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Articles

Case and Comment

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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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Editorial

Welcome to the March 2015 edition of JPIL.

We have a nice balance of articles in this edition addressing a number of topical issues that will be of relevance to practitioners in 2015.

The question of the meaning of disability for the purposes of the Ogden Tables is considered in two of our articles. *Victoria Wass*, who was the Claimant expert in *Billett v MoD* but who did not give evidence, explains her understanding of how it should be applied and comments on the judgment in *Billett*, which is pending appeal. Meanwhile, *Stephen Cottrell* also examines the judgment in *Billett* and also that in *Reaney v North Staffordshire Hospital*.

Andrew Roy looks at the impact of the Enterprise Act on employers' liability in practice. JPIL Board member *Simon Allen* looks at the latest case law on the issue of nervous shock and in particular the judgment in *Wild v Southend Hospital*.

David Wynn looks at the issue of whether noise induced hearing loss ("NIHL") claims are the new whiplash and *Zahra Awaiz Bilal* considers the recent introduction of the Duty of Candour on health professionals and organisations and looks at the role apologies can play.

Daniel Lawson writes on the issue of insolvent defendants and rights against insurers and JPIL Board Member *John McQuater* provides a further update on Part 36 in the next of his series of articles on this topic.

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

Muiris Lyons

Nervous Shock : A “most vexed and tantalising topic … still".

Simon Allen*

Clinical negligence; Foreseeability; Psychiatric harm; Secondary victims; Stillbirth

JPIL Board member Simon Allen revisits the issue of nervous shock in the context of claims for secondary victims. He looks at the latest decision in Wild v Southend[1] *and reviews the case law, tracing the development of the law and examining the policy reasons behind the arbitrary distinctions it is required to draw.*

ML

“For sale: baby shoes, never worn.”

This story is attributed to Ernest Hemingway who was challenged to produce a six-word novel which would make people cry. He said it was his best piece of work. The world is a place in which trauma sits comfortably waiting to appear in our lives with a depressing regularity. One is fortunate if one avoids it for long. However, amidst the account of daily tragedy with which the media feeds us, the death of a child is always particularly emotive.

In the instant case Mr and Mrs Wild were expecting their first child. On the 20th March Mrs Wild woke to find spots of blood. She contacted her husband at work and they went to the local hospital. At this stage he was “elated but also terrified” thinking the baby was on its way. The heartbeat could not be found by a handheld scanner, a Doppler scanner or a heart monitor with pads, and yet it was only on the 5th person saying, “I concur”, that Mr Wild was worried. No one advised him that the child, to be called Matthew, was dead. People were crying, including one of the midwives, his wife’s face was one of “utter devastation” and a day which had started with the prospect of the exciting arrival of a new infant had ended with his life stopping amidst a scene of “bedlam”.

The baby still had to be delivered and this was done the next day in Mr Wild’s presence. The blow upon a bruise came with hearing another newborn’s crying in a nearby delivery suite.

Was the event endured by Mr Wild “shocking” and foreseeably likely to cause mental injury beyond mere upset and distress?

Arguably, the most dispiriting aspect of the law as it relates to claims for damages arising from nervous shock is the necessary proximity of the secondary victim to the incident which seriously injures or fatally harms their relative, the primary victim. As Lord Justice Jackson stated, it is not the law’s function to eliminate every iota of risk, but the law does seek to impose limitations on those who will foreseeably suffer injury as a result of witnessing the harm to those with whom they have a close tie of love and affection. Foreseeability of injury is not, apparently, a sufficiently high hurdle to clear to allow claims for damages by secondary victims, and, therefore, the “control mechanisms” have been introduced to act like Minos, in the second of Dante’s circles of Hell, to judge those cases in which damages should be awarded.

The instant case emphasises in stark terms the contrast between the status of the primary victim (the mother of Matthew, the stillborn child) and, Mr Wild, the secondary victim (her husband and his father).

Whilst the defendants had argued that as the child had not been born, there was effectively no primary victim and, therefore, the father couldn’t succeed as a secondary victim, the judge readily dismissed the

* Simon Allen was formerly a partner at Slater & Gordon solicitors and a member of the JPIL Board.

[1] (2014) EWHC 4053 (QB): Michael Kent QC.

argument, accepting there was no distinction in law between a stillborn child and its mother. As counsel for the claimant informed the court, the perpetrator of an assault on a pregnant woman may be convicted of manslaughter if the child is born alive, but dies as a result of the injury sustained whilst in the womb.[2]

Before considering the decision of the court in relation to the unsuccessful claim of the father, it is necessary to put it into context by reviewing what Sir Thomas Bingham MR stated was "one of the most vexed and tantalising topics in the modern law of tort". To tantalise is defined[3] as "to torment or tease by the sight or promise of what is unobtainable". It is puzzling that at a time when he was Master of the Rolls, His Lordship felt that clarifying the law in relation to the plight of secondary victims of nervous shock was desirable but not achievable.

The Neighbour Principle

Damage caused by mental trauma is a separate head of damages. For the purpose of foreseeability the claimant must be assumed to be a person of normal fortitude, as assessed by the judiciary and not requiring an expert medical opinion.

In terms of the primary victims the consequences of an accident may be relatively discrete. Consider the case of an everyday road traffic accident involving a Volkswagen Beetle which stops at a zebra crossing and assume that the age of the car pre-dates the installation of seat belts. An off-road vehicle fails to observe the fact that the car has stopped, and causes a rear end shunt. The Volkswagen driver hits the windscreen fracturing the glass, and suffers a cut injury to his throat, resulting in a laceration of the jugular vein, creating much blood, as well as his imminent death. If the accident occurred in a major city, there could potentially be 50 people standing waiting to cross the road. They would have observed the accident and the horror that resulted. A simple RTA then becomes a significant group action. The financial consequences to the insurer of the off-road vehicle increase dramatically. Additionally, there could be claims for mental injury suffered by other pedestrians and the drivers of other vehicles who also witnessed the event.

"Because we are injured by what we do not expect, we must expect everything."[4] One needn't stretch the boundaries of foreseeability to see how the road traffic accident described above could create a psychiatric injury in a significant number of people, all of whom would satisfy the neighbour test of "… persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation …".[5]

In *McLoughlin v O'Brian*,[6] a majority decision, Lord Wilberforce held that as a matter of policy or "perhaps common sense", the courts must impose a limitation to prevent the opening of the gates and a flood of potential claimants stepping through. The dissenters (Lord Bridge and Lord Scarman) felt that there was no need for such a limitation, with the latter stating "the courts must adjudicate according to principle not policy". As a result, the question of proximity was dressed up as policy when, in *Alcock*, Lord Oliver set out the control mechanisms.

Primary and Secondary Victims and the Control Mechanisms

Because of the potential for situations such as the Volkswagen RTA the House of Lords decided that there was "a real need for the law to place some limitation on the extent of admissible claims because 'shock' … is capable of affecting so wide a range of people".

[2] *Attorney-Generals Reference (No.3 of 1994)* [1998] A.C. 245.
[3] *The Concise Oxford English Dictionary of Modern English*.
[4] Seneca, the Roman philosopher.
[5] Lord Atkin: *Donoghue v Stevenson* (1932) A.C.
[6] *McLoughlin v O'Brian* [1983] 1 A.C. 410.

The concept of "primary" and "secondary" victims had been introduced by Lord Wright.[7]

- A primary victim is someone directly involved in an accident caused by a defendant's negligence: the driver of the Volkswagen Beetle.
- A secondary victim is someone who suffers injury consequential upon the injury, or fear for injury, to a primary victim, caused by the defendant's negligence: the pedestrians witnessing the road traffic accident to the driver of the Volkswagen.

The categorisation of primary or secondary victim defines whether a duty of care exists, and not, as Waller J held in *Frost v The Chief Constable of South Yorkshire*,[8] the scope of the duty.

In order to assist the judiciary and practitioners in assessing whether a potential claimant is a secondary victim, a number of control mechanisms were created as set out by Lord Oliver in *Alcock v The Chief Constable of South Yorkshire*.[9] These are listed on p.411F–H of his judgment, but in short can be summarised as follows:

1. There must be a close tie of love and affection between the claimant and the primary victim.
2. The claimant must have been present at the accident or come upon its immediate aftermath.
3. The psychiatric injury must have been caused by direct perception of the accident or its immediate aftermath, and not by hearing or it from a third party.
4. The claimant must have "*reasonable fortitude*".[10]

These mechanisms, which Lord Hoffman stated were "more or less arbitrary conditions",[11] and which Clarke LJ felt should not "be applied too rigidly or mechanistically",[12] operate to refine a potentially numerous group of claimants into a contained and necessarily much smaller cluster.

It is the first of the control mechanisms, namely the need for a close tie of love and affection between the claimant and the primary victim, which scuppers the prospects of pursuing a claim for damages on behalf of most secondary victims. In the example of the Volkswagen Beetle, it is highly unlikely that any of the pedestrians, waiting at the side of the road to make the crossing, would have had such a tie with the driver of the vehicle.

The Circumstances of the father's claim

The timing of the death of the infant was unclear.. The father may have been present at that time, but we know he was present when knowledge of its death became apparent and was then present at its subsequent still birth. His wife had called him at work. He went home, and he and his wife then went to hospital where they were taken into an examination room. From being excited and elated at the prospect of the arrival of their newborn, the day developed differently, with three unsuccessful attempts made to find a heartbeat, as a result of which one of the trainee midwives was in tears. He indicated that "it started to dawn on us that there was a problem", and it was only when the fifth medical person arrived with a scanner and said "I concur" that he was shocked, bemused and dumbfounded, and didn't know what to do. He described the scene as "bedlam"; a description which was not disputed. No one actually advised him at that stage that the child was dead, and it had not entered his head that such a potentially wonderful day could end up going so gravely wrong.

[7] *Borehill v Young* [1943] A.C. 92.
[8] (1999) 2 A.C. 455.
[9] (1992) 1 A.C. 310.
[10] Lord Lloyd in *Page v Smith* (1995) 1 A.C. 155.
[11] *White v Chief Constable of South Yorkshire*.
[12] *Walters v North Glamorgan NHS Trust* [2002] EWCA Civ 1792.

It is noteworthy that liability was admitted for the injuries to his wife, the primary victim, and the psychiatric experts agreed Mr Wild had suffered from a recognised psychiatric disorder, albeit that they differed on the precise diagnosis.

The experts were also in agreement that the event causing the shock was "the realisation that his son was dead", and "… the sudden knowledge of his son's death in utero …".

The control mechanisms were applied. The claimant had a close tie of love and affection with his wife and the unborn child, who together constituted the primary victim. Unfortunately, it was in relation to the second of the control mechanisms, namely the presence at the accident or its immediate aftermath, that the case failed. The court examined past case law, including other clinical negligence cases in which the circumstances were similar.

In *Taylor v Somerset Health Authority*[13] Auld J (as he then was) held that there was no shocking event, and that the death of Mr Taylor was a consequence of his progressively deteriorating heart condition which the health authority through its negligence some months previously had failed to arrest. The subsequent viewing of the body went to the fact of the death, rather than the circumstances of the death. The claim failed.

In *Sion v Hampstead Health Authority*[14], the claimant's son's health deteriorated to the point of death over a period of 14 days, all of which he witnessed. Peter Gibson LJ found that it is "the sudden awareness violently agitating the mind, of what is occurring or has occurred that is the crucial ingredient of shock". The claim failed.

In *North Glamorgan NHS Trust v Walters*[15] the exposure of the mother, who was the secondary victim, was to a series of shocking events over a 36-hour period with the child's first fit identified as the beginning of a "seamless tale" (see Ward LJ) of woe. The claim succeeded.

In *McLoughlin v O'Brian*, the claimant arrived at the hospital within an hour of the incident in which members of her family had been injured. She was met with a hellish scene which exposed her to the death of a child of the family and the bloodied bodies of others. The claim succeeded.

In *Atkinson v Seghal* Mrs Atkinson was taken to the mortuary of the local hospital where she arrived 2 hours 10 minutes after the accident and she saw her daughter Olivia extensively bandaged around the head, and noticed the disfiguring and facial injuries. The claim succeeded.

In *Taylorson v Shieldness Produce Ltd*[16] the Appeal Court upheld the decision of the High Court that a mother who stayed with her 14 year old son over a period of three days before he died in intensive care following a road traffic accident, had a dawning consciousness that she was going to lose her son, and this was "an elongated process". There was, therefore, no sudden appreciation of a horrifying event. The claim failed.

In *Tredget v Bexley Health Authority*[17] the facts were, perhaps, the most similar. This was a clinical negligence case in which the mother had to undergo an emergency caesarean section after a protracted labour. During a 48-hour period there was an atmosphere of "chaos and pandemonium". The child was born but died shortly afterwards. Whilst understanding that this "event" was different to those which last only a few seconds, it was held that the 48-hour period was effectively one event and just as traumatic for those immediately involved. The claim succeeded.

In *Wild*, His Lordship distinguished the case on two bases: that the child was born alive and that the negligence occurred during the labour. That cannot be a correct interpretation for it is settled law that it matters not that, when seen by the secondary victim, the victim is alive or dead. The view of Waller J, as he then was, in *Frost* that "The risk and horror to the victims must still be present for the aftermath to be

[13] [1993] P.I.Q.R. 262.
[14] [1984] S. Med. L.R. 170.
[15] [2002] EWCA 1792.
[16] [1994] P.I.Q.R. 329.
[17] (1994) 5 Med. L.R. 178.

immediate and that will provide its own limitation in terms of time and place", is, with respect, nonsense and starkly at odds with the decisions in a number of decisions of the Appeal Court (by example, see *Atkinson v Seghal*).[18]

In *Walters*, the Appeal Court found that the timing of the "aftermath" began with the first fit, which was the first visible sign of distress caused by the failings of the defendants. Adopting that proposition it is arguable in the instant case that the timing began with the "bedlam" in the delivery suite or the "I concur" comment. Either way the claimant should have succeeded. But the critical point is that Mr Wild's exposure to the elongated but shocking event was for a lesser time that the successful claimants in both *Tredget* and *Walters*.

The court held that Mr Wild was not exposed to a shocking event, but to an elongated process, running from the timing of the "bedlam" of the delivery suite, to the "I concur" comment when the death was confirmed through until the delivery of the baby the following day. Nothing that he witnessed from the growing anxiety about the failure to find a heartbeat until the belated realisation of the death of the baby and ultimately the sight of the dead body amounted to "actually witnessing horrific events leading to a death or serious injury".

The case law suggests that the following can be established:

1. The body of the victim must be seen by the secondary victim.
2. The body must be bloodied or evidently injured in a disturbing way.
3. The fact that the victim is alive or dead is of no consequence.
4. The body must be seen within a short period of the accident (arguably within a maximum of three hours).

The most recent decision of the Appeal Court, which featured heavily in this case, underlined the requirement for proximity to the incident which caused the injury.[19] The claimant's mother was injured when, through the negligence of a fellow employee, a stack of racking boards fell on top of her. Her daughter did not witness the accident. She apparently made a good recovery, but, almost three weeks later she suddenly and unexpectedly collapsed and died at home. Her daughter witnessed her mother's death. As a result she suffered from PTSD.

Lord Dyson, The Master of the Rolls, gave the lead judgment in a unanimous decision dismissing the claim. In doing so, he said that the boundaries of proximity should be drawn as far as is possible to "reflect what the ordinary, reasonable person would regard as acceptable". He held that the daughter did not come across the immediate aftermath of the event. Unlike the case of *Walters*, the accident causing injury to Mrs Taylor and her subsequent death were quite distinct events.

It is surprising that the case featured in the claim of Mr Wild for the facts are readily distinguishable. It doesn't merit the attention it received, especially when contrasted with the reference to *Tredget*, a case with similar facts, which was dismissed in a single sentence

Overview

Sir Christopher Slade[20] said "the rules of the law of tort which govern the recoverability for psychiatric illness resulting from nervous shock might not appear to present a logical and consistent whole". Butler-Sloss LJ stated that "laws are like nation states — they are more secure when they rest within natural boundaries".

The proximity principle creates a natural boundary. Additionally the law should make sense to the citizens of a country and reflect their perception of what is right and proper. Whilst there may, thankfully

[18] [2003] EWCA Civ 697.
[19] *Taylor v A Novo (UK) Ltd* [2013] EWCA Civ 194.
[20] *Ravenscroft v Rederiaktievolaget Transatlantic* (1991) 3 All E.R. 73.

in rare occasions, be a need to introduce a policy to restrict the potential for the claims of thousands of sufferers of mental injury arising from an event (for example "9/11") any restrictions must be logical.

In Mr Wild's case one has to ask, was he exposed to a horrifying event, and did he come upon the immediate aftermath of the negligent act of the defendants? In answerng those questions, one considers the following:

1. He was present at the hospital from the outset of the treatment of his wife.
2. He was aware of the inability to find a heartbeat on three occasions.
3. He witnessed the distress of the nurse who was in tears.
4. He witnessed the growing distress of his wife who was "upset".
5. He was present when the fifth medic stated "I concur" which indicated the death of the baby.
6. He immediately witnessed the "utter devastation" on the face of his wife.
7. He described the circumstances of the whole event as "bedlam".

If the baby had been delivered at that time and immediately pronounced dead, would his prospects of success have improved? The answer appears to be "yes". He would, therefore, have been involved, and witnessed the shocking event of the "immediate" delivery of his stillborn child.

The additional day of upset and distress that he and his wife had to face until the child was delivered the following day and he first witnessed the dead infant, was simply an administrative necessity. It was not influenced by him or his wife.

The decision puts into doubt the prospects of success for any father of a stillborn child, who receives the news of the death, but then has to wait for a period of time until the child is delivered, though His Lordship states that this is not what he intended. As it stands this introduces an extra level of arbitrariness to an already erratic area of the law of tort and further unveils the capricious approach of the courts to the assessment of the claims of secondary victims.

In order to attempt to confront this unpredictability, as practitioners, we are required to ask questions of our clients, which at best appear cold and clinical, and, at worse, bluntly re-cut the raw scar tissue of the family tragedy through an inquisition which demands precision in respect of the timings and emotions encountered during the event which led to the death or serious injury of their relative.

If it does not go to appeal, this decision simply sharpens the scalpel.

Cases involving nervous shock have visited the House of Lords on five occasions; the last of which was *Frost*. Despite the guidance given in each of the cases, one is reminded of the comment by Baroness Hale that: "I pity the practitioners as well as academics who have to make sense of our judgments in difficult cases."[21] The law relating to the so-called "involuntary participants", the definition of the "immediate aftermath" and the nature of what is a "shocking event" all, apparently, remain unclear. As the secondary victim will necessarily have been exposed to a tragedy affecting a loved one, surely the senior judiciary can prevent adding any further harm to their mental state by ensuring that certainty features more noticeably in this aspect of the law of tort?

[21] *Sienkiewitz v Grief UK Ltd* [2011] UKSC 10.

The duty of candour and apologies as a legal remedy

Zahra Awaiz-Bilal*

Apologies; Child abuse; Health professionals; Personal injury; Social care workers; Transparency

Those responsible for the care of some of the most vulnerable people in our society owe a duty to protect those people from harm. This is widely understood. However, we continue to face difficulties where harm does occur and the institutions concerned fail to be open and honest about the mistakes made and fail to offer an explanation or apology to the victims and their families. Of further distress is that individuals working within those institutions also fail to speak up when they have witnessed abuse for fear of being reprimanded. As a child abuse lawyer, I come across this time and time again in cases involving teachers, scout leaders and members of the clergy but of course, as events in recent years have highlighted, these problems extend to other areas including health and social care. As a society, we are moving towards a culture of transparency, openness and accountability and we are no longer prepared to accept at face value when things go wrong. Instead, we question what could have been done to prevent the harm and what will be done to ensure that it does not happen in the future. This cultural shift has led to proposals for mandatory reporting in the field of child abuse and the introduction of a statutory duty of candour in health and adult social care. For the purposes of this article, I will be examining the importance of candour and of apologies as a legal remedy.

Duty of Candour

In the last two decades, various governments, healthcare providers and professional bodies have developed policies and guidelines for disclosure as part of their risk management systems. To give some examples from an international perspective:

- In 2001, the US Joint Commission on Accreditation of Healthcare Organisations ("JCAHO") announced a policy that demands greater transparency by disclosure of a critical event by the provider or the institution[1] and some States, including Pennsylvania, Nevada and Florida, have introduced a statutory duty for organisations to notify patients in case of an adverse event.
- In 2007, New South Wales Health in Australia defined open disclosure as "the process of communicating with a patient and their support person about a patient related incident".[2] This includes an acknowledgment that something has gone wrong, an apology, an explanation of the incident and an undertaking to investigate how the incident occurred.
- The Hong Kong Hospital Authority launched the Sentinel Event policy in 2007 and a further Serious Untoward Event policy in 2010,[3] which require all public hospitals to report and investigate incidents and make necessary efforts to ensure such incidents do not recur. The Authority also strongly encourages staff to be open and honest with patients in the event of an adverse incident.

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[1] *JCAHO Comprehensive Accreditation Manual for Hospitals: The Official Handbook.*

[2] *Policy Directive New South Wales Health*, PD2007_061, July 24, 2007.

[3] *https://www.ha.org.hk/visitor/ha_visitor_text_index.asp?Content_ID=137734&Lang=ENG&Dimension=100.*

Here in the UK a number of recent reviews and inquiries—such as the Mid Staffordshire NHS Foundation Trust Public Inquiry (the Francis Inquiry),[4] the inquiry into Winterbourne View Hospital,[5] and the Berwick Review into Patient Safety[6]—have highlighted concerns about the standard of care provided within health and adult social care. The inquiry into Winterbourne View revealed a failure on the part of the local NHS and health watchdogs for not acting on concerns raised by patients and their families about the standard of care provided within the home. It also brought to light the failure of multiple agencies in not raising concerns or alerting the authorities about incidents known to them.[7] The Francis Inquiry came to similar conclusions, highlighting a culture of poor care, failure to listen to concerns expressed by patients and relatives and a lack of openness and transparency about errors which led to the deaths of between 400 and 1,200 patients at Mid Staffordshire NHS Trust.

Although there are a number of reasons why the standard of care in these institutions fell so low, the principal reason was the failure of the staff to voice their concerns. Whilst the Public Interest (Disclosure) Act 1998 protects staff from suffering any detriment in their employment as a result of reporting events which they consider might endanger patients, the Francis Inquiry highlighted evidence that many are reluctant to speak out. To this end, the key recommendation of the Francis Inquiry was the creation of a statutory duty of candour which would place a legal obligation on staff to inform patients and their families if harm had occurred.

In its initial response to the Francis Inquiry, the Government acknowledged that "a new spirit of candour and transparency will be essential for exposing poor care"[8] and this would include "strengthening the protection available to whistleblowers, including a right to raise concerns".[9] A contractual duty of candour was introduced into NHS Standard Contracts[10] but this did not apply to primary care practitioners or private sector providers; the Government vowed to do more and confirmed its intention to implement a statutory duty of candour.

In May 2013, the Care Bill was introduced, Part 2 of which contained the measure to take forward the Government's response to the Francis Inquiry. Between March 26, 2014 and April 25, 2014, the Department of Health ran a consultation on introducing a statutory duty of candour. There were 116 responses to the consultation, with the majority in favour of such a duty.

The Care Bill received Royal Assent on May 14, 2014 and is now The Care Act 2014.[11] This placed a specific duty on the Government to make provision for a duty of candour to apply "in a case where an incident of a specified description affecting a person's safety occurs in the course of the person being provided with a service".[12]

The Government published its response to the consultation on July 7, 2014, confirming that it would be putting in place "a new requirement for providers of health and adult social care to be open with patients, and to apologise, when things go wrong".[13] This was to be a requirement for all health and adult social care providers registered with the Care Quality Commission ("CQC") and was introduced by way of secondary legislation in the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014. The duty of candour came into force on November 27, 2014 and applies to NHS bodies registered with the CQC. From April 2015 it will extend to all other CQC registered providers.

[4] *http://www.midstaffspublicinquiry.com*.

[5] *Transforming Care: A national response to Winterbourne View Hospital, Department of Health Review: Final Report https://www.gov.uk/government /uploads/system/uploads/attachment_data/file/213215/final-report.pdf*.

[6] *A Promise to Learn, a Commitment to Act: Improving the Safety of Patients in England, August 2013 https://www.gov.uk/government/uploads /system/uploads/attachment_data/file/226703/Berwick_Report.pdf*.

[7] Winterbourne View patients attended NHS A&E services on 78 occasions but there was no process in place for linking these. Between 2008 and 2011, police were involved in 29 incidents concerning the patients and 40 safeguarding alerts were made to South Gloucestershire Council.

[8] *The Initial Government Response to the Report of the Mid Staffordshire NHS Foundation Trust Public Inquiry*, March 2013, p.17.

[9] *The Initial Government Response to the Report of the Mid Staffordshire NHS Foundation Trust Public Inquiry*, March 2013, p.22.

[10] *http://www.england.nhs.uk/nhs-standard-contract/*.

[11] *http://www.legislation.gov.uk/ukpga/2014/23/contents/enacted*.

[12] Care Act 2014 s.81: *http://www.legislation.gov.uk/ukpga/2014/23/contents/enacted*.

[13] *https://www.gov.uk/government/consultations/fundamental-standards-for-health-and-social-care-providers*.

The objective of the duty of candour is to ensure that providers of health and social care are open when things go wrong and provide an explanation to the victim and/or their family. This duty extends to all healthcare professionals and applies when the harm caused is above a certain threshold. For healthcare providers, this will include all harm classified as moderate or severe or where prolonged psychological harm has arisen. For adult social care, the existing CQC notification requirement for serious injuries will be used[14] which includes death, serious injury, moderate harm and prolonged psychological harm. The duty is backed by criminal sanctions, making it an offence to fail to notify a service user, or their representative, that they have been involved in a notifiable safety incident. It will also be an offence to fail to carry out the actions that a provider must take as part of the process of notifying the relevant person, as set out in the Regulations.

There is an obvious concern that fear of prosecution could deter people from being candid but the Francis Report clarifies that criminal sanctions are to be used proportionately and in cases where no improvements are made or the deficiencies are particularly serious:

> "It is likely that nothing will focus the minds of a board or trust leaders more on avoiding serious breaches of safety requirements than the possibility of prosecution. Clearly, it should be a last resort, sparingly used, but it undoubtedly has its place in maintaining public confidence in the system and preserving proper standards of service."[15]

An important by-product of the introduction of this criminal measure is that it should lead to increased vigilance by institutions which should put in place procedures that aim to minimise opportunities in which harm can occur. Furthermore, one would hope that this protection from the law will provide the catalyst for staff employed in organisations responsible for the care of vulnerable people to be candid and for this to be adopted as a central part of their job, but only time will tell how effective this proves to be.

Potential impact of the duty of candour on abuse claims

Whilst the duty of candour is laudable in itself, the greater aspiration is for this to engender a paradigm shift in societal attitudes to transparency when people have done wrong, legally as well as ethically and morally. The main focus needs to be on developing a culture of openness, in which concerns can be voiced freely. This is embodied in the overarching recommendation of the Francis Inquiry that:

> "The common culture of caring requires a displacement of a culture of fear with a culture of openness, honesty and transparency, where the only fear is the failure to uphold the fundamental standards and the caring culture."[16]

Working for victims of abuse, I know exactly how long lasting and devastating the impact of abuse can be. I also know how let down my clients feel when they question why those who saw or heard something never did anything to help them. I am therefore particularly encouraged by the notion of "a culture of openness, honesty and transparency" because of the potential impact it will have on bringing sexual and physical abuse in health and social care to light.

A number of abuse scandals have been the topic of discussion over the course of the last year; the widespread abuse in Rotherham, the abuse in care homes in Islington and North Wales, inquiries into public schools and the continuing inquiries into the abuse by Jimmy Savile. What have also been highlighted are the opportunities available for members of the health service, one of the most trusted professions, to abuse their position. Records recently obtained under the Freedom of Information Act 2000 revealed a 50 per cent rise in reports of sexual abuse in hospitals since 2011, which include 1,615 attacks on NHS

[14] Care Quality Commission (Registration) Regulations 2009, reg.18.
[15] *Report of the Mid Staffordshire NHS Foundation Trust Public Inquiry*, Vol.2, para.13.155.
[16] *Report of the Mid Staffordshire NHS Foundation Trust Public Inquiry, Executive Summary*, para.1.180.

wards, in private clinics and other health centres.[17] What is more distressing is that these figures relate to reported incidents of abuse only, and bearing in mind the number of unreported incidents, the true scale of abuse in healthcare is likely to be much greater. Last year alone, five doctors were struck off or suspended from the medical register for alleged offences involving children under the age of 16.[18]

Figures published earlier this year by the Health and Social Care Information Centre show that 26 per cent of NHS doctors are foreign nationals, which means that vetting such doctors may not always be as thorough as one would expect due to a lack of information sharing between different countries. In these circumstances, one would expect members of staff working closely with such doctors to report incidents of abuse, which makes the need for candour even greater.

Sadly, as we have learnt from the investigation into Jimmy Savile, it is not only the professionals working within hospitals who may pose a threat to the care and safety of patients. Savile's vast footprint reached across 28 NHS hospitals, including Leeds General Infirmary, Broadmoor psychiatric hospital, and Stoke Mandeville Hospital, where it is accepted that he sexually assaulted more than 100 victims. The Department of Health commissioned independent hospital investigations and the reports[19] published have highlighted the "missed opportunities" when Savile's offending could have been brought to light.

Savile had unsupervised access to patients and the report into Leeds General Infirmary describes the lack of curiosity by staff into his presence in the hospital. What has also been highlighted is that, during the time of Savile's offending, most of the hospitals were introspective institutions with staff placing loyalties to colleagues above concerns for the rights and interests of patients. In the light of recent cases of abuse in hospitals, it is questionable as to whether this attitude has changed much. Dr Bill Kirkup, who carried out the investigation into Broadmoor, pointed out that the organisational culture of the hospital at the time "tolerated inappropriate sexual liaisons between staff and patients and strongly discouraged reporting".[20]

Reports into Stoke Mandeville, Rampton, Springfield, and Crawley hospitals as well as a report into lessons for the rest of the NHS from the Savile abuse are due to be published shortly; no doubt these will reveal similar shortcomings.

Fundamentally, these cases highlight that awareness of abuse alone, in all its forms, is not sufficient to bring the perpetrators to justice and the onus should not solely be on the victims to break the silence, particularly when they are so vulnerable either because of age or capacity and less likely to be believed because of this vulnerability. This is particularly applicable to people with challenging behaviour or mental health difficulties as highlighted by the inquiry into Winterbourne View, which found that people with learning disabilities and autism were not believed or listened to when they told others about the abuse. Nat Miles, the senior policy and campaigns officer at the charity Mind, recently reported on the first hand experience of such people who feel that they are "more easily discredited and less likely to be taken more

[17] "Sexual violence soars in UK hospitals": *http://www.theguardian.com/society/2014/dec/31/sexual-violence-soars-uk-hospitals*.

[18] In January 2014, Dr Dana Faratian, a leading cancer research doctor at the University of Edinburgh, was sacked after police found 151 indecent images of girls aged between 6 and 14 on his computer. In July 2014, as part of Operation Notarise, the National Crime Agency announced the arrest of 660 paedophiles which included doctors, teachers and police officers. Amongst them was Dr Raza Laskar, a junior paediatrician, who has been charged with sexual activity with a 15 year old boy and possessing indecent images of children. He is due to stand trial next year. Dr Adenkule Adeosun, who was hired by the police as a forensic medical examiner for victims of sexual assaults, and a former doctor at Dipple Medical Centre, was also struck off in July 2014 for inappropriate sexual behaviour towards five female patients including a girl aged 12. An anaesthetist at South Tyneside District Hospital, Dr Mohammed Ahmed, was suspended for six months in July 2014 after being found to have engaged in sexually explicit conversation and behaviour with two girls aged 15 and 16. The worst case of all came to light in September 2014 when Dr Myles Bradbury, a paediatric haematologist at Addenbrooke Hospital in Cambridge, was convicted of sexually abusing cancer patients aged between 8 and 17. Bradbury was first identified as a child abuse suspect during a Canadian police inquiry into the online sale of films depicting naked children two years before his arrest. This information was passed via Interpol to the Child Exploitation and Online Protection Centre ("CEOP") in July 2012 but no further action was taken. As a result of this failure, Bradbury continued to abuse children for a further 16 months. He was only arrested when the mother of one of his patients spoke out and on November 28, 2014 he was sentenced to 22 years' imprisonment. The failure by CEOP has been referred to the Independent Police Complaints Commission by the National Crime Agency.

[19] *https://www.gov.uk/government/collections/nhs-and-department-of-health-investigations-into-jimmy-savile*.

[20] *Jimmy Savile Investigation: Broadmoor Hospital*, June 2, 2014, para.1.26.

seriously if they report a crime". She added it is "vital that front line staff are adequately trained, so crimes are taken seriously and dealt with quickly and appropriately".[21]

The inquiry into Winterbourne View criticised leaders of care organisations "for creating a culture where neglect and even abuse can happen"[22] and pointed out the need for "developing a supportive, open and positive culture in our care system".[23] The statutory duty of candour, vis a vis CQC regulated care homes, should achieve this outcome to ensure that events such as those at Winterbourne View do not recur.

A duty of candour, if embraced in the spirit it is intended, has the potential to protect the vulnerable from being preyed upon.

Apologies as a legal remedy

There is a general societal expectation that the wrongdoer should, at the very least, apologise to those who are harmed by his actions, and a failure to apologise is objectively insulting and disrespectful and can antagonise the victim. It should, therefore, come as no surprise that the duty of candour encompasses a specific requirement to provide an apology, which is defined in the Regulations as "an expression of sorrow or regret in respect of a notifiable safety incident".[24]

In December 2013, the NHS Litigation Authority ("NHSLA") issued guidance, "Saying Sorry",[25] which supports and encourages Trusts to apologise to patients. This was in response to recognition that 50 per cent of those who suffered harm wanted an apology and an explanation. Placing this requirement within a statutory instrument now enhances the importance of apologies even further.

The process of apologising after causing harm takes place on a daily basis; world leaders, politicians, sports heroes, actors and other celebrities often offer apologies for various wrongs, recognising that people value remorse and apologies because they heal psychological wounds and reconcile damaged relationships.[26] As such, apologies are concerned not just with an individual's disposition but they also reaffirm societal norms.

Although the value of an apology is well recognised in philosophy and religion, and apologies have always played a vital role in social discourse, the significance of an apology as a remedy in law continues to be undermined, much to my dismay.

At present apologies are available as legal remedies in limited situations only, such as cases of discrimination and defamation. Some tribunals can order a defendant to apologise, where they find that an apology would be appropriate for a person who has been a victim of discrimination. Section 1.4 of the Pre Action Protocol for Defamation expressly refers to the claimant's right to an apology by setting out that "there are important features which distinguish defamation claims from other areas of civil litigation and these must be borne in mind … a Claimant will be seeking an immediate correction and/or apology as part of the process of restoring his/her reputation".[27]

In my view, there is an even greater need for an apology in a case where a wrong has caused physical and/or psychological harm to the victim, because of the invaluable role it can play in the healing process. Whilst an apology cannot change the past it can affect one's perception of the past and help ameliorate the future.

[21] *http://www.theguardian.com/society/2014/dec/31/sexual-violence-soars-uk-hospitals*.

[22] *Transforming Care: A national response to Winterbourne View Hospital, Department of Health Review: Final Report*, para.5.1. *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/213215/final-report.pdf*.

[23] *Transforming Care: A national response to Winterbourne View Hospital, Department of Health Review: Final Report*, p.5.

[24] *Introducing the Statutory Duty of Candour March 2014, Annex A https://www.gov.uk/government/consultations/statutory-duty-of-candour-for-health-and-adult-social-care-providers*.

[25] *http://www.nhsla.com/CurrentActivity/Pages/News.aspx*.

[26] "Integrating Remorse and Apology into Criminal Procedure" Stephanos Bibas and Richard Bierschbach, *Yale Law Journal* (2004).

[27] *http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_def*.

Strong emotions are often involved in abuse claims because of the nature of the victims' injuries; they may well have experienced a violation of their dignity and betrayal of trust, which leads to complex emotional and psychological injuries. As such, they are driven more by the need to heal than for financial recompense because, as the influential British writer Gilbert K. Chesterton noted, "the injured party does not want to be compensated because he has been wronged; he wants to be healed because he has been hurt". Monetary damages can compensate victims for tangible losses but they cannot redress the emotional and psychological harm caused; apologies, however, provide moral recompense by addressing the very personal nature of the harm suffered by the victims.

Furthermore, as an apology is a moral act and an act of good conscience which demonstrates respect for the victims, institutions where the harm occurred can also improve their reputation through an apology. This objective has certainly prompted religious institutions to proffer public apologies for actions that damaged their reputations; the most recent of these being issued by the Church of England for abuse in the Diocese of Chichester.[28] Other organisations are also beginning to realise the importance of apologies and in the last few months we have seen apologies issued by Addenbrooke Hospital[29] and the Scout Association.[30]

The potential that candour and apology have as a reparatory function for victims is, at present, overshadowed by an unfounded preoccupation with the fear that open disclosure and an apology will be seen as an admission of negligence and lead to litigation and an adverse liability determination. However, for most people litigation is the last resort and a response to being antagonised by a lack of transparency and little information about what happened and why. A study in relation to clinical negligence claims found that 37 per cent of claimants who brought claims against their doctors would not have done so if they had received an apology and an explanation for their injury.[31]

Apologies are discouraged in case the individuals making the apology incriminate themselves and the courts interpret their apology as an admission of liability. However, as the NHSLA's guidance states "saying sorry is not an admission of legal liability; it is the right thing to do"[32] and in support of this the NHSLA has reiterated its commitment to indemnifying organisations that apologise. Furthermore, the Compensation Act 2006 explicitly states that an apology "shall not of itself amount to an admission of negligence or breach of statutory duty".[33]

Whether an apology will have any persuasive force will depend, ultimately, on what is said and whether this helps to establish any of the elements of the case that must be proven.[34] It is difficult to see how an apology on its own can sufficiently determine liability; even in the presence of an apology, the claimant will still have to satisfy the burden of proof and the court will need to look at all the facts of the case and review the strength of the evidence as a whole. Cases in the United States have highlighted this very point; where apologies were relied on as sole evidence of liability the courts ruled that this evidence was insufficient to prove liability.[35]

Conversely, where a claim is pursued, an apology can be beneficial to defendants; courts treat apologies favourably and they can be a mitigating factor in assessing the level of damages to be awarded. Further, apologies can play an important role in facilitating negotiations by influencing a victim's willingness to accept a settlement and this in turn can minimise the costs of litigation. As Stephen Goldberg et al point out "the first lesson of dispute resolution that many of us learn as children is the importance of apologising"

[28] *http://www.bbc.co.uk/news/uk-23215388*.
[29] *http://www.bbc.co.uk/news/uk-england-cambridgeshire-29313281*.
[30] *http://www.theguardian.com/society/2014/dec/10/scout-association-apologises-for-child-abuse*.
[31] "Why do people sue doctors? A study of patients and relatives taking legal action" Charles Vincent et al. 343 *The Lancet* (1994).
[32] *http://www.nhsla.com/CurrentActivity/Pages/News.aspx*.
[33] Compensation Act 2006, Pt 1, s.2.
[34] "Apologising for Social Wrongdoing: Social, Psychological and Legal Considerations" Susan Alter (1999).
[35] See, for example, *Sutton v Calhoun* 593 F.2d 127 and *Senesac v Associates in Obstetrics & Gynaecology* 449 A.2d 900.

and they highlight further that "many mediators have had one or more experiences in which an apology was the key to a settlement that might otherwise not have been attainable".[36]

From my experience in dealing with child abuse claims, defendants also argue against giving an apology on the basis that the officials who were responsible at the time when the abuse occurred have long since vacated their offices, so the institution has nothing to apologise for. However, in my opinion, this argument is baseless. The apology, whether at the time or years later, is made by a representative or agent of the offending institution who may not be personally implicated in what happened but who, by virtue of the office that he or she holds, has a certain responsibility.[37]

Governments and other public organisations often apologise for historical wrongdoings, where the wrongs were committed by their predecessors. A striking example[38] of this follows from what took place in Canada after the Japanese attack on Pearl Harbour in December 1941. The Allies were concerned about the presence of Japanese nationals in North America, and Canada used the War Measures Act 1914 to take action against Japanese Canadians; thousands of men, women and children of Japanese origin were removed from their homes, held in internment camps and deprived of their property. In the 1970s, the Japanese Canadian community began to seek redress. In September 1988, over 40 years after the event, the Canadian Government formally apologised for the actions of the past. Prime Minister Brian Mulroney stated "I speak for members on all sides of the House today in offering to Japanese Canadians the formal and sincere apology of this Parliament for those past injustices against them, against their families, against their heritage".[39]

The importance of this apology to the Japanese Canadians and the role it played in their healing process was captured by the writer Joy Kogawa, who lived in the camps as a child, when he stated "a lot of us felt like we worked hard for the apology … it's been acknowledged that what the government did was racist, and it was wrong, and it's been put right; we can now cross over and we can no longer claim we are victims".[40]

The conclusion that apologies have a positive effect on the settlement of cases has led to the enactment of apology legislation in various jurisdictions around the world, including the United States, Australia and Canada, to primarily address concerns about apologies leading to liability. Such legislation, which encourages apologies, is gaining support as more people recognise the moral, social and legal justifications for apologies, and the need to include them within the context of negotiated settlements in certain cases.

Not every victim will feel that an apology would be of benefit to them, but those who do deserve their request to be given serious consideration. When faced with such a request, instead of an outright refusal, which compounds a victim's distress, defendants should appreciate the significance of their moral, and now, in some instances, their legal obligation to apologise and carefully contemplate how the apology might influence a variety of decisions and the final outcome.

Conclusion

I believe that the introduction of a duty of candour and the recognition of apologies as a key element of that duty is an overdue step in the right direction. It is particularly relevant to the future of child abuse claims, not only in bringing abuse which takes place in a health or social care setting to light but also because it provides the impetus needed for reforms in this area too.

It is imperative that we foster a culture in which those responsible for the care of the most vulnerable people in our society are encouraged and supported, and even rewarded, to be candid and acknowledge

[36] "Dispute Resolution: Negotiation, Mediation and Other Processes" Stephen B Goldberg et al. (3rd edition 1999).
[37] "Apologising for Social Wrongdoing: Social, Psychological and Legal Considerations" Susan Alter (1999).
[38] Another striking example is East Germany's apology in 1990 to Israel and to Jewish men, women and children for the Holocaust.
[39] "Relocation to Redress: The Internment of the Japanese Canadians" — *http://www.archives.cbc.ca*.
[40] "A Dark History in Canada: Japanese Internments" Audrey Magazine (November 2006).

the need to apologise where their lack of care has caused harm. The ultimate corollary of this culture can only be beneficial, for such openness is the first step towards the healing process for victims and the restoration of trust in health and social care institutions.

Without A Safety Net: Litigating Employers' Liability Claims after the Enterprise Act[1]

Andrew Roy[*]

Common law rights; Defences; Employers' liability claims; EU law; Health and safety offences

A year on from the introduction of the Enterprise and Regulatory Reform Act 2013, barrister Andrew Roy looks at the how employers' liability claims are now being litigated and assesses the impact the reform has had.

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Introduction

Enterprise and Regulatory Reform Act 2013 s.69 repealed Health and Safety at Work etc. Act 1974 ("HSWA 1974") s.47. The latter accorded a civil right of action for a breach of the regulations created under the HSWA 1974 except so far as the regulations themselves provide otherwise. Section 69 reverses this; breaches are not actionable except so far as the regulations themselves provide otherwise (and virtually none do). Breaches of health and safety regulations committed after October 1, 2013 are therefore prima facie no longer actionable. (The repeal is not retrospective.)

Statutory duties have been the centerpiece of employer liability ("EL") litigation for many years. It follows that s.69 demands a profound reconsideration of how such claims should be litigated.

I will seek in this paper to:

- identify the likely effects of s.69;
- identify possible means for claimants to circumvent or mitigate the effects of s.69, and possible counter-arguments for defendants; and
- draw together some conclusions.

The normal preliminary health warning: the paper does not purport to be comprehensive or definitive in its coverage of what is a large and complex topic; it will seek to set out the main principles and the practice points arising from them; it cannot be a substitute for a close study of the relevant statutory and case law, and application of the law to the facts of any particular case.

The likely effects of Enterprise and Regulatory Reform Act 2013 Section 69

The prima facie position following s.69 is that claimants will no longer be able to rely upon statutory duties and will therefore have to resort to common law (or other general generally applicable duties such as those under the Occupiers' Liability Act 1957). Statutory duties under the HSWA 1974 are generally much more potent than equivalent common law or other duties.

There are basically two categories of regulations: those imposing strict liability and those imposing qualified liability.

[1] This article is based on a lecture given by the author which is, in turn, updated from an earlier talk and paper composed jointly with Vanessa Cashman of 12 Kings Bench Walk.

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Strict liability regulations essentially mandate that a certain state of affairs must exist. For example Provision and Use of Work Equipment Regulations r.5(1) stipulates that "Every employer shall ensure that work equipment is maintained in an efficient state, in efficient working order and in good repair".

If this state of affairs does not exist the defendant is in breach, irrespective of whether or not he is at "fault" in the normally understood sense (albeit value judgments can be incorporated by terms such as "safe").

The potency of such regulations is well illustrated by *Stark v Post Office*.[2] The claimant was injured due a defect in his bicycle. The defect was a latent one which the defendant could not possibly have discovered. There, therefore, was no case in negligence. There was, however, a breach of the absolute duty under the predecessor to Provision and Use of Work Equipment Regulations r.5(1). This claim would undoubtedly fail if the accident were suffered today.

All other regulations imposed qualified liability. The normal qualification is that of reasonable practicability or (more rarely) practicability. For example, Manual Handling (Operations) Regulations r.4 stipulate:

> "(1) Each employer shall - (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 …"

Whilst not quite as potent as strict liability regulations, these are nevertheless very difficult allegations to defend for several reasons.

The burden is on the defendant to plead and prove that compliance was not reasonably practicable; *O'Neil v DSG Retail Ltd*.[3] The breadth of this burden was described thus by Longmore LJ in *Ghaith v Indesit Company UK Ltd* :[4]

> **"Appropriate steps to reduce risk to lowest reasonable practicable level**
>
> 20. Here there is no doubt that the onus is firmly on the employer to show that he took all reasonable practicable steps to reduce the risk. It is a burden that is inevitably difficult to discharge. Of course it is, as Smith LJ says, open to an employee to suggest ways in which the risk could have been reduced (and Mr Ghaith has done so) but there is no obligation on the employee to do so."

The burden is a heavy one. The defendant has to show a "gross disproportion" between the risk and the imposition: *Edwards v National Coal Board*.[5] The burden where the criterion is "practicability" alone is heavier still. Basically, if a measure is possible in light of existing knowledge, it is practicable.

The burden moreover extends to causation. See *Ghaith*:[6]

> **"Causation**
>
> 23. This is not a separate hurdle for the employee, granted that the onus is on the employer to prove that he took appropriate steps to reduce the risk to the lowest level practicable. If the employer does not do that, he will usually be liable without more ado. It is possible to imagine a case when an employer could show that, even if he had taken all practicable steps to reduce the injury (though he had not done so), the injury would still have occurred e.g. if the injury was caused by a freak accident or some such thing; but the onus of so proving must be on the employer to show that that was the case, not on the employee to prove the negative

[2] *Stark v Post Office* [2000] I.C.R. 1013 CA (Civ Div).
[3] *O'Neil v DSG Retail Ltd* [2002] EWCA Civ 1139; [2003] I.C.R. 222.
[4] *Ghaith v Indesit Company UK Ltd* [2012] EWCA Civ 642; [2012] I.C.R. D34.
[5] *Edwards v National Coal Board* [1949] 1 K.B. 704 CA.
[6] *Ghaith* [2012] I.C.R. D34 at [23].

> proposition that, if all possible precautions had been taken, he would not have suffered any injury."

Thus, even these qualified duties are much more onerous than any common law equivalent. See for example *Blair v Chief Constable of Sussex*,[7] where it was held that the defendant was liable under the Personal Protective Equipment Regulations 1992 for failing to provide boots stronger than standard issue during a motorcycle training exercise on the basis that it had failed to prove it was not practicable to so provide. Longmore LJ at [14] made clear, in mournful terms, that the claim succeeded only because of the stringency of the regulations, and would have failed at common law:

> "I regretfully conclude not merely that the judgment in favour of the Chief Constable relating to breach of the 1992 Regulations cannot be supported but that he has not discharged the obligation (which is on him) of showing that he did comply with the requirements of the Regulations. It was possible (and not impractical) to prevent significant injury to trainees by proving them with stronger boots than the Alt-berg boots and the Chief Constable is therefore liable. I emphasize that this is not to say that the Chief Constable was in any way negligent at common law. Likelihood or foresight of injury does not come into the matter. Nor is it of any relevant to consider whether it would be sensible (as opposed to impractical) to provide boots such as motocross boots to trainees who would be unlikely to be wearing them in the course of their operational duties as police constables. The 1992 Regulations do not address matters of that kind. This is a sea-change from the old concepts of common law negligence. Whether that is a good or bad thing is not for this court to say, since the 1992 Regulations are now the law of the land."

By contrast, the starting point at common law is that the burden is on the claimant to prove:

- breach of duty, which entails proving:
  - — that there was a sufficient known danger to place the defendant under a potential obligation to take steps to ameliorate the risk; and
  - — that the defendants' actions fell below what was reasonable; and
- causation.

In many cases this will be a difficult burden to discharge. Many of the relevant matters, such as the operation of a piece of equipment, will be within the defendant's knowledge rather than the claimant's. It follows that the overall effect of s.69 is to deprive claimants of potent causes of action, thus forcing them to rely upon more easily defensible allegations. The bottom line is therefore that EL cases as a whole will be significantly more difficult to win. Case such as *Stark* and *Blair* would simply not be winnable in light of s.69. Many others will be rendered significantly less meritorious.

Circumventing or mitigating the effects of section 69

Conventional common law principles

There will be cases where the deployment of conventional common law principles can lead to the same result as breach of statutory duty. There will be circumstances where the burden of proof shifts at common law. See *Davies v Global Strategies Group (Hong Kong) Ltd*:[8]

> "… once a claimant shows that he was exposed to a risk which was capable of being reduced there is an evidential burden on the defendant employer to show why the reduction was not achieved."

[7] *Blair v Chief Constable of Sussex* [2012] EWCA Civ 633; (2012) 156(20) S.J.L.B. 31; [2012] I.C.R. D33.
[8] *Davies v Global Strategies Group (Hong Kong) Ltd* [2010] EWCA Civ 648 at [20] per Sir Anthony May.

This is obviously helpful to claimants. However, it is not as strong a burden shift was would occur under statute. The common law burden is much more easily discharged by the defendant than the statutory equivalent of (reasonable) practicability and it remains for the claimant to establish causation.

Defendants would be well advised to obtain their own evidence specifically directed at proving why more could not reasonably have been done to reduce the risk. That the burden is a lighter one should not mean that anything other than the best evidence available should be obtained.

However, the crucial point remains when it comes to assessing the merits of the defence and the ultimate result that any common law burden is in practice likely to be much easier to discharge than the statutory equivalent. The claim in *Davies* itself failed as the defendant established (albeit with rather unsatisfactory evidence) why it was reasonable not to fit bullet-proof windscreens to vehicles operating in Iraq.

Moreover, once breach has been established there may be arguments for a shift in the evidential burden as regards causation. See *Phethean-Hubble v Coles*:[9]

> "In these circumstances I do not consider that it is necessary for the claimant to prove positively the negative proposition that the accident would not have occurred if the defendant had been going at a safe speed; realistically it should be for the defendant (who has already been found to be in breach of duty) to show that even if he had been driving at a non-negligent speed, the accident would still have occurred."

Defendants can—and should—argue that this is an unconventional approach to causation which is not generally to be followed.

Even when not ostensibly placing any burden on the defendant, the courts are apt to take a benevolent approach to causation, and will often readily infer that the steps the employer should have taken would have been effective even if the claimant cannot show precisely how.[10]

There will also be cases where there is a composite shift as regards breach and causation (i.e. *res ipsa loquitur*). To take a well known example, it was established in *Ward v Tesco Stores Ltd*[11] that presence of a hazard which ought not to have been there (in that case yoghurt on the floor) gave rise to a prima facie inference of negligence placing an evidential burden on the occupier to show that the hazard had been there for too short a time to have been made safe despite the exercise of reasonable care. Recent cases, such as *Dawkins v Carnival Plc*[12] and *Hassan v Gill*,[13] demonstrate that this can a very difficult burden for a defendant to discharge.

In most cases this will render otiose the statutory duty under Workplace (Health, Safety and Welfare) Regulations 1992 r.12(3) to take all reasonably practicable steps to see that the workplace floor is free from spillages and so forth. However, not in all. For example, *Ward* would have no application in respect of naturally occurring slipping hazards such as rainwater; *Kiapasha (t/a Takeaway Supreme) v Laverton*,[14] whereas r.12(3) would. Nor does it apply where the hazard is not proved to be a regularly accurring one; *Loughweed v On The Beach Ltd* [2014] EWCA civ 1538. Defendants should therefore be astute to identify basis for distinguishing unfavourable authorities.

The common law is a flexible instrument that seeks to do justice in the given circumstances. The courts might well be inclined to partially address the balance by adopting an employee-friendly approach to common law liability. I can see, for example, significant force in the argument that the principle of *res ipsa loquitur* should apply in the event of work equipment malfunctioning. This indeed is already established

[9] *Phethean-Hubble v Coles* [2012] EWCA Civ 349; [2012] R.T.R. 31 at [90] per Longmore LJ.
[10] *Vaile v Havering LBC* [2011] EWCA Civ 246; [2011] E.L.R. 274 at [29]–[35].
[11] *Ward v Tesco Stores Ltd* [1976] 1 WLR 810 CA (Civ Div).
[12] *Dawkins v Carnival Plc (t/a P & O Cruises)* [2011] EWCA Civ 1237; [2012] 1 Lloyd's Rep. 1.
[13] *Hassan v Gill* [2012] EWCA Civ 1291; [2013] P.I.Q.R. P1.
[14] *Kiapasha (t/a Takeaway Supreme) v Laverton* [2002] EWCA Civ 1656; (2002) 146 S.J.L.B. 266.

as being so when a motor vehicle malfunctions.[15] Whilst there would be cases (such as *Stark*) where the defendant could discharge the evidential burden thereby arising, in many this would carry the day.

There is also no doubt that a duty to risk assess arises at common law.[16] Whilst this can never by itself be decisive (the presence or absence of a risk assessment will never by itself be directly causative), it can carry a claimant a long way.

There can also be adverse inferences drawn against a defendant who is obliged to create and retain documents (such as risk assessments or accident reports) but fails to do so.[17] This does not depend upon the duty being actionable at statute.

More basically, there will be cases were the allegations of negligence are sufficiently strong that statutory duty is rendered otiose. For recent examples see *Quinn v Keenan*[18] [2013] NIQB 55 (merely advising workers to seek help before lifting heavy weights did not discharge the common law duty in circumstances where workers were commonly lifting weights on their own, the statutory obligations added nothing to the common law duty) and *Wembridge Claimants v Winter*[19] (multiple system and command failures by a fire service).

In many cases then, application of conventional common law principles will be sufficient to carry the day. However, in other cases they will not. There will, for example, be cases where the defendant is able to show on an open-textured test why a given risk was not reduced (*Davies* itself being one such) yet would not have been able to discharge the heavier burden of (reasonable) practicability. It will often, therefore, be necessary for claimants to consider what other arguments might be available.

Enhanced Common Law Duties

There are two viable bases upon which it could be said that EL common law duties should be construed in an employee-friendly fashion. First, such an interpretative imperative arguably arises under European law. National courts are under an obligation to construe national legislation in accordance with European law. In *Marleasing SA v La Comercial Internacional de Alimentacion SA*[20] it was held that the national court should interpret the law "as far as possible in light of the wording and the purpose of the Directive in order to achieve the result referred to".

There seems no reason in principle why this rationale should not also apply to common law. It certainly applies to other statutes. As per *Marleasing*,[21] although:

> "The question whether an interpretation is in conformity with a directive usually arises in relation to provisions of national law which are specifically intended to implement the directive concerned (…) there is no reason to restrict the requirement that an interpretation must be in conformity with a directive to that situation."

Consideration of the Occupiers' Liability Acts, which are essentially co-extensive with common law, illustrate how it would make little sense to apply a purposive interpretation to legislation but not to common law.

The overarching Directive is the OSH Framework Directive.[22]Article 137 sets out that the objective of the European Community is to encourage "improvement in particular of the working environment to protect workers' health and safety".

[15] *Henderson v Henry E Jenkins* [1970] A.C. 282 HL.
[16] *Uren v (1) Corporate Leisure (UK) Ltd (2) Ministry of Defence* [2011] EWCA Civ 66; (2011) 108(7) L.S.G. 16.
[17] *Keefe v Isle of Man Steam Packet Co Ltd* [2010] EWCA Civ 683.
[18] *Quinn v Keenan* [2013] NIQB 55 QBD.
[19] *Wembridge Claimants v Winter* [2013] EWHC 2331 (QB).
[20] *Marleasing SA v La Comercial Internacional de Alimentacion SA* (C-106/89) [1990] E.C.R. I-4135; [1992] 1 C.M.L.R. 305.
[21] *Marleasing* [1992] 1 C.M.L.R. 305 at [9]
[22] Directive 89/391 on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ L183/1.

The Directive contains:[23]

> "general principles concerning the prevention of occupational risks, the protection of safety and health, the elimination of risk and accident factors, the informing, consultation, balanced participation in accordance with national laws and/or practices and training of workers and their representatives, as well as general guidelines for the implementation of the said principles."

In summary, the Directive sets out that employers in Member States are to:

- ensure health and safety;
- take necessary measures;
- be alert to the need to adjust measures;
- evaluate risks;
- adapt to technical progress; and
- give appropriate instructions.

The "daughter directives" of the Framework Directive correspond to the six-pack regulations, and apply similar principles to specific areas:

European Directive	**UK Regulations**
Framework Directive 89/391	Management of Health and Safety at Work Regulations 1999
Workplace (the First) Directive 89/654	Workplace (Health, Safety and Welfare) Regulations 1992
Work Equipment (the Second) Directive 89/655 (now 2009/104/EC)	Provision and Use of Work Equipment Regulations 1992
Personal Protective Equipment (the Third) Directive 89/656 (now 96/58)	Personal Protective Equipment at Work Regulations 1992
Manual Handling of Heavy Loads (the Fourth) Directive 90/269	Manual Handling Operations Regulations 1992
Display Screen Equipment (the Fifth) Directive 90/270	Health and Safety (Display Screen Equipment) Regulations 1992

The contents of the daughter directives correspond in large part to the regulations with which we have become familiar. They are still subject to qualifications of "suitable" and "appropriate" and so forth.

Although consideration would need to be given to the individual Directive, they all share the aim of improving health and safety.[24] See also *Stark v Post Office*[25] and in particular Waller LJ's apparent approval of the following argument (at 1019):

> "… both the provisions of national law, under the ultra vires doctrine, and the rules of construction derived from the E.E.C., lean heavily against the down-grading of existing standards. It follows that the circumstances in which a national court will find itself obliged to give effect to Regulations that do permit such a lowering of standards of protection are virtually inconceivable."

The Directives thus all tend to tell against s.69 being legitimately deployed to justify a sudden and serious reduction in health and safety standards.

Secondly, there are strong arguments that on the application of domestic common law principle the regulations should inform and thus enhance the standard of care. It should be remembered that the regulations have not been repealed; they still exist as a criminal framework and breaches may have criminal consequences.

[23] Directive 89/391 art.1(2).
[24] See *Robb v Salamis* [2006] UKHL 56; [2007] 2 All E.R. 97 at [16] per Lord Hope.
[25] *Stark* [2000] I.C.R. 1013 at 1019, 1022 per Waller LJ.

Reasonableness is a contextual concept. Arguably there is nothing unreasonable in requiring a defendant to do at civil law what he is required to do by criminal law in any event. As Lord Reid said in *Boyle v Kodak*:[26] "Employers are bound to know their statutory duty". See also *Bux v Slough Metals Ltd*:[27]

> "… it is not too much to expect of the employer that he should acquaint himself with the statutory provisions applicable to the work which he employs men to do and do his best to make sure that the men he employs to do the work know of them and understand them and the duties which they impose."

An extension of this principle can be seen in *Butt v Inner London Education Authority*,[28] where a student at a technical college was injured by an unfenced printing machine. It was held that, although the Factories Act 1961 was inapplicable (school not being a factory), it was treated as analogous so as to establish the standard in negligence. It is noteworthy that the common law duty was here informed by a statutory duty which was not merely non-actionable, but not even applicable to begin with.

This applies equally to regulations made under HSWA 1974. See *Griffiths v Vauxhall Motors*[29] in support of this proposition in respect of the pre-1999 non-actionable statutory duty under the Management of Health and Safety at Work Regulations 1992 (thus the same non-actionable duty as post-October 2013) to undertake risk assessments. The regulation, although non-actionable "helps to identify the standard of care to be expected of a reasonable employer".[30] Similarly, it was held in *Spencer v Boots The Chemist Ltd*[31] that the failure to comply with a non-actionable duty to risk assess could constitute evidence of negligence.

Perhaps ironically, support for this enhanced approached to common law duties mitigating the effects of s.69 can be found in government pronouncements in respect of s.69 itself. See the Ministerial Statement in the House of Lords from Viscount Younger, made on April 22, 2013:

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

It is important to note in this context that the converse is not true. That a defendant might have fulfilled its statutory duties (actionable or otherwise) does not by itself indicate the absence of negligence or otherwise provide any defence.[32]

Moreover, secondary materials such as any HSE guidance and any Approved Code of Practice ("ACOP"), whose function is to provide practical guidance to those who must comply with the regulations, are also likely to inform the standard of care, just as in other contexts do the relevant British Standards.[33]

It is well established that an employer is obliged to keep abreast of such literature: see e.g. *Cartwright v GKN Sankey*.[34] A defendant who culpably fails to do so is likely to be adjudged negligent.

Thus the Control of Lead at Work Regulations 1980 and its accompanying ACOP were used to set the standard of care in negligence, see *Hewett v Alf Brown's Transport Ltd*.[35]

[26] *Boyle v Kodak* [1969] 1 W.L.R. 661 HL at 668.
[27] *Bux v Slough Metals Ltd* [1973] 1 W.L.R. 1358 CA (Div Div) per Stephenson LJ.
[28] *Butt v Inner London Education Authority* (1968) 66 L.G.R. 379 CA (Div Div).
[29] *Griffiths v Vauxhall Motors* [2003] EWCA Civ 412.
[30] Per Clarke LJ at [22].
[31] *Spencer v Boots the Chemist Ltd* [2002] EWCA Civ 1691; (2002) 146 S.J.L.B. 251.
[32] *Bux* [1973] 1 W.L.R. 1358; *Franklin v Gramophone Co* [1948] 1 K.B. 542 CA.
[33] *Ward v Ritz Hotel (London) Ltd* [1992] P.I.Q.R. P315 CA (Civ Div).
[34] *Cartwright v GKN Sankey* (1973) 14 K.I.R 349 CA (Civ Div).
[35] *Hewett v Alf Brown's Transport Ltd* [1991] I.C.R. 471 CA (Civ Div).

In a similar vein, manufacturers' guidance and the like could in some cases prove decisive.

It needs to be emphasised however—and defendants should do so—that, in contrast to the regulations, such materials are not prescriptive. Non-compliance does not without more establish liability. If there were a good reason from deviating from the recommended practice there would be no negligence. Again, defendants who can adduce reasonable quality evidence are likely to be in a good position.

Equally, an otherwise unremarkable and relatively innocuous state of affairs will not become actionable simply due to non-compliance with applicable guidance. A useful case for defendants on this point is *Green v Building Scene Ltd*[36] where the Court of Appeal held that the absence, contrary to the British Standards, of handrail did not render the defendant liable when the claimant slipped on stairs apropos of nothing.

Another point for defendants is that absent provisions for changing standards relating to a structural feature of an existing building (e.g. the removal of asbestos), predominantly there is no duty to engage in a constant updating of existing premises; *Japp v Virgin Holidays Ltd* [2013] EWCA civ 1371; [2014] P.I.Q.R. P8. Thus it would have to be shown that the premises were non-compliant at the time of construction by reference to the standards then applicable.

It thus remains to be seen precisely how far such arguments take claimants. They obviously cannot go so far as to effectively render the statutory duties duty actionable by the back door under the guise of common law. This would be to frustrate parliamentary intention. Such arguments could well prove winning ones for defendants, albeit that the precise nature of parliamentary intention is itself likely to be a matter for argument given that s.69 goes far beyond what was originally envisaged, which was simply to remove strict liability in cases where the employer could not reasonably have prevented injury (see the Ministerial Statement above).

It may well be that the regulations at common law merely inform the standard of care (what is generally expected of the employer). This in contrasted with the regulations when they were directly actionable which went further in prescriptively determining what constitutes breach (whether the employer is liable irrespective of objective or contextual standards of reasonableness).

In summary then:

- There are strong arguments that the effects of s.69 might be mitigated by a claimant-friendly application of enhanced common law duties.
- There are counter arguments available to defendants to limit the extent of such enhancements.
- Irrespective of precisely how these arguments are resolved, enhanced common law duties will fall well short of the potency of the pre-s.69 statutory duties.

Direct application of European legislation

The European Directives can be directly actionable against an emanation of the State.[37] Detailed consideration of what constitutes an emanation of the State is beyond the scope of this paper. Broadly speaking, if a body provides a public service and is under the control of the State it is likely to be an emanation of the State.[38] The following would thus qualify.

- Police authorities; *Johnston v Chief Constable of the Royal Ulster Constabulary*.[39]
- Public health bodies; *Marshall v South West Area Health Authority*.[40]
- Local or regional authorities; *Fratelli SpA v Comune di Milano*.[41]

[36] *Green v Building Scene Ltd* [1994] P.I.Q.R. 259 CA (Civ Div).
[37] *Factortame Ltd v Secretary of State for Transport* [1990] 2 A.C. 85 HL.
[38] *Foster v British Gas* [1991] 1 Q.B. 405 ECJ.
[39] *Johnston v Chief Constable of the Royal Ulster Constabulary* [1987] Q.B. 129 ECJ.
[40] *Marshall v South West Area Health Authority* [1986] Q.B. 401 ECJ.
[41] *Fratelli Costanzo SpA v Comune di Milano* (103/88) [1989] E.C.R. 1839; [1990] 3 C.M.L.R. 239 ECJ.

- Tax authorities; *Becker v Finanzamt Münster-Innenstadt*.[42]
- A nationalised corporation under state control; *R v British Coal Corp, ex p Vardy*.[43]
- A privatised water company; *Griffin v South West Water Services Ltd*.[44]
- The governing body of a voluntary aided school; *NUT v St Mary's Church of England (Aided) Junior School*.[45]
- Statutorily established or supported professional bodies; *R v Royal Pharmaceutical Society of Great Britain, ex p Association of Pharmaceutical Importers*.[46]

There is thus authority (albeit non-binding) that the Manual Handling Directive[47] is directly actionable against emergency services.[48]

It remains to be seen whether and to what extent such arguments will prove effective or add significantly to common law duties. Not all Directives (or all parts of all Directives) are directly effective.[49] Even when they are, they may be subject to significant exclusions. To take one pertinent example, para.2.2(c) of the Personal Protective Equipment Directive[50] specifically excludes the police from its application. It would therefore have been of no assistance in *Blair*.

Defendants moreover can counter such arguments by reference to Framework Directive art.5(4):

> "This Directive shall not restrict the option of Member States to provide for the exclusion or the limitation of employers' responsibility where occurrences are due to unusual and unforeseeable circumstances beyond the employers' control, or to exceptional events, the consequences of which could not have been avoided despite the exercise of all due care."

It could plausibly be argued that this simply restates the principles of negligence, and thus that requiring claimants to rely on common law does not constitute an implementation failure. Support for this can be found in *Commission of the European Communities v United Kingdom*.[51] There the European Court of Justice held that the UK was not in breach of the Framework Directive by qualifying the duties by reference to reasonable practicability; there was no requirement to implement a no-fault regime.

This decision also reflects the general principle that only a sufficiently serious and manifest breach of European law will give rise to damages.[52] This in turn reflects that Member States have a reasonably wide margin of appreciation when implementing directives. This gives rise to a potent argument for defendants that by retaining criminal liability for breaches of the regulations the UK has fulfilled its obligations, especially when one considers that the directives are aimed primarily at preventing injury, as opposed to providing compensation after the event.

Sayers v Cambridgeshire CC[53] illustrates well the difficulties claimants are likely to face. This was a stress at work claim. In addition to common law allegations the Claimant relied upon the Working Time Regulations 1998 and their parent European legislation Working Time Directive 93/10[54] (the defendant clearly being an emanation of the State). He argued that even if he could not establish foreseeability and

[42] *Becker v Finanzamt Münster-Innenstadt* (8/81) [1982] E.C.R. 53; [1982] 1 C.M.L.R. 499 ECJ.
[43] *R. v Secretary of State for Trade and Industry Ex p. Vardy* [1993] 1 C.M.L.R. 721.
[44] *Griffin v South West Water Services Ltd* [1995] I.R.L.R. 15 Ch.D.
[45] *NUT v St Mary's Church of England (Aided) Junior School* [1997] 3 C.M.L.R. 630.
[46] *R. v Royal Pharmaceutical Society of Great Britain Ex p. Association of Pharmaceutical Importers* (266/87) [1990] 1 Q.B. 534 ECJ.
[47] 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 Article 16 (1) of Directive 89/391) [1990] OJ L156/9.
[48] *King v Sussex Ambulance NHS Trust* [2002] EWCA Civ 953; [2002] I.C.R. 1413 and *Peck v Chief Constable of Avon and Somerset* [2000] C.L.Y. 2971 CC (Bristol).
[49] *Johnston v Chief Constable of the Royal Ulster Constabulary* (222/84) [1987] Q.B. 129 ECJ.
[50] Directive 89/686 on the approximation of the laws of the Member States relating to personal protective equipment [1989] OJ L399/18.
[51] *Commission of the European Communities v United Kingdom* (C-127/05) [2007] 3 C.M.L.R 20.
[52] *Kobler v Austria* (C-224/01) [2004] Q.B. 848 ECJ.
[53] *Sayers v Cambridgeshire CC* [2006] EWHC 2029 (QB); [2007] I.R.L.R. 29.
[54] Directive 93/104 concerning certain aspects of the organization of working time [1993] OJ L307/18.

thus negligence, the fact that he had worked beyond the hours permitted by statute by itself gave rise to a freestanding breach.

Ramsey J rejected these arguments. He held, at [282], that as a matter of construction the 1998 Regulations did not confer a civil right of action. He also held, at [289], that they adequately implemented the 1993 Directive so as to preclude the claimant relying upon breach of European law. In coming to these conclusions he relied in particular upon the fact that the regulations contained two methods of enforcement in the form of criminal prosecution and a complaint to the employment tribunal.

Sayers might appear to be distinguishable in that most other regulations do not provide for a complaint to the Employment Tribunal and thus a civil remedy. However, *R. (on the application of United Road Transport Union) v Secretary of State for Transport*[55] puts pay to that argument. The Road Transport (Working Time) Regulations 2005 (stipulating rest time for lorry drivers) do not provide for such complaints, the only sanction for breach being a criminal one.

The union sought to challenge this omission by judicial review arguing that it:

- infringed the principle of equivalence, by failing to provide a mobile worker with access to an employment tribunal, when such access was provided to other workers under the 1998 Regulations; and
- infringed the principle of effectiveness, since in practice it was impossible for a mobile worker to exercise his rights under the regulations, and thus did not constitute adequate compliance with the parent European legislation Directive 2002/15.

The Court of Appeal rejected these arguments, holding that the Directive had in terms left it to Member States to lay down rules on penalties in implementation, and that the availability of criminal penalties and a potential claim against the employer for breach of implied duty in the contract of employment were sufficient.

It is difficult to see how a claimant would distinguish these cases.

It must also be recognised that the courts are likely to find unattractive the health and safety apartheid which would arise if the extent of health and safety protection varied greatly between the privately and the publicly employed.

It can thus be seen that there are extremely potent arguments for defendants against the direct application of European legislation.

My overall view is that:

- for claimants, whilst allegations of direct breach are worth pursuing in conjunction with other viable allegations, they are unlikely to be sufficiently strong to pursue on their own; and
- for defendants, in cases where there is otherwise a strong defence, should not be daunted by such allegations.

I would emphasis that this is largely unexplored territory and other practitioners take a different view. See for example N. Tompkins, "Civil health and safety law after the Enterprise and Regulatory Reform Act 2013" [2013] J.P.I.L. 203.

Francovich actions

If national law is not or cannot be interpreted such that it gives effect to European law, or an individual is precluded from relying on the doctrine of direct effect in a claim because it is not against an emanation

[55] *R. (on the application of United Road Transport Union) v Secretary of State for Transport* [2013] EWCA Civ 962; [2014] R.T.R. 9.

of the State, there remains a possibility of suing the state itself (i.e. the UK) for failing properly to implement the relevant Directive.[56]

This gives a potential alternative remedy for claimants. For defendants (unless you are the Government itself), at this point the claim is no longer your problem.

However, such a remedy is only available in limited circumstances:

- the rule breached must have been intended to confer rights on individuals;
- the breach must be sufficiently serious; and
- the failure to implement the Directive must have caused the loss to the individual.

I am sceptical that many claims would succeed on this basis for the reasons set out above, albeit I repeat the caveat. Again *Sayers* illustrates the difficulties. The claim relied upon the alleged non-implementation of the Working Time Directive as the basis for what was framed as a *Francovich* claim. As per above, Ramsay J rejected the allegation of inadequate implementation.

Also note that *Francovich* actions are subject to the long but strict six-year period from date of injury under Limitation Act 1980 s.2.[57] There is no jurisdiction to extend time under s.33.

Other duties

There may be applicable statutory duties not enacted under the HSWA 1974, and thus not affected by s.69. My researches thus far have uncovered surprisingly few of these.

I have identified only one still in force, and it remains in force only in respect of an absurdly limited class of persons, namely the police and, bizarrely, registrars of births and deaths. Office, Shops and Railway Premises Act 1963 s.23(1) provides that:

> "No person shall, in the course of his work in premises to which this Act applies, be required to lift, carry or move a load so heavy as to be likely to cause injury to him."

The Act in fact applies to quite of lot of premises, as can be seen from s.1:

> **"Premises to which this Act applies.**
>
> (1) The premises to which this Act applies are office premises, shop premises and railway premises, being (in each case) premises in the case of which persons are employed to work therein.
>
> (2) In this Act—
>
> (a) "office premises" means a building or part of a building, being a building or part the sole or principal use of which is as an office or for office purposes;
>
> (b) "office purposes"includes the purposes of administration, clerical work, handling money and telephone and telegraph operating; and
>
> (c) "clerical work"includes writing, book-keeping, sorting papers, filing, typing, duplicating, machine calculating, drawing and the editorial preparation of matter for publication;
>
> and for the purposes of this Act premises occupied together with office premises for the purposes of the activities there carried on shall be treated as forming part of the office premises.
>
> (3) In this Act—

[56] *Francovich v Italy* (C-6/90) [1991] E.C.R. I-5357; [1993] 2 C.M.L.R. 66.
[57] *Spencer v Secretary of State for Work and Pensions* [2008] EWCA Civ 750; [2009] Q.B. 358.

(a) 'shop premises' means —
  (i) a shop;
  (ii) a building or part of a building, being a building or part which is not a shop but of which the sole or principal use is the carrying on there of retail trade or business;
  (iii) a building occupied by a wholesale dealer or merchant where goods are kept for sale wholesale or a part of a building so occupied where goods are so kept, but not including a warehouse belonging to the owners, trustees or conservators of a dock, wharf or quay;
  (iv) a building to which members of the public are invited to resort for the purpose of delivering there goods for repair or other treatment or of themselves there carrying out repairs to, or other treatment of, goods, or a part of a building to which members of the public are invited to resort for that purpose;
  (v) any premises (in this Act referred to as 'fuel storage premises') occupied for the purpose of a trade or business which consists of, or includes, the sale of solid fuel, being premises used for the storage of such fuel intended to be sold in the course of that trade or business, but not including dock storage premises or colliery storage premises;

(b) 'retail trade or business' includes the sale to members of the public of food or drink for immediate consumption, retail sales by auction and the business of lending books or periodicals for the purpose of gain."

Thus, although of application to very limited classes of persons, where they do apply these regulations bite in a quite a wide range of circumstances. Where they do, they will probably bite quite heavily (see *Brown v Allied Ironfounders Ltd*[58] [1974] 1 W.L.R. 527 in respect of the identically worded predecessor provision Factories Act 1961 s.72(1)). Indeed, the duty here in some ways appears more stringent that the Manual Handling Regulations in that there is no qualification of reasonable practicability.

Claimants should therefore look to rely upon this in the limited circumstances where it applies; defendants need to be aware that claims under this statute are likely to resemble those prior to s.69 in terms of the difficulties in defending them.

The other most notable one of general application is the Employer's Liability (Defective Equipment) Act 1969. This is a very short Act. The relevant part reads as follows:

"Extension of employer's liability for defective equipment.

(1) Where after the commencement of this Act—
  (a) an employee suffers personal injury in the course of his employment in consequence of a defect in equipment provided by his employer for the purposes of the employer's business; and
  (b) the defect is attributable wholly or partly to the fault of a third party (whether identified or not),

the injury shall be deemed to be also attributable to negligence on the part of the employer (whether or not he is liable in respect of the injury apart from this subsection), but without prejudice to the law relating to contributory negligence and to any remedy by way of contribution or in contract or otherwise which is available to the employer in respect of the injury.

[58] *Brown v Allied Ironfounders Ltd* [1974] 1 W.L.R. 527 HL.

(2) In so far as any agreement purports to exclude or limit any liability of an employer arising under subsection (1) of this section, the agreement shall be void.

(3) In this section—

'business' includes the activities carried on by any public body;

'employee' means a person who is employed by another person under a contract of service or apprenticeship and is so employed for the purposes of a business carried on by that other person, and

'employer' shall be construed accordingly;

'equipment' includes any plant and machinery, vehicle, aircraft and clothing;

'fault' means negligence, breach of statutory duty or other act or omission which gives rise to liability in tort in England and Wales or which is wrongful and gives rise to liability in damages in Scotland; and

'personal injury' includes loss of life, any impairment of a person's physical or mental condition and any disease."

It is, however, doubtful whether this adds much if anything to common law. It seems to beg the question of breach, and the non-delegable nature of an employer's duty of care would seem render the extension of liability to the acts of third parties obsolete in most cases.

There is a small exception to s.69 in respect of new or expectant mothers. They still have a civil right of action for breach Management of Health and Safety at Work Regulations 1999 regs 16, 16A, 17 and 17A (compare reg.22).

There is a broader argument that as a matter of construction that the same Management Regulations remain actionable generally. I am not entirely convinced by this and in any event it is probably academic. In contrast to other regulations, the duties under Management Regulations are formulated in extremely broad and generic terms which render them all but indistinguishable from an employer's general common law duties.[59]

Finally, there may occasionally be specific contractual duties which go further than common law tortious ones. For example, an employer might have undertaken to provide PPE and specify what is to be provided. If so, breaches of contract being strictly actionable without proof of fault, liability would arise if the absence of the equipment foreseeably caused injury.

Some contracts of employment, especially those arising as a result of collective bargaining, may contain extensive applicable terms. The fire service is a good example of this. As was noted in *Wembridge* at [215], the terms of service (the "Grey Book") impose a duty upon fire and rescue authorities to comply with legislation governing the health, safety and welfare of employees. There is thus an argument that failure so to comply would constitute breach of contract, thus rendering by indirect route, the applicable regulations actionable just as they were before October 2013.

Note, however, that absent any such specific terms, the general implied contractual duty upon an employer to take reasonable care for their employees' safety goes no further that the equivalent tortious duty; *Greenway v Johnson Matthey Plc* [2014] EWHC 3957 (QB).

Practical considerations

As regards assessing the strength of conventional common law allegations, renewed attention to cases decided before civil liability for breach of regulations was imposed is likely to pay dividends. The most recent edition of *Munkman on Employer's Liability*[60] reincorporates passages from much older editions

[59] *Baker v Quantum Clothing Group Ltd* [2011] UKSC 17; [2011] 1 W.L.R. 1003 per Lord Dyson JSC at [125]; *Sayers* [2007] I.R.L.R. 29 and *Mullen v Accenture Services Ltd* [2010] EWHC 2336 (QB).

[60] *Munkman on Employer's Liability*, edited by Daniel Bennett, 16th edn (London: LexisNexis, 2013).

which were removed upon the advent of the regulations. These passages contain various cases decided on common law negligence; they bear consideration.

If European legislation is to be relied upon, close consideration will need to be given to the language of the Directives.[61]

The following steps will also be worth considering for claimants, depending upon the individual case:

- pleading the regulations;
- pleading European legislation;
- pleading other applicable duties;
- relying upon any criminal prosecution;
- pleading res ipsa loquitur;
- obtaining early disclosure of documents from the employer;
- taking early prods of evidence
- instructing an expert;
- obtaining/pleading the employment contract;
- obtaining/pleading any HSE guidance and any ACOPs; and
- obtaining/pleading manufacturers' guidance or other relevant literature.

As regards expert evidence, although this will need to be considered on a case by case basis, the need is likely to be greater under the new regime. For example, in equipment cases it will, arguably, no longer be enough for the claimant to plead that the machine failed. The claimant might need to show precisely how the machine failed and that it arose from a lack of reasonable care on the part of the employer. This would often require expert evidence.

From a practical point of view, the sooner an expert is instructed the better. An inspection of the machine, premises or system of work might be required. The greater the delay the higher the likelihood that by the time the expert is instructed the time for useful inspection will have passed.

The importance of taking an accurate proof of evidence as early as possible and of obtaining early disclosure of all relevant documentation is even greater in the new EL world. For example, maintenance and inspection records are now likely to be far more important when it comes to assessing whether the employer acted reasonably. These may have been overlooked in the past when it was enough for a claimant to point to a defect but are now likely to be crucial.

For defendants, the position is rather simpler. As before, it is always advisable to obtain the best evidence possible. Contemporaneous or near-contemporaneous evidence (risk assessments, accident reports, early statements) remains vital. It is also important to keep a track of witnesses who leave the defendant's employ. The advent of s.69 should not be taken as any excuse for complacency.

In the same vein, for employers themselves, s.69 obviously should not be taken as a license to disregard the relevant statutory duties. As per above, breach of such duties could well buttress a common law claim, in addition to giving rise to criminal prosecution.

Defendants also need to be alive to the strengths and weaknesses of the possible alternative allegations, as discussed above. But generally, as regards litigation, the difference for the defendants is that many claims which previously would have been lost can now be won. So a more robust approach to contesting claims is probably indicated.

[61] They can be found at *https://osha.europa.eu/en/legislation/directives* [accessed January 20, 2015].

Conclusions

There is no doubt that EL claims remain in general a strong species of action. However, there is equally no doubt that the advent of s.69 renders them easier to defend than previously. What is very much in doubt is the precise extent to which this is so.

Broadly speaking, post-October 1, 2013, EL claims can be divided into three categories.

1) Those such as *Wembridge* which are strong enough under conventional common law principles not to require breach of statutory regulation to succeed. These will be unaffected.
2) Those such as *Stark* or *Blair* which would have required fully actionable statutory duties to succeed. These would fail if they are now pursued at all.
3) The remainder which, whilst not dependent upon fully actionable statutory duties, are nevertheless not likely to be strong enough to succeed at common law simpliciter and require some form of enhanced duty to succeed. By definition it is not possible to cite examples of such claims. Their resolution is currently unpredictable.

Category (3) will doubtless give rise to extensive litigation over the coming years.

Watch this space.

NIHL Claims: Are They Really the New Whiplash?

David Wynn*

Employers' liability claims; Employers' liability insurance; Hearing impairment

David Wynn provides an insurance lawyer's perspective on the recent rapid growth of noise-induced hearing loss ("NIHL") claims. He asks are NIHL claims the "new whiplash"? He concludes that while there are similarities and that there are very real reasons for insurers to be concerned, NIHL claims are unlikely to cost the insurance industry as much. He calls for further reforms to the process for handling such claims and suggests that a combination of further reform and the development by insurers of a more robust and viable model for dealing with these claims should ensure that NIHL claims are not the "new whiplash".

ML

There have been a number of articles in the legal/insurance press claiming that deafness claims are increasing at such a rate that they are comparable with the increase in whiplash RTA claims from a few years ago. The increase in whiplash claims was linked to the "no win/no fee" business model advocated by virtually all claimant personal injury firms. However this article may allay the fears of insurers and also question whether claimant solicitors firms should adopt the same business models they applied to RTA whiplash claims for deafness claims.

The numbers

Between 2006 and 2012 the number of reported road traffic accidents fell from 189,000 to 151,000. However during the same period the number of personal injury claims (of which over 90 per cent were whiplash claims) for road traffic accidents rose from 519,000 to 828,000. Therefore despite a fall of approximately 20 per cent in accidents, claims rose by over 60 per cent. These figures, at first glance, do not appear to tally, but it should be remembered that often a claim would arise for an accident which was not reported because there was no apparent injury at the time and also there may have been more than one claim arising out of only one accident given that passengers may well be involved.

The insurance industry calculated that the cost of settling these claims for this period (2006–2012) was approximately £2 billion per year (i.e. £12 billion for this six-year period). As a result, £90 of the cost of an average motor insurance policy now stems from the cost of these whiplash claims.

As everyone is aware, the cost of these claims saw the introduction of the Portal for RTA claims which was extended to more valuable claims (up to £25,000) by way of the Jackson Reforms introduced in 2014.

Although it is currently still too early to assess the savings made for the insurance industry as a result of the introduction of the Portal for RTA claims, it is known that the average cost for a road traffic accident has reduced from approximately £10,000 per claim to £500 per claim. This will clearly have a significant effect on reducing the figure highlighted above (£12 billion).

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How do these figures compare to the increase recently seen in NIHL claims?

In 2011, insurers received approximately 36,000 NIHL claims for the year. In 2012 this figure increased to 55,000 claims, and for 2013 there were an estimated 80,000 claims received. This is clearly a sharp rise, so are insurers right to be worried about the potential outlay for these claims and whether it will reach the figures highlighted above for whiplash claims?

Back in 2007, and approximately 12 months after the implementation of the Control of Noise at Work Regulations 2005 the HSE estimated that there were approximately one million workers exposed to damaging noise levels. Anecdotal reports from claimant solicitors put the figure at a higher amount of 2.2 million workers. If only half of this number of workers made claims for NIHL and utilising an average of £10,000 for damages and £10,000 for claimant's solicitors' costs then this could have resulted in a total outlay for insurers of over £20 billion. These would clearly be worrying figures for the insurance industry and could justify the assertion that NIHL claims were the new whiplash and potentially worse for insurers.

Why the dramatic increase in NIHL claims?

What claimant firm wouldn't enjoy the luxuries of a whiplash claim? Causation is almost impossible to disprove, engineering evidence is rendered moot 9 times out of 10 removing any opportunity for a liability defence and the claim will likely be finalised in a matter of months by the insurer due to any lack of prospect of a defence. Easy claims to run from the handler's side, great rate of cash flow for the firm and an abundance of sources available for the recruitment of claims making a virtually self-sustaining market.

Of course, enter the Jackson reforms and the business becomes in dire jeopardy of existing no longer. The RTA Portal essentially removed any chance of profitability from running solely whiplash/RTA claims. Naturally, the instinct to survive prevails and disease claims became the new source of business. Whilst there was still the issue of the EL Claims Portal, it was not long before claimant firms quickly understood that the chance of a claimant being exposed to excessive noise, at solely one employer and, that employer being a currently trading company despite the long-tail nature of the disease, was entering into the realms of isolation.

Here now lays a source of work seldom affected by fixed fees; historic in nature making a defence on liability difficulty; easy to prove from a causation perspective due to the flexibility of the Guidelines for medico-legal assessment and virtually impossible to quantify in terms of actual perceptive disability due to the "subjective" nature of the disease and the overstating of symptoms of tinnitus. Déjà vu?

With up to £10,000 in damages and £10,000–£20,000 for pre-litigation legal costs, it is easy to see the attraction of noise-induced hearing loss claims.

Taking into account the above, there are, therefore, a number of factors which have resulted in the above dramatic increase which can be listed as follows.

1) The introduction of the Portal for RTA claims has clearly made such claims less profitable for claimant solicitors. Firms who pursued a strategy for RTA claims may well have adapted such a strategy for disease claims, most notably NIHL. Figures suggest the average costs for an RTA claim have fallen dramatically from £10,000 to £500.
2) There appears to be an anomaly with regard to the Jackson Reforms and disease claims as, unlike an accident claim, no fixed costs will apply to a disease claim should the matter come out of the employer's liability Claims Portal. There are also numerous reasons why a disease matter will not stay within the Portal, set out below.
    a) Many disease claims will not start in the Portal if the claimant alleges exposure at more than one employer. Portal fixed costs will not apply even if the claimant only successfully pursues one of the employers as long as he mentions more than one employer in his letter of claim.

b) Insurers deny liability on a large percentage of deafness claims (approximately 60–70 per cent) and when liability is denied the claim exits the Portal.

c) If the claim is denied on limitation grounds then again the claim will exit the Portal. Limitation will often be a successful and viable defence for defendants in disease claims.

d) If liability is accepted, but causation is denied, then again the claim will come out of the Portal. It is open to claimants to argue that when a defendant requests the occupational health and personnel records they are automatically putting causation in issue and as this happens on virtually all disease claims it is difficult to see how any disease claim would remain within the Portal, if this argument is adopted by claimants and their solicitors.

e) There appears to be a trend to artificially increase the value of NIHL claims to over £25,000 which would therefore again bring the claim out of the Portal even if liability is admitted, causation is not raised and limitation is not pursued. The over inflation of claims is normally linked to claims for hearing aids when quite often claimants will already have hearing aids already fitted by the NHS, or there is an unrealistic need for the hearing aids to be replaced every 12 months, or the acceleration period for the need for hearing aids is artificially increased.

3) Claimant firms are adopting a similar aggressive advertising strategy in relation to NIHL claims as they did with whiplash claims approximately five years ago. Instead of using a claims management company to locate claims (given the ban on referral fees—see below), one can simply skip the middle-man and go for the data direct. As such, there is now a growing trend for claimant firms to utilise in-house "call centres" where an individual can be telephoned, vetted for traits of a possible noise-induced hearing loss claim and recruited as a client on a "no win, no fee" (but "win and you will just have to pay a small after the event ("ATE") premium and 25 per cent for our costs, all from your damages which you didn't know you could get until now!") basis.

Equally, if the data source runs empty, the firm will still have the numerous avenues of newspaper, television, radio adverts and billboards placed outside now defunct factories asking whether people worked in these factories during a certain period of time (1970s/1980s/1990s) and now experience problems with their hearing. A further recent advertising strategy has utilised text messaging; the difference being that now the question is "have you ever been exposed to noise in the workplace?" rather than the old "have you had an accident in the last three years?". Such a strategy could be adopted for other diseases and in the future claimant firms may well be sending out the following text messages—"Do you have asthma and have you worked in a dusty environment?" or "Do you have dermatitis and have you worked with rubber or chemicals?" A self-sustaining claims market?

4) On April 1, 2013, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 came into effect making it so that referral fees were banned and success fees and staged ATE premiums could not be claimed. March 2013 saw perhaps the largest historical spike in deafness claims the insurance industry has ever seen. Coincidently, the following year has seen the largest number of ABS authorisations by the Solicitors Regulation Authority. Is this a coincidence or do the private equity firms who have invested in firms specialising in NIHL claims see an opportunity to receive a significant return on their investments? Looking at a typical private equity firm's model they will look to invest for three to four years in such an operation before looking to sell so as to make a profit.

5) Since April 2011 the insurance industry has made it easier to search for employers liability ("EL") insurance policies by using a central database known as ELTO (Employers Liability Tracing Office). Prior to the introduction of ELTO it was harder to find insurance policies in place for companies who have subsequently gone into administration. Previously without such a database it would have been extremely hard for claimants to find insurers willing to deal with particularly historic claims like NIHL. There is therefore more visibility of insurers and therefore, for claimants, easier targets for compensation.

6) Claims for NIHL would have traditionally been made against companies involved in noisy environments such as construction, manufacturing and music industries. However more claims are now being made against less traditional noisy environments such as textiles, food production and logistics which can undoubtedly be linked to the Control of Noise at Work Regulations 2005, which came into effect in April 2006 and reduced the action levels for noise to 85dB(A) and 80dB(A).

7) As with whiplash claims, there is the potential for fraudulent/exaggerated claims to be made. Whilst pure-tone audiograms are usually the most accurate method of assessing hearing levels they are susceptible to an element of manipulation by the subject as they are subjective. There are other means of assessing an individual's hearing which are more objective such as a Cortical Evoked Response Audiometry ("CERA"). A typical examination using this type of audiometry would have the patient in a quiet room and sound signals are introduced into the ear and the brain's response is monitored by means of electrodes placed on the scalp. Those responses are in turn analysed by computer. A patient is unable, consciously, to influence the responses as it is his brain's activity and not his perception which is measured. However, the disadvantage of CERA is that it does not permit so precise a means of quantifying hearing loss as pure-tone audiometry with a fully co-operative patient, as results may exaggerate the apparent hearing loss by up to 10dB or more. It therefore appears that we are left with the potential for individuals to manipulate pure-tone audiograms in their favour and therefore may attract fraudulent claimants.

8) Account must be taken of the recessionary effects which have been most significant over the past few years, which leads to redundancies and in turn leads to a loss of employee loyalty to employers in industrial areas that have been particularly affected by the recession.

9) A new type of NIHL claim is starting to arise from call centre workers who suffer acoustic shock.

Opening the floodgates …

As indicated above, in 2007, and approximately 12 months after the implementation of the Control of Noise at Work Regulations 2005, the HSE estimated that there were approximately one million workers exposed to damaging noise levels. Anecdotal reports from claimant solicitors put the figure at a higher amount of 2.2 million workers. The HSE has since estimated that approximately 18,000 workers in Britain, based on the IIDB Scheme data collated from 2011–2013, will be suffering with NIHL. Simultaneously, the Employer's Liability Tracing Office released their annual review in 2013 which estimated that 97,000 enquires had been made relating to NIHL.

Whatever figures are correct, simple deduction would suggest that the market is flooded with claims of an unmerited nature. But why such a level of saturation? The answer is undeniably obvious:

"Cold-calling" approach to generating claims + flexibility of diagnosis and exposure requirements x Number of historical EL policies retained by ELTO and made available for public viewing at ease

= approximately 80 per cent of time and money by the insurer spent on dealing with unfounded claims."

As a best case scenario, if only the remaining 20 per cent of claims were settled and, utilising an average of £20,000 per claim (for damages and solicitors' costs inclusive), the insurance market would be facing an outlay of £400 million per year. Across a 5–10-year period to deal with the number of historical claims coming through, expenditure could culminate to anywhere between £2 billion–£4 billion respectively. With such worrying figures being a best-case scenario, there is undoubtedly some justification for a comparison to be drawn to whiplash claims. However, the same mistakes are not being made twice by insurers.

How will insurers attempt to reduce the number of claims/the cost of these claims?

Insurers are aware of the potential outlay for NIHL claims whether that be the figure of £20 billion (if 50 per cent of individuals who could be exposed to excessive noise make claims) or the estimate of £2 billion–£4 billion (if 20 per cent of claims are settled). They have in place a strategy to deal with individual claims as well as more generic strategies to deal with deafness claims. They are as follows.

1) Lobbying of the Government to change the Portal in relation to all disease claims (but more particularly NIHL claims) to allow for the following:
   a) more time to investigate a claim;
   b) ensure the claimant's solicitors provide better and further information on the claim notification form;
   c) multi-defendant claims to start in the Portal, or alternatively penalties to be imposed on the claimant's solicitors who give no explanation as to why they only pursued one employer when a number were mentioned on the letter of claim; and
   d) a fixed-costs regime should apply to disease claims when such claims drop out of the Portal as applies with employer's liability accident claims.
2) There are new Industrial Disease Claims Working Party ("IDCWP") Guidelines specifically for NIHL claims which have the intention of making the process on the defendant's side more streamlined so that a co-ordinating insurer is agreed at an earlier stage on a series of agreed criteria. These guidelines have been in place since January 2014 and apply strictly to NIHL claims. They have the effect of streamlining the process such that they reduce chasing letters from claimant's solicitors and therefore ultimately reduce the costs of claimant's solicitors.
3) A robust stance is taken on liability as evidenced by the fact that currently approximately 60–70 per cent of claims are denied on liability grounds. Insurers use noise surveys which have been retained from previous claims for a site where it is known that a successful repudiation of claims has been made. Further a denial of liability can be made even where there are no historic noise surveys but instead insurers will advise their insured to carry out an up to date noise survey and back this up with witness evidence to say that the levels of noise are the same as when the claimant was employed and that no new machines/processes have been introduced in the meantime.
4) As indicated above, limitation is a viable defence on NIHL claims. Insurers will carry out a careful review of medical records to see if the claimant had the requisite knowledge that his/her hearing loss was linked to noise exposure more than three years prior to the issue of proceedings. Further, as many of the NIHL claims are historic in nature with the alleged exposure potentially going back to the 1960s/1970s, insurers will argue that there has been severe prejudice in not bringing the claim in time given that documents and/or witnesses

can no longer be traced and as a result this would minimise the arguments open to claimant's solicitors to allow the claim to proceed in any event utilising Limitation Act 1980 s.33 given that one of the factors for a judge to take into account in deciding whether to apply his discretion to allow the claim to proceed is the prejudice suffered by the parties.

5) Even on claims where liability/breach of duty has been admitted, and limitation is not pursued, insurers will still thoroughly investigate medical causation to ensure that the audiogram which accompanies the medical report complies with the "Coles guidelines".[1] The Guidelines are aimed at a medico-legal diagnosis on the balance of probabilities and are widely used by almost all medical experts. The Guidelines require three main things.
   a) A high frequency hearing impairment such that the hearing threshold level is at least 10dB greater at 3–6kHz than at 1–2kHz. A 7dB difference is adequate if an average is taken across two or more tests.
   b) A noise emission level ("NIL") of at least 100dB(A) that the claimant was exposed to. Engineering evidence can be used to determine the levels of noise that a claimant would have been exposed to particularly where a claimant is not based in one particular location/position at a defendant's premises such that it is not easily determinable as to the levels of noise the claimant would have been exposed to on a day to day basis.
   c) A notch or bulge of at least 10dB. The definition of a notch/bulge is where the hearing threshold level at 3 and/or 4 and/or 6kHz is at least 10dB greater than at 1 or 2kHz and at 6 or 8kHz.

6) As well as these general principles which must be satisfied in order for the Coles Guidelines to be met there are specific examples of how to approach unusual cases particularly asymmetrical cases (ie where one of the ears is significantly "better" than the other). Note 11 of the Guidelines provide the following four different scenarios.
   a) If one ear meets the 10dB notch/bulge requirement and the other ear also shows a notch or bulge but it is smaller than the 10dB required, then the probability of NIHL is still high.
   b) If one ear is markedly better at high frequencies and shows a significant notch or bulge, but the worse ear shows little or no trace of such, then there is still a more likely than not probability of NIHL.
   c) If there is not much difference between two ears at high frequencies but without apparent explanation only one ear shows a significant notch or bulge and the other shows little or no trace of one, then such cases should be regarded as very borderline and be decided on the strength of other evidence (e.g. noise levels).
   d) If only the worse ear shows a significant notch or bulge at high frequency and there is little or no trace of NIHL in the better ear, then there is only a possibility of NIHL not a probability.

There can also be numerous reasons for hearing loss other than noise, most notably age-associated hearing loss ("AAHL"). Medical reports should always consider the age-associated hearing loss in order to calculate the NIHL. There are guidelines and tables produced showing what the accepted hearing losses are for individuals of a certain age and gender.

On reviewing medical records, insurers will be on the lookout for the following which can also cause sensori-neural (inner ear) hearing loss:

[1] R Coles, M Lutman and J Buffin, "Guidelines on the diagnosis of noise-induced hearing loss for medicolegal purposes" (2000) 25(4) *Clinical Otolaryngology* 264.

- ototoxic drugs;
- genetic damage;
- german measles in pregnancy;
- premature birth;
- high cholesterol levels;
- diabetes;
- rheumatoid arthritis/ms;
- heart disease;
- head trauma; and
- ear disease.

Insurers will also be looking as to whether a claimant suffers continually with wax in the ear which could also cause an individual to think he has hearing loss caused by noise.

As well as the Coles Guidelines being used by the majority of experts, they have now also received judicial approval in the recent cases of *Cran v Perkins Engines Co Ltd*[2] and *Aldred v Courtaulds Northern Textiles Ltd (2012)*.[3] In both cases the Judges approved the applicability of the Coles Guidelines when dealing with causation in NIHL claims.

Even where causation has been made out insurers are beginning to pursue de minimus arguments that a small amount of hearing loss will be too remote to be compensable in line with the case of *Johnston v NEI International Combustion Ltd* (alt cit *Grieves v FT Everard & Sons Ltd*)[4] which of course referred to the pleural plaques litigation and which determined that the same were not an actionable injury.

Therefore as a result of all of the above it is estimated that only 10 per cent of claimants making a claim for NIHL receive compensation for the same.

Conclusions

Therefore in answer to the question "Is NIHL the new whiplash?" there are similarities but the insurance industry is far more prepared to deal with these claims robustly and have strategies in place to ensure that the number of successful claimants is limited such that the figure of £20 billion will never materialise. Insurers were far less willing to try to defend RTA whiplash claims because it was simply not economically worthwhile to do so. However, the strategies in place for deafness claims have established a successful way to defend NIHL claims.

Claimant solicitor firms who think that it will simply be enough to find individuals who worked in potentially noisy environments must take into account all of the insurers' strategies highlighted above in defeating these claims and claimant solicitor firms must be prepared to face stiff opposition for the same which they probably did not encounter when handling a large number of whiplash claims.

Claimant firms face a duty to weed out weak or fraudulent claims. Private equity backing should sharpen the means by which these firms focus upon meritorious claims.

Any failure to do so will simply be met by a resolute defence of the high numbers of unmeritorious claims and attendant continued focus on highlighting such issues which, quite obviously, would not help legitimate Claimants.

[2] *Cran v Perkins Engines Co Ltd* , Unreported, December 14, 2012 CC (Norwich).
[3] *Aldred v Cortaulds Northern Textiles Ltd* , Unreported, November 2, 2012 CC (Liverpool).
[4] *Grieves v FT Everard & Sons Ltd* [2007] UKHL 39; [2008] 1 A.C. 281.

Billett v MOD and the Meaning of Disability in the Ogden Tables

Victoria Wass*

Disability; Discounts; Future loss; Loss of earnings; Minor injuries; Ogden tables

In a follow up to her recent JPIL articles (with William Latimer-Sayer) and in response to the judgment of Andrew Edis QC sitting as a High Court judge in the case of Billett v Ministry of Defence *Dr Victoria Wass addresses some of the issues arising from the judgment (which goes to appeal at the end of June) and looks at the meaning of disability in the Ogden Tables and the application of the reduction factors.*

Introduction

The decision in *Billett v Ministry of Defence*[1] concerns the classification of disability in respect of a former soldier who suffered "a minor non-freezing cold injury to his feet"[2] and who continues to have increased vulnerability to cold weather and will in the future need to look after his feet.[3] Mr Billett was considered to be disabled for the purposes of the application of the Ogden Tables reduction factors but insufficiently disabled to avoid a downwards adjustment to his damages.

Points of departure

This case is unusual in a number of respects. First, the expert in the application of the Ogden reduction factors was not called in the case; "I have not heard from Dr Wass or any other expert in her field"[4] but that expert's opinion, as set out in a series of articles published in the *Journal of Personal Injury Law*,[5] was scrutinised at some length. It was found to be wanting by the trial judge in relation to the circumstances of this case. The MOD sought permission to appeal which is due to be heard at the end of June. I am the expert in question and in writing this I add a further item to the "unusual list" by providing an opinion which challenges the findings of the court in advance of an appeal being heard. My purpose in doing so is to help clarify the use of the Ogden Tables in the assessment of employment risks in relation to disability.

The decision

As background, Mr Billett was 29 at trial. He was injured during training exercises with the British Army in February 2009. He left the Army in October 2011 for reasons unrelated to his injury and has since been continuously employed as an HGV driver.

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[1] *Billet v Ministry of Defence* [2014] EWHC 3060 (QB).

[2] *Billett* [2014] EWHC 3060 (QB) at [3].

[3] *Billett* [2014] EWHC 3060 (QB) at [5].

[4] *Billett* [2014] EWHC 3060 (QB) at [48].

[5] V. Wass, "Discretion in the Application of the New Ogden Six Multipliers—The case of Conner v Bradman and Company" (2008) J.P.I.L. 155; W. Latimer-Sayer and V. Wass, "Ogden Reduction Factor adjustments since *Conner v Bradman*" [2012] J.P.I.L. 219 and W. Latimer-Sayer and V. Wass, "Ask the Expert: William Latimer-Sayer asks Victoria Wass some questions about the practical application of the Ogden Reduction Factors" [2013] J.P.I.L. 35.

The claimant argued for a strict application of the Ogden reduction factors[6] and in the alternative for a *Smith v Manchester*[7]/*Blamire*[8] award equal to three years of his post-injury earnings.[9] The Judge adopted the Ogden approach but compromised the claim by awarding a reduction factor of 0.73, equal to the mid-point between the disabled (0.54) and non-disabled reduction factors (0.92). It was this approach that I had questioned in a review[10] of the case of *Conner v Bradman*.[11] The Judge justified the compromise on the basis that

- the effects of the claimant's injury were minor and were not accurately represented by an average reduction factor; and
- his inability to make an adjustment using any of the mechanisms that I had proposed.[12]

He describes "a real divergence of view between Dr Wass and the judiciary about the way the tables should be used".[13]

The meaning of disability in the Ogden Tables

The reduction factors estimate employment risks over a life time. Employment risks are raised for a disabled person. The starting point for me, and any expert on the application of the Ogden Tables, would be to consider the claimant's characteristics and circumstances in relation to the definitions used in the data that underlie the estimation of the reduction factors and therefore the reduction factors themselves. The first of these is whether or not the claimant meets the classification criteria for disability. The criteria for disability are set out at para.35 of the Explanatory Notes (Seventh Edition).

"(i) The person has an illness or disability which has lasted or is expected to last for over a year or is a progressive illness

(ii) The person satisfied the Equality Act definition that the impact of the disability substantially limits the person's ability to carry out normal day to day activities and

(iii) The condition affects either the kind or amount of work they can do."

A set of Guidance Notes on Disability to assist with classification in relation to (ii) above is reproduced immediately after the definition of disability in para.35 of the Explanatory Notes. These originate from s.D15 to s.D27 of the *Disability Discrimination Act ("DDA") (1995) Guidance* and are also reproduced in the Labour Force Survey ("LFS") to guide interviewers and respondents when deciding on disability status. A different set of Guidance Notes is used to define disability under the Equality Act 2010. These can be found in the Appendix to the *Equality Act 2010 Guidance* produced by the Office for Disability Issues (pp.53–55). The purpose of the revised guidance is to clarify rather than to change the definition of disability. It is the older Notes associated with the DDA that are used in the LFS (until April 2013) and in the reduction factors.

Guidance Notes on Disability classification in the Ogden reduction factors:

> "Mobility — for example, unable to travel short journeys as a passenger in a car, unable to walk other than at a slow pace or with jerky movements, difficulty in negotiating stairs, unable to use one or more forms of public transport, unable to go out of doors unaccompanied

[6] *Billett* [2014] EWHC 3060 (QB) at [34].
[7] *Smith v Manchester Corp* [1974] 17 K.I.R. 1 CA (Civ Div).
[8] *Blamire v South Cumbria HA* [1993] P.I.Q.R. Q1 CA (Civ Div).
[9] *Billett* [2014] EWHC 3060 (QB) at [35].
[10] Wass, "Discretion in the Application of the New Ogden Six Multipliers—The case of *Conner v Bradman and Company*" [2008] J.P.I.L. 155.
[11] *Conner v Bradman & Co Ltd* [2007] EWHC 2789 (QB).
[12] W. Latimer-Sayer and V. Wass, "Ogden Reduction Factor adjustments since *Conner v Bradman*" [2012] J.P.I.L. 219.
[13] *Billett* [2014] EWHC 3060 (QB) at [47].

> Manual dexterity — for example, loss of functioning in one or both hands, inability to use a knife and fork at the same time, or difficulty in pressing buttons on a keyboard
> Physical co-ordination — for example, the inability to feed or dress oneself; or to pour liquid from one vessel to another except with unusual slowness or concentration
> Problems with bowel/bladder control — for example, frequent or regular loss of control of the bladder or bowel. Occasional bedwetting is not considered a disability
> Ability to lift, carry or otherwise move everyday objects (for example, books, kettles, light furniture) — for example, inability to pick up a weight with one hand but not the other, or to carry a tray steadily
> Speech — for example, unable to communicate (clearly) orally with others, taking significantly longer to say things. A minor stutter, difficulty in speaking in front of an audience, or inability to speak a foreign language would not be considered impairments
> Hearing — for example, not being able to hear without the use of a hearing aid, the inability to understand speech under normal conditions or over the telephone
> Eyesight — for example, while wearing spectacles or contact lenses — being unable to pass the standard driving eyesight test, total inability to distinguish colours (excluding ordinary red/green colour blindness), or inability to read newsprint
> Memory or ability to concentrate, learn or understand — for example, intermittent loss of consciousness or confused behaviour, inability to remember names of family or friends, unable to write a cheque without assistance, or an inability to follow a recipe
> Perception of risk of physical danger — for example, reckless behaviour putting oneself or others at risk, mobility to cross the road safely. This excludes (significant) fear of heights or underestimating risk of dangerous hobbies."

While these examples are not intended to be exhaustive or exclusive they are intended to be illustrative of the type of functional impairments and activity limitations which define the threshold between disability and non-disability in the LFS and in the reduction factors. Injury has affected Mr Billet's mobility and the appropriate test is whether or not the impairment to his mobility broadly matches that given in the illustrative examples.

The Judge notes, at [55], that these Guidance Notes have been removed from the definition of disability under the Equality Act 2010 and it is the Equality Act definition which is used to classify the claimant at [58(ii)]. For the sake of completeness, the Guidance Notes in relation to mobility used to define disability in the Equality Act are as follows. They would not appear to set a lower threshold than in the DDA:

> "Difficulty waiting or queuing, for example, because of a lack of understanding of the concept, or because of pain or fatigue when standing for prolonged periods
> Difficulty using transport; for example, because of physical restrictions, pain or fatigue, a frequent need for a lavatory or as a result of a mental impairment or learning disability
> Difficulty in going up or down steps, stairs or gradients; for example, because movements are painful, fatiguing or restricted in some way
> A total inability to walk, or an ability to walk only a short distance without difficulty; for example because of physical restrictions, pain or fatigue
> Difficulty entering or staying in environments that the person perceives as strange or frightening
> Persistent difficulty crossing a road safely, for example, because of physical restrictions or a failure to understand and manage the risk
> Persistent general low motivation or loss of interest in everyday activities

> Difficulty accessing and moving around buildings; for example because of inability to open doors, grip handrails on steps or gradients, or an inability to follow directions."

Disability in the context of Mr Billett's limitations

The army assesses deployability using a grading system called Joint Medical Employment Standing ("JMES") and functional capacity and deployment limitations using a grading system called PULHHEEMS.[14] At the time of his discharge, Mr Billett was classified as a P2 under JMES, that is, medically fully deployable ("MFD"). According to Table 7 of the *PULHHEEMS Administrative Pamphlet* 2010, P2 is defined as:

> **"Medically Fit for unrestricted service worldwide.**
>
> The absence of a medical condition or functional limitation that would prevent the individual from meeting any of the following requirements:
> - Undertaking all elements expected of both rank and Career Employment Group (CEG) in barracks and whilst deployed.
> - Unrestricted World-wide deployment."

Mr Billet's injury relates to the "L" domain: strength, range of movement and efficiency of feet, legs, pelvic girdle and lower back. He was graded as L2. This is defined as:

> "The absence of a medical condition affecting locomotion likely to affect the individual's ability to perform their CEG. This includes all Military Annual Training Tests (MATTs) appropriate to the individual's Arm or Service. No limit to wearing of current in-Service operational body armour, helmet, personal weapon and personal equipment appropriate to their CEG and rank."

The Judge notes that Mr Billett was "deployable anywhere in the world to do anything"[15] although he is found to have "very mild physical impairment which has some impact on the choice of jobs available to him, but allows him to work as a HGV Driver which is what he wants to do".[16] He remains vulnerable to cold weather and needs to take care of his feet.[17] He is able to take care of his feet.[18] The important question here is therefore "Why did the Judge consider a man whom the army considered to be MFD to be disabled in civilian employment?"

The answer lies at [55] and [58] of the judgment. At [58] the Judge indicates his intention "to decide whether the claimant is 'disabled' by the Ogden test", but he applies a different test: "In doing so, I use the ordinary legal meaning of the word 'substantially' which means 'more than minimal'." At [55], he wrongly rejected the DDA Disability Guidelines and he did not replace them with the Equality Act Guidelines.

Clearly there is a gap between a disability which is "more than minimal" and one that satisfies the Guidance Notes on Disability in either Act. The reduction factors are based on the Guidance Notes definition where the threshold for impairment and limitation is higher than has been applied here. It is this difference in "disability" that causes later difficulties in the calculation. Understandably, the Judge is concerned that 10 years' disability-induced non-employment is likely to be overstated. The adjustment proposed by me in Wass 2008[19] and Latimer-Sayer and Wass 2012[20] to raise the reduction factor to the level associated with a higher level of education (16–18 per cent) proved to be insufficient in this case

[14] Acronym comprising the following: *P*hysical, *U*pper body, *L*ower body, *H*earing, *E*yes, *M*ental capacity, Emotional *S*tability.
[15] *Billett* [2014] EWHC 3060 (QB) at [57].
[16] *Billett* [2014] EWHC 3060 (QB) at [49].
[17] *Billett* [2014] EWHC 3060 (QB) at [5].
[18] *Billett* [2014] EWHC 3060 (QB) at [17].
[19] Wass, "Discretion in the Application of the New Ogden Six Multipliers—The case of *Conner v Bradman and Company*" [2008] J.P.I.L. 155.
[20] W. Latimer-Sayer and V. Wass, "Ogden Reduction Factor adjustments since *Conner v Bradman*" [2012] J.P.I.L. 219.

because disability is the key determinant of employment chances and Mr Billett does not appear to meet the disability classification criteria.

Conclusion

Mr Billett's impairments and limitations as set out in the judgment appear to be insufficient for him to be included in the disabled group on which and for whom the Reductions Factors were estimated. The threshold for disability is higher in the reduction factors than appears to have been applied in this case. This is not to say that relatively minor impairments and limitations do not lead to employment disadvantage, there is every reason to believe that they do. However, these mild impairments are not included in the disability-adjusted reduction factors. Where the claimant is outside the territory covered by the disability definition, the disability-adjusted reduction factors, and the mechanisms that I proposed to adjust these (see Wass 2008[21] and Latimer-Sayer and Wass 2012),[22] do not apply. This is because the impact of disability exceeds the impact of other characteristics. An alternative approach where the claimant does not meet the disability threshold is to use the non-disabled reduction factor as the starting point and consider adjustments from this using reduction factors for other characteristics negatively associated with employment prospects. In this case, if Mr Billet were unqualified then the reduction factor would come down to 0.82 and if he were also 10 years older it would reduce to 0.78. These figures are guides which provide a more appropriate approach than taking a disabled/non-disabled midpoint. How many discounts to apply depends on the court's view as to the level of the claimant's additional risk on account of his limitations in losing his current job and additional difficulty in finding re-employment should he lose his current job.

The question of expertise was important in this case, as elsewhere. I repeat my advice from Latimer-Sayer and Wass.[23] If there is disagreement over the application of the reduction factors, then opinion should be sought from an expert who understands the concept of the reduction factor. This is likely to mean an economist, an actuary or a statistician rather than an employment consultant.

[21] Wass, "Discretion in the Application of the New Ogden Six Multipliers—The case of *Conner v Bradman and Company*" [2008] J.P.I.L. 155.
[22] W. Latimer-Sayer and V. Wass, "Ogden Reduction Factor adjustments since *Conner v Bradman*" [2012] J.P.I.L. 219.
[23] W. Latimer-Sayer and V. Wass, "Ask the Expert: William Latimer-Sayer asks Victoria Wass some questions about the practical application of the Ogden Reduction Factors" [2013] J.P.I.L. 35, 44.

Future Imperfect

Stephen Cottrell*

Clinical negligence; Disability; Discounts; Future loss; Life expectancy; Loss of earnings; Measure of damages; Minor injuries; Ogden tables

In this article, Stephen Cottrell discusses the difficulties inherent in judicial adjustment of multipliers for future pecuniary loss as illustrated in the recent cases of Reaney v University Hospital of Staffordshire NHS Trust[1] *and* Billett v Ministry of Defence.[2]

Two recent decisions

Reaney and *Billett* both involved High Court judges (Foskett J in *Reaney* and Andrew Edis QC, shortly before his elevation to the High Court bench, in *Billett*) grappling with the dilemma articulated by Andrew Edis QC in *Billett* at [61]:

> "A judicial approach to the assessment of damages involves an exercise of judgment in the individual case being considered. Sometimes statistics give an answer which appears obviously too high, given the picture which emerges in the particular case. Where that happens, the Judge has to make an apparently arbitrary adjustment to that result, or to decline to use the statistical material at all."

Both cases produced outcomes that were favourable to the individual claimants on approaches which, if followed, will be of significant benefit to future claimants in many clinical negligence and personal injury cases. Both cases are currently under appeal to the Court of Appeal, with permission granted in each case.

The drive towards certainty

Since the decision of the House of Lords in *Wells v Wells*,[3] and especially since the publication of the sixth and then seventh editions of the Ogden Tables, there has been a drive towards increasing mathematical certainty in the assessment of damages for future pecuniary losses. One problem with a strict application of the mathematical approach is that such an approach will often lead to a result which appears on the face of it to be too generous—or not generous enough—in any given case. The struggles of the respective judges in *Reaney* and *Billett* illustrate the difficulties inherent in a strict application of the multipliers in the Ogden Tables but also demonstrate the difficulty in straying from the path marked out by the Tables.

The cases—*Reaney*

Janet Reaney was 61 years old when she began to experience sudden back pain with increasing weakness in her legs. She was taken to the defendants' hospital where it was discovered that she was suffering from the very rare inflammatory condition transverse myelitis causing damage to the spinal cord. There was

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[1] *Reaney v University Hospital of Staffordshire NHS Trust* [2014] EWHC 3016 (QB); [2015] P.I.Q.R. P4 per Foskett J and *Reaney v University Hospital of Staffordshire NHS Trust*, Unreported, October 31, 2014 QBD.

[2] *Billett v Ministry of Defence* [2014] EWHC 3060 (QB).

[3] *Wells v Wells* [1999] 1 A.C. 345 HL.

no negligence to cause the onset of this condition. The transverse myelitis left her "T7 paraplegic". She was left doubly incontinent and with little or no power in her lower limbs.

Unfortunately, during her time in the defendants' care she developed severe pressure sores with consequent osteomyelitis, flexion contractures and a hip dislocation. These additional injuries significantly worsened Mrs Reaney's situation—whereas she would have spent most of her time sitting in a wheelchair but for the defendants' negligence, she was instead bed-bound for the majority of the time and the high risk of infection to the pressure sore sites combined with her incontinence meant that a much higher level of care was needed than if the claimant had been a typical T7 paraplegic.

At trial—when the claimant was aged 66—the defendants deployed a number of unsuccessful arguments. The lead spinal experts were Mr Gardner for the claimant and Mr Tromans for the defendants. The Judge decided that:

- He did not accept Mr Tromans' evidence that the fact of a previous shoulder injury (remarkably Mr Tromans did not feel the need to examine the shoulder when giving this opinion) and some apparent breathlessness would have rendered her unable to make transfers without assistance in any event.
- Given that the initial paraplegia was not caused by a separate tortfeasor and given that the defendants had caused or materially contributed to the condition which gave rise to the claimant's current needs and losses, the defendants were liable to meet *all* of the costs of the claimant's care. This is potentially a very significant decision, if upheld. I will not explore this issue in this article, but it is worth noting that in reaching this decision, Foskett J took into account that:
  - The care that the claimant would have accessed had she not been negligently injured would have been provided gratuitously through the NHS and benefits system. She would not have had the means of paying for it. The notional cost of providing this care did not fall to be deducted from the cost of providing the overall care package required as a result of the defendants' negligence.
  - The assessment by a public body of a claimant's needs was a different exercise to that performed by a court when assessing a claimant's reasonable needs, especially in a climate of austerity. It followed that the assessment by the claimant's expert of the level of care that a statutory body would have been required to provide in order to meet Mrs Reaney's needs but for the negligence of the defendants could not be taken to be indicative of her needs as determined by the Court when assessing damages.

For the purpose of this article, the most important finding (or agreed fact, endorsed by the Judge) at trial was that the claimant's life expectancy was until the age of 78, another 10.75 years. Rather optimistically, the Judge indicated that:

> "If the relevant Table by which the multiplier should be calculated cannot be agreed, I will invite written submissions on the issue."

There were indeed further submissions on that issue—and on several other issues, many of which the Judge (understandably) felt he had determined in favour of the claimant in the main judgment. For that reason there are currently two separate judgments.

The main issue that fell to be determined when the case came back before Foskett J was how the multiplier for pecuniary losses for life was to be determined. Should Table 2 be used, or was the effect of the agreement that the claimant's life expectancy was 78 that a multiplier for a term certain should be used? The claimant argued that to use Table 2 would be to apply a "double-discount"—in reaching their

conclusion that Mrs Reaney would live to age 78, the experts had taken account of significant issues such as the fact that she was a smoker and had been significantly overweight prior to her illness; the defendants argued that using Table 28 meant that other "ordinary" contingencies (the risk of accidental death, for example) would not be taken into account and that the claimant would therefore be over-compensated.

Foskett J reviewed a long line of authorities including *Royal Victoria Infirmary v B*,[4] *Crofts v Murton*[5] and *Whiten v St George's Healthcare NHS Trust*.[6]

There is clearly a distinction to be drawn between cases in which an expert (or experts) state that, by reason of a claimant's injury, her life expectancy has been reduced by, say, five years, and those cases in which the evidence is that this individual claimant can expect to live for a further, say, 10 years. In the former case, a claimant cannot simply go to the life tables, select the remaining life expectancy, subtract five and then apply the Table 28 multiplier to that figure—on that example no account has been taken of contingencies at all. On the latter example, experts giving an opinion on the likely longevity of an individual claimant should be taken to have considered all of the relevant information about that claimant's health that was available to them, unless they otherwise indicate; to make a deduction to a claimant's life expectancy to take account of her smoking and then to allow a further "Table 2 discount" that takes to account factors such as lung cancer and heart disease would be unfair.

At [13], having reviewed the authorities and the principles, Foskett J reached the conclusion that:

> "In my view, what was agreed between Mr Gardner and Mr Tromans (and endorsed by me) was a predicted life expectancy of this claimant. The most significant factors affecting her life expectancy (for example, her immobility, her weight and her smoking) were taken into account in arriving at this prediction. Mr Feeny contends that the claimant still has all the usual contingencies associated with mortality, but that does not seem to me necessarily to be so: at all events, because of her immobility some of the risks that more mobile people will face are obviated, but, of course, she faces the risks associated with immobility. There is, of course, no certainty with any prediction of this sort, but, in my judgment, adopting Table 2 would result in an additional, and thus unfair, discount."

It followed that the Table 28 multiplier was to be preferred.

In truth, neither method will ever be perfect in any given case, but this illustrates that it is unrealistic to expect the Ogden multipliers to produce a perfect answer in every case. In a case such as *Reaney* (or *Whiten*) in the absence of extremely precise expert evidence and statistical analysis of data, it is very difficult for a trial judge to make any meaningful adjustment to the multipliers in the Tables. Use of the Tables will tend to produce consistency and predictability for practitioners in the majority of cases, encouraging settlement. Judicial adjustment to the multipliers in the few litigated catastrophic injury cases is likely to encourage a degree of horse-trading in negotiations, and when dealing with technical issues, such as life expectancy, may be unwarranted and meaningless. But in some cases a degree of judicial adjustment is likely to be necessary, as amply demonstrated by our next case study.

The Cases—*Billett v MOD*

The basic facts and outcome on the evidence in *Billet* are striking:

- The claimant was 24 years old when injured and 29 at trial. He suffered a non-freezing cold injury ("NFCI") when he was on manoeuvres as an acting Lance-Corporal in the Royal Logistics Corps.

[4] *Royal Victoria Infirmary and Associated Hospitals NHS Trust v B (A Child)* [2002] EWCA Civ 348; [2002] P.I.Q.R. Q10.
[5] *Crofts v Murton* (2008) 152(35) S.J.L.B. 31 QBD per Cranston J.
[6] *Whiten v St George's Healthcare NHS Trust* [2011] EWHC 2066 (QB) per Swift J.

- Since the injury, the claimant had been become a Lance Corporal; he was medically downgraded but then upgraded. He was able to complete a tour of Afghanistan in 2009/2010 despite his injury and he was assessed as "fit for deployment anywhere".
- He subsequently left the army, the Judge found, through choice and not by reason of his injury—he was earning comparable amounts as an HGV driver at a well-established and stable family business.
- The continuing effects of the injury appear to have been modest, although there is reference to continuing use of painkillers most days and the use of foot powder. At [57] the Judge found that the claimant's feet were "permanently sensitised to cold and give him pain when they become cold". He was therefore unsuitable for work that required him to work outdoors in cold conditions.
- Having decided that the claimant was disabled (as to which, see below), the Judge commented (at [59]) that:

  > "I find it hard to conceive of very many people who could be classified as disabled who are as fit and able as is this claimant. It must be remembered that when he left the Army he was medically fully deployable. He could be deployed anywhere in the world to do anything."

- Against that background the Judge employed the Ogden Tables, and in particular Tables A and B (which deal with reduction factors for disability and that first appeared in the Sixth Edition of the Ogden Tables) but made an adjustment. He awarded £99,026.04 for loss of earning capacity. Had he not made any adjustment, the figure would have been more than twice as much.

At first glance, an award of almost £100,000 for future loss of earnings for a claimant who, in his injured state, had been able to complete a tour of duty in Afghanistan and who had been in steady, secure employment as a lorry driver since leaving the army may seem high.

The battleground in the case was in part to do with the use of the Tables as opposed to the application of a "traditional" lump-sum award along the lines of *Smith v Manchester Corp*[7] or *Blamire v SE Cumbria HA*.[8] As is often the case, there is a huge disparity between the kinds of figures produced by these respective approaches. The Judge summarised the position at [40]:

> "… if I use Ogden Tables A and B reduction factors (RF) the loss is 21,442 x 10.41 = 223,211. If I use a traditional method, it is suggested it should be 21,442 x 3 = £64,326."

The employment experts (a rarity these days!) agreed that Mr Billett:

> "Has a disadvantage on the labour market for some occupations due to his injuries. He will have to avoid jobs that require him to work outside and therefore will be more limited in terms of choice."

The Judge accepted that the claimant would have more difficulty finding alternative work than if he had not been injured and that there was a risk that the claimant may find himself out of work in the future for a variety of reasons. He said this, at [41], of the "traditional method":

> "The traditional method was based on a judicial assessment of the chances of a particular claimant failing to find work quickly when necessary, and of the chances of that claimant becoming unemployed and thus needing to look for other work. If he has another 41 years of working life, there is obviously a substantial chance that he will need to find other work, but the traditional method did not offer any

[7] *Smith v Manchester Corp* (1974) 17 K.I.R. 1 CA (Civ Div).
[8] *Blamire v South Cumbria HA* [1993] P.I.Q.R. Q1 CA (Civ Div).

formula for assessing that chance, or of the extent to which his actual difficulty may cause him longer periods of unemployment than otherwise would have been the case."

He then went on to deal with the Ogden approach, noting that the Tables and Explanatory Notes (but not the introductory commentary to the Tables) were admissible under the Civil Evidence Act 1995 but that he was not obliged to follow the Tables. He summarised the Explanatory Notes and highlighted the fact that the Notes specifically contemplate cases in which the *Smith*/*Blamire* approach remains applicable and that the Tables amounted to a "ready reckoner" which, "cannot take into account all circumstances and it may be appropriate to argue for higher or lower adjustments in particular cases." There then followed a long discussion about the desirability or otherwise of making adjustments to the reduction factors, including an article in which Dr Victoria Wass, one of the members of the Ogden Working Party, was interviewed at length. In essence, the problem in making reductions was a lack of certainty and the need for an expert assessment of the effect of the injury on the claimant's employability in each case. The Judge concluded that there were three options:

"(i) A traditional award of a lump sum as in *Smith v. Manchester Corporation*, *Blamire v. South Cumbria Health Authority* [1993] PIQR, and *Ward v Allies & Morrison Architects* , [2012] EWCA Civ 1287; [2013] P.I.Q.R. Q1.

(ii) An award based on Ogden tables A and B without adjustment.

(iii) An award using Ogden tables A and B as suggested in paragraph 32 of the Explanatory Notes."

The Judge began by dismissing the first option and distinguishing the case of *Ward* on the basis that in that case there was too much uncertainty about the claimant's likely career path (the facts were unusual—the claimant was a university student injured on work-experience as a model-maker). He then went on to consider the Tables and the question of disability—a pre-requisite for the use of the Tables—and noted (at [53]) that:

"… the definition of disabled in the Notes is very broad and captures people such as the claimant with very mild conditions, and others with very severe ones. Obviously, as is pointed out, those who are in work, or able to work, will tend towards the lower levels of disability and the statistical results of analysing their career paths will tend therefore to concern predominantly those towards the milder end of the disability spectrum. Therefore, there is a level of self-correction in the statistics."

He then went on to consider the definition of disability in the Explanatory Notes which provide that:

"A person is classified as being disabled if all three of the following conditions in relation to the ill-health or disability are met:

(i) the person has an illness or disability which has lasted or is expected to last for over a year or is a progressive illness,

(ii) the person satisfies the Equality Act 2010 definition that the impact of the disability substantially limits the person's ability to carry out normal day to day activities, and

(iii) their condition affects either the kind or the amount of paid work they can do."

Crucially, at [55], the Judge noted that the list of ways in which a disability may effect a person's day-to-day activities in the Explanatory Notes had previously formed part of the definition of disability under the Disability Discrimination Act 1995 (to which the Explanatory Notes had initially referred) but that the list was not part of the Equality Act (which had replaced the Disability Discrimination Act) so that it was no longer necessary for a claimant to prove that he fell within the list in order to be categorised as disabled. A rather looser—and somewhat subjective—definition of disability appeared to have been used by the Labour Force Survey which was the statistical basis of the Tables. On this basis the Judge

decided that the claimant satisfied the Equality Act definition of disability by reason of the fact that his day-to-day activities were limited "because he cannot work or do anything else outside in cold conditions for any appreciable period of time". Importantly, the Judge considered that the ability to work was a "day-to-day activity" even though that created some overlap in the definition of disability. Finally he found that the injury affected the kind and amount of paid work he could do as the claimant had to avoid working outside in cold conditions. The claimant was therefore disabled.

Because of the very limited extent of the claimant's disability, the Judge decided that he had to take "option 3" and apply the Tables with an adjustment. He noted (at [60]) that "I have no expert evidence or guidance as to what adjustment I might make from the Explanatory Notes, although on my findings about this case there is, in my judgment, a very clear indication from paragraphs 31 and 32 of the Notes that I should do something". Having rejected suggestions put forward by Dr Wass in an article on the basis that they would over-compensate the claimant, he decided (at [61])

> "… that I should use the multiplier/multiplicand method but that my multiplier will be substantially reduced for contingencies other than mortality to reflect the minor nature of the disability. I consider that in the absence of any other evidence or guidance I should take a midpoint between the not disabled RF of 0.92 and the disabled RF of 0.54, which is 0.73. There is little logic in this approach, except that it gives a figure which appears to me to reflect fully the loss sustained by the claimant, but to do so in a way which does not obviously overstate that loss."

It is interesting to note that the Judge felt that the effect of adopting the method suggested by Dr Wass was too high because it would have meant that the claimant was being in effect compensated for nine years' loss of earnings and he felt that this was unrealistic. However, the award made amounts almost to five years' loss of earnings with no discount for accelerated receipt.

With respect, the Judge was right to bemoan the lack of logic in the approach that he felt compelled to adopt. At first glance it seems odd to use a mid-point figure between the disabled and non-disabled figures in a case of such minor disability—surely a figure closer to the "non-disabled" figure would be more appropriate. However, the approach makes sense if it is accepted that there will be cases in which there should be no adjustment to reduction factor. Assuming that Andrew Edis QC's approach to the definition of disability is correct, it would be logical to assume that:

- there are many cases where no adjustment should be made;
- those cases would involve "moderate" disability where the claimant has (for example) a wrist fusion or an arthritic knee and where the effect of that disability neither completely hampers his pre-accident work nor permits him to continue unencumbered; and
- there are cases where the disability is very severe (for example paraplegia) or the effect of the disability on that particular claimant's ability to continue in his career is very severe (for example a manual worker in his 50s with an arthrodesis) where it is necessary to adjust the Reduction Factor downwards so as to provide a larger award.

One major problem with the Judge's approach is that it begs the question: why bother with the Tables at all? If the exercise is one of judicial fact-finding and assessment then why should the starting point be the Tables rather than the Judge's own assessment of the likely effect on the claimant of the injury/disability—i.e. the traditional method? Of course, one problem with the "traditional method" is that prior to the introduction of "Ogden 6" it had become somewhat atrophied, with judges tending towards "rule-of-thumb" type allowances of one and a half to two years' loss of earnings, and figures very unlikely to approach six figures. Further, the use of expert employment evidence is increasingly rare, leaving non-specialist personal injury judges in the unenviable position of having to guesstimate the loss of earnings to be suffered by a claimant—often a young, employed claimant—many years into the future. There was

an understandable judicial tendency towards conservatism that might lead to under-compensation with many awards typically in the region of £20,000–£40,000.

Perhaps the best use of the Tables in cases of "borderline" disability such as *Billett* is as a yardstick of reasonableness. The Ogden Tables and Explanatory Notes are generally admissible. Whatever definition of disability is used, it is clearly wrong that those who fall on one side of the definition should be eligible for a much higher award than those who narrowly miss out—the Tables and Explanatory Notes properly viewed are *evidence* of the effect of illness and injury on lifetime earnings and that evidence should be used to inform judges making assessments—whether mathematical or "rough and ready" of the claimant's likely loss. A judge who decides that the Tables do not produce a fair result and who is contemplating a lump-sum award should, it is submitted, have regard to the Tables as an indication of the suitability of that lump sum award. It can be seen that this is a "third way" that avoids the dilemma articulated by Andrew Edis QC at [61] and cited at the beginning of this article—the Judge would not be making an "arbitrary deduction" or ignoring the Tables, but rather checking his own assessment of the likely effect of the injury on a claimant's earning capacity by reference to an admissible statistical database.

Conclusions

The certainty produced by the use of multipliers in the calculation of damages for future pecuniary losses is helpful to litigants and their lawyers when it comes to evaluating the likely outcome at trial. In theory, a strict application of multipliers and the Ogden Tables should promote settlement in the majority of cases. However, in the very small minority of difficult, atypical cases that go to trial, application of a mathematical approach will often lead to injustice and the trial judge's role is to decide the case justly, not to have an eye on the potential ramifications of any given decision. Whereas the Tables are likely to be the starting point—and may well take centre stage—in negotiations, once at trial their role may prove to be less determinative.

The application of a strict mathematical approach is never likely to lead to the "right" answer in any given case, but absolute accuracy is barely ever attainable when it comes to an assessment of future events and losses—the only guarantee is that the precise amount awarded in any given case will always be too high or too low; the court should try to get as close to the likeliest "right" answer as possible, but should not become obsessed with precision when predicting uncertain events. In some cases, such as the assessment of life multipliers, there is little basis for judicial tinkering with established multipliers in the absence of very clear evidence as the multipliers will provide the best estimate of the likeliest outcome; in other instances, such as the assessment of the likely career path of any given claimant, old-fashioned judicial assessment may be more likely to produce an appropriate outcome than slavish dedication to fixed formulae. Properly understood, the Ogden Tables and the data that inform them are, at the very least, good evidence—and often the best evidence—of what the future may hold.

The Future of Part 36 (Part 8)

John McQuater*

Acceptance; Costs; Part 36 offers; Variation; Withdrawal

John McQuater continues his occasional review of the operation of Part 36. In this 8th piece in the series he reviews a number of recent and important decisions affecting Part 36 including the tactical considerations relating to withdrawal and amendment of Part 36 offers and also the most recent cases on how Part 36 benefits or sanctions are being applied by the Courts.

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Introduction

Since the seventh article in this series, which looked at the impact of significant amendments to the CPR in both April 2013 and July 2013, case law has continued to interpret and clarify Part 36, whilst practitioners have begun to get to grips with the tactics of Part 36 in the post-2013 litigation world.

This eighth article in the series will look at various aspects of the rule considered in recent caselaw and what these decisions mean in practice.

Various aspects of Part 36 will be considered in turn, starting with the making of offers and then working through the topics of withdrawal, changing and acceptance of offers before concluding with the issue of costs consequences under Part 36 as well as, by way of contrast, costs consequences of Part 36 offers under Part 44.

Making Offers

A series of cases, reviewed by earlier articles in this series, have emphasised the importance of complying with the rules on form and content, particularly those set out in Part 36.2 (2) when making an offer intended to have the consequences provided for in the rule.

The courts will, nevertheless, try to give effect to an offer, as a Part 36 offer, if the rule is referred to, even when there may be issues about compliance with the requirements of form and content. A recent example of this approach is *Haynes v Department for Business Innovation and Skills* [2014] EWHC 643 (QB), which will be returned to later in this article on a different point, where an offer was made in the following terms:

> "We now have our client's instructions to put forward an offer to settle this claim against your client pursuant to Part 36 CPR in the sum of £18,000 plus standard costs. The amount is net of benefits in full and final settlement of her claim."

The judge held that, whilst this offer probably did not comply with the terms of Part 36, as no point had been taken by the defendant at the time any non-compliance was waived.

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Withdrawing Offers

Part 36.3 (6) confirms that after expiry of the relevant period, provided the offeree has not previously served notice of acceptance, the offeror may withdraw the offer, or change its terms to be less advantageous to the offeree, without the permission of the court.

Part 36.3 (7) provides that is achieved by serving written notice of the withdrawal or change of terms on the offeree.

Recent caselaw has considered the proper approach to withdrawal of Part 36 offers within the relevant period, when permission of the court is required, and also what constitutes notice of withdrawal.

Permission

The approach of the courts to an application for permission to withdraw a Part 36 offer, within the relevant period, was reviewed in *Evans v Royal Wolverhampton Hospitals NHS Foundation Trust* [2014] EWHC 3185 (QB)

The defendant, in this clinical negligence claim, made an application for permission to withdraw a Part 36 offer within the relevant period of that offer in circumstances described as "remarkable" by the judge.

The unusual feature of the application was that it raised the question whether permission could be granted by the court on the basis of information, and for reasons, not disclosed to the offeree.

The claimant had been admitted to the defendant's hospital following a fall in the street while intoxicated. The claimant was discharged from hospital later on the day of admission but the following day re-admitted in an unresponsive state as a result of a brain injury leaving permanent disability. The claimant's case was that the defendant failed to properly assess and treat her properly and that this caused the adverse outcome of permanent disability.

The defendant admitted breach of duty but denied this had any causal effect on the claimant's clinical outcome.

On July 3, 2014 the defendant made a Part 36 offer of £325,000. At 11.25 am on July 23, 2014 the defendant's solicitors served, by fax on the claimant's solicitors a notice of withdrawal of that offer. At 12.45 pm on the same day the claimant's solicitors served, on the defendant's solicitors by fax a notice of acceptance of the offer.

Consequently, both notices were served within the relevant period, Part 36.3 (5) providing that before expiry of the relevant period a Part 36 offer may be withdrawn or its terms changed to be less advantageous to the offeree only if the court gives permission.

On August 6, 2014 the claimant made an application seeking a declaration the proceedings had been settled for a sum of £325,000 and an order for judgment accordingly.

Meanwhile, but unknown to the claimant, the defendant issued, on July 24, 2014, an application for permission to withdraw the Part 36 offer. Without notice of the application being given to the claimant that application was heard on August 7, 2014 and an order made:

- giving the defendant permission to make application without serving a copy on the claimant;
- giving the defendant permission to withdraw the Part 36 offer;
- setting aside the purported acceptance of the Part 36 offer by the claimant;
- dispensing with the requirement to serve the application notice and evidence in support on the claimany after the without notice hearing; and
- reciting the defendant's right to set aside or vary the order under Part 23.10.

On August 13, 2014 the claimant received a copy of the order made on August 7, 2014 but, in accordance with the terms of that order, no application notice or evidence in support. Consequently, the claimant was

never made aware of the basis on which that order was made. The following day the claimant issued an application under Part 23.10 to set aside the order made on August 7, 2014.

After reviewing the procedure adopted when the defendant's application was considered by the court, in the context of relevant authorities, Leggatt J concluded:

> "Two points emerge clearly from these cases. The first is that adherence to the principle of natural justice is not an optional feature of litigation from which a court has power to derogate because it considers that in the particular circumstances the need to follow a fair procedure is outweighed by a conflicting public or private interest. Subject only to certain established and tightly defined exceptions, the right to participate in proceedings in accordance with the principle of natural justice is absolute. The second point is that, although the Al Rawi case concerned the trial of a civil claim for damages, the reasoning which underpins that decision is not confined to trials and is of broader application. The broader principle which I derive from these authorities is that the logic of the Al Rawi case applies whenever a court is deciding a question of substantive legal right as between the parties to the litigation. This is consistent also with Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which establishes the right of everyone to a fair and public hearing in the determiation of his civil rights and obligations" and provides only for balancing the requirement of publicity and not that of fairness against other interests."

Consequently, the order of August 7, 2014 should not have been made and the claimant was entitled as of right to have it set aside.

That did not prevent the defendant still arguing there should be permission to withdraw the Part 36 offer, though the judge held that in accordance with the principle of natural justice such argument would have to be supported by reasons and evidence as it did not fall into a category where any form of "closed material procedure" was permissible. However, the defendant had not served any evidence or disclosed any reasons to support such a contention. In the absence of that the claimant's acceptance of the offer had to be treated as effective, and it followed the claimant was entitled to judgment under Part 36.11 (7).

Leggatt J went on to observe that there was another separate line of reasoning which would, in any event, have led him to the same conclusion. He explained:

> "The test to be applied when the court is considering whether to give a party permission to withdraw a Part 36 offer is whether there has been a sufficient change of circumstances to make it just to permit the party to withdraw its offer. That test was set out by the Court of Appeal in relation to payments into court in *Cumper v Pothecary* [1941] 2 KB 58 at 70. The Court of Appeal gave as examples of such circumstances "the discovery of further evidence which puts a wholly different complexion on the case … or a change in the legal outlook brought about by a new judicial decision…" This test was adopted in relation to Part 36 payments by the Court of Appeal in *Flynn v Scougall* [2004] 1 WLR 3069, 3079 at para 39. I see no reason why the test should be different in relation to a Part 36 offer and, as mentioned earlier, the defendant's application to withdraw its Part 36 offer was made on the basis that this is the applicable test."

In the absence of any evidence from the defendant there could be no basis for concluding there was a sufficient change of circumstances.

Leggatt J concluded:

> "Part 36 sets out a structured series of steps, with specified timescales, for the acceptance of an offer made in accordance with its provisions and for payment of the accepted sum. It would be inconsistent with this regime and with the aim of providing a fair, speedy and effective mechanism for the settlement of proceedings, if the offeree could be required to wait in limbo for an indeterminate time, as is proposed in this case, with the whole action stayed meanwhile, before it can be established

whether the offer was validly accepted within the 21 day relevant period such that the offeree was entitled to payment or judgment within 14 days thereafter."

Whilst the background, as the judge noted, was indeed remarkable the judgment makes some important points, of more general application, in particular stressing that when an application to withdraw, and presumably change so it is less advantageous to the offeree, an offer within the relevant period is considered the offeror will need to prove there has been a sufficient change of circumstances so that it is just to permit the party to take that step.

This principle might also be applicable in the event of the claimant seeking, in the limited circumstances where this is necessary, permission to accept an extant Part 36 offer made by the defendant outside the relevant period. In other words if there was no sufficient change of circumstances permission ought usually to be granted subject, of course, to terms on costs.

In other circumstances, of course, the offeror can withdraw or change a Part 36 offer, unless and until accepted, at will.

Mistake

Barrett -v- Nutman (Liverpool County Court, June 20, 2014) concerned an application by the Claimant for permission to withdraw a Part 36 offer on the basis of a mistake.

The proceedings arose out of a road traffic accident. The claimant made a Part 36 offer of £2,701.22. The defendant enquired whether that offer included £540 physiotherapy fees.

Within the relevant period the claimant then purported to withdraw the offer and to make another Part 36 offer, which included the physiotherapy fees. The defendant then accepted the original Part 36 offer.

The claimant argued that there had been a genuine mistake hence applying the overriding objective permission to withdraw the offer should be given.

The defendant contended a mistake about the calculation of the offer was something the claimant should be fixed with and the court ought not to readily allow the withdrawal of a Part 36 offer, because that would undermine the certainty provided by the rule and did not assist in the administration of justice.

District Judge Clark concluded, taking account of the overriding objective, permission to withdraw the offer should not be given.

Noting the amount involved was £540 the judge held it was necessary to have regard to proportionality and also to allot only an appropriate share of the court's resources, given that if permission was granted that would effectively revive a case which had been stayed with the result further hearings, and possibly a final hearing, might be necessary.

Consequently, permission to withdraw the Part 36 offer was refused.

The decision does seem rather harsh on the claimant because, applying the common law of mistake, an agreement will be vitiated if there was no mutual mistake, in other words if one party made a mistake and the other party was aware of that mistake. That seems to have been the position here, given the request for clarification. The court was not referred to the potentially persuasive decision of *Milton v Schlegel (2006) Ltd* (Cambridge County Court, October 31, 2008) where, although on the facts the agreement was held to be binding, this approach to the law was adopted.

Notice of Withdrawal

What amounts to notice of withdrawal was considered in *Super Group Plc v Just Enough* [2014] EWHC 3260 (Comm)

The defendant made a Part 36 offer on November 26, 2013 but subsequently wrote on April 25, 2014 stating:

> "…our client made every effort to settle this matter, which was simply ignored by yourselves and your client which offers are, needless to say, withdrawn."

On May 8, 2014 the claimant served notice of discontinuance of the claim.

On May 5, 2014 the claimant wrote purporting to accept the Part 36 offer made on November 26, 2013.

The claimant applied to court for an order on the basis the offer was to remain open for acceptance. The defendant contended the offer had been withdrawn and, additionally, the offer could not, in any event, be accepted following notice of discontinuance.

Flaux J held that:

> "…the Part 36 offer that was made was clearly withdrawn by the letter of 25 April. It is accepted, as indeed it must be, that there does not have to be any specific form of notice and although Moore-Bick LJ says in the passage I cited from paragraph 17 of his judgment that it would be preferable if the date of the offer is specified so that it can be made absolutely clear that that is the offer that is being withdrawn, he recognises that there may be cases in which the court may need to explore what offers have been made and whether the Part 36 offer is one of them and whether that offer has been withdrawn. So that he is clearly contemplating that there does not have to be some rigid regime of a specific form of notice. Furthermore, it seems to me that although Rix LJ refers to a formal notice of withdrawal, he is simply making the point there that you have to serve something in writing that states in terms that an offer is being withdrawn. He is not prescribing a particular form of words or the incantation of some magic formula that has to be gone through. Indeed, any such suggestion would be contrary to the whole force of the passage of Moore-Bick LJ in his judgment as to the purpose of the Part 36 regime."

Consequently, it was not necessary to determine the effect of the notice of discontinuance, though the Judge expressed the view that following service of that notice the offer could not be accepted and observed this was consistent with the judgment of Kenneth Parker J in *Joyce v West Bus Coach Services Ltd* [2012] EWHC 404 (QB).

Changing Offers

It is easy to overlook the option of changing, so it is less advantageous to the offeree, an offer rather than withdrawing that offer. The former may be a better step tactically for the offeror than the latter as the judgment in *Burrett v Mencap Ltd* (Northampton County Court, May 14, 2014) illustrates.

Giving judgment District Judge Ackroyd observed:

> "What I have before me is the interesting question of interpretation of Part 36. One would have thought that Part 36, having been in existence for many years now every possible wrinkle in it would be ironed out before now. It appears not to be so because the question I have to decide is whether on variation of a Part 36 offer the time for acceptance is fixed by the time for acceptance of the original offer or whether a fresh period of time begins to run."

The background was that the defendant made an effective Part 36 offer to settle the claim on July 19, 2013.

By a letter dated January 17, 2014 the defendant stated:

> "We hereby change the terms of our client's Part 36 offer dated 19th of July pursuant to CPR 36.3(6)."

The claimant accepted the offer as changed reasonably promptly.

The hearing before the district judge concerned the incidence of costs following acceptance of the offer.

The issues involved in the application were summarised by the judge:

> "One could I think reasonably assume that because maybe the nature of the case has changed or certainly the strength or weakness of the evidence has changed that a Defendant should have an opportunity of reviewing previous offers in order to bring the litigation to a conclusion. That makes good sense but should it be able to carry with it the costs protection that attached to the original offer? Of course, in this case we are talking about a difference of some six or seven months which may be of significance in terms of costs. One might also have thought that where an offer has been changed there should be a period of time allowed to the Claimant to at least reflect on that change and what the consequences of acceptance or refusing the offer bring to the Claimant. That also would make good sense."

After noting that Part 36.3(6) allows a party to withdraw or change, so it is less advantageous to the offeree, an offer once the relevant period has expired and also that Part 36.3 (7) confirms that can be done by serving written notice of the withdrawal or change of terms, the district judge, observing that this rule was silent about there being any further time allowed for acceptance, concluded there was no implied entitlement to such further time.

Consequently, the claimant did not get the benefit of the deemed costs order found in Part 36.10, which would be applicable on acceptance of a Part 36 offer within the relevant period.

This case does deal with an important point; namely the ability to change a Part 36 offer, after the relevant period has elapsed, at any time unless and until that offer is accepted. The significance of this is that changing an offer may be far more beneficial to the offeror, by preserving the benefits conferred under Part 36, than withdrawing the offer and making a new offer.

The judgment, it would seem correctly, recognises the ability, under Part 36, to change an offer which, on the basis the rule is a self-contained code (see *Gibbon v Manchester CC* [2010] EWCA Civ 726), means simply that the original offer is now read as though it had been made as subsequently amended.

It is, of course, essential to either change or withdraw a Part 36 offer in the event that it no longer represents an appropriate settlement and to do so irrespective of any events that would, under the law of contract, prevent acceptance (see *Gibbon v Manchester CC* [2010] EWCA Civ 726). The wording used in the case might be adopted, or perhaps service of an amended notice in form N242A where that was used to communicated the original offer.

As the claimant appears to have accepted the offer more than 21 days after the change the judge could have approached costs on the basis of the general discretion found in Part 36.10(5).

Acceptance

A series of cases have considered different issues that may arise in relation to the acceptance of a Part 36 offer.

Timescale for Payment

Treating Part 36 as a self-contained code is significant when considering timescale for payment of sums due following acceptance of an offer as confirmed in *Cave v Bulley Davey* [2013] EWHC 4246 (QB).

This was a judgment on costs following acceptance, by the claimant, of a Part 36 offer made by the defendant long after the expiry of the relevant period.

The background was that on February 29, 2012 the defendant made the claimant a Part 36 offer to pay £20,000. The claimant accepted the offer on July 13, 2013.

The first day of the trial of the action was July 15, 2013. At that hearing a number of matters were agreed.

- It was agreed the defendant should pay the claimant's costs up to March 21, 2012.

- It was agreed the claimant should pay the defendant's costs from March 22, 2012 to July 13, 2013.
- It was agreed there should be a set off of costs, so that whichever party was to receive the greater sum in costs should receive only the balance in excess of the amount found to be due to the other party.

There was, however, an issue between the parties as to whether the costs to which the defendant was entitled should be set off not merely against the costs to which the claimant was entitled but also against the £20,000 payable on acceptance of the Part 36 offer.

Part 36.11 (6) was held to provide that, unless the parties agree otherwise in writing, where a Part 36 offer is or includes an offer to pay a single sum of money then, on acceptance, that sum must be paid within 14 days of acceptance (or, where appropriate, when the court makes an order under Part 41.2 or Part 41.8).

Consequently, on acceptance of the Part 36 offer to pay £20,000 that sum had to be paid within 14 days with no right of set off.

This decision confirms a further advantage to the claimant on accepting a Part 36 offer, even at a late stage, namely that the damages must be paid even if there may be some potential liability for costs. Whilst the judge did go on to provide for an offset on costs that may not be viable if QOCS applies because there the right of set off does not extend to costs.

Costs of the Proceedings

Part 36.10 deals with the costs consequences on acceptance of a Part 36 offer and provides that this will generally entitle the claimant to the "costs of the proceedings".

The meaning of this phrase, in the context of a claim against multiple defendants, was considered in *Haynes v Department for Business Innovation and Skills* [2014] EWHC 643 (QB).

The claimant commenced proceedings against 10 defendants, including the defendant involved in the appeal, alleging that her husband had, in breach of duty, been exposed to asbestos and that this had caused his death.

The total value of the claim against all defendants was £195,000. The claimant made the defendant involved in this appeal a Part 36 offer of £18,000. That offer was accepted by this defendant.

The claimant did not pursue the claims against the other defendants, proceedings having been issued but never served on those defendants.

The claimant sought costs, without these being disaggregated, apportioned or divided, from the defendant who had accepted the Part 36 offer.

At first instance it was held that costs should be apportioned, with the defendant involved in the appeal only to pay costs directly attributable to the action against that defendant and 1/10 of the common costs.

On appeal the judge recognised that when a Part 36 offer was accepted within the relevant period a costs order in favour of the claimant, for the "costs of the proceedings up to the date on which notice of acceptance was served on the offeror", will be deemed to have been made on the standard basis.

The effect of such a deemed order is that the claimant becomes entitled to 100 per cent of the costs found to be due and owing on a detailed assessment (and the costs judge has no power to vary the deemed order): *Lahey v Pirelli Tyres Ltd* [2007] 1 W.L.R. 998 (CA).

On the issue of what the term "costs of the proceedings" in Part 36.10 (1) meant Jay J held:

> "I have no hesitation in concluding that the term means, in this context, "the costs of proceeding against the defendant against whom the deemed order has been made". Any broader definition would achieve obvious injustice and violate the language of the rule as seen in its proper contextual setting."

On this basis the court had to consider technical points relating to apportionment outside the scope of this article.

This case highlights the potential difficulties, in relation to Part 36, where there are multiple defendants unless those defendants collectively make the Part 36 offer which, in turn, emphasises the need, wherever possible, to have a single defendant.

Judgment

An important consideration, particularly for claimants, is whether, on acceptance of a Part 36 offer, the court can, or should, enter judgment. This is particularly significant if the defendant accepts the claimant's Part 36 offer after the end of the relevant period because on judgment, unless that would be unjust, the claimant will then be entitled to the benefits conferred by Part 36.14 (3).

There has been caselaw which suggests judgment is not appropriate following acceptance of a Part 36 offer (*Jolly v Harsco* [2012] EWHC 3086 (QB)).

More recently, however, Warby J reached a different conclusion in *Ontulmus v Collett* [2014] EWHC 4117 (QB).

This was a libel claim brought by three claimants. The defendant made offers to settle each of those claims comprising:

The defendant made offers to settle the claimant's claims:

- a Part 36 offer of £75,000 to the first claimant;
- a Part 36 offer of £25,000 to the second claimant; and
- a non-Part 36 offer of £25,000 to the third claimant.

Those offers were accepted over 10 months after being made. The judgment dealt with the various issues then arising including the appropriate order in respect of the damages which, following agreement, the defendant had agreed to pay to each claimant.

The Judge noted that so far as the first claimant was concerned under Part 36.11 (1) and (2), if a Part 36 offer which relates to the whole of the claim is accepted that claim will be stayed on the terms of the offer but Part 36.11 (5) confirms this does not affect the power of the court to enforce the terms of the order or to deal with any question of costs relating to the proceedings.

The Judge also noted that so far as the third claimant was concerned a stay could be imposed under the court's general powers of case management: Part 3.1(2)(f). As the relevant offer was in full and final settlement a stay, subject to the question of costs, was appropriate.

The parties agreed it was appropriate for judgment to be entered and Warby J concurred with that approach. The Judge held that, so far as the Part 36 offers made to the first and second claimants were concerned, that was consonant with Part 36.11(7), which provides that if a Part 36 offer is accepted and the sum not paid within 14 days judgment may be entered for that unpaid sum.

Settlement with the second claimant was not governed by Part 36 but as a contractual obligation had been entered into it was agreed judgment should be entered for the sum payable.

In *The Chief Constable of Hampshire Constabulary v Southampton CC* [2014] EWCH Civ 1541 the Court of Appeal implicitly confirmed that the making of an order, following acceptance of a Part 36 offer, could be appropriate when noting this was an exercise of the power under Part 36.11 (5) "to deal with any question of costs … relating to the proceedings". On the facts of the case, however, the consent order was held not to be a judgment. That would suggest that if there is intended to be a judgment it is important the order states as much in clear terms. Whilst other comments in that case suggest a judgment may not be necessary following acceptance of a Part 36 offer these were not made in the context of argument about the need for a judgment following late acceptance when, perhaps, the matter needs to be looked at in the

context of the overriding objective which may put a different complexion on the exercise of a power that these cases suggest, contrary to earlier decisions, the court has.

Limitation

The Court of Appeal ruling in *The Chief Constable of Hampshire Constabulary v Southampton CC* [2014] EWCH Civ 1541 also deals with a very important point on limitation, triggered by acceptance of a Part 36 offer, for the purposes of the Civil Liability (Contribution) Act 1978.

The claimant in these proceedings sought a contribution from the defendant following settlement of a personal injury claim which had been previously brought against the claimant.

In the earlier claim the claimant, in those proceedings, made a Part 36 offer which the claimant, as Defendant in the proceedings, accepted on November 4, 2010. Terms of settlement were subsequently recorded in a consent order made on December 15, 2010.

Limitation under the 1978 Act is governed by s.10 of the Limitation Act 1980. The terms of that Act provide that if any person becomes entitled to a contribution under the 1978 Act no action shall be brought after the expiration of two years from the date on which that right accrued.

Whilst a consent order had been made in the earlier proceedings that was held not to constitute a "judgment", meaning that the "right accrued" on the date the Part 36 offer was accepted for the purposes of s.10(3)of the 1980 Act.

The Court of Appeal left open the question whether, had there been a judgment following acceptance of the Part 36 offer, the time limit would have run under Section 10 (4) from the date of that judgment. A defendant, contemplating contribution proceedings, might prefer there to be a judgment, as this may afford additional time, and, for the reasons already noted when dealing with the topic of judgment following acceptance of a Part 36 offer, it would seem the court does have power to do this.

Costs Consequences of Part 36 Offers (Under Part 36)

Part 36 provides for very specific costs, and other, consequences for offers made in accordance with the rules which, when the rule applies, will prevail over the more general provisions as to costs found in Part 44.

For these consequences to apply there must be a judgment which is "more advantageous" or "at least as advantageous", as appropriate, as an effective and extant Part 36 offer, unless those consequences would be "unjust".

More Advantageous?

The question of whether a judgment was "more advantageous" arose in slightly unusual circumstances in *Newland Shipping & Forwarding Ltd v Toba Trading FZC* [2014] EWHC 864 (Comm).

The claimant sued the defendant on two contracts, the claims being initially conjoined. The claims were subsequently divided into separate actions but, meanwhile, the claimant made a Part 36 offer to settle both claims for $2.9 million.

Judgment was eventually given for the claimant in each of the, now separated, claims, though at different times. The claimant argued the judgments in each action should be added together for the purpose of determining whether that cumulative figure was "at least as advantageous" to the claimant as the claimant's own Part 36 offer.

Leggatt J rejected that argument, concluding that Part 36.14 was not apt to cover a situation where two different judgments were given at different times in two separate actions so as to enable those judgments to be aggregated and treated as if they were one.

Unjust? (Claimant's Additional Amount)

Part 36.14 (3), reflecting a recommendation in the Jackson Report, was amended in April 2013 so as to confer on claimants, with offers made after the amendment to the rule, the potential benefit of an additional amount. That is, in broad terms, 10 per cent of the damages awarded, in a money claim, subject to a ceiling of £75,000.

Caselaw on this topic has considered, particularly with Part 36 offers made at a late stage, whether it would be unjust for the claimant to have this benefit.

Feltham v Freer Bouskell [2013] EWHC 3086 (Ch) was a judgment on costs following trial of a negligence claim brought by the claimant against the defendant when judgment was entered for the claimant in the sum of £650,000.

The trial started on June 4, 2013. On May 10, 2013, more than 21 days before the start of that trial, the claimant made a Part 36 offer of £700,000.

The judge noted that the claimant had obtained judgment at least as advantageous as the claimant's own Part 36 offer so, unless that would be unjust, was entitled to the benefits conferred by Part 36.14 (3).

Interest, under Part 36.14(3)(a), was awarded at 3.5 per cent above base rate from June 3, 2013, on the basis current interest rates are rather different from when this rule was first devised and "it would be quite wrong to order a sum anywhere near 10 per cent as that would be effectively penal".

Under Part 36.14 (3) (d) the claimant was entitled to an additional amount unless, again, that would be unjust. Part 36.14 (4) sets out some of the circumstances for consideration by the court in deciding whether it would be unjust to make such an order. On this point the judge took particular account of:

- the raising of the key allegation by the claimant at a very late stage;
- the late disclosure of documents by the claimant; and
- the offer was "very much last minute".

The new point raised by the claimant during the opening of the trial proved to be the principal ground on which liability was decided, although not the only ground.

Whilst, with enhanced interest, the length of time since the offer was reflected in the amount of the award, where the court was concerned with the "additional amount" it was "all or nothing" and hence the timing of the offer might well be a factor rendering such an order unjust.

Having regard to all these matters, but in particular the claimant having raised a new issue during the opening of the trial which proved to be of "fundamental importance", it was held to be unjust for the claimant to receive the additional amount.

No reduction was made from the order for costs in favour of the claimant, though the judge indicated a relevant factor was the decision not to allow any additional amount and that, had such an award been made, the claimant would have received less than the full amount of her costs. This was on the basis it would be unfair to penalise the claimant a second time in respect of the matters taken into account in deciding not to award the additional amount.

Davison v Leitch [2013] EWHC 3092 (QB) was also a case in which the judge had to consider whether the claimant should receive indemnity costs, additional interest and an additional amount under Part 36.14 (3).

This was a clinical negligence claim in which, following trial, damages, excluding interest, were awarded for a total of £1,534,293.

The claimant had made a Part 36 offer of £900,000 on September 11, 2013. The relevant period in that offer expired on October 2, 2013. The trial did not start until October 8, 2013, but had been delayed because it was not ready to commence on October 2 as originally scheduled.

In these circumstances the judge had to determine whether it would be "unjust" for the claimant to receive all or any of the benefits potentially conferred by Part 36.14 (3).

The judge, reflecting the terms of Part 36.14 (4) considered a number of factors were relevant to the exercise of discretion.

- The terms of the Part 36 offer: the clamant had beaten her own offer by a very substantial margin.
- The stage in the proceedings at which the offer was made (including how long before trial): noting the later the offer was made the less costs savings were likely to be made if it was then accepted the judge observed that had the claimant's legal team "got their tackle in order" the trial would have started on October 2, hence Part 36.14 (3) would not have applied at all because the offer would have been made less than 21 days before the start of the trial.
- Information available to the parties when the offer was made: whilst some crucial evidence relied on by the claimant at trial had been obtained late it had been served by the time of the offer and could, therefore, have been evaluated by the defendant.
- Other factors: the judge held costs savings were not the only important factor, for example acceptance of the claimant's Part 36 offer would have avoided the need for her to leave a small baby in Hong Kong and to give evidence, which inevitably would have been an unpleasant and distressing experience given the subject matter of the claim.

Taking all these matters into account the judge concluded that it would not be unfair to the defendant for some of the consequences found in Part 36.14 to be visited upon him but it probably would be unfair for all of them to apply. On this basis:

- costs should be assessed on the standard basis;
- interest should be awarded on costs recoverable from the date at which the offer expired until the date of judgment at 2% above base rate;
- the claimant would receive the full "additional amount" of £75,000; and
- there would be no additional interest on damages.

This judgment confirms the potency of the "additional amount", particularly in a higher value claim, as the claimant may secure this benefit even with an offer made at a very late stage.

Another case considering the additional amount under Part 36.14 (3)(d) was *Elsevier Ltd v Munro* [2014] EWHC 2728 (QB). This was another late offer but, crucially, the offeree received the offeror's witness statements at a late stage and the judge concluded it was unduly harsh to criticise the offeree for not accepting the offer promptly in these circumstances. Consequently, imposing an additional amount would involve an unjust element of penalty and that was not, therefore, awarded.

In *Watchorn v Jupiter Industries Ltd* [2014] EWHC 3003 (Ch) the claimant was awarded the additional amount, along with other benefits conferred by Part 36.14(3), HHJ Purle QC observing:

> "The whole purpose of these consequences is to encourage claimants to make, and the defendants to receive and consider very carefully, Part 36 offers so as to avoid some of the horrendous costs that are on display in this case. That encouragement, to be effective, needs to be underpinned by an effective sanction."

That was so, even if the claimant received well short of the sum originally claimed given that, for Part 36.14(3) to apply at all, the claimant had to have made a realistic offer.

Downing v Peterborough & Stamford Hospitals NHS Foundation Trust [2014] EWHC Civ 4216 (QB) completes the recent cases considering whether the award of an additional amount would be unjust.

This was a clinical negligence claim in which agreement was reached on liability but the issue of quantum had to be tried. The judge awarded, after apportionment to reflect agreement on the issue of liability, damages totalling £1,508,524. The claimant had made a Part 36 offer to accept £1.2m. Sir David

Eady rejected an argument by the defendant that indemnity costs, and enhanced interest on costs, would be "punitive" concluding:

> "I believe that there is nothing here to justify a departure from the presumption in favour of indemnity costs. The Defendant's advisers made a particular judgment call which turned out (at least at first instance) to have been wrong. Such an award does not carry with it any implied criticism of their professional skill or of their conduct. It is just one of the consequences imposed by the rules. I rule, accordingly, that costs should be assessed from the relevant date on the indemnity basis and, further, that there should be interest on those costs at 10% above base rate under CPR 36.14(3)(c)."

On the question of the additional amount the judge held:

> "There is also provision in CPR 36.14(3)(d) for an additional sum, not exceeding at the moment £75,000, to be paid in accordance with a sliding scale there set out. I cannot see any reason why, under this new regime, the Claimant should not receive the maximum figure."

The judge also emphasised the need for an objective approach to the application of costs consequences under Part 36 observing:

> "It is elemental that a judge who is asked to depart from the norm, on the ground that it would be 'unjust' not to do so, should not be tempted to make an exception merely because he or she thinks the regime itself harsh or unjust. There must be something about the particular circumstances of the case which takes it out of the norm."

Unjust? (Defendant's Costs)

In *Ted Baker Plc v AXA Insurance UK Plc* [2014] EWHC 4178 (Comm) the court considered what would be "unjust" in the context of the usual costs consequences in favour of a defendant where the claimant has failed to obtain a "more advantageous" judgment than a Part 36 offer.

On this point Eder J approved and adopted the observations of Briggs J in *Smith v Trafford Housing Trust* [2012] EWHC 3320 who held:

> "The question is not whether it was reasonable for the claimant to refuse the offer. Rather, the question is whether, having regard to all the circumstances and looking at the matter as it affects both parties, an order that the claimant should pay the costs would be unjust: see *Matthews v Metal Improvements Co Inc* [2007] EWCA Civ 215."

Eder J also approved the comments of Briggs J in *Smith* that:

> "… the court does not have an unfettered discretion to depart from the ordinary cost consequences set out in Part 36.14. The burden on a claimant who has failed to beat the defendant's Part 36 offer to show injustice is a formidable obstacle to the obtaining of a different costs order."

Interestingly, Eder J went on to observe that it would be unjust, within the meaning of Part 36, to require the claimant to pay the entirety of the defendant's costs. That was because the defendant took an approach that left "no stone unturned" and ignored all sense of proportionality. Consequently, the judge concluded:

> "It is for these reasons that I consider that it would be unjust to order the claimants to pay the entirety of the costs of Part 1 notwithstanding the offers (in particular, the first offer) made by the defendants. In my view, the just course is to reduce the amount of the costs to which the defendants are entitled by a substantial amount to reflect the very exceptional circumstances which I have described. Whilst recognising that any assessment of such reduction involves an exercise which is necessarily imprecise

> and somewhat broad-brush, the conclusion which I have reached is that the defendants should be entitled to 25% of their costs …"

ADR

A party who makes a Part 36 offer, even if that offer is subsequently proved to be well-judged, cannot ignore the need to continue engagement with ADR as the Court of Appeal ruling in *PGF II SA v OMFS Company 1 Ltd* [2013] EWCA Civ 1288 confirms.

The relevant Part 36 offer in this case, of £700,000, was made on April 11, 2011 by the defendant.

On the same day the claimant made a Part 36 offer and also wrote to the defendant, in a letter headed "without prejudice save as to costs", suggesting a mediation any time after May 6, 2011 (the letter suggesting dates and nominating possible mediators).

The defendant made no response to the suggestion of mediation.

On January 10, 2012, the day before trial, the claimant accepted the Part 36 offer which had been made by the defendant on April 114, 2011.

On the issue of costs the judge at first instance concluded, on the basis the defendant unreasonably refused to mediate, there should be no order for costs following expiry of the relevant period in the defendant's offer.

In the Court of Appeal Briggs LJ observed that there are automatic costs consequences where a Part 36 offer is accepted (rule 10) and where at trial a claimant fails to improve upon it (rule 14). In the latter case, rule 36.14 (2) preserves the court's discretion to order otherwise where "it considers it unjust" to make an order as prescribed by the rule. By contrast, rule 10(5) provides only that the specified costs consequences will ensue "unless the court orders otherwise", with no specific reference to an injustice test.

Despite this distinction the judge, following *Lumb v Hampsey* [2011] EWHC 2808 (QB) had concluded that the same test should be applied under rule 10 as under rule 14, including the non-exclusive guidelines set out in rule 14(4). That approach was, meanwhile, endorsed by the Court of Appeal in *SG v Hewitt* [2012] EWCA Civ 1053.

Briggs LJ confirmed that where that threshold test (the "injustice test") was satisfied the judge then had a wide discretion as to the form of costs order to be made in substitution for the prescribed consequences noting:

> "Part 36 is itself designed to encourage parties to make, and promptly to accept, realistic offers of settlement."

Briggs LJ went on to observe:

> "It may for example be used by a defendant to encourage its opponent to accept a lower offer than its own valuation of the claim, on account of the claimant's limited appetite for costs risk."

Picking this point up later in his judgment Briggs LJ continued:

> "… it is in my view simply wrong to regard a Part 36 offer, without any supporting explanation for its basis, as a living demonstration of a party's belief in the strength of its case. As I have said, defendants' Part 36 offers are frequently made at a level below that which the defendant fears having to pay at trial, in the hope that the claimant's appetite for, or ability to undertake, costs risk will encourage it to settle for less than its claim is worth."

Briggs LJ added:

> "Nor do Part 36 offers necessarily or even usually represent the parties' respective bottom lines. There was, accordingly, no unbridgeable gulf between these parties' respective Part 36 offers, which could not in any circumstances have been overcome in a mediation."

After concluding there had been, therefore, an unreasonable refusal to engage in ADR the Court of Appeal concluded the exercise of discretion by the judge, to make no order for costs as he did, could not be faulted.

This is an important decision highlighting the need for parties to engage in ADR, not least because that helps to ensure parties do not receive more than a fair share of the court's limited resources: *Hague Plant Ltd v Hague* [2014] EWCA Civ 1609.

Costs Consequences Of Part 36 Offers (Under Part 44)

An offer which is made under Part 36 but does not have the costs consequences found in that rule may, nevertheless, still have costs consequences when the court exercises the general discretion as to costs under Part 44. Non-Part 36 offers are also, of course, potentially relevant for these purposes.

Part 44.2 (4) provides that when deciding what order to make as to costs, the court must have regard to all the circumstances including:

> "(a) the conduct of all the parties;
> (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and
> (c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply."

Near Miss Offers

Since the introduction of Part 36.14 (1A) it has been clear that what might be termed "near miss" offers will not be relevant under Part 36. But might such an offer be relevant under Part 44 where there is no express requirement judgment be "more advantageous" or "at least as advantageous" as the relevant offer?

In *Hammersmatch Properties (Welwyn) Ltd v Saint-Gobain Ceramics & Plastics Ltd* [2013] EWHC 2227 (TCC) the court had to consider the application of Part 44 to costs in a claim where judgment was entered for the claimant in the sum of £1,058,678 when the defendant had made a Part 36 offer of £1,000,000. Allowing for interest the judgment exceeded the offer by £3,637.90.

The defendant's offer was made after October 1, 2011 and, accordingly, Part 36.14 (1A) applied, defining "more advantageous" as "better in money terms by any amount".

Consequently, the defendant's offer carried no automatic costs consequences under Part 36 as the judgment was "more advantageous" to the claimant than the defendant's offer.

Ramsey J held that whilst the Part 36 offer made by the defendant could fall within the wording of Part 44.2 (4) (c) it was wrong to apply hindsight on the basis the defendant should have offered a small amount more and the claimant have reasonably accepted that offer if made.

The judge noted that in *Johnsey Estates (1990) Ltd v Secretary of State for the Environment, Transport and the Regions* [2001] EWCA Civ 535 Chadwick LJ held, on an argument by the defendant the claim had not settled simply because the claimant was not interested in any reasonable offer, that:

> "The submission has some superficial attraction on the facts of the present case; but, for my part, I would reject it. It seems to me that a court should resist invitations to speculate whether offers to settle litigation which were not in fact made might or might not have been accepted if they had been made. There are, I think, at least two reasons why a court should not allow itself to be led down that road. First, the rules of court provide the means by which a party who thinks that his opponent is not

> open to reason can protect himself from costs. He can make a payment in; he can make a Calderbank offer; now, under the Civil Procedure Rules 1998, he can make a payment or an offer under CPR Part 36. The advantage of the courses open under the rules is that they remove speculation. The court can see what offer was made, when it was made, and whether it was accepted. Secondly, speculation is likely to be a most unsatisfactory tool by which to determine questions of costs at the end of a trial."

Ramsey J concluded:

> "In my judgment, to do so would be to seek to use the provisions of CPR 44.2(4)(c) to give a similar effect to a Part 36 offer and thereby introduce the same uncertainty into Part 36 offers which are near to but below the sum awarded, as led to the criticism of Carver and the subsequent amendment introduced in CPR 36.14(1A)."

The judge accepted that if there was an unreasonable refusal to negotiate that was in itself a matter the court could take into account under Part 44.2 (4) (a), but to find a "near miss" offer amounted to an unreasonable refusal to negotiate would raise the difficulties highlighted in Johnsey.

Withdrawn Part 36 Offers

The costs significance of a withdrawn Part 36 offer under Part 44 was considered by the Court of Appeal in *Rehill v Rider Holdings Ltd* [2014] EWCA Civ 42.

Shortly before trial of quantum the claimant accepted an offer of £17,500 by the defendant.

The parties were not, however, able to agree the incidence of costs as the defendant had made a number of offers for more than the claimant ultimately recovered, in particular:

- on April 23, 2007 the defendant made a Calderbank offer of £75,000, expressed to expire on June 1, 2007;
- on November 8, 2007 the defendant made a Part 36 offer of £100,000 which was withdrawn on January 18, 2008; and
- on June 10, 2009 the defendant made a Part 36 offer for just under £40,000, stated as being "open for 21 days and intended to have the consequences of Part 36 CPR".

On the basis the claimant had failed to beat the defendant's Part 36 offer made on June 10, 2009 the judge ordered the claimant to pay the defendant's costs on the standard basis with effect from the expiry of the relevant period in that offer.

The defendant was ordered to pay the claimant's costs prior to that date, despite the other offers made. That was because at the time of the April 2007 offer there was held to be uncertainty about the claimant's prognosis which persisted until after that offer was withdrawn. The same observations were made regarding the November 2007 offer.

On the defendant's appeal the Court of Appeal held that as the offers of both April 2007 and November 2007 were withdrawn the terms of Part 36.14 (6) (a) meant the automatic consequences applicable to a subsisting Part 36 offer did not apply to those offers.

However, those offers fell within Part 44.3, which requires the court to take into account any admissible offer to settle.

Consequently, the question for the Recorder was whether the claimant acted reasonably in not accepting one or other of the 2007 offers. In reaching that decision the terms of Part 36.14 (4) (c), which requires the court to have regard to the information available to the parties at the time a Part 36 is made, must be applied when considering whether an offeree is reasonable in declining a Part 36 offer that has subsequently been withdrawn.

On that point the question was not what the medical experts said at the time, or whether a competent legal advisor should have advised the claimant to accept the offer, but what the claimant himself knew. Here the Recorder overlooked the agreed medical evidence which, whilst not available at the date of the offer, was available before the end of 2007 and that the claimant had reached the end of his recovery from the injuries two years after the accident,

On this basis the Court of Appeal concluded the Recorder's exercise of discretion was vitiated and should be exercised afresh.

It was held to have been unreasonable for the claimant not to have accepted the offer of November 2007, as that was not withdrawn until January 2008 and hence open for acceptance at a time the claimant should reasonably have taken it. The same could not be said, however, about the April 2007 offer.

Accordingly, the November 2007 offer was effective for costs purposes and the claimant ordered to pay the defendant's costs after that offer.

The applicability of Part 36.14 (4), in the self-contained code which is Part 36, to the exercise of discretion under Part 44 might be questioned, as the issue is not whether the usual costs consequences would be "unjust" but a broader assessment, taking all factors into account, of the appropriate order as to costs (applying the approach in *Widlake v BAA Ltd* [2009] EWCA Civ 1256). Subsequently the Court of Appeal have affirmed the significant difference between a Part 36 offer and a non-Part 36 offer in *Coward v Phaestos Ltd* [2014] EWCA Civ 1256, though the court also observed there was no justification for applying the rigid test found in Part 36.14 (1A) to Part 44 because that rule conferred a broad discretion which depended very much on the particular circumstances of the case.

In *Saigol v Thorney Ltd* [2014] EWCA Civ 556, the court of appeal held that a judge had fallen into error by treating an offer which was time-limited, and only open for a short period of time, as having the costs consequences of a Part 36 offer.

Whilst there may be some questions raised about the relevance of Part 36.14, when the automatic costs consequences of that rule are not applicable, the judgment in *Rehill* and *Saigol* are a reminder that with a time limited or withdrawn offers a crucial consideration is likely to be whether, during the time the offer was open for acceptance, it would have been reasonable for the offeree, on what was known at the time, to have accepted the offer.

Conclusion

This review of recent caselaw confirms that the courts continue to regard Part 36 as an important rule of real significance for both claimants and defendants.

Part 36 has become even more important for claimants from 2013, given the greater emphasis on proportionality and the imposition of fixed costs for certain types of claim. That is because Part 36 is the most likely route for a claimant to secure an order for indemnity costs which do not have to be proportionate and, by definition, are not fixed.

For defendants the advent of QOCS, again from 2013, makes effective Part 36 offers all the more important as that will be the most likely way, for a Defendant, around QOCS.

Over the years caselaw has thrown up some anomalies in the workings of Part 36 and the CPRC have now taken the opportunity of codifying the rule, both to reflect existing caselaw and to modify the rule where that caselaw has suggested there are matters which require amendment.

The revised Part 36 can already be found within The Civil Procedure (Amendment No.8) Rules 2014 and will be introduced on April 6, 2015.

The next in this series of articles will review and consider the new Part 36.

Part 36 still very much has a future!

Insolvent Defendants and Rights Against Insurers

Daniel Lawson*

Insolvency; Insurance claims; Personal injury claims; Third parties

Daniel Lawson provides guidance on best practice when dealing with an insolvent defendant and examines how claimants can enforce rights directly against insurers. He discusses the provisions applicable under the Third Parties (Rights Against Insurers) Act 1930 and provides a health warning re the provisions of the Third Parties (Rights Against Insurers) Act 2010 which, although it has received the royal assent, has yet to be brought into force.

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Introduction

Insurers' refusal of indemnity is an ever-increasing issue facing PI practitioners. This article aims to review the practical options available to meet the problem if it arises, focusing primarily upon enforcement of rights under the Third Parties (Rights Against Insurers) Act 1930 ("the 1930 Act").

The regime of the 1930 Act continues to apply for the time being. The Third Parties (Rights Against Insurers) Act 2010 makes important changes to the law, which are discussed below, but it has still not been brought into force more than four years after receiving royal assent on March 25, 2010.

Practice points

Rights against insurers only become critical if one is dealing with a defendant that is insolvent or unlikely to be able to satisfy judgment. There are therefore two practical issues that should always be considered before entering a contest with insurers. First, whether some proximate *and solvent* defendant can be fixed with liability instead. Secondly, the purely procedural requirements when suing an insolvent defendant in order to enforce against an insurer.

Proximate defendants

To illustrate the first point, consider the position if the primary cause of action is against an insolvent limited company. The basic underlying principle is that a company is a legal entity distinct from its members. The fact that one shareholder controls all the shares in a company is not a sufficient reason for ignoring the separate legal personality of the company, and there is little likelihood that the court will "pierce the veil of incorporation" unless the corporate form has been used for the purposes of fraud. There are, however, situations in which a company director (who may or may not also be a shareholder) can incur direct liability to a third party in tort. Whilst this is a topic of some complexity, in some cases one may be able to show that a director has the status of joint tortfeasor, because he or she has "authorised, directed or procured" the tort. It is a last resort form of remedy, but one that can at least be considered when the situation is otherwise desperate. For a successful recent example see *Tafa v Matsim Properties Ltd*.[1]

The principle of separate corporate personality is applied as between companies in the same group. A holding company will not generally be held liable for the debts of its insolvent subsidiary. However, in

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[1] *Tafa v Matsim Properties Ltd* [2011] EWHC 1302 (QB).

similar vein it has recently been confirmed that there may be special circumstances where a parent company owes a direct duty of care in respect of the health and safety of the employees of a subsidiary: see *Chandler v Cape Plc*[2] and *Thompson v Renwick Group Plc*.[3]

Another form of side-step has met with less success, namely the attempt to argue that, when the primary defendant is uninsured, some third party had a duty to ensure it held valid liability cover. The courts have repeatedly rejected the notion of a free-standing duty to ensure others hold insurance: see for example, *Naylor v Payling*[4] (nightclub owner owed no duty to ensure independent contractor door staff insured) and *Richardson v Pitt-Stanley*[5] (failure by company director to take out compulsory employer's liability insurance could not found civil claim).

Procedure

Even if an insurer is in place and has admitted liability, procedural formalities must be complied with when pursuing an insolvent defendant. With corporate defendants insolvency status can be checked swiftly and easily by performing a webcheck Companies House search online and clicking on "Insolvency History" under the entry for the relevant company. If a company is in compulsory liquidation (i.e. where a winding up order has been made) then the permission of the Companies Court must be obtained to commence or continue with a personal injury claim.[6] If it is a voluntary liquidation, whether members or creditors, no such permission is required, but it is good practice to at least notify the liquidator. With a company in administration one needs either the consent of the administrator or the permission of the court to institute proceedings.[7] If a company has been dissolved, or struck off the register, then an application for restoration must be made.[8] Until restored, the company no longer exists as a legal entity. The permission of the court is likewise required to pursue a claim against a bankrupt individual[9] and, where a partnership has been wound up, to pursue the firm or any individual partner in respect of a partnership debt.[10]

Provided the application is brought in proper form and on time, permission to commence proceedings will almost invariably be granted if the insolvent entity is being pursued to enforce rights under the 1930 Act. The key practical point is to be aware early of the potential need to apply for permission, which means determining and keeping in clear focus the correct formal defendant and making appropriate solvency checks. Insurers are often involved in a claim by virtue of a group policy. The entity on behalf of whom the insurer corresponds is not necessarily the entity against which the formal cause of action lies, which can create unpleasant surprises when liability has not been admitted and no solicitor has been nominated to accept service of proceedings. If the need for court permission to pursue an insolvent entity has been overlooked then the action is liable to be struck out. Whilst the balance of the case law suggests there is jurisdiction to give leave retrospectively, it is a discretionary remedy that will be granted sparingly.

Third Parties (Rights Against Insurers) Act 1930

The regime of the 1930 Act remains in force at the present time. Further, there will be many claims still governed by the provisions of the 1930 Act even after the 2010 Act has come into force. In essence, the 1930 Act s.1 effects a statutory assignment of the defendant's rights under a contract of liability insurance to the injured person when any of a series of specified insolvency events occurs. It applies to personal

[2] *Chandler v Cape Plc* [2012] EWCA Civ 525; [2012] 1 W.L.R. 3111.
[3] *Thompson v Renwick Group Plc* [2014] EWCA Civ 635; [2014] P.I.Q.R. P18.
[4] *Naylor v Payling (t/a Mainstreet)* [2004] EWCA Civ 560; [2004] P.I.Q.R. P36.
[5] *Richardson v Pitt-Stanley* [1995] Q.B. 123 CA (Civ Div).
[6] Insolvency Act 1986 s.130(2).
[7] Insolvency Act 1986 Sch.B1 para.43(6).
[8] Companies Act 2006 ss.1029–1032.
[9] Insolvency Act 1986 s.285(3).
[10] Combined effect of Insolvency Act 1986 ss.130(2), 221(5) and 228.

bankruptcy and to company insolvency. In respect of a company s.1 covers not just compulsory liquidation but also voluntary winding up, the appointment of a receiver and possession being taken by a debenture-holder. Entry into a voluntary arrangement with creditors will likewise trigger statutory assignment. In all this it is immaterial whether the accident occurs before or after the relevant insolvency event.

Need for a liquidated judgment

The 1930 Act s.1 does not give the third party any right to recover monies from the insurer before the liability of the assured has been established: see *Post Office v Norwich Union*.[11] The correct procedure is therefore for the third party to sue the insured company and secure a liquidated judgment against it in the first instance. Only then can one seek to enforce transferred rights against the insurer. Hence the need, under the current regime, to restore defunct companies to the register in order to pursue claims that only have substantive worth by virtue of rights under the 1930 Act. The height of the matter is that the court may, in appropriate circumstances, allow a claimant to seek declaratory relief against an insurer before a liquidated judgment (i.e. judgment for a fixed sum, damages having been assessed) is obtained against the assured: see *Hawley v Luminar Leisure*[12] where this approach was adopted.

Insurers' defences

A critical feature of the 1930 Act regime is that the third party is in no better position than the assured. The Act simply transfers such rights as the assured may have under the contract of insurance. Thus any defence that the insurer might have to a claim under the policy by the assured binds the third party. Breach of warranty or material non-disclosure by the assured can defeat a claim. So too can any valid construction point governing policy coverage, or failure to comply with a clause making prompt notification of the claim a condition precedent to the liability of the insurer. If the insurance contract contains an arbitration clause this binds the third party. As a matter of principle all contractual conditions will bind, subject to two provisos. First, there can be no contracting out of the 1930 Act. Secondly, there is a key distinction between employers' liability policies and general public liability policies. Employers' liability insurance is compulsory and governed by a distinct statutory regime. By virtue of the Employers' Liability (Compulsory Insurance) Regulations 1998 provisions in the policy defeating a claim by reason of post-accident acts or omissions by the employer (for example an omission as to accident notification) have no effect.[13]

Provision of information

This is covered by the 1930 Act s.2. The liquidator or receiver of the company is under a duty to provide interested persons with such information as is reasonably required to enable them to determine whether they have acquired rights under the Act. The duty to provide information includes a duty to allow policies and other relevant documents to be inspected and copies to be taken. If the information obtained discloses reasonable grounds for supposing rights have been acquired against a particular insurer, then that insurer itself falls under a like duty. The position is more complex, however, if one has a formally solvent defendant that is unlikely to be able to satisfy judgment. There have been conflicting first instance decisions as to whether a party can be under an obligation to disclose documents relating to its insurance position, or to provide the same information by a Pt 18 Request. The current weight of judicial opinion at first instance

[11] *Post Office v Norwich Union Fire Insurance Society Ltd* [1967] 2 Q.B. 363 CA (Civ Div).
[12] *Hawley v Luminar Leisure Plc* [2006] EWCA Civ 18; [2006] I.R.L.R. 817.
[13] Employers' Liability (Compulsory Insurance) Regulations 1998 reg.2(1)(a).

is against ordering such disclosure: see the review of authorities in *XYZ v Various Companies*,[14] though this is undoubtedly an area where clarification by the Court of Appeal would be welcome.

Challenging refusal of indemnity

If an insurer has been identified but has indicated it is refusing to indemnify, the overriding focus must be upon securing sufficient information to determine whether the insurer's position is justified. Tactics must be fact specific, but it is worth setting out some of the core considerations that come into play. Insurers repudiate liability for invalid reasons. Whilst there may be problems securing all relevant pre-action disclosure by formal application, reasonableness remains the touchstone of pre-action conduct: see the general CPR Practice Direction on Pre-Action Conduct. Costs protection will always be improved if the insurer has been offered an opportunity to act co-operatively and put on notice of steps that will otherwise be taken. The merit of joining insurers to proceedings from the outset to seek declaratory relief as to their contingent liability to indemnify will depend upon many factors, but in particular whether or not they consent to the step and the primary defendant's formal solvency status at the point in time when the claim form is issued.

Reference to CPR r.40.9 is often an important preliminary tactical step. It provides as follows:

> "A person who is not a party but who is directly affected by a judgment or order may apply to have the judgment or order set aside or varied."

For insurers this is a vitally important procedural provision. An insurer who has repudiated cover on borderline grounds will not be keen to have the claimant enter default judgment against an insolvent assured, and still less keen to see damages assessed on an unopposed basis. It may therefore be appropriate to point out to an insurer that if it refuses to involve itself co-operatively in dealing with a claim, or at least fully justifying the basis for a refusal of indemnity, the claimant will resist any later attempt under CPR r.40.9 to have judgment against their assured set aside (on the footing that timely and orderly involvement was invited, but turned down).

Third Parties (Rights Against Insurers) Act 2010

No deadline for implementation of the 2010 Act has been set. In an April 25, 2013 ministerial statement the Government announced that it intended to introduce legislation to effect some technical amendments to the Act "when parliamentary time permitted". The Ministry of Justice May 2014 report on implementation of Law Commission proposals gave no further substantive update. The review below is therefore simply intended to give forewarning of changes likely in due course come into effect.

As with the 1930 Act, under the 2010 Act a statutory assignment of rights under the contract of insurance takes place when one of a series of insolvency events takes place. The main difference from the old regime is that the third party may bring proceedings to enforce the rights against the insurer without having first established the insured's liability. This takes the form of claiming a declaration as to the insured's liability to the claimant and as to the insurer's potential follow on liability.[15] One can therefore proceed without joining an already insolvent or defunct company to the proceedings at all. One simply sues the relevant insurer. Note, however, that there is nothing to preclude one suing the insured itself. That may be the safe course where, on the facts, there is room for argument as to whether the 1930 Act or the 2010 Act applies. An insurer's contractual defences against the insured will continue to operate so as to potentially defeat a claim. There is, however, some easing of the position to prevent the most technical defences. For example, an insurer can no longer decline liability on the ground that the insured failed to notify him of a claim

[14] *XYZ v Various Companies* [2013] EWHC 3643 (QB); [2014] 2 Costs L.O. 197.
[15] Third Parties (Rights Against Insurers) Act 2010 s.2(2).

provided the third party has notified the insurer.[16] Again, the provisions dealing with disclosure of information and documents are bolstered in comparison to the 1930 Act.[17]

Transitional provisions

These are set out in Sch.3. If, before the commencement date of the 2010 Act, (a) the insured incurs the liability to the third party and (b) the relevant insolvency event takes place, then the 1930 Act will continue to apply. If either event (liability or insolvency) occurs after the commencement date, one can rely on the provisions of the 2010 Act. It follows that even for standard claims there is likely to be a time lapse before one can make use of the 2010 Act provisions. Moreover, the 1930 Act will continue to apply to many long-tail disease claims.

[16] Third Parties (Rights Against Insurers) Act 2010 s.9.
[17] Third Parties (Rights Against Insurers) Act 2010 Sch.1.

Case and Comment: Liability

Kennedy v Cordia (Services) LLP

(IHCS, Lady Smith, Lord Brodie, Lord Clarke, September 19, 2014, [2014] CSIH 76)

Personal injury—employers liability—negligence—personal protective equipment—Management of Health and Safety at Work Regulations 1999—Personal Protective Equipment at Work Regulations 1992

Contributory negligence; Employers' liability; Footwear; Personal protective equipment; Risk assessment; Scotland; Tripping and slipping

At the end of 2010 Scotland was afflicted by a very severe winter which lasted many weeks. Snow fell. It lay then froze. More snow fell in larger amounts and intermittently. Tracey Kennedy (then aged 41) worked for the defenders as a home carer. On December 18 she and a colleague had to go at night to visit a homebound sick person. They went by car and having parked it proceeded on foot down a path. Tracey Kennedy lost her footing, fell and was injured.

Tracey Kennedy sued her employers alleging fault at common law and breaches of the Management of Health and Safety at Work Regulations 1999 and the Personal Protective Equipment at Work Regulations 1992. Her case was that staff fell every year on snow and ice while carrying out their duties and she alleged:

- there was no risk assessment to cover ice and snow;
- no provision of personal protective equipment;
- no guidance from the employer as to what was suitable footwear;
- provided no attachments for footwear which if provided she would have worn; and
- her training was inadequate.

The employer claimed that training was given, that they had carried out two risk assessments, and stated that at the time of the accident, Tracey Kennedy had been wearing footwear with a smooth sole and was guilty of contributory negligent in that she had failed to keep a proper look out and watch where she placed her feet, had failed to wear suitable footwear, and had failed to report the weather and underfoot conditions to her management. There was a trial on liability.

Tracey Kennedy was supported by an expert witness: a Mr Greasly. Despite an objection to his evidence on the ground that he did not have any relevant special skill or experience or specialised learning, Lord McEwan treated Mr Greasly as an expert witness in "the areas of health and safety at work which would not be in the knowledge of the court" and accepted his evidence in the entirety.

Miss Rodger was the only defenders' witness at the proof. She was the defenders' business development manager for health and safety. She was well qualified with a university degree in politics and history, a number of qualifications on health and safety, postgraduate diploma on risk management with many assignments and a portfolio. She was familiar with health and safety and human behaviour legislation.

The defendants elide upon two risk assessments. They were general assessments which clearly showed the defenders were aware of personal protective equipment ("PPE") in some areas. The later risk assessment was the one in force at the time of the accident. What the Judge found curious was the way the risk was assessed in the general assessment. One part of it related to slipping. Miss Rodger agreed in cross that a

fall on the ice was "likely" and that any resultant injury could be "harmful", e.g. a head injury. Reading down and across the grid produced something called a "substantial risk", not one that was "moderate" or "tolerable".

The Judge, Lord McEwan, noted:[1]

> "When one looks at the action needed box there is a stark difference between what should be done for substantial" and what little for "tolerable". Cost implications are mentioned.""

In the later assessment the risk was classed as "tolerable". This conclusion was explained by Miss Rodger saying that she took account of existing precautions and statistics of numbers of accidents.

The relevant pages of the two assessments were compared. In each the wording was almost identical but the words "inclement weather" were omitted from the later one. There was no clear explanation for this. Nor why the risk was reduced from substantial to tolerable. In both risk assessments there was no mention of personal protective equipment. The wording for preventative and protective measures was almost the same in both.

Miss Rodger gave evidence that what was safe and adequate footwear was left to the individual. She accepted that the company had not addressed the provision of personal protective equipment in relation to footwear. She also conceded a fall on ice was likely and the resulting injury could be harmful but Miss Rodger rated the risk as tolerable.

Lord McEwan applied *Allison v London Underground*[2] and quoted Smith LJ, saying this:

> "… the right approach for the court to take in deciding whether the claimant's training had been adequate for health and safety purposes, was to examine whether the employer's risk assessment had been sufficient and suitable …"

Lord McEwan[3] noted that Miss Rodger had given no clear explanation for reducing the risk from substantial to tolerable. He held that even on the methodology used by her, the direction of the law was to level safety upwards and Miss Rodger's failure to address that by considering PPE had resulted in a breach of duty in all areas. Moreover, the employer conceded that the risk was not de minimis. Neither risk assessment was suitable and sufficient, the methodology could be criticised, and it was wholly unclear that any precautions put in place by the employer justified a reduction of the risk to tolerable.

The evidence in relation to training and enforcement was held to be vague and unsatisfactory. There had been no attempt to consider PPE for footwear which in itself showed that whatever precautions the employer thought they were taking they could never amount to "adequate control by means which are equally or more effective" in terms of the 1992 Regulations reg.4(1). Lord McEwan held, on the evidence, it was impossible to state that that amounted to any adequate control of what the employees wore, and it followed that the defenders were in breach of both the 1992 and the 1999 Regulations.

Lord McEwan held they were also liable at common law where in the face of obvious and continuing risk they had provided no safe footwear. There was no evidence that they had checked what footwear was being worn. There was no evidence of any system of working or reporting in when staff required to go out in extreme weather and walk on snow and ice.

The employers were found liable. Their risk assessments were unsuitable and insufficient, they had failed to consider PPE for footwear, and they were in breach of the Management of Health and Safety at Work Regulations 1999 and the Personal Protective Equipment at Work Regulations 1992.

[1] *Kennedy v Cordia (Services) LLP* [2013] CSOH 130; 2013 Rep. L.R. 126.

[2] *Allison v London Underground Ltd* [2008] EWCA Civ 71; [2008] I.C.R. 719.

[3] *Threlfall v Hull CC* [2010] EWCA Civ 1147; [2011] I.C.R. 209; *Henser-Leather v Securicor Cash Services Ltd* [2002] EWCA Civ 816; *Blair v Chief Constable of Sussex* [2012] EWCA Civ 633; [2012] I.C.R. D33; *Chief Constable of Hampshire v Taylor* [2013] EWCA Civ 496; [2013] I.C.R. 1150 considered.

Turning to contributory negligence, the Judge accepted that the pursuer had worn flat, ridged boots on the night of her accident. He held that she could not be criticised for wearing the footwear she thought was best for the conditions. There had been adverse weather for several weeks. The employer was well aware of that.

Lord McEwan held where Tracey Kennedy's visit to the patient was high priority, there was no evidence that had she reported the weather to her management, she would have been instructed to abandon her visit and her accident would have been avoided. That meant there was no case of contributory negligence shown at common law. The Judge also held that, in relation to the involvement of the health and safety legislation, there was no clear system of reporting and no consideration of proper footwear.

The Judge held that it could not be said that Tracey Kennedy held had embarked on a risky course of action, and she was in no way to blame. The defenders appealed.

They held that Lord McEwan's acceptance of Mr. Greasly's evidence without reservation, including his opinion that the defenders had breached the 1999 and 1992 Regulations, led him to his conclusions and he had abdicated his role as decision maker in Mr. Greasley's favour. They expressed the view that the Judge was fully equipped to resolve the dispute without any instruction or advice. It was squarely within his province as judicial decision maker and it was the job of a judge to hear evidence about matters with which he might previously have been unfamiliar and, on the basis thereof, come to conclusions of fact and apply the relevant law to those facts.

Mr Greasly's opinion evidence was considered unnecessary and for that reason alone, was inadmissible. Moreover the case related to the application of the law to a few relatively simple facts within the realm of "ordinary human experience in Scotland". Lord McEwan had failed to identify what was considered to be outwith the knowledge of the court. They said that health and safety was not a recognised body of science or experience which was suitably acknowledged as being useful and reliable and properly capable of reaching and justifying the opinions offered. They concluded that Mr. Greasly's frequent expressions of opinion did not constitute expert evidence.[4]

They further held that the 1999 Regulations reg.3 did not impose a duty to take precautions. So a breach thereof could not, in a case where it was averred that the failure to take safety precautions caused injury, be said to be the direct cause of that injury. Therefore, the employer could not be liable to the pursuer in respect of breach of the 1999 Regulations.

Turning to PPE, they held that for the purpose of the 1992 Regulations, a distinction fell to be made between work-related risks and other risks to which a worker might be exposed. The risk to which, here, was not materially different from that to which any member of the public was exposed. Accordingly they held that the 1992 Regulations reg.4 did not impose on the employer a duty to provide the pursuer with PPE aimed at reducing the risk of her slipping on snow and ice.

They went on to express the view that it has never been the law that nothing more than it being foreseeable that another person might suffer harm in the event that a particular precaution was not taken gave rise to a duty at common law to take that precaution. Neither requirement of Lord Dunedin's formula in *Morton v William Dixon Ltd*[5] was satisfied in the present case. Their view was that had the Lord Ordinary balanced the arguments with a view to determining whether it would be fair, just and reasonable to find a duty of care of the scope contended for by the pursuer, he could not have failed to reject it, and the duty figured by the Lord Ordinary was to be rejected as totally impracticable and, in any event, imposing it on the employer would not be fair, just and reasonable.[6]

Their conclusion was that the risk of slipping on snow and ice was not a risk at work which engaged reg.4 of the 1992 Regulations. It appeared that the risk was adequately controlled by other means; the

[4] *Wilson (Brian) v HM Advocate* [2009] HCJAC 58; 2009 J.C. 336 applied.
[5] *Morton v William Dixon Ltd* 1909 S.C. 807.
[6] *Morton* 1909 S.C. 807 applied.

pursuer had been given training including discussions on coping with snow and ice and on the evidence it could not be said that wearing footwear attachments would have made any material difference on the particular surface.

They went on to say that had the question arisen of whether, had the pursuer been wearing attachments, she would not have fallen, it was difficult to identify why wearing such attachments would have prevented her from doing so. However, the Lord Ordinary made no such express finding in fact and there was neither a clear basis in his findings for the conclusion that a breach of statutory and common law duties on the employer's part caused her damage, nor was there such a basis in the evidence. The appeal was allowed. The case now proceeds to the Supreme Court.

Comment

Lord Brodie:

> *"Adults in Scotland can be expected to have experience of negotiating snow and ice in an urban environment, and in choosing footwear which will help them to do so."*

Ms Kennedy and a colleague were visiting a terminally ill elderly housebound patient during the course of her duties as a carer of the elderly and infirm. She was wearing ankle boots made from a synthetic waterproof fabric with a flat rubber-ridged sole. She slipped and fell backwards whilst walking on the pathway to the patient's door.

Whilst successful at first instance, her case was overturned on appeal because the risk of slipping was not a risk "at work", as the work did not increase the risk. As such the Personal Protective Equipment at Work Regulations 1992 were not engaged. Her risk was not materially different from any member of the public exposed to the same weather conditions in Glasgow at that time.

At common law it was held that the employers did not have a responsibility to determine what competent adult employees should wear on their feet when negotiating the streets of the city. Imposition of such a requirement would create an:

> "unwarranted intrusion into the private lives of adults who within the sphere of day to day living are likely to be better placed to make judgment as to what would be conducive to their health and safety when walking the streets than their employers will be."[7]

The case raises an interesting question as to how far does the responsibility of an employer stretch in relation to the application of these regulations when the employee is not confined to a discrete workplace under their immediate control.

The regulations

Personal Protective Equipment at Work Regulations 1992 reg.2(1) defines PPE as:

> "All equipment (*including clothing affording protection against the weather*) which is intended to be worn or held by a person at work, and which protects him from one or more risks to his health or safety, and any additional accessory designed to meet that objective." (Emphasis added)

PPE is a means of "last resort".[8] Other measures such as the use of work equipment to avoid the risk will take precedence. Unlike the other regulations enacted in 1992, these are designed for the individual and not for the workplace as a whole. The risk assessment under reg.4 must be specific to the worker, and

[7] Per Lord Brodie at [34].
[8] HSE, *Personal Protective Equipment at Work Regulations 1992 (as amended). Guidance on Regulations.* (HSE Books, 2005).

in carrying it out, the employer must evaluate the risk properly by considering the factors set out in reg.6, including:

1) an assessment of any risks which have not been avoided by other means; and
2) the definition of the characteristics which the PPE must have in order to be effective against the risks set out in (1).

To assist, Appendix 1 to the Guidance Note has a helpful "specimen risk survey table" which includes "slipping, falling over".

In the context of this case it is relevant to note that the Guidance Note identifies that no PPE provides 100 per cent protection.

The starting point for considering whether a claimant has a valid claim for damages is, therefore, to assess whether the risk could be avoided.

Employees injured whilst working in the public arena

In the instant case, the claimant did not have a single workplace, but the nature of her employment required her to visit a number of workplaces, namely the homes of the sick and infirm, for whom she provided nursing services. It was inevitable that the claimant would be required to undertake this task in inclement weather, and that on occasion snow would be falling, or already have fallen.

In fact, and importantly, the employers had carried out a risk assessment which included an assessment of the risk of home carers slipping on snow and ice on public streets whilst working during the course of their employment. They then provided training specifically to address the risks of slipping in inclement weather. The judgment of Lord Brodie makes reference to the advice given to take care, and to wear "suitable footwear". The claimant was left to choose the footwear she considered suitable.

The foundation on which the three judges unanimously rejected the claimant's case can best be found in the brief judgment of Lady Smith when she stated:

> "Fundamentally, the risk to the respondent was an ordinary risk arising, in a public place, from the ordinary facts of life in Scotland. It was a risk encountered, at the time of her accident, by any person walking on snow covered pavements, whatever the reason or reasons they had to do so … In the present case the risk was not a risk that arose from any hazard inherent in the particular jobs that the respondent was employed to do, namely to provide personal care to an elderly woman, in her home. Nor was this a risk which was, as a matter of fact, amenable to control or minimisation at the hands of the re-claimer (employer); the state of the public streets and pavements was not their domain."[9]

Expressed in less blunt terms by Lord Brodie in the lead judgment, this passage fails, in my view, to properly consider the nature of the task that the clamant had to perform. Other instances of employees working beyond their workplace were provided, and merit consideration.

- The claimant[10] was employed to collect large sums of money from commercial premises. He was shot in the stomach by a robber during the course of these duties. He argued that the employers failed in their duty of care under the regulations in not providing him with suitable PPE in the form of body armour. The Court of Appeal, reversing the decision of the Judge at first instance, found in his favour with Kennedy LJ stating that:

  > "I do not doubt that the risk to someone doing the job which the claimant was doing when he was shot can be to some extent controlled by measures such as parking his

[9] At [2].
[10] *Henser-Leather* (2002) EWCA Civ 816.

> van reasonably close to the office from which cash had to be removed, and training employees not to offer resistance, and to use the smoke box which was provided. But so long as it remained (as it plainly did) well above the risk to other members of the public going about their daily tasks, it seems to me that the control could not be described as adequate."

- An example was given in the instant case of a person who was employed to pick up litter on the streets. It was suggested that he too would also be at risk of becoming the victim of an act of violence on the part of a criminal in a public place. This was quite rightly rejected for the risk that the security guard was exposed to was an "at work" risk, rather than a risk which was equally applicable to a member of public.
- In *Smith v Northamptonshire CC*,[11] a work equipment case, it was questioned whether an employer of a London-based accountant travelling to Yorkshire to do an audit, would be held responsible if that accountant was injured by an exploding kettle whilst making a cup of coffee at the customer's premises. It was acknowledged that the employer, having no control over the kettle, would escape responsibility.
- Finally, in the same case a further example was raised of a clerk travelling to the courts and in doing suffering injury on an escalator leading to the underground. Once more, it was held that the employer would have no ability to control the maintenance of such work equipment and, therefore, avoided responsibility.

The case of Ms Kennedy is wholly different to that of the accountant or the law clerk. The accountant would have a good cause of action against the occupier of the premises at which he was visiting. The law clerk would potentially have a claim for damages against the London Underground. The employer could neither foresee the circumstances of their injury, nor put in place measures to avoid or reduce the risk of injury.

The same applies to the litter picker. The assault by the criminal is independent of the employer and the employment. The litter picker could pursue a claim for damages through the Criminal Injuries Compensation Authority.

The claimant's case is most akin to that of the security guard. There was a foreseeable risk of an assault by a criminal to the guard because he was handling substantial amounts of money within the public arena. There was, therefore, a foreseeable risk which needed to be risk assessed, and a system of work created which would prevent or reduce the risk. Kennedy LJ cited an example of a simple mechanism for reduction of the risk: namely the parking of the van closer to the commercial premises.

Risk assessment and the provision of "suitable" PPE

In the instant case, one is met with the circumstances of Ms Kennedy's employment necessitating her travelling to patients' homes. She resides in the UK, and more specifically in Scotland, where the weather conditions during the winter months can be adverse. It was foreseeable that on occasion her task would entail visiting a patient in snowy weather. She could not refuse to undertake the task and, therefore, as avoidance was out of the question, the employer was under an obligation to risk assess the task in order to assess the risk of injury and then to reduce it as far as is reasonably practicable. The employer did so and identified the risk from snow and ice. It is at this point that, in my opinion, the employers failed in their responsibility to the claimant. Aside from the rather facile advice to take more care, and wear "suitable footwear"; an undefined term the interpretation of which is left to the employee; nothing further was done.

[11] *Smith v Northamptonshire CC* [2009] UKHL 27; [2009] 4 All E.R. 557; [2009] I.C.R. 734.

In short, the problem was identified and then the burden shifted wholly on to the employee to resolve the problem.

Within the workplace, this would be judged as a breach by the employer. By example, if the employer identified that there was a risk of the claimant suffering from a skin condition as a result of exposure to oil, he wouldn't then leave the employee to work out which type of glove was best suited to provide protection. Whilst one can argue that "everyone has to live and work through winters"[12] in Scotland, the public can, in the main, choose whether to venture out into the inclement weather to visit a neighbour. Ms Kennedy did not have that option. She was obliged to visit the sick and infirm, and the only step that her employer took to ensure her safety, was to tell her to take care and wear suitable footwear.

In *O'Neill v DSG Retail Ltd*[13] the Appeal Court impliedly held that once an employer sets off on the path to the reduction of a risk to the safety of employees they should complete the journey. In that case, the training on manual handling was insufficient to combat the risk. In the instant case, one can argue that the steps taken to ensure suitable PPE was used were equally so.

It is noteworthy that whilst the employer in this instance chose to provide no greater direction than footwear should be suitable, in other sections of health and social care employers give far greater direction for employees who are working inside their premises, and *not* exposed to inclement weather. The following are examples:

- Staff should wear soft-soled closed-toe shoes.[14]
- A full shoe, either lace up or slip on with safe-grip soles and flat heels to be worn:
  - — no canvas shoes, sand shoes or moccasins to be worn;
  - — white trainers of the shoe type, with no additional colour may be worn; and
  - — clogs may be worn only in designated areas.[15]
- Footwear should be comfortable—shoes should be non-slip, have enclosed toes, and provide support whilst sandals, clogs or shoes without heel support may not be deemed suitable when undertaking patient handling.[16]
- The correct use of footwear should be considered to promote infection control and prevention practice. When providing care, closed toe shoes should be worn to avoid contamination with blood or other body fluids, or potential injury from sharps.[17]

In maintaining his decision, Lord Brodie clutched at a number of straws, but in particular cited the "unwanted intrusion into the private lives of competent adults", and suggested that the employer could not control the provision of the PPE or its usage. There was a rather peculiar comment that the employer would have to monitor the weather conditions at all times in order to advise his employees when to wear the PPE, and then to monitor that they did wear it. This is really quite silly. In *Fytch v Wincanton Logistics Plc*[18] the claimant was a driver collecting milk from farms in the countryside. He was provided with steel toe capped boots because there was a risk of heavy containers of milk falling on to his feet. There was a hole in the boot through which ice and snow entered causing frostbite. The issue was whether the boots had been "maintained" within the definition of reg.7(1).

The facts thereafter are of little relevance to the instant case, but it is the comment by Lord Hope that the claimant had "to drive to farms in all weather conditions" which assists Ms Kennedy. She had to visit patient's in all weather conditions. The employer recognised this in the risk assessment, and yet having

[12] Per Lord Clarke at [43].
[13] *O'Neill v DSG Retail Ltd* [2002] EWCA Civ 1139; [2003] I.C.R. 222.
[14] NHS Scotland Dress Code (December 16, 2008).
[15] *Nursing and Midwifery Uniform Policy* (March 2005).
[16] Department of Health, *The Health & Social Care Act 2008: Code of Practice on the Prevention & Control of Infections and related guidance* (December 2010).
[17] NHS Professionals, *Standard Infection Control Precautions* (November 2010).
[18] *Fytche v Wincanton Logistics Plc* [2004] UKHL 31; [2004] 4 All E.R. 221; [2004] I.C.R. 975.

done so provided no PPE which could then be left to her discretion to wear when the weather conditions dictated that it was necessary. The regulations apply only to adults by the very fact that they relate to employment. Adults have the capacity to decide that certain footwear should be worn in certain weather conditions. Provided with suitable boots to combat the weather conditions to which on occasion she will be exposed, would enable the claimant to recognise the risk from the weather, aided by her training, and then wear the PPE provided to reduce the risk of injury from the weather conditions.

The claimant sought to introduce expert evidence by means of a non-expert. This individual received very short shrift from the Judges. He was apparently an expert in "health and safety", which as Lord Brodie stated "frankly I do not know what that means". He had suggested a number of types of attachments which could be fitted over shoes, with names such as "Yak Tracks" "Magic Spiker" "STABILisers" and Sandy Ice Grips". These seem to be products which feature steel coils, spikes, studs and chains fitted over the soles of ordinary footwear. The court held that these would not necessarily have avoided the accident. The evidence of the "expert" clearly irritated the Judges. There is undoubtedly footwear which will provide much greater protection to individuals in snowy conditions than putting an attachment over one's shoes. The suggestion that no suitable footwear was available is incorrect.

One wonders whether the introduction of the evidence of the "expert" distracted the Court from making a more considered assessment of the second of the two questions set out by Chadwick LJ in *O'Neill*,[19] when assessing whether the employer has addressed a recognised risk, namely:

> "…(i) had the employer taken appropriate steps to reduce the risk of injury to the lowest level reasonably practicable; and (ii) if not, was the employer's failure to take those steps a cause of the injury."

As PPE is a "last resort", by not providing any footwear but merely advising to take care, the employers had failed to reduce the risk, but the evidence of the so called expert seems to have lead their Lordships away from properly analysing whether there was any PPE/footwear which could have reduced the risk of injury further than the boots which Ms Kennedy kept in her cupboard at home. There undoubtedly was and, as such, the failure to provide PPE was causative.

Finally, the court considered whether there was a common law breach. It is at this point that the judgment takes a particularly sinister direction. Having taken a balance of both sides of the arguments with a view to determining whether it would be "fair, just or reasonable"[20] the court held that the employers were not under a duty to determine exactly what their competent adult employees should wear on their feet when negotiating the streets of the city. The responsibility for their own health and safety was clearly shifted on to the employees, with the extremely concerning statement of Lord Brodie that "in relation to some matters, care for health and safety is best left in the hands of the individual adult concerned".

Conclusion

The Scottish courts have in the past 25 years embraced the Framework Directive and the daughter Directives which flowed from it, and ultimately became the "6 pack" regulations of 1992. Whilst the senior judiciary in the Court of Appeal and House of Lords have at times been ambivalent about the European influence on employers' liability law, Scotland has not. It is, therefore, both disappointing and disturbing that this decision should be so restrictive in its interpretation of the Personal Protective Equipment Regulations 1992, and with the advent of the Enterprise Regulatory Reform Act 2013, their view of common law liability even more so.

[19] *O'Neill* [2003] I.C.R. 222.
[20] *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605; [1990] 2 W.L.R. 358.

Practice points

- Note that PPE does not provide 100 per cent protection; it reduces the risk of injury.
- Consider whether the claimant is performing a task similar to that of members of the public in assessing whether the risk to which he is exposed is created by being "at work" rather than being in the public arena.
- The judgment is rather thin in terms of evidence about the nature of the risk assessment carried out by the employer as to the risks from slipping on snow and ice. The proof of evidence should contain precise detail of the claimant's involvement in the risk assessment process, and the guidance provided by the employer to reduce the risk of surgery.
- The evidence of the training given to the employee in relation to the risks from slipping on snow and ice was contained within two sentences. The proof of evidence should also detail precisely what such training incorporated. It is said that the respondent understood her training, but in what context.
- Whilst it is not the employee's task to design the solution to a potentially unsafe aspect of the work/workplace it assists to be able to present the court with a means of reducing the risk. It is in this context that the "expert" in the instant case let down the claimant.
- If seeking to introduce "expert evidence", in respect of the suitability of the PPE one should note the content of [16] of the judgment of Lord Brodie, who sets out what the court requires from an expert.

Simon Allen

Laughton v Shalaby

(CA (Civ), Longmore LJ, McCombe LJ, Vos LJ, November 12, 2014, [2014] EWCA Civ 1450)

Personal injury—clinical negligence—civil evidence—bad character—competence—credibility—hip—propensity—similar fact evidence

Admissibility; Bad character; Clinical negligence; Competence; Credibility; Similar fact evidence

The defendant Mr Shalaby performed a left hip replacement operation on Mrs Janet Laughton on July 30, 2007. On March 3, 2008 Mr Shalaby performed a successful right hip replacement operation on Mrs Laughton. However, the left hip operation was proved not to have been so successful and Mrs Laughton continued to have a painful loss of mobility.

Mrs Laughton alleged that Mr Shalaby acted negligently while performing the left hip replacement operation on July 30, 2007. During exploratory surgery, another surgeon found that her gluteus medius muscle was not attached to the bone as it should have been. She alleged that Mr Shalaby had failed to reattach the muscle properly or at all, as he should have done following insertion of the artificial hip.

After a four day trial in September 2013, HH Judge William Birtles accepted that the original operation had been unsuccessful. However the judge held that the surgeon had not acted negligently while performing the operation. The judge preferred expert evidence that avulsion, or tearing away, of the muscle was a recognised, albeit rare, occurrence after the operation and did not indicate negligence on Mr Shalaby's part.

Mr Shalaby had performed 3,000 such operations. He had been investigated by the General Medical Council for incompetence. The investigation included a report into his treatment of seven patients (including the claimant) on whom he had performed knee, foot, wrist and hip operations. The report found that Mr Shalaby's care fell seriously below the expected standard on occasion. Conditions were placed on his registration. He was also suspended after committing assault on a bus driver.

Mrs Laughton appealed and argued that HH Judge Birtles:

- should have been satisfied that Mr Shalaby had been negligent because natural avulsion, occurring in 1 in 200 cases, was so rare as to be statistically insignificant;
- had failed to address matters going to Mr Shalaby's probity, including his failure to disclose the conditions or his suspension; and
- should have admitted the findings of the GMC report as evidence of incompetence in other cases from which the court could infer negligence in this case, under a principle similar to the admissibility of bad character evidence in criminal cases.

The Court of Appeal stated that there were no data about how many of the 1 in 200 cases occurred as a result of negligence. In any event, they held that the claimant's argument went nowhere in the case of a doctor who had performed around 3,000 hip replacements. Before a judge could say that Mrs Laughton's operation had been negligently performed, there would have to be something which differentiated her operation from any other operation where avulsion had occurred. There was nothing to support such differentiation.

Evidence of lack of probity would be relevant to the credibility of a witness, but it was Mr Shalaby's competence that was in issue, not his credibility. The most that could be said was that any lack of probity proved could show that he would be unlikely to admit to any incompetence or that he was less likely to have followed his standard practice than he asserted. That was described as a slender basis on which to advance a negligence case.

In addition, on the facts, the examples of Mr Shalaby's lack of probity were not of the most serious kind. The judge had been aware that Mr Shalaby was "unable to practise", but he had not informed him of the conditions imposed on his registration, or of his suspension. The court held that to be a very serious dereliction of the surgeon's obligation to be honest with the court. The Court of Appeal knew about the assault and that Mr Shalaby had sought to conceal it; however, they held that those factors did not make it more probable than not that he had performed the claimant's operation negligently.

The court confirmed that evidence of incompetence in other cases was admissible only if relevant. They pointed out that the proposition that a principle should be adopted similar to the criminal law's approach to bad character evidence went well beyond the statutory provisions of the criminal law. The proposed principle did not represent the law, and the criminal law position did not apply to civil proceedings, since the criminal law represented a statutory change to the common law.

Evidence of extraneous matters should be confined to cases of similar fact for the traditional reason that, unless it was similar fact evidence, it was not probative of the issue to be determined. The finding in the GMC report was a damning general comment but, of itself, it could not prove that Mr Shalaby had been negligent in the claimant's operation, particularly since the report had found that the avulsion in her case did not necessarily indicate negligence.

Accordingly it was not open to Mrs Laughton to rely on the general comment unless she could point to other cases which could constitute similar fact evidence. That was impossible. They held that knee, foot and wrist operations were too far removed from hip operations to constitute such evidence. The only other hip replacement considered in the report had been criticised for insufficient discussion with the patient, which could also not be considered similar fact.

Their conclusion was that there is no principle in clinical negligence cases analogous to the admissibility of bad character evidence in criminal law under which the court could infer negligence in one case from evidence of incompetence in other cases. The appeal was dismissed.

Comment

How does a claimant prove that an adverse outcome from surgery represents breach of duty in the performance of the surgery rather than non-negligent manifestation of a known (though rare) complication? This is an age-old problem for claimants, particularly given that the surgeon in question is likely to provide self-serving evidence regarding how the surgery was performed. Such were the problems for Mrs Laughton. Her counsel deployed three main weapons to discharge the burden for the claimant, namely:

1) expert opinion;
2) extraneous factors (principally lack of probity); and
3) evidence of incompetence in other cases.

Expert opinion

This was against Mrs Laughton as the trial judge preferred the evidence of the defendant's expert to the effect that there was nothing to indicate any breach of duty. The judge considered that the claimant's expert gave his evidence in an exaggerated manner, whilst the defendant's expert was more impartial and had the support of textual authority.

Extraneous factors

These led to censure of Mr Shalaby for not being forthcoming about the fact that conditions had been imposed upon his registration to practice (amongst other things). Nevertheless, the trial judge was prepared to accept that as a matter of fact he had probably carried out the surgery in accordance with his usual practice—albeit he could not recall the actual operation. By the time of the appeal there was additional evidence of interim suspension from practice following two "Fitness to Practice Panel" decisions. The Court of Appeal admitted this information into evidence, but considered that none of the extraneous evidence made it more probable than not that Mr Shalaby performed the surgery on Mrs Laughton negligently.

Incompetence in other cases

This aspect of the appeal will be of the most interest for litigators. With the agreement of the other two Lord Justices, Longmore LJ concluded that the claimant might have been able to prove that the surgery had been negligently performed if it were found that a significant percentage of Mr Shalaby's hip operations had suffered the same complication. He did not want to suggest that a "high" percentage was necessary, but clearly there would have to be more adverse outcomes than the statistical average applicable for all surgeons.

With advances in the auditing of surgical outcomes for individual surgeons, it may become easier in time to establish trends or higher than normal adverse outcomes. Near miss reporting may also be helpful, but unless a surgeon has performed a very high number of similar procedures, the volume of operations may be insufficient to provide the evidence claimants require.

Longmore LJ was clearly prepared to accept that a surgeon's incompetence in other cases is admissible in evidence, but only if it is relevant. This is in line with well-established common law principles, see *O'Brien v Chief Constable of South Wales*.[1] The claimant's counsel sought to extend the principle such

[1] *O'Brien v Chief Constable of South Wales* [2005] 2 A.C. 534; [2005] 2 W.L.R. 1038.

that "… evidence of systemic failure of various types of incompetence is admissible in professional negligence cases as enabling a judge to make inferences of negligence in a particular case".

He prayed in aid of Criminal Justice Act 534 ss.101 and 103 which he suggested should apply similarly to civil cases. Longmore LJ stated (at [22]) that:

> "This proposition goes well beyond the statutory provisions of the criminal law. For my part I would not accept that Mr Yell's proposed principle represents the law; nor would I accept that the criminal law position applies to civil proceedings, since the criminal law represents a statutory change to the common law. In my judgment evidence of extraneous matters should be confined to cases of similar fact evidence for the traditional reason that, unless the evidence is similar fact evidence, it is not probative of the issue to be determined."

He suggested that the courts may be readier to admit similar fact evidence than they were in the past, but that the trial judge retains a discretion whether to admit, particularly if the similar fact evidence will "open up complex collateral issues".

This aspect of the judgment may be of assistance to claimants if suitable evidence is available, but equally a defendant surgeon could point to a history of hundreds of similar operations with no adverse outcomes. In general personal injury actions, similar fact evidence will extend to previous accidents which, though admissible to show that a particular act or place was dangerous, are not usually evidence of the defendant's negligence. Conversely, long immunity from accident does not necessarily prove absence of carelessness.[2]

The problems for the claimant regarding similar fact evidence in the present case were twofold. First, the evidence of complaints from other patients, were just that—complaints. Mr Shalaby denied he had been negligent with any of those patients and the trial judge correctly said: "The evidence of complaints is not probative. It is merely evidence of complaints." Secondly, the evidence from the GMC Fitness to Practice Panel regarding substandard performance of a number of operations related to two knee, two foot, one wrist, and two hip operations. In relation to the hip operations, one complaint concerned insufficient discussion with the patient—therefore of no relevance—and the other related to Mrs Laughton's complaint as to which the GMC's investigating surgeon found no evidence of negligence. The GMC evidence did not show any percentage of previous hip operations in which gluteal detachment occurred. It was not therefore probative.

Conclusion

In conclusion, the touchstone of admissibility in relation to similar fact evidence in civil cases is always *relevance*. What is legally relevant ought to be closely aligned with what is logically relevant, but what is logical to one person may not be to another: a jury may well be prepared to accept the logic of similar fact evidence where a judge trying the case alone would not! Of course, a judge has to balance prejudice against probative value. The trial judge has a wide degree of discretion, and can exclude such evidence.

The handling of similar fact evidence at the interlocutory case management stage may well be problematic, as it will raise practical difficulties of disclosure on collateral matters. For example, to what extent should the medical records relating to a surgeon's other adverse outcomes be disclosed? The court's desire to deal with cases efficiently and at proportionate cost may serve to fetter much of what a claimant might seek to prove his case. The boundary between a legitimate exercise and "fishing expedition" may also be difficult to discern. The present case does nothing to simplify issues surrounding the search for or admissibility of similar fact evidence in civil cases.

[2] See *Thomas v GW Colliery Co* (1894) 10 T.L.R. 244 CA.

Practice points

- Proving negligence in surgery poses particular challenges. Similar fact evidence may be admissible if it is truly "similar" and relevant. A close analysis of its probative value will be required.
- A review of a surgeon's previous adverse outcomes and near misses will be necessary and may be helpful.
- Where a surgical operation is complex or unusual, any failure may be less likely to be negligent (see for example *Lavelle v Hammersmith and Queen Charlotte Special HA*).[3]
- The fact remains that an unfavourable outcome is not synonymous with negligence, and a surgeon is not an insurer. Damage can occur even with the exercise of reasonable care.
- Evidence of dishonesty in a surgeon does not equate to substandard performance of surgery.
- As expert evidence is key in professional negligence cases, the demeanour of an expert in the witness box is extremely important. Exaggerated or emotive language by an expert can lose cases.

Nathan Tavares

Hay v Advanced Stairlifts (Scotland) Ltd

(OHCS, Lady Stacey, August 1, 2014, [2014] CSOH 118)

Personal injury—employers—liability—health and safety at work—work equipment—suitability—Provision and Use of Work Equipment Regulations 1998—risk—negligence

Burden of proof; Employers' liability; Falls from height; Foreseeability; Scotland

The pursuer was employed by the defenders, Advanced Stairlifts (Scotland) Ltd, as a sales surveyor. Her job was to carry out surveys on the premises of customers who wished to buy a stairlift. The defenders' business supplied stairlifts but did not manufacture them; they ordered them to be made by other companies. The measurements given to the manufacturing companies had to be both detailed and accurate.

Customers were seen at home at least twice before a stairlift was ordered. The first visit would enable the surveyor to see the stair and decide what type of stair lift would be suitable, and to take some measurements. The defenders then provided a quote. If the customer decided to go ahead then a further detailed survey would be done.

On November 20, 2009 the pursuer went to a house in Lossiemouth to measure the stair. To do so she used an expandable metre stick. It could expand to a length of 5m. It weighed approximately 1.6kg. Her case was that while she was taking the measurement, she sat on the stairs, nearer to the top than to the bottom, holding the expandable metre stick in both hands. It had a gauge at one end which would show the distance measured by the stick. She had that end nearest to her. To get the necessary measurement, she had to expand the stick and hold it horizontal. The far end of the stick began to drop and she reached out to try to steady it. While she was doing so, she slipped and landed on her bottom on the next step down.

[3] *Lavelle v Hammersmith and Queen Charlotte Special HA* , Unreported, January 16, 1998 CA.

She suffered a lower back injury, had reported her accident to the defenders and had been absent from work for a week. She claimed that her employers negligent and in breach of Provision and Use of Work Equipment Regulations 1998[1](PUWER) reg.4(1) and (3). The defenders accepted that the pursuer had been in the house to take measurements. However liability was not accepted and she was put to her proof about what happened in the house. Contributory negligence was also alleged.

The Judge found none of the witnesses were reliable. However Lady Stacey accepted that the pursuer was truthful and reliable when she said that she had slipped from one step to the next while measuring because the end of the stick had started to drop and she reached out.

The pursuer relied on the case of *Kennedy v Chivas Brothers Ltd*[2] in which the court had followed the Court of Appeal in the case of *Hide v Steeplechase Company (Cheltenham) Ltd*.[3] She argued that the effect of the regulations was that if she showed that she suffered an injury as a result of contact with work equipment which was or might be unsafe it was for the defenders to show that the accident happened due to unforeseeable circumstances beyond its control, or to exceptional events the consequences of which could not be avoided despite the defenders exercising all due care.

Her case was quite simple. She had to sit on the stairs holding and extending a stick. That gave rise to a general risk that she might fall. It was obvious and foreseeable. It was obvious that the stick had caused the fall. It was not for her to plead and prove what alternative method could have been used and the accident avoided. It was for her employers to show that the accident arose from unforeseen circumstances or from an exceptional event which could not be avoided in spite of the exercise of all due care. She argued that the defenders had not done so.

Lady Stacey accepted that it was reasonably foreseeable, as defined in the PUWER that an accident of the type which occurred might happen. That was borne out by defender's risk assessments which found that there was a risk of falling if working on stairs. The pursuer's work involved extending a metre stick while on stairs and it was foreseeable that such a manoeuvre involved the risk of falling. PUWER reg.4(1) and (3) were breached. There was no deduction for contributory negligence. The pursuer succeeded in full.

Comment

The importance of the decisions in *Hide v Steeplechase Company (Cheltenham) Ltd*[4] and *Kennedy v Chivas Brothers Ltd*[5] is illustrated very well in this case. Pre-*Hide* and *Kennedy* for years totally the wrong approach was regularly being used when assessing liability under PUWER. Common law foreseeability was being applied instead of the standard required by the originating EU Directive.

In this case, the defenders agreed that PUWER applied. However, they argued that the equipment was suitable for the job. The pursuer carried out the work sitting down on the stairs. They said it was not reasonably foreseeable that there was a risk that she might fall, when sitting on the stairs. They argued that the law did not require an absolute guarantee of protection as there was no absolute liability. For support they relied upon *Reid v Sundolitt Ltd*[6] and *Hodgkinson v Renfrewshire CC*.[7]

[1] "(1) Every employer shall ensure that work equipment is so constructed or adapted as to be suitable for the purpose for which it is used or provided. (2) … (3) Every employer shall ensure that work equipment is used only for operations for which, and under conditions for which, it is suitable. (4) In this regulation "suitable" — (a) Subject to subparagraph (b), means suitable in any respect which it is reasonably foreseeable will affect the health or safety of any person …"

[2] *Kennedy v Chivas Brothers Ltd* [2013] CSIH 57; 2013 S.L.T. 981.

[3] *Hide v Steeplechase Co (Cheltenham) Ltd* [2013] EWCA Civ 545; [2014] 1 All E.R. 405; [2014] I.C.R. 326.

[4] *Hide* [2014] 1 All E.R. 405.

[5] *Kennedy* 2013 S.L.T. 981.

[6] *Reid v Sundolitt Ltd* [2007] CSIH 64; 2008 S.C. 49.

[7] *Hodgkinson v Renfrewshire Council* [2011] CSOH 142; 2011 G.W.D. 29-639.

Having considered the Work Equipment Directive 89/655[8] in *Reid* the court held that the word "ensure" in reg.4(3) did not imply employers' liability merely because an accident had occurred when using work equipment. It was necessary to consider the use of the equipment in the context of suitability. The employer in that case had provided bins purely to contain scrap material and its system of work did not require employees to climb into the bins as the pursuer had.

In *Hodgkinson*, when opening a gate, the pursuer had stood too close to it and had pulled it into herself. The Judge considered *Moohan v Glasgow CC*[9] in which Lord Brodie expressed the view there had to be "… a greater measure of foreseeability than mere possibility…" and that for work equipment to be suitable there had to be an absence of reasonably foreseeable risk of material (more than de minimis) harm.[10] The Judge held that the employers were not in breach of PUWER reg.4 and Workplace (Health, Safety and Welfare) Regulations 1992 reg.18. It could not be said that opening the gate involved anything more than a mere possibility of injury or harm to Heather Hodgkinson.

In reality, on their facts, neither *Reid* nor *Hodgkinson* really assisted the defenders. They were both decided pre-*Hide* and *Kennedy*. They did not consider the interaction between the Framework[11] and Work Equipment Directives. Implementation of PUWER was pursuant to the UK's obligations under both the Framework Directive on the introduction of measures to encourage improvements in the safety and health of workers and the Work Equipment Directive.

Both the Use of Work Equipment Directive art.3.1 and PUWER reg.4 impose a requirement that work equipment is to be suitable for the purpose for which it is used and that that work equipment can be used without impairment to health and safety. The Directives do not anywhere define the word "suitable". Regulation 4(4) does, however, state that "suitable" means:

> "suitable in any respect which it is reasonably foreseeable will affect the health or safety of any person."

So the concept of reasonable foresight is introduced into our domestic regulation but is absent from the Directive. The question was: had the regulation correctly implemented the Directive? This was raised in *Robb v Salamis*[12] by Lord Clyde who commented on the different wording, saying this:

> "47. … if Article 5(4) is the basis for Regulation 4(4), it is appropriately transposed by the introduction of the concept of reasonable foreseeability. On the face of it the language of Article 5(4) is significantly different. It speaks of "unusual and unforeseeable circumstances, beyond the employers' control, or to exceptional events, the consequences of which could not have been avoided despite the exercise of all due care". It may be difficult to construe the words of the Regulation to equate with this language. But the meaning and effect of Regulation 4(4) has not been argued before us."

There are in reg.4 two categories of occurrences in respect of which a defendant may seek to excuse his liability namely:

[8] Directive 89/655 concerning the minimum safety and health requirements for the use of work equipment by workers at work (second individual Directive within the meaning of Article 16(1) of Directive 89/391) [1989] OJ L393/13 art.3: "1. The employer shall take the measures necessary to ensure that the work equipment made available to workers in the undertaking and/or establishment is suitable for the work to be carried out or properly adapted for that purpose and may be used by workers without impairment to their safety or health. In selecting the work equipment which he proposes to use, the employer shall pay attention to the specific working conditions and characteristics and to the hazards which exist in the undertaking and/or establishment, in particular at the workplace, for the safety and health of the workers, and/or any additional hazards posed by the use of work equipment in question. 2. Where it is not possible fully so to ensure that work equipment can be used by workers without risk to their safety or health, the employer shall take appropriate measures to minimise the risks."

[9] *Moohan v Glasgow CC* 2003 S.L.T. 745.

[10] In that case, the pursuer's use of a pinch bar, pick and spade to dig a hole in a play area was found not to involve such a reasonably foreseeable risk of harm.

[11] Directive 89/391 on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ L183/1.

[12] *Robb v Salamis (M&I) Ltd* [2006] UKHL 56; [2007] 2 All E.R. 97; 2007 S.C. (H.L.) 71.

1) occurrences due to unforeseeable circumstances beyond the employers' control; or
2) occurrences due to exceptional events the consequences of which could not be avoided despite the exercise of all due care.

The Court of Appeal concluded that the first category expressly introduces the concept of foreseeability but in a limited way: the circumstances causing the accident must not only be "unforeseeable" but also "beyond the employer's control". The second category could be said to recognise the concept of foreseeability by requiring that there has to be an exceptional event the consequences of which could not be avoided by the exercise of "all due care". Their view was that you could only assess whether such an event had occurred by considering whether "all due care" has been exercised; if an event was truly unforeseeable, then its consequences could not be avoided by the exercise of "all due care". They concluded that it was due to these references to foreseeability that the draftsman of the regulations defined "suitable" to mean "suitable in any respect which it is reasonably foreseeable will affect the health and safety of any person".

They decided that it was difficult to say that the introduction of the concept of reasonable foreseeability in reg.4(4) meat that the Directives had not been appropriately or accurately transposed into our law. However they also decided that the words "reasonably foreseeable" must be construed so as to be consistent with the limited concept of foreseeability envisaged by the Directive. Article 5(4) allows member states to opt to provide for the exclusion or limitation of an employer's responsibility in respect of each of the two categories of occurrences referred to above. Since the option allows the exclusion or limiting of what would otherwise be the employer's (or another defendant's) liability, they held that it must be for the defendant to prove that any relevant accident was due either to unforeseeable occurrences beyond the defendant's control or to exceptional events the consequences of which could not be avoided in spite of the exercise of all due care. Construed like that they decided that the regulation is consistent with the Directive.

Their approach was also consistent with Lord Rodger's speech in *Robb v Salamis* when he said:[13]

> "The primary purpose of the relevant regulations is not to give a ground of action to employees who are injured in some particular way but to ensure that employers take the necessary steps to prevent foreseeable harm coming to their employees in the first place. Therefore, the respondents' obligations under the regulation were triggered because it was reasonably foreseeable that an employee might injure himself while using a ladder which became dislodged and fell because it had not been replaced properly …"

What this means is that once the claimant shows that he has suffered injury as a result of contact with a piece of work equipment which is (or may be) unsuitable, it will be for the defendant to show that the accident was due to unforeseeable circumstances beyond his control or to exceptional events, the consequences of which could not be avoided in spite of the exercise of all due care on his part. The fact that an injury occurs in an unexpected way will not excuse the defendant unless he can show, further, that the circumstances were "unforeseeable" or "exceptional" in the sense given to those words by the Directive.

This is totally different from the common law. The regulations, reflecting the relevant Directives, are in far more uncompromising terms. In particular, the opening language of reg.4(1) and (3), as does the language of Framework Directive art.5.1, imposes an obligation on an employer to "ensure" an outcome. That is a high duty.

[13] *Robb* [2007] 2 All E.R. 97 at [53].

Practice points

- "Work equipment" means any machinery, appliance, apparatus, tool or installation for use at work (whether exclusively or not)".[14]
- "The definition of work equipment in Regulation 2(1) is very broad indeed, and one should not restrict that breadth unnecessarily if the intention of the regulations and Directive to provide comprehensive protection to workers is to be fulfilled".[15]
- For lack of foreseeability to provide a defence in terms of suitability of work equipment the accident must not only be "unforeseeable" but also "beyond the employer's control.
- Decisions post-*Hide* and *Kennedy* trump earlier decisions on what is suitable work equipment.
- If work equipment is unsuitable under PUWER then the employer will almost certainly have been negligent in providing it and that should not be changed by the Enterprise Act 2013.

Nigel Tomkins

McDonald v Department for Communities and Local Government

(SCUK, Lord Neuberger PSC, Lady Hale DPSC, Lord Kerr JSC, Lord Clarke JSC, Lord Reed JSC, October 22, 2014, [2014] UKSC 53)

Personal injury—asbestos—employers' liability—occupiers' liability—health and safety at work—torts—negligence—breach of statutory duty—duty of care—mesothelioma—Asbestos Industry Regulations 1931

LT Asbestos; Breach of statutory duty; Duty of care; Employers' liability; Health and safety at work; Mesothelioma; Occupiers' liability; Visitors

The claimant Percy McDonald[1] was diagnosed as suffering from mesothelioma in July 2012. Mr McDonald was employed as a lorry driver by a firm known as Building Research Establishment, operated by the government.[2] Between 1954 and March 1959 he attended Battersea power station[3] in the course of his employment. This was for the purpose of collecting pulverised fuel ash. Between 1954 and January 1957 he was at the power station approximately twice a month. Between January 1957 and March 1959 he was there about twice every three months.

The plant where the ash was collected did not contain asbestos. But Mr McDonald, while visiting the power station, went into other areas where asbestos dust was generated by lagging work. This happened particularly in the boiler house. In particular he claimed that he had been present while laggers mixed asbestos powder with water to make lagging paste that he had been in close proximity to such work and had seen clouds of dust in the air.

Percy McDonald alleged that he had been exposed to asbestos dust, from which he had developed mesothelioma, when paying visits to Battersea power station controlled by the defendant's predecessor, as occupiers of the power station, during the course of his employment. At trial, Mr McDonald alleged that those occupiers were negligent and in breach of their statutory obligations under Asbestos Industry

[14] The definition of work equipment in PUWER reg 2(1).
[15] *Spencer-Franks v Kellogg Brown & Root Ltd* [2008] UKHL 46; [2009] 1 All E.R. 269; 2008 S.C. (H.L.) 159 at [74], per Lord Carswell.
[1] The claimant died just before the hearing in the Supreme Court. His widow, Edna McDonald, was substituted as respondent to the appeal and appellant in the cross-appeal.
[2] The predecessor body of the Department for Communities and Local Government.
[3] Responsibility for which now lies with the National Grid Electricity Transmission Plc.

Regulations 1931 ("1931 Regulations") reg.2(a) and Factories Act 1937 (1937 Act) s.47. He also claimed against his employers that they had been guilty of negligence.

The trial judge, HH Judge Denyer QC, found that Percy McDonald's exposure to asbestos was:

> "of a modest level on a limited number of occasions over a relatively short period of time … [and] … was not greater than those levels thought of in the 1950s and 1960s as being unlikely to pose any real risk to health."

Judge Denyer QC, dismissed all the claims against both defendants. On appeal, the Court of Appeal allowed Mr McDonald's appeal under the 1931 Regulations against the occupiers of the power station but dismissed the appeal under the 1937 Act and in negligence. National Grid appealed to the Supreme Court against the judgment under the 1931 Regulations and Mrs McDonald cross appealed against the dismissal of her husband's claim under 1937 Act s.47 against the "employer". Negligence was no longer in issue.

The Supreme Court confirmed that the 1931 Regulations were not confined to the clearly identifiable asbestos industry and those working within it. The 1931 Regulations made it prominently clear that all factories and workshops in which certain specified processes were carried out were covered, and accordingly the emphasis was on the processes carried out rather than the nature of the industry.[4] The 1931 Regulations applied not only to factories engaged in manufacturing asbestos goods, but also those, such as the power station, carrying out lagging work. The term "mixing" in the preamble to the 1931 Regulations was not to be given a restricted, technical meaning, but was to be construed more broadly and taken to cover the mixing of asbestos powder with water such as had occurred in the power station.

The court further held that the words in the 1937 Act s.47(1), "a process" carried out in a factory, were to be given their plain and natural meaning. If the relevant process was one that was a normal feature of the factory's activity, it was a process for the purposes of the legislation. The lagging work encountered by Percy McDonald therefore constituted a process for the purposes of s.47(1). However he was not a "person employed" under s.47(1), either in the sense of being employed at the factory or in the process of handling asbestos. Even so, in interpreting s.47(1), the court held that the emphasis should be on the need for protection rather than on the involvement in the process. The relevant test was whether Percy McDonald was a person employed in the factory, not whether he was employed by the occupier of the factory, and on that basis it was unnecessary for him to show that he was employed by the occupier defendant.[5]

The fact that Mr McDonald had not been required to go to the parts of the power station where the lagging work occurred was irrelevant.[6] However, they concluded that there was insufficient evidence to establish that a substantial quantity of dust had been given off by the lagging work. Whether substantial dust had been produced called for a purely quantitative, rather than qualitative, assessment, and there was insufficient evidence to satisfy that ground.

The 1931 Regulations in general did not apply to the power station by virtue of the work being carried out by the laggers, and reg.2(a) in particular did not apply to that work.[7] The 1931 Regulations applied only to factories and workshops in which one or more of the processes listed in the preamble was carried out. The term "mixing", as employed in the preamble, had a technical meaning, describing particular processes carried out in the asbestos industry which were not carried out at the power station. Regulation 2(a) did not apply to the work carried out by the laggers, as it did not involve the "mixing or blending by hand of asbestos" within the meaning of the 1931 Regulations.

The appeal and cross appeal were dismissed.

[4] *Shell Tankers UK Ltd v Jeromson* [2001] EWCA Civ 101, [2001] I.C.R. 1223 applied.
[5] *Canadian Pacific Steamships Ltd v Bryers* [1958] A.C. 485; [1957] 3 W.L.R. 993 followed.
[6] *Uddin v Associated Portland Cement Manufacturers Ltd* [1965] 2 Q.B. 582; [1965] 2 W.L.R. 1183 applied.
[7] Per Lord Reed.

Comment

The huge hulk of the Battersea Power Station, a Grade II* listed architectural landmark on the River Thames, was also the setting for this legal landmark of great significance in cases on asbestos exposure. Currently the location of a controversial £8 billion housing scheme,[8] the Supreme Court decision in *McDonald* was a reminder of the grim aspects of an industrial past for this defunct power station at Battersea and those elsewhere; a legacy which has caused immense suffering to families coping with what Lord Kerr characterises as this "insidious disease" of mesothelioma.[9]

A critical aspect of the case was that Percy McDonald, diagnosed with mesothelioma in July 2012 and dead in February 2014, was a visitor and not an employee at the Battersea site. Indeed, the defendants sought strenuously to suggest he was merely a "sightseer" or an "interested visitor",[10] a perspective subsequently characterised by Lord Kerr as an assertion that he was a "casual visitor" to the premises.[11] Admittedly the claimant was an irregular visitor at the power station, driving his tipper lorry to collect pulverised fuel ash on an occasional basis, and now over half a century ago. He was also clearly employed by the Building Research Establishment and not at the power station or by associated companies. But from what we now know about "single fibre" exposure of this incredibly hazardous substance of asbestos it was abundantly clear that his visits to Battersea had caused this calamity; causation was therefore not an issue.

The workplace exposure was that, while waiting his turn in the queue for loading from the chute, and needing to deal with paperwork, Mr McDonald habitually went into the power station to eat his lunch, use the toilet facilities and converse with fellow workers. All around him in these visits were laggers mixing asbestos powder with water to make paste, sawing preformed asbestos sections, and stripping off old asbestos. Lagging boiler pipework and using asbestos for the protection of high voltage cabling was, of course, a persistent feature of power stations back in that era, and no thought was given to protection for workers, either employees or visitors. With an average latency period of decades before the onset of mesothelioma this work history was necessarily always a "timebomb".

Lady Hale, with Lord Kerr and Lord Clarke, in the majority, notes that "although liability under the Factories Acts is often considered a type of employers' liability, it is in fact a species of occupiers' liability".[12]

Whereas the Court of Appeal had determined that Mr McDonald was neither employed at the factory nor in the process of "handling" asbestos, and that this would be determinative,[13] the Supreme Court makes it very clear that the famous 1931 Regulations were not confined just to the clearly identifiable asbestos industry or to those working within it. The emphasis in these cases should therefore be on the need for protecting all workers, including visitors, rather than on just those who were involved in the asbestos industry itself.

As on other occasions the disputation in the Supreme Court seemed to centre around those arguing for proactive textual analysis which would give increasing safety protection and those who would seek to have a narrow construction because of the "penal" nature of the 1931 Regulations and the accompanying legislation. Lord Reed, joined by Lord Neuberger in the minority dissent, arduously interrogates the Factory and Workshop Act 1901 and the precise language of the 1931 Regulations, considering in particular the heavy emphasis from the defendants that these Regulations were "The Asbestos Industry Regulations" (sic). But Lord Kerr for the majority rebuts this interpretative approach by citing Lord Porter in *Harrison*

[8] See generally *Architects Journal* (December 4, 2014).
[9] *McDonald v Department for Communities and Local Government* [2014] UKSC 53; [2014] 3 W.L.R. 1197 at [1].
[10] Terms advanced by Dominic Nolan QC, noted at *McDonald* [2014] 3 W.L.R. 1197 at [3].
[11] *McDonald* [2014] 3 W.L.R. 1197 at [57].
[12] *McDonald* [2014] 3 W.L.R. 1197 at [104].
[13] *McDonald v Department for Communities and Local Government* [2013] EWCA Civ 1346; [2014] P.I.Q.R. P7, per Lord Dyson MR at [107] and MCombe LJ at [59].

v NCB that "a restrictive interpretation should not be adopted unless the wording compels it".[14] Allowing for the differing viewpoints which can creep in to any discussion of some of this antiquated legislation and regulation it would now appear to be settled law as a result of *McDonald* that a wider purposive interpretation applies to the 1931 Regulations, and that in particular they apply to all visitors.

Another issue that is also resolved is the *Cherry Tree* consideration of the word in the Preamble to the 1931 Regulations of "mixing".[15] Lady Hale, who was of course involved in that Court of Appeal decision, starts her speech in *McDonald* by indicating, modestly, that "A just and sensible judge is always prepared to admit that she has been wrong".[16] Happily there is a unanimous endorsement in the Supreme Court that "mixing" has a wider contextual meaning and is not a term confined to a situation where someone is personally involving in mixing asbestos himself.

However, Lady Hale finds herself her in a minority of one when the Supreme Court considers the cross-appeal. The majority consider there is no sufficient evidence to rebut the Court of Appeal's conclusion that the claimant had failed to establish that a "substantial quantity of dust" had been given off by the mixing process, as required by 1937 Act s.47(1). A difficulty here is that the learned judge at first instance, HH Judge Denyer, made no finding on this point; indeed he had indicated that exposure had only been at a "modest level" and of course dismissed all the claims.

While the Court of Appeal allowed an appeal under the 1931 Regulations they too dismissed the claim under the 1937 Act. While the absence of a finding on "substantial dust" at first instance was regretted in the Court of Appeal by Lord Dyson MR—"difficult for this court to make good this omission"[17]—Lord Kerr in the Supreme Court indicates that this condition under the 1937 Act "has not been, and cannot now be, satisfied".[18] Given the nature of the lagging industry in power stations of the 1950s it might be thought that the generation of "substantial dust" was axiomatic in the vicinity of work of this sort, but clearly further specificity is required. Only Lady Hale would have allowed this cross-appeal on the basis that there *was* such evidence.

Finally, there is a somewhat forlorn suggestion by the defendants that theoretical legal demarcation lines existed at the Battersea power station in respect of Mr McDonald's employment. The Supreme Court reiterates the familiar case of *Uddin*,[19] where the worker went to a part of the premises where he had no authority and his arm was caught in machinery, but was nevertheless still protected; Lord Kerr indicates that:

> "the suggestion that Mr McDonald was acting within the scope of his employment while in the areas where pulverised fuel ash was collected and stepped outside that scope as soon as he crossed the threshold of another room in the factory is *fanciful*." (emphasis added)[20]

Practice points

- A visitor to a power station is entitled to compensation for mesothelioma under the 1931 Regulations, despite not being an employee in the asbestos industry.
- An occupier has continuing safety responsibilities for everyone on a work site, and not just for employees.

Julian Fulbrook

[14] *Harrison v NCB* [1951] AC 639 at 650.
[15] *Shell Tankers UK Ltd v Jeromson* [2001] I.C.R. 1223.
[16] *McDonald* [2014] 3 W.L.R. 1197 at [93].
[17] *McDonald* [2014] P.I.Q.R. P7 at [109].
[18] *McDonald* [2014] 3 W.L.R. 1197 at [90].
[19] *Uddin* [1965] 2 W.L.R. 1183.
[20] *McDonald* [2014] 3 W.L.R. 1197 at [72].

Wilson v North Star Shipping (Aberdeen) Ltd

(OHCS, Lord Bannatyne, October 29, 2014, [2014] CSOH 156)

Personal injury—employers' liability—health and safety at work—duty of care—Merchant Shipping and Fishing Vessels (Health and Safety at Work) Regulations 1997

Employers' liability; Health and safety at work; Risk assessment; Scotland; Shipping industry; Training

Paul Wilson was employed by North Star (Cyprus) Ltd[1] as a second-year apprentice deck hand. On July 28, 2009 he was on duty on the Grampian Conqueror[2] ("the mother craft"), an offshore standby vessel, which was stationed off an oil platform, Sedco 7/11 situated about 190 kilometres east of Peterhead. That day Paul was a member of the close standby crew.

On board the mother craft was a much smaller vessel ("the daughter craft") which could be launched from the mother craft. When carrying out close standby duties Paul served on the daughter craft as part of a crew of three. That day the cox'n in charge was Dmitri Rand, assisted by Piotr Snaizder, a qualified deck hand. Both were senior to Paul and he was expected to take orders from both of them.

The daughter craft was lowered onto the water at or about 14.15 in appropriate wind and sea conditions. Conditions remained throughout just within the safe working capabilities of the daughter craft. Later, oil was spotted from the rig bubbling up from below and there were concerns as to whether gas was also leaking which gave rise to safety concerns. The rig requested that an oil sample be obtained from the water near the rig. Sampling was a job for the daughter craft. Obtaining oil samples was a task regularly carried out by the crew of a daughter craft.

Before it could carry out sampling, the daughter craft needed a sampling kit. They were routinely kept on the mother craft. As the daughter craft did not have sampling kits on board and it had to return to the mother craft to obtain one. The captain of the mother craft considered the weather and sea conditions and decided the transfer would be done as follows: the daughter craft would come alongside the mother craft and the sampling kit would be thrown from the mother craft onto the daughter craft's deck. The cox'n of the daughter craft was informed of this decision.

To achieve this form of transfer the mother craft turned at right angles to the wind direction in order to form an area of calm sea out of the wind on the leeward side of a vessel (a lee) for the daughter craft. The cox'n then approached the leeward (starboard) side of the mother craft. He brought the starboard side of the daughter craft to within approximately 1m to 1.5m of the port side of the mother craft. The two vessels were when alongside each other both moving at a relatively slow speed. The sample bottles were very light. As usual they were placed within a knotted black bin bag. The black bag was dropped by a member of the crew of the mother craft onto the roof of the wheelhouse of the daughter craft.

While the two vessels were travelling alongside one another, they came together crushing Paul Wilson pursuer who was standing on the port side of the daughter craft. It was not in dispute that given the dynamics of two vessels proceeding alongside each other and the sea and wind conditions at the material time there was a real risk during the carrying out of such a task that the two vessels would come together forming a pinch point. Wilson was crushed between two vessels suffering five fractured ribs and a fractured clavicle and sustaining PTSD.

[1] The second defenders.
[2] The first defenders were sued as operators of the vessel on which the pursuer was serving at the material time.

Wilson's case was that both defenders collectively were at fault at common law and either one or both of them had breached the Merchant Shipping and Fishing Vessels (Health and Safety at Work) Regulations 1997 (1997 Regulations) reg.5, reg.7 and reg.12 in that the manner of the transfer of the sampling kit had created an avoidable risk, N had not risk assessed the transfer of the kit from the larger craft to the smaller one, and there was no evidence that Wilson had had specific training on carrying out equipment transfers.

Lord Bannatyne held that both defenders had breached reg.5 of the 1997 Regulations as the method of transferring sampling kits created an avoidable risk. There was an inherent risk of the two vessels coming together and creating a pinch point when alongside each other. The judge further held that Wilson's actions clearly showed inattention, a lack of care and a lack of prudence, however, the defenders ought to have had that type of behaviour in mind when assessing risk. There was clearly a risk of a member of the crew acting as Wilson had done, and his actions, although admittedly negligent, were of a reasonably foreseeable type.

The judge recognised that the risk arising from a member of the crew entering a pinch point was avoidable by storing the sample kits on the smaller craft, and there was no question of such a step not having been reasonably practicable. A further method of avoiding the risk would have been dropping the kit into the sea and its recovery by the smaller craft once the larger one had moved away.

No suitable and sufficient assessment of the risks of the transfer of sampling kits or transfers generally of items from the larger craft to the smaller one had been carried out. The defenders' generic assessment was neither suitable nor sufficient where it covered the launch and recovery of the smaller craft by the larger one. That was an entirely different situation from the transfer of items. Had matters been properly risk assessed, the material risk would have been identified and avoided, and the defenders had breached the 1997 Regulations reg.7.

Lord Bannatyne held there was no breach of reg.12 by the operator. Wilson was a very experienced seaman who was aware of the dangers of entering a pinch point and had been given significant training, and no training or instruction could be identified that could have been given to him which would have prevented or materially lessened the likelihood of the accident. In addition, the evidence did not support the conclusion that the system of transfer on the day of the accident had been changed from a previous system.

The defenders' breaches were the effective cause of Wilson's injuries, and there was a causal link between the two which was not broken by his conduct. Paul Wilson had put himself into an unsafe position in the heat of the moment and in an automatic and unthinking response to recover the sampling kit. The aim of the 1997 Regulations was to protect the worker who was not prudent and made an error of the type made by Wilson, and the reason he had been able to make his error flowed from the defenders' breaches.[3] His behaviour could not be characterised as inexcusably careless such as to breach the causal chain and cause him to be entirely to blame for the accident.

The judge also held that the operators were at fault at common law for the same reasons relative to the breach of reg.5 and the failures were directly attributable to them where the cox'n had given Wilson proper instructions and had done nothing wrong. However, given the extent to which Wilson's actions confounded common sense and good seamanship his damages were reduced by 40 per cent for contributory negligence.

Comment

This case gives rise to a number of interesting issues, but there are four upon which I would like to focus. Of course, this is a breach of statutory duty case which has limited relevance in the light of Enterprise Act 2013 s.69. Nevertheless, there are some principles drawn from this case that may be of some use.

[3] *Boyle v Kodak* [1969] 1 W.L.R. 661; [1969] 2 All E.R. 439 HL and *Anderson v Newham College of Further Education* [2002] EWCA Civ 505; [2003] I.C.R. 212 considered.

First, I would refer to the reference that is made to the decision of the House of Lords in *Robb v Salamis (M&I) Ltd*.[4] At one point the House of Lords was concerned with the worker who does not necessarily show vigilance. Lord Hope said:

> "… when an employer is assessing the risks to which his employees may be exposed when using equipment that he provides for them to work with, he must consider not only the skilled and careful man who never relaxes his vigilance. He must take into consideration the contingency of carelessness on the part of the workman in charge of it and the frequency with which that contingency is likely to arise."

Then Lord Rodger is quoted in the case as saying:

> "It is trite that an employer must always have in mind, not only the careful man, but also the man who is inattentive to such a degree as can normally be expected and that the circumstances which can reasonably be expected by an employer include a great deal more than the staid, prudent, well regulated conduct of men diligently attentive to their work."

It is suggested that this approach will be adopted in all workplace incident cases regardless of whether breach of statutory duty is at stake or not. This lies fairly and squarely on an employer to take into account the less prudent as well as the attentive.

Secondly, it is worthwhile focusing on risk assessment. In health and safety legislation, carrying out a risk assessment is now fundamental. This was identified by the Court of Appeal in *Allison v London Underground Ltd*.[5] It is also suggested that when dealing with a negligence case concerning an accident at work, the Court will wish to focus on whether or not there has been an adequate and suitable risk assessment. A risk assessment very much seems part and parcel of the health and safety process. In this case, the Court found that no suitable and sufficient assessment of risks for the relevant job in question (the transfer of sampling kits or transfers generally of items from the mother boat to the daughter boat) had been carried out. The Court rejected the defenders' argument concerning that a risk assessment had been carried out on the basis that such an assessment was generic. It had not considered how items had been transferred from the mother craft to the daughter craft. The assessment gave no consideration to what should have been the starting point in a risk assessment with respect to the transfer of items, namely how such transfers, in specific circumstances, could be avoided.

Of course, the Court has to be satisfied that the failure to carry out a risk assessment was causative of the incident. In this case it was found that had one been done, then steps would have been put in place to prevent the incident from occurring.

Thirdly, the defendants in this case argued that the actions of the pursuer were such that this, alone, gave rise to the breach of statutory obligation. They relied on the House of Lords' decision in *Boyle v Kodak*.[6] In respect of an analysis of this case the Court identified that the defining issue was "whether a breach by the Defender was an operative cause or the sole effective cause was the action of the Pursuer".

The Court found that the breaches of the defender were, indeed, effective causes of the injuries of the pursuer. This case is another example of how difficult it is for defendants to be able to establish a defence on the basis of the principles as enunciated in *Boyle v Kodak*.

Finally, there is also the issue of contributory negligence. It was accepted by the pursuer that he was partly at fault by placing himself in a position of danger. However, the court had to have regard to the circumstances in which the incident happened. It said:

[4] *Robb v Salamis (M&I) Ltd* [2006] UKHL 56; [2007] 2 All E.R. 97; 2007 S.C. (H.L.) 71.
[5] *Allison v London Underground Ltd* [2008] EWCA Civ 71; [2008] I.C.R. 719.
[6] *Boyle* [1969] 1 W.L.R. 661.

> "The circumstances in the incident case were that the Pursuer was at sea, it was noisy, both ships were moving about a great deal and the Pursuer had no lengthy period of time to think about what he was about to do. In these circumstances there has been inattention to his own safety. However, his actions took place in the above circumstances and not in a Court whereas, in this case, hours and hours of thought and analysis have been poured into considering the actions of the Pursuer, which took place in a split second."

On this basis the pursuer was found to be 40 per cent to blame. This might seem surprisingly high, bearing in mind the comments made by the court. It is also noted that no account was taken of a case which was made reference to on behalf of the pursuer. This was *Mullard v Ben Line Steamers*[7] in which it was held that in order to protect a finding of breach of statutory duty, contributory negligence on the part of the Plaintiff should not be assessed particularly high. In that case, where the plaintiff was clearly partly at fault, contributory negligence was one-third.

Practice point

- In any accident at work case, consideration must still be given to regulations. Regulations lay down the standards upon which a Court may well find a common law duty of care is to be imposed. Such standards, as can be seen from above, are tough and rigorous.

Colin Ettinger

Boylin v Christie NHS Foundation

(QBD (Liverpool), Kenneth Parker J, October 17, 2014, [2014] EWHC 3363 (QB))

Personal injury—employers liability—negligence—bullying—harassment—psychiatric harm—Protection from Harassment Act 1997 s.1(1)(a)—causation—material contribution

LT Bullying; Employers' liability; Harassment; Psychiatric harm

The claimant, Tracy Boylin, brought a claim under the Protection from Harassment Act 1997 s.1(1)(a)[1] and in common law negligence against her employer, the defendant foundation, alleging that she had suffered bullying and harassment which had caused severe and lasting psychiatric injury.

Tracey Boylin (then aged 45) a single mother, with two teenage daughters, aged 10 and 11 was the senior human resources manager of the defendant. Its chief executive appointed an external consultant to carry out an executive review of the HR function. The chief executive felt that HR could play a potentially larger role within the Foundation, which would need an appropriately experienced manager. There was a question as to whether Boylin would be fit for such a role.

Christine Pilgrem was appointed interim director of workforce. In that role, she became Boylin's line manager. During September and October 2010 there were meetings between the two women, during which Boylin alleged Pilgrem was aggressive and angry. In one meeting, Pilgrem informed Boylin that she did not think Boylin would be able to fulfil the role of HR Director. Pilgrem admitted that, in a meeting between her and the claimant on November 10, in response to Boylin stating that she had received a job

[7] *Mullard v Ben Line Steamers* [1970] 1 W.L.R. 1414; [1971] 2 All E.R. 424 CA (Civ Div).
[1] A person must not pursue a course of conduct which amounts to harassment of another.

offer and did not intend to work her notice if she left, she swore at the claimant and effectively threatened her. Pilgrem informed the claimant that she was well-known around Manchester and would be able to influence how Boylin was seen. They worked together later that day. The defendant terminated its contract with Christine Pilgrem following investigation of the claimant's subsequent complaint. The claimant went on sick leave on November 22. She received anti-depressants and saw a clinical psychologist for five months.

Whilst Kenneth Parker J found the claimant to be someone who manufactured a grievance without good cause, misrepresented events in her own interest and behaved immaturely, he accepted that he would have found that Christine Pilgrem's conduct on November 10 crossed the line from unattractive, unreasonable or regrettable to oppressive and unacceptable under s.1(1)(a).[2] However, on the evidence, the claimant had not pursued the necessary "course of conduct" which was a prerequisite for liability under s.1. Whilst previous meetings between the two women were difficult, and doubtless Pilgrem did not always conceal her own annoyance and irritation and the claimant felt poorly treated, Pilgrem was not physically or verbally aggressive towards her, and nor did she treat her in a manner that constituted bullying or harassment.

In respect of the common law claim, the Judge concluded that there was nothing unusual or unacceptable about the board's business decision to initiate an executive review and there were understandable reasons for appointing Christine Pilgrem, despite her being an external consultant, as interim director of HR. The claimant reacted badly to those developments, adopting a very negative attitude of grievance and even assuming that she would be left with no job. Save in one respect, there was no breach of duty by the defendant.

Pilgrem admitted to swearing at and threatening the claimant on November 10. The defendant accepted responsibility for Pilgrem's significant misconduct. On that occasion, she did not treat the claimant with the respect to which she was entitled. The threat in particular was wholly improper and caused real distress and well-founded anxiety. However, the breach ought not to be taken out of proportion. It was a momentary lapse by Pilgrem and within minutes she and the claimant were working normally again. The threat was not repeated and by the end of the day it was doubtful whether the claimant still thought it would be implemented.

As soon as the claimant made her complaint, the defendant acted with exemplary speed, and Pilgrem immediately admitted her behaviour. Her appointment was appropriately terminated and the claimant was assured that Pilgrem was no longer her line manager and would not thereafter be on site. The issue was whether the single breach of duty caused or materially contributed to the mental illness that the claimant alleged she had sustained.

The Judge was prepared to proceed on the basis that the claimant's condition was as severe as described by one of the medical experts and he accepted another's opinion that such a severe condition would be caused by events as a whole. Nevertheless he held that the real cause of such a condition was the claimant's burning sense of grievance at the management process, encompassing the executive review, Pilgrem's appointment as interim HR director and her line manager and the reduction in her own management autonomy, together with her apprehensions about the outcome of the process. Seen in that context, the Judge held that the November 10 incident did not cause or materially contribute to her mental condition. The case was dismissed.

[2] *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34; [2007] 1 A.C. 224; [2006] 3 W.L.R. 125 and *Veakins v Kier Islington Ltd* [2009] EWCA Civ 1288; [2010] I.R.L.R. 132.

Comment

The judgment in this case acutely demonstrates the factual intricacy and technical complexity of claims for mental injury resulting from occupational stress in the workplace, and exemplifies the reason why a number of practitioners are hesitant about pursuing such claims.

The claimant, Ms Boylin, founded her claim on two bases: namely a breach of Protection from Harassment Act 1997 s.1(1)(a), and at common law. Her failure on both counts resulted from the interpretation of the 1997 Act and common law concepts of causation and foreseeability, as applied to the individual facts of her case.

Reasonable foreseeability

In the Court of Appeal decision of *Barber v Somerset CC*,[3] Hale LJ, as she then was, set out a number of propositions designed to assist practitioners in understanding what the claimant had to show to successfully pursue a claim for damages arising out of mental injury from occupational stress. The seventh of those propositions was

> "… to trigger a duty to take steps, the indications of impending harm to health arising from stress at work must be plain enough for any reasonable employer to realise that he should have done something about it".

This judgment—accepted by Lord Scott in *Barber v Somerset CC*,[4] the first occupational stress claim to proceed to the House of Lords, as "accurately expressing the principles that ought to be applied"—was merely an extension of the decision of the High Court in *Walker v Northumberland CC*[5] in setting out the three questions that had to be answered, namely:

1) Did the claimant's work create a reasonably foreseeable risk of psychiatric injury?
2) Was the system of work in place "*reasonable*"?
3) Did the failure to adopt a "reasonable" system cause the claimant's injury?

The responsibility of the sufferer for bringing one's mental distress to the attention of the employer is clear, for the synopsis of her Ladyship's judgment in *Barber* can, perhaps be set out in simple terms as:

- the claimant is in charge of their own mental health;
- the claimant can gauge whether the work is causing them distress; and
- the claimant can then do something about it.

In the absence of bringing one's mental distress to the employer's attention, a claimant will likely fail on the issue of foreseeability. This is *the* primary hurdle to clear in the majority of occupational stress claims. In Barber, the House of Lords held that whilst a claimant does not have to resort to swearing, shouting, tears and tantrums to put the employer on notice, they will have to jump quite high to satisfy the test of foreseeability. This difficulty was underlined by Lord Phillips.[6]

The claimant was a pub manager with an exemplary work record, who had formally been the "Pub Manager of the Year". With the loss of two employees he had struggled and complained to the employer about his excessive working hours (averaging 90 hours per week), the fact that he was very tired, and his need for an assistant manager. Nothing was done to relieve his burden. It was accepted that the impression that he gave was that he was "well, confident, and in control".

[3] *Barber v Somerset CC* [2002] EWCA Civ 76; [2002] 2 All E.R. 1; [2002] I.C.R. 613.
[4] *Barber v Somerset CC* [2004] UKHL 13; [2004] 1 W.L.R. 1089; [2004] 2 All E.R. 385.
[5] *Walker v Northumberland CC* [1995] 1 All E.R. 737; [1995] I.C.R. 702 (HC).
[6] *Hone v Six Continents Retail Ltd* [2005] EWCA Civ 922; [2006] I.R.L.R. 49.

Adopting Hale LJ's proposition in Hatton, Dyson LJ giving the lead judgment found that this was "a clear and workable test". The court found for the claimant, but it is important to note that Lord Phillips stated that the fact that the claimant had complained about the excessive hours, was clearly tired and had recorded his hours at averaging 90 per week, together with the employer's failing was "not the most compelling of indications".

Finally, in *Hartman v South Essex Mental Health and Community Care NHS Trust*[7] the Court of Appeal refined the decision in *Hatton*, and effectively circumscribed the judgment in *Barber* by suggesting that nothing in the decision of the Law Lords in that case differed from the practical effect of *Hatton*, with each case being factually individual. The additional guidance resulting from that case is as follows:

- Generic complaints are insufficient in themselves to create a finding of foreseeable risk of injury on the part of an individual claimant.
- Complaints should be specific to the individual claimant.
- If there are any other sufferers from mental illness at a workplace, the cause of their condition must be similar to the claimants.
- There must be specific signs of vulnerability on the part of the individual claimant obvious to the employer.
- Documentary evidence is of little value if it is "*generic*".

The facts of Boylin

Ms Boylin had been upset by the decision of the management to examine the structure of the top management of the Trust, and appoint an external consultant to carry out a review. His Lordship felt that there was nothing unusual or unacceptable about the business decisions in the case. She reacted badly to this development, adopting a negative attitude, bordering on resentment. His Lordship found that her reaction was "exaggerated", and with the exception of a single incident set out below, nothing to which the claimant was exposed was foreseeably likely to cause mental harm through occupational stress. As His Lordship stated:

> "… in my judgment the real cause of such a condition was Tracey Boylin's burning sense of grievance at what can be called the management process that was instigated, and was pursued from September 2010, namely the Executive Review, the appointment of Christine Pilgrem as interim HR Director and line manager, and the reduction in her own management autonomy, combined with her apprehension for the outcome of that process, namely a failure to gain the putative new position of HR Director, and the real risk that she might not even retain her present job."

The incident on which the claimant built her case was an event on November 10, during which the defendant's agent, Ms Pilgrem, apparently stated: "Tracey — I am trying to work with you here — so don't fuck with me." She also made an implied threat to the claimant that she was well known in Manchester and would be able to influence how the claimant was perceived in the outside world. Whilst the claimant stated that Ms Pilgrem "exploded and screamed", the Judge dismissed this suggestion, stating that a number of the statements made by the claimant were "frankly, nonsense". Interestingly, following the conversation the claimant and Ms Pilgrem subsequently went for lunch and then had a further meeting that afternoon. Others who spoke to the claimant at that time did not describe a person who was distressed in any way.

[7] *Hartman v South Essex Mental Health and Community Care NHS Trust* [2005] EWCA Civ 6; [2005] I.C.R. 782.

Harassment

Having failed on the issue of foreseeability of injury at common law, the claimant was left with a possible claim under the Protection from Harassment Act 1997 ("PHA").

The PHA was perceived to apply only in the criminal context, and was created to address the problem of stalking. It was first used in the context of a civil claim arising out of mental injury in a case of *Majrowski v Guys & St Thomas NHS Trust*, which went to the House of Lords.[8] Mr Majrowski was a clinical auditor co-ordinator working for the defendant's NHS Trust. His female departmental manager was rude and abusive, excessively critical of his timekeeping at work, imposed unrealistic performance targets for him, and isolated him by refusing to talk to him. The applicant was gay, and he believed that his manager was homophobic. He lodged a formal complaint, and the investigation resulted in a finding that harassment had occurred. He then pursued an action against the Trust alleging that the Trust was vicariously liable for the actions of their employee under the PHA.

Lord Nicholls giving the lead judgment set out the core principles relating to vicarious liability as follows:

- It is a common law principle of strict no fault liability.
- It's purpose is fair because it means injured persons can look for recompense to a source better placed financially than the individual employee who has committed the wrong doing.
- A wrong is committed in the course of employment only if the conduct is so closely connected with the acts that the employee is authorised to do.
- There are a number of key authorities, which at that time included *Lister v Headley Hall Ltd*.[9]

PHA s.1 states:

> "A person must not pursue a course of conduct:
> a) Which amounts to harassment of another, and
> b) Which he knows or ought to know amounts to harassment of the other.
> He will be deemed to know that the Act amounted to harassment if a reasonable person in possession of the same information would think so."

The word "harassment" is not defined within the PHA. Their Lordships gave a number of examples of conduct which would amount to harassment, including "alarming a person or causing her distress; genuinely offensive and unacceptable behaviour; and conduct which is oppressive and unacceptable". Baroness Hale stated that:

> "A great deal is left to the wisdom of the courts to draw sensible lines between the ordinary badinage of life, and genuinely offensive and unacceptable behaviour."

Lord Nicholls sought to assist with further guidance by identifying that:

> "Irritations, annoyances, even a measure of upset, arise at time in everybody's day to day dealings with other people. The boundary between conduct which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable will be recognised by the court."

The final word in terms of the definition is unhelpfully provided by Lord Phillips[10] when he stated that:

> "Harassment is, however, a word which has a meaning which is generally understood."

[8] *Majrowski* [2007] 1 A.C. 224.
[9] *Lister v Headley Hall Ltd* (2002) 1 A.C. 215.
[10] *Thomas v News Group Newspapers Ltd* [2001] EWCA Civ 1233; [2002] E.M.L.R. 4.

To succeed a claimant must show that the defendant's conduct was as follows:

- it occurred on at least two occasions;
- it was targeted at the claimant;
- it was calculated, in an objective sense, to cause distress; and
- judged objectively, it would be viewed as oppressive and unreasonable.

The Lordships found for the claimant, although Baroness Hale and Lord Brown had to be "driven" to find in his favour, with her Ladyship responding to the concern about a flood of cases by stating that:

> "'Floodgates' arguments may assist the courts in deciding how to develop the principles of common law, but they are of little help in construing a language which Parliament would have used.""

The sense was, that whilst foreseeability of injury was not necessary to succeed in a claim under the PHA, the circumstances in which a claimant would satisfy the tests set out by their Lordships would perhaps be less frequent than envisaged shortly after the judgment was given.

In two subsequent cases, an issue arose as to whether the conduct had to satisfy the test of criminality. In *Conn v Sunderland CC*[11] the claimant was spoken to in sharp terms by a supervisor who was trying to ascertain from the claimant and his colleagues which employees had been leaving the building site, at which they worked, a little early. The claimant refused to "shop his colleagues", and the foreman became angry and threatened to punch out the windows of the cabin.

This seems a remarkably stupid thing to threaten and would, of course, not have harmed the claimant. Subsequently, the foreman asked why he was giving him the "silent treatment". Conn replied stating that he was only prepared to talk about work matters. The foreman lost his temper and said he would give Mr Conn a good hiding, and called him a "little shit". It rarely bodes well for a claimant when a judge opens his judgment by using words such as those exasperatingly expressed by Ward LJ, who said "… what on earth is the world coming to …". Gage LJ, giving the lead judgment, cited the criminality test as "the touchstone for recognising what is not harassment".

In *Veakins v Kier Islington Ltd*[12] the claimant was a female electrician who had a period of two years of enjoyable employment with the defendants. Unfortunately, the introduction of a new supervisor brought this pleasant existence to a halt. During a period of two months she was exposed to episodes that "humiliated and embarrassed" her in the presence of others. She expressed her concerns to the supervisor who, when the letter was handed to her, simply tore it up without reading it and threw it in the bin.

Maurice Kay LJ giving the lead judgment said that:

> "The account of victimisation, demoralisation, and the reduction of a substantially reasonable and usually robust woman to a state of clinical depression is not simply an account of 'unattractive' and 'unreasonable conduct', or 'the ordinary banter and badinage of life'. It self evidently crosses the line into conduct which is 'oppressive and unreasonable'."

Once more, however, the court was anxious to put down a marker that this was an unusually one-sided case, with the conduct of the defendant's agent being "extraordinary".

In the claimant's case, over five days of evidence Ms Boylin put forward a history of behaviour which she suggested gave rise to a number of incidents of harassment. Sadly for her, the evidence was unpersuasive, and His Lordship found that:

> "…her distress in truth arose from her misguided and slanted view that she was the victim of senior corporate wrongdoing, and from her loss of face …"

[11] *Conn v Sunderland CC* (2007) EWCA Civ 1492.
[12] *Veakins v Kier Islington Ltd* (2009) EWCA Civ 1288.

He accepted that the manner of Ms Pilgrem was of a tough executive who did not suffer fools gladly, and whose tone could be strong, verging on harsh, but it did not amount to bullying nor was it aggressive or intimidating in nature. There was only one incident which satisfied the tests set out in *Majrowksi*, namely the incident in which the claimant was sworn at.

Conclusion

Although Ms Boylin could not prove that any of the treatment that she allegedly suffered at work was the cause of her mental distress and, therefore, failed to move beyond base camp in relation to her claim for damages, even if she had succeeded on this issue, she failed to prove that she was at a foreseeable risk of suffering injury, or that the behaviour to which she was exposed satisfied the requirements under the statute. Foreseeability is a significant hurdle for the claimant to clear in pursuing a claim for damages arising out of negligence at common law. If working 90 hours a week following the loss of two employees whilst managing a public house is not the most compelling indication of a risk to health in the eyes of a senior law lord, then most cases will fail. Therefore, it is critical that the employee brings to the employer's attention anything which should alert the employer to the risk to health in order to shift the responsibility on to the employer to address the issue. The view so clearly set out by Coleman J in the *Walker* case maintains, namely, that:

> "… where it was reasonably foreseeable to an employer that an employee might suffer a nervous breakdown because of stress and pressures of his workload, the employer was under a duty of care as part of that duty to provide a safe system of work, not to cause the employee psychiatric damage by reason of the volume or character of the work which the employee was required to perform …"

It is noteworthy that foreseeable mental harm caused by an employer to an employee is just as much a breach of the duty of care as harm to the body (see *Mount Isa Mines v Pusey*).[13]

Whilst the PHA apparently makes life easier for claimants—as foreseeability of harm is not a requisite under the Act—it is evident from recent decisions that for behaviour to amount to harassment, the level of oppression and unacceptableness will have to be high.

Practice points

- One can infer from the judgment that His Lordship was unimpressed with Ms Boylin as a witness. His assessment that some of her statements were "nonsense" supports this. It is critical, therefore, that at an early stage a proper and considered assessment is made of the claimant's evidence, and how it is likely to play out before the court.
- The courts have shown a reluctance to accept that behaviour is "oppressive and unacceptable". The test is a hard one to satisfy with unattractive and unreasonable conduct being insufficient.
- To improve one's prospects of satisfying the foreseeability requirement at Common Law, the reporting of the claimant's distress at the workplace is essential. Documentary evidence *specific to the claimant* will be far less capable of being unravelled than evidence of the "he said, she said" variety, so evidently present in the *Boylin* case.
- The requirements to succeed under the PHA are clear and exacting. In particular, the conduct must occur on two occasions, and must be "of an order which would sustain criminal liability".

Simon Allen

[13] *Mount Isa Mines v Pusey* 125 C.L.R. 383, per Windeyer J.

Case and Comment: Quantum Damages

Ali[1] v Caton

(CA (Civ Div), Tomlinson LJ, McCombe LJ, Beatson LJ, October 15, 2014, [2014] EWCA Civ 1313)

Personal injury—damages—brain damage—injury: severity—alleged malingering—road traffic accidents

LT Brain damage; Injury severity; Malingering; Measure of damages; Road traffic accidents

On January 30, 2006, Jubair Ali was struck by a car being driven at about 50mph by the first defendant, David Graham Caton, who was uninsured. Jubair suffered a very severe brain injury as well as significant orthopaedic injuries. Proceedings were commenced on January 30, 2009 against Caton and the Motor Insurers' Bureau ("MIB") as first and second defendants. Caton took no active part in the proceedings.

A trial of the issue of liability was conducted in December 2011, but the issue was compromised before judgment was given on the basis that the first defendant was negligent and that 80 per cent of the responsibility for the accident should be apportioned to him.

On the assessment of damages, the MIB's case was that the claimant (a protected party) was malingering. They alleged that any ongoing cognitive defects were mild and that, once the litigation was over, the claimant would be motivated to function and would function at a far higher level than he had, until then, exhibited.

The MIB contended that the claimant showed a level of cognitive performance and motivation which was inconsistent with his case that his injuries had serious consequences for his ability to lead an independent life. They argued that psychometric tests consistently returned results strongly indicating that he was deliberately exaggerating his difficulties. Their case was that the claimant's daily performance was inconsistent with, and worse than, his assessment while in residential rehabilitation. They pointed out that, on his own initiative, he had taken and passed the UK Citizenship Test ("UKCT"), a task thy claimed was wholly inconsistent with his level of cognitive disability.

Stuart Smith J found[2] that the claimant had consistently presented with significant memory problems from a time when he had been in no fit state to contemplate feigning. He held that on the evidence his cognitive deficit attributable to the accident was not accurately reflected in the various test results that had been recorded. On a daily level he had been performing less than optimally, despite having engaged constructively with rehabilitation but the root causes were the accident and its sequelae, not his deliberate or fraudulent underperformance.

The Judge concluded that the evidence showed that the claimant had suffered lasting cognitive deficit as a result of the accident, the scope and extent of which could not be quantified with precision. It was not as severe as a number of the test results had indicated; otherwise he would not have been able to pass the citizenship test. However, the effects were significant and profoundly damaging in their impact on his everyday life.

The claimant was awarded damages and interest totalling £988,902, after allowing for interim payments and benefits and the 20 per cent deduction. The award included general damages of £147,500, past losses of £376,850 and future losses of £1,134,660, excluding future care and case management.

[1] Jubair Ali (protected party by Jabid Ali, his father and litigation friend).
[2] *Ali v Caton* [2013] EWHC 1730 (QB).

The MIB appealed and submitted that if the Judge had attributed the correct weight to the citizenship test he would have:

1) found that the claimant had either been malingering or consciously exaggerating and that he did not suffer from significant cognitive deficits;
2) found that the claimant did not lack mental capacity;
3) made a smaller award for future care and case management;
4) found that the claimant had a residual earning capacity, particularly because he was thought capable of some profitable activity even before passing the citizenship test; and
5) awarded £75,000, rather than £147,500, for pain, suffering and loss of amenity.

The claimant cross-appealed and argued that he had not passed the citizenship test unaided and the finding that he had done so was against the weight of the evidence. As a consequence, he contended that the Judge should have awarded £175,000 for pain, suffering and loss of amenity and had underestimated his need for future care.

The Court of Appeal held that, on the evidence before him, the Judge had been entitled to make the finding that the claimant had passed the citizenship test unaided. The Judge had been bound to take into account all the features of the evidence in the context of his finding that the claimant had somehow passed the citizenship test. He had been acutely aware of the need to factor the test success into the rest of the evidence. To focus upon the citizenship test almost to the exclusion of anything else would not have been the correct approach. There could be no doubt that the claimant had suffered a very severe brain injury. He was not a person who could have kept up a pretence of incapacity, capable of fooling so many people, for so long. The citizenship test had to be put into context with all of the other evidence

They also held that the Judge had been entitled to conclude that the claimant lacked capacity, having regard to the sum total of the evidence, including the expert evidence and evidence from other quarters as to how he presented and functioned in his day-to-day life.

In circumstances where the Judge had found that the claimant had passed the citizenship test but had residual cognitive difficulties, they concluded that it was understandable that he had made the award he had for future care and case management. They considered that he had achieved a sensible balance of all the evidence.

They accepted that there were varying features of the evidence relating to the claimant's earning capacity and held that it was not possible to second guess the Judge's assessment of the true likelihood of gainful employment. The Judge's findings were upheld. His assessment of pain, suffering and loss of amenity could not be faulted either. The appeal and cross-appeal were dismissed.

Comment

I commented on this case at [2013] J.P.I.L. C215. It is clear that the defendants felt very strongly about the first instance decision of Stuart-Smith J. As a consequence, they appealed his decisions with the five grounds to the appeal outlined above. However, undoubtedly the most important aspect of the appeal was whether the claimant was malingering, or consciously exaggerating, and the relevance of passing the UKCT in this regard. Had the appeal succeeded on this ground then many or all other strands to the appeal would have failed. The claimant cross-appealed on the grounds that both general damages for pain and suffering and loss of amenity ("PSLA") were too low and that future care needs had not been adequately considered.

Overall, the result is a bit of a "no score draw" with both appeal and cross-appeal being dismissed with the trial judge's decisions being upheld.

The main issue in both the original trial and the appeal was the UKCT. How had someone who had sustained a serious brain injury which left him with cognitive deficits been able to pass the UKCT in Feb 2012 having previously failed the test twice in 2010?

It is acknowledged by many, including some of the experts in this case, that the UKCT is no "walk in the park" and requires a not inconsiderable amount of knowledge and abilities of recall. Therefore, the defendants argued to have been able to pass the test must indicate that the claimant had not been left with the degree of cognitive deficit which other evidence suggested he had.

In my opinion, one of the distinguishing features of this case was the plethora of evidence, not just from the usual cohorts of medico legal experts but also from treating clinicians at the Queen Elizabeth Foundation in Banstead and support workers. Many of the experts had also seen the claimant on several occasions. This evidence spanned a period of some six years, a period equating to roughly a quarter of the claimant's life to date. Would someone in general, and this claimant in particular, be capable of fooling treating clinicians, support workers and medico legal experts over such an extended period?

The medico legal experts were baffled as to how the claimant had passed the UKCT, though none said it was impossible. There is no doubt that the claimant attended the test centre in February 2012 and on the previous occasions. The evidence of staff from the test centre would indicate that cheating was difficult, if not impossible, though the claimant alluded that was exactly what he did. His ability to cheat by using a phone to contact outside assistance was called in question.

Both at first instance and on appeal, the Judges were impressed with Ali's ability to motivate when he wanted to. His desire to go on holiday to Mexico and to pass the UKCT were examples of this, but an ability to motivate in certain circumstances is not necessarily evidence of malingering let alone of conscious exaggeration.

Also of relevance was the claimant's failure, on a number of occasions, of neuropsychological effort testing. This was also cited as evidence of malingering or conscious exaggeration. Against this, though, there was plenty of evidence that pointed to the severity of the claimant's disability. How then, are these apparent contradictions "squared".

As per Lord Justice McCombe in his lead judgment:

> "In my judgment, the Judge was entitled, and indeed bound, to take into account all the features of the evidence in the context of his finding that the Claimant had somehow passed the UKCT. The Defendant would have us focus upon the UKCT almost to the exclusion of anything else. I do not think that is the correct approach. There can be no doubt, as the Judge found, that the claimant had suffered a very severe brain injury. He had failed SVTs and had passed the test. However, all were agreed that he was not a person who could have kept up a mere pretence of incapacity, capable of fooling so many people, for so long."

This is the key point of the case and is a useful reminder to all practitioners, both claimant and defendant, of the need to take an holistic view of all the evidence and then to take a balanced view.

A view advanced was that the claimant's failure in effort testing and variable motivation was more one of a "deep seated realisation that he was not going to function as a normal young man" as opposed to malingering.

On appeal, it was held that the defendant overemphasised the impact of the UKCT test success in the context of the evidence as a whole and therefore the defendant's first ground of appeal failed.

The UKCT result also played to the issue of capacity. Again, an holistic view has to be taken and, to quote McCombe LJ: "The opinion formed in the consulting room does not dictate what happens on the street or in the home."

The defendant's appeal in respect of capacity was also dismissed. The success for the defendants, if it can be called that, was that the UKCT success suggested a degree of cognitive ability which served to

contain the cost of care and case management, though it did not help reduce general damages for pain and suffering. The claimant's arguments on the cross-appeal that damages for care and PSLA were too low failed, and it was held that the trial judge had struck the correct balance.

Practice points

Bearing in mind that the Court of Appeal upheld the trial judge's findings, the practice points remain as previously:

- Do not lose sight of the wood for the trees. The defendants seem to have focussed on the UKCT test and the failure of the neuropsychological effort tests to the exclusion of other evidence.
- A detailed analysis of *all* the evidence is required. Many aspects of this case hinged on the evidence from Banstead.
- Where there is evidence from clinicians in contact with the claimant over an extended period, such as here, consider whether greater weight should be placed on it than on medico legal reports prepared in the case.
- Needless to say that where there are discrepancies and contradictions between the evidence try and find a rational explanation.

David Fisher

Winrow v Hemphill

(QBD, Slade J, October 6, 2014, [2014] EWHC 3164 (QB))

Personal injury—damages—foreign jurisdictions—conflict of laws—applicable law—allocation of jurisdiction—habitual residence—Regulation 864/2007 art.4(1), art.4(2), art.4(3), art.25, art.4, art.23, art.15(c) and art.15 (Rome II)

LT Allocation of jurisprudence; Applicable law; Damages; EU law; Habitual residence; Personal injury; Road traffic accidents

[1]The claimant, Gaynor Winrow, was an English national. She had moved to Germany with her husband after he was posted there by the British army. They had lived in Germany with their children for over eight years but intended to return to the UK at the end of his posting. The claimant had been a rear seat passenger in a car driven by an English national, the first defendant, Mrs J Hemphill, when it was involved in a collision with a car driven by a German national. Mrs Hemphill was also living in Germany because of her husband's army posting.

The claimant suffered a prolapsed disc. She suffered depression and continuing pain in her right leg. She and her family returned to the UK 18 months after the accident and she issued these proceedings. Mrs J Hemphill's insurer, the second defendant Ageas Insurance Ltd, conceded liability. Ageas Insurance Ltd is a company incorporated in England and Wales.

The court was required to determine, as a preliminary issue, the law to be applied to the assessment of damages for personal injury arising from the claim. The claimant submitted that German law, applicable

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

under Regulation 864/2007 art.4(1),[2] was displaced by art.4(2)[3] or 4(3).[4] She asserted that all the parties were habitually resident in the UK on the date of the accident, and the tort was more closely connected to the UK because the majority of her consequential loss had been incurred in the UK.

Mrs Justice Slade held that art.4(2) was an exception to the general rule that the law of the place of the tort was to be applied. To bring herself within art.4(2), the claimant had to establish that she was habitually resident in England at the time of the accident. In addition, the person claimed to be liable had to be habitually resident in England at the time; that was the driver and not the insurer.[5] The habitual residence of the second defendant was therefore immaterial for the purposes of art.4(2).

The claimant had been living and working in Germany for eight-and-a-half years by the time of the accident. That was a considerable length of time. She lived there with her husband, and three of their children were at school in Germany. The family remained living in Germany for a further 18 months after the accident. There was no evidence that during that time they had a house in England. Her family's intention to return to the UK at the end of her husband's posting did not affect her status at the time of the accident. Her habitual residence at the time of the accident was Germany.[6] The law of tort indicated by art.4(1) had not been displaced by art.4(2).

The court ruled that to bring herself within art.4(3) the claimant had to show that the tort was "manifestly" more closely connected with a country other than that indicated by art.4(1) or 4(2). The circumstances to be taken into account under art.4(3) did not vary depending upon the issues to be determined or the stage reached in proceedings. One system of law governed the entire tortious claim. The "centre of gravity" was the centre of gravity of the tort, not of the damage caused by the tort.[7]

However, the Judge went on to hold that there was no temporal limitation on the factors taken into account and a court would assess the factors as they stood at the date of the decision. If a claimant and a defendant were habitually resident in country A at the time of the accident but in country B at the time art.4(3) was applied, both circumstances could be taken into account. There was a difference of opinion as to whether the factors to be taken into account under art.4(3) were limited to those connected with the tort, and excluded those connected with the consequences of the tort. While the answer was by no means clear, the court proceeded on the basis that the link of the consequences of the tort to a particular country was a relevant factor for the purposes of art.4(3).[8] The factors connecting the tort with German law included:

- the accident took place in Germany;
- the claimant sustained injury in Germany;
- the claimant and first defendant were habitually resident in Germany at the time of the accident;
- the claimant had remained in Germany for a further 18 months after the accident; and
- she received a significant amount of treatment for her injuries in Germany.

The following factors indicated a connection of the tort with English law:

- the claimant and first defendant were both resident in England at the date of the hearing;

[2] "Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a 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."

[3] "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 the damage occurs, the law of that country shall apply".

[4] "Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paras 1 or 2, the law of that other 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."

[5] *Jacobs v Motor Insurers Bureau* [2010] EWHC 231 (QB); [2010] 1 All E.R. (Comm) 1128; [2010] R.T.R. 35 applied

[6] *LC (Children) (International Abduction: Child's Objections to Return), Re* [2014] UKSC 1; [2014] A.C. 1038 and *Mercredi v Chaffe* (C-497/10 PPU) [2012] Fam. 22 ECJ applied.

[7] *Fortress Value Recovery Fund I LLC v Blue Skye Special Opportunities Fund LP* [2013] EWHC 14 (Comm); [2013] 1 All E.R. (Comm) 973 applied.

[8] *Stylianou v Toyoshima* [2013] EWHC 2188 (QB) and *Harding v Wealands* [2004] EWCA Civ 1735; [2005] 1 W.L.R. 1539 considered.

- the claimant attended a pain clinic and received treatment for depression in the UK;
- the claimant was allegedly suffering loss of earnings in England; and
- she had pursued proceedings in the UK, although that was not a strong connecting factor.

The Judge concluded that those factors did not indicate a manifestly closer connection of the tort with England than with Germany. The law indicated by art.4(1) had not been displaced by art.4(3). The preliminary issue was determined on the basis that the applicable law was therefore German law.

Comment

This case is the latest of a slow trickle of cases that are beginning to emerge which are giving some guidance as to the application of Rome II. This hearing was a preliminary issue to determine the appropriate law for the assessment of damages. It was accepted from the start that unless the claimant could succeed in applying the escape clause Rome II cl.4(3), German law would be applied to the assessment of damages. This would mean considerably less pain and suffering damages.

The preliminary issue the High Court was determining was what the applicable law as defined by Rome II art.4.[9] The focus was the third paragraph[10] of art.4 and whether this case produced a suitable exemption from the first paragraph. As such the primary issue related to the habitual residence of the claimant. The defendant resisted primarily on the basis that the actual and therefore habitual residence of the claimant was Germany

The key facts behind the residence argument involved her living in Germany 18 months after the accident after eight years residence. Remaining a British national of course; being employed by the UK government and a stated intention of her and her husband returning to the UK in or around two to three years and then living in England permanently. The claimant further argued that her return to the UK for her treatment was making the case that a majority of her loss would continue to be incurred in England. In similar circumstances the first defendant also the wife of a serving soldier stationed in Germany had only been there for around 18 months and returned to England shortly afterwards.

Curiously there is no definition of "habitual residence" in Rome II in relation to an individual whilst there is in relation to business related parties.[11] The expression appears and is defined in the Brussels II regulation in relation to jurisdiction and the recognition of enforcement of judgements and matrimonial matters. The European Court had defined it in the context of social security law where it said:[12]

> "Where the habitual centre of their interests is to be found. In that context, account should be taken in particular of the employed person's family's situation; the reasons which have led him to move; the length and continuity of his residence; the fact (where this is the case) that he is in stable employment; and his intention as appears from all circumstances."

This definition is of limited application, however, and in the past the European Court has warned that its case law on habitual residency cannot simply be moved across from one case area to another.

[9] "Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a 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".

[10] "Where it is clear from all the circumstances of the case the tort/delict is manifestly more closely connected with the country other than that indicated in paragraphs 1 or 2, the law of the other countries 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"

[11] "1. For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration. Where the event giving rise to the damage occurs, or the damage arises, in the course of operation of a branch, agency or any other establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence. 2. For the purposes of this Regulation, the habitual residence of a natural person acting in the course of his or her business activity shall be his or her principal place of business."

[12] *Swaddling v Adjudication Officer* (C-90/97) [1999] E.C.R. I-1075; [1999] 2 C.M.L.R. 679.

The defendant denied the residence of England but also argued in reference to *Jacobs v MIB*.[13] However here "the person claimed to be liable" as defined by art.4(2) was actually the first defendant, the army wife and not really the second defendant, the insurer. The insurer was an indemnifier. In their view it was plain that the claimant was settled in Germany and that this gave rise to habitual residence and the future was irrelevant.

It should be noted that the key wording of course is "residence", it is not based around nationality. The court was reminded by the defendant that the primary objective of Rome II as with all EU regulations was to provide legal certainty and therefore the court was cautioned that to apply the escape cl.4(3) the circumstances had to be truly exceptional. On the basis they argued that it was the tort that must be more closely connected with a different country the effect.

The judge in this case took into account the length of time that the claimant had lived in Germany (around eight years at the time of the accident); why she was there and on what basis. The judge went on to acknowledge that there was considerable scope when considering the relevant factors in applying reg.4(3). He went on to consider the fact that both parties were British but with the same residency basis and the fact that the claimant had since returned to England where she was suffering her injuries and loss of earnings.

On balance, the judge decided that the balance was in favour of not applying reg.4(3) by the exceptionality test. In reaching that decision he considered in particular that the road traffic accident took place in Germany where the injury was sustained; where both the claimant and the first defendant were habitually resident; in the claimant's case for around eight years and living there for a further 18 months following the accident. The Judge did not therefore consider that the tort was "manifestly more closely connected" with English rather than German law.

The Judge acknowledged the need for legal certainty. She accepted the argument that the "person claimed to be liable" was in fact the first defendant driver and not the insurer. Looking at the habitual residence she was particularly influenced by the family law case of *LC (children), Re*.[14] The leading judgement from Baroness Hale had said that habitual residence was identified by concentrating upon the terms of the reasons why a person was in a particular place and his or her perception whilst there—their state of mind. Therefore at the time of the accident this claimant was habitually resident in Germany. The court acknowledged that the joint British nationality of the defendants was a relevant consideration but this was outweighed by the significant period of habitual residence in Germany before the accident (eight to nine years) and after the accident (two years). Reflecting on the defendants' argument the court acknowledged it was a high hurdle for the party seeking to displace the normal provisions of art.4(1) and (2).

From an academic perspective, it is interesting to consider what needed to have altered within the circumstances of this accident to have arrived at a different decision. If perhaps one had reversed the period of time living in Germany between the claimant and the first defendant, then perhaps a different outcome may have resulted but then again may be not. How long is "habitual"?

Practice points

- Take advice in relation to the law on liability and then the law and manner of assessment of quantum.
- The applicable law should be assessed on the basis of the usual provision of Rome II art.4 and then having regard to the foreign law advice received assessment should be made of the

[13] *Jacobs v Motor Insurers Bureau* [2010] EWCA Civ 1208; [2011] 1 W.L.R. 2609.
[14] *LC (children), Re* [2014] A.C. 1038.

claimant's likely position in relation to the default position under Rome II and then a contrast made to their home jurisdiction if different.

- If it is thought more advantageous that the law of England and Wales should be the applicable law then careful consideration of the factual matrix in relation to the habitual residence should be taken.

Mark Harvey

Reaney v University Hospital of North Staffordshire NHS Trust

(QBD, Foskett J, September 19, 2014, [2014] EWHC 3016 (QB))

Personal injury—clinical negligence—causation—pre-existing condition—damages

Causation; Clinical negligence; Measure of damages; Pre-existing condition

The claimant, Christine Reaney was born on May 14, 1947. On or around December 30, 2008, when she was 61, she experienced a sudden onset of back pain with associated increasing weakness in her legs. She was admitted to the A&E Department of Stafford Hospital and on the following day underwent an MRI scan. She was transferred to the North Staffordshire Royal Infirmary that day and the initial impression from the MRI scans of a transverse myelitis was confirmed.

Transverse myelitis is a very rare inflammatory condition causing damage to the spinal cord. The condition left her paralysed below the mid-thoracic level and with no control over her bladder or bowels. During her hospitalisation, she developed a number of deep pressure sores with consequent osteomyelitis (infection of the bone marrow), flexion contractures (abnormal shortening of the muscle tissue) of her legs and a hip dislocation. The combined effect of those disabilities was that her lower limbs adopted a "windswept" configuration, causing her to fall from an upright sitting position to the left. At trial she was only able to sit out in her wheelchair for four hours at the most; otherwise she remained in bed.

The claimant brought a clinical negligence claim against the first defendant NHS trust and the second defendant NHS foundation trust. Because of the effect of the transverse myelitis, the claimant was always destined to be confined to a wheelchair for the rest of her life. The Trusts admitted negligence in respect of the claimant's pressure sores and their consequences. The central issue related to the extent to which the pressure sores and their sequelae had made her essential condition worse than it would have been but for their development and what damages should be paid by the defendants in respect of the claimant's current condition.

Foskett J held that it was apparent that the pressure sores and their consequences had made a significant and material difference to the claimant's physical well-being and her care needs. Without them, she would have had a much better quality of life, spending her waking hours out of bed in a standard wheelchair (with the ability to maintain a good spinal posture and balance) which she would have been able to self-propel. She could have undertaken a few basic household tasks and would have been able to get out and about much more than was possible in her present condition. While she was inevitably going to be doubly incontinent, her bowel management would have been better and she would not have required the urethral catheter which she used now. But for the development of the pressure sores in hospital and their consequences, she would have required no more than roughly seven hours of professional care each week until the age of 70; she now required two carers on a 24/7 basis, a requirement that would continue for the rest of her life.

The Judge accepted that she and her husband would need to move to a larger property to accommodate the carers. They would also need a larger vehicle. While accepting the general thrust of the Trusts' submission that in law a defendant could only be liable to compensate a claimant for the damage it had caused him or to which it had materially contributed, the Judge concluded that this case should be seen as a reflection of the principle that a tortfeasor had to take his victim as he found him. If that involved making the victim's current damaged condition worse, then the tortfeasor had to make full compensation for that worsened condition.[1] On the evidence, it was held that the Trusts' negligence had made the claimant's position materially[2] and significantly worse than it would have been but for that negligence. She would not have required the significant care package (and the accommodation consequent upon it) that she now required but for the negligence. The Judge ordered that compensation should be assessed, hopefully by agreement, on that basis.

The sum awarded for pain, suffering and loss of amenity was £115,000. Agreement could not be reached on all of the other heads. On October 31, 2014 a supplementary judgment[3] was handed down by Foskett J when judgement was entered for £2,894,814.69.

Comment

Introduction

This is an important decision explaining, and clarifying, the proper approach to both causation and the assessment of damages where the claimant has a pre-existing condition which means some of the losses and expenses claimed from the defendant would have been likely in any event, irrespective of the defendant's breach of duty.

The judgment pre-supposes familiarity with some underlying concepts which it is worth considering before analysing the application of those principles to the facts of the case and considering the significance of this analysis for other cases. A number of concepts are relevant for these purposes.

- The distinction between causation of damage, in the sense of the claimant proving damage necessary to complete the tort of negligence, and the assessment of damages once liability has been established.
- The different ways which, depending on the evidence, the claimant may be able to prove causation and hence liability. Specifically:
  - — the "but for" or balance of probabilities test; and
  - — the test of material contribution to injury.[4]
- The related topic of distinguishing divisible and indivisible damage which is relevant to identifying the damage, for which damages will need to be assessed, caused by the breach of duty.
- The "full compensation" principle applicable, once liability has been established for some damage, to the assessment of damages.
- The proper approach to deductions from damages assessed on the "full compensation" principle, to reflect expenses saved as a result of the injuries suffered.

These concepts were deployed by the parties in arguments raised on the issues before the court.

[1] *Livingstone v Rawyards Coal Co* (1880) 5 App. Cas. 25 HL considered.
[2] *Bailey v Ministry of Defence* [2008] EWCA Civ 883; [2009] 1 W.L.R. 1052 considered.
[3] *Reaney v University Hospital of North Staffordshire NHS Trust* , Unreported, October 31, 2014.
[4] See *Bailey* [2009] 1 W.L.R. 1052.

Issues

The focus of the defendant's argument was on the preliminary issue of causation, arguing on the law that the claimant could not prove relevant heads of divisible damage were caused by the breach of duty for which the defendant was responsible, and hence establish liability for such damage.

The claimant argued that there had been a causative breach of duty by the defendant and hence the issue for the court concerned only the assessment of damages, to be dealt with by applying the law dealing with that issue.

The argument preferred by the court would inevitably have a crucial bearing on the outcome of, in particular, the claimant's care claim. That was because, if the claimant could not establish the defendant's breach of duty caused relevant damage, the court would not even reach the stage of assessing damages and considering how the "full compensation" principle would need to be applied to the facts of the case.

This, equally, was of significance to the amount of any damages awarded. Whilst the defendant accepted the claimant was entitled to some damages for pain, suffering and loss of amenity, the figures contended for would, as the Judge observed, so far as the claimant was concerned, "go nowhere near meeting her reasonable needs as they presently stand". Conversely, if the claimant's arguments were accepted that would mean the defendant paying damages in accordance with a schedule which the defendant contended "in almost its entirety could reasonably have been presented as a schedule for T7 paraplegia" despite the defendant contending there was no material additional need arising from the extra disability caused by the defendant's breach of duty.

Causation

Logically, the first issue for the court to tackle was the defendant's contention that the stage of assessing damages had not been reached. That was, the defendant argued, because the claimant could not establish liability, in the sense of the defendant's breach of duty having caused some, indivisible, damage for which damages would need to be assessed.

There is a stark distinction between the approach taken by the courts when deciding causation, in the sense of the claimant proving some damage which results from the defendant's breach of duty and thereby establishes liability, and when assessing damages. That is because the courts will apply quite different approaches to these distinct issues, as explained by Moore-Bick LJ in *Smithhurst v Sealant Construction Services Ltd*[5] when he said:

> "… it is necessary to remind oneself of the important distinction in cases of this kind between proof of damage and assessment of damages. Damage is an essential element of the cause of action in negligence and therefore, as part of establishing liability on the part of the defendant, the claimant must prove on the balance of probabilities that the defendant's act or omission caused the harm in respect of which he claims. If he fails to do so, his claim will fail[6]. It is to be contrasted with the assessment of damages, which involves determining the extent of the loss suffered by the claimant, a distinction which Lord Hoffmann was at pains to emphasise in paragraphs 67–69 of his speech in *Gregg v Scott*. … It is usually, and I think preferably, treated as an aspect of the assessment of damages. It calls for a different approach because the nature of the enquiry is different."

On this primary issue of causation the defendant's argument was based on *Steel v Joy*,[7] which followed the earlier Court of Appeal judgment in *Performance Cars Ltd v Abraham*.[8] In Steel the claimant's claim

[5] *Smithurst v Sealant Construction Services Ltd* [2011] EWCA Civ 1277; [2012] Med. L.R. 258.
[6] See for example, *Hotson v East Berkshire HA* [1987] A.C. 750; [1987] 3 W.L.R. 232 HL.
[7] *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576; [2004] 1 W.L.R. 3002.
[8] *Performance Cars v Abraham* [1962] 1 Q.B. 33; [1961] 3 W.L.R. 749.

concerned losses from two separate accidents each of which had some effect upon pre-existing spinal stenosis. The first accident accelerated existing problems by 7–10 years whilst the second accident caused a three to six month aggravation of the claimant's problems. The second accident did not affect the long term prognosis, although if the first accident had not occurred that second accident would have had the same effect on acceleration as the first accident. In these circumstances Dyson LJ held:

> "In the present case, the question is whether the second tortfeasor is responsible for the consequences of the first injury. To that question, the answer can only be: no. It is true that, but for the first accident, the second accident would have caused the same damage as the first accident. But that is irrelevant. Since the claimant had already suffered that damage, the second defendant did not cause it."

The Judge, however, distinguished *Steel* as here the defendant had caused, as a result of a breach of duty, the claimant damage. Hence liability, for that damage, was established and damages needed to be assessed. Foskett J observed:

> "There can, in my judgment, be no doubt that a defendant cannot be held to be liable for loss or damage that it did not cause or to which it made no material contribution. Where, however, a defendant has been shown to have done one or the other of these things in relation to an injury sustained by a claimant, then that claimant is entitled to full compensation …"

The Judge went on to explain that, unlike the claimant in *Steel*, this claimant had not already suffered the damage inflicted by the defendant's breach of duty because:

> "… the Defendants' negligence has made the Claimant's position materially and significantly worse than it would have been but for that negligence. She would not have required the significant care package (and the accommodation consequent upon it) that she now requires but for the negligence."

This conclusion was based on the Judge's findings, when resolving a conflict of expert opinion between Mr Gardner for the claimant and Mr Tromans for the defendant, that "but for" the defendant's breach of duty the claimant would not have needed two carers on a 24/7 basis, new accommodation (because her current property was too small for those carers) and a vehicle to accommodate the claimant and her carers.

The ruling that the claimant's position was "materially and significantly worse" reflects the approach in cases such as *Tahir v Harringey HA*[9] and *Oliver v Williams*.[10]

The Judge felt able, on the evidence, to decide this point on a balance of probabilities or what is sometimes termed the "but for" approach. This was explained by Lord Phillips in *Sienkiewicz v Greif (UK) Ltd*[11] when he said:

> "It is a basic principle of the law of tort that the claimant will only have a cause of action if he can prove, on balance of probabilities, that the defendant's tortious conduct caused the damage in respect of which compensation is claimed. He must show that, *but for* the defendant's tortious conduct he would not have suffered the damage. This broad test of balance of probabilities means that in some cases a defendant will be held liable for damage which he did not, in fact, cause. Equally there will be cases where the defendant escapes liability, notwithstanding that he has caused the damage, because the claimant is unable to discharge the burden of proving causation."

In *Sienkiewicz*, Lord Phillips noted the "important exception to the 'but for' test". Interestingly, Foskett J observed that, if necessary, there would have been another basis for finding that the claimant had established causation, in the sense of damage necessary to establish liability. The Judge held:

[9] *Tahir v Harringey HA* [1998] Lloyd's Rep Med 104.
[10] *Oliver v Williams* [2013] EWHC 600 (QB).
[11] *Sienkiewicz v Greif (UK) Ltd* [2011] UKSC 10; [2011] 2 A.C. 229.

> "Had I had any doubts in this case about the issue of causation in the "but for" sense, I would have been inclined to find that the Defendants had "materially contributed" to the condition that has led to the need for the 24/7 care of the nature discussed earlier in this judgment and that the lack of any joint or concurrent tortfeasor as a potential direct compensator (and/or from whom a contribution might be sought by the Defendants) is no answer to a full claim against the Defendants: cf. *Bailey v Ministry of Defence* [2007] EWHC 2913 (QB) as upheld in the Court of Appeal: [2009] 1 WLR 1052. However, as I have indicated, I consider that causation is established by what might be termed the more conventional route."

This "material contribution" test was explained by Waller LJ in *Bailey* when he said:

> "I would summarise the position in relation to cumulative cause cases as follows. If the evidence demonstrates on a balance of probabilities that the injury would have occurred as a result of the non-tortious cause or causes in any event, the claimant will have failed to establish that the tortious cause contributed. *Hotson* exemplifies such a situation. If the evidence demonstrates that 'but for' the contribution of the tortious cause the injury would probably not have occurred, the claimant will (obviously) have discharged the burden. In a case where medical science cannot establish the probability that 'but for' an act of negligence the injury would not have happened but can establish that the contribution of the negligent cause was more than negligible, the 'but for' test is modified, and the claimant will succeed."

Consequently, either way, the Judge concluded that the claimant had established causation and the issue was, as the claimant suggested, one of quantification, or assessment, of damages. Foskett J was fortified in this conclusion by observing:

> "… I see this case as a reflection of the principle that a tortfeasor must take his victim as he finds him and if that involves making the victim's current damaged condition worse, then he (the tortfeasor) must make full compensation for that worsened condition. The principle is neatly summed up in footnote 94 to paragraph 2-31 in *Clerk & Lindsell on Torts*, 20th Ed., which reminds the reader that "the fact that the defendant's breach of duty has worsened an existing condition may lead to a higher assessment of the loss, since the consequences of the impairment may be greater" and continues to say "[thus], it is much worse to be totally deaf than half deaf, and the additional hearing loss (from half to totally deaf) causes greater damage than the initial hearing loss (from full hearing to half deaf)." The footnote refers to *Paris v Stepney Borough Council* [1951] AC 367 from which is derived the proposition that 'loss of an eye is significantly worse for a one-eyed man than a man with full eyesight'."

Related to the issue of deciding whether the defendant's breach of duty had caused the claimant some damage was the question of what that damage was which, in turn, raises the concept of divisible and indivisible damage.

Divisible and indivisible damage

If the claimant establishes liability, by proving the defendant's breach of duty caused damage, the defendant will potentially be liable for all the damage thereby caused. Some damage is regarded as indivisible, so if the defendant is held to have caused that damage, damages will be assessed for the whole of that damage. If, however, the damage is treated as divisible then damages will only be assessed to reflect the divisible part of that damage which the defendant's breach of duty has caused.

It can, in practice, sometimes be difficult to distinguish what is divisible damage from indivisible damage. Indivisible damage is sometimes termed concurrent torts. As Laws LJ observed in *Rahman v*

Arearose Ltd[12] "the characteristic of such torts is the *logical* impossibility of apportioning the damage among the different tortfeasors". This concept also overlaps with that of "same damage", found in the Civil Liability (Contribution) Act 1978 with which the judgment in *Rahman* was concerned, and hence Laws LJ went on to explain:

> "The justice which lies behind the rule as to concurrent tortfeasors, that is the rule that each is liable for the whole of the damage constituted by the single indivisible injury suffered by the claimant, casts much light on what is meant by 'single indivisible injury' and thus 'same damage'."

The approach of Foskett J in this case suggests the claim for care was treated as an individual head of damage, divisible from an award for pain, suffering and loss of amenity (which the defendant conceded), and which was therefore indivisible within itself once causation, and hence liability for the care element of the claim, had been established. If that is so this is, perhaps, an expansion of the principle in *Bailey*, which until now has focussed on the mechanism by what injury has been caused, to heads of claim for expenses and losses.

Having reached this point Foskett J observed that the "…claimant is entitled to full compensation in the manner encapsulated in the words of Lord Blackburn".

Assessment of damages

The words of Lord Blackburn, referred to by the Judge, were those in *Livingston v Rawyards Coal Co*[13] where he said that the court should award:

> "that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."

This is the "full compensation" principle, meaning that once the claimant had established the defendant's breach of duty had caused an indivisible injury the claimant is entitled to be fully compensated for that injury.

That injury, in the present context, was the need for care. The court having found that the defendant's breach of duty caused a need for care the damages for this then fell to be assessed by reference to the care the claimant now required, even though the claimant would have required some care in any event. That, at first sight, seems illogical, but is a reflection of the principled approach taken by the Judge. If any allowance was to be given for care the claimant would have required in any event, this had, therefore, not to be on the basis of arguments about causation, but by applying the law concerning the extent to which the defendant is entitled to offset against damages any expenses saved by the claimant as a result of those injuries.

Deductions

The general approach of the courts, when assessing damages, towards allowance for expenses saved, was explained in *Hodgson v Trapp*[14] where Lord Bridge held:

> "My Lords, it cannot be emphasised too often when considering the assessment of damages for negligence that they are intended to be purely compensatory. Where the damages claimed are essentially financial in character, being the measure on the one hand of the injured plaintiff's consequential loss of earnings, profits or other gains which he would have made if not injured, or on

[12] *Rahman v Arearose Ltd* [2001] Q.B. 351; [2000] 3 W.L.R. 1184 CA.
[13] *Livingston* (1880) 5 App. Cas. 25.
[14] *Hodgson v Trapp* [1989] A.C. 807; [1988] 3 W.L.R. 1281 HL.

> the other hand, of consequential expenses to which he has been and will be put which, if not injured, he would not have needed to incur, the basic rule is that it is the net consequential loss and expense which the court must measure. If, in consequence of the injuries sustained, the plaintiff has enjoyed receipts to which he would not otherwise have been entitled, *prima facie*, those receipts are to be set against the aggregate of the plaintiff's loss and expenses in arriving at the measure of his damages."

With some heads of loss, notably care, the provision which would have been made, irrespective of the damage caused by the defendant, would often not have involved the claimant in expense. This very point was considered in *Sklair v Haycock*[15] where Edwards-Stuart J held:

> "However, where the Claimant would have continued to enjoy care and attention given out of love and affection which he now cannot enjoy because of the accident, I see no reason in either logic or justice why he should be required to place a value on that care and attention and then be made to give credit for it against his claim. In this case the Claimant has not gained by the absence of his father's care and attention — indeed he would say that he is now worse off because he is without it - and I do not believe for one moment that his father would feel that he has achieved a saving as a result of the accident: far from it, I am sure that he would have much preferred to continue to care for the Claimant for as long as he is able to do so. I therefore reject the submission of the Defendant that I should place a value on these services and give the Defendant the benefit of it. To do that would be to add insult to injury."

This approach was approved, and adopted, by Foskett J in his judgment. That is, once again, an entirely principled approach in line with authority. It is notable that since the first instance decision of Sir Rodger Bell in *Iqbal v Whipps Cross University Hospital NHS Trust*[16] it has been established that voluntary care does not prevent recovery of the cost of that care if the need has been caused by the defendant's breach of duty.

The approach taken to the claim for care was equally applicable to other heads of loss caused by the defendant, in the sense of making the claimant's needs materially and significantly greater than they were, where pre-existing needs were being met without the claimant incurring expenditure. Specifically, in this case, the Judge held that the same approach was applicable to the claims for accommodation and transportation. The same approach might well be applicable to further heads of claim such as therapies.

All of this follows, as a matter of law, once the claimant had established liability for particular damage and the issue for the court then becomes the assessment of damages for that damage.

Conclusion

Whilst it could be said the judgment in this case does no more than apply well established legal principles it is, as well as acting as a reminder of those principles, a useful illustration of how significant these are in the formulation of claims for heads of loss such as care, transportation, accommodation and therapies where the claimant had pre-existing needs but these had been materially increased as a result of the defendant's breach of duty.

Practice points

Consequently, a number of important practice points can be drawn from this judgment.

- The initial focus, for both parties, needs to be on the primary issue of whether the defendant's breach of duty has caused, in the sense of making the claimant's position materially worse

[15] *Sklair v Haycock* [2009] EWHC 3328 (QB).
[16] *Iqbal v Whipps Cross University Hospital NHS Trust* [2006] EWHC 3111 (QB); [2007] P.I.Q.R. Q5.

than it would have been, heads of loss such as care, accommodation, transportation and therapies. For these purposes it is important to remember the different ways the court may, depending on the evidence, approach causation.

- If the evidence will support such a finding, the court is likely to determine that issue by applying the "but for" test on a balance of probabilities.
- If, however, medical science cannot furnish the court with the information necessary to determine matters on a balance of probability, but does confirm the breach of duty made a material contribution to the relevant damage, that should suffice to establish causation and hence liability for that damage.
- Experts may have some important input, in establishing causation, by contrasting the claimant's post-injury situation with pre-injury needs in order to show the relevant breach of duty has caused the claimant to be materially and significantly worse off in terms of the requirement for care, accommodation, transportation or therapies.
- However, if liability is, on that basis, established, the claimant will then need experts to identify the claimant's ongoing needs without reference to what the needs would have been (unless those would have incurred expenditure), as damages will be assessed simply by reference to the claimant's current needs with any deduction limited to expenditure the claimant has saved.
- Consequently, evidence may be necessary to confirm that the claimant's pre-existing needs would have been met without monies being expended by, or on behalf of, the claimant, by for example gratuitous care or provision of facilities by local authorities or the NHS.
- The claimant's schedule, assuming causation can be established, should be prepared on the "full compensation" principle as explained in this case, only allowing for actual expenditure the claimant would have incurred by way of offset.

John McQuater

Case and Comment: Procedure

Evans v Royal Wolverhampton Hospitals NHS Foundation Trust

(QBD, Leggatt J, October 8, 2014, [2014] EWHC 3185 (QB))

Civil procedure—fairness—natural justice—open justice—orders without notice—Pt 36 offers—withdrawal of offers—personal injury

LT Applications without notice; Clinical negligence; Natural justice; Orders without notice; Part 36 offers; Personal injury claims; Setting aside; Withdrawal

This claim is for damages for personal injury allegedly caused by a delay in treatment of the claimant at the defendant's hospital. The claimant suffered a brain injury and has been left with a permanent disability. It is the claimant's case that this was caused by the defendant's negligence in failing to assess and treat her properly. The defendant has admitted negligence in failing to admit the claimant to hospital on August 24, 2009 overnight for observation, but has denied that its negligence had any causal effect on the claimant's clinical outcome.

The action was begun on August 21, 2012. At a case management conference on June 4, 2014 directions were given for the service of expert evidence. On July 1, 2014 a round table settlement meeting took place but no settlement was reached on that day. The Trust made a CPR Pt 36 offer. On July 23, 2014, within the 21-day acceptance period, it served a notice of withdrawal of the offer. Within the hour, the claimant served on the Trust a notice of acceptance. The claimant subsequently sought a declaration that the proceedings had been settled and asked that judgment be entered in her favour.

However, at that time the claimant was not aware that on July 24 the Trust had obtained a without-notice order granting it permission to withdraw its offer. The claimant had not been given a copy of the application notice or any of the evidence relied on by the Trust. Nor was she told the basis on which the order had been made. All she was told was that there had been a change of circumstances. She applied to set aside the order.

The Trust conceded that the court could not uphold the without-notice order without permitting the claimant to see the evidence or to know the grounds relied upon, but it argued that the set-aside application should be adjourned indefinitely until the evidence could properly be disclosed. The claimant submitted that the Trust's suggested procedure was contrary to natural justice and was impermissible as a matter of law. The Trust argued that the adjournment was a procedural matter which did not engage the principles of open and natural justice, and that for the purpose of the adjournment, the court could consider evidence and argument not disclosed to the claimant.

Leggatt J held that as a general principle, an application should not be made without notice unless giving notice would enable the respondent to take steps to defeat the purpose of the application or there was no time to give notice before the urgent assistance of the court was required[1]. Paradigm cases falling in the first category were freezing orders and search orders, in which it was standard practice for the court to require the applicant to undertake to serve the respondent with copies of the evidence relied upon as soon

[1] *National Commercial Bank Jamaica Ltd v Olint Corp Ltd* [2009] UKPC 16; [2009] 1 W.L.R. 1405 applied.

as practicable after the making of the order. An application for permission to withdraw a Pt 36 offer was not one whose purpose could be defeated by the offeree if notice was given.

The Judge held that it was wrong in principle for the Trust to have made its application without notice, and for the court to have entertained it. It was all the more wrong, after permission had been given, to conceal from the claimant the grounds on which the order had been made. Making without-notice orders which determined questions of substantive rights as between the parties could only be justified if the respondent had the right to apply to the court to set aside the order upon being given notice of it. That right was only real and meaningful if the respondent was told the grounds on which the order had been made and was shown the evidence on which the applicant had relied. The claimant was therefore entitled to have the without-notice order set aside.

This case did not fall into a category where any form of closed material procedure was permissible. In the absence of any evidence or reasons from the Trust, the claimant's acceptance of the offer had to be treated as effective. It followed that she was entitled to judgment pursuant to CPR r.36.11(7).

The Judge further held that the Trust could not avoid that conclusion by requesting an adjournment, having served no evidence and not having disclosed the reasons it had given in support of that request. The application for an adjournment engaged the claimant's substantive legal rights and had to be decided in accordance with the principles of natural justice. It would be unlawful for the court to receive evidence from the Trust in support of a request for an adjournment without the claimant knowing the content of that evidence. Either the Trust had to serve the evidence on which it relied or judgment should be entered in the claimant's favour.

The Judge confirmed the test to be applied when considering whether to grant a party permission to withdraw a Pt 36 offer was whether there had been a sufficient change of circumstances to make it just to do so.[2] The date as at which the court had to decide whether there was a sufficient change of circumstances was the date on which the offer had purportedly been withdrawn. Leggatt J found it difficult to envisage what legitimate reason there might be for seeking to conceal from the offeree the way in which circumstances were said to have changed between the offer being made and the notice of withdrawal. In any event, the only new circumstances which could make it just were circumstances which the offeror was able and willing to make known to the offeree at the time of serving notice of withdrawal.

The claimant's application was granted.

Comment

Introduction

This was, as Leggatt J observed, a "remarkable" case.

The issue was whether an offeror who requires the court's permission to withdraw a Pt 36 offer may be granted such permission on the basis of information, and for reasons, not disclosed to the offeree.

It is indeed, remarkable, that a party applied, without notice, for an order which would almost inevitably be the subject of an application to set aside if made, let alone contend it was unnecessary to even let the other party know the basis on which the application was made and hence any order granted.

It might be thought to be equally remarkable that, at least initially, a court felt it appropriate to make such an order in these circumstances.

Whilst these observations are, like the judgment of Leggatt J, made without knowledge of the reasons for the application, which of course were taken into account when the original order was made, it is difficult not to conclude that any underlying merit there may have been is irreparably tainted by the egregious practice adopted. That is because once courts, save in very prescribed circumstances, make orders against

[2] *Cumper v Pothecary* [1941] 2 K.B. 58; [1941] 2 All E.R. 516 applied.

parties who do not know the grounds for such orders, and hence the reasoning, it is all too easy for speculation, even though this may be erroneous, to sow seeds of doubt in the integrity of the process. That is inimical to the rule of law.

The judgment deals with important issues on natural justice, the appropriateness of hearings which take place without notice as well as the way in which the court should exercise discretion to permit a party to withdraw or change, so it is less advantageous to the offeree, a Pt 36 offer during the relevant period.

Natural justice

Natural justice generally requires evidence placed before a court by one party to be made available to other parties.

Exceptional measures, such as those found in the Justice and Security Act 2013, may be necessary in the interests of national security and the common law has established, but narrowly defined, categories of case where departure from the usual rules of procedure have been held to be justified, namely cases involving the interests of children or confidentiality cases where the whole object of the proceedings is to protect a commercial interest. However, no argument was advanced by the defendant that any of those factors were applicable in this case.

The worrying conclusion, though again this is speculative in the absence of reasons behind the application, is that a procedure enacted for sensitive issues such as national security are at risk of being hijacked by public authorities in support of more venial causes with no regard to the rules of natural justice. That has a potentially corrosive effect on the administration of justice and, indeed, faith in the rule of law.

These concerns were addressed firmly and fairly by Leggatt J who observed the principle of natural justice is:

> "not an optional feature of litigation from which a court has power to derogate because it considers that in the particular circumstances the need to follow a fair procedure is outweighed by conflicting public or private interest."

Furthermore, subject only to certain established and tightly defined exceptions, the Judge held that the right to participate in proceedings in accordance with the principle of natural justice is absolute. The common law accords entirely, in this respect, with European Convention for Protection of Human Rights and Fundamental Freedoms art.6(1) which establishes the right to a fair and public hearing.

Hearings without notice

The Judge also gave firm guidance on the limited circumstances in which application should be made for an order without notice which will be inappropriate unless either giving notice would enable the respondent to take steps to defeat the purpose of the application or there has been literally no time to give notice before the urgent assistance of the court is required.

This case illustrates, only too well, the readiness of the court on occasions to make orders, without notice or without a hearing, when the order is likely to be contentious and the subject of an application to set aside or vary. In such circumstances an order without a hearing or without notice, is likely to be contrary to the overriding objective as, above and beyond the need to deal with the case justly, if an application to set aside or vary is likely to follow that will mean, when there has already been a hearing, a further hearing with the inevitable increase in costs.

Leggatt J was clear that, specifically, an application for permission to withdraw a Pt 36 offer without notice was wrong in principle.

There is some overlap between hearings that take place without notice and applications which are dealt with without a hearing, as with each the party against whom the order is made will not have had the

opportunity of being heard by the court. A helpful review of the matrix of circumstances involving applications made with or without notice and with or without a hearing, and steps which might be taken to vary or set aside such orders, was conducted by Ramsey J in *Hills Contracts & Construction Ltd v Struth*.[3]

Whilst applications made without notice, or without a hearing, ought to be made only in the limited circumstances identified by the Judge, either procedure may be entirely apposite where the court is being invited to do no more than make an order which is straightforward, unlikely to be opposed or where it is difficult to see any basis for opposition. Here the overriding objective may favour the court making an order without a hearing as that may save the costs of any hearing at all.

Withdrawing or changing a Part 36 offer within the relevant period

To withdraw, or change, so that it is less advantageous to the offeree, a Pt 36 offer within the relevant period, court permission will be required. The judgment in this case confirms the exercise of the court's discretion on an application to withdraw a Pt 36 offer within the relevant period should follow the approach taken to applications concerning the withdrawal of Pt 36 payments adopted in *Flynn v Scougall*.[4] That, in effect, puts a moratorium on either withdrawal of the offer or acceptance of the offer until the court has considered any such application, and if there is more than one such application suggests these should be considered on the same occasion.

Furthermore, the judgment confirms that, where application is made to withdraw a Pt 36 offer within the relevant period, there must be a "significant change of circumstances to make it just to permit the party to withdrawn its offer". That, in turn, applies the body of case law that developed around applications to withdraw or reduce payments into court. In particular, examples of appropriate circumstances, when payments into court might be withdrawn or reduced, were identified in *Cumper v Pothecary*[5] including:

> "… the discovery of further evidence which puts a wholly different complexion on the case … or a change in the legal outlook brought about by a new judicial decision …"

Moreover, that change of circumstances must be operative at the date the offer is purportedly withdrawn rather than any subsequent event and, of course, must be a matter which is disclosed by the offeror to the offeree.

Once the relevant period has elapsed the offeror is free to withdraw or change, so it is less advantageous to the offeree, a Pt 36 offer without reason or permission from the court. Equally the offeree, generally, is able to accept, at any time, a Pt 36 offer which has not been changed or withdrawn. In those circumstances, when court permission is required to accept an extant Pt 36 offer after the end of the relevant period, the judgment in this case implies, again by analogy with the old case law about change in circumstances necessary to withdraw a Pt 36 payment, a similar change of circumstances may be necessary before the court is likely to refuse the offeree permission to accept late.

Conclusion

Whilst the circumstances in which this matter came before the court were indeed remarkable, and perhaps unlikely to be repeated, the judgment does provide some important guidance about the application of natural justice to interim applications generally as well as, more specifically, the correct approach to an application for permission to withdraw a Pt 36 offer within the relevant period.

[3] *Hills Contracts and Construction Ltd v Struth* [2013] EWHC 1693 (TCC); [2014] 1 W.L.R. 1.
[4] *Flynn v Scougall* [2004] EWCA Civ 873; [2004] 1 W.L.R. 3069; [2004] 3 All E.R. 609.
[5] *Cumper* [1941] 2 All E.R. 516.

Practice points

A number of practice points can be drawn from the judgment in this case:

- Applications need to be supported by evidence as the court needs to exercise case management powers with regard to the overriding objective; to do that effectively, and in a reasoned and principled way, needs relevant background information.
- Save for very limited circumstances the evidence relied on by one party in support of an application must be disclosed to any other party.
- It is not appropriate, in many circumstances, to seek an order on the basis of an application dealt with either without a hearing, or without notice of any hearing, to other parties.
- It is, specifically, not appropriate to make an application to withdraw, or change, so it is less advantageous to the offeree, a Pt 36 offer within the relevant period without notice.
- Within the relevant period of a Pt 36 offer a party who wishes to withdraw that offer, or change the offer so it is less advantageous to the offeree, will need to establish, by evidence, that at the material time there has been a "significant change of circumstances to make it just to permit the party to withdraw its offer".

John McQuater

Hockley v North Lincolnshire and Goole NHS Foundation Trust

(HC (Hull), HH Judge Jeremy Richardson QC, September 19, 2014, Unreported)

Civil procedure—personal injury—clinical negligence—acknowledgment of service—late filing—pre-action protocols—setting aside default judgment—CPR r.13.3—CPR r.3.9—relief from sanctions—telephone hearings

LT Clinical negligence; Default judgments; Late filing; Non-compliance; Personal injury claims; Pre-action protocols; Setting aside

In 2005 the claimant underwent surgery for the removal of her gall bladder and surgical repair of an umbilical hernia. Over time other procedures followed. She subsequently developed various problems which led to a clinical negligence claim against the defendant.

In May 2011, Sharon Hockley sent a letter of complaint to the Trust. Her medical records were disclosed in October 2011. In March 2013, to preserve the limitation position, she commenced proceedings. However, as investigations were not complete, neither a letter of claim nor the particulars of claim were served.

In July 2013, a consent order between the parties provided for the time for service of the particulars of claim to be extended to January 17, 2014. It was served on January 15, 2014. The Trust had to file the acknowledgement of service within 14 days.[1] It was filed on February 13, 2014. Meanwhile, the claimant applied for default judgment which was granted on February 14, 2014.

In a telephone hearing granting the Trust's application to set aside the default judgment, District Judge McIlwaine found that there was a good reason for so doing, under CPR r.13.3(1)(b), namely "fairness and justice". He decided that the Pre-Action Protocol for the Resolution of Clinical Disputes had not been followed and that it was a major fault of the claimant. He also considered CPR r.3.9 and *Mitchell v News*

[1] In accordance with CPR r.10.3(1).

Group Newspapers Ltd,[2] and found that the breach of the acknowledgment of service deadline was not trivial, and that the reason given, namely oversight, was not good enough.

The claimant appealed and submitted that the judge placed the failure to comply with the protocol on a level above all other matters which he then failed properly to consider.

The judge held that whilst this case concerned an application to set aside a default judgment rather than relief from sanctions, and although CPR rr.13.3(1) and 3.9 were couched in different language, the relevant considerations in respect of either application were similar. Consequently, *Mitchell* and *Denton v TH White Ltd*,[3] although covering relief from sanctions, had profound importance in applications to set aside default judgments, and the three-stage approach set out in *Denton* had considerable relevance when considering an application under the "good reason ground" in CPR r.13.3(1)(b). Where a defaulter sought to set aside a regular and entirely reasonable judgment based on non-compliance with a Rule, the court had to consider it by reference to an assessment of how serious the default was and why it occurred.[4]

It was abundantly clear to the judge that in this case, District Judge McIlwaine based much of his judgment on the failure by the claimant, as he saw it, to comply with the protocol. However, he did not analyse the consequences surrounding the consent order and failure to engage the protocol. Whilst compliance with the protocol was a key part of the litigation process and any failure to comply with it had to be properly analysed and weighed in the context of the case, such a failure did not necessarily lead to a default judgment in the same way that a failure to file an acknowledgement of service could. The district judge erred when he analysed the situation as he did.

District Judge McIlwaine was perfectly entitled to place importance on the failure to comply with the protocol but he elevated the consequence of that to a level it did not deserve. The raw features of the case were that, whilst there was no doubt that the claimant ignored the protocol, the Trust did not demand compliance; there was plainly an agreement to allow the claimant a period of time to file and serve the particulars of claim, and the particulars were filed and served within that timeframe. In the light of the agreement, the Trust did not demand that the claimant engage the protocol; as a result of incompetence, the acknowledgement of service was not filed within the deadline provided by the Rules. Accordingly the claimant was entitled to invoke the default judgment procedure and take advantage of it by saving money in not having to prove her case.

Had the District Judge calibrated the factors correctly, the weight of the case would have come down heavily in the claimant's favour. The failure to do nothing more than acknowledge the particulars of claim was a serious default. The fact that it was a first default had little relevance as it was likely to be so at that early stage. The advantage to the claimant and loss to the Trust was equally profound. The judge held that the Trust was the author of its own downfall; and the claimant was not at fault in complying with the agreement to the letter (see [34], [42], [71], [75]–[76] and [78] of judgment).

Judge Richardson QC had no doubt that an application demanding the exercise of judgment in a difficult factual matrix, where the consequences were likely to be very significant, should not have been dealt with by way of telephone hearing. Telephone hearings were amenable to short decision-making cases and truly procedural matters rather than cases requiring a fully reasoned exercise of judgment. Whilst parties were entitled to telephone hearings of applications of under an hour, the judge pointed out that allowance had to be made for a judgment to be delivered and for time for reflection.

The appeal was allowed and the judgment restored.

[2] *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537; [2014] 1 W.L.R. 795; [2014] 2 All E.R. 430.
[3] *Denton v TH White Ltd* [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926.
[4] *Mitchell* [2014] 1 W.L.R. 795 and *Denton* [2014] 1 W.L.R. 3926 applied.

Comment

Hurrah for HH Judge Jeremy Richardson QC and for a proper application of the rules relating to default judgment.[5] I cannot count the number of cases pursued pre-Jackson where a properly obtained default judgment was set aside on the (in my biased view, "flimsy") ground that the defendant had an arguable case and should be entitled to the court's indulgence: "After all my client didn't choose to be sued", or so my opponent's argument would seem to run. If there is any point to the court rules at all, they have to be followed and the sanctions properly and consistently applied. Curiously on this point I find myself ad idem with Lord Justice Jackson, possibly for the very first time.

Judge Richardson accepted that he did not find Ms Hockley's case easy to resolve, and he acknowledged that his judgment would have profound consequences on the tax payer, who would need to fund the compensation which will now ultimately be awarded in this case. Judge Richardson was greatly assisted by the fact that *Denton* had been decided in time for the appeal; that case had not been heard at the time of the hearing before the District Judge at first instance.

Failing to file the Acknowledgement of Service is clearly a serious and substantial breach in view of the sanction applied in the court rules which allows judgment in default to be entered. Indeed there can be no harsher penalty for a defendant, denied the opportunity to fully argue the case on the evidence. This trumped a mere failure by the claimant to follow the pre-action protocol, the sanction for which, if any, was likely to be a costs-based penalty and so certainly much less draconian.

Having established that the default was serious and significant (the first part of the test in *Denton*), one should proceed to the second part of the test—was there a good reason for the default? There was not here—this was caused by an administrative failure on the part of the defendant. In different circumstances, a sanctioned party may be able to sue his negligent solicitors. It is regrettable that the taxpayer (you and me) cannot sue the NHSLA for its incompetence in this case. Thirdly, one looks at the overall circumstances of the case to deal justly with the application. It is here that under the "*ancien regime*" (a phrase HH Judge Richardson clearly relishes), the defendant usually received the benefit of any doubt in my experience and was allowed to defend; it would have been unfair to order otherwise. But, quite rightly in his judgment, taking away the claimant's legitimate win was also seen as an unfairness by the appellate judge.

On one view in *Hockley* the defendant had been co-operative, agreeing extensions requested by the claimant, and then made a mistake, of which the claimant had taken advantage. The District Judge's decision to set aside judgment could be seen to be a fair one. The Acknowledgement of Service was filed 13 days late on February 13, 2014, after an application for default judgment had been made but before that order was granted on February 19. The application to set aside the judgment had been promptly made. The District Judge below referred in his judgment to "fairness and justice" as his reasoning for granting the defendant the ability to defend its case. HH Judge Richardson felt that the District Judge's use of that expression was "misplaced": "It was an engaging echo of a former era, but a phrase which does not resonate with the modern ethos of conducting litigation."[6] What a telling quotation!

Justice these days is no longer pure—it has to be cut with proportionality and a utilitarian view of the impact on other court users—for the greater good of all.[7] This was the thrust of the Jackson implementation

[5] For a later, analogous decision of the High Court see Mrs Justice McGowan's ruling in *British Gas Trading Ltd v Oak Cash and Carry Ltd* [2014] EWHC 4058 (QB); [2014] 6 Costs L.R. 1122.

[6] *Hockley v North Lincolnshire and Goole NHS Foundation Trust*, Unreported, September 19, 2014 HC at [64].

[7] In the eighteenth implementation lecture on the Jackson reforms, the Master of the Rolls said there was to be a departure from exclusively focussing on doing justice in an individual case. Rules were not "trip wires" and nor was compliance with the rules to become "the mistress rather than the handmaid of justice", a beautiful phrase. However "dispensing justice" does not mean being a stranger to the over-riding objective which itself was re-phrased as a result of the Jackson reforms to have "justice at proportionate cost" at its heart. "The tougher, more robust approach to rule-compliance and relief from sanctions is intended to ensure that justice can be done *in the majority of cases*." (Master of the Rolls, *18th Implementation Lecture*, March 22, 2013, emphasis added). In *Hockley*, Unreported, September 19, 2014 HC, the appeal judge refers to this as "*regime change*" (at [43]).

lectures, the rationale for the reforms, later embodied in the judgment in *Mitchell* and later still re-stated for "clarification" (read: "a change of emphasis") in *Denton*.[8]

Had not those on both sides, when consulted by Lord Justice Jackson in the course of his work, complained that they were fed up of court rules being flouted by the other, and critical of the courts' lackadaisical approach to enforcing them and punishing offenders? Lord Justice Jackson may well have expected to be applauded for his re-working of CPR r.3.9, but instead both parties blew him a raspberry from the side-lines. "It is now understood that compliance is not a slide rule to be easily readjusted" says HHJ Richardson in *Hockley* and "incompetence of a party or its representatives is highly unlikely to be regarded as a good reason for the removal of a sanction or setting aside an order or judgment".[9] Beware of what you wish for!

Had the defendant not itself been an emanation of the state, I wonder whether it could have advanced an argument under European Convention art.6 to complain that the draconian sanction for failing to lodge a piece of paper accepting it had been served with proceedings could deny its right to a fair hearing. I will leave that to others to argue in later cases.

Finally this case was a shining example of where a telephone hearing had been undesirable, and instead of saving costs had had the opposite effect, ultimately leading to the further costs of an appeal.

Practice points

- This judgment confirms that an application for relief from sanctions under CPR r.3.9, and the jurisprudence behind that, is equally applicable to an application pursuant to CPR r.13.3 to set aside a default judgment.
- In a relief from sanctions application, the court must consider all the circumstances of the case "to deal justly with the application".
- To set aside a default judgment there must be "some other good reason" for doing so.
- "The discipline of the three stage approach [in Denton] is entirely apposite to an application to set aside a default judgment when considering whether there are good reasons for doing so."[10]
- Whilst compliance with pre-action protocols is "truly important,"[11] failure to do so will not put you in gaol or cause the heavens to implode. This was especially the case here where the defendant failed to insist that the protocol was followed, and had agreed an extension of time for particulars to be served thereby effectively nullifying the claimant's default.
- When applying to set aside a default judgment, the defendant should produce a draft defence and any other material upon which the court could conclude there was a real prospect of defending the claim. Why would a party go to the lengths it did in this case to set aside a judgment if they hadn't got a defence to it anyway?
- Without relevant material a defendant can only rely on the alternative limb of the test under CPR r.13.3(1): that there is otherwise a good reason for setting aside the judgment. The

[8] The main differences between the two cases is how the courts are meant to practically approach the issue as to whether to grant relief from sanctions: First the courts should now consider whether a breach is "significant and serious" (*Denton* [2014] 1 W.L.R. 3926 at [27]), as opposed to non-"trivial" in *Mitchell* [2014] 1 W.L.R. 795 (at [40]). Then, when considering the overall circumstances of the case it was no longer of "paramount importance" that (a) litigation should be conducted efficiently and at proportionate cost and (b) the court should enforce compliance with rules, practice directions and court orders (*Mitchell* [2014] 1 W.L.R. 795 at [36]). These issues are now only of "particular importance" (*Denton* [2014] 1 W.L.R. 3926 at [32]), a dumbing down if ever there was one.

[9] *Hockley*, Unreported, September 19, 2014 HC at [45].

[10] *Hockley*, Unreported, September 19, 2014 HC at [42].

[11] *Hockley*, Unreported, September 19, 2014 HC at [56].

practice point for defendants has to be that if you have got a defence, shout out about it, and you may still be able to get a regular judgment set aside.[12]

- Telephone hearings should only be used for small procedural points and not applications where protracted legal argument is required, and where some reflection may be desirable before the judge makes his decision.

Jonathan Wheeler

Symes v St George's Healthcare NHS Trust

(QBD, Simon Picken QC, July 23, 2014, [2014] EWHC 2505 (QB))

Personal injury—clinical negligence—civil procedure—default judgments—defences—causation—estoppel—overriding objective—schedule of expenses and losses—statements of case—CPR r.16.5—CPR r.52.11(3)

LT Causation; Clinical negligence; Default judgments; Defences; Estoppel; Overriding objective; Schedule of expenses and losses; Statements of case

In October 2008, Timothy Symes was referred to hospital by his GP because of a lump on his face. On January 29, 2009 Mr Symes was seen by a Mr Williamson, an ENT consultant working for the defendant NHS Trust. The consultant reported that it was a pleomorphic adenoma but in fact it was a malignant tumour.

Timothy Symes alleged negligence on the basis of a failure to advise him that his lump was "suspicious of malignancy" and a failure to arrange for an urgent superficial parotidectomy to be carried out within two weeks. The claimant's case was that these failures resulted in metastasis of the tumour to the lungs and invasion of the facial nerve, as diagnosed in May 2009. The claimant developed inoperable lung cancer, and had only a short time to live.

Before proceedings were issued, the trust admitted that the consultant's report had been wrong and that the parotidectomy should have been carried out within two weeks of the consultant seeing him rather than four months later. However, it denied that the delay had affected the nature or extent of the claimant's surgery or post-operative treatment, or his subsequent development of lung cancer or life expectancy.

Symes issued proceedings, and relied on the trust's admissions. The trust did not serve a defence or acknowledge service and the court ordered judgment in default. Following agreed directions, Symes served a schedule of losses and the trust served a counter-schedule which accepted that the delay in having the surgery caused the claimant pain and discomfort, but disputed the other consequences of the delay as claimed.

On March 21, 2014 Master Roberts held that it had been contrary to the overriding objective for the trust to allow judgment to be entered against it and then to serve a counter-schedule that addressed allegations of causation that should properly have been addressed within a defence that should have been served weeks earlier, and he struck out those parts of the counter-schedule that were inconsistent with the particulars of claim.

[12] The Supreme Court has said in another relief from sanctions case that a default judgment entered as a result of a breach of an order should not be set aside on the basis that the defendant had a "substantive defence" to the action. See *Prince Abdulaziz v Apex Global Management Ltd* [2014] UKSC 64; [2014] 1 W.L.R. 4495. So the ability to effectively obtain a relief from sanction by showing one does have a substantive defence would only seem to apply in cases where judgment in default is obtained as a result of failing to acknowledge service or file a defence in time.

The trust appealed and submitted that, applying *Lunnun v Singh*[1], the default judgment should be regarded as having established nothing more than that it had acted negligently and that as a result the claimant had suffered some, but not specific, loss and damage. They contended that it was inappropriate to regard it as having already been determined, by dint of the default judgment, that the trust was liable to the claimant for the losses claimed since that presupposed a causation determination which the default judgment did not entail.

The judge held that the trust's position was correct, and any other conclusion would be contrary to authority. The starting point was the particulars of claim, which were to be regarded as a proxy for the default judgment, in order to work out what that judgment had decided. That approach was consistent with the need to scrutinise a default judgment with extreme particularity so as to ascertain the bare essence of what it must necessarily have decided.[2]

The judge held that the court, like the master, was bound to follow the approach in *Turner v Toleman*[3] and *Lunnun v Singh*, which remained good authorities post-CPR.[4] No authority had been cited that held that a defendant could not challenge causation in the face of a default judgment where damages had been ordered to be assessed. As the claimant recognised, in the assessment of damages phase of proceedings it was open to a defendant to advance arguments that the claimant should not be permitted to recover to the extent of the amounts claimed. A defendant had to recognise that "some damage" had been caused, but did not have to accept that the actual damage alleged by the claimant in his statement of case had been caused by the alleged breach of duty.[5]

The judge pointed out that in any event, the trust had accepted that the claimant had suffered at least some of the damage that he had alleged in the particulars of claim. He held that, therefore, the default judgment should be regarded as having determined merely that there was some damage. He ruled that the master was incorrect and therefore CPR r.52.11(3)(a)[6] applied.

Although the judge accepted that the situation that had arisen was regrettable and should be avoided, he held that the master had been wrong to hold that the trust had acted in breach of the CPR and contrary to the overriding objective. The CPR did not preclude a defendant from contesting issues of causation in the context of an assessment of damages hearing after a default judgment on liability had been obtained. The trust had not been obliged to serve a defence setting out its case on causation, and the master should not have criticised it for the way in which it had acted.

The judge further held that CPR r.16.5[7] and CPR PD 16 para.12.1 would come into play only if it was necessary or obligatory for a defendant to serve a defence, which was not so in the trust's case. However the judge accepted that it would have been better if it had served a defence. Then it would have been apparent to the master that the trust was advancing a causation case.

The judge commented that the claimant's solicitors knew all along that the trust intended to run a causation case, so its counter-schedule was not some sort of ambush so the trust had not acted contrary to the overriding objective.

Appeal allowed.

[1] *Lunnun v Singh (Hajar)* [1999] C.P.L.R. 587 CA (Civ Div).
[2] *Kok Hoong v Leong Cheong Kweng Mines* [1964] A.C. 993; [1964] 2 W.L.R. 150 PC followed.
[3] *Turner v Toleman*, Unreported, January 15, 1999 CA (Civ Div).
[4] *Turner* and *Lunnun* followed.
[5] *Lunnun* [1999] C.P.L.R. 587 followed
[6] The appeal court will allow an appeal where the decision of the lower court was wrong.
[7] Requirements for the contents of a defence

Comment

Introduction

Causation is an issue which poses many potential problems for practitioners and the courts. There are particular difficulties when the claim involves a cause of action, such as negligence or breach of a statutory duty approached on similar lines, where proof of at least some damage caused by a relevant breach of duty is essential to establish liability. The real difficulty in such claims can be distinguishing damage necessary to complete the tort, and establishing liability, from damage that is a question of quantification, of loss from that liability, and hence concerned only with quantum.

These difficulties are likely to arise both at the first stage of establishing liability and, once that has been done, at the second stage when determining exactly what the defendant is then liable for. The complexity is compounded by the courts taking a different approach to what the claimant will need to prove at each of these stages.

Proving causation

At the first stage, when a claimant is seeking to establish liability, difficulties on causation are likely to be concerned with the need to link, by the legal concept of causation in the sense of a chain of events, a breach of duty to damage suffered by the claimant. This will be determined on a balance of probability, where the evidence allows that, or otherwise on the basis of proving a material contribution.[8]

At the second stage, once liability has been established, there may still be difficulties, as the judgment in this case illustrates, determining the extent to which the defendant is liable for damage suffered, and hence damages for that damage.

So far as there is a liability for any damage the court, at the second stage, can approach quantification of damages by assessing chance.[9]

Judgment on liability

The very real difficulties in this area, and specifically in deciding what is covered by the scope of the judgment on liability, are highlighted by the fundamentally different views on this issue taken by a Master, with great experience in dealing with cases of this kind, and a deputy High Court judge.

Raising issues about causation, in the sense of establishing liability, after judgment is not really a satisfactory way of approaching matters in the modern era of costs, as well as case, management with greater emphasis on proportionality and predictability. To avoid such problems it is important, wherever possible, that when judgment is entered on liability, whether that be by default or on admissions or even after trial of a preliminary issue, the damage for which liability is thereby established can readily be identified from that judgment, even if that means looking back to the statements of case where these will stand as proxy for, in the absence of, a detailed judgment on individual issues by the court.

Whilst this case highlights the problems that can arise, if there is insufficient clarity at the stage of judgment, there were some unusual features which did make identification of the damage, covered by the judgment and for which damages could then be assessed, more problematic than usual.

Consequently, before considering both case law and related aspects of the CPR as well as ways of helping to guard against the problems that occurred in this case, it is worth looking at the background which led to the problems that generated both a contested hearing before the master and then an appeal.

[8] *Hotson v East Berkshire HA* [1987] A.C. 750; [1987] 3 W.L.R. 232 HL; *Bailey v Ministry of Defence* [2008] EWCA Civ 883; [2009] 1 W.L.R. 1052.

[9] *Smithurst v Sealant Construction Services Ltd* [2011] EWCA Civ 1277; [2012] Med. L.R. 258.

Background

An important feature of this particular case, and one that the judgment on appeal suggests may have been determinative of the outcome, was that, both before and after proceedings were commenced, the defendant made an express "limited admission". Many of the subsequent difficulties resulted from the defendant's failure to incorporate that admission into a statement of case before the court, as no defence was served. Whilst the extent to which the absence of a defence did, or did not, comply with the CPR was clearly a relevant consideration, the judge, on appeal, noted, so far as the outcome of the appeal was concerned, that:

> "The position might be different if this had been a case in which the Defendant had done nothing at all and had, instead, simply allowed the default judgment to be entered without engaging with the Claimant, whether before or after commencement of proceedings …"

In the event both parties appear to have taken a somewhat tactical approach. The defendant failed to file either an acknowledgment of service or defence, despite making only a limited admission, preferring, either with a view to either saving costs or for tactical reasons, to raise issues concerning the extent of the admission only at the late stage of serving a counter-schedule. The claimant, meanwhile, sought to capitalise on what was perceived as an error by the defendant, an error which the claimant presumably wished to remain silent about to avoid alerting the defendant until it might be too late for the situation to be retrieved.

Case law

Case law, both pre-CPR and post-CPR, has to be viewed with the particular factual background to the case in mind. The starting point for a review of case law, taken by the judge on appeal, was the statement of principle in *Kok Hoong v Leong Cheong Kweng Mines Ltd*[10] where Viscount Radcliffe framed the relevant question as follow:

> "… there is no doubt that by the law of England, which is the law applicable for this purpose, a default judgment is capable of giving rise to an estoppel per rem judicatam. The question is not whether there can be such an estoppel, but rather what the judgment prayed in aid should be treated as concluding and for what conclusion it is to stand."

Viscount Radcliffe also referred to the earlier authority of *New Brunswick Railway Co v British & French Trust Corporation Ltd*[11] which he described as "containing an authoritative reinterpretation of the principle" and phrased that principle in the following terms:

> "… default judgments, though capable of giving rise to estoppels, must always be scrutinised with extreme particularity for the purpose of ascertaining the bare essence of what they must necessarily have decided and, to use the words of Lord Maugham L.C. [in New Brunswick] they can estop only for what must 'necessarily and with complete precision' have been thereby determined."

In *Turner v P.E. Toleman*[12] the particulars of claim alleged negligence causing injury, loss and damage, a medical report accompanying the particulars of claim describing the claimant having suffered frozen shoulder. The defence admitted liability to compensate any injuries, loss or damage suffered but denied the claimant had suffered the alleged, or any, injury. Although summary judgment was obtained Simon Brown LJ, on a renewed oral application for permission to appeal, held:

[10] *Kok Hoong* [1964] A.C. 993.
[11] *New Brunswick Railway Co v British & French Trust Corp Ltd* [1939] A.C. 1; [1938] 4 All E.R. 747 HL.
[12] *Turner v Toleman*, Unreported, January 15, 1999 CA (Civ Div).

> "No doubt defendants must acknowledge some injury to a plaintiff before judgment could properly be entered against them, otherwise the cause of action is not complete. But, of course, here they were. That is a far cry from saying that they are necessarily liable for each and every aspect of loss and injury which the plaintiff in his pleaded claim asserts he suffered. Indeed, their defence expressly denied it. That has everything to do with quantification and nothing to do with basic liability."

That approach was followed, and approved, by the Court of Appeal in *Lunnun v Singh*.[13] Accepting a submission based on *Turner*, Jonathan Parker J held:

> "In my judgment, the underlying principle is that on an assessment of damages all issues are open to a defendant save to the extent that they are inconsistent with the earlier determination of the issue of liability, whether such determination takes the form of a judgment following a full hearing on the facts or a default judgment. In this case the judgment was a default judgment."

Clarke LJ in *Lunnun*, agreeing with Jonathan Parker J, explained that on the assessment of damages the defendant may not take any point inconsistent with the liability alleged in the statement of claim, such points including contributory negligence, failure to mitigate, causation and quantum. On causation, drawing on the judgment of Sir Richard Scott in *Maes Finance Ltd v A Phillips & Co*[14] Clarke LJ held that whilst the defendant cannot contend the breach of duty was not causative of any loss the defendant might still be able to argue such breaches were not causative of any particular items of alleged loss.

The third Judgment in *Lunnun* was given by Peter Gibson LJ who held:

> "In my judgment, the true principle is that on an assessment of damages any point which goes to quantification of the damage can be raised by the defendant, provided that it is not inconsistent with any issue settled by the judgment."

These pre-CPR cases have been followed after the introduction of the CPR in a number of judgments, most recently *New Century Media Ltd v Makhlay*.[15] Giving judgment, in that case, Carr J explained:

> "A default judgment on liability under CPR Part 12 is a final judgment that is conclusive on liability. The Particulars of Claim are, in effect, a proxy for the judgment, setting out the basis of liability. Once judgment is entered, it is not open to a defendant to go behind it. Damages of course still have to be proved, and a defendant can raise any issue which is not inconsistent with the judgment."

The observations of Carr J emphasised the importance of the statements of case in the event of a default judgment. But do recent changes to the CPR have any effect on this approach?

CPR

It is important to recognise that some of the case law looking at this issue pre-dates the introduction of the CPR which, crucially, requires the defendant to plead, in the defence, any positive case. Whilst some of the case law post-dates the introduction of the CPR those cases, as well as the earlier decisions, now have to be considered in the light of subsequent amendments to the CPR, particularly the overriding objective. There are, therefore, some provisions of the CPR of particular relevance to the matters considered by the court in this case.

Part 1.1(2) now expressly provides that dealing with a case justly includes "enforcing compliance with rules, practice directions and orders".

[13] *Lunnun* [1999] C.P.L.R. 587.
[14] *Maes Finance Ltd v AL Phillips & Co*, *The Times*, March 25, 1997 Ch. D.
[15] *New Century Media Ltd v Makhlay* [2013] EWHC 3556 (QB).

Part 15.2 provides that "a defendant who wishes to defend all or part of a claim must file a defence". Consequently, although Pt 12 allows for a default judgment if a defence has not been filed by the due date, this does not detract from the requirement, imposed by Pt 15, to file a defence if any part of the claim is defended. Failure to do so, where any part of the claim is disputed, is a failure to comply with the rules and hence contrary to the overriding objective.

Furthermore, if there is a defence, Pt 16.5 provides the defence "must state" what is denied and, so far as any matters are denied, the defendant's reasons for the denial and any different version of events which the defendant intends to put forward. Once again the failure to do this is a failure to comply with the rules, and a very relevant consideration, because of the revised terms of the overriding objective, for the court when dealing with any subsequent case management issues.

The need to properly plead matters in the defence, in a way that complies with the terms of the CPR, is important not just to ensure compliance with the rules, and hence the overriding objective, but is of critical importance in the event of a default judgment because the pleadings need to be precise if they are to stand as a proxy for a judgment determining the issues between the parties.

If the claimant, in a personal injury claim, has included a schedule of expenses and losses with the particulars of claim para.12.2 of the Practice Direction to Pt 16 requires the defendant to include in, or attach to, the defence a counter-schedule identifying points of agreement and disagreement with, where any items are disputed, alternative figures. This, often overlooked, provision confirms the need for the issues on expenses and losses to be identified, if possible, at an early stage. It is, consequently, inappropriate, and contrary to the general structure of the rules, for matters, that ought to be in, or with, a defence, being introduced at a late stage by counter-schedule.

It is also worth noting there is no provision in the CPR for counter-schedules to be used for the purpose of introducing documents, not disclosed by the due date under case management directions, or factual evidence, again beyond the date provided for in the timetable, given the terms of Pt 31.21 and Pt 32.10 respectively.

A counter-schedule should not, therefore, be used as a "Trojan Horse", served with a view to raising matters at trial which have not been properly pleaded or dealt with at the proper stage of the court timetable. Whilst there may be sound tactical reasons for a defendant to approach matters in this way that can often cause problems leading to potentially disproportionate costs being occurred as illustrated by what occurred in this case and also, for example, *Tutas v East London Bus & Coach Co Ltd*.[16]

The Master, no doubt drawing on his extensive experience of case management, made some trenchant points about the impact of the approach taken by the defendant on achieving the overriding objective. It is, perhaps, a little surprising that, on appeal, the judge appeared to take the view service of a defence was optional, despite the clear terms of Pt 16.

Moreover, as the Master observed, knowing the nature of the dispute, which requires the parties to plead their cases in accordance with the CPR, is essential if costs management is to be effective.

Whilst it is right, a point to which the judge on appeal attached particular significance, to recognise the defendant made a "limited admission" by letter, that does not negate the failure to comply with the CPR.

Looked at in the round it is difficult to reconcile the ruling made on appeal with all the emphasis, post-April 2013, on the need for compliance with the terms of the CPR and, indeed, the result of that failure to comply generated both a contested hearing before the Master and an appeal, proof if proof were needed, of the linkage, identified by Lord Justice Jackson, between compliance and proportionality.

Given the decision reached on appeal it is, however, necessary to consider how practitioners should approach such matters in the future.

[16] *Tutas v East London Bus & Coach Co Ltd* [2013] EWCA Civ 1380.

Practice points

Practitioners, whether acting for claimant or defendant, may wish to consider taking appropriate practical steps, in the light of this case, to avoid similar problems occurring in the future.

- It is important that the particulars of claim set out not just the case on breach of duty but also, as clearly as possible, the case on causation and by reference to specific damage suffered, particularly where there may be a number of divisible injuries (because of the risk that where damages divisible an admission of breach of duty may not suffice to establish any causation, and hence liability, for certain aspects of the damage).
- A defendant who wishes to defend the whole or any part of a case should do so by a defence, moreover a defence which complies with the requirements of Pt 16. Furthermore, if there is already a detailed schedule in, or with, the particulars of claim the defendant should provide a counter-schedule in, or with, the defence.
- The claimant should insist on a defence, rather than dealing with matters informally, and if no defence is provided seek default judgment. In the event of any correspondence suggesting the defendant does intend to raise any issues it may be prudent, rather than seeking default judgment, to make application for the specific purpose of the court defining the issues, or perhaps contemplate a Pt 18 request if that seems likely to clarify the issues without the need for an application.[17]
- If the parties agree there should be a judgment on liability it may be helpful for that judgment to recite those parts of the particulars of claim, for the avoidance of any doubt, which the judgment covers, particularly the extent to which admitted breaches of duty have caused specific damage, and especially where different aspects of the damage might be regarded as divisible. The judgment can, indeed, even confirm aspects of quantification are agreed if that be the case.
- A claimant would always be wise to seek judgment, wherever possible, rather than relying on admissions, because of the risk a defendant may later seek permission to withdraw an admission (once there is a judgment it will be too late, generally, to do that).[18] Some of the case law cited, particularly *Lunnun*, confirms judgment may still be entered, even when there are issues such as contributory negligence still to resolve (although issues of this kind cannot be raised after judgment unless pleaded in a defence).

If matters are approached in this way the issues will be narrowed, in a way that resolves those issues once and for all, whilst the parties, and court, will all be aware of those matters remaining in dispute which, in turn, will inform how the case is managed, the evidence that will be required and, accordingly, allow the case to be run in the most proportionate way.

Practice points

In summary this case suggests a number of key practice points.

- The claimant should plead, as fully as possible, in the particulars of claim the case on both breach of duty and the alleged causative effect in terms of damage.
- A defendant should not seek to rely on correspondence in lieu of a defence nor should a claimant accept this but insist on a proper pleaded case.

[17] See, for example, the recent suggestion to this effect in *Akhtar v Boland* [2014] EWCA Civ 872.
[18] *Akhtar* [2014] EWCA Civ 872.

- A defendant would be wise to serve a defence, even where there are some admissions, so that the scope of any judgment is clear and any remaining issues clearly identified.
- If there are any uncertainties at the stage of judgment being entered, whether by default or an admission, it is better to try and be express about the scope of the judgment either by agreement or, if necessary, application.
- It is preferable to have judgment, rather than rely on admissions, and the court may enter judgment even when matters remain in issue provided the scope of those issues are defined by the pleadings and/or judgment.
- Counter-schedules should be provided at the appropriate stage. Claimants should scrutinise any counter-schedule carefully to ensure the issues raised do not go beyond the scope of any judgment nor seek to introduce new evidence not previously disclosed in accordance with case management directions. Whilst defendants may wish to use counter-schedules as a vehicle for raising issues at a later stage that may be a risky strategy and, as this case illustrates, a false economy.
- It is, perhaps, unwise to adopt tactics intended to out manoeuvre the opponent, as both parties in this case may have tried to do.

John McQuater

Landau v Big Bus Co Ltd

(SCCO, Master Howarth, October 31, 2014, Unreported Elsewhere)

Civil procedure—personal injury—costs—funding arrangements—qualified one-way costs shifting—appeals—proceedings—CPR r.44.13, r.44.14, r.44.17

Appeals; Personal injury claims; Qualified one-way costs shifting; Road traffic accidents

On Sunday May 3, 2009 near the junction of Pall Mall East and Cockspur Street in the area of Trafalgar Square, London, there was an accident involving three vehicles. The roads form part of a one-way system. At the junction is a set of traffic lights. The three vehicles had come down Pall Mall East and stopped at the traffic lights.

The first was a tourist bus operated by the Big Bus Company Limited (the first defendant) and driven by a Mrs Dean. It was in the outside (right-hand) lane. The second was a VW Passat motor car driven by the second defendant Mr Pawel Zeital, a Polish national who was then residing and working in the UK. It was in the inside (left-hand) lane. The third was a 125 cc motor scooter ridden by the claimant Michael Landau which he was riding as part of the process of acquiring "the knowledge" needed to become a London taxicab driver. The position of the scooter at the lights was a central issue at the trial.

When the lights changed to green the vehicles moved forward and started to negotiate the sharp left-hand turn into Cockspur Street. The claimant's scooter became trapped between the rear nearside of the bus and the rear offside of the car before any of the vehicles had completed the turn. Although the bus and the car stopped very quickly, the claimant sustained a serious injury to his right leg which subsequently necessitated a below-knee amputation.

Foskett J found[1] that the claimant had not been in the position he said he was at the lights, so that it was more likely that he was in the blind spot of both defendants. He found that neither defendant was negligent and that, even if they had seen the claimant at the lights, they would have been entitled to rely on him to have had regard to the developing situation and to have held back. He said that even if he had found that the driving of either of the other two had fallen below a reasonable standard, he would have found the claimant largely to blame, certainly no less than 75 per cent. Landau appealed.

The Court of Appeal held that there was a well-recognised reluctance of appellate courts to interfere with findings of primary fact which depended on a judge's assessment of witnesses he had heard give evidence.[2] The Judge had made it clear that he was unable to make any positive finding as to the claimant's position at the lights albeit that he considered it more likely than not that he was in a blind spot.

The crucial finding was that Michael Landau was not in the position where he said he was, which meant that he had failed to prove his case that both defendants should have seen him at the lights. It was not a case where the Judge's conclusion was based on an alternative scenario introduced by him and not canvassed with the parties.[3] The evidence did not undermine the Judge's suggestion of a blind spot.

They also held that there was nothing in the judgment or the evidence to justify the conclusion that the bus driver ought to have seen Michael Landau's scooter sooner than she did. The Judge was correct to conclude that she drove with reasonable care. The overall evidential picture was not clear cut, but the Judge had grappled with it conscientiously and there was no proper basis for interfering with his evaluation. In addition he was not wrong to find that Mr Zeital's driving had not fallen below a reasonable standard.

Finally they also held that the Judge was not mistaken in his view that the drivers would have been entitled to assume in the circumstances of the case that Landau would hold back as they negotiated the turn. The appeal was dismissed.[4]

There was a costs issue which was dealt with later. The rules on qualified one-way costs shifting ("QOCS") were introduced by the Jackson reforms. When they apply pursuant to CPR r.44.13[5] and CPR r.44.14,[6] a costs order cannot be enforced against a claimant. In *Wagenaar v Weekend Travel Ltd*[7] the Court of Appeal confirmed that there was nothing in rr.44.13–44.17 to indicate that QOCS were not intended to be retrospective.

Here at first instance the claimant's case had been funded on a pre-April 1, 2013 conditional fee agreement ("CFA") backed by after-the-event ("ATE") insurance. CPR Pt 44.17 does not apply where the claimant has entered into a pre-commencement funding agreement so QOCS had no relevance at first instance. However the original CFA and ATE insurance policy did not cover any appeal by the claimant. The question was: did QOCS apply on the appeal although it clearly could not have applied at first instance?

The claimant relied upon what Rix LJ said in *Hawksford Trustees Jersey Ltd v Stella Global UK Ltd*[8] at [42]:

[1] *Landau v Big Bus Co Ltd* [2013] EWHC 3281 (QB).
[2] *Henderson v Foxworth Investments Ltd* [2014] UKSC 41; [2014] 1 W.L.R. 2600 and *Biogen Inc v Medeva Plc* [1997] R.P.C. 1 HL followed.
[3] *Faunch v O'Donoghue* [2013] EWCA Civ 1698 distinguished.
[4] *Landau v Big Bus Co Ltd* [2014] EWCA Civ 1102.
[5] "Qualified one-way costs shifting: scope and interpretation (1) This Section applies to proceedings which include a claim for damages—(a) for personal injuries; b) under the Fatal Accidents Act 1976; or (c) which arises out of death or personal injury and survives for the benefit of an estate by virtue of section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934, but does not apply to applications pursuant to section 33 of the Senior Courts Act 1981 or section 52 of the County Courts Act 1984[4] (applications for pre-action disclosure), or where rule 44.17 applies. (2) In this Section, 'claimant' means a person bringing a claim to which this Section applies or an estate on behalf of which such a claim is brought, and includes a person making a counterclaim or an additional claim."
[6] "Effect of qualified one-way costs shifting (1) Subject to rules 44.15 and 44.16, orders for costs made against a claimant may be enforced without the permission of the court but only to the extent that the aggregate amount in money terms of such orders does not exceed the aggregate amount in money terms of any orders for damages and interest made in favour of the claimant. (2) Orders for costs made against a claimant may only be enforced after the proceedings have been concluded and the costs have been assessed or agreed. (3) An order for costs which is enforced only to the extent permitted by paragraph (1) shall not be treated as an unsatisfied or outstanding judgment for the purposes of any court record."
[7] *Wagenaar v Weekend Travel Ltd (t/a Ski Weekend)* [2014] EWCA Civ 1105; [2014] C.P. Rep. 46.
[8] *Hawksford Trustees Jersey Ltd v Stella Global UK Ltd* [2012] EWCA Civ 987; [2012] 1 W.L.R. 3581.

> "In my judgment, it is possible to conceive that "proceedings" could either embrace both trial and appeal or else be interpreted as referring separately to trial and appeal. Although it would be perfectly natural to think of an appeal as arising from and being part of the same proceedings as the trial from which the appeal is taken, it is nevertheless clear that trial and appeal have been treated as separate proceedings for the purposes of costs."

At [47] he continued:

> "In these circumstances it seems to me that the interpretation of section 29 can legitimately go in either direction: either "proceedings" refers to the litigation as a whole, or it refers to the trial or appeal proceedings separately. Indeed, it might even be said that *in the context of costs* there is good reason for thinking that it should have the latter meaning. But whether that is so or not, it is standard wisdom in such a situation to ask which meaning would better answer the purpose and aims of the legislation. In asking that question, it is proper to begin by consulting jurisprudence for any light that it may be able to throw on the subject."

Master Haworth decided that all that could be derived from *Hawksford* was that "proceedings" must be looked at in context. However it could not be assumed that "proceedings" can or should in every case mean separate proceedings by way of trial and by way of appeal. His answer to the question "Did QOCS apply to the appeal?" was no.

His decision was largely based on two reasons. First, he accepted that the definition of a pre-commencement CFA in CPR r.48.2(1)(i)(aa)[9] meant that all proceedings arising out of the same "subject matter" were caught. Secondly he held that for the purposes of CPR r.44.17, the appeal was part of the same "proceedings" as at those at first instance. Accordingly the claimant did not have QOCS protection.

Comment

Rule changes often bring uncertainty. Frequently drafting leaves room for clever arguments about precisely what a word here or there means. The rules on QOCS provide a good example of this.

Careful discussion of QOCS is set out in Chs 9 and 19 of the Jackson Report. The rationale for QOCS that Sir Rupert Jackson expressed in those sections came through loud and clear. It was that QOCS was a way of protecting those who had suffered injuries from the risk of facing adverse costs orders obtained by insured or self-insured parties or well-funded defendants. Sir Rupert thought that it was far preferable to the previous regime of recoverable success fees under CFAs and recoverable ATE premiums.

QOCS is a simple concept. 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 courts agreement.[10]

The drafting of the QOCS rules left a number of issues to be resolved by the courts. What if a claimant had entered into a "funding arrangement" prior to April 1, 2013 but things changed? Would they benefit from QOCS protection? For example the claimant abandoned that retainer and signed a new one post-April 1, 2013. Perhaps they did so because they changed their lawyer. Perhaps the original lawyer terminated the original funding arrangement leaving the claimant to find a new firm willing to run their case on a post-April 1, 2013 CFA. Most people believed that such a claimant would be precluded gaining the benefit of QOCS. That is exactly the conclusion reached by Master Howarth in this case.

The QOCS rule changes now have a little less uncertainty.

[9] "[an] agreement … entered into before 1 April 2013 specifically for the purposes of the provision … of advocacy or litigation services in relation to the matter that is the subject of the proceedings in which the costs order is to be made."

[10] CPR rr.44.13 and 44.14

Practice points

- Cases in which the claimant has had the benefit of a pre-April 1, 2013 "funding arrangement" will not gain the benefit of QOCS in any circumstances.
- Termination of a pre-April 1, 2013 "funding arrangement", whatever the reason, cannot gain the claimant the benefit of QOCS.
- When QOCS does apply, a claimant can lose or abandon proceedings with almost complete costs protection.
- QOCS does not protect a defendant in any Pt 20 proceedings.[11]
- QOCS has retrospective effect in any personal injury case without a relevant pre-commencement funding arrangement.[12]

Nigel Tomkins

Draper v Newport

(Birkenhead CC, District Judge Baker, September 3, 2014, Unreported)

Personal injury—civil procedure—low value personal injury claims—mistake—settlement

☞ Low value personal injury claims; Mistake; Settlement

Pamela Draper was involved in an accident on January 9, 2013. It was an accident which lent itself to the low value PI portal and the appropriate steps were taken by her solicitors to upload the claim by means of a claims notification form. As the process took over, the claimant made an offer and the defendant a counter-offer.

When the counter-offer was made by the defendant and the claimant's solicitors had not been instructed to accept it, unfortunately, the individual who was charged with dealing with this claim for the claimant under the portal apparently clicked "yes" on at least two occasions in order to accept the sum that was offered by the defendant instead of rejecting the sum.

She recognised her error almost immediately and then wrote the same day, within about half an hour or so, to the defendant's insurers indicating that the acceptance of the offer had been a mistake. The response was that the insurers were instructing their own solicitors to deal with the matter. The court had to determine, as a preliminary issue, whether the claim of the claimant against the defendant had been compromised within the protocol for low-value personal injury claims. The issue was whether the common law doctrine of mistake applied to claims of this nature.

District Judge Baker referred to the low-value personal injury protocol as a streamlined process. That process had been imposed upon the courts, and upon the parties, as a result of careful negotiations between representatives from claimants' solicitors and the insurance industry to deal with particular problems that were perceived on both sides in terms of the way that these low-value claims had been dealt with.

The District Judge held that the doctrine of mistake should not be imported into the rules-based scheme of the low-value personal injury protocol. The claim had been settled. If the doctrine of mistake was imported, much satellite litigation would result. Regard should be had to the overriding objective, the low-value scheme itself and the way in which it should operate. Introducing the law of mistake would

[11] *Wagenaar* [2014] C.P. Rep. 46.
[12] *Wagenaar* [2014] C.P. Rep. 46.

create a real risk of undermining the certainty, speed and cost savings which the scheme was aimed at promoting.

The preliminary issue was determined in favour of defendant.

Comment

The preliminary issue tried was a very narrow one: whether the law of mistake applies to protocol cases proceeding through the portal. The defendant accepted that there was a mistake, leaving the District Judge to concentrate only on whether or not the common law doctrine of mistake applied in portal cases.

He accepted the defendant submission that the protocols are self-contained codes, designed to bring certainty in dealing with low-value cases, involving a low and proportionate cost, and that to "import" the doctrine of mistake would significantly negate these objectives.

However, there is in fact no express exclusion of the doctrine of this well-established common law principle. By contrast, where there is a change, for example with regard to witness statements (as the judgment refers to) or indeed medical evidence, there is always express provision in the protocols. Furthermore, having sat on the relevant Civil Procedure Rules Committees protocol drafting committees I can confirm that such an implied exclusion was never envisaged, nor indeed even considered. Surely, a departure from the common law would need to be clearly and expressly stated? Whilst the protocol frameworks are rules-based and prescriptive, this does not imply exclusion of important and well-established common law doctrines.

The judgment refers to careful negotiations between representatives from claimant solicitors, and insurers to deal with "particular problems that were perceived on both sides in terms of the way that these low value claims had been dealt with". This is incorrect; the government were persuaded by the Association of British Insurers that the new scheme was a way forward, and the Ministry of Justice set about setting the appropriate policy objective. Claimant solicitors and other stakeholders had to work within the set policy framework. Pressure and lobbying for the policy came almost exclusively from the insurers. The judge refers to the protocols as a "scheme which has been devised by lawyers for lawyers". This is plainly inaccurate.

The overriding objective of proportionality applies to protocol cases, as does the requirement to deal with cases justly, the District Judge correctly found. Somewhat paradoxically, he found no such room for the common law doctrine of mistake.

Since the scheme is prescriptive, and because both parties are insured, the first instance judge concluded that there is equality of arms between the parties. However, the reality is that claimants are, increasingly, frequently not insured.

The court was understandably concerned with avoiding satellite litigation, and cited the prospect of mistake being pursed to "unwind" settlements on a wider scale; he was very reluctant to open the door to this. In fact mistake is going to be rare. This is actually the first case on the point I have heard of, after approaching four years of the operation of the protocols. In this case the mistake was immediately realised, and action was taken to rectify in 30 minutes. Cases of longer delay would surely open the prospect of defendant challenge as to whether there had in fact been a mistake, unlike in this case.

Practice point

- Be very careful to not press accept twice in error! Whether correctly decided or not, it is the apparently the only case law on the point, for the time being. It is a point which may well be tested going forward in the higher courts.

John Spencer

Cumulative Index

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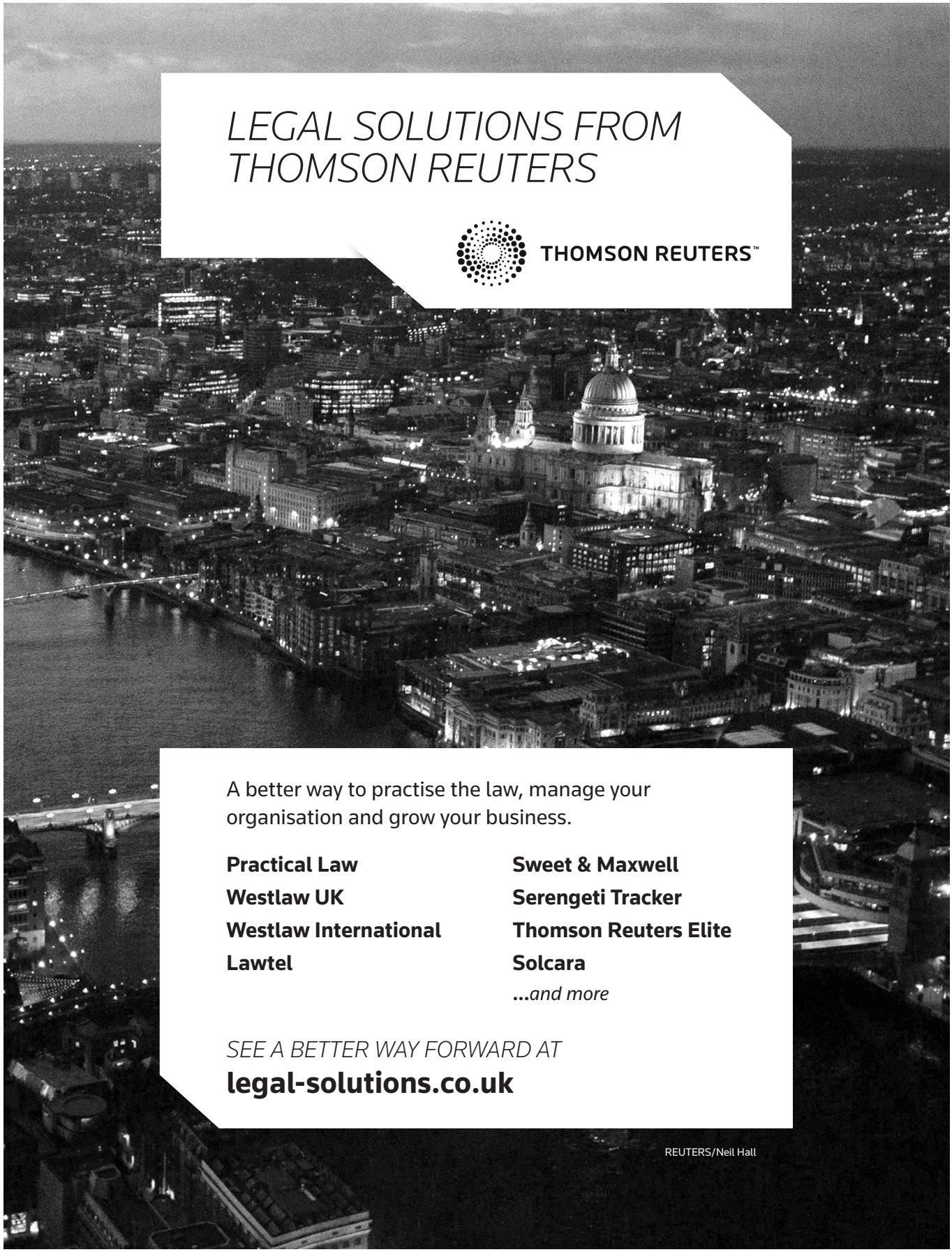
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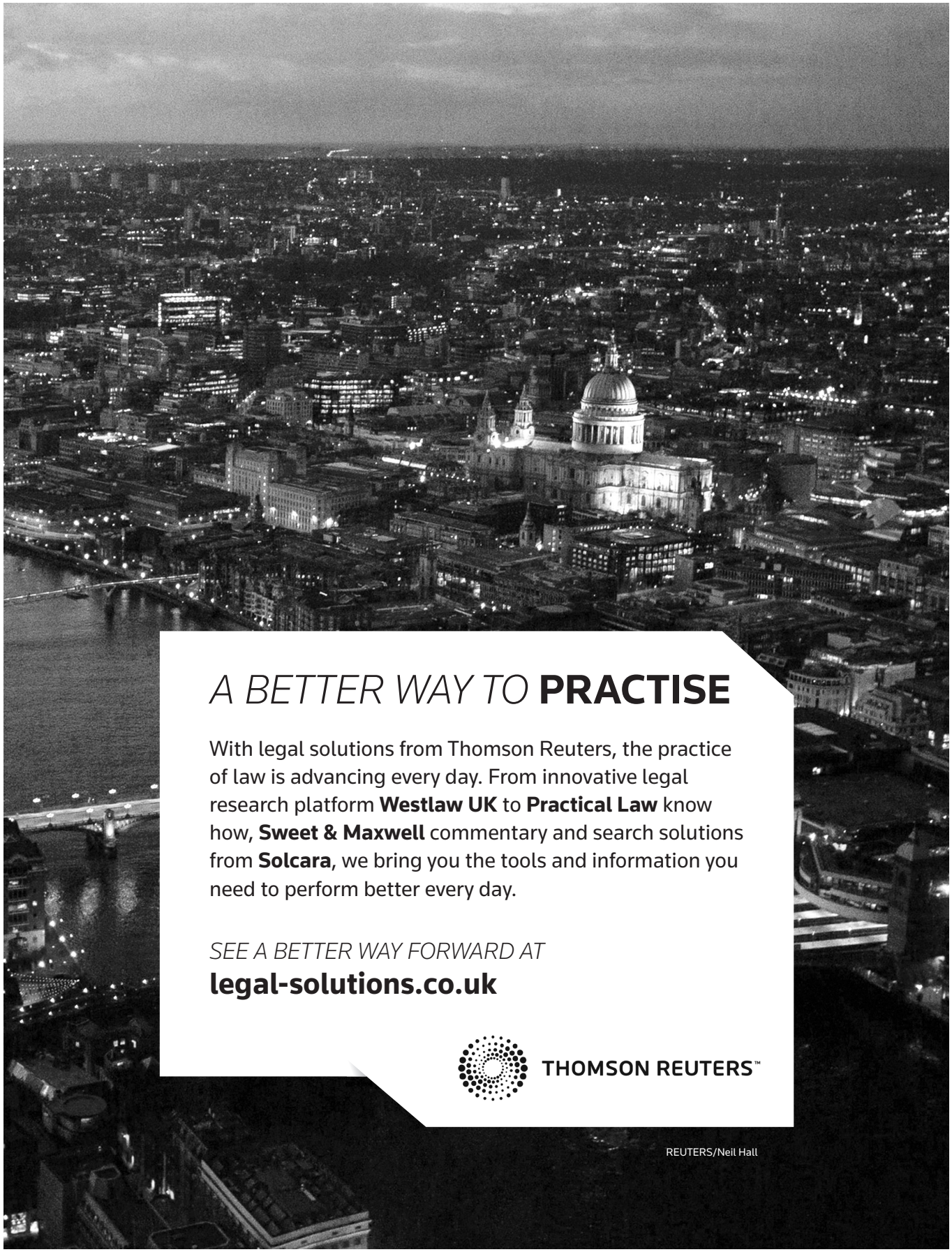

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