage.

In terms of practice points:

- Any claims based in negligence, or related to statutory duties, where liability is disputed, require a methodical analysis of what the issue is really about.
- The views of the Court of Appeal offer guidance on quantum in this type of case.
- An appeal on quantum, if that is based just on the judge having awarded what is contended to be the wrong figure, may require the appellant to show "the judge has gone into the wrong bracket".

**John McQuater**

[19] *Kuwait Airways Corp* [2002] UKHL 19.
[20] *Spencer v Wincanton Holdings Ltd (Wincanton Logistics Ltd)* [2009] EWCA Civ 1404; [2010] P.I.Q.R. P8 at [15].
[21] *Gray* [2014] EWCA Civ 1201 at [44].

# Vnuk v Zavarovalnica Triglav D.D.

(CJEU (Third Chamber), M. Ilešic, President of the Chamber, C.G. Fernlund, A. Ó Caoimh, C. Toader and E. Jaraši unas (Rapporteur), September 4, 2014, C-162/13)

*Liability—motor vehicles—use of vehicles—compulsory motor insurance—indemnity—insured tractor with trailer attached—Directive 72/166 art.3(1)—off road accidents*

LT Compulsory insurance; EU law; Motor insurance; Personal injury; Slovenia; Tractors

On August 13, 2007 there was an accident at a farm in Slovenia. Bales of hay were being stored in the loft of a barn at the farm. A tractor with a trailer attached was involved and was reversing in the courtyard of the farm. The trailer struck a ladder which Mr Damijan Vnuk had climbed, causing him to fall.

An EU Directive[1] provides, inter alia, that each Member State has 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 extent of the liability covered and the terms and conditions of the cover are to be determined on the basis of these measures.

Under Slovenian Law on compulsory motor vehicle liability insurance, the owner of a vehicle must take out insurance covering liability for damage caused by the use of the vehicle to third parties resulting in: death; physical injury; invalidity; and loss of, or damage to, property, with the exception of liability for damage to property which the proprietor has agreed to transport.

The owner of the tractor had taken out compulsory insurance on the vehicle with Zavarovalnica Triglav. Mr Vnuk brought an action against the insurer seeking payment of the sum of €15,944.10 as compensation for his non-pecuniary damage, together with default interest.

The first-instance court dismissed his case. Vnuk lodged an appeal which was dismissed by the second-instance court. The court held that a compulsory insurance policy in respect of the use of a motor vehicle covered damage caused by the use of a tractor as a means of transport, but not damage caused when a tractor was used as a machine or propulsion device.

There was a further appeal to the Supreme Court, Slovenia, who asked the Court of Justice of the European Union ("CJEU") to rule on whether the concept of "use of vehicles" used in Directive 72/166 covered the manoeuvre of a tractor in a farmyard in order to bring the trailer attached to the tractor into a barn.

The CJEU held that the definition of the concept of "vehicle" within the meaning of Directive 72/166 is unconnected with the use which is made or might be made of the vehicle in question. Consequently, the fact that a tractor, possibly with a trailer attached, might, in certain circumstances, by used as an agricultural machine has no effect on the finding that such a vehicle corresponds to the concept of "vehicle" in the Directive. A tractor to which a trailer is attached is subject to the obligation to insure against civil liability if it is normally based in the territory of a Member State which has not excluded that type of vehicle from that obligation.

The Court then considered whether the manoeuvre of a tractor in the courtyard of a farm to bring the attached trailer into a barn should be regarded as being covered by the concept of "use of vehicles". This was held to be a concept which could not be left to the assessment of each Member State. The Court confirmed that there must be a uniform application of EU law. The principle of equality requires the terms

[1] 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 Spec. Ed. 360.

of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope normally to be given an independent and uniform interpretation throughout the EU. That interpretation must take into account not only its wording, but also its context and the objectives pursued by the rules of which it is part.

The court pointed out that within that context, the development of the EU legislation concerning compulsory insurance shows that the objective of protecting the victims of accidents caused by vehicles has continuously been pursued and reinforced by the EU legislature. They held that the EU legislature did not wish to exclude from that protection injured parties to an accident caused by a vehicle in the course of its use, if that use was consistent with the normal function of that vehicle.

Slovenia does not exclude any type of vehicle from the obligation to insure against civil liability. The accident which gave rise to this dispute was caused by a vehicle reversing, for the purpose of taking up a position in a specific location. The Court stared that it therefore seemed to have been caused by the use of a vehicle that was consistent with its normal function. This, however, was a matter for the national court to determine.

The court accordingly held that the concept of "use of vehicles" in the Directive covers any use of a vehicle that is consistent with the normal function of that vehicle. That concept seems to cover the manoeuvre of a tractor in a farmyard in order to bring the trailer attached to that tractor into a barn, as in this case. That is again a matter for the national court to determine.

## Comment

The *Vnuk v Zavarovalnica Triglav D.D.* ruling is the first time that the CJEU has attempted to interpret the imprecise terminology employed in arts 1 and 3 of Directive 72/166. These define the scope of the civil liability insurance cover that Member States are required to put into effect in their territories. These definitions are directly relevant to the scope of our own national law provision for third-party motor insurance cover under Pt VI of the Road Traffic Act 1988 as well as the secondary safeguards provided under the Uninsured Drivers Agreement 1999 and the Untraced Drivers Agreement 2003. That is because our national law is supposed to implement this European law fully; only it does not.



### *Why you need to know about Vnuk*

The *Vnuk* ruling is right up there in top place because it extends the scope of the compensatory safeguards for motor accident victims to such a degree that it is no longer accurate for lawyers acting in this field to describe themselves as a "road traffic" specialists. *Vnuk* has made "motor accident" practitioners of us all.

What is more, the ruling has immediate impact on motor accident victims, if not through direct effect then indirectly because our courts are obliged to interpret our national law implementation of these Directives (both statutory and extra-statutory) in the light of their wording and purpose in order to achieve, as far as is possible, their objectives.[2] Furthermore, in doing so, our courts are required to give application to any CJEU rulings interpreting their meaning or effect.[3]

### *Vnuk in a nutshell*

CJEU rulings are rarely as clearly articulated or coherently argued as we are fortunate enough to expect here in the UK. The reasoning in a CJEU judgment can often seem oblique and its writing style stiff and

[2] See *Pfeiffer v Deutsches Rotes Kreuz Kreisverband Waldshut eV* (C-397/01) [2004] E.C.R. I-8835; [2005] 1 C.M.L.R. 44.

[3] By s.3 of the European Communities Act 1972, whenever our national law is affected by relevant European law, our courts are required to interpret that European law in accordance with any relevant CJEU rulings.

formulaic and the *Vnuk* ruling is no exception. This is because it is the product of a single consensual opinion agreed by five different judges. However, properly understood, the *Vnuk* ruling says that the compulsory third-party motor insurance requirement must extend to cover:

- *any motor vehicle*,
- *any use* of that vehicle, provided that use is a normal function of that vehicle; and
- *anywhere* in the UK, or abroad in a Member State of the EU or EEA.

The CJEU justifies the inclusive scope of the compulsory motor insurance requirement by promoting the importance of the legislative aim within these Directives of protecting accident victims and placing this on equal footing with that of liberalising the free movement of persons and motor vehicles between Member States with a view to the creation of an internal market.[4] This affects not only the CJEU's own purposive interpretation of these Directives but also our own European law-consistent interpretation of our national law. It is also relevant to the weight and importance to be attached to any breach in their transposition into UK law when deciding whether a *Francovich* award is appropriate.

## *Consequences*

The implications flowing from this decision are large and they apply with immediate effect to:

- the cover provided by every one of the millions of third-party motor insurance policies issued in this country;
- the reserves and pricing of motor insurance in response to risk posed by the extended scope;
- the increased contractual entitlement of consumers of third-party insurance;
- the unqualified nature of the protection extended to motor accident victims of insured, under-insured, uninsured and untraced drivers;
- the Department for Transport's ("DfT") policy and national law implementation of these Directives, which will require immediate revision not just to Pt VI of the Road Traffic Act 1988 but also both MIB Agreements and the European Community (Rights Against Insurers) Regulations 2002; and
- the extensive body of case law interpreting our national law provision, much of which is rendered obsolete.

## *What the ruling means for day to day practice*

First, the geographic restrictions within our national law that restrict the scope of: (i) the duty to take out third-party motor insurance;[5] (ii) the cover provided under every third-party motor insurance policy;[6] (iii) the direct right of action against motor insurers;[7] and (iv) the obligation of the Motor Insurers Bureau ("MIB") to compensate victims of uninsured and untraced drivers,[8] all infringe the wider more inclusive scope required under this new interpretation of arts 1 and 3 of the Directive.



[4] As recently as June 3, 2014, Mr Justice Jay opined that "*the protection of victims* [within these Directives] *is a principle of second-order importance"*, see his judgment in *Delaney v Secretary of State for Transport* [2014] EWHC 1785 (QB); [2014] R.T.R. 25 at [160]. This did not prevent him from concluding that the minister's egregious breach of European law in permitting the MIB to rely on an unlawful exclusion of liability clause was sufficient serious to warrant an award of damages under the *Francovich* principle. See the author's JPIL article: Nicholas Bevan, *A World Turned Upside Down*, [2014] J.P.I.L. 136.

[5] Which under Road Traffic Act 1988 s.143 is confined to the use of a motor vehicle "on a road or other public place".

[6] Road Traffic Act 1988 s.145.

[7] European Communities (Rights Against Insurers) Regulations 2002 reg.3. See the definition of "accident" in reg.2.

[8] The Uninsured Drivers Agreement 1999 cl.1 matches its scope to the insurance requirement imposed under Pt VI of the 1988 Act and so will self correct once that Act is amended, not so for Untraced Drivers Agreement 2003 cl.4 which confines the scope of that agreement to an incident arising out of "the use of a motor vehicle on a road or other public place in Great Britain".

Article 3 of the Directive blandly 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".

It does not define "territory" as such, but *Vnuk* makes it abundantly clear that this means anywhere in a Member State's territory. Consequently, a farm tractor operating off-road in a farmyard, not accessible to the general public, was held to be capable of falling within this definition.

In practical terms, this means saying a fond farewell to all those familiar authorities that differentiate between public and private land.[9] So a toddler crushed, or someone injured, by a reversing camper van on a private campsite, or a reversing car in a private lane, a gated community, in a communal car park at the back of a block of flats, or in a residential driveway, will now be entitled to benefit from that vehicles' motor insurance. They are entitled to benefit from the motor insurer's indemnity under s.151 and/or to pursuit the insurer directly under the 2002 Regulations, and in default of an identified insurer, to present a claim to the MIB.

Secondly, all types of motor vehicle are caught by the compulsory insurance requirement, ostensibly at least, provided:

- they conform with the definition in art.1 of the Directive:

  > "any motor vehicle intended for travel on land and propelled by mechanical power, but not running on rails, and any trailer, whether or not coupled;"

  and
- they are not a vehicle that has been derogated from the duty to insure under art.5 of the Directive.

Article 5.1 allows certain officially sanctioned owners to be exempted from the duty to insure their vehicles; transposed into national law by s.144 of the 1988 Act. Article 5.2 allows the DfT to derogate certain vehicle types from the duty to insure, subject to certain procedural requirements, but it requires the compensating body (in the UK, the MIB) to compensate victims injured from their use.[10]

In practical terms, all the guidance on whether a motor vehicle is intended or adapted for road use are obsolete.[11] The statutory provision that restricts the duty to such use is unlawful. So all those exotic and impractical means of transportation such as mini-bikes, large quarry style dumpsters, fork lift trucks or motorised go-carts lacking mirrors, lights, hand brakes, horn, indicators and such, are all *potentially* caught by the third-party insurance requirement, and by implication the MIB is exposed to compensate any liability arising from their use—whether on private land or on our roads. However, this potential liability is qualified by the pragmatism of the next proposition.

Thirdly, the insurance requirement does not extend to any and every use: the use must be a normal function (not "use") of that vehicle. Neither the Directive nor the *Vnuk* judgment attempts to explain what is meant by "use of a vehicle" or "normal function". However, it is certainly not confined to use as a means of conveyance, as the tractor in *Vnuk* was not transporting anyone anywhere: it was simply being used as a piece of farm machinery to propel a large trailer of hay towards the hapless Mr Vnuk, who was standing on a ladder waiting for the next batch of bales to load into the barn loft.

In practical terms, this would exclude the mandatory third-party insurance requirement for a ride-on mower or a golf buggy where used to visit the local pub down the road, as this is unlikely to constitute normal function of such a vehicle. Yet the default position for the same vehicles, deployed to their normal



[9] See *Harrison v Hill* 1932 J.C. 13 HC and *Clarke v Kato* [1998] 1 W.L.R. 1647.

[10] Last month the Department for Transport responded to this author's Freedom of Information Act 2000 request by confirming that there are no vehicles listed as derogated from insurance under art.5.2. This is bound to change as, post-*Vnuk*, motorised lawnmowers and aircraft tugs and other motorised vehicles unsuited to road use are subject to the compulsory third-party motor insurance requirement.

[11] See *Burns v Currell* [1963] 2 Q.B. 433; [1963] 2 W.L.R. 1106 and *Chief Constable of Avon and Somerset v F* [1987] 1 All E.R. 318; (1987) 84 Cr. App. R. 345.

usage, such as a mower mowing a lawn, is a use of a motor vehicle that ostensibly requires third-party motor insurance cover. This is why we are likely to see the DfT leap into action with unaccustomed decisiveness, at the behest of concerned motor insurers, to designate these and other unusual vehicle types as art.5.2 vehicles derogated from the insurance obligation. It is unclear whether stripped down off-road motor bikes will be included in this list. They have in the past been held to be capable of falling within the current definition of "motor vehicle"—see *Clarke v Higson*[12]—but it seems probable that the motor insurance lobby will not waste this opportunity to exempt them.

## *Wider implications*

The *Vnuk* case was concerned with deciding whether the use of a farm tractor, off road, on private land as a piece of machinery, was capable of falling within the scope of the compulsory third-party insurance requirement. As we have seen, it confirmed in decisive terms that it is. However, in explaining its reasoning, it has elevated the European law protective principle[13] to an equal level of importance to that of ensuring the freedom of movement of vehicles, goods and people within the EU. The judgment also explains how the second and third Directives on motor insurance[14] served to progressively restrict the discretion enjoyed by Member States to implement their own differing standards of protection in this area.

Whilst there is always a danger of misconstruing the proper reach of a ruling, or misapplying the specific wording in a judgment to a scenario that does not share the same context, there appears to be a strong case to argue that the protective principle underscoring the *Vnuk* decision goes much further than extending the geographic and technical scope of the third-party insurance obligation.

It should be noted that the *Vnuk* case was preceded by a consistent line of CJEU rulings[15] that have gradually restricted the ability of Member States to create or permit their own exceptions to or restrictions in third-party insurance cover extended to passengers under these Directives. These decisions were also based on a purposive or teleological approach that seeks to give effect to the same European law protective principle

Accordingly when, in the operative and concluding part of its judgment in *Vnuk*, the CJEU ruled:

> "Article 3(1) of Council Directive 72/166/EEC of 24 April 1972 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 must be interpreted as meaning that the concept of 'use of vehicles' in that article covers any use of a vehicle that is consistent with the normal function of that vehicle …"

It is reasonably safe to assume that this is capable of bearing the broad meaning of the words used, namely that "any use" made of a motor vehicle must be covered by compulsory third-party insurance cover and furthermore that this is a principle of general application. In which case, the author's earlier criticism[16] of the Court of Appeal's unanimous ruling in *EUI v Bristol Alliance Partnership Ltd* [2012]



[12] *Clark v Higson* 2004 J.C. 66, see also *Daley v Hargreaves* [1961] 1 W.L.R. 487 and *Winter v DPP* [2002] EWHC 1524 (Admin); [2003] R.T.R. 14.

[13] Namely, of safeguarding motor accident victims' compensatory entitlement, see para.51.

[14] 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 L 8/17 and 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 [1990] OJ L 129/33.

[15] *Criminal Proceedings against Bernaldez* (C-129/94) [1996] E.C.R. I-1829; [1996] 2 C.M.L.R. 889, *Ferreira v Companhia de Seguros Mundial Confianca SA* (C-348/98) [2000] E.C.R. I-6711; *Candolin v Vahinkovakuutusosakeyhtio Pohjola* (C-537/03) [2005] E.C.R. I-5745; [2005] 3 C.M.L.R. 17; *Farrell v Whitty* (C-356/05) [2007] E.C.R. I-3067; [2007] 2 C.M.L.R. 46; and more recently in *Churchill Insurance Co Ltd v Wilkinson* (C-442/10) [2013] 1 W.L.R. 1776 and *Csonka v Magyar Allam* (C-409/11) [2014] 1 C.M.L.R. 14.

[16] JPIL case comment by Nicholas Bevan at [2012] J.P.I.L. C34 and his article Nicholas Bevan, *Marking the Boundary*, [2013] J.P.I.L. 151.

EWCA Civ 1267 is vindicated. Accordingly, motor insurers cannot exclude liability to third-party victims for road rage or because the driver is running a minicab service with a social and domestic user policy.[17]

Motor accident victims, and consumers of motor insurance policies, and are being short changed and it is time that we did something about it. Happily the solution is readily to hand. All that is required is for legal professionals to reacquaint themselves with the Directives and to demand a European law-consistent application of our national law to cure these defects, and failing that, to claim damages from the Secretary of State under the *Francovich* principle.

## Practice points:

- 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 Directives. The problem infects not only our statutory[18] and extra-statutory provision[19] 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 Directives, now consolidated in a sixth Directive[20] and the relevant ECJ rulings; not just when the meaning is unclear but always.
- 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.
- Not only is the *Vnuk* ruling a "game changer" but it is a "name changer" too. It is no longer appropriate to describe this area of tort law practice as "RTA" practice, anymore than it would be sufficient to describe oneself as a car accident practitioner—the potential scope of this area of practice has just been extended, thanks to the EU. This is good for business too.
- The DfT's shambolic policy presents some excellent opportunities for successful legal challenges for those who know what they are doing.
- A working knowledge of EU law is now an essential requirement for competency in RTA practice. We are all European lawyers now![21]

**Nicholas Bevan**



[17] Recital 15 of Directive 2009/103 is very clear on this: "It is in the interest of victims that the effects of certain exclusion clauses be limited to the relationship between the insurer and the person responsible for the accident."

[18] Road Traffic Act 1988 Pt VI and the European Communities Rights Against Insurers Regulations 2002.

[19] The Uninsured Drivers Agreement 1999, the Untraced Drivers Agreement 2003 and the so called art.75 procedure.

[20] 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.

[21] The author offers his thanks to Colin Ettinger for this phrase.

# Case and Comment: Quantum Damages

## Zurich Insurance Plc v Umerji[1]

(CA (Civ), Moses, L.J., Underhill, L.J., Sir Robin Jacob, March 25, 2014, [2014] EWCA Civ 357)

*Road traffic accidents—measure of damages—car hire—consumer hire agreements—failure to mitigate—impecuniosity—insurance claims—storage*

LT Car hire; Failure to mitigate; Hire charges; Impecuniosity; Insurance claims; Measure of damages; Road traffic accidents; Storage

In 2010 Sameer Umerji was the owner of a Mercedes car, first registered in February 2007. It was worth about £8,000. On October 19, 2010 he was involved in an accident and his car was damaged. It was in due course assessed as a write-off. The other driver was the first defendant, who was not a party to this appeal. The second defendants, Zurich, were the first defendant's insurers.

The car was not drivable following the accident and Mr Umerji contacted a company called Elite Rentals (Bolton) Ltd. He entered into a credit hire agreement with them, under which they rented him, from the following day, a replacement car for a maximum period of 89 days. Over the next year and a half he entered into a series of further agreements in substantially the same terms (though not always for the same vehicle) until June 2, 2012—a total period of 591 days. The rental for that period was £95,130.14 (representing a rate of about £161 per day).[2]

The claimant's case was that he was unable to afford to buy a replacement vehicle until Zurich paid him the pre-accident value of his old car. That did not, in fact, happen until November 16, 2012. Elite also arranged for the recovery of the damaged car and its storage. It remained in store for over four months, until February 22, 2011. The recovery and storage charges came to £3,420.75.

It was a term of the credit hire agreement that the claimant agreed to Elite appointing solicitors to pursue a claim in his name against the first defendant and that he would co-operate in that claim. A firm called M&S Legal were duly instructed, apparently on the day of the accident itself. They notified Zurich of the claimant's claim in accordance with the pre-action protocol.

After some correspondence, proceedings were initiated in the claimant's name in the Manchester County Court on August 24, 2011. The first defendant did not file a defence and a liability judgment was entered in default on October 6 and Zurich was subsequently joined as a defendant.

The judge made directions for trial of the quantum issue and set a deadline by which the claimant had to confirm whether he intended to allege that he was impecunious at the time of the hire. He did not do so and an order at the next hearing contained a recital recording that he was debarred from relying on impecuniosity.

At trial, Mr Umerji indicated that he had not had the means to buy a replacement as soon as he knew that the damaged car was a write-off and Zurich asserted that he was debarred from relying on impecuniosity. The trial judge concluded that impecuniosity went to the question of credit hire, not duration of hire, and awarded damages for the entire period of hire. He also held that Mr Umerji had acted reasonably



[1] Also known as *Umerji v Khan*.
[2] Underhill L.J.: "a remarkable sum given the value of the damaged car."

in storing the car for four months because he would have been criticised if he had disposed of it before Zurich had a chance to inspect it. Zurich appealed.

The disputed elements of the award were £92,387 in respect of hire charges and £2,540 in respect of storage charges. Zurich submitted that the claimant was debarred from relying on impecuniosity for any purpose, including justifying the duration of the hire. They also contended that it had been unreasonable of the claimant to have his vehicle stored for over four months because he should have disposed of it as soon as he knew that it was a write-off.

The Court of Appeal held that the trial judge had been wrong. The starting point had to be the language of the debarring order, which purported straightforwardly to prevent the claimant from relying on his impecuniosity, without qualification. An averment by a claimant that he had to hire a replacement car for as long as he did because he did not have the money to buy one was a claim of impecuniosity, just as much as a claim that he had to pay credit hire rates because he did not have the money to hire on the ordinary market, and it operated in the same way as a matter of law.

The court pointed out that it would make little practical sense to debar the claimant from relying on his impecuniosity for the purpose of claiming credit hire rates while allowing him to do so for the purpose of justifying the duration of the hire, which would require him providing full disclosure about his means, when the primary purpose of a debarring order was to establish whether the parties had to spend time and money going down that route. It did not follow from the fact that the order was discussed in the context of the claim for credit hire rates that there was a clear common understanding that that was the only intended impact of the order.

Impecuniosity relating to rate and means was the same concept, and in both cases the burden was on the claimant to plead and prove his case. This claimant was, therefore, debarred from asserting that he could not afford to buy a replacement vehicle. It followed that he should only have been entitled to recover hire charges up to the date when he should reasonably have done so.

They held that it had been reasonable for him to wait until his car had eventually been disposed of for scrap before buying a replacement. He could have bought a replacement within the next fortnight. Damages in respect of hire charges were therefore awarded in respect of the period ending two weeks after disposal of the car. This aspect of the appeal was allowed.

The appeal in relation to storage charges was dismissed.

## Comment

I am sure that this is far from the being the largest credit hire claim in the history of the world but it does raise some interesting points relating to debarral orders, impecuniosity, obligation to repair and use of one's own comprehensive policy. These last two points go to mitigation of loss. To me it seems utter madness that we have a claims process, in the loosest sense of the term, which allows someone to run up nearly £100,000 of hire charges in some 20 months. Hire charges totalled £95,130—or put another way nearly £4,800 per month; enough to have allowed Mr Umerji to have replaced his car 12 times, or in the alternative, to have bought a house in Bolton.

I understand the principle of polluter pays and that Mr Umerji was entitled to a replacement vehicle, but it seems a nonsense especially when Mr Umerji had his own comprehensive insurance policy which, undoubtedly, would provide him with a replacement vehicle. It also seems to make a nonsense of the fundamental obligation to mitigate loss. This is something to which I will return later.

In October 2010, Mr Umerji was involved in a road traffic accident with Mr Khan. The damage to Mr Umerji's three-year-old Mercedes was sufficient to render it beyond economical repair. The day after the accident, Mr Umerji entered into a credit hire agreement. In August 2011 proceedings were commenced to recover Mr Umerji's losses. For whatever reason, no defence was filed on behalf of Mr Khan and

judgment was entered in default. This judgment stood and during the course of proceedings a direction was given that:

> "The claimant shall confirm by 4.00pm on 30 October 2012 whether he intends to allege that he was impecunious at the time of hire."[3]

No statement was made by Mr Umerji in accordance with the direction and an application was made to debar him from any argument in respect of impecuniosity. The application was successful.

At trial Mr Umerji argued that he did not have the funds to buy a replacement car once he was aware that his own car was a write-off. Zurich, as insurers of Mr Khan, argued that he was debarred from relying on impecuniosity. The trial judge, Mr Recorder Alldis, concluded that impecuniosity went to question of the rate of credit hire and not to the duration of hire. He felt that Umerji had been ambushed somewhat as the discussion at the debarring hearing only related to the rate of hire and not duration. He gave judgment in favour of Mr Umerji in the sum of £101,559.00. Zurich Insurance appealed. There were three issues: the effect of the debarring order, the effect of Mr Umerji's comprehensive insurance policy, and the storage charges.

The effect of the debarring order goes straight to the issue of impecuniosity. Zurich Insurance argued that by Umerji asserting that impecuniosity related to rates of hire and not duration was, to all intents and purposes, an ambush and that Umerji would have been on notice as to their stance since the service of Zurich's revised counter schedule. Umerji averred that he had to hire for the length of time he did as he did not have the money to buy a replacement car. The Court of Appeal decided that this was a claim of impecuniosity and that:

> "when the claimant was said to be debarred from relying on his impecuniosity that meant as a matter of ordinary language that he was debarred from relying on his impecuniosity for either purpose."[4]

Impecuniosity is the same concept both in respect of rate of hire charge and duration of hire. Zurich successfully argued that the wording of the debarring Order was simple and very clear: Umerji could not rely on impecuniosity and, as there was no qualification to the order, it related to rate and duration of hire.

On the issue of Umerji's own comprehensive policy, unfortunately, the Court of Appeal declined to comment as the point has not been pleaded or raised in any way until the first instance trial. It was then put to Umerji by Zurich's counsel that he could have claimed against his own policy and used the proceeds to buy a new car. Mr Recorder Aldis intervened to state that there was no obligation for the claimant to have done this and the point was dropped.

The Appeal Court did acknowledge the point was one of some general importance. However, they concluded that it would be necessary to consider the full circumstances, including the policy terms and conditions as regards to any policy excess and no claims bonus, before a court could reach a view as to whether not claiming on one's own insurance was reasonable or not. As Lord Justice Underhill said in his lead judgment: "The battle will have to be fought, if insurers are so inclined, on another field."

On storage charges, Zurich Insurance argued that they should have been on notice earlier that the charges were being incurred and that the vehicle would not be disposed within 21 days. The court encouraged claimants' advisers in similar situations to put the defendant's insurers on notice promptly that storage charges were being incurred and to impose a clear deadline after which the vehicle would be disposed of. However, in this case, the trial judge had not been wrong to hold that the claimant's solicitors had done enough. Although they had not imposed an explicit deadline, they had made it clear that storage charges were accruing, and had received no reply of any kind, despite sending two chasing letters. That aspect of the appeal was dismissed.



[3] *Zurich Insurance Plc v Umerji* [2014] EWCA Civ 357; [2014] R.T.R. 23 at [11].
[4] *Zurich Insurance Plc v Umerji* [2014] EWCA Civ 357 at [4] per Underhill L.J.

These comments clearly provide some pointers and perhaps the "other filed" will include a policy of insurance where the claimant has a comprehensive policy with a low or no excess and a protected no claims bonus. Overall this is a useful judgment for defendants, even if something of a "score draw". Now let's see how round two—in respect of the reasonableness or otherwise of not claiming on one's own insurance policy—plays out.

## Practice points:

This case raises some useful practice points for both claimant and defendant practitioners.

- Plead your case fully. If in doubt, plead it! Had the issue of Umerji's own insurance policy been pleaded, the judgment might have been very different.
- Impecuniosity is all-embracing and applies to rate and duration of hire. If impecuniosity is pleaded, full and frank disclosure must be provided by the claimant seeking to raise impecuniosity. This should assist defendants in those cases where the hirer is no longer co-operating, for whatever reason, in pursuit of a claim.
- It is reasonable to store a vehicle until the defendant insurers inspect or otherwise confirm that they do not wish to do so. The further comment in the judgment of giving insurers a reasonable period in which to inspect, and at the same time putting them on notice of any charges being incurred and stating that after a certain date the vehicle will be disposed of, should be regarded as good practice.

**David Fisher**

# JXL v Britton

(QBD, Andrew Edis Q.C., July 31, 2014, [2014] EWHC 2571 (QB))

*Personal injury—damages—children—measure of damages—psychiatric harm—rape—aggravated damages*



LT Aggravated damages; Child sexual abuse; Loss of earnings; Psychiatric harm; Special damages

The claimants JXL and SXC are sisters. When they were children, their family moved to live in a block of flats in Chingford, Essex. The defendant lived in the same block. The claimants became friends with his daughter and niece, and used to play with them.

SXC went to the defendant's flat in or around 1989–1990, at which point in time she was seven years of age, to see his daughter and niece. Neither was at home, but the defendant tempted SXC into his flat by offering her some mango, which she had never eaten before. He then took SXC into his bedroom, undressed her, then raped her. On a second occasion in or around 1989–1990, he took SXC into his bedroom again, and he raped her for a second time. Shortly afterwards he raped JXL who was then 10–11 years of age.

SXC told her mother what had happened and she reported it to the police. However, no investigation was begun until October 2010, following another of the defendant's victims reporting a sexual attack to the police. The defendant was charged with 21 counts of child rape and indecent assaults on children. He entered not guilty pleas and his case was committed from the Waltham Forest Magistrates' Court to the

Snaresbrook Crown Court for trial. Both JXL and SXC gave evidence of the facts that gave rise to this child abuse claim.

The jury convicted the defendant of 18 of the 21 allegations he faced in March 2012. Two of these convictions related to the two rapes of the two claimants on the occasions when they were raped. He was sentenced on April 13, 2012 to a total of 22 years custody. JXL and SXC then commenced these personal injury proceedings against him.

The defendant claimed that JXL and SXC had invented the complaints for financial gain. He refused to open correspondence from their solicitors and judgment in default of appearance by the defendant was entered against him. The court had to assess the damages payable by the defendant to the claimants JXL and SXC.

According to the psychiatric evidence, JXL and SXC both suffered from permanent post-traumatic stress disorder ("PTSD"). SXC was unable to work, as she also suffered from emotionally unstable personality disorder and substance dependency as a result of the defendant's conduct. JXL was able to work as a nurse but suffered from poor self-confidence and self-esteem as well as the PTSD symptoms. She was unable to have sexual relations with her husband. JXL and SXC sought damages for the rapes and their psychiatric consequences, together with aggravated damages.

Having regard to the guidance in the *Judicial College Guidelines*,[1] the judge held that the award for general damages should be higher in cases of sexual and physical abuse than for most other awards for an equivalent level of psychiatric harm. He recognised that damages for pain, suffering and loss of amenity had to be assessed without regard to any element which would be represented by a separate aggravated damages award. He reminded himself that where aggravated damages were awarded, both elements of the award were compensatory and not punitive, and the court had to assess the total amount to ensure that it was proportionate. He also accepted that it was difficult to draw a firm line between the immediate effects of the rapes and their psychological consequences.

The impact on SXC had been substantially more severe than on JXL, given that she had been raped twice and suffered from a more severe psychiatric illness. However, there was no serious physical violence in either case and the extent of any false imprisonment was short.[2] The awards were increased by the very young ages of the girls at the time of the offending, and by the fact that they had suffered without treatment for decades. JXL had suffered serious damage to her marriage. The judge held that both cases fell within the moderately severe bracket for psychiatric damage in the *Guidelines*.

The judge pointed out that aggravated damages were intended to compensate JXL and SXC for distress and humiliation, including the fact that no action was taken at the time to vindicate their complaints. JXL was awarded £32,500 for general damages. The award for general damages to SXC was £40,000. The aggravated damages awards were £15,000 to JXL and £25,000 to SXC. Special damages were also awarded for loss of earnings and medical treatment in the sum of £84,174 to JXL and £167,360 to SXC. The total awards were £131,674 to JXL and £232,360 to SXC.

## Comment

Assessing quantum for victims of childhood rape is inevitably an extremely difficult task. In this first instance decision by Andrew Edis QC, sitting as a High Court judge, he treads warily through a legal minefield to produce some very useful indicators of what is appropriate.

Judgment had in this case been entered by default, but the defendant appeared by video link from prison, principally to contest his multiple convictions and to allege that the complaints in this resultant civil case



[1] Judicial College, *Guidelines for the Assessment of General Damages in Personal Injury Cases*, 12th edn (Oxford: Oxford University Press, 2013), para.(A)(vii).

[2] *AT v Dulghieru* [2009] EWHC 225 (QB) considered.

"were concocted".[3] Carefully setting out the somewhat inchoate points made by the defendant the learned judge concludes that there had been a deliberate failure to engage with documentation in the case and gives a robust refusal to allow the defendant to cross-examine the victims, which inevitably would have exacerbated their trauma.[4]

While the rapes of the two girls, then aged about 7 and 10, had taken place in or about 1990, and their mother had promptly informed the police, it was not until 2010 that a serious investigation had begun, following another victim reporting a further sexual attack. A jury then convicted the defendant of 18 of the 21 allegations he faced in March 2012 and he was sentenced to a total of 22 years in custody, receiving terms of seven years each for the rapes of the two sisters.

The resultant aftermath for the sisters had been horrendous. JXL had suffered permanent PTSD with symptoms of flashback, hyper-vigilance, and psychosexual aversion which, since the start of police investigations in 2010, had led to poor libido and no further sexual relations with her husband. Five important factors were adumbrated in an assessment of her case: JXL was a 10 year old girl at the time of the rape; she was a virgin; she was not believed when her mother reported the allegations in 1990; she was put through the ordeal of giving evidence at the criminal trial; and the defendant, who was a neighbour, was acting *in loco parentis* at the time of the rape.

Assigning an appropriate bracket to such a situation is not an easy judgment, but the analysis here was that JXL's consequential PTSD "falls within the middle to upper range of bracket (b) *Moderately Severe*" with a quantum range of £17,000-£44,000 in the *Judicial College Guidelines*. The claimant contended her longstanding and permanent symptoms were to be calculated at £35,000 from a total for general damages of £55,000.[5] In the event she was awarded £32,500 under this head.

The younger sister, SXC, had suffered two vaginal rapes within a couple of weeks, and her subsequent turmoil had caused her to suffer emotionally unstable personality disorder ("EUPD") in addition to the PTSD, with symptoms of poor self-esteem, fear of rejection, recurrent self-harm, substance abuse, suicidal ideation and unstable mood. She also suffered from substance dependency on cocaine and alcohol. Again the five factor analysis showed similar points made in the case about JXL, with the additional issue of her being "very young".

All rape is egregious, so categorisations can be notoriously difficult. This judgement warns that:

> "all rapes cause intense damage to the victims and the court must guard against assumptions that familial rape (the classic breach of trust) is invariably more distressing than rape by a stranger, or by a former partner. Awards must be based on the evidence, and not on assumptions of any kind."[6]

Nonetheless, in a carefully calibrated assessment the learned judge concludes that the impact on the younger sister was:

> "substantially more severe than it has been on JXL. She was raped twice, and suffers a more serious psychiatric illness. This does not minimise the offences against JXL, it merely states that she has been able to survive them more successfully than her sister. Both of them are very significantly affected and always will be."[7]

The conclusion is that, in contrast to the £32,500 awarded in general damages to JXL the award to SXC, the younger sister, was £40,000.

While awards of damages are, in the main, compensatory, there are, of course, circumstances where discretion can be exercised to raise or lower with specialist arrangements such as exemplary or nominal



[3] *JXL v Britton* [2014] EWHC 2571 (QB) at [4].
[4] *JXL* [2014] EWHC 2571 (QB) at [6] on "Power of Court to control evidence" under the Civil Procedure Rules.
[5] *JXL* [2014] EWHC 2571 (QB) at [11] and [12].
[6] *JXL* [2014] EWHC 2571 (QB) at [27].
[7] *JXL* [2014] EWHC 2571 (QB) at [29].

awards. In this case, there was also an additional head of a claim for aggravated damages. Since the Law Commission study in 1993 on *Exemplary, Aggravated and Restitutionary Damages* there have been repeated calls for parliamentary intervention to tidy up the law in this area.[8]

Cases are few and far between in the modern era, and largely "fact sensitive" in the words of Lord Steyn in *Jolley v Sutton LBC*.[9] In *JXL v Britton* [2014] EWHC 2571 (QB) the learned judge further indicates, with some considerable justification on any analysis of the decided cases, that there "is really no useful guidance to be derived from authority as to the amount to be awarded under this head" of aggravated damages.[10] His awards to the two sisters are then indicated as £25,000 for the younger SXC and £15,000 for JXL.

One point of potential confusion is well dealt with. In respect of general damages and the consideration of factors, the terminology has developed with usage of the expression "aggravating features", deriving from the case of *AT v Dulghieru*.[11] This was a substantial award by Treacy J. to a number of claimants who had been trafficked and sexually exploited by being used for prostitution. There had been multiple rapes and long periods of false imprisonment. However, a careful reading of that case shows that, while the horrific circumstances had many "aggravating features" the learned judge was very careful to ensure that when the separate head of aggravated damages was considered, there was no prospect of double recovery. In a similar manner, in *JXL* [2014] EWHC 2571 (QB) the learned judge carefully delineates the separate head of aggravated damages when he reaches the conclusion that such an additional award was justified.[12]

A third head of damages here related to special damages: JXL had been delayed in qualifying as a nurse for some eight years because of the educational disruption caused by her psychiatric condition, while SXC was never able to work in any capacity. The learned judge indicated that "in reality" the claims here were likely to be "academic given the means of the defendant", incarcerated but still with some small equity in a house which was part of divorce proceedings currently underway, but with the likelihood that only a part of the civil claims would be met before bankruptcy ensued.[13]

## Practice points:

- Interpretation of the *Judicial College Guidelines* in cases of child rape can be assisted by considering carefully potentially "aggravating features".
- "Aggravating features" include such things as the age of the victim, previous absence of sexual experience, disbelief on the part of investigating authorities that a very serious crime had been perpetrated, the ordeal of giving evidence at a criminal trial, and whether the assailant was acting *in loco parentis*.
- This potential "aggravation" in assessing general damages should not be confused with the separate issue of whether an additional head of "aggravated damages" is appropriate to mark the heinous nature of the tortious conduct.
- A careful analysis should take place to avoid the problem which might occur of a double recovery.

**Julian Fulbrook**



[8] Law Commission *Exemplary, Aggravated and Restitutionary Damages* (HMSO, 1993) Consultation Paper No.132.
[9] *Jolley v Sutton LBC* [2000] 1 W.L.R. 1082.
[10] *JXL* [2014] EWHC 2571 (QB) at [30].
[11] *Dulghieru* [2009] EWHC 225 (QB).
[12] *JXL* [2014] EWHC 2571 (QB) at [24].
[13] *JXL* [2014] EWHC 2571 (QB) at [31].

# Case and Comment: Procedure

## Bewicke-Copley v Ibeh

(Oxford CC, District Judge Vincent, April 4, 2014, Unreported)

*Civil procedure—personal injury—pre-action protocols; road traffic accidents—rta protocol offers—settlement—costs between the parties*

Pre-action protocols; Road traffic accidents; RTA Protocol offers; Settlement

The claimant cyclist was involved in a road traffic accident sustaining minor soft-tissue injuries. He recovered within about three months. He submitted his claim via the online RTA portal. He claimed £319 as the pre-accident value of his bicycle, credit hire charges of £1,278 and storage charges. The insurer admitted liability at stage 1. The claimant submitted the stage 2 settlement pack, offering to settle general damages for £2,000 and listing the other items of loss, including the pre-accident value of the bicycle.

The insurer accepted the offers for general damages and the pre-accident value, but not the claims for storage or credit hire charges and queried whether those were reasonable. The claimant responded that the matter would exit the portal in accordance with para.7.76,[1] given that the claim in its totality could not be compromised and that the insurer had raised "complex issues of fact and law" relating to the claims for hire and storage.

The claimant subsequently issued proceedings under Pt 7 of the CPR seeking all items of loss. In the defence it was argued that the claims for personal injury and the pre-accident value of the bicycle had been compromised pre-issue through the portal scheme. The defendant therefore sought judgment in respect of those two items, and for the remainder of the claim to be allocated to the small claims track.

The claimant submitted that the portal process did not permit defendants to pick and choose individual items to settle, that at the time the claimant withdrew from the portal process there was no agreement in respect of the entire claim, and therefore there could not have been settlement of any of its elements.

The judge held that it was not only possible, but it was intended by the provisions of the protocol, that the parties might compromise individual elements of a claim within the stage 2 process. First, the portal was specifically designed for each head of loss to be claimed for separately, and for any part of a claimant's offer accepted by the defendant to be regarded as an item "not in dispute", thereby providing the parties with a mechanism by which issues were narrowed and progress made towards settlement. If the parties had not resolved matters by the end of stage 2, then stage 3 proceedings were issued.

The judge stated that:

> "It defies logic and the aims and intentions of the protocol if at such point, all items that had previously been agreed were regarded as un-agreed. If that were the case, I would expect the protocol to state this clearly. It does not."[2]

Secondly, the judge held that the claimant's interpretation of the rules would mean that in all cases proceeding to stage 3 where parties had agreed some, but not all, items of loss, the parties would be required to start the negotiation process afresh, as all previous agreements would be found to be invalid.

[1] Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ("protocol") para.7.76.
[2] *Bewicke-Copley v Ibeh* , unreported, June 4, 2014 CC (Oxford) at [31].

That would inevitably create more cases at stage 3, more work for the courts and the parties, a need for interim payments to be repaid, uncertainty and the risk of injustice as the status of offers previously made and accepted would be wholly unclear.

Thirdly, the protocol contained detailed provision for interim payments to be made. That was entirely consistent with a code that allowed individual heads of loss to be compromised while other heads of loss proceeded to a further stage. There was no provision within the code for interim payments to be returned in the event that the parties were unable to agree remaining items of loss. The claimant had not sought to return the payment made in respect of the pre-accident value of the bicycle. That was contrary to the stance he took in the proceeding.

Turning to costs, the judge found that there was no merit in the claimant's argument that if the defendant was allowed to hold the claimant to his acceptance of an offer after exit from the portal, the claimant was at risk of recovering no costs in respect of the matters agreed. The rules clearly provided that any offer made within the portal was deemed to include portal costs. The judge said:

> "I am left with the conclusion that the reason the claimant has sought to exit the portal and to insist that there has been no agreement in respect of the claim for personal injury, is an attempt to manipulate the RTA protocol procedure in order to afford an opportunity of recovering increased costs from the defendant."

In the circumstances, judgment was entered for the claimant for £2,319 in respect of the items previously agreed, together with associated protocol costs. The remaining items were allocated to the small claims track. There was no element of complexity which required allocation to a different track.

## Comment

This decision underlines the court's attitude to what are perceived to be tactical claimant exits from the portal in order to benefit from a better costs regime in Pt 7 proceedings. Courts will not approve such conduct. Practitioners need to ensure that exit, where discretionary, is justified, failing which the claimant will be limited to protocol costs.

The decision for the district judge in this case was whether the claimant, who exited the protocol, and commenced proceedings under Pt 7, was entitled to recover costs that follow from a matter contested in the fast track. The claimant claimed so, whereas the defendant sought judgment on the sums agreed in stage 2 of the protocol, together with the protocol fixed costs which follow the agreement, and any further costs recoverable under Pt 7 proceedings which follow from allocation to the small claims track.

The foundation principle for the judgment is the aim of the protocol stated in para.3.1, namely that the defendant pays damages and costs in a reasonable time, and without the need for proceedings to be commenced. Quoting H.H Judge Platt in *Ilahi v Usman*[3] the protocol was developed "to provide a speedy, certain and cost effective way of dealing with these claims".

The claimant was entitled to withdraw an offer made in stage 2 and to start Pt 7 proceedings, at any time after the total consideration period.[4] However, if the claimant has acted "unreasonably" in exiting, his costs will be restricted to those recoverable under the protocol process.[5]

There was an admission of liability in stage 1. The claimant's offers for pain, suffering and loss of amenity, and the pre-accident value of the bicycle were accepted by the defendant in stage 2 of the protocol. Unsurprisingly, given that the bicycle was worth £319, there was no agreement with regard to hire charges for a replacement bicycle of £1,278, nor was there agreement with regard to storage charges of £96. The defendant paid the value of the bike, and the district judge commented that for the claimant's behaviour

[3] *Ilahi v Usman* , unreported, November 20, 2012 CC (Manchester).
[4] Protocol para.7.46.
[5] Protocol para.7.76.

to be consistent with his argument, this should have been repaid when he withdrew his offer, but he did not.

The district judge concluded that the protocol did not envisage withdrawal of agreements reached under specific heads of damage, but only offers made and not accepted. He cited the detailed interim payment provisions in the protocol as being inconsistent with the concept of "undoing" agreed damages. Further, the protocol was deliberately designed to allow each item of loss to be claimed separately. The defendant here offered zero for credit hire and storage. Thus agreed items were irrevocably so. Just as when a Pt 36 offer is accepted it cannot be litigated, neither can protocol offers be made under specific heads of loss, and correctly accepted in the stage 2 procedure.

Had conditionality been envisaged in the protocol it would have been specifically expressed; it was not. Whilst many would argue protocol costs are too low, the protocol is clear that the defendant has to meet damages and fixed protocol costs, and disbursements.[6] Again, if it was intended that the claimant could keep his options open in respect of costs, the protocol would state so, and it does not.

The district judge concluded that the claimant attempted to manipulate the protocol to increase costs. The courts have pretty consistently resisted such manipulation, as in cases referred to in the judgement:

- *Bostan v Royal Mail Group*,[7] where it was held an offer remains open in stage 3, and can be accepted, with consequent protocol fixed costs, unless it is withdrawn.
- *Purcell v McGarry*,[8] where again it was held that an offer remains open in stage 3, and can be accepted, unless withdrawn, but note this late acceptance loophole defendant tactic was closed in the post July 31, 2013 protocol.
- *Patel v Fortis Insurance Ltd*,[9] where exit for the defendant's failure to acknowledge the claim notification form was judged "unreasonable".
- *Ilahi v Usman*,[10] where an appeal was allowed following a decision that the claimant had exited for costs advantage through withdrawing a stage 2 offer.

In *Akhtar v Boland*[11] the claimant's appeal against the court's refusal to allocate to the fast track from the small claims track was dismissed, on the basis that the defendant had made it "abundantly clear" that the amount in dispute was limited to a sum which made allocation to the small claims track correct, and the case was not complex, so as to warrant allocation to the fast track. The approach of the Court of Appeal in this case, albeit with regard to the issue of appropriate track allocation, is consistent with the decisions made in the county courts over protocol exit and the consequent award of fixed costs.

## Practice points:

- Practitioners should ensure there is a good and justifiable reason to exit the protocol over and above enjoying a better costs position in Pt 7 proceedings.
- Tactical arguments to justify exit are unlikely to succeed where the claimant has discretion over exiting the protocol.
- Courts should adopt a similar approach to defendant costs tactics but may not always do so as shown by *Kukadia v Haven Insurance Company Ltd* and *Nord v Haven Insurance Company*

[6] Protocol para.7.70
[7] *Bostan v Royal Mail Group* , unreported, June 11, 2012 CC (Bradford).
[8] *Purcell v McGarry* , unreported, December 7, 2012 CC (Liverpool).
[9] *Patel v Fortis Insurance Ltd* , unreported, December 5, 2011 CC (Leicester).
[10] *Ilahi v Usman* , unreported, November 20, 2012 CC (Manchester).
[11] *Akhtar v Boland* [2014] EWCA Civ 872.

*Ltd*[12] where the defendant successfully avoided paying protocol costs by making payment to the claimant direct.

**John Spencer**

## Power v Meloy Whittle Robinson Solicitors

(CA (Civ Div), Tomlinson, L.J., Briggs, L.J., Vos, L.J., July 2, 2014, [2014] EWCA Civ 898)

*Procedure—claim forms—negligence—service by alternative permitted method—CPR rr.3.10, 6.4, 6.7, 6.14, 7.5, 7.6, 6.15*

Claim forms; Service by alternative permitted method

From 1966–1979 Edward Power was employed by the National Coal Board. His work required him to use vibrating tools as a result of which he developed hand-arm vibration syndrome ("VWF"). In due course he became entitled to be compensated under a statutory compensation scheme ("the Scheme") administered by "IRISC", on behalf of the Department of Trade and Industry. The Scheme came into existence in the late 1990s.

In or about 1999, Meloy Whittle Robinson solicitors ("MWR") were instructed to act on behalf of Mr Power in the conduct of his claim for compensation pursuant to the Scheme. MWR investigated the claim, obtained medical evidence and registered Mr Power's claim with IRISC. That claim was compromised on January 28, 2000 by Edward Power's acceptance of £6,771.60 in full and final settlement of his claim.

That sum represented an award for pain and suffering and handicap on the labour market. However, it made no allowance for a "services claim"—a claim dependent upon demonstrating that, in consequence of his being affected by VWF, rather than by any other preceding or supervening medical condition, the claimant required assistance with routine domestic tasks such as gardening, DIY, car maintenance, car washing and so forth.

Edward Power alleged that MWR negligently failed to investigate and pursue a services claim on his behalf. The cut-off date for presentation of such claims was March 31, 2005. Powers contended that a claim for services on his behalf, if pursued, would have been settled in or about October 2005 in the sum of £27,947.34, net of interest payable pursuant to the Scheme on sums paid for relevant assistant prior to the date of settlement. With interest, the claim first intimated against MWR in May 2009 by letter from Mellor Hargreaves, was in the order of £33,000.

The primary limitation period applicable to this claim, whether brought in contract or in tort, expired on January 28, 2006. However, it was common ground that the claimant only had the relevant knowledge required for the bringing of an action as from November 13, 2008. Pursuant to s.14A of the Limitation Act 1980 the limitation period would therefore have expired on November 13, 2011.

On March 10, 2010, Messrs Berrymans Lace Mawer LLP ("BLM"), by now acting for MWR, confirmed to Messrs Mellor Hargreaves, at the latter's request, that they were instructed to accept proceedings on behalf of their client. A case management order issued in 2011 laid down the procedures to be followed by prospective claimants alleging negligence against solicitors concerning VWF. On June 3, 2011, the parties entered into a standstill agreement which suspended the running of the limitation period.

[12] *Nord v Haven Insurance Company Ltd* , unreported, February 20, 2014 CC (Liverpool).

On January 31, 2012, the defendant validly served notice to terminate the standstill agreement. Under its provisions, time, therefore, again began to run as from May 1, 2012 and the limitation period expired on October 1, 2012. In August 2012, one month before the expiry of the limitation period, Mellor Hargreaves sent draft claim forms to the Salford Business Centre, in accordance with a new administrative procedure, and requested that the issued claim form be returned to them for service on the defendant's solicitors in accordance with r.6.7of the CPR.[1]

The claim form was issued on September 14, 2012. The court, however, sent it directly to MWR, who received it on September 18, 2012. Hard copies were then sent by MWR to BLM. The court also failed to send Mellor Hargreaves a notice stating the date upon which the claim form was deemed served, pursuant to r.6.14.[2]

BLM wrote to Mellor Hargreaves stating that it was unclear whether the proceedings had been formally served, but indicated that the claim was being dealt with as if it was a live claim. Mellor Hargreaves did not respond until after the limitation period had expired. The claimant successfully applied for an extension of time for service of the claim form pursuant to r.7.6,[3] and served the claim form on BLM. However, the proceedings were later struck out, the judge having decided that there was no good reason to authorise service by another method under r.6.15[4] because:

- there had never been any difficulty about effecting service and MWR had not been evasive;
- where parties agreed to serve solicitor to solicitor, it was wrong to go behind that agreement; and
- it was wrong to allow a claimant to sidestep any rigours by reliance upon r.6.15.

The claimant appealed.

The Court of Appeal held that in the light of the guidance in *Abela v Baadarani*,[5] the judge's first and third reasons for declining to grant the relief sought under r.6.15 were insupportable.[6] The relevant focus was upon why the claim form could not have been served in the ordinary way during the period of its validity for service and whether the steps already taken to bring the claim form to MWR's attention constituted good service. The matter had to be considered afresh.

Mellor Hargreaves could be criticised for failing to respond to BLM's query concerning the formality of service, and steps could have been taken in an attempt to ascertain what had become of the claim form. They did not know that the proceedings had been issued on September 14, 2012, as BLM did, but they did know that they had neither received the issued claim form from the court nor served it themselves. To them, therefore, it would have been obvious that the proceedings had not been formally served, unaware as they were that the proceedings had in fact been served by the court on MWR direct.

To BLM it was equally obvious that the proceedings had not been formally served as they had not been served as required by r.6.7. However, the correspondence proceeded upon the clear understanding that the claimant was actively pursuing his claim. Nothing short of an explicit enquiry concerning the validity of service upon MWR direct in the light of r.6.7 would have sufficed to put Mellor Hargreaves on notice as to the errors made by the court.

That the claimant intended to pursue the claim was apparent not just from his issue and service or attempted service of a claim form, but also from the time and money expended in compliance with the

[1] CPR r.6.7(1) states: "Subject to rule 6.5(1), where- (a) the defendant has given in writing the business address within the jurisdiction of a solicitor as an address at which the defendant may be served with the claim form; or (b) a solicitor acting for the defendant has notified the claimant in writing that the solicitor is instructed by the defendant to accept service of the claim form on behalf of the defendant at a business address within the jurisdiction, The claim form must be served at the business address of that solicitor."

[2] CPR r.6.14 states: "A claim form served [within the UK] in accordance with this Part is deemed to be served on the second business day after completion of the relevant step under rule 7.5(1)."

[3] CPR r.7.6: "Extension of time for serving a claim form."

[4] CPR r.6.15: "Service of the claim form by an alternative method or at an alternative place."

[5] *Abela v Baadarani* [2013] UKSC 44; [2013] 1 W.L.R. 2043.

[6] *Abela* [2013] UKSC 44 applied.

case management order. MWR already knew the nature of the claimant's case; the only thing added by the claim form was the circumstance that its issue and service, or attempted service, demonstrated that the claimant intended to convert his "potential claim" into an "existing claim".

Mellor Hargreaves only became aware of the court's error at the end of March or early April 2013. Thereafter, they acted in a manner which "might just possibly be said to be promptly". MWR knew everything they needed to know about the claimant's claim and knew that he intended to pursue the action and that he had at the very least attempted to serve proceedings upon them, through the medium of the court. The correspondence and discussions between the solicitors, objectively viewed, could only have given the impression that the claim was acknowledged to be live, which in the context was consistent with service having been effected within the period of validity of the claim form.

The court held that there was an overwhelmingly good reason to order under r.6.15(2)[7] that the steps already taken to bring the claim form to MWR's attention constituted good service.

The appeal was allowed.

## Comment

When one reaches a certain age one starts to look backwards rather than forwards, not so much in a Proustian search for lost time, but more out of a (misplaced?) view that things used to make much more sense.

As an articled clerk, my first appearance in the Sheffield County Court was before the immensely experienced and very affable senior District Judge, Mr Thornton Lambert, who having listened to me for 10 minutes or so on an uncontested hearing, smiled warmly and said "you have splashed about enough Mr Allen; I will grant you your order". Over time, my relationship, both with the district judge and the local county court developed as I became a regular attendee at the court. These days, despite still running a heavily-litigated caseload, it is now over 12 months since I have attended.

Not only has the telephone become the means of communication between the judges and lawyers, but all cases valued at below £25,000.00 are, from March 19, 2012, issued from a county court money claims centre ("CCMCC") in a distant county. This break in the geographical link between a claimant's solicitor and the court may have created some financial savings for the Ministry of Justice, but in terms of the administration of the issuing of claim forms, has resulted in a level of uncertainty about the date of the commencement of court proceedings; always a cause of angst for claimant solicitors issuing in the last months before the expiry of the limitation period. Rather than being able to take the claim form to the local court by hand, have it issued and bring it back to the office to serve, nowadays it has to be sent to the CCMCC and its return awaited. It is important to note that even should one choose to travel to a CCMCC, one will not be permitted to enter the building. Motorbike riders have been turned away.

The problem in the instant case, which took up the valuable time of the appeal court, flowed from this administrative process and, specifically, from the failings of the CCMCC; in this instance, the Salford Business Centre.

The court made two errors, namely:

- it failed to heed a quite common request of the claimant's solicitors to return to them the claim form for service, as the defendant's solicitors had indicated that they would accept service of proceedings; and
- it failed to notify the claimant's solicitors of the deemed date of service, having inadvertently ignored their request and served proceedings directly on the defendants.

[7] On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method, or at an alternative place, is good service.

The law relating to service of proceedings has always been fraught for claimant practitioners. A contrary situation—not out of place at Lewis Caroll's tea party—has arisen, whereby it does a solicitor less harm to fail to commence proceedings within three years of the date of the accident, than, if he does so, he then fails to properly serve the proceedings within the subsequent four months.

The immensely disappointing aspect in this case, is that the claimant's lawyers were obliged to make an application to correct the court's error by defendants who sought to seize on the technicality and take advantage of a windfall, which, on any interpretation of the rules, lacked a sense of morality or fair play. As Tomlinson L.J. said in commencing his judgment:

> "This depressing litigation reflects no credit on our civil justice system. It is yet another example of wasteful satellite litigation unconcerned with the merits of the underlying claim. The Claimant alone escapes censure."[8]

Fortunately, common sense did prevail because the judgment of Lord Clarke in *Abela*,[9] surprisingly not brought to the judge's attention at first instance, set the ground on which the appeal court were able to erect their judgement. His Lordship reminded us of the direct and rational approach of Lewison L.J. in the earlier appeal when he said:

> "… the purpose of service of proceedings, quite obviously, is to bring proceedings to the notice of the Defendant. It is not about playing technical games (my emphasis). There is no doubt on the evidence that the Defendant is fully aware of the proceedings which are sought to be brought against him, of the nature of the claims made against him, and of the seriousness of the allegations."[10]

Having been placed in this awkward situation by officers of the state, the claimant's solicitors were left with three options, namely:

1) To seek an order to extend the validity of the claim form.[11]
2) To seek an order to dispense with service.[12] This will only be granted if there are "exceptional circumstances".
3) To seek an order that steps already taken to bring a claim form to the service of the defendants is good service.[13] There has to be "a good reason" to make such order.

The claimant rightly, in my opinion, chose to hang his case on the third option. In *Abela*, Lord Clarke stated that:

> "the mere fact that the Defendant learned of the existence in content of the claim form cannot, without more, constitute a good reason to make an order under CPR 6.15(2). On the other hand, the wording of the rule shows that it is a critical factor."

[14]

It is noteworthy that this provision is relatively new, having been introduced by an amendment to the CPR on the October 1, 2008. Prior to that date the Court of Appeal adopted the stance that there was no jurisdiction to order retrospectively that an erroneous method already adopted should be allowed to stand as service as an alternative method permitted by the court. An approach which permitted process to trump practicality.

PROCEDURE

[8] *Power v Meloy Whittle Robinson Solicitors* [2014] EWCA Civ 898 at [1].
[9] *Abela* [2013] UKSC 44.
[10] *Power* [2014] EWCA Civ 898 at [38].
[11] CPR r.7.6.
[12] CPR r.6.16.
[13] CPR r.6.15(2).
[14] *Abela* [2013] UKSC 44 at [36].

As His Lordship pointed out, the editors of the *White Book*[15] have added that the particular significance of r.6.15(2) is that it may enable the claimant to escape the serious consequences that would normally ensue where there has been mis-service when, not only has the period for service of the claim form been fixed by r.7.5 of the CPR run, but where the relevant limitation period has also expired.

Helpfully, His Lordship provided clear guidance as to how the court should consider the issue by stating:

> "… the court should simply ask itself whether, in all the circumstances of the particular case, there is good reason to make the order sought. It should not be necessary for the court to spend undue time analysing the decisions of judges in previous cases which have depended upon their own facts."[16]

He stressed that events that occurred prior to the issue of the claim form, such as a delay in issuing proceedings, were not relevant in assessing whether there was a "good reason" to make the order. Past behaviour was something that the respondents' representatives sought to rely upon in the instant case.

The only criticisms that could be made of the claimant's solicitors were their failure to diary the matter for the return of the claim form from the court, and their subsequent failure to chase up the court for its return. Similar failings were considered by Dyson L.J. (as he then was) in *Cranfield v Bridgegrove Ltd*, a case in which the court did not serve proceedings at all and, therefore, had not provided the solicitor with notice of service. His Lordship approved the reasoning of the county court judge that it was going too far to expect solicitors to badger the court and seek confirmation that service had been effected in that case. The time for service was extended.

The defendants' legal representatives were open to greater criticism in this matter. Tomlinson L.J. found that the failure to formally serve proceedings would have been obvious and yet they lulled the claimant's solicitors into a false sense of security through the content of their correspondence and telephone conversations which raised a degree of curiosity, on his part, as to their underlying intention. He found that there was an "overwhelmingly" good reason to make the order pursuant to r. 6.15(2) of the CPR.

Rather like many of the decisions which led the Master of the Roles, in *Denton v TH White Ltd*, to provide further guidance on relief from sanctions, the background to this appeal does the law no favours in the eyes of those members of the profession and the public who become aware of it. Lord Dyson said it was "wholly inappropriate" for lawyers to take advantage of mistakes made by the opposing party in the hope of a windfall outcome. Tomlinson L.J. did not go that far but, one suspects his opening observations emphasise his true feelings about the conduct of those who sought to take advantage of the mistakes, not of the opposing party, but, in this instance, of the State.

## Practice points:

- Claimant solicitors in personal injury claims should, time permitting at the date of instruction, preferably commence proceedings within six months of the limitation period expiring. This enables service of proceedings to be effected and, should problems occur, they can be remedied ahead of the limitation period expiring.
- The letter to the CCMCC sending the claim form should state in bold (and highlighter pen, perhaps) "We should be obliged if you would issue these proceedings and then return them to ourselves for service on the defendants".
- Practitioners should diary the case for 14 days from the date of the letter sending the claim form to the CCMCC for its return.

[15] *Civil Procedure*, edited by Jackson L.J. (London: Sweet & Maxwell, 2014).
[16] *Abela* [2013] UKSC 44 at [35].

- If not received at 14 days, the court should be telephoned to enquire as to when the claim form will be returned. A letter should also be sent to the court confirming the content of the telephone conversation.
- If the court serves proceedings on the defendants, contrary to the solicitor's instruction, then it is suggested that the following process should take place:
  - — A letter should be sent to the court marked "urgent" referring to the notice of issue and the letter enclosing the claim form with the direction for service, requesting that a further set of sealed copies of the claim form and accompanying documentation should be returned immediately to enable service of proceedings upon the defendant's solicitors to be properly effected.
  - — At the same time, a letter should be sent to the defendant's solicitors enclosing a copy of the letter to the court.
  - — The court should then respond with a general form of order stating in terms:

> "… upon it appearing that the court has served the claim form, particulars of claim and the supporting schedule of loss and medical report on the defendant notwithstanding a request from the solicitor for the claimant that upon issue the claim be returned to the solicitor for service, time for service of those documents is extended to 4pm on …"

**Simon Allen**

## Duce v Worcestershire Acute Hospitals NHS Trust

(CA (Civ Div), Richards L.J., Black L.J., Fulford L.J., March 12, 2014, [2014] EWCA Civ 249)

*Procedure—clinical negligence—personal injury—striking out—breach of duty of care—causation—duty to warn—surgical procedures—requirement to serve medical evidence—real prospects of success—CPR rr.24.2, 3.4(2), 3.9, Pt 33.3(5)*

LT Duty to warn; Pain; Personal injury claims; Striking out; Surgical procedures

This was a second appeal, to the Court of Appeal, by the claimant against dismissal of a first appeal refusing to set aside an order striking the action out. In the Court of Appeal, Richards L.J. observed: "The procedural history reveals a muddle."[1] There was indeed.

The claim form was issued on March 21, 2011. The claim form was served with the particulars of claim on July 18, 2011. The particulars of claim set out details of the pain allegedly suffered by the claimant as a result of the surgery, together with her understanding that it constituted neuropathic chronic post-surgical pain ("CPSP"). There was alleged to have been a negligent failure to warn the claimant prior to surgery of the risk of CPSP, and it was alleged that she would not have consented to the surgery if she had been properly informed of that risk.

Paragraph 4.3 of Practice Direction 16 supplementing the Civil Procedure Rules ("CPR PD 16") provides:

[1] *Duce v Worcestershire Acute Hospitals NHS Trust* [2014] EWCA Civ 249 at [2].

> "Where the claimant is relying on the evidence of a medical practitioner the claimant must attach to or serve with his particulars of claim a report from a medical practitioner about the personal injuries which he alleges in his claim."

It was common ground, by the time the case reached the Court of Appeal, that the medical practitioner's report so required was a "condition and prognosis" report about the alleged injuries, *not* the expert medical evidence relied on in support of allegations of breach of duty and causation. The required report of a medical practitioner was not attached to or served with the particulars of claim.

On October 11, 2011, the defendant applied for an order that the claimant serve a report within seven days or be debarred from relying on such evidence. The terms of the application make clear that what was sought was a condition and prognosis report. On December 13, 2011, a district judge made an order that included the following terms:

> "5. On the Defendant's application dated 11.10.11 it is ordered that the claimant must file and serve the medical evidence on which she proposes to rely within 14 days of service of this order. Unless she does so she will be debarred from relying on such evidence in the absence of any further order of this court.
> 6. In the absence of any such medical evidence it is difficult to see how the claim can succeed and if no such evidence is filed the court may consider striking out the claim on request."

This order was the beginning of what the Court of Appeal described as the "muddle". That was because the order was not, on its face, limited to service of a condition and prognosis report as required by para.4.3 of the CPR PD16, but appeared to direct the claimant to serve *all* the medical evidence on which she proposed to rely, including evidence relating to breach of duty and causation. The Court of Appeal considered that whilst the former would have been an entirely appropriate order, there was no justification for the latter.

Prior to the deadline in the order a report from a consultant in chronic pain management, dealing with breach of duty, was filed. The expert expressed the opinion that all patients, especially those who displayed the claimant's risk factors, should be advised about the risk of developing CPSP. However:

- This was not a condition and prognosis report, so did not cure the failure to comply with para.4.3 of the CPR PD16.
- The report did not include the declarations required from the expert by Pt 35.
- Expert evidence on the question of whether there was a duty to warn was, as subsequently identified, required from an expert in the field of gynaecology.

To add to the problems, due to an administrative error, this report did not get through to the judge by the time a further order was made, on January 6, 2012, striking the claim out on the basis it had no real prospect of success. That order was allowed to stand even when the judge became aware a report had been filed because the report was not CPR compliant and, in the view of the judge, there remained no real prospect of success.

The claimant made an application to reinstate the claim, which was heard by a different district judge. A point not raised at the hearing of that application, was the distinction between Pt 3.4(2), which gives the court power to strike out for failure to comply with a rule, practice direction or court order, and Pt 24.2, giving the power to enter summary judgment if the court considers the claim has no real prospect of success. The grounds given for striking out the claim were that it had no real prospect of success rather than the claimant's failure to comply with the rules.

The application to reinstate was unsuccessful on the basis that, in a claim of this kind, the claimant would need to have medical evidence supporting the claim and as such evidence would need to be from

an expert in the field of gynaecology there was, on the evidence, "no real prospect of success". The claimant appealed.

On the first appeal the judge concluded that the claimant required the evidence of a gynaecologist to establish breach of duty and that, without this, the claim, though arguable, had no real prospect of success. The hearing was then adjourned for the claimant to get further expert evidence from a gynaecologist. The claimant obtained the report from a consultant obstetrician and gynaecologist which concluded there was substandard treatment in failing to warn the claimant about the risk of developing post-operative pain, but no breach of duty in not advising on the specific risk of developing CPSP.

On the basis that the judge read the expert opinion as suggesting that the claimant ought to have been advised about any pain following surgery, the claim was still held, despite this further evidence, to have no real prospect of success and was, accordingly, appropriate to be struck out. The claimant pursued a further appeal.

The Court of Appeal observed that if clearer thinking had been applied at the earlier procedural stages the muddle would not have occurred. The correct focus should have been on the claimant's failure to serve a condition and prognosis report as required by the CPR PD16, which the original order should have made clear rather than being expressed in more general terms. Whilst there would still have been a failure to comply with that order, requiring relief from sanctions, the likelihood was that such relief would have been granted when the claimant applied to reinstate (applying Pt 3.9 as it then stood).

Even so the issue, on the second appeal, was whether the judge dealing with the first appeal had been wrong to find the claim had no real prospect of success on the evidence as it stood at the time of that hearing. This was because it was too late to raise what would have been valid procedural arguments at the stage of appeal.

Allowing the appeal, the Court of Appeal concluded the claim might not be "particularly promising" but there was insufficient basis for stopping it from going forward given that, at the very least, the evidence concluded there was a duty to warn the claimant and, ultimately, that issue would depend on factual questions to be explored at trial.

Accordingly, the judge hearing the first appeal was wrong to find the claim, on the basis of the expert evidence of the gynaecologist which was taken into account during the hearing of that appeal, had no real prospect of success.

## Comment

Murphy's Law states that "if anything can go wrong, it will". This applies as much to personal injury case management as anything else in life. One way to try to avoid complicated procedural wrangles (along with sleepless nights and increased indemnity premiums) is to not leave the issue and service of proceedings to the last minute. That way you will always have time to rectify any problems that do arise. Another is to make sure you have everything you need ready before you issue and serve. Finally, it is always helpful to know the rules (the Civil Procedure Rules)!

"The procedural history reveals a muddle", said Richards L.J., giving judgment in the Court of Appeal on this clinical negligence claim, and indeed it does.

The injury occurred in March 2008. The claim form was issued on March 21, 2011, right at the three-year limitation limit. It was served on July 18, 2011, right on the four-month service limit. Unfortunately, no medical report dealing with condition and prognosis was served with proceedings in breach of para.4.3 of CPD PD16.

From that position we proceed through hearings before two different district judges, two hearings before a circuit judge and finally to the Court of Appeal.

It is clear that by the time the matter reached the Court of Appeal it was in the hands of counsel who plainly knew their stuff. Benjamin Browne QC for the claimant contended that throughout all the hearing

below, the judges dealing with this issue had sought to address the substantive issue of the prospects of success when they should have been addressing the procedural issue of the failure to serve a compliant condition and prognosis report. Philip Havers QC for the defendant recognised this too but put it on the basis that "we are where we are" and that there were little or no prospect of success: although the judges below may not have dealt with the matter in a procedurally correct way, their assessment of the prospects of success was sound and the case should be struck out.

In a nice turn of phrase, Richards L.J. said:

> "It is difficult to disagree with Mr Havers's proposition that we are where we are. But it is right to stress that where we are is not where we ought to be."[2]

Richards L.J. proceeded to untangle the procedural muddle and identify that the real issue was the failure to serve a complaint condition and prognosis report. Thereafter the court had taken a wrong turn and the focus had shifted to a premature assessment of the merits of the case. The initial failure would have triggered a sanction for which relief would probably have been granted.

However, Richards L.J. went on to say that even so, the appeal before the Court of Appeal was one that went to the assessment of the merits of the case by the circuit judge and as such the court had to look at that substantive issue as that is what had brought the case to the Court of Appeal. He did so in one paragraph, concluding that, at its lowest, the reports available did support a claim for a failure to warn of the risk of post-operative pain and so it could not be said that the claim had no real prospect of success.

Whilst not exactly a ringing judicial endorsement, he said:

> "It may not be a particularly promising claim but I do not think that there was a sufficient basis for stopping it from going forward."[3]

Before you play any sport or game, it helps to know what the rules are. If you are going to have a referee or umpire, it helps if they know the rules too. Lord Justice Jackson in his Report on Civil Costs[4] called for "ticketed" specialist judges and the "docketing" of personal injury cases before them to ensure that judges could properly case manage claims such as these. Whilst we remain fortunate that in the QBD we have excellent specialist masters dealing with clinical negligence cases and this is mirrored in the major regional trial centres, it is plain that beyond those areas of specialist judicial knowledge there remain areas of concern. This is a case that should never have ended up in the Court of Appeal.

## Practice points:

- Know the rules.
- Comply with them.
- Do not leave things until the last minute.
- Make sure that if your tribunal is unfamiliar with the rules that you clearly set out what they are and what the tribunal has to decide.

**Muiris Lyons**

[2] *Duce* [2014] EWCA Civ 249 at [29].
[3] *Duce* [2014] EWCA Civ 249 at [37].
[4] R. Jackson, *Review of Civil Litigation Costs: Final Report* (The Stationary Office, December 2009).

# Wagenaar v Weekend Travel Ltd (t/a Ski Weekend)

(CA (Civ Div), Laws L.J., Floyd L.J., and Vos L.J., July 31, 2014, [2014] EWCA Civ 1105)

*Civil procedure—personal injury—costs—funding arrangements—qualified one-way costs shifting—retrospective legislation—ultra vires—additional claims—costs between the parties—CPR rr.44.13, 44.14, 48.1, 44.17, 48.2, 44.16 and Pt 20—Senior Courts Act 1981 ss.51(3), 51, 51(1) and 51(2)*

LT Additional claims; Costs between the parties; Funding arrangements; Personal injury claims; Qualified one-way costs shifting; Retrospective effect; Ultra vires

The claimant, Arabella Wagenaar, suffered a severe skiing accident while on holiday in Chamonix. She sued the defendant tour operator under the Package Travel, Package Holidays and Package Tour Regulations 1992, alleging negligence on the part of the defendant's supplier, the third-party ski instructor Ms Nawelle Serradj. The defendant then brought a Pt 20 claim for indemnity or contribution against Nawelle Serradj.

On September 19, 2013, after a lengthy trial, HH Judge Iain Hughes QC dismissed the claimant's claim against the defendant and the defendant's claim against the third party. The claimant's claim had not been funded by a relevant pre-commencement funding arrangement.[1] She was privately funded, so the pre-April 2013 rule on conditional fee agreements ("CFA") did not apply. Judge Hughes gave judgment on costs on October 31, 2013 after receiving written submissions and refusing an oral hearing. He ordered:

- that the claimant should pay the defendant's costs, but that such order was not to be enforced against the claimant pursuant to the provisions of rr.44.13 and 44.14 of the CPR; and
- that the defendant should pay the third party's costs, but that such order was not to be enforced against the defendant pursuant to the provisions of rr.44.13 and 44.14 of the CPR.

The order meant that the qualified one-way costs shifting ("QOCS") rules applied to both claims, so that neither costs order could be enforced. The effect of this was that each party had to bear her or its own costs. The defendant and third party both appealed to the Court of Appeal.

The defendant contended that the judge should not have held that QOCS applied to the case at all. It raised three main points. First, it said that the QOCS provisions were ultra vires s.51(3) of the Senior Courts Act 1981, which provides that "[t]he court shall have full power to determine by whom and to what extent the costs are to be paid". Secondly, the defendant contended that the rules on QOCS should not have had retrospective effect on the defendant, since most of the costs in question had been incurred before they came into force on April 1, 2013. Thirdly, it argued that in any event, the defendant's junior counsel had a pre-commencement funding arrangement in place within r.48.1 of the CPR so that the former costs rules should apply to that arrangement.

The third party contended that the judge should not have held that the rules on QOCS applied to the Pt 20 of the CPR proceedings between the defendant and the third party, and that there should not have been a stay on the order for costs in her favour.

There were four issues for the Court of Appeal to determine:

1) Were the QOCS provisions in the CPR intra vires?
2) Was it appropriate to make the QOCS provisions retrospective?
3) Was the defendant's junior counsel's CFA still effective in a QOCS case?

[1] Pre-April 1, 2013 conditional fee agreement ("CFA") and/or after-the-event ("ATE") policy.

4) Did QOCS apply to a claim by a defendant against a third party?

The defendant's principal argument was that the judge should not have applied the QOCS rules to the case at all because they were ultra vires. It was submitted that the power of the court in relation to costs which was set out in s.51(3) of the Senior Courts Act 1981 could not be trammelled by rules of court such as the QOCS rules. This was rejected.

The Court of Appeal held that the argument was wrong and that the court's power under s.51(3) to determine by whom and to what extent costs are to be paid is to be read subject to the power of the rules committee to make rules of court concerning the availability of an award of costs, the amount of such costs and the exercise of the court's discretion in relation to costs. The rules committee was therefore fully entitled to make the QOCS rules.

The defendant's final argument on its appeal was that its junior counsel's CFA should, at least, survive the QOCS reform, because of the provisions of rr.48.1 and 48.2 of the CPR. It was submitted that r.48.1 makes clear that the provisions of Pts 43–48 of the CPR "relating to funding arrangements" should apply in relation to pre-commencement funding arrangements as they were in force immediately before April 1, 2013: i.e. before QOCS were introduced. Since the CFA was such a pre-commencement funding arrangement, at least the fee due under that arrangement should be recoverable as it would have been before QOCS came in.

The court held that the specific QOCS regime has only one specific transitional provision in Pt 44.17 which provides that the regime does not apply to proceedings where the *claimant* has entered into a pre-commencement funding arrangement. That did not apply to this case since, as the judge found, the claimant had not entered into any such arrangement. The defendant was contending that the entirety of the new costs regime in Pts 43–48 of the CPR should to be disapplied in respect of the CFA by r.48.1 of the CPR.

The court pointed out that r.48.1 of the CPR only disapplies the provisions of Pts 43–48 of the CPR "relating to funding arrangements", not relating to costs generally. The QOCS provisions in new rr.44.13–44.16 of the CPR do not relate to funding arrangements at all; they relate to the costs orders that can and should in future be made in personal injuries claims. Accordingly, rr.48.1 and 48.2 of the CPR did not have the effect of carving out the defendant's CFA from the general QOCS regime, and this limb of the defendant's argument was rejected. The defendant's appeal was dismissed.

The Court of Appeal agreed with the third party's submission that the QOCS provisions only applied to protect claimants who were bringing a claim which included a claim for damages for personal injuries (or the other claims specified in r.44.13(1)(b) and (c) of the CPR) but did not apply to the whole of an action in which such a claim featured.

This meant that the judge had erred in his interpretation of the provisions as extending such protection to defendants who were claimants in third party or contribution proceedings arising out of personal injury claims. The third party's appeal was allowed, leaving the defendant to pay the costs of the third party.

## Comment

Shortly under five years since Jackson L.J. came up with the concept of QOCS we have the first appellate decision on its meaning and application.[2] It is noteworthy that the introduction of this followed in Jackson L.J.'s report after he had already discussed removing recoverability, in particular of ATE insurance policy premiums. He identified, by quoting statistical information, that 73 per cent of all households have savings of less than £10,000. He noted the defence costs:

[2] R. Jackson, *Review of Civil Litigation Costs: Final Report* (The Stationary Office, December 2009).

> "Can easily be many times higher than £10,000 in a fully contested litigation. This would mean that for ¾ of households their other financial assets (their home in most cases) would be at risk from an adverse costs order."[3]

Coupled with that:

> "Secondly, the defendant is almost invariably either insured or self insured … (meaning) that the defendant is a large organisation which has adopted the policy of paying out on personal injury claims as and when they arise, rather than paying substantial liability insurance premiums every year."

He set out four factors that pointed him towards recommending QOCS, the second and third being:

> "Personal injuries litigation is the paradigm instance of litigation in which the parties are in an asymmetric relationship.
>
> The principle objective of recoverable ATE insurance premiums is to protect claimants against adverse costs orders."[4]

He went onto recommend:

> "I therefore propose that claimants in personal injury cases, whether or not legally aided, be given a broadly similar degree of protection against adverse costs."[5]

However, he did in fact consider means testing in that aspect, but that was not eventually adopted. After consultation, the Government adopted the proposal, albeit without means testing. Informally, the Ministry of Justice commented:

> "A new costs protection regime has been introduced for personal injury claims (including clinical negligence). This will provide protection limiting the costs *that a claimant* might have to pay to the other side. This regime is called "qualified one way costs shifting" (QOCS). This affects the costs *that a claimant might have to pay to a defendant. A losing defendant remains liable for the claimant's costs* in the usual way."[6]

It will, of course, be understood by personal injury practitioners that QOCS does not remove the personal injury defendant's right or ability to recover its costs from the claimant, but that the order for costs cannot be enforced against the claimant other than in limited circumstances and/or with the court's agreement.[7]

The defendant in this case pretty much mounted every conceivable argument that it wanted the court to consider to try to get around what it no doubt considered to be the apparent unfairness of being required to pay not one but two party's legal costs following its successful defence of a claim by a claimant.

The defendants in personal injury litigation have been making Pt 20 claims for defence and contribution for countless years. However, it is arguable that it is in the holiday claims that one sees perhaps a higher than usual instance of such Pt 20 litigation. For instance, in package holiday claims, as here, where the claimant seeks liability against their tour operator effectively for the vicarious liability of the actions of the third party supplier (such as the hotel abroad), it is quite often the case that an indemnity is sought by the holiday company against the supplier.

This case illustrates what some will say is a frequent and arguably abusive use of the new system that is the claimant who litigates with cost impunity. Subject to the Pt 36 provisions and of course a finding of "fundamental dishonesty" (still to be defined by an appellate court), the claimant will be able to lose, or even abandon, their claim, safe in the knowledge that they are protected from being required to meet

[3] R. Jackson, *Review of Civil Litigation Costs: Final Report*, Ch.19.
[4] R. Jackson, *Review of Civil Litigation Costs: Final Report*, Ch.19 para.1.3.
[5] R. Jackson, *Review of Civil Litigation Costs: Final Report*, Ch.19 para.4.7.
[6] Justice website: *https://www.justice.gov.uk/civil-justice-reforms/personal-injury-claims* [Accessed October 20, 2014] (Emphasis added).
[7] CPR rr.44.13 and 44.14.

any of the costs of their opponent. If the opponents have sought a Pt 20 contribution from a third party then they are rather left with litigation that there is no longer any need to fight. By definition, if the defendant is not required to meet a claim from the claimant then there is no longer a requirement for them to seek a contribution from the third party. This means that the defendant is suddenly left with a piece of litigation that it no longer needs but if it discontinues, then leaving aside the unexpected generosity of the third party in bearing its own costs, it will be expected to meet those costs as well as having, of course, already had to meet its own defence costs.

It may be that an unintended consequence of this decision is that where a defendant faces a claim, they may positively encourage the claimant to get on with the case so that there is enough limitation period left for the defendant to seek a contribution from a supplier only once the claimant's case has been determined.

Their other remedy would be to positively encourage the claimant to sue the supplier anyway to perhaps avoid the defendant needing to issue Pt 20 proceedings. It may then be able to encourage the supplier to share the burden with them. Of course it is not always in the claimant's interests to bring multiple defendants into litigation, particularly in an area of litigation that is already vulnerable to the challenges of proportionality.

In many overseas accident cases issues of foreign law or custom and practice will be a feature of even the most straightforward personal injury claim. It is unclear at the moment to what extent the court will make a suitable allowance for those additional costs in the lower value personal injury claims. The claimant will argue that the incidence of foreign law is an essential part of the claim and it is, therefore, necessary for the claimant to obtain evidence to deal with that, but of course necessity is no longer a factor that the court need take into account in determining whether it will allow costs that it otherwise considers to be disproportionate. This will leave a defendant, certainly in overseas accident cases, frequently having to consider difficult tactical options as to what to do about the claim they are facing. This may, of course, produce its own signal to a claimant as to the confidence that a defendant has in defending the claim. If it is very confident, then it may choose not to seek a Pt 20 indemnity, whereas the converse may apply to a claim where they fear the claimant could well succeed. The issue of whether or not to join in an additional party has always required careful thought from whomever is considering it; whether that be the claimant or the defendant. The courts have shown a greater appetite for looking at how forensically the issues in dispute have been examined by the claiming party before joining the additional defendant, and deciding the appropriate costs orders at the conclusion of the litigation.

In the meantime, the court has, at the earliest opportunity, shut out the perhaps more esoteric challenges to the regime: namely that it is ultra vires or unlawful because it was retrospective.

As to the first point, the court held that the "judicial power" to deal with costs under the 1981 Act[8] should be interpreted to mean "judicial discretion" which meant, therefore, that the delegated ability of the Civil Procedure Rules Committee to "make rules which control the exercise of the court's jurisdiction" was a properly empowered body able to make the new rules. It would of course have produced quite a challenge to modern personal injury litigation to have set aside QOCS for, as the court commented:

> "If QOCS were to be struck down, there would need to be a complete rethink of the entire Jackson reform programme."[9]

Reinforcing the point that QOCS is an exception solely for the reason postulated by Jackson L.J. in his original report (the David v Goliath case of the claimant against the defendant), the Court of Appeal made clear that the associated litigation around a personal injury claim should still have the usual cost orders and risks. Interestingly, in the personal injury context the court gave the example:

[8] Senior Courts Act 1981 s.51(3).
[9] *Wagenaar v Weekend Travel Ltd (t/a Ski Weekend)* [2014] EWCA Civ 1105; [2014] P.I.Q.R. P23 at [26].

> "In medical negligence claims, a claimant may sue a doctor, a health authority and the manufacturer of some piece of medical equipment. It would be strange if there could be no cost orders enforced between the defendants at the end of a long battle in the cross contribution claims between them where it was ultimately proved that the doctor and the health authority were blameless that the injury was caused by a defective piece of medical equipment. In such a case, the claimant's damages might be agreed, and the argument might be almost wholly between the defendants — or possibly third parties, if any of them were not originally sued."[10]

It is generally considered that any funding arrangement entered into by a claimant prior to April 1, 2013, even if that retainer were abandoned or perhaps caused by a change of lawyer, precludes the claimant from being able to have the benefit of QOCS. It is commonly thought that this is an unintended consequence of the reforms and this is one of the areas of potential anomalies being examined by a working party of the Civil Justice Council. To those who argue that there are other similar examples where claimants suffer a disadvantage through the unintended consequences, there will always be the opportunity to point to other iniquities that may also be unintended consequences but to the detriment of the paying party, the defendant.

This case is perhaps an example of that. Here the litigation had all but concluded prior to April 1, 2013, and yet by reason of the fact that there was no pre-existing claimant funding arrangement in place, that claimant got the benefit of QOCS. Of course in this case, the only funding agreement in place apparently was that of defence junior counsel who had a pre-April 1 CFA, but the point was made that the QOCS regime in personal injury claims is triggered where the *claimant* has entered into a pre-commencement funding arrangement. For QOCS it was simply irrelevant what the funding arrangements of the defendant might be.

Whether one is a supporter of this decision or not, it does at least have the benefit of providing some level of certainty in this new and unique area and helpfully appears to have dealt with four significant areas of challenge.

## Practice points:

- Cases in which the claimant has any form of pre-April 1, 2013 funding arrangement, will preclude the application of QOCS.
- Providing a claimant is not found to have been fundamentally dishonest, then they may lose or abandon proceedings with almost complete costs impunity.
- When acting for a defendant where it is thought that liability may actually be solely or partly the responsibility of a third party, careful consideration should be given as to the merits both of the claimant's initial claim as well as that of the Pt 20 proceedings.
- It is important to identify carefully the likely limitation date for Pt 20 proceedings to avoid a premature issue of proceedings pending the outcome of the personal injury claim, or conversely to delay the issue and become statute-barred.

**Mark Harvey**

PROCEDURE

[10] *Wagenaar v Weekend Travel Ltd (t/a Ski Weekend)* [2014] EWCA Civ 1105 at [41].

# Bright v Motor Insurers' Bureau

(QBD, Slade J., May 15, 2014, [2014] EWHC 1557 (QB))

*Personal injury—civil procedure—costs—legal advice and funding—conditional fee agreements—success fees—reasonableness—contributory negligence*

LT Conditional fee agreements; Contributory negligence; Costs; Personal injury claims; Reasonableness; Success fees

On September 26, 2010, Carol Bright suffered serious injury when the first defendant Mr Abimbola's vehicle reversed into her when she was standing behind it. Mrs Bright suffered a severed spinal cord at C3/4 leaving her tetraplegic. She brought a personal injury claim against the driver and when his insurance company avoided its obligations, she brought a claim against the second defendant, the Motor Insurance Bureau ("MIB").

On May 27, 2011, the MIB filed a defence denying liability for the claim and asserting, in the alternative, contributory negligence. A preliminary trial on liability was listed for a trial window which was fixed for May 1, 2012 with a time estimate of two to three days. On March 23, 2012 a joint settlement meeting took place. Agreement was not reached and liability and contributory negligence remained in issue.

On April 26, 2012, five days before a liability trial, a second joint settlement meeting took place. At this meeting the claim settled for a lump sum payment (gross of compensation recovery unit ("CRU") and interim payments) of £1.6 million with periodic payments of £230,000 per annum, together with costs on the standard basis to be assessed if not agreed. The order was approved on June 15, 2012.

The claimant had signed a conditional fee agreement ("CFA") with her solicitors which provided for a two-stage success fee. Her bill of costs included a success fee of 75 per cent on her solicitors' charges. The MIB challenged that claim and offered 30 per cent. Master Rowley found that the risks to be considered by the claimant's solicitors of non-recovery of costs revolved entirely around the risk of a Pt 36 offer and the complications that might ensue from any finding of contributory negligence. He concluded that the MIB's offer of 30 per cent reflected the real risk taking into account all the relevant circumstances. He did not think that it would be reasonable to increase the percentage uplift from 30 per cent simply because the case settled close to the trial. The claimant appealed.

Mrs Justice Slade held that when it came to assessing the reasonableness of the success fee the use of hindsight was not permitted.[1] The reasonableness of the success fee was to be determined by reference to the facts and circumstances as they reasonably appeared to the solicitors at the time when the CFA was entered into. Master Rowley's conclusion was that the MIB would be hard-pressed to contest liability. Slade J. held that this was amply supported by what was known at the time of entering the CFA, namely that the accident was caused by a driver reversing at speed into a pedestrian. She confirmed that Master Rowley had correctly concluded that the risks to be considered by the claimant's solicitors revolved around the risk of a Pt 36 offer and the complications that might ensue from any finding of contributory negligence.

Master Rowley had had before him the bill of costs which included details of the allegations of contributory negligence. Those included that the vehicle's hazard lights were flashing and an allegation that the claimant had been preoccupied with her mobile phone. In addition, the fact that liability was not admitted was also taken into account as adding to the risk justification for the success fee. Master Rowley

[1] *U (A Child) v Liverpool CC* [2005] EWCA Civ 475; [2005] 1 W.L.R. 2657 considered.

had had regard to the decision in *C v W* [2008] EWCA Civ 1459; [2009] 4 All E.R. 1129[2] in which the Court of Appeal substituted a success fee of 20 per cent for the risk of failure to beat a rejected Pt 36 offer where there was an issue of contributory negligence.[3] Accordingly, Slade J. concluded that the master did not err in his approach to assessing a reasonable success fee. Nor was the conclusion that he reached—that the success fee should be assessed at 30 per cent—outside the parameters of a decision of a master properly directing himself on the relevant circumstances. The appeal was dismissed.

## Comment

In *Callery v Gray* [2001] EWCA Civ 1117[4] the Court of Appeal came up with the idea of a "two-stage" success fee. Lord Woolf explained it like this:

> "The logic behind a two-stage success fee is that, in calculating the success fee, it can properly be assumed that if, notwithstanding the compliance with the protocol, the other party is not prepared to settle, or not prepared to settle upon reasonable terms, there is a serious defence. By the end of the protocol period, both parties should have decided upon their positions. If they are prepared to settle, they should make an offer setting out their position clearly and providing the level of costs protection which they determine is appropriate."[5]

The CFA in this case had a "two-stage" success fee now commonly called a split success fee. It was set out in the CFA at:

> "(a) 50 per cent of the basic charges, assuming the case settles at any time prior to three months before the date fixed for the trial or the first date of the trial window (whichever is the earlier); or
> (b) 100 per cent if the case settles at any time thereafter; or
> (c) such percentage as is fixed by the Rules of Court to be recoverable from your opponent."[6]

In *Callery* [2001] EWCA Civ 1117 Lord Woolf continued in the following paragraph:

> "A further advantage of a two-stage success fee would be the knowledge that if a claim was not settled, the full success fee would be payable. This knowledge would encourage rigorous consideration of the merits of the claim during the protocol period and therefore accord with the intent of the CPR."[7]

It seems to me that the idea was that defendants should not run defences unless they had some merit. If there was liability then cases should settle early, or at least the issue of liability should not be left on the table. In effect, if liability was still at issue the prospects of success should not have been better than 50/50. A 50/50 case meant a 100 per cent success fee. If insurers or defendants chose to run defences with little or no merit, the price would be paying a high success fee.

However, it was not long before the courts were saying that not all cases can be taken as having a 50/50 chance of success when they get to court, justifying a success fee of 100 per cent. *Atack v Lee*[8] is a good example of a case which reached trial without a 100 per cent success fee being allowed. This was because cases were still going to trial, or at least getting close, when there was no defence of real merit. If insurers or defendants chose to run defences with little or no merit they would be paying high success fees for the

[2] *C v W* [2008] EWCA Civ 1459; [2009] 4 All E.R. 1129.
[3] *C* [2008] EWCA Civ 1459 considered.
[4] *Callery v Gray* [2001] EWCA Civ 1117.
[5] *Callery* [2001] EWCA Civ 1117 at [108].
[6] *Bright v Motor Insurers Bureau* [2014] EWHC 1557 (QB); [2014] 4 Costs L.R. 643 at [20].
[7] *Callery* [2001] EWCA Civ 1117 at [109].
[8] *Atack v Lee* [2004] EWCA Civ 1712; [2005] 1 W.L.R. 2643.

privilege of doing so. In other words, there was meant to be a real incentive not to run bad points and drag cases out.

This accident was caused by a driver reversing at speed into a pedestrian, yet liability and contributory negligence remained in issue throughout. The risks assessed as high and recorded in the risk assessment were: lack of independent witnesses, contributory negligence, quantum, expert evidence and risk of a well-placed Pt 36 offer.

Unsurprisingly, Master Rowley held that the defendant driver would have been hard-pressed to escape a finding of liability against him. The risk assessed at the time of entering into the CFA was: "…really a question of the extent to which the claimant may have contributed to the accident circumstances." So, in reality, the risks to be considered by the claimant's solicitor in this case revolved entirely around the risk of a Pt 36 offer and the complications that might ensue from any finding of contributory negligence.

That meant this was never going to be a 100 per cent success fee case. However, one of the success fee arguments in *Bright* [2014] EWHC 1557 (QB); [2014] 4 Costs L.R. 643 was that the proximity of the settlement to trial justified a higher success fee than one that simply equated to the risk of the case. They had run a defence with little or no merit so they should be paying a high success fee.

The argument did not appeal to Master Rowley who said:

> "I do not see that the case is in fact any more risky if it only settles a week before the trial than if it settled a month or a year earlier. The process of quantification of a personal injury claim takes some time to crystallise and settlements regularly occur close to hearings. If the claimant has prepared for a forthcoming trial and the defendant then settles the case, the defendant will have to pay for those extra costs. It does not mean, in my view, that the case necessarily becomes riskier during the trial preparation period."

Master Rowley was of the view that the risk of the claimant not succeeding in her claim was no more real on the eve of the hearing than it would be when the case was originally being risk assessed.

The claimant's problems were made worse by the fact that the master did not consider the first stage success fee of 50 per cent to be "low" in any event, and so justifying a high second stage success fee. In observing that a 50 per cent success fee could not really be described as low, Master Rowley referred to the "standard RTA percentage of 12.5 per cent" in r. 45.16 of the CPR and the fact that the fixed fee regime only allowed the higher success fee if the trial had started. In addition, the situation did not fall within the guidance in *KU (A Child) v Liverpool CC*[9] that:

> "… costs judges should be more willing to approve what appears to be high success fees in cases which have gone a long distance towards trial if the maker of the CFA has agreed that a much lower success fee should be payable if the claim settles at an early stage."

For these reasons, he did not think that it would be reasonable to increase the percentage uplift from the 30 per cent to reflect the general risks simply because the case settled close to the trial on liability. All of these points were endorsed by Mrs Justice Slade and the claimant was ordered to pay the MIB their costs of the appeal.

## Practice points:

- The contents of a defence often mean little when trying to justify a particular level of success fee.

[9] *U (A Child)* [2005] EWCA Civ 475.

- A defendant who denies liability may subsequently argue (as here) that there was very little risk of the claimant not establishing liability for the accident simply to reduce their costs outlay.
- Judges do not like what they see as high success fees.
- Split success fees are in reality of very little value.

**Nigel Tomkins**

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