JOURNAL OF PERSONAL INJURY LAW

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Issue 2 2015

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  - Practical guidance on procedure.
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Editorial

Welcome to the June 2015 edition of JPIL.

We are only a few weeks from the General Election as I write this editorial and the outcome of that election is likely to have a profound impact on personal injury lawyers and their clients for the next five years. Will we have a government lead by a party significantly funded by insurers that will continue to pursue "insurer-friendly" policies to the detriment of claimants, or will we have a government significantly influenced by the trade unions which might seek to preserve access to justice for injured people and possibly repeal some of the last government's more controversial measures? Whatever your political allegiance, there is no doubt that the coalition's policies have had a significantly adverse effect on access to justice including the recent increase in court fees and legislation such as LASPO, SARAH, and the Enterprise Act. These Acts have been carefully considered by this Journal.

In this edition we look at two further and more recent Acts of Parliament and consider their impact. APIL EC member **Brett Dixon** examines the new test of fundamental dishonesty introduced by the Criminal Justice and Courts Act 2015 and the sanctions available under that Act. **Austin Thornton** looks at the implications for assessing damages and assessing care awards of the Care Act 2015. Also on the regulatory front **Matthew Chapman** looks at the impact of the Rome II regulation and how it applied in the English Courts.

Case law remains at the heart of our common-law system and there have been some fascinating decisions recently. **William Norris QC** and **Quintin Fraser** look at a number of recent cases on the issue of Occupiers' Liability and our own digest editor **Nigel Tomkins** looks at the Supreme Court decision in *Woodlands* and the issues raised by that case in relation to withdrawal of admissions and non-delegable duties of care. Also on the case-law front, and with some very helpful practical pointers, **Christopher Kennedy QC** and **Matthew Snarr** look at the issues of intoxication and inebriation.

Finally, JPIL Board member **David Fisher** along with **Julian Chamberlayne** and **Peter Walmsley** analyse a recent Jersey RTA case which illustrates how a consensual approach built around the Multi-Track code can prove beneficial to all parties in resolving a very complicated piece of litigation.

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

Muiris Lyons

Erratum

An error in my article "Without A Safety Net: Litigating Employers' Liability Claims after the Enterprise Act" [2015] J.P.L. 15 has been identified to me. On proper analysis the Office, Shops and Railway Premises Act 1963 s.23(1) no longer provides a civil cause of action. My understanding to the contrary was based upon a misreading of the relevant statutory provisions for which I apologise.

The passage of the article dealing with the 1963 Act (the second, third, fourth and fifth paragraphs of the "Other duties" section, beginning with "I have identified only one still in force" and ending with "claims under this statute are likely to resemble those prior to s.69 in terms of the difficulties in defending them") should be removed so that after the first paragraph the section should resume "The other most notable one", but removing the word "other".

I am very grateful to Jonathan Clarke of Old Square Chambers for alerting me to this.

Andrew Roy

Occupiers' Liability: Issues Arising in Recent Case Law

William Norris QC

Quintin Fraser*

Independent contractors; Occupiers' liability; Periodical payments; Personal injury claims; Spectators; Trespassers

Introduction

Listening to someone tell you about their recent triumphs and disasters in court is nearly as dull as watching a video of their family holiday. So we apologise and hope to be forgiven if our study of recent cases under the Occupiers' Liability Act 1957 and Occupiers' Liability Act 1984 appears to pay undue attention to litigation in which one or both of the authors have been personally involved. There may be other decisions of greater jurisprudential significance which we have missed, but we hope that those which are discussed below will provide a useful study of current judicial thinking as regards the issues which commonly arise in relation to these statutes.

Tomlinson and the "state of the premises"

The starting point in relation to all cases under both Acts is to consider whether the accident resulted from a danger created by the "state of the premises" (see *Tomlinson v Congleton BC*).[1] This point is key to the analysis of all Occupiers' Liability Act cases including the Court of Appeal's decision in *Keown v Coventry Healthcare*,[2] and several first instance cases including *Young v Kent CC*,[3] *Kolasa v Ealing Hospitals*[4] and *Buckett v Staffordshire CC*.[5] By contrast, the "activity duty" (so-called) is concerned only with protecting visitors from the danger that may arise from the activities of others and imposes no obligation to supervise or regulate the activities of visitors for their own benefit.[6]

There are two preliminary points of importance here.

First, the requirement[7] that there must be a danger due to the "state of the premises" is one that is common to both the 1957 and 1984 Acts (see *Clerk & Lindsell*,[8] *Tomlinson* and *Poppleton v Trustees of Portsmouth YAC*).[9]

Secondly, their Lordships did not speak with one voice as to whether Mr Tomlinson's accident could be said to have resulted from something to do with the state of the premises as opposed to his own actions. Indeed, Lord Hutton (at [53]) said that he "inclined to the view" that the dark and murky water which

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

[2] *Keown v Coventry Healthcare NHS Trust* [2006] EWCA Civ 39; [2006] 1 W.L.R. 953.

[3] *Young v Kent CC* [2005] EWHC 1342 (QB).

[4] *Kolasa v Ealing Hospital NHS Trust* [2015] EWHC 289 (QB).

[5] *Buckett v Staffordshire CC*, unreported, April 13, 2015, QBD.

[6] See Lord Hobhouse's examples in *Tomlinson* at [69]–[70] and *Poppleton*.

[7] Under s.1(1) of the 1957 Act and under s.1(1)(a) of the 1984 Act.

[8] Professor Michael Jones, Professor Anthony Dugdale and Mark Simpson QC (eds), *Clerk & Lindsell on Torts*, 21st edn (London: Sweet & Maxwell, 2014).

[9] *Poppleton v Trustees of the Portsmouth Youth Activities Committee* [2008] EWCA Civ 646; [2009] P.I.Q.R. P1.

prevented a person seeing the bottom could be "viewed as the 'state of the premises'". Lord Hobhouse, whilst agreeing with Lord Hoffmann,[10] also looked at this issue slightly differently.

Suffice it to say, however, that the majority of their Lordships, including Lord Hobhouse, agreed with Lord Hoffmann. It must, therefore, be taken as settled law that in all cases under both statutes it is a "threshold requirement"[11] to establish that the accident resulted from a danger resulting from the state of the premises as opposed to the injured person's conduct. The only qualification to be placed upon that is that the context of the activities permitted or foreseen may be relevant to deciding whether the premises are in a dangerous state. Similarly, what may be a dangerous state of premises for a child may not be so for an adult.[12]

The above uncontroversial summary sets the scene for our consideration of the cases and issues to which we now turn.

Trespassers on roofs

Several children, teenagers and adult dancers who have drink taken[13] have brought claims over the years when they have fallen off, or through, roofs. Almost all have been found to be trespassers and very few have succeeded. Those claimants' main difficulty, of course, has been to establish liability under the more restrictive bases found in the 1984 Act.

Three of the cases already mentioned merit particular consideration.

In *Young*, Morison J found in favour of a 12-year-old boy (with learning difficulties) who had got onto a roof when attending a youth club run by the County Council. The judge found (contrary to the defendant's evidence) that he had signed in that evening and then chose to go outside to muck around. Access to the roof was relatively easy and the claimant said he climbed up to "retrieve a football". Being a trusting soul and failing to recognise this as the standard excuse[14] usually offered in such circumstances, the judge accepted that explanation, but he also found that the boy had jumped deliberately on the skylight through which he fell. Nevertheless, Morison J found liability established under the 1984 Act (subject to a finding of 50 per cent contributory negligence) and[15] there was no appeal.

The *Young* case was closely considered in *Keown*, a case in which an 11-year-old boy had fallen when trying to climb the underside of a fire escape. The ratio of the Court of Appeal's decision is that what happened in the case in question had everything to do with what the claimant did and nothing to do with the "state of the premises" which merely provided the opportunity for his adventure and accident. Lewison J evidently thought the *Young* decision was plain wrong, mistakenly assuming (perhaps by way of wanting to offer an excuse for Morison J's error) that the "state of the premises" argument had not been taken there. In fact, Lewison J was wrong about that: the argument was both pleaded and pursued; it just did not prevail. That sometimes happens to one's submissions, even the good ones.

Longmore LJ engaged in a slightly different analysis.[16] As is apparent from [13], he thought *Young* a borderline case. He felt that Morison J's decision might be defensible but only on the basis that a roof with a brittle skylight[17] in the factual context might be said to be dangerous.[18]

[10] And with the approach of Lord Phillips MR in *Donoghue v Folkestone Properties Ltd* [2003] EWCA Civ 231; [2003] Q.B. 1008.

[11] As Longmore LJ termed it in *Keown* [2006] 1 W.L.R. 953 at [14].

[12] See Longmore LJ in *Keown* [2006] 1 W.L.R. 953 at [12]; see also (at [13]) how he explained a possible basis on which Morison J's decision in *Young* might have been upheld. But, as Lewison J observed at [32], premises that are unsafe do not become unsafe just (say) because a child is attracted to play there.

[13] *Siddorn v Patel* [2007] EWHC 1248 (QB).

[14] Along the lines of "the dog ate my homework" or "I swerved to avoid a deer that ran out in front of me".

[15] For reasons that do not matter.

[16] Mummery LJ agreed with both judgments so any differences between those of Longmore LJ and Lewison J remain unresolved.

[17] Neither history nor recollection enables us to say whether there was anything unusual about the design or construction of the skylight so that it was "brittle" whereas others (presumably) might not have been so described.

[18] Note that the Court of Appeal did not consider whether it might have been arguable that a free standing duty of care arose as between Young and the Council on the basis of his particular circumstances and attendance at the Youth Club that evening.

Reliance on *Young* was to the forefront of the claimant's arguments in the recent case of *Buckett v Staffordshire CC*.[19]

Thomas Buckett was 16 when he and a number of other boys decided to get into the grounds of their school (though it was closed for the weekend). Whilst they were there, they broke into two locked sheds, stole a large quantity of food and drink and other items before vandalising various other parts of the building. They then went onto the roofs using a set of canopies as an improvised trampoline, did a bit more damage and then climbed to a less immediately accessible part of the roof, probably just to explore. As they returned, but whilst it was still daylight, Thomas Buckett jumped down from an anti-climb fence and fell through a skylight, the glass of which was (unsurprisingly) unable to withstand his weight. He was seriously injured and sued the local authority, essentially on the basis of an alleged breach of the limited duty owed under the 1984 Act.[20]

The claim failed. The key elements of the judge's decision can be summarised thus.

1) The claimant was a trespasser.
2) The defendant knew, or ought to have known, that children of this age did trespass in the grounds (which were obviously likely to be attractive to them).
3) Access to the grounds and to the roof was relatively easy and it was also foreseeable that trespassers would go onto the roof and that they might venture into the area in which the accident occurred and be in the vicinity of the skylight.
4) Although the boys had been guilty of criminal damage on the ground and on the roof, that phase of their escapade was over by the time the claimant was climbing back over and fell.[21]
5) The claimant did not deliberately jump onto the skylight in order to break or damage it: it was more likely he thought it would hold his weight.[22]
6) The school's process of risk assessment was inadequate. Whilst there were in fact few, if any, additional measures that might (within reason) have been taken to prevent all access to the school grounds, there should at least have been an assessment of the likelihood and consequences of youths gaining access to school roofs outside school hours.
7) Nevertheless, there was no sense in which the roof or skylights (the "state of the premises") could fairly be characterised as defective or dangerous. Accordingly, the claim failed[23] because the claimant had "not establish[ed] that the duty under the 1984 Act [was] engaged".[24]

The terrible dangers of low walls and railings

One might have thought that the dangers of falling off or over a low wall or railings, like the dangers of falling off an unprotected bank or cliff, were so obvious that someone injured in those circumstances might expect to have only himself or herself to blame; at least outside areas governed by specific statutory regulation, where there is a relationship of employer-employee or where there are exceptional circumstances (such as the known vulnerability of the victim and an assumption of responsibility for him).

However, it has not always been so in the eyes of our judges, at least until recent cases have focused on the precise nature of the cause of action relied upon; typically, a duty under the Occupiers Liability

[19] *Buckett v Staffordshire CC*, unreported, April 13, 2015, QBD; Judge Main QC, sitting in Stoke as Deputy High Court Judge.

[20] It was conceded that the claimant was a trespasser at the time (the pretence that he too had been on the roof to retrieve another mythical football had long since been abandoned). The claimant also argued that the local authority owed him a free-standing duty of care but the judge firmly rejected that contention (see [200]) and held there was no duty to take care of him as a trespasser (see [201r]).

[21] Accordingly, the judge rejected the defendant's secondary case to the effect that the maxim "ex turpi causa non oritur action" defeated his claim in any event.

[22] See [201] of the judgment; compare the claimant in *Young*. Judge Main did not go so far as to say he actually disagreed with Morison J, only that his was a different approach more in line with *Tomlinson* and *Keown* (which, as he noted, had not exactly provided a "ringing endorsement" of *Young*).

[23] The judge rejected the alternative argument that the claim would have failed on causation even had a breach of duty been established. He would have found contributory negligence (only) to the extent of 50 per cent.

[24] *Buckett*, unreported, April 13, 2015, QBD at [202].

Acts and/or in negligence. We set the scene by looking at three of the older cases in which variations on this point have been litigated.

An example of what one might regard as the generosity of judicial spirit on the one hand or of jurisprudential imprecision on the other is *Lips v Older*,[25] a first instance decision of Mackay J.[26]

This was a personal injury claim brought by a tenant against a landlord after the claimant, who was overly refreshed, and sat on and toppled over the wall above the basement of his flat. Practitioners would be well advised to treat this decision with considerable caution,[27] not least because the claim was not put as a breach of any duty under the 1957 Act but on the basis of some free-standing duty of care supposedly owed by the landlord (see [40] of the judgment). To be frank, the grounds for imposing such a duty appear not to have been subjected to any sufficient argument or analysis, nor is there any basis for saying in what respect the "state of the premises" could be said to have been unsafe or to have caused the accident.

We do not see any reason in principle why the fact that a party is not just an occupier, but is also a landlord, should provide a basis for extending the duty of care under either the 1957 or 1984 Acts or for imposing any common law duty. Indeed, it is difficult to see what grounds there could be for imposing an additional duty on the landlord beyond that arising under the Landlord and Tenant Act 1985.[28] The decision of the Court of Appeal in *Edwards v Baladas Kularasamy*,[29] for example, demonstrates how liability for personal injury can be established under s.11(1A) of the Landlord and Tenant Act 1985.

A less controversial decision (and another old favourite) is *Ward v Ritz Hotels*[30] where the plaintiff fainted and fell over a low balustrade on a balcony. By a majority,[31] the Court of Appeal decided that the occupier was in breach of its common duty of care under the 1957 Act[32] when, in the course of resurfacing the balcony, it failed to recognise that the effect was to lower the balustrade to the extent that it was well below the British Standards Institution's recommended height. Although the BSI recommendations were not binding, the majority held that the occupier should have attached proper weight to that recommendation and, since it had not and as the kind of accident which occurred was foreseeable,[33] found liability was established.

In *Lewis v Six Continents*,[34] on the other hand, the claimant failed. He had leant out of a second-floor window of a hotel and fallen in circumstances that were unclear. The Court of Appeal rejected his claim on the basis that this kind of accident was not reasonably foreseeable and was evidently unimpressed by the argument that the hotel should have carried out a risk assessment.[35] Ward LJ said this:

> "In my judgment, the more serious difficulty is this: breach of that duty, assuming that there was such a duty, would not establish liability. If the risk assessment had recommended the fixing of limiters or guardrails and the risk had been ignored, then of course the claimant would be well on the way to success. But failure to carry out a risk assessment helps not a bit to establish the key requirement, namely that the risk of falling out of the window was reasonably foreseeable at the time and not after the event. It may well have opened the key to further exploration, had the answers in

[25] *Lips v Older* [2003] EWHC 1686 (QB).

[26] Our experience is that it tends be relied on only by claimants in extremis.

[27] Mackay J himself acknowledged that it was a "finely balanced" case; see *Lips* [2003] EWHC 1686 (QB) at [53].

[28] See also the Defective Premises Act 1972 and the useful commentary in *Clerk & Lindsell on Torts* (2014) at paras 12-82–12-86.

[29] *Edwards v Kumarasamy* [2015] EWCA Civ 20; [2015] P.I.Q.R. P11.

[30] *Ward v Ritz Hotel (London) Ltd* [1992] P.I.Q.R. P315 CA (Civ Div).

[31] Contrary to the impression given in *Clerk & Lindsell on Torts* (2014) at para.12-28.

[32] This, ultimately, was the only cause of action in issue; see McGowan LJ.

[33] As Macpherson J had found at first instance. It was also the case that the plaintiff's centre of gravity had been five inches above the level of the balustrade: accordingly (per McGowan LJ), the trial judge rightly held that causation had been established because, had it been at the recommended height, "the plaintiff's fall would on the balance of probabilities not have occurred".

[34] *Lewis v Six Continents Plc (formerly Bass Plc)* [2005] EWCA Civ 1805.

[35] For other cases where the existence (and adequacy) of a risk assessment was considered see, e.g. *Johnson v Warburtons Ltd* [2014] EWCA Civ 258 (no need for a risk assessment to consider whether a purpose-built handrail should have been provided for a set of steps as the risk was obvious), the fairly similar case of *Taylor v Wincanton Group Ltd* [2009] EWCA Civ 1581, *Blair-Ford v CRS Adventures Ltd* [2012] EWHC 2360 (QB) (welly wanging), *Allison v London Underground Ltd* [2008] EWCA Civ 71; [2008] I.C.R. 719, *Uren v Corporate Leisure (UK) Ltd* [2011] EWCA Civ 66; (2011) 108(7) L.S.G. 16, *West Sussex CC v Pierce* [2013] EWCA Civ 1230; [2014] E.L.R. 62, and *West Sussex CC v Fuller* [2015] EWCA Civ 189.

> cross-examination established that there was some risk assessment, but that would have been a forensic point and not one which goes to the establishing of a liability."[36]

Against that background, a number of more recent, but only first instance, cases merit attention.

In *Driver v Dover Roman Painted House*,[37] John Leighton Williams QC, sitting as Deputy High Court Judge, rejected a claim by a woman who injured herself when she fell from a wall into a dry moat having had too much to drink and who was (as he found) trying to climb over it to go for a pee. Applying *Tomlinson* and *Harvey v Plymouth CC*,[38] the deputy judge held that the clamant was in fact a trespasser given the reason why she was climbing the wall. Accordingly, what mattered was not whether this sort of behaviour was foreseeable but whether it had been impliedly consented to. Since it had not, only the 1984 Act arose and, in any case, since the accident had nothing to do with the "state of the premises", it failed anyway.

The decision of Judge Gore QC in *Edwards v Sutton LBC*[39] may be considered as running contrary to the general flow of recent cases on comparable facts. We shall consider it only briefly as we understand that the defendants have been given permission to appeal.

This is the case in which the claimant and his wife were (as the deputy judge held) pushing their bikes across an ornamental bridge in a local authority park. For some unknown reason, the claimant lost his balance and fell over the low parapet wall and suffered serious injury. Judge Gore seems to have been impressed by the absence of a risk assessment and held that the bridge gave rise to an obvious and foreseeable risk of injury (an observation that one might make about every pavement adjacent to a busy road and to a footpath alongside a cliff or harbour wall). He went on to find a breach of the duty owed under the 1957 Act in that the defendants had failed to ensure that their visitors were reasonably safe in using the bridge. Though he accepted there was no duty to put up railings, he did consider that the defendants ought to have put up warning signs or suggested alternative routes.

There are a number of obvious difficulties with this approach. For example, in what sense did the accident have anything to do with the state of the premises? What "danger" was there which was not perfectly obvious to an adult in the position of the claimant? What (following the analysis of Carnwath LJ in *Harvey v Plymouth CC*) is the utility of the test of foreseeability in such a case and how far was it helpful to engage (as the deputy judge did) in a discussion of the *Hughes v Lord Advocate*[40] line of analysis as to foreseeability of different kinds (or degrees) of risk?[41] Was it realistic to suggest that the local authority ought to have warned of that which was obvious and/or that it would have made any difference to what the claimant did?[42] Nevertheless, we defer further comment until we have seen what the Court of Appeal makes of the case.

In *Foulds v Devon CC*,[43] the claimants' son suffered serious injury when the bike he was riding collided with metal railings which had been placed on a low retaining wall. They had broken on impact and he had fallen down the large drop beyond.

The claimants argued that there was a common law duty[44] to ensure that the railings were made strong enough to have withstood such an impact. The defendants denied that it owed any duty of care on the basis that it had assumed no responsibility for the protection of bicyclists and had no other duty beyond making the road safe[45] and had not created any trap or danger.[46] In any case, the local authority was able

[36] *Lewis* [2005] EWCA Civ 1805 at [15].
[37] *Driver v Dover Roman Painted House* [2014] EWHC 1929 (QB).
[38] *Harvey v Plymouth CC* [2010] EWCA Civ 860; [2010] P.I.Q.R. P18.
[39] *Edwards v Sutton LBC* [2014] EWHC 4378 (QB).
[40] *Hughes v Lord Advocate* [1963] A.C. 837 HL.
[41] See also *Darby v National Trust* [2001] EWCA Civ 189 (D foresaw a risk of Weil's disease but not of drowning because the water was murky), *Lewis*, *Perry v Harris* [2008] EWCA Civ 907, *Wisniewski v Central Manchester HA* [1998] EWCA Civ 596, *Poppleton*, *Keown*, etc.
[42] Consider, by contrast, *Donoghue v Folkestone* [203] 2 W.L.R. 1138 and *Staples v West Dorset* [1995] P.I.Q.R. 439.
[43] *Foulds v Devon CC*, unreported, January 9, 2015, QBD.
[44] None under s.41 of the Highways Act 1980 because the surface was in sufficient repair and passable and none brought under the OLA 1957.
[45] *Gorringe v Calderdale MBC* [2004] UKHL 15; [2004] 1 W.L.R. 1057.
[46] *Yetkin v Mahmood* [2010] EWCA Civ 776; [2011] Q.B. 827.

to show that it did regularly inspect and maintain the railings so as to provide some protection for pedestrians but they were never intended to constitute a form of crash barrier for bicycles. So, not unsurprisingly, the claim failed.

The last case in this sequence is *Kolasa*, a decision of another Deputy High Court Judge, Judge Bidder QC.

Mr Kolasa, a Polish builder who had been drinking, was taken by ambulance to the hospital. The A&E Department was on the first floor which meant driving up a ramp/roadway to a covered area outside the entrance. The claimant must have been taken inside but before he had been treated, or at least before his treatment was complete, he decided to leave and went outside. He was seen to climb over a wall (some 3ft 2in to 3ft 6in high) on the side of the ramp/roadway and fell some 30ft to the ground below. Although it was dark, the drop beyond the wall was obvious and the area was well lit.

His case against the hospital was based[47] on an alleged breach of the duty owed under the 1957 and 1984 Acts.

The claimant was able to establish that pedestrians were known to gather in the vicinity of where he fell and also that the risk[48] that people might sit on the wall and lose their balance was recognised. He could also show that following his accident (though in response to another accident in a different part of the site) a review of safety led to the erection of barriers/railings on top of the otherwise unprotected walls.

Judge Bidder dismissed the claim on the following bases.

1) The claimant was a trespasser when he climbed over the wall.[49] He acted deliberately in doing so.
2) The danger of the drop beyond the wall was obvious.
3) The accident had everything to do with what the claimant chose to do and nothing to do with the "state of the premises": accordingly it failed the threshold requirement under both the 1957 and 1984 Acts.
4) The only risk of which the defendant knew, or ought to have been aware of, was the risk that people sitting on the wall might fall, not that they would try and climb (or jump over) the wall. It was in respect of that (sitting) risk that the defendant later erected the railings.
5) The possibility that someone might climb over was not a risk in respect of which it would have been reasonable to have provided protection.
6) Even if the defendant did owe a duty of care, it discharged it.
7) By acting as he did the claimant voluntarily accepted the risk of injury through falling.
8) Alternatively, his actions were the whole cause of the accident.

An occupier's liability for independent contractors

The claimant in *Yates v National Trust*[50] was a young tree surgeon of limited experience working as a self-employed sub-contractor for arboricultural specialists (Joe Jackman, trading as Jackman and Sons) who were engaged by the National Trust. Mr Yates fell and broke his back when working with a chainsaw up a tall tree. Exactly how and why he fell was unclear but it was his case that he was insufficiently trained and experienced for the job and was not adequately supervised.

His claim was not, however, brought against his (effective) employer and the main contractor, Mr Jackman, because of the absence (or at least inadequacy) of Mr Jackman's insurance. Instead, Mr Yates

[47] An earlier attempt to invoke some free-standing duty of care on the basis that the hospital should have taken care of someone who was drunk and might have been expected to have been disorientated was struck out at an interlocutory stage.
[48] A different sort of risk; compare the approach in *Edwards v Sutton* [2014] EWHC 4378 (QB).
[49] Applying Lord Atkin's example in *The Calgarth* [1927] P93, *Harvey v Plymouth* [2010] P.I.Q.R. P18, *Geary v Wetherspoon* [2011] EWHC 1506 (QB).
[50] *Yates v National Trust* [2014] EWHC 222 (QB); [2014] P.I.Q.R. P16.

sued the National Trust. He did not pursue the pleaded claim for breach of the Work at Height Regulations 2008 because (it was, in effect, conceded) such Regulations only applied where the other party was in control of the operation and then only to the extent of that control. It was accepted that control here was (or should have been) exercised by Mr Jackman.

Accordingly, it was argued that the National Trust owed Mr Yates a direct and actionable duty to take care in the selection of a contractor (Jackman) when working on their land, it being foreseeable (and foreseen) that Jackman would engage sub-contractors. In addition it was contended that the work on their land (using chainsaws at height) was, by its nature, exceptionally hazardous so the National Trust could not claim to have discharged any duty by engaging independent contractors.

Nicol J held as follows.

1) No duty of care was owed to the claimant beyond that arising under s.2(2) of the 1957 Act (see below). Particularly, this was not an "extra-hazardous activity" which would provide an exception to the general rule that an occupier is not liable for things done on his land by his independent contractor, (see *Bottomley v Todmorden Cricket Club*)[51] nor would it fall under the special (exceptional) circumstances contemplated in *Ferguson v Welsh*.[52] Particularly, there was no basis for characterising Jackman as a "cowboy operator" which, had it been the case, might have constituted one such "special circumstance"; see [79]–[80] of the judgment.
2) The 1957 Act does not provide some other basis for imposing a duty of care on the occupier in respect of injury to a visitor caused by the act of a third party; *Fairchild v Glenhaven Funeral Services*.[53]
3) The claimant was owed a duty of care under the s.2(2) of the 1957 Act but that duty was not engaged because the accident happened as a result of the way the work was done and/or the claimant's inexperience and had nothing to do with the "state of the premises". In any case, under s.2(3)(b)[54] the occupier would be entitled to have expected his visitor(s) who were engaged as specialist contractors to have taken care to guard against the ordinary risks incidental to the job.
4) There was no duty owed to the claimant in respect of the defendant's selection of an independent contractor. Obviously, had the claimant been an ordinary visitor to the grounds and not the (effective) employee of the contractor, the situation would have been different; see s.2(4)(b) of the 1957 Act.
5) Even if there were such a duty, the National Trust would not have been in breach of it. There was nothing to suggest, at least by the time the accident occurred, that Jackman and his men were not capable of doing a safe and competent job.[55]

Watch the ball, please

Devotees of 20/20 or one day cricket[56] may wonder that no spectator has so far suffered any serious injury as yet another six sails into the crowd. But what if there were a serious injury to the head or the eye,

[51] *Bottomley v Todmorden Cricket Club* [2003] EWCA Civ 1575; [2004] P.I.Q.R. P18.

[52] *Ferguson v Welsh* [1987] 1 W.L.R. 1553; [1987] 3 All E.R. 777.

[53] *Fairchild v Glenhaven Funeral Services Ltd (t/a GH Dovener & Son)* [2001] EWCA Civ 1881; [2002] 1 W.L.R. 1052. See the judgment of Brooke LJ. This part of the CA judgment was not affected by what happened in the House of Lords.

[54] A provision which does not feature in the judgments in *Bottomley*. See also *Roles v Nathan (t/a Manchester Assembly Rooms)* [1963] 1 W.L.R. 1117 CA and *General Cleaning Contractors v Christmas* [1953] A.C. 180 HL.

[55] This issue also leads into discussion of the extent to which the National Trust ought to have checked the certifications of competency of Jackman and his men as well as the nature and extent of his insurance cover; see *Yates v National Trust* [2014] EWHC 222 (QB); [2014] P.I.Q.R. P16 at [60]–[73].

[56] Contrary to expectations, this will affect England supporters equally albeit perhaps not when their side is batting. The exploits of one Brendan McCullum come to mind.

perhaps, especially if the victim were a child? Might there be a claim on the basis that the risk could have been reduced by the erection of nets or, perhaps, the reduction in the boundary (or the use of smaller bats)?

Of course, the very idea of a claim in those circumstances may seem absurd: those sort of precautions would spoil half the fun. But what is the legal answer?

There may be several but we suggest two for the moment.

First, having the ball go into the crowd is a recognised part of the fun as well as part of the game. A remote risk of injury may be foreseeable but it is not reasonably avoidable and, in circumstances where it is a known and accepted feature of the game, it should give rise to no claim in negligence or breach of statutory duty. Further, it is reasonable to expect people to watch out for (and be prepared for) such risks, and to take care of children if they are in their care[57] and to put their hands up, or get out of the way, if they see the ball coming. That principle is to be derived from and consistent with a long line of older cases including *Woolridge v Sumner*.[58]

Secondly, one must consider the nature and extent of the risk. The chance of anyone being hit must be statistically very remote especially if paying attention (and not trying to take the catch). The chance of serious (rather than trivial) injury must be remoter still; see *Harris v Perry*[59] (the bouncy castle case).

A case in (limited) point is *Courtney Harris Browning v Odyssey Trust*,[60] where the occupiers of an ice rink were held not to be liable when the puck flew out and hit a spectator.

The judge (Gillen J) considered the older and more recent authorities and decided that they still provided a sound basis in principle for deciding liability. On the facts he held that neither negligence nor any breach of an Occupiers' Liability Act duty had been made out as the arena was "as safe as could reasonably be expected" and the danger was one that was inherent in the sport being played. He also took account of the fact that the risk of such an event was, or should have been given the "plethora of warning signs", clear to all spectators.

Paddling pools

These, like trampolines in the garden, are probably best avoided, especially if you or your guests are tempted to dive into them. Two recent cases are of interest.

In *Risk v Rose Bruford College*[61] Jay J found against a 21-year-old student who had broken his neck when diving head first into a small inflatable pool.

The judge found that whilst the college owed him a general duty of care the scope of that duty did not extend to protecting someone of full age and capacity from obvious risks. Nor, in relation to what he was doing, was there any sound basis for saying that the college had assumed any responsibility for him or that he had relied on the college to take care of him.

The 16-year-old claimant in *Cockbill v Riley*[62] also dived into a paddling pool during a barbecue held by the defendant at his home. Although there was alcohol served, there was no evidence that people had drunk to excess. Notwithstanding the age of the claimant, the defendant conceded a general duty of care[63]

[57] A court might not take the same view if a ground permitted a group of unsupervised young children into a part of the ground which was particularly at risk.

[58] *Woolridge v Sumner* (1963) 2 QB 43 QBD at 48 per Diplock LJ:

"a person attending a game or competition takes the risk of any damage caused to him by any act of a participant done in the course of and for the purposes of a game or competition."

See also *Murray v Haringay Arena* (1951) 2 KB 529 in which a six-year-old boy hit by a puck at an ice hockey match failed in his claim, but that was because there was no negligence not because of any assumption of risk.

[59] *Harris v Perry* [2008] EWCA Civ 907; [2009] 1 W.L.R. 19.

[60] *Browning v Odyssey Trust Co Ltd* [2014] NIQB 39 QBD.

[61] *Risk v Rose Bruford College* [2013] EWHC 3869 (QB); [2014] E.L.R. 157.

[62] *Cockbill v Riley* [2013] EWHC 656 (QB).

[63] This appears to have been common ground. But we would not say that the existence of any such general or supervisory duty should be taken as read in every case. For children of 14 or under, perhaps, there may be little room for doubt. In the case of adults, it will be only exceptionally that any such a duty would arise in circumstances where (say) people are enjoying themselves, or fooling about, in your garden or pool. A group of 16 year olds are, we think, on the cusp of whether a supervisory duty is or is not owed. In short, the safe approach must be to say that whether there is or is

but contended that it was one of limited scope, in effect, a light supervisory duty in the sense of "keeping an eye on" behaviour and intervening if things got obviously out of hand (see [52] of the judgment).

Bean J accepted that approach. He held that the use of the pool created no foreseeable risk of significant injury nor did it justify a formal risk assessment or a requirement to tell guests not to run or jump into the pool. Accordingly, he found there was no breach of the duty admittedly owed.

Allegations of a free-standing duty

For completeness, we shall conclude by saying something very briefly about the subsidiary or supporting argument that has been run in several of these cases (*Buckett*, for example) to the effect that there is an alternative case in negligence. Ordinarily, such claims get nowhere, at least absent special circumstances such as where the occupier is an adult looking after children and there is an obvious supervisory responsibility.

Essentially, there are two reasons why this is so.

First, the mere provision of premises where the occupier does not purport to supervise the visitor's activities imposes no free-standing duty save where inherent dangers are not obvious;[64] see *Poppleton*.

Secondly, there is no scope or justification for the imposition of an additional or parallel common law duty where the duties under the OLAs are expressly stated to take the place of the same; see s.1(1), (2), (3) of the 1957 and s.1(1) of the 1984 Acts.

not such a supervisory duty will depend on the individual facts and an important feature of the case in question is that the householder was present in person: consider, for example, *Grimes v Hawkins* [2011] EWHC 2004 (QB).

[64] The familiar pre-conditions of liability are either found in the tests of assumption of responsibility/reliance/reasonableness that we see, for example, in *Poppleton* and *Mitchell v Glasgow CC* [2009] UKHL 11; [2009] 1 A.C. 874 or the three-part test of foreseeability/proximity/reasonableness derived from *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605 HL and applied in the context of personal injury cases in *Everett v Comojo (UK) Ltd (t/a Metropolitan)* [2011] EWCA Civ 13; [2012] 1 W.L.R. 150, for example.

Non-Delegable Duties and Worthless Admissions

Nigel Tomkins*

Brain damage; Duty of care; In loco parentis; Independent contractors; Local education authorities' powers and duties; Personal injury claims; Pre-action admissions; Swimming; Teachers; Withdrawal

In this article JPIL Digest Editor Nigel Tomkins, looks at the history and lessons from the "Woodland Case".

On July 5, 2000 schoolgirl Annie Woodland went with her class to the Gloucester Park swimming pool in Basildon. Annie was 10 years old at the time. Her school delegated the teaching of swimming lessons to Direct Swimming Services, which was the name under which Mrs Beryl Stopford traded.

The lessons took place at the Gloucester Park Swimming Pool managed by the Basildon District Council. Mrs Stopford was not present when the lessons took place. She engaged instructor Paula Burlinson and lifeguard Deborah Maxwell to conduct the lesson on her behalf. Subsequently there was a hot dispute as to whether or not these two ladies were employees of Mrs Stopford or whether they were independent contractors.

The class was divided into groups, according to their ability to swim. Annie was in a group of better swimmers, who used the deep pool. In groups of three or four abreast, at 5–10 second intervals, they were to dive into the pool at the deep end, swim the length to the shallow end, exit the pool, and return by the pool side to the deep end ready to swim the next length when it was their turn to do so. The swimming lesson was supervised by a swimming teacher who was in the pool and by a life guard, Deborah Maxwell, who was at the side of the pool.

Shortly after she entered the water, Annie was observed by Paula Burlinson, the swimming teacher of the advanced group, floating vertically in the water. Annie did not respond to questioning or a physical touch. Ms Burlinson shouted for assistance. Another of the swimming teachers, Zoe Dean, responded to the call and the two teachers lifted Annie out of the water. She was assessed to be still breathing and placed in the recovery position.

A few moments later the pool manager, Frank Palmer, attended at the poolside. Annie's breathing was seen to be erratic or fading. Mouth to mouth and cardio-pulmonary resuscitation was administered. She was taken by ambulance to hospital. She had suffered cardiac arrest and a serious brain injury caused through lack of oxygen.

The injuries she suffered that day impact on every aspect of her life. She has short-term memory loss. Her balance is poor and she drops things. She is prone to depression. She tires easily and slurs her words because she's tired, sounding like she's drunk. Inappropriate behaviour in social situations can be a problem and there is much more.

By early in 2001, the Woodland family had instructed a firm of solicitors, Beviss and Beckinsale ("B&B") in Honiton, Devon, to pursue a claim for damages for their daughter's catastrophic personal injuries. B&B wrote a letter of claim to Basildon District Council and on March 10, 2001 the Council's insurers, Royal and Sun Alliance, replied firmly denying that any member of their staff was responsible and stating that the claim should be redirected to Mrs Stopford. B&B therefore sent a pre-action protocol letter of claim to her on March 22, 2001 alleging that there was no adequate level of supervision for the

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swimming lesson. There was initially much confusion about the role of, and relationship between, the various parties and at one time as a result there were five defendants.

Later it became clear that Mrs Stopford must have been a member of a professional association, the Swimming Teachers Association ("STA"). STA had block insurance cover covering not only Mrs Stopford but also Ms Maxwell, though for some reason not Ms Burlinson. It seems that Mrs Stopford passed the letter to STA who referred it to the insurer who in turn asked Crawford & Co to handle the claim on its member's behalf. They denied liability on November 20, 2001.

The Health and Safety Executive had prepared a report into the incident and prepared a further report at the urging of Annie's father. Five years later the report was sent to the claims handlers who then conceded liability and sought copies of the medical reports, school reports and a schedule of special damages.

Conduct of the claimant's case then passed to Pannone LLP sometime early in 2008. It seems that they had great difficulty in obtaining the file from B&B and that when they did receive papers they were incomplete. In their dealings with Crawford & Co, they indicated they were undertaking investigations into quantum, in particular in respect of neurological and care reports. They sought an interim payment on more than one occasion of £5,000.

In November 2008 Fishburns Solicitors took over the conduct of the defendant's case and on December 5, 2008 confirmed that they did, of course, understand that liability had been admitted by the loss adjustors but wished for further information "simply to complete our investigation of the case in its entirety". They said:

> "We are sure that you will understand that having taken this case over, it is preferable to have a complete understanding of the entirety of events and not simply those relating to quantum. We are not seeking to go behind the admission of liability, merely to understand the entire case."

However, on July 27, 2009 the bombshell arrived in the form of another letter from Fishburns saying:

> "The Swimming Teachers Association Ltd hereby now forthwith, and with immediate effect, retracts in full that concession/admission and any other statements or acts that could in any way be construed as any form of admission/concession of liability or responsibility and/or any waiver of rights to alleged contributory negligence and/or to seek a contribution and/or indemnity from any third party.
>
> All liability thus now remains in issue and all of the rights of the Swimming Teachers Association Ltd regarding all of the above and this matter generally are thus (and remain) fully reserved."

Pannone's quite rightly issued proceedings and applied for judgment on the admission. However the judge permitted the admission to be withdrawn under r.14.1A of the Civil Procedure Rules 1998[1] on the basis that the balance, albeit by no great margin, came down in favour of the Association. The Court of Appeal subsequently dismissed the claimant's appeal.[2] The eleventh anniversary of the accident was now rapidly approaching and fully contested litigation was underway.

Part of Annie's case was that there was a "non-delegable duty of care in the capacity *loco parentis*" owed to her by the education authority. This was pursued as a preliminary issue. However, on October 17, 2011 Langstaff J held that the claimant's claim to be owed a "non-delegable" duty of care by the education authority was bound to fail on the pleaded facts, and accordingly he struck out that part of the pleading. The Court of Appeal confirmed that decision[3] with Laws LJ dissenting and accepting that there was a non-delegable duty owed. He pointed out that Annie was generally in the care of the authority's

[1] "14.1A(3) A person may, by giving notice in writing, withdraw a pre-action admission—(a) before commencement of proceedings, if the person to whom the admission was made agrees; (b) after commencement of proceedings, if all parties to the proceedings consent or with the permission of the court."

[2] *Woodland v Stopford* [2011] EWCA Civ 266.

[3] *Woodland v Essex CC* [2012] EWCA Civ 239.

school and swimming lessons formed part of the national curriculum which, of course, the school was bound to deliver.

Subsequently, on the successful appeal, the Supreme Court set out the criteria which will give rise to the existence of a non-delegable duty of care.[4] The case established that in addition to a duty giving rise to vicarious liability there is a parallel personal non-delegable duty. This arises when an organisation "outsources" a service in circumstances where the claimant is vulnerable, where there is a relationship of "protective custody", and where that custody is delegated.

A non-delegable duty will only be imputed in so far as it is "fair, just and reasonable". For example, where a school delegates control to someone else it will be answerable for the "careful exercise of its control by the delegate". The Supreme Court confirmed that the local education authority in this case had owed a non-delegable duty of care. That duty was to ensure that reasonable care was taken to secure the safety of Annie and the other pupils attending the swimming lesson being conducted through an independent contractor. This was a monumentally significant case in the tort of negligence.

Civil proceedings were then pursued against the lifeguard Deborah Maxwell, who was on duty at the swimming pool at the material time, and against the local authority on the basis that it owed a non-delegable duty to take care of her in school swimming lessons and that accordingly it would be liable for the negligence of Deborah Maxwell and/or Paula Burlinson.

Annie Woodland's case was that Paula Burlinson as swimming teacher and/or Deborah Maxwell as lifeguard had failed to exercise reasonable care in the performance of their duties on the day of the accident, in that each failed to keep pupils under observation when in the water and failed within a reasonable period of time to observe that the claimant was in difficulties, raise the alarm and effect a rescue. Her treatment after she had been removed from the water was not an issue at trial.

Annie's battle for justice finally reached a conclusion on February 13, 2015 when Mr Justice Blake found that the swimming teacher and the lifeguard both fell below the standard of care reasonably to be expected when they failed to notice a near-drowning incident involving Annie during the school swimming lesson. He held[5] that Annie's injuries were the consequence of a near-drowning episode, which would have started a minimum of 30 seconds from the first submersion of the airways in water. The probability was that if she had been spotted and rescued earlier, she would not have suffered the injury that she did.

On the evidence, the judge accepted that Annie was in the water for at least 50 seconds and was in difficulty, taking in water for at least 30 seconds. The fact that Annie was in difficulty was not noticed by either Burlinson or Maxwell. No good explanation was given as to why they failed to spot the child for as long as 20–30 seconds. Maxwell had belatedly suggested that she was prevented from adequately performing her duties as lifeguard because the class had started early when she was not present. That was contrary to her earlier evidence and pleaded case and the late change of position was rejected.

Mr Justice Blake accepted that Annie's fellow pupils had encountered her in the water in an advanced state of difficulties and had attempted to rescue her. It followed that she had stopped swimming for longer than the minimum period of 30 seconds. He held that Burlinson's failure to notice a pupil in difficulties in the water for more than 30 seconds fell below the standard of care reasonably to be expected of a teacher. It was not possible to determine why her attention was deflected from the pupils who were in the water and the one pupil who was in difficulty, but it was deflected and the opportunity for an earlier response was missed.

Blake J also held that Maxwell's failure to observe the claimant was a failure to perform her role to the reasonable standard to be expected. She was not paying sufficient attention to users in the water at the material time. Both Deborah Maxwell and Paula Burlinson were negligent and the local authority was

[4] *Woodland v Essex CC* [2013] UKSC 66.
[5] *Woodland v Maxwell* [2015] EWHC 273 (QB).

liable for their negligence. Annie Woodland succeeded on liability as their failures of the duty of care caused or materially contributed to her terrible injuries.

Annie Woodland's case is important for a number of reasons. First of all it has established that a local education authority assumes a non-delegable duty to ensure that activities such as swimming lessons are carefully conducted and supervised, by whomever it might get to perform those functions. Such a duty has never been more important when outsourcing of activities to reduce costs has become the norm. Any activity which is an integral part of a school's teaching function is covered by this duty as are other activities of public bodies. The fact that such activities do not occur on school premises is irrelevant when they occur during school hours in a place where the school choses to carry out that part of its functions.

The case also provides a reminder that a court may permit a party to withdraw an admission even where no new evidence has come to light. Arguments of prejudice if the admission stands, such as the high value claim, may be sufficient for a defendant to be allowed to resile.

Claimants may hold onto an admission by showing that it was relied on to "substantial detriment" for example that but for the admission they would have continued their investigations into liability which is now impossible. However, the claimant has very little protection under the Civil Procedure Rules as they face a balance of prejudice test. It seems to me that claimants would be well advised to issue immediately upon receipt of an admission, particularly in a significant case, then sign judgment otherwise the admission may prove to be worthless.

Mr Justice Blake's decision hopefully marks the end of a battle for justice lasting almost 15 years for Annie Woodland and her family. This is a very sad case indeed. It is a tragedy that it took so long to get justice for Annie. She is fortunate to have been so well represented since 2008 by excellent lawyers. Many would not have been so lucky.

Intoxication and Inebriation: Another Late Night

Christopher Kennedy QC

Matthew Snarr*

Contributory negligence; Discount rate; Intoxication; Passengers; Road traffic accidents; Volenti non fit injuria

Abstract

This article considers the law of contributory negligence governing road traffic accidents where the injured party has accepted a lift from a driver intoxicated by drink or drugs. It aims to provide an overview of the legal landscape and practical advice as to how lawyers should marshal relevant evidence.

Macbeth, Act 2, Scene 2

"Porter	Faith sir, we were carousing till the second cock; and drink, sir, is a great provoker of three things.
MacDuff	What three things does drink especially provoke?
Porter	Marry, sir, nose-painting, sleep, and urine. Lechery, sir, it provokes, and unprovokes; it provokes the desire, but it takes away the performance. Therefore, much drink may be said to be an equivocator with lechery: it makes him, and it mars him; it sets him on, and it takes him off; it persuades him, and disheartens him; makes him stand to, and not stand to; in conclusion, equivocates him in a sleep, and, giving him the lie, leaves him.
MacDuff	I believe drink gave thee the lie last night."

Introduction

Drink (or drugs) for many people is an essential ingredient to a good night out. Unsurprisingly, catastrophic accidents influenced by drugs or alcohol often occur late in the evening.

The Department for Transport's statistics[1] show that in 2012 there was a 26 per cent increase in fatal accidents caused by drink driving. 290 people were killed and 1,210 people were seriously injured. Impairment by drugs was a contributory factor in 54 deaths caused by road traffic accidents in 2011.[2]

The statistics reveal the sad fact that alcohol and drugs remain a significant cause of driving related fatalities and serious injuries.

Lawyers acting for both parties in relation to accidents involving drunk pedestrians or the passengers of drunk drivers need to know how the law approaches situations in which the incidence of alcohol or drugs has impaired either party's ability to make rational judgments.

The legal background: Contributory negligence

Until the Law Reform (Contributory Negligence) Act 1945 came into force, the contributory negligence of a claimant was a complete defence to a claim. The award of damages in tort was either all or nothing. This changed in 1945.

Section 1 of the Law Reform (Contributory Negligence) Act 1945 provides:

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[1] *https://www.gov.uk/government/statistical-data-sets/ras51-reported-drinking-and-driving* and *http://www.bbc.co.uk/news/uk-23529736* [Accessed April 27, 2015].

[2] *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/98431/fs-mg-drug-driving.pdf* [Accessed April 27, 2015].

> "Where any person suffers damage as a result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage should not be defeated by reason of the fault of the persons suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the Claimant's share in the responsibility for the damage."

For there to be a reduction for contributory negligence three elements must be proved against a claimant:

1) that he or she was in some way at fault;
2) that the fault was partly causative of the injury; and
3) that it is just and equitable for damages to be reduced to reflect that fault (in which case they are reduced to the extent that is just and equitable).

The burden of proving contributory negligence lies on the defendant and the party who bears the burden of proof must go first. However, the defendant may not have any evidence to call which can pose a problem as is illustrated by the facts of *Dawes v Oldest* [2007] EWHC 1831. In *Dawes* the claimant was struck by the defendant who had stolen a car and was being chased by the Police. Primary liability was admitted. The defendant, however, alleged that the claimant was negligently running across the carriageway when he was struck. Neither the claimant nor the defendant gave evidence although there was expert reconstruction evidence. In his judgment Eady J accepted that the claimant was at least partly in the carriageway when he was struck. However, he held that the there was not enough evidence to piece together what exactly happened and he could not conclude that the claimant had either deliberately or recklessly placed himself in front of the vehicle. Despite the presence of a strong possibility that there may have been contributory negligence it could not be elevated to a probability.

It is reasonable to wonder whether the driver's legal team might have been tactically better off putting the entire claim in dispute. This would then have placed the burden on the claimant to prove what happened. The judge would have had to make findings of fact and that would, at least, have made it more difficult for the judge to find for him without finding that he contributed.

The passenger of the intoxicated driver: "Volenti non fit injuria"

In *Dann v Hamilton*[3] the claimant accepted a lift from the defendant knowing that he was drunk. Asquith J held that the doctrine of volenti did not apply but it might have been different if there had been a more radical set of facts such as extreme inebriation where the drunkenness of the driver was so obvious that it was akin to accepting a glaringly and obviously dangerous occupation such as a bomb disposal expert.

The admittedly remote possibility of a volenti defence raised by *Dann* was dashed, as far as road traffic collisions were concerned, by s.148(3) of the Road Traffic Act 1972[4] which statutorily prohibited the defence of volenti to road traffic injury claims. Water and air collisions are capable of attracting a defence of volenti.[5]

The passenger of the intoxicated driver: Contributory negligence

In *Owens v Brimmell*[6] Watkins J conducted a review of both national and commonwealth law and provided a legal formula for the determination of contributory negligence for passengers which remains good law nearly 40 years later.

[3] *Dann v Hamilton* [1939] 1 K.B. 509 KBD.
[4] Now the Road Traffic Act 1988 s.149(3).
[5] See *Morris v Murray* [1991] 2 QB 6 QBD in which the claimant accepted a ride in a light aircraft with a drunk pilot and the claim failed on the grounds of volenti.
[6] *Owens v Brimmell* [1977] 1 QB 859 QBD.

Owens had accompanied Brimmell on an evening's drinking. Brimmell drank eight to nine pints. As he drove Owens home, he crashed into a lamppost causing Owens to sustain serious injuries.

Watkins J held that the doctrine of volenti did not apply. However, he found that the claimant knew or ought to have known that the defendant was drunk and unfit to drive. Accordingly he reduced his damages by 20 per cent. The ratio of the judgment is set out below:[7]

> "thus, it appears to me that there is widespread and weighty authority for the proposition that a passenger may be guilty of contributory negligence if he rides with the driver of a car who he knows has consumed alcohol in such quantity as is likely to impair to a dangerous degree that driver's capacity to drive properly and safely. So, also, may a passenger be guilty of contributory negligence if he, knowing that he is going to be driven in a car by his companion later, accompanies him upon a bout of drinking which has the effect, eventually, of robbing the passenger of clear thought and perception and diminishes the driver's capacity to drive properly and carefully. Whether this principle can be relied upon successfully is a question of fact and degree to be determined in the circumstances of which the issue is said to arise."

Watkins J set out two ways in which a passenger may be guilty of contributory negligence as a result of accepting a lift from an intoxicated driver. The first way is if he has actual knowledge that that driver's capacity to drive properly may be impaired "to a dangerous degree" through alcohol. The second way is if he goes drinking with someone whom he knows is going to give him a lift home later.

The decision in *Owens* answers some but not all questions that can arise. Can a claimant rely on their impaired perception by alcohol as a reason for not appreciating that a driver was intoxicated? What does "to a dangerous degree" mean? Is it sufficient for a defendant to show that at the time of the accident the defendant driver was over the legal limit? These considerations will be considered in greater detail below.

A duty to assess or a duty to interrogate?

In *Booth v White*[8] the defendant driver was approximately two and a half times over the legal limit. The claimant admitted drinking some 10–15 pints (closer to 15) during the day and at the time he elected to accept a lift home from the defendant he was incapable of making a reliable judgment.

The claimant's wife testified that the defendant appeared fine shortly before the claimant accepted a lift from the defendant. That evidence was unchallenged by the defendant and this clearly influenced the judge's final decision. The trial judge held that the claimant could not rely on his drunken state as a defence to making a proper judgment of the defendant's fitness to drive. The standard was to be judged by what a reasonable man should be expected to do. However, the trial judge held that, had a reasonable man made an assessment of the defendant, it would have been similar to that of the claimant's wife which was that the defendant appeared fine and that therefore there was no impairment to accepting a lift. Accordingly no reduction for contributory negligence was held. The defendant appealed to the Court of Appeal.

The defendant's key submission was that the claimant was under a duty to interrogate the defendant and thus should have ascertained that the defendant had drunk earlier that day. Rejecting this proposition, Brooke LJ held that the law requires the passenger to make an *assessment* of the driver but the law would take a wrong turn if it required the passenger to conduct an *interrogation* of the driver (see [20] and [21] of the judgment).

Brooke LJ cited with approval the judgment of McCowan LJ in *Brignall v Kelly*.[9] In this case the defendant was slightly more than twice over the limit. The defendant's expert evidence was that the defendant would have been obviously drunk at the time he provided a lift to the claimant. The claimant

[7] *Owens* [1977] 1 QB 859 at 886H–867A.
[8] *Booth v White* [2003] EWCA Civ 1708; (2003) 147 S.J.L.B. 1367.
[9] *Brignall v Kelly*, unreported, May 17, 1994, CA.

called five witnesses stating that the defendant appeared entirely normal. The defendant accepted that he had drunk four pints in two hours. The claimant saw him drink one pint. The trial judge held that the defendant had not established contributory negligence. On appeal McCowan LJ rejected the defendant's argument there was a duty to interrogate.

In the light of *Booth* and *Brignall* a number of observations can be made. First, the prospects of defending an allegation of contributory negligence are significantly enhanced if the claimant is able to rely on a supporting witness to testify to the sobriety, real or apparent, of the driver. Secondly, there may be a point at which the required assessment triggers a duty to ask a question along the lines of "How much have you had to drink?" Thirdly, might there be a situation in which information from or observations of a third party trigger a duty to ask a similar question.

The benchmark of 20 per cent reduction for contributory negligence for a pedestrian accepting a lift from an inebriated driver was set by Watkins J in *Owens*[10] with the following justification:

> "In such a case as this the degree of blameworthiness is not, in my opinion, equal. The driver, who alone controls the car and has it in him, therefore, to do, whilst in drink, great damage, must bear by far the greater responsibility."

Higher or lower: Different judicial discounts

In *Gleeson v Court*[11] HH Judge Foster QC held that, where the claimant had been travelling in a boot with a drunken driver an appropriate discount was 30 per cent. He took as his starting points the *Owens* discount of 20 per cent and the *Froome v Butcher* [1976] QB 286 (CA) at 25 per cent but felt that it was inappropriate to aggregate them.

Akers v Motor Insurers Bureau[12] a case in Guildford County Court before HH Judge Bishop,[13] is an interesting one to compare with *Gleeson*. Both the deceased and the defendant were stranded in Margate. Both had been drinking. The deceased put pressure on the defendant to drive them home. The defendant was initially reluctant saying that he did not own the car and was uninsured. The deceased entered the boot of the vehicle and was transported home in the boot when an accident occurred in which he was fatally injured. At trial HH Judge Bishop did not aggregate the reductions for the seatbelt and the alcohol point and reduced the claimant's damages by the full 45 per cent. He may have been influenced by the fact that it was the deceased who placed pressure on the defendant to drive them both home.

It would be interesting to see whether a judge could be persuaded that a passenger of a driver who has consumed both alcohol and drugs ought to receive a higher discount than the 20 per cent benchmark established in *Owens*.

In *Buckingham v Symons-D'Souza*[14] Jupp J, in applying a discount of 20 per cent, also held that if the two men, driver and passenger, had set out on a pub crawl together that would warrant a higher reduction than the 20 per cent in *Owens*, if the passenger subsequently accepted a lift from the same, but now inebriated driver. The majority of cases rest on factual scenarios where the driver and passenger are well known to each other. There is a dearth of cases where the passenger is in no fit state to make an assessment accepts a lift from a driver with whom they have not been out drinking and who subsequently turns out to be over the legal limit. It would be interesting to see whether the court would have equal sympathy for the injured party in this scenario or apply a rigid objective standard.

[10] *Owens* [1977] 1 QB 859 at 867G.
[11] *Gleeson v Court* [2007] EWHC 2397 (QB); [2008] R.T.R. 10.
[12] *Akers v Motor Insurers Bureau* , unreported, May 15, 2002, CC (Guildford).
[13] This case eventually went to the Court of Appeal (*Akers v Motor Insurers Bureau* [2003] EWCA Civ 18; [2003] Lloyd's Rep. I.R. 427) on a separate point pertaining to the liability of the Motor Insurers Bureau in which HH Judge Bishop's decision at first instance was overturned.
[14] *Buckingham v Symons-D'Souza* [1978] C.L.Y. 723.1.

In *Meah v McCreamer*[15] the claimant suffered severe head injuries and brain damage when a car in which he was a passenger was involved in an accident caused by the negligence of the driver. Following the accident the claimant developed a severe personality change which resulted in sexual assaults on woman for which he was convicted and incarcerated. He sought to recover damages for his imprisonment. He succeeded in part but Mr Justice Woolf (as he then was) held that it was appropriate to reduce his damages by 25 per cent taking into account the claimant's contributory negligence in travelling as a passenger with a driver he knew to be drunk. The defendant was described by a police officer as manifesting the conventional symptoms of a driver who had been drinking excessively. At the time of the officer's attendance at the scene of the accident the blood sample level, taken half an hour post accident, was equivalent to 143mg per 100ml of blood, in excess of the legal limit of 80mg. The claimant had also been drinking in fact with the defendant at a country club for a period of two and a half hours. Woolf J held:

> "I have no doubt at all, on the evidence, that if the Plaintiff had not himself been affected by drink it would have been quite obvious to him that the Defendant was not in a fit state to drive, that there was an obvious risk in accompanying the Defendant in that motorcar, and that this is an appropriate case, therefore, in which there should be a finding of contributory negligence against the Plaintiff on the basis of the approach indicated by Watkins J. Although urged by the Defendant to take the view that this was a case which was considerably worse than that described by Watkins J and treat it on the same basis as Watkins J by Counsel for the Plaintiff, I have come to the conclusion that the Plaintiff is entitled to succeed in this case because there was a clear negligence on the part of the Defendant but that he was also negligent and that the appropriate proportion of blame which he should bear is 25%. It accordingly follows that any damages I award will be reduced by that amount."

In *Donelan v Donelan*[16] HH Judge Astill sitting as a judge of the High Court held that the claimant was 75 per cent responsible for his injuries after sharing a car driven by a drunken defendant. HH Judge Astill distinguished the general thrust of the cases which have been reviewed above, and others, on the basis that the facts were different in that they pointed towards a much greater degree of responsibility on the part of the claimant. The claimant was a 38-year-old male and the defendant was a 23-year-old female. They were both drunk. The claimant had decided that the defendant should drive. He knew her to be an inexperienced driver. He was dominant in every way. HH Judge Astill held that there was no doubt that the defendant would not have made the decision to drive but for pressure applied by the claimant.

Practical tips

Practitioners litigating cases in this area may wish to consider the following practical tips.

1) If the case involves a fatality, obtain full documentation from the coroner especially the documents prepared by the forensic pathologist and the toxicologist. These normally will provide some insight into the level of intoxication of the deceased driver.
2) It will often be appropriate to obtain a report by an independent expert toxicologist. It would be sensible to instruct him or her at an early stage in proceedings.
3) Lawyers representing the passenger may not consider it desirable to undertake a detailed investigation of the driver's medical history. However, the lawyers representing the driver will want to know as much as possible about their medical history, including their weight, height, relevant medical conditions and previous drinking capacity, if appropriate, by reference to relevant lay witness evidence. The information will help the toxicologist to provide a more accurate opinion as to the rate at which alcohol would have been absorbed

[15] *Meah v McCreamer* [1986] 1 All E.R. 943 QBD.
[16] *Donelan v Donelan* [1993] P.I.Q.R. P205 QBD.

into that individual's body which could enhance the accuracy of the experts' opinion as to the likely effect on the individual.

4) The reliability of the sample is important. It is the author's experience that the reliability of the sample can be and is frequently challenged. The site the sample is taken from is important. Is it a blood sample or is it a urine sample? Is there a difference between the reliability of those samples? If the sample is taken from another site does that undermine the reliability of the sample? What is the passage of time between the time of the accident to the time the sample was taken? If there is a significant passage of time, is it possible for micro-organisms to affect the reliability of the sample? What is the passage of time between the time the sample was taken and the time the sample was tested? Were preservatives added to the sample and does this affect the reliability of the sample?

5) The effect of alcohol on the driver is often the key issue. The starting point is to ascertain via the toxicologist what the effect of the level of alcohol at the time of the accident would have been on an ordinary person and then to gauge that behaviour specifically, if possible, as regards the driver. However, it should be born in mind that some individuals are able to absorb or receive alcohol with less effect than others. The authorities suggest that direct witness evidence as to the state of the driver is often persuasive.

6) Backdating the sample to the time of the accident can be difficult. It will be important to ascertain the following matters: the time of the sample, the time the driver started drinking and the time of the accident. Average alcohol absorption rates may enable the toxicologist to provide a bracket of time in which the alcohol would have been absorbed and a bracket of relevant blood alcohol levels. It will be important to ascertain whereabouts on the scale the legal limit is.

7) In some cases, the effects of alcohol may have been exacerbated or aggravated by the effects of cannabis, cocaine or other narcotics. It is important to engage with the toxicologist as to what, if any, the effect of the narcotics would have been on the driver and/or any exacerbation or interplay between the narcotics and alcohol.

8) In terms of establishing what the effects of the alcohol would have been, this needs to be spelled out by the toxicologist, i.e. slurred speech, ability to walk in a straight line, tiredness, loss of co-ordination or mumbled language.

9) An interesting consideration is whether or not to deploy a toxicologist to resolve an evidential dispute between the numbers of drinks taken by the defendant. For example if the claimant's evidence is that the defendant drank two drinks but the defendant's insurer's evidence is that he consumed four drinks, is the toxicologist able to assist with whether one version of events is more likely than another? Even if the toxicologist is not able to reliably backdate the blood sample to provide a blood alcohol level at the time of the accident, can she or he provide an indication as to volume of consumption? Another consideration for both legal teams would be whether or not if, for example, the defendant's evidence was accepted that it was more likely than not that the defendant drank four pints, it would be a reasonable inference of fact to find that the claimant ought to have realised that the defendant was impaired to drive, i.e. by volume of alcohol alone as opposed to external signs? This question leads into another key consideration in these types of cases which is how much the claimant actually saw the defendant drink.

10) Split trials may be important. They can exert pressure onto either side. The claimant's legal team will need to consider on the strength of their case whether it is appropriate to have a split trial or not. Considerations as to the burden of proof may apply, as previously discussed, if the defendant has already admitted primary liability.

Conclusion

A discount of 20 per cent is likely to be seen as a benchmark but as cases post-*Owens* have shown, the courts may increase that figure subject to the incidence of additional negligent acts or aggravating factors. One such factor might be a combination of alcohol and drugs together. Pressure applied to a driver to act irresponsibly is unlikely to engage the sympathies of the court and may result in a higher discount being applied.

Owens was decided in 1977, at first instance, at a time when driving after the consumption of alcohol was more socially acceptable. Whilst all attempts to revisit the level of discount in relation to the failure to wear a seatbelt have been rebuffed by the Court of Appeal it does not necessarily follow that the answer would be the same in relation to alcohol or drugs.

Whilst the law is superficially clear that there is a duty to assess but not a duty to interrogate, whether the results of an assessment or information imparted by a third party might trigger a duty to ask questions remains uncharted territory.

As regards whether the law applies an objective or subjective test to the inebriated passenger when determining whether or not they are entitled to ignore the consequences of their own impaired judgment by reason of alcohol, we believe the courts are likely to apply an objective standard, i.e. what the reasonable person on the London tube ought to have known. However, it is to be noted that the authorities do not automatically assume that the passenger is contributorily negligent merely because they have been drinking. Findings of contributory negligence have tended to be based on either reckless conduct or actual knowledge not constructive knowledge. It is the context in which that drinking occurs which is key. Watkins J referred to "reckless" behaviour by the passenger and the driver in *Owens* in his judgment when he states:[17]

> "I think this is a clear case of contributory negligence either upon the basis that the minds of the plaintiff and the defendant behaving recklessly, were equally befuddled by drink so as to rid them of clear thought and perception, or, as seems less likely, the plaintiff remained able to, and should have if he actually did not, foresee the risk of being hurt by riding with the defendant as passenger."

The litmus test for "a dangerous degree" is likely to be the legal limit but that will not always be determinative, for example, if there is reasonable evidence to suggest that the driver did not appear inebriated or could "take his or her drink". The point is untested on appeal. A court may conclude that irrespective of the unlawful level of alcohol consumption it does not automatically translate into a finding of fact that the driver was impaired to a dangerous degree. As Watkins J held, it will depend on the fact and degree to be determined in all the circumstances.

[17] *Owens* [1977] 1 QB 859 at 867G.

Care Act 2014: Changes to the Means Testing of Personal Injury Damages and their Implications for the Form of Award

Austin Thornton*

LT Care costs; Community care; Damages; Local authorities' powers and duties; Lump sum payments; Means testing; Periodical payments

The author has previously raised with practitioners[1] the impact in partial settlement cases that a requirement to access social services funding for care may have on consideration of the form of award as between periodical payment and a lump sum. This article looks at the implications of the Care Act 2014 for claimants living in England. This article does not apply to Wales which has legislative competence in this area and where the law diverges significantly from that in England.

The issue

From the late 1990s to about 2009, the implications for awards of damages to pay for private care of the availability of state funded care were explored in a number of important cases. The issues were essentially two fold. First, were claimants required to mitigate their loss by claiming statutory funding for care from the NHS or from their local council? The answer of the Court of Appeal in the case of *Peters v East Midlands*[2] was "no". Claimants had a right to choose their source of remedy. But they should not seek both damages for private care and also statutory funding for care where this would achieve double recovery.

Addressing this led to judicial consideration of the second issue which was how care damages would be treated within the social care means testing systems.

This proved a complex area not least because until the introduction of the Care Act on April 1, 2015 there were two social care means testing systems. The first related to the provision of residential care provided under s.21 of the National Assistance Act 1948. Regulations made under s.22 provided a comprehensive and largely non-discretionary means testing regime. These Regulations set out a number of statutory disregards of personal injury damages. Implementation was subject to mandatory guidance, the Charging for Residential Accommodation Guide ("CRAG").

Domiciliary care was, however, provided under s.29 of the National Assistance Act 1948. Councils had a power to charge for domiciliary care provision under s.17 of the Health and Social Services and Social Security Adjudications Act 1983 ("HASSASSA Act 1983"). There are no means testing Regulations which prescribed a method and hence no statutory disregard of personal injury damages. But council charging was subject to mandatory guidance known as "Fairer Charging".

In *Firth v Geo Ackroyd*,[3] a defendant council which was joined in proceedings sought to argue that personal injury damages disregards in residential care means testing applied only to the award for pain and suffering and loss of amenity. This was rejected. Disregards applied to the whole award including damages awarded for care.

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[1] [2013] J.P.I.L. 182.

[2] *Peters v East Midlands SHA* [2008] EWHC 778 (QB); [2008] LS Law Medical 370.

[3] *Firth v Geo Ackroyd Junior Ltd* [2001] P.I.Q.R. Q4 QBD.

In *Freeman v Lockett*,[4] the defendant argued that the claimant could be expected to receive statutory funding in the future and that anticipating this, the court should make an appropriate deduction from the care award. Mr Justice Tomlinson declined to do so noting that this would make the claimant dependant upon state funding and noting that councils had discretion in the way they assessed resources under the Fairer Charging guidance so that the extent of such statutory support was uncertain.

In the case of *Crofton v NHSLA*,[5] in defending the mitigation point, the claimant sought to argue that he could obtain no benefit from state care funding for care at home, because his care damages would be taken into account in the means test. The logic was that even if in principle, he could be expected to mitigate his loss by claiming state care, the point did not arise in practice because no benefit could be obtained from such a claim. The court's answer was both yes and no. It held that for domiciliary care, income payments were assessable at the council's discretion but capital payments were subject to the CRAG guidance and hence by implication, the statutory disregards of personal injury damages.

It was implicit in these cases that a claimant entitled to a partial payment for care and who as a consequence needed to access state funding for top-up care needed to have regard to the means testing provisions to determine whether such care would be available.

The means testing provisions for domiciliary care appeared to give greater protection to care damages rolled up into a lump sum than those paid as a periodical payment.[6] However, as foreseen by Mr Justice Tomlinson in *Freeman & Locket*[7] councils began to argue that these disregards were non statutory. Accordingly on their view, even care damages rolled up into lump sums were assessable because they were entitled to depart from statutory guidance for good reason and the existence of such damages was sufficient reason.

The position of perhaps the majority of English local authorities over the last few years has thus been that as regards domiciliary care provision, damages received for care in partial settlements could be means tested, whatever the form of the award. This proposition remains untested. The legal uncertainty on the point and councils' wish to avoid judicial review proceedings has been the main benefit to a claimant taking a lump sum.

The impact of the Care Act 2014

The Care Act 2014 changes the law regarding the means testing of domiciliary care and should resolve many of the present uncertainties. It is the author's view, however, that this may give rise to significant disputes before councils accept that their capacity to take account of care damages is now significantly more restricted. However, pitfalls remain for the unwary advisor.

The Care Act was brought into force on April 1, 2015. Much of the previous care legislation will be wholly or substantially repealed including the National Assistance Act 1948 and the Chronically Sick and Disabled Persons Act 1970.

Transitional provisions[8] mean that Part 1 of the Act, which contains all the provisions with which this article is concerned, only applies to new cases until they are reassessed, or April 1, 2016, which ever is earlier. Councils are expected to have carried out a reassessment by that date and the Care Act will apply to all cases from then. The old law, including the law on charging, will apply until these conditions are met.

[4] *Freeman v Lockett* [2006] EWHC 102 (QB); [2006] P.I.Q.R. P23.
[5] *Crofton v NHS Litigation Authority* [2007] EWCA Civ 71; [2007] 1 W.L.R. 923.
[6] See my previous article.
[7] *Freeman* [2006] P.I.Q.R. P23 at [29].
[8] The Care act 2014 (Transitional Provision) Order 2015

The Care Act provides for a duty of assessment.[9] There is a duty to apply new statutory eligibility criteria to the assessment.[10] There is a statutory duty upon councils to meet the eligible needs identified in the assessment.[11]

There is a power within the Act to charge for services provided unless those services are exempt from charging.[12]

Section 17 sets out that where the council proposes to make a charge, it must make a "financial assessment" of the adult's financial resources and the amount they would be likely to be able to pay.

Section 17(7) requires that regulations must make provision about the carrying out of a financial assessment. Section 17(12)(a) provides that Regulations may be made "for treating, or not treating, amounts of a specified type as income or capital".

The Care and Support (Charging and Assessment of Resources) Regulations 2014 ("CSCAR") were laid before Parliament on October 30, 2014.

The new Regulations are very similar to the previous residential care charging Regulations.[13] However that similarity disguises some significant differences in the way that care and support will be means assessed.

The most significant innovation is that CSCAR provides a regulatory charging scheme for both residential and domiciliary care. The discretion given to local authorities to design their own domiciliary care charging scheme under the current legislative regime largely disappears. If a local authority wishes to charge, they must apply the statutory method of charging. There is some discretion given to local authorities to adopt a more generous disregard policy than the statutory minimum. However this only applies to domiciliary care.[14]

When faced with the task of interpreting the National Assistance (Assessment of Resources) Regulations 1992 ("NAAR"), the courts have expressed their dismay. In *Crofton* LJ Dyson ended his judgment with the following remarks:

> "We cannot conclude this judgment without expressing our dismay at the complexity and labyrinthine nature of the relevant legislation and guidance, as well as (in some respects) its obscurity. Social security law should be clear and accessible. The tortuous analysis in the earlier part of this judgment shows that it is neither."[15]

Save that they unify the means testing regimes, the CSCAR do nothing else to simplify interpretation.

It is the author's opinion that the Regulations do have a consistent and intelligible structure but generally it has not been appreciated that they are dealing separately with situations where funds are held and in the case of income, received, by on the one hand a third party and on the other by the claimant for care.

As regards capital they cover separately, the position where capital is held by the claimant, by the court, including their deputy, by a trustee of a personal injury trust and by another third party.

As regards income, they also cover separately the position where income is received by those different entities and make specific provision for transfer between those entities, for example where a personal injury trustee makes a payment to the beneficiary of that trust.

This level of complexity can, I am afraid, only be explained by looking at each case separately.

In what follows, my reference to "the claimant" means both the person claiming personal injury damages and the person seeking statutory support.

[9] Care Act 2014 s.9.
[10] Care Act 2014 s.13.
[11] Care Act 2014 s.18.
[12] Care Act 2014 s.14.
[13] National Assistance (Assessment of Resources) Regulations 1992 ("NAAR").
[14] Care and Support (Charging and Assessment of Resources) Regulations 2014 ("CSCAR") reg.15(2).
[15] *Crofton* [2007] 1 W.L.R. 923 at [111].

Unless otherwise stated, these disregards now apply to *both* domiciliary and residential care charging. Before implementation of the Care Act, these two statutory duties were separate. Under the Care Act, there is no separate statutory duty to provide domiciliary or residential care. Both are simply one means of meeting care needs as set out in s.8 of the Act.

Lump sum damages held by the claimant

Under para.16 of Sch.2 to the CSCAR, the position as regards the payment of personal injury damages to the claimant in person remains the same as regards residential care but is now extended to domiciliary care.

The first payment made to the claimant in consequence of any personal injury is disregarded for 52 weeks subject to an exception. The payment does not need to be damages, so would include an insurance payment under the claimant's own insurance policy. There is no disregard under this provision for any payment from a trust where the funds of the trust are derived from a payment made in consequence of any personal injury to the claimant.

The exception is for "any payment or any part of any payment that has been specifically identified by a court to deal with the cost of care". The wording here does seem to greatly limit its scope since only in cases that go to trial on quantum does the court specify what is awarded for care.

Lump sum damages held by a personal injury trust

Under para.15 of Sch.1 to the CSCAR, where the funds of a trust are derived from a payment made in consequence of any personal injury to the claimant, the value of the trust fund and the capitalised value of the right to receive any payment under that trust are disregarded.

Lump sum damages held in court or by a deputy

Paragraph 25 of Sch.2 to the CSCAR disregards any personal injury lump sum:

- which is administered on behalf of a person by the High Court or the County Court under r.21.11(1) of the Civil Procedure Rules 1998 or by the Court of Protection; or
- which can only be disposed of by order or direction of any such court; or
- where the person concerned is under the age of 18, which can only be disposed of by order or direction prior to that person attaining age 18.

This disregard applies to personal injury funds held by a Court of Protection appointed deputy (*Walsall MBC*).[16]

This disregard also applies to a fatal accident award for the death of one or both parents whilst the person concerned remains under the age of 18.

The notional capital provision

Under reg.22 of the CSCAR, where capital is held by a third party the claimant can ordinarily be expected to obtain it if they are able to do so. However, reg.22 exempts from this requirement both personal injury damages held in trust and funds under the control of the court, which includes deputyships.

[16] *R. (on the application of ZYN) v Walsall MBC* [2014] EWHC 1918 (Admin); [2015] 1 All E.R. 165.

Periodical payments and investment received by a personal injury trust

As with *capital* held on trust or controlled by the court, payments of income received by a trustee are not payments received by the claimant. This applies both to investment income and periodical payments.

In the same way that the claimant is not required to apply to a trustee or the court to obtain capital, neither is he required to apply for income.[17]

This means that investment income payable to trustees is exempt from assessment. This is good news for claimants because of course the receipt of such income has already been discounted in the calculation of the award.

However, as regards the payment of a periodical payment to a trustee, this should not be organised for the purpose of avoiding incurring care fees as this may cause the claimant to be treated as possessing that income.

Periodical payments and investment received by the court or by a deputy

The author is not aware of a case of periodical payments being made into court. However, as further to the case of *Walsall MBC*, the disregard for funds controlled by the court applies to funds helf by deputies, periodical payments made to the deputy will be disregarded under the CSCAR whilst they remain with the deputy.

Income upon court-controlled funds will also be exempt from assessment although for other reasons, local authorities have never to the author's knowledge sought to assess such income.

Income paid from a personal injury trust to the claimant

When the trustee/s pay income out from the trust to the claimant, this income is then legally held by the claimant and it is covered by the Regulations applying to receipts of income by the claimant himself.

Under reg.19(3) of the CSCAR, income derived from capital is generally treated as capital. Most income derived from capital is investment income. The Regulations use the usual tariff income approach to such receipts and therefore it would be double counting to means assess both a regulatory payment representing income on capital and also the actual investment income received. However not all income from capital is in the nature of investment income. Regulation 19(3) exempts both rental income on property and business assets and also payments from capital held in a personal injury trust from the general provision with the result that these are treated as income.

Given this, such payments will only be disregarded if they fall within any of the disregards referred to in Sch.1 to the CSCAR.

Paragraph 15 of Sch.1 disregards "relevant payments" which include periodical payments, annuities under structured settlements and payments out of personal injury trusts. Importantly however, this disregard makes special provision for payments for care which qualifies the more general disregard of relevant payments. So para.15(2) of Sch.1 states that the following is disregarded:

> "Any relevant payment made or due to be made at regular intervals which is intended and used for any item which was not specified in the personal budget but was specified in the care and support plan."

The wording in this provision is tortuous, but basically this means that if an income payment is received by the claimant in person that was not intended to provide for care that the local authority assesses is eligible for their support, and provided the local authority recognises that intended care as a genuine even

[17] CSCAR reg.17(2).

though ineligible need and provided also that claimant uses that payment to purchase that care, then the payment is disregarded, otherwise a payment for care is taken into account.

These may be significant hurdles to overcome. The result is that there is a significant risk that periodical payments made to the claimant either directly or paid to the claimant via their trustee will be taken into account as income.

Income paid from court or from a deputy to the claimant

Payments to a claimant directly referable to investment income should be treated as capital under reg.19(3). The general capital limits apply to the total of the claimant's assessable capital of which that payment forms a part.

What would happen if a deputy paid out a periodical payment to the claimant? A periodical payment is not investment income. There are significant complexities around this area. However, as a matter of practice, since a deputy is appointed for an adult who to an extent lacks capacity to deal with property and affairs, such payments would not be expected as it is usually the function of the deputy to contract with care providers and make payments direct. Therefore the issue does not merit any detailed treatment.

Payments made from a personal injury trust or deputy direct to a residential care provider

The effect of reg.17(2) of the CSCAR is that payments made direct to a residential care provider by a third party may be treated as income in the hands of the claimant. However, this regulation does not apply to domiciliary care. This is important because it means that even though a periodical payment is exempt in the hands of trustees or a deputy, if they spend it on residential care it is assessable. The actual workings of this provision are less than clear and it conflicts with para.15(2) of Sch.1 in so far as it does not provide a disregard for top-up care. As such the author wonders whether this is an error but at the time of writing I have no information to that effect.

The care cap

Section 15(1) of the Care Act 2014 provides that a local authority may not make a charge for meeting adult care needs if the total costs of meeting their eligible needs incurred after the commencement of s.15 exceeds the cap on care costs.

Under s.15(3) needs are eligible if they:

- meet the eligibility criteria;
- were not being met by an unpaid carer; and
- the adult was ordinarily resident or present in the council's area.

Under s.15(4), regulations may specify that the cap shall be of a different amount according to the age of the person receiving care.

Draft Regulations[18] have now been published and consultation on these and the policy principles which underlie them closed on March 30, 2015. These provide that:

> "The amount of the cap on care costs is zero in a case where —
> (a) An adult has needs for care and support which meet the eligibility criteria;
> (b) Those needs commenced before the adult reached the age of 25 ; and
> (c) The adult had not reached the age of 25 on or before xx April 2016"

[18] The Care and Support (Cap on Care Costs, etc) Regulations 2015 (draft).

So the care cap for those injured whilst under the age of 25 will be nil provided they were under 25 when the provisions commence. Otherwise the care cap will be £72,000. There is an obvious unfairness in tying the nil rate to date of birth regardless of the age of injury. It is possible that this will not survive the consultation in precisely the same form.

On these provisions, there will not be a graduated scale up to age 65 whereby the cap increases according to age as was previously indicated.

This cap only applies to personal care so the board and lodging element of residential care is uncapped.

Form of award considerations

The net effect of the Care Act is that lump sum awards held by trustees or by a deputy are exempt from means assessment whether the type of care offered is domiciliary or residential care.

There are complications around periodical payments made to the claimant in person. Assuming the care cap is implemented in a manner substantially similar to that now proposed, after April 2016, once they have incurred eligible care to the value of the care cap, the claimant's care will in any event be exempt from means testing. In catastrophic injury cases, the care cap is likely to be reached quite quickly. For current claimants who are under 25 in April 2016, personal care will be free after April 2016.

For claimants whose periodical payment is held by a deputy or trustee, the payment should again be exempt from means assessment for all personal care. There are some matters to be taken into consideration when determining how care is paid for but again after April 2016, the care cap if implemented as proposed will supplant these considerations either immediately or in severe disability cases, in quite a short period depending on age.

The transitional period complicates matters. The review which triggers the application of Part 1 is a full review and not just a charging reassessment. If the old law applies for up to a year to claimants who were receiving social services care on March 31, 2015, the receipt of a settlement should trigger a new charging assessment which, it would seem, will be under the old law. Specialist advice may be required in these cases.

I end with two cautionary notes. It is my opinion that local authority charging teams will not be receptive to the view that they no longer have discretion to make charges that they currently make in domiciliary care packages. They are likely to seek legal advice within the council as to whether this can be circumvented. Until the new system beds down, it is quite possible that disputes will occur, to be settled by judicial review if necessary. For the group of claimants settling now, they may not face a smooth run when seeking to top up partial settlements.

In line with the dictum in *Peters*, I anticipate that deputies will not advocate for double recoveries of damages and statutory funding. Obtaining funds from councils that are not required to meet a care need should not be pursued by those charged with making a decision about such matters. To do otherwise is only to fuel local authority lobbying for the abolition of personal injury damage disregards which will be to the great detriment of disabled claimants.

The response of the Association of Directors of Social Services to the draft charging Regulations[19] emphasised their view that disregards for care damages should be removed. The effect of doing so would of course be to substantially disincentivise claimants from seeking care damages in partial recovery cases since their ability to improve their own care would be limited. I recall one council solicitor responding to me on this point stating that if a litigant did not pursue such a claim they would be denied council assistance. The view that private litigation is merely a civil obligation to relieve the state of costs is not one likely to gain broad acceptance, especially where the state does not fund that litigation and submit to its risks, but local authority representatives are clearly lobbying for some form of regulatory redress from defendants.

[19] *ADASS Care Act—Draft Regulations and Guidance Charging and Financial Assessment—Early Feedback* 2014.

It is a pity that some local authorities and local authority representatives appear to see themselves as in some way in conflict with claimant representatives over claims for statutory support. Were it not for personal injury litigation firms, the costs falling on councils from medical negligence, road traffic accidents and injuries at work would be huge and the standard of care delivery for these individuals much reduced. All that is really asked for as the quid pro quo, is that claimants be allowed to benefit from the damages received. Where full damages are received, it is axiomatic that there is no justification for claiming additional funds from the council. But top up support is right both in practice and in principle. ADASS[20] would be better engaging with the sector to develop a way of working out any problems in these matters than setting up an entirely false opposition based on an unwillingness to recognise the important benefit that claimants and their solicitors already make to the sustainability of the care system in seeking to recover redress on a private basis.

The disregards are there for that reason. The approach of litigators and claimants should be based strictly on the meeting of need. Sticking to that approach is the best way to defend them.

[20] The Association of Directors of Adult Social Services.

The Multi-Track Code: A Case Study of Consensual Resolution of a Complex Claim

Julian Chamberlayne*

Peter Walmsley**

David Fisher***

Brain damage; Care; Discount rate; Jersey; Periodical payments order; Poland; Rehabilitation; Residential accommodation; Road traffic accidents; Settlements

Julian Chamberlayne (Head of the Travel Team at Stewarts Law), David Fisher (Catastrophic and Injury Claims Technical Manager at AXA) and Peter Walmsley (Head of Catastrophic Injury & Large Loss at Clyde & Co) describe how they worked together on a collaborative basis to resolve the many complex issues that arose in the claim for a young Polish man who suffered a serious traumatic brain injury in an road traffic accident in Jersey and subsequently returned to Poland. This approach ensured that the plaintiff had access to the best available rehabilitation and ultimately led to a ground-breaking and pragmatic settlement.

Background

The plaintiff, a 22-year-old Polish national, sustained a severe traumatic brain injury during the course of a road traffic accident on La Rue des Buttes in Jersey in 2010, only a matter of days after moving to the Island to live and work.

He was an unrestrained passenger in a BMW which failed to give way at a poorly signed junction, that collided with a vehicle breakdown truck, and then crashed into the stone wall of a chapel. The BMW driver, insured with AXA Insurance, died as a result of his injuries.

The plaintiff had a post-traumatic amnesia of several weeks which combined with the findings on brain scans led his neuro-rehab expert Professor Udo Kishka to categorise this as a "very severe traumatic brain injury". A multi-disciplinary team of experts was assembled and sent out to Poland twice during the lifetime of the case.

Proceedings were issued out of the Royal Court in Jersey with the plaintiff being represented by Benest Law on the island as well as Stewarts Law in London and Gerard McDermott QC and latterly David Westcott QC, both of Outer Temple Chambers. Clyde & Co in Manchester acted on behalf of the defendant in conjunction with Lee Ingram of Davies and Ingram in Jersey and Neil Block QC of 39 Essex Street.

Whilst he made a good physical recovery, the plaintiff was left with permanent cognitive impairment, mainly in respect of memory, concentration and executive functioning. In addition he suffered personality and behavioural changes, becoming argumentative, impulsive, and prone to anger outbursts. The parties' medical experts agreed that he lacked capacity and would not be capable of returning to employment or driving.

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After his condition stabilised, the plaintiff made a permanent return to Poland to be cared for by his family in their home town of Przemysl, raising exigent problems for the parties in terms of providing rehabilitation and care and assistance in a foreign country as well as finding suitable long-term accommodation to suit the plaintiff's needs and those of his family.

Settlement was ultimately achieved at a meeting on April 16, 2014 in which the plaintiff agreed to accept a lump sum of £1.6 million in addition to annual periodical payments in respect of future care (£38,500 to age 40 then £58,500 per annum), case management (£10,000 per annum) and loss of earnings in Poland (£6,500 per annum).

The terms of settlement were approved by the Polish Family Court. The Royal Court in Jersey in a landmark judgment in October 2014 then made, by consent, the first periodical payment order ("PPO") ever to be awarded on the island, notwithstanding the lack of a statutory framework such as the Damages Act 1996.

A final hearing in which the issue of security of the PPO was determined took place in February 2015, bringing this unique and ground-breaking claim to a conclusion.

The remainder of this article will explore in more detail a number of those specific cross-border issues and provide an insight into how those issues were perceived and ultimately resolved from the perspective of Julian Chamberlayne, solicitor for the plaintiff, David Fisher of AXA, the insurer and AXA's solicitor, Peter Walmsley.

Liability and seat belts

Julian Chamberlayne

> "The Police report and accompanying photos made it clear that the Plaintiff had not been wearing a seatbelt. I commissioned reports from both an accident reconstruction expert and an accident and emergency consultant. They were of the view that the extensive damage to the passenger side of the BMW was so great that even if he had been wearing a seatbelt he would have been likely to have sustained injuries of a similar severity, or even fatal injuries. Armed with those reports I was able to convince AXA to compensate on a 100% basis. If this point had not been addressed a standard deduction of 15–25% would have reduced the damages by a seven-figure sum and left the Plaintiff having to cut back on his long term care arrangements."

Peter Walmsley

> "Liability was admitted at an early stage prior to my involvement, subject to the outstanding issues of contributory negligence and causation.
>
> Whilst it was plainly evident that the Plaintiff had not been wearing a seat belt, the more pressing issue requiring investigation was the extent to which this would have made a difference to the injuries sustained. A positive report was obtained from an academic neurosurgeon. His view was that there may have been two head injuries in rapid succession, the first when the Isuzu hit the BMW and the second when the BMW hit the granite wall. He opined that it might have been the case that the first impact rendered the Plaintiff unconscious, thereby causing him to lose any anticipatory protective reflexes during the second impact. On that basis, he expressed the opinion that if the Plaintiff had been wearing a seat belt then he would not have been so free to have been moved about within the car by the collision and hence might not have suffered impact to the head. Hence, he would not have suffered such severe diffuse injury to the brain as to render him immediately unconscious and so he would have retained anticipation of the second impact. If that were the case then our expert suggested

that, on the balance of probabilities, the Plaintiff would not have sustained secondary diffuse brain injury.

Ultimately, however, we accepted that it would be unlikely that any biomechanical expert would support a scenario whereby there would not have been impact to the head given the significant vehicle intrusion and therefore liability was accepted in full. We agreed in conjunction with Leading Counsel that there was no merit in pursuing an argument that was bound to fail simply because of the established fact that a seat belt was not in use. It would have inflated costs significantly and weakened our credibility with Julian and his team and potentially a trial judge."

Care and brain injury rehabilitation overseas

Julian Chamberlayne

"Organising the Plaintiff's rehabilitation was a real challenge. We rapidly discovered that there are no case managers or even OTs in Poland. In-patient neuro-rehab was heavily focused around physical recovery. There was very little provision in the community and long-term care in a sanatorium was not going to provide any real stimulation or quality of life to the Plaintiff. We appointed CCMS as case managers as they had experience in Poland. They had an assistant case manager from Poland whose work was heavily supervised by Kate Russell, who made numerous trips to Poland to address the many issues that arose during the lifetime of this case. Priority issues were to relieve the Plaintiff's family from being the main carers and develop the Plaintiff's independence. CCMS were unable to find any local agencies who could provide suitable carers so they advertised, recruited and trained a small team of PAs to provide buddy support.

Arranging ongoing neuro-psychological input was also difficult through a combination of limited suitable local therapists and the Plaintiff's volatile moods. On the advice of Dr Sundeep Sembi, expert for the Plaintiff, CCMS ultimately arranged for an English neuro-psychologist to fly out to Poland for periodic oversight of the neuro-rehab plan. The recommendations of the plaintiff's expert neuro-psychiatrist, Dr Simon Fleminger and speech therapist, Amanda Mozley, also influenced the rehab plans.

Notwithstanding the differing viewpoints of the legal teams regarding the cost of care and rehabilitation, AXA readily agreed to provide interims when requested. I met with AXA within just a few weeks of first making contact. At that first meeting they agreed to a £25,000 interim payment and to fund the neuro-rehab without sight of any evidence. We agreed to apply the APIL/FOIL Multi-Track Code. During the lifetime of the case they ultimately provided interims of £464,000. This reliable stream of interim payments avoided the distraction, delay and cost of contested interim payment applications. It also developed a strong working relationship from which the settlement terms were ultimately agreed. All too often insurers seem to me to overlook the negative impact on settlement dynamics that arises if interim payment requests are time and again contested, leaving the injured person struggling financially. Coping with the impact of brain injury is hard enough without additional obstacles being thrown up by the insurer."

Peter Walmsley

"AXA is committed to funding rehabilitation to help seriously brain injured Claimants, recognising that early intervention in the first few crucial years can only lead to a better prognosis overall and therefore ultimately reduce the eventual cost of the claim. Its decision to fund rehabilitation for the Plaintiff in this case was therefore a reflection of its ethos and commitment to rehabilitation.

As Julian mentions, the Plaintiff instructed a UK-based Case Management Company on receipt of funds from AXA which threw up a whole host of care related issues that will be explored further later in this article. Whilst we accepted advice from local Polish Agents that the role of a Case Manager did not specifically exist in Poland, we argued that, rightly, this should be provided locally rather than from the UK which was evidently also not the closest place from which a Case Manager could have been sourced. We also submitted that it was unreasonable to claim that a suitably qualified local person such as a nurse or occupational therapist or physiotherapist could not perform this role in the absence of dedicated Case Managers.

By the conclusion of the claim it was evident that the neuro-rehabilitation provided to the Plaintiff post-accident had been less effective than we had hoped, partly due to the Plaintiff's unwillingness to engage as a result of his brain injury. In terms of ongoing future rehabilitation, given the length of time that had passed since the accident, both our neuropsychologist, Dr Torrens, and the Plaintiff's, Dr Sembi, agreed that intensive neuro-rehabilitation could not carry on indefinitely, but was worth a further try. As such, for a limited period we were willing to agree to continue to fund input from a UK based neuropsychologist with only a contingency fund provided thereafter for all other therapies."

Accommodation

Julian Chamberlayne

"The Plaintiff's parent's flat was tiny and up four flights of stairs. Post-accident his parents moved into the living room so that the Plaintiff could have his own small bedroom. However, this arrangement was still, in his mother's words 'putting a great strain on our family relationships, as none of us feel as if we have our own space'. All of the Plaintiff's neuro-experts recommended that he move to accommodation of his own but with his family very close by to support him. The local housing options were limited but the Plaintiff's mother eventually found a two-storey house which our expert, Tom Wethers, agreed could readily be portioned to form two living units; one for the Plaintiff and his PAs and the other for his parents. AXA again provided the interim funding that enabled the purchase and adaptation works to go ahead.

There were several legal quirks relating to the accommodation claim. Firstly, David Benest, our Jersey advocate, advised that there were no reported cases in Jersey applying *Roberts v Johnstone*. Secondly, our claim for the application of negative discount rates would, if *Robert v Johnstone* applied, knock out that aspect altogether; a point adopted in the Defendant's counter-schedule. Finally, there was the argument that both the Plaintiff and his parents would, but for the accident, have had housing costs anyway. Thankfully houses in the Plaintiff's home town are cheap by British standards and the lump sum aspect of the settlement was big enough to cover off the cost of purchase, adaptations and running costs."

Peter Walmsley

"It was not contentious that the Plaintiff's existing accommodation was not suitable, hence our willingness to fund the Plaintiff's move to alternative accommodation. What we were mindful of was that the assessment of suitable accommodation should be by reference to living standards in Poland, not England, for instance in terms of the size of property that should be considered suitable.

Luckily there was minimal dispute between the experts.

A number of accommodation options were put forward by our accommodation expert, the late John Pile, but ultimately a two-storey house was purchased and adapted into two separate living areas satisfying the Plaintiff's and his family's needs which ended up costing less than anticipated.

As Julian rightly pointed out, although the accommodation claim ended up being a non-eventful issue between the parties, there was an issue over the appropriateness of a claim under *Roberts v Johnstone*. Our position remains that this is the correct way to calculate the true cost of the accommodation claim on behalf of the Plaintiff. That the argument for a negative discount rate eradicated the Plaintiff's claim under *Roberts v Johnstone* is a peculiar feature of the calculation and one which we submitted the Plaintiff should not be able to circumvent because the outcome was undesirable. There was a certain element of the Plaintiff wanting to have his cake and eat it in trying to claim the full cost of the transaction because to do otherwise would have left him with a negative accommodation claim when at the same time arguing for a discount rate as low as -4.5% to inflate other areas of his claim."

Care

Peter Walmsley

"The difficulty we faced was that the plaintiff was paying for care worker and case manager input on the basis of UK care rates, despite the fact that local agency rates in Poland were, unsurprisingly, substantially less than in the UK. Our challenge was to ensure that we provided evidence of local rates of pay for support workers in Poland to ensure that AXA was not paying unreasonably inflated future care costs. As such, we engaged local Agents to obtain witness statements from care agencies in the Przemysl area confirming their ability to provide the care required by the Plaintiff and to confirm the rates that they would charge for their services. In addition we obtained a report from Labour Economist, Dr Victoria Wass, to consider carer wage rates collected and published by the Central Statistical Office for Poland. This brought to light that care wages in Przemysl would be lower than the average as Przemysl is in the Voivodship of Podkarpackie, the lowest paying Voivodship in Poland. The upshot of this evidence was that we were able to show that local support workers were paid on average £3 per hour, significantly reducing the future care claim from the Plaintiff's contention for £9 per hour, which was higher than the wages even professional people could expect to receive in Poland."

Julian Chamberlayne

"The hourly rate for care in Poland was one of the biggest issues in the case. Whilst £9 per hour seemed high for Poland we challenged the case managers on this on several occasions and they were unable to find a cheaper acceptable alternative. There were no private local care agencies who could provide buddy support for those with brain injury. Our expert, Jo-Clark Wilson, made two visits to Poland and her investigations corroborated what CCMS told us. She met with the State and charitable care organisations identified by the Defendants expert Jane James and ascertained that they could not provide care of the type the Plaintiff required. The care and case management PPs which we ultimately agreed largely provided for the annual costs we had claimed. Further novel features are that the PP for the Polish care is paid in Polish Zloty, so our client is not subject to currency fluctuations and indexed to the aggregate average (mean) rate reported in the Employment, Wages & Salaries by the Polish Central Statistics Office. The PP for case management is paid in Sterling, as CCMS are to continue post-settlement, and is indexed to ASHE category 222 (therapy professionals). Victoria Wass provided the expert evidence on these indexation issues."

Discount Rate

Peter Walmsley

"The appropriate discount rate was one of the most challenging issues resulting from jurisdiction arising in Jersey. There is inevitably a degree of uncertainty as to the discount rate that will be applied in Jersey following the decision of the Privy Council in the Guernsey case of *Helmot v Simon* and this was a major area of contention between the parties. The net result of the discount rates contended for on behalf of the plaintiff was that AXA was faced with a claim that was pleaded at in excess of £27 million; an award, it was felt, would have surely over-compensated the plaintiff, particularly one living in one of the poorest Voivodships in Poland.

Our primary argument had to be that the Royal Court ought to follow the discount rate used in the UK courts of 2.5% to promote certainty for parties. In the alternative we felt that it was high time that the principles enshrined in *Wells v Wells* and the false assumption that ILGS is a risk-free investment should be challenged and that an alternative starting point for calculating the discount rate should be adopted. A combination of financial evidence from Polish & UK Investment Advisors, Macro and Labour Economists and Actuaries was obtained. Our experts unanimously agreed that investment in 100% ILGS was inappropriate on the basis that, amongst other reasons, ILGS is not risk-free and no one in reality invests their damages 100% in ILGS. To invest in UK ILGS the Plaintiff would be exposing himself to mismatch risk and currency risk with additional reinvestment risk if he were to invest in Polish ILGS. To use ILGS as a starting point is therefore arbitrary and wrong. Advice from our Independent Financial Advisers suggested that a mixed portfolio with a 70:30% split for equities would be preferable to provide for diversification of risk and, in fact, would not expose the Plaintiff to more than a tolerable level of risk given that investment in ILGS would not be risk free in any event.

We put forward some strong points of principle arguing that CPI as a measure of inflation should be preferred to RPI. This is because CPI takes account of how the consumer responds to changing prices, strengthened by the fact that the Government regards CPI as a better measure of inflation for a wide range of different uses.

In addition, our Labour Economist, Dr Victoria Wass, noted the preferred use of median wage inflation rather than the mean, when calculating the adjustment for excess wage growth against RPI, on the basis that the mean would be distorted by very high earners. In addition, Dr Wass made a strong common sense point in relation to the suggested Polish earnings multiplier of -4.5% in that to achieve this real wage growth in the long-term the underlying data would mean that the Polish economy would have to outperform that of Germany, something it categorically could and would not do. The culmination of our evidence was that if 2.5% was not accepted as a matter of principle then, even taking into account the differences between Polish and English wage inflation, the multipliers would have been positive. There was effectively a chasm between the two multipliers advanced.

Ultimately, in order to avoid the risk to both parties of running a trial on the discount rate issue and to overcome the insurmountable difference in the multipliers being put forward by each side, AXA was prepared to sacrifice the finality of a lump sum settlement in favour of a PPO, which was only capable of agreement by consent on the basis of the unique circumstances of this case. Discussions over the appropriate discount rate were therefore largely circumvented by the agreement of a PPO for future care and case management. However, on the basis of the multipliers we were using at the settlement meeting for the capitalisation of the award it would have represented a net present value of £5 million."

Julian Chamberlayne

"My position for the Plaintiff was that the judgments of the Court of Appeal and Privy Council in *Helmot v Simon* were compelling and highly likely to be followed by the Jersey Courts. I initially commissioned reports from our expert actuary, Chris Daykin and economist John Llewellyn. The latter recommended we obtain a further report from a specialist in the Polish economy, Simon Commander. When the Defence team raised the challenge to *Wells v Wells* it became necessary to obtain a report from a financial adviser and, as the Plaintiff lived in Poland, I selected a Polish IFA, Adam Rucinski. He advised that indexed linked bonds in Poland were only available for a 10 year period. He disagreed with the Defendant's contention that a mixed portfolio including equity was lower risk than ILGS. The claim based on our expert evidence was that for future losses in Jersey the appropriate discount rate for prices was -1% and for earnings was -2.5% but for Polish losses that should be -1.5% and -4.5% for earnings. This differential was based on predictions that Poland had a rapidly developing economy which was likely to result in much higher earnings inflation that in England. To illustrate the scale of the difference between the parties on this issue the Defendants' proposed lifetime multipliers utilising the 2.5% discount rate resulted in a multiplier of 27.65. The equivalent multiplier at -1.5% was 81.41 and at -4.5%, as contended for the Plaintiff's future care, the multiplier was 259.70.

The PPO package we agreed with the Defendants proved to be the way around this unbridgeable gulf. In addition to providing for the care and case management at the claimed rates, we agreed for the future loss of earnings to also be paid as a PP which gave the Plaintiff a budget for his day to day living expenses. It is impossible to put a precise value to the overall settlement package as the parties did not agree discount rates or multipliers. If you applied the plaintiff's expert evidence on the discount rate then the grossed up value of the settlement would be circa £18 million. Conversely if you applied the defendant's expert's evidence then the figure would be £5 million. If you assumed the answer lay somewhere in between with say a 0% discount rate for prices heads of loss and -2.5% for Polish earnings related heads of loss, then the grossed up value was over £9 million. Any way you look at it the result was much closer to full compensation than the figure you would get to in England by applying the unfair 2.5% discount rate."

PPO

Peter Walmsley

"Having agreed settlement by way of a PPO in this case in order to avoid protracted arguments over the discount rate, this presented a new challenge in that the Damages Act 1996 has no application in Jersey and so the Royal Court has no legislative power to award a PPO. The challenge then became one of convincing the Royal Court that it had the power to approve a PPO made with the consent of both parties, even if it did not feel it could impose a PPO in the absence of legislation.

This was a unique problem given that the issue had never been considered by the Royal Court before and there was no certainty as to which way the Court would decide the issue.

One issue that required satisfaction before the Approval Hearing was the issue of taxation of the PPO in Jersey and Poland. Understandably, the Plaintiff wanted to be sure that the payment of the lump sum and the annual payments would not be subject to tax in either Poland or Jersey. Whilst the Plaintiff took the lead on satisfying itself of the taxation position in Poland, we were responsible for obtaining the appropriate confirmation from the Comptroller of Taxes in Jersey. Ultimately, a written ruling from the Comptroller was obtained confirming that no tax would be payable in Jersey.

The parties then worked together in the lead up to the Approval Hearing on 2 October 2014, jointly instructing Richard Cropper, an Independent Financial Adviser, to obtain the necessary evidence to show that the standard required under UK statute in relation to the security of the continuity of the proposed 'periodical payments' was met in this case.

Ultimately, the Royal Court accepted that it was able to make a PPO by consent if the conditions precedent to making such an order in the UK were established and if it was satisfied that the continuity of periodical payments was reasonably secure. This is a historic judgment and may well change the legal landscape in Jersey entirely as more and more parties wish to agree settlements to include PPOs. Given the backdrop to this claim and the insurmountable difference between the discount rates put forward of 2.5% to -4.5% the only prudent outcome in this unique claim was settlement by way of a PPO."

Julian Chamberlayne

"Prior to even presenting this to the Jersey Court I had to work with our Polish Legal Agents, BFP, to obtain the approval to the settlement package by the Polish Family Court; the Polish equivalent of the Court of Protection. I also instructed a Polish Tax Adviser, Marek Wronka, who obtained a declaration from the Polish Ministry of Finance to that neither the lump sum nor the PPs would be taxed on receipt.

The parties, their Jersey advocates and Richard Cropper worked effectively together to present a united front and compelling case to the Royal Court of Jersey that a PPO could and should be made by consent applying the Damages Act approach to security and continuity of funding. The one point we did not agree on, but which was not in issue at the hearing, was whether the Jersey Court might have had an inherent common law power to make a PPO without consent. Our stance on that point was that giving a Court power to impose a PPO really required legislation. No one suggested the English Courts had such a power prior to the Damages Act."

Security of the PPO

Peter Walmsley

"The issue of security of the PPO became a central issue towards the final stages of this claim. Enquiries had to be bottomed out with the FSCS who ultimately confirmed that it did not cover motor policies issued in Jersey if the insurer became insolvent. However, on the advice of Richard Cropper, the parties were confident that for so long as the Uninsured Drivers' Agreement Jersey 2000 was in force, subject to the claim coming within the terms of that agreement, the Motor Insurers Bureau (MIB) would be obliged to pay to the Plaintiff any sum payable or remaining payable in the event of a default by AXA. AXA provided confirmation that none of the exceptions under the MIB Agreement applied on the facts of this case and so we were satisfied that the PPO would be secure.

To that end, from our perspective, the security or otherwise of AXA Insurance was to a certain extent irrelevant as the PPO would be secure if the MIB were obliged to step in. Nonetheless, to satisfy the concerns of the Plaintiff, AXA Insurance provided all requested information about its business and finances to include a statement from its UK Head of Risk & Compliance and the Royal Court was satisfied that AXA is presently reasonably secure. The real issue was about security in the unlikely event that at some future date during the plaintiff's life AXA were to become insolvent.

A disagreement ensued between the plaintiff and the MIB over the wording of the PPO in respect of the MIB's obligations which led to a final hearing to determine the issue in front of the Royal Court on 10 February 2015. As it was for the plaintiff to be satisfied of the security of the PPO we

adopted a relatively neutral stance, being of the belief that either version of the wording proposed by the plaintiff or the MIB would suffice to establish reasonable security of the periodical payments. We appreciated that the MIB had some difficult questions to answer and investigations to complete, whilst noting the Plaintiff's stance that the MIB might have investigated the issue and been in a position to discuss matters with the Court at the original Approval Hearing in October 2014."

Julian Chamberlayne

"When it comes to proving security of funding the insurer inevitably has access to the financial information that both the plaintiff and the Court needs to see. It was really helpful in this case that AXA was willing to provide a comprehensive statement from its UK Head of Risk & Compliance. The Royal Court commented that statement gave them a 'substantial degree of comfort as to the probability of AXA UK being able to meet its obligations under the proposed PPO'. In my experience insurers are often reluctant to provide these statements and that merely serves to protract the process as this is evidence the Court needs to see to be satisfied as to security and continuity of funding.

The additional comfort on this point came from AXA's membership of the MIB and its confirmation that none of the exceptions under the MIB Agreement applied on the facts of this case. We had hoped that the MIB would be willing to provide the same confirmation, which we thought would be straight-forward as its member, AXA, held all the information. Our concern was that it would be really problematic if the MIB tried to challenge their obligations to step in and support funding if AXA became insolvent in 2045, long after all the lawyers in this case had long forgotten the detail, if they were even still with us, and with files long archived or even destroyed. The best the MIB was willing to say was that they had no present knowledge of any exception to cover under the Agreement. As in *Bennett v Stephens* the Jersey Court was satisfied that the risk of the MIB Agreement changing in the future so that there would no longer be cover for an AXA default was so remote (given the UK's obligations under the Motor Directives) that it did not undermine the security. If the MIB Agreement was to be changed that would under the terms of this PPO amount to a breach by AXA, not the MIB and result in the matter coming back before the Jersey Court for further consideration."

David Fisher

"This case illustrates what collaborative working and openness between the parties can achieve. If we had not adopted such an approach, I strongly suspect that the claim would still be ongoing and heading towards trial, with costs increasing all the time. Stewarts Law acted in the best interests of their client throughout and their client now has compensation and can get on with his life as best he can, with the assurance that his future is protected. From my perspective, we have the best settlement that we could have hoped for in the circumstances. It may be a cliché, but I would like to think that it was a '*win-win*' all round. The approach adopted in this case reinforces for me why the Multi Track Code and the change in behaviours that it has helped bring out should not be allowed to wither on the vine."

Fundamental Dishonesty and the Criminal Justice and Courts Act 2015[1]

Brett Dixon

Comparative law; Dishonesty; Ireland; Personal injury claims; Striking out

This article considers the background and timing of the introduction of the fundamental dishonesty clause in the Criminal Justice and Courts Act 2015, the practical effect of the provision, and the nature of the balancing act the court must now undertake

Introduction

The Criminal Justice and Courts Act 2015 (the Act) came in to force on April 13, 2015, having been given royal assent on February 12, 2015. The guidance note issued by the MOJ[2] states that s.57 provides as follows:

> "in any personal injury claim where the court finds that the claimant is entitled to damages, but is satisfied on the balance of probabilities that the claimant has been fundamentally dishonest in relation to the claim, it must dismiss the entirety of the claim unless it is satisfied that the claimant would suffer substantial injustice as a result."

Further that it:

> "strengthens the law so that dismissal of the claim in its entirety becomes the norm in such cases, subject only to the court's assessment regarding whether the claimant will suffer substantial injustice by such dismissal."

The intention was that the perceived rise in fraud would be combatted by placing a duty on the court to dismiss even a successful claim if that claim is tainted by dishonesty either by reference to a part of the claim or by association with a related claim. The only defence to such a dismissal is where the claimant can make out they would suffer substantial injustice as a consequence of that dismissal.

There should be no misunderstanding here; the coalition government clearly intended to give the defendant in a claim an opportunity to "win" regardless of the merits of a claim. The real "win" for the insurance industry though will be the deterrent effect of such a provision on genuine claimants, who may be deterred from even bringing a claim because of concerns that a late dismissal under these provisions for something well short of fraud will be at great personal cost to them. It is noteworthy that there is no reciprocal sanction on a defendant who behaves in a dishonest manner in the defence of a claim.

Commentary from defendant representatives such as "the genuine claimant has nothing to fear"[3] frankly does nothing to dispel the concerns of anybody concerned with access to justice and human rights. Such comments are uncomfortably close to Chris Grayling's—then an employment minister—comments[4] when announcing the roll out of capacity to work assessments for those on incapacity benefit.

[1] This article represents the law at the time of writing.
[2] The Criminal Justice and Courts Act 2015 Circular 2015/01.
[3] David Spencer and Alistair Kinley, "The Truth Hurts" (January 30, 2015), New Law Journal, *http://www.newlawjournal.co.uk/nlj/content/truth-hurts* [Accessed April 27, 2015].
[4] BBC News, April 4, 2011.

The draconian sanction of dismissing the claim is at odds with the concept of proportionality which has been given pride of place in recent civil justice reforms. It also departs significantly from the recommendations of the Civil Justice Council who considered "fundamental dishonesty"[5] in the context of qualified one way costs shifting, who drew a very clear distinction between claims "polluted by fraud" such as an exaggerated but genuine claim, for which a defendant should look to a Pt 36 offer for protection, and fraud pleaded and proven which they recommended should be offered no costs protection.

So we have now a movement beyond the scope of the original considerations in to exaggerated claims and a movement beyond the recommended punishment from a loss of costs to the loss of damages as well. It would be fair to say that it will impact the actual claimant much more than a loss of costs, but at the expense of the claimant solicitor who will get no costs for work done on genuine elements of the claim.

The provisions within the Act were introduced very late in the parliamentary process, which is an often seen tactic to limit proper scrutiny.

The provision

The Act goes on to provide the procedural details[6] and how this would interact with any further proceedings, for example, in relation to contempt of court.

The provision itself is suggested to be quite similar to that in s.26 of the Civil Liability and Courts Act 2004 in Ireland by some, and indeed was pointed to by Lord Hunt of Wirral in the debate in the House of Lords.[7] However, there are fundamental differences which put the Irish provision much closer to the recommendations of the Civil Justice Council discussed above. The Irish Act focuses on evidence given:

> "26.— (1) If, after the commencement of this section, a plaintiff in a personal injuries action gives or adduces, or dishonestly causes to be given or adduced, evidence that—
> (a) is false or misleading, in any material respect, and
> (b) he or she knows to be false or misleading,"

and

> "(2) The court in a personal injuries action shall, if satisfied that a person has sworn an affidavit under section 14 that—
> (a) is false or misleading in any material respect, and
> (b) that he or she knew to be false or misleading when swearing the affidavit."

If the evidence given meets that test then the court in Ireland must dismiss the action unless simple injustice would be done. It goes on to define dishonesty as an act done if it is done with the intention of misleading the court.

The Irish provision is much different from our own. It is also quite clearly much more proportionate and fairly balanced than our own.

What does it all mean?

The starting point has to be to consider the two key phrases in the provision.

[5] Civil Justice Council's report on Qualified One Way Costs Shifting ("QOCS"), July 10, 2012.

[6] I am very grateful to Gary Barker for assistance in considering these particular provisions.

[7] "It might be helpful to point out to noble Lords that Clause 45 is not unique—not even slightly unique—because an analogous provision can be found in Ireland, in Section 26 of its Civil Liability and Courts Act 2004."

Substantial injustice

The concept of substantial injustice is best understood by reference to the parliamentary discussions during the debates on the Bill recorded in Hansard. There was clearly a degree of difficulty experienced by the Members of Parliament in addressing the issue. Lord Marks of Henley-on-Thames QC (Liberal Democrat) found the subsection to be very difficult to understand,[8] and pointed out that the real beneficiary, if the claim was dismissed, would be the defendant's insurers.[9] He went on to comment that the real injustice would be on the public purse which would pick up the cost the defendant insurer had been let off.

The wording of the clause confirms that we are, in fact, concerned with only the injustice the claimant would suffer.[10]

Clearly the claimant must make out how the dismissal would affect them, and why that would cause substantial injustice. Whilst in a smaller case that may present some obvious difficulties, in a more substantial case that test perhaps becomes more important.

Lord Faulks QC (Conservative—Minister of State for Justice) in Hansard said that dismissal of the claim would not always be appropriate and that its use allowed the court a degree of flexibility to ensure that the overall provision was applied fairly and proportionately,[11] and that the courts would be expected to work with the provisions which is fairly taken to mean that the court will have a discretion in relation to its application.[12]

Fundamental dishonesty

Whilst Hansard again is helpful, the courts will also be able to have regard to the case law that has already begun to develop in relation to qualified one way costs shifting ("QOCS") as the phrase is identical. The most useful case to date—*Gosling v Screwfix*[13]— is only at County Court-level but is instructive and is reported fully on Lawtel.

The problem starts with the use of the word fundamental to precede dishonesty. It qualifies the dishonesty, and leads inevitably to the conclusion that if nothing else it will promote satellite litigation until there are clear binding authorities on what it means. What is clear is that it is contextual. Lord Faulks[14] tells us that it is both obvious and does not include either an inaccuracy in a schedule or a slight exaggeration. Further, that it is not intended to be something that is found lightly and that it must be dishonesty that goes to the heart of the claim.[15] Lord Hunt[16] tells us that it should not be abused by overzealous defendants and that it is meant to have a deterrent effect, for which we should be grateful.

The courts approach to defining the phrase in a QOCS context in *Gosling* is helpful in adding some detail to the comments in Hansard. It is also worth considering that the comments are made by the level

[8] "I certainly am of the view that the saving subsection, 'unless it is satisfied that the claimant would suffer substantial injustice if the claim were dismissed', is very difficult to understand."

[9] "The people who would be let off the claim if Clause 45 was applied would be the defendant's insurers, and the public purse would bear the cost of that. It is not the claimant who suffers the substantial injustice in that case, so Clause 45 would be applied and the whole claim dismissed."

[10] See the wording of the provision and the MOJ guidance above.

[11] "Clause 45 seeks to strengthen the law so that dismissal of the entire claim should become the norm in such cases. However, at the same time, it recognises that the dismissal of the claim will not always be appropriate and gives the court the discretion not to do so where it would cause substantial injustice to the claimant. To that extent, some of the remarks of my noble friend Lord Marks were entirely apposite. The clause gives the court some flexibility to ensure that the provision is applied fairly and proportionately."

[12] "We believe that an element of discretion is necessary because difficult cases may arise where depriving the claimant entirely of damages may cause substantial injustice."

[13] *Gosling v Hailo and Screwfix*, unreported, April 29, 2014, CC (Cambridge).

[14] "Frankly, we do not think that a judge will have any difficulty recognising fundamental dishonesty. We are talking not about a schedule that contains some slight exaggerations or minor inaccuracies, but about fundamental dishonesty."

[15] "Civil courts do not make findings of dishonesty lightly in any event; clear evidence is required. The sanction imposed by the clause—the denial of compensation to which the claimant would otherwise be entitled—is a serious one and will be imposed only where the dishonesty is fundamental; that is, where it goes to the heart of the claim."

[16] "If there is a fear that the power in Clause 45 would be abused by overzealous defendants, the experience of more than 10 years in Ireland proves otherwise: the courts are alert to any attempts to abuse a provision that is expected to apply in only a small number of cases, and of course if the clause truly has a deterrent effect, it should mean fewer cases coming to court in the first place."

of judge that is likely to be hearing any applications made under the Act. The court confirmed that the phrase must be interpreted purposively and contextually. This mirrors the views expressed in Hansard. There is a distinction made between what the judge describes as two levels of dishonesty:

1) that which was not fundamental so as to expose the claimant to a costs liability; and
2) dishonesty which is fundamental, so as to expose the claimant to a costs liability.

That approach requires a consideration of the culpability of the actions of the claimant that are being complained of by the defendant who makes the application whether under the QOCS provisions, or the Act. He goes on to say that a finding of fundamental dishonesty should not be made where the dishonesty relates to some "collateral matter" or "minor, self-contained head of damage". His view appears to mirror that expressed by Lord Faulks in Hansard. The similarities between Faulks—"the dishonesty is fundamental; that is, where it goes to the heart of the claim"[17]—and *Gosling*—"a fundamentally dishonest claim: a claim which depended as to a substantial or important part of itself upon dishonesty"[18]—are clear.

In *Gosling* the finding of dishonesty affected "around half of a claim for general damages for pain, suffering and loss of amenity of £40,000"[19] along with the effect on the loss of earnings claim this was said to be "dishonesty crucial to such a large part of the claim under those two heads is sufficient to enable the claim to be characterised as fundamentally dishonest"[20] and that consequently the claimant fell in to category (2) above and he would lose his costs protection, subject to the decision of the court as to how much he should pay. In reaching that conclusion the judge paid particular attention to the fact that the dishonesty was deliberate, and affected a large portion of his claim, "the claimant was deliberately dishonest, in that knowingly and dishonestly he gravely exaggerated his symptoms to the doctors and to the court"[21] and "the effect of his dishonesty was fundamental to a substantial part (both in size and importance) of his claim for damages".[22]

Crucially, the finding was based in large part on video surveillance evidence backed up by solid evidence from the medical experts commenting on the same. I anticipate surveillance will form a large part of the Defendants approach to proving such issues.

Practicalities

It is nothing short of a sea change in how the courts consider claims for personal injury. To pretend otherwise is at best disingenuous and at worst deliberately misleading. The provisions as discussed above fall short of the protections that the Irish legislation offers, and have the potential to capture more than the obviously fraudulent claimants. That is not to say that exaggeration is not to be discouraged but there is obvious potential both for the provisions to be misused by a defendant to place pressure on a claimant to settle, and to inadvertently deter the genuine claimant from bringing a claim through fear of the potential costs to them personally of a loss.

On the face of it all personal injury cases are caught by the provision, and all are at risk of dismissal under the provision.[23] It actually goes further in that it captures both the primary claim or case and behaviour in related to a related claim, such as that of a passenger in the same car.

However, the following assists in narrowing the practical impact of the provision.

1) The defendant must make an application.
2) The court must make a finding of fundamental dishonesty.

[17] House of Lords Committee Stage July 23, 2014.
[18] *Gosling*, unreported, April 29, 2014, CC at [45].
[19] *Gosling*, unreported, April 29, 2014, CC at [48].
[20] *Gosling*, unreported, April 29, 2014, CC at [49].
[21] *Gosling*, unreported, April 29, 2014, CC at [58].
[22] *Gosling*, unreported, April 29, 2014, CC at [58].
[23] The Criminal Justice and Courts Act 2015 s.1(1) captures: "a claim for damages in respect of personal injury."

3) The court must have first made a finding of an entitlement to damages.
4) Only a small percentage of cases are fraudulent.

Balanced against this though.

1) Fundamental dishonesty is wider than the test for fraud.[24]
2) The burden on the defendant is only the civil burden of proof.
3) Fundamental dishonesty need only be found in relation to an element of the claim to trigger dismissal of all of the claim.

Whilst such applications would ordinarily be made at the conclusion of a trial they could also occur at the stage where there has been a finding of an entitlement to damages such as where a default judgment has been obtained. They could also be made at the conclusion of a stage three hearing in a portal claim.

Clearly, the case with obvious fraud is easy to classify and should be dismissed. Indeed such a case should not be pursued to a final hearing nor is likely that the Court would find an entitlement to damages in such a scenario.

Less easy though are the cases that fall short of such obvious classification. An exaggerated claim would likely be caught by the provision if the defendant proves that it related to a substantial part of the claim. A difficult quantum claim, such as the claimant who pleads a loss based on a projected future career path but fails, could potentially be caught based upon the value of the loss claimed in the context of the full value of the claim. There is no guarantee a defendant will not make an application in such a case, but in my view such an application should fail based upon the need for culpability that is clearly stated in *Gosling*[25] and suggested in the discussions recorded in Hansard.

If a finding of fundamental dishonesty were made in such circumstances, a claimant who has told no lies would be subject to substantial injustice if his claim were dismissed in its entirety simply because the judge found against him on one point. That surely is a costs issue, and something for which the defendant should have properly protected himself by making an appropriate Pt 36 offer.[26] Bearing in mind that Hansard suggests strongly that the court has a discretion as to how to implement this provision then a claimant who has not been culpably dishonest should make an appropriate Pt 36 offer. A judge exercising a discretion will be looking at all the surrounding factors, and an appropriately pitched offer that has not been accepted will put the spotlight on who bears the responsibility for the case proceeding, for example, to a judicial determination of damages.

Liability issues may also put the claimant at risk, and again it is a question of degree. The deliberately dishonest claimant with a fabricated claim will be caught. Honest mistakes, such as to the sequence of events, should not be. Again, culpability would appear to be key.

A lot regrettably depends upon the approach both of the defendant industry and that of the judiciary. The key question will be whether the courts expand their new "duty" to dismiss or approach it in a more restrictive but fair and proportionate way.

The Act will be relevant to all cases where you have not issued a claim form before the commencement date of April 13, 2015. My view is that it was both sensible and proportionate to issue cases before that date where there was felt to be a risk of an application by the defendant. Arguably not to do so would have been a failure to act in your client's best interests. Commentary from defendant practitioners[27] suggesting that to do so would in some way be an abdication of professional responsibility really does

[24] See *Brighton and Hove Bus v Brooks* [2011] EWHC 2504 (Admin).

[25] *Gosling*, unreported, April 29, 2014, CC at [58] "the claimant was deliberately dishonest, in that knowingly and dishonestly he gravely exaggerated his symptoms to the doctors and to the court" and "the effect of his dishonesty was fundamental to a substantial part (both in size and importance) of his claim for damages."

[26] See for example *Fox v Foundation Piling Ltd* [2011] EWCA Civ 790 and *Goodwin v Bennetts UK Ltd* [2008] EWCA Civ 1658.

[27] Spencer and Kinley, "The Truth Hurts".

miss the obvious point that claimant practitioners would not be issuing fraudulent claims for which they would not be paid.

The worry is, and always has been, the effect that this draconian measure could potentially have on the genuine claimant when such a weapon is placed in the hands of those that are concerned only with making a profit for shareholders.

Remember, generally:

1) It is for the defendant to make the application, and for the claimant to defend it—be aware but do not be afraid.
2) Hansard courtesy of Lord Hunt makes it clear that the expectation is that this provision should not be lightly used and is aimed at deliberate fraud. The provisions in s.59(6) and (7) of the Act in relation to contempt and criminal proceedings would certainly support that conclusion.
3) The only detailed consideration of the phrase by the courts in Gosling makes it clear that culpability is a very relevant consideration for the court.
4) The court has other powers short of complete dismissal to deal with "lesser" offences.
   a) QOCS provides for enforcement of costs orders in appropriate cases.[28]
   b) The general discretion in relation to costs in r.44.2 of the CPR.

And finally.

1) Fundamental dishonesty needs to be substantial and deliberate. Use the quotes from *Gosling* and Hansard to defeat any misguided applications.
2) Substantial injustice is contextual and will develop. It would seem that seriousness of case will be a factor. Certainly choice as to delivery of care could be an important factor in making out substantial injustice to the seriously injured claimant.[29]
3) You must consider amending your client care documentation and providing your client with warnings as to the potential impact of the Act generally and if appropriate in relation to their particular case.
   a) Specifically a dismissal under this provision means that they will receive no damages and could be liable for the defendant's costs of the whole claim.
   b) Prior to the Act they would have in all likelihood received damages for the honest or genuine element of the claim along with costs.
   c) Post the introduction of the Act whilst the damages may be offset[30] against any costs liability, that liability will be the defendant's costs of the whole claim along with any liability to pay your costs and disbursements set out in your retainer with them.

[28] Both in cases of fundamental dishonesty and where a Pt 36 offer has not been beaten.
[29] See for example *Peters v East Midlands* [2009] EWCA Civ 145.
[30] The Criminal Justice and Courts Act 2015 s.57 provides:
"(4) The court's order dismissing the claim must record the amount of damages that the court would have awarded to the claimant in respect of the primary claim but for the dismissal of the claim.
(5) When assessing costs in the proceedings, a court which dismisses a claim under this section must deduct the amount recorded in accordance with subsection (4) from the amount which it would otherwise order the claimant to pay in respect of costs incurred by the defendant."

The Rome II Regulation in the English Courts

Matthew Chapman*

LT After-care; Allocation of jurisdiction; Applicable law; EU law; Measure of damages; Personal injury claims; Road traffic accidents

This paper considers the first decisions of the English courts about the meaning and content of the Rome II Regulation (Regulation 864/2007).[1] These decisions (and the commentary below) focus on the following topics.

(1) The displacement of art.4(1) by recourse to art.4(3) of Rome II (*Winrow v Hemphill*).[2]
(2) The distinction between substantive law and evidence/procedure (*Wall v Mutuelle de Poitiers Assurances*).[3]
(3) The meaning of recital (33) to Rome II (*Stylianou v Toyoshima*);[4] and, albeit an issue that has most recently been considered by reference to Pt III of the Private International Law (Miscellaneous Provisions) Act 1995, rather than Rome II.
(4) The award of interest and whether the same should be properly be regarded as a substantive or procedural matter (*Hyde v Sara Assicurazioni SPA*).[5]

PROCEDURE

While this case law (and the more commercially orientated decision of Flaux J in *Fortress Value Recovery Fund I LLC v Blue Skye Special Opportunities Fund LP*[6] and the Court of Appeal in *Erste Group Bank AG (London) v JSC (VMZ Red October)* [2015] EWCA Civ 379 cannot answer all, or even most, of the questions raised by Rome II, there is now a developing body of domestic jurisprudence which points the English personal injury lawyer in a particular direction. Whether this is the correct direction of travel is a quite different matter.

Introduction

The Rome II Regulation commences with a statement of bold intent. The first recital refers to the need for "judicial cooperation" in "civil matters with a cross-border impact" and the sixth recital goes even further, emphasising the need for:

> "certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought."

If the needs of the internal market, and the consequent requirement of "predictability of the outcome of litigation", have not (yet) resulted in the harmonisation of the law of tort across the EU, the same policy objectives have driven such uniformity in the applicable law rules in tort that the Member States are now to use.

The Rome II Regulation has made very substantial inroads into the flexible approach to resolution of conflicts of law in tort that English lawyers had developed under Pt III of the Private International Law

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[1] Regulation 864/2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40.
[2] *Winrow v Hemphill* [2014] EWHC 3164 (QB); [2015] I.L.Pr. 12.
[3] *Wall v Mutuelle de Poitiers Assurances* [2014] EWCA Civ 138; [2014] 1 W.L.R. 4263.
[4] *Stylianou v Toyoshima* [2013] EWHC 2188 (QB).
[5] *Hyde v SARA Assicurazioni SPA* [2014] EWHC 2881 (QB).
[6] *Fortress Value Recovery Fund I LLC v Blue Skye Special Opportunities Fund LP* [2013] EWHC 14 (Comm); [2013] 1 All E.R. (Comm) 973.

(Miscellaneous Provisions) Act 1995.[7] However, in the watery light that the recent, and first, decisions in England have shed on the meaning of Rome II, some survivors of the previous regime can still be found. The checklist[8] found in s.12 of the Private International Law (Miscellaneous Provisions) Act 1995 was referred to by Slade J in the course of her judgment in the Rome II case *Winrow v Hemphill*.[9] In addition, the distinction between matters of substance and procedure which found expression in *Harding v Wealands*,[10] remains of relevance in Rome II cases as a result of art.1(3) of the Regulation and the decision of the Court of Appeal in *Wall v Mutuelle de Poitiers Assurances*.[11] The consequential effects of injury—the jurisdiction where the victim of a tort experiences injury and loss—continue to impact on the exercise undertaken by reference to art.4(3) of Rome II. Equally, some residual, albeit limited, role for the law of the road traffic accident victim's habitual residence may yet remain relevant in the assessment of damages as a result of recital (33) to the Rome II Regulation (even if recent case law has consigned recital (33) to a position on the far periphery of the quantum assessment process).

Rome II is driven by a need for certainty and predictability of outcome, but such certainty is qualified. There remain a number of unanswered questions and it seems likely that, for some years to come, preliminary issue trials will continue to be fought in the English courts on the detailed meaning and content of the Regulation, particularly as it impacts on the assessment of damages. The much wider availability of the English jurisdiction in motor and other personal injury claims in recent years, as a result of the 2007 decision of the Court of Justice in *FBTO Schadeverzekeringen NV v Jack Odenbreit*,[12] can only increase the likelihood of such disputes.

Identifying the applicable law: Article 4(1) and (3) of Rome II

For ease of reference, art.4(1) and (3) of Rome II provide as follows:

> "1. 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. 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 paragraphs 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 preexisting relationship between the parties, such as a contract, that is closely connected with the tort/delict in question."

Article 4(1) and (3) were directly engaged in *Winrow*: a personal injury claim which arose out of a road traffic accident in Germany in November 2009. The claimant was a UK national, domiciled in England, who was living in Germany at the time of the accident (having moved there with her British Forces husband several years before the accident). The claimant returned to England around 18 months after the accident and continued to live in England at the time of preliminary issue trial. The first defendant was also a UK national. She was also an army wife and her husband served with the army in Germany. The first defendant, like the claimant, later moved back to England. The second defendant insurer was registered in

[7] For a summary of the pre-Rome II regime (under Private International Law (Miscellaneous Provisions) Act 1995 Pt III), see: M. Chapman, "The Rome II Regulation and a 'European Law-Enforcement Area': Harmony and Discord in the Assessment of Damages" [2010] J.P.I.L. 10, 12–14.
[8] Of matters relevant to displacement of the law of the place where the tort occurred.
[9] See *Winrow* [2015] I.L.Pr. 12 at [44].
[10] *Harding v Wealands* [2006] UKHL 32; [2007] 2 A.C. 1.
[11] *Mutuelle de Poitiers Assurances* [2014] 1 W.L.R. 4263.
[12] *FBTO Schadeverzekeringen NV v Odenbreit* (C-463/06) [2008] 2 All E.R. (Comm) 733; [2007] E.C.R. I-11321.

England/Wales. It was the insurer of the first defendant at the time of the accident. The claimant was a rear-seat passenger in a vehicle driven by the first defendant. The vehicle was involved in a head-on collision with a vehicle driven by a German national. It was not in issue that the accident was caused by the negligent driving of the first defendant. Accordingly, liability was not in issue and judgment was entered. The parties continued to fight the causation and quantum issues. The preliminary issue trial before Slade J concerned the applicable law of the tort and, more particularly, under art.15(c) of Rome II, the law to apply to the assessment of the damages to which the claimant would be entitled: should damages be assessed, as the claimant argued, according to English law (on application of art.4(3) of Rome II) or should they be assessed, as the defendants argued, according to German law (by reason of art.4(1) of Rome II)?

Slade J determined the preliminary issue decisively in the defendant insurer's favour: German law was to be applied. Perhaps surprisingly, the trial judge was—in the absence of much authority on the proper approach to displacement of the art.4(1) presumption—prepared to consider similar factors to those listed in s.12 of the Private International Law (Miscellaneous Provisions) Act 1995 in determining whether England had (per art.4(3)) a "manifestly closer connection" to the tort than Germany.[13] However, notwithstanding the nationality of the claimant and first defendant and the shared domicile of the claimant and defendant parties throughout the litigation, Slade J held that the art.4(1) presumption in favour of German law was not displaced:

> "Factors weighing against displacement of German law as the applicable law of the tort by reason of Article 4(1) are that the road traffic accident caused by the negligence of the First Defendant took place in Germany. The Claimant sustained her injury in Germany. At the time of the accident both the Claimant and the First Defendant were habitually resident there. The Claimant had lived in Germany for about eight and a half years and remained living there for eighteen months after the accident … Under Article 4(3) the court must be satisfied that the tort is manifestly more closely connected with English law than German law. Article 4(3) places a high hurdle in the path of a party seeking to displace the law indicated by Article 4(1) or 4(2). Taking into account all the circumstances, the relevant factors do not indicate a manifestly closer connection of the tort with England than with Germany. The law indicated by Article 4(1) is not displaced by Article 4(3). The law applicable to the claim in tort is therefore German law."[14]

This disposed of the preliminary issue on the basis of a weighing up of the factors connecting the tort to England (under art.4(3)) with those connecting the same to Germany (under art.4(1)).

In the course of her judgment Slade J also stated:

> "I do not accept the contention … that the circumstances to be taken into account in considering Article 4(3) will vary depending upon the issues to be determined and … the stage reached in the proceedings. Nor do I accept the submission that 'the centre of gravity' of the tort when liability was conceded and only damages were to be considered depended upon circumstances relevant to or more weighted towards that issue."[15]

Slade J was clearly attracted to the defendants' arguments based, as they were, on certainty and predictability of outcome. While the judge was prepared to accept some residual role for the (indirect)

[13] See *Winrow* [2015] I.L.Pr. 12 at [44]. Section 12(2) of the 1995 Act directs the Court's attention to the following factors: "the parties, to any of the events which constitute the tort or delict in question or to any of the circumstances or consequences of those events."

[14] See *Winrow* [2015] I.L.Pr. 12 at [62]–[63]. In *Stylianou* [2013] EWHC 2188 (QB) Sir Robert Nelson was similarly unimpressed by the claimant's argument that there was, per art.4(3), a "manifestly closer connection" with England (the jurisdiction of the claimant's nationality and habitual residence) than with Western Australia (where the relevant road traffic accident had occurred): see [83] of the judgment.

[15] See [45] of *Winrow* (citing the decision of Flaux J in *Fortress Value Recovery Fund I LLC v Blue Skye Special Opportunities Fund LP* [2013] EWHC 14 (Comm); [2013] 1 All E.R. (Comm) 973): "The 'centre of gravity' of the tort … is the centre of gravity of the tort not of the damage and consequential loss caused by the tort."

effects of injury (and the place where injury and loss was experienced by the injured claimant), she evidently did not accept the proposition that the effects of injury (and the jurisdiction in which such effects were felt) had particular relevance in a case where liability was conceded and where the only matters left to be resolved were causation and quantum. The claimant is surely entitled to ask why this is so. In *Winrow* most dispassionate observers would accept that causation and quantum were more closely connected to England (where the claimant lived at the time of trial and was experiencing ongoing loss and where medico-legal experts were based) than Germany. If, as art.4(3) directs, "all the circumstances of the case" are to be considered in determining whether the tort/delict is more closely connected with one country (England) than another (Germany), it would seem artificial (at best) and, perhaps more ambitiously, wrong (in law) to put out of mind the fact that liability is no longer in issue and, therefore, is no longer a relevant consideration. Some of the textbook writers—particularly those wedded to a more certain/less discretionary approach to the identification of the applicable law of the tort—might (like Slade J) baulk at the approach advocated on behalf of the *Winrow* claimant. However, there may, in this limited way, still be room for English common law inroads into (even) the Rome II regime so that some weight is given to the issues actually in dispute before deciding which law ought to be applied to them. There is nothing in Rome II which prohibits this kind of sensible and flexible approach (capable, as it is, of more accurately reflecting in damages the loss that has actually been sustained and limiting the instruction and involvement of foreign law experts and also limiting the consequential increase in time and cost). Indeed, as the Court of Appeal recently recognised in *Opo v MLA* [2014] EWCA Civ 1277, recital (14) to Rome II states that the choice of law rules in art.4 are to be a "flexbile framework".

Substance and procedure

Prior to Rome II, English law had evolved a distinction between substantive and procedural matters which assisted in separating those matters which were to be determined according to the applicable law and those which could be left to the law of the forum. Questions of liability, causation and contributory negligence[16] were, accordingly, treated as matters of substance which were determined by the applicable law. By contrast, matters of evidence and procedure (including costs) were procedural matters for the law of the forum (see s.14(3)(b) of the Private International Law (Miscellaneous Provisions) Act 1995).

Traditionally, English law treated the recoverability of a head of loss or damage as a substantive matter to be determined according to the applicable law. However, once it had been determined that a head of loss or damage was, according to the applicable law, recoverable, the assessment or quantification of that loss was then treated as a matter of procedure and dealt with according to the law of the forum (i.e. according to English law). In the course of his speech in *Harding* Lord Hoffmann stated as follows:[17]

> "24 In applying this distinction to actions in tort [viz. the distinction between substance and procedure], the courts have distinguished between the kind of damage which constitutes an actionable injury and the assessment of compensation (ie damages) for the injury which has been held to be actionable. The identification of actionable damage is an integral part of the rules which determine liability. As I have previously had occasion to say, it makes no sense simply to say that someone is liable in tort. He must be liable for something and the rules which determine what he is liable for are inseparable from the rules which determine the conduct which gives rise to liability. Thus the rules which exclude damage from the scope of liability on the grounds that it does not fall within the ambit of the liability rule or does not have the prescribed causal connection with the wrongful act, or which require that the damage should have been reasonably foreseeable, are all rules which determine whether

[16] See *Dawson v Broughton* (2007) 151 S.J.L.B. 1167 CC (Manchester).
[17] *Harding* [2007] 2 A.C. 1.

there is liability for the damage in question. On the other hand, whether the claimant is awarded money damages (and if so, how much) or, for example, restitution in kind, is a question of remedy."

Something of the substance/procedure distinction is retained by Rome II; the question is, how much of this survives the Regulation? Article 15(c) of Rome II, under the sub-heading, "Scope of the law applicable", directs that:

> "The law applicable to non-contractual obligations under this Regulation shall govern in particular … (c) the existence, the nature and the assessment of damage or the remedy claimed."

Article 1(3) further provides that "[t]his regulation shall not apply to evidence and procedure". One might ask why the committee draftsmen of Rome II inserted art.1(3); the effect has been to muddy the water in a manner that works against improving the predictability of outcome. The following might, however, justify the inclusion of art.1(3).

1) It is impossible to replicate the judicial and administrative machinery of the applicable law State in the forum State (and so a reservation as to procedure and evidence is needed to reflect this).
2) Rome II is not concerned with evidence and procedure and has a wholly different focus, it says nothing about disclosure, expert evidence, trial windows and the like and, accordingly, the insertion of art.1(3) was included (perhaps out of an excess of caution) to make this clear.
3) In most EU Member States the heads of recoverable loss and the assessment of damages under the same are both dealt with by the same applicable law. In the circumstances, the division between applicable law (assessment) and forum law (procedure/evidence) creates few problems. That it does create a potential problem in the UK is because of the approach taken (historically) in this jurisdiction, rather than because of some overarching policy of the EU to regulate the forum State's evidence and procedure.

Given the inheritance of *Harding*, it is perhaps unsurprising that English lawyers, acting for claimants injured overseas and bringing claims in the English court by reference to a foreign applicable law, have sought to present a variety of issues relevant to quantum as procedural/evidential (and so to be determined by reference to English law), rather than substantive (and so determinable by reference to the applicable law). In *Wall v Mutuelle de Poitiers Assurances*,[18] for example, the case management issue of "which expert evidence the court should order" in a catastrophic injury case was identified as an issue of evidence/procedure (to be determined by the law of the forum, English law), rather than an issue of substance (to be determined by the applicable law). However, the Court of Appeal went further in *Wall* and also directed that the "tariffs, guidelines or formulae"[19] used by foreign judges (judicial practice or guidelines) in the calculation of damages should also form part of the "scope of the law applicable [to the tort]" under art.15(c).[20]

[18] *Mutuelle de Poitiers Assurances* [2014] 1 W.L.R. 4263.
[19] A phrase deployed by Andrew Dickinson in his 2008 monograph, *The Rome II Regulation: The Law Applicable to Non-contractual Obligations*.
[20] See, for example, *Mutuelle de Poitiers Assurances* [2014] 1 W.L.R. 4263 at [24] per Longmore LJ:
"It seems to me that in the context of a Regulation (or Convention) intended to have international effect, a narrow view of 'law' is inappropriate. If there are guidelines, even if they can be disapplied in an appropriate case, judges will tend to follow them. No doubt one can call this 'soft law' rather than 'hard law' but it is law nevertheless. Any foreign judge having to apply English law on the assessment of damages would find the Judicial College Guidelines helpful as a starting point. If, therefore, French law had the equivalent of these guidelines, I would hold that the Master could permit evidence of them to be given by an English court."
Wall concerned the application of French law to the assessment of damages. The Court of Appeal accordingly suggested that the "figures normally adopted by the Paris Court of Appeal for the various heads of non-pecuniary losses in M. Dintilhac's list" could form part of the applicable law (at [28] per Longmore LJ. See also [38] per Jackson LJ and [54] per Christopher Clarke LJ).

In *Stylianou*[21] Sir Robert Nelson held that the discount rate used for the identification of an appropriate multiplier for the assessment of future loss was also a matter of substance for the applicable law (by reference to art.15(c)), rather than a matter of evidence and procedure for the law of the forum. This decision significantly reduced the value of the lump sum awarded to the injured claimant because the discount rate in Western Australia (the applicable law pursuant to art.4 of Rome II) was six per cent:

> "I see no difference between a mandatory 6% discount rate which operates as a ceiling on damages for future loss created by statute and a general ceiling on damages so created. In my judgment, the 6% discount is a rule of law [and so within the scope of the law applicable by reason of art.15 of Rome II]."[22]

It seems likely that the English courts will continue to develop responses to Rome II in a piecemeal, issue by issue, manner in which foreign law questions relevant to the assessment of quantum are placed on either side of the substance/procedure divide as seems appropriate in the given case. There are a number of such questions which are, as yet, unresolved (and where the academic and textbook writers disagree on their status as either substantive or procedural matters). In *Harding* certain quantum-relevant issues were identified in the speech of Lord Hoffmann.[23] Are these issues procedural/evidential (and, therefore, for the law of the forum under art.1(3) of Rome II) or are these issues substantive (and, therefore, for the applicable law of the tort under art.15(c) of Rome II)?

The responses of some of the academic writers to the issues identified by Lord Hoffmann are set out, in tabular format, below:[24]

Issue	Procedural	Substantive
1) A prescribed maximum sum for non-economic loss		*C, N & F*, p.845;
		P & W, p.16-043 (as a rule aimed not at accurate assessment of the loss, but instead a rule of law determining the value of the loss suffered);
		G & L, p.33; and
		Garnett, p.11.54.
2) In the assessment of loss of earnings, disregard of an excess of net weekly earnings at a certain limit		*P & W*, p.16-043; and
		Garnett, p.11.54.
3) No award for the loss of the first five days of earning capacity		*P & W*, p.16-043; and
		Garnett, p.11.54.
4) Minima for the award of gratuitous care		*P & W*, p.16-043; and
		Garnett, p.11.54.
5) Prescription of the discount rate at 5 per cent	*R & S*, p.294 unless the applicable law discount rate is "not an attempt factually to determine the claimant's loss, but in-	*P & W*, p.16-043; and
		Garnett, p.11.54 (by reference to Rome II).

[21] *Stylianou* [2013] EWHC 2188 (QB).
[22] See *Stylianou* [2013] EWHC 2188 (QB) at [96] per Sir Robert Nelson.
[23] See *Harding* [2007] 2 A.C. 1 per Lord Hoffmann.
[24] Key: J.J. Fawcett and J.M. Carruthers, *Cheshire, North & Fawcett: Private International Law* 14th edn (Oxford: Oxford University Press, 2008) (C, N & F); R. Plender and M. Wilderspin, *The European Private International Law of Obligations*, 3rd edn (London: Sweet & Maxwell, 2009) (P &W); A. Rushworth and A. Scott, "Rome II: Choice of Law for Non-contractual Obligations" (2008) L.M.C.L.Q. 274 (R & S); Professor Mario Giuliano and Professor Paul Lagarde, *Report on the Convention on the Law Applicable to Contractual Obligations* ("the Giuliano Lagarde Report") [1980 OJ C282/1: (G & L); R. Garnett, *Substance and Procedure in Private International Law* (Oxford: Oxford Private International Law Series, 2012) (Garnett).

Issue	Procedural	Substantive
	stead is an artifice by which to lower insurance premiums".	
6) Credit for payments made by an insurer		*Garnett* suggests at p.11.54 that deductibility of *benefits* will be treated as a matter of applicable law under art.15(c) of Rome II.
		The other textbook/article writers do not deal expressly with this issue, but are likely to treat it as substantive.

It is possible to identify a large number of other quantum-relevant issues for the same treatment. What has been lacking, however, is a principled means, capable of more general application, by which to test—by reference to any given rule of foreign law—whether an issue of substance or an issue of procedure is involved. It is tentatively suggested that it might be possible to divide up these (and other) foreign law rules relevant to the assessment of quantum by asking the following two questions of each relevant rule of foreign law.

1) Is this rule concerned with the *administrative or judicial machinery* by which the assessment of damages is *conducted*?
   If the answer is yes, then the rule is procedural and a matter for the law of the forum and if the answer is no, then it is necessary to ask question (2), below.
2) Is this rule:
   (a) concerned with the assessment of the losses *actually experienced* by the claimant (to put the matter another way, is the rule concerned with the *organisation* of the factual evidence by which the loss is accurately to be calculated); or
   (b) is it *determinative* of the *valuation* of the claim (whatever the actual losses might have been)?
   If (a) then the rule is procedural/evidential within the meaning of art.1(3) and dealt with by the law of the forum and if (b) then it is part of the applicable law for art.15(c).

Can the application of this test answer questions about the substantive/procedural status of the issues listed above? To take the *Harding* examples above from Lord Hoffmann's speech,[25] we could probably agree with most of the academic authors that these rules are not concerned with the administrative or judicial machinery by which the assessment of damages is conducted, but I suspect that we could also agree that, with the possible exception of the deductibility of an insurer's payments, they fall within (2)(b) above because they determine the value of the claimant's claim, rather than being concerned with an accurate assessment of the claimant's actual loss. It remains to be seen, however, whether English judges will show any interest in developing an overarching approach to questions of substance or procedure or whether a more piecemeal and evolutionary method will continue to be preferred (with the likely result that there will be lots more preliminary issue trials to fight on the questions identified by Lord Hoffmann and others).

[25] That is: a prescribed maximum sum for non-economic loss; disregard of an excess of net weekly earnings at a certain limit (in the assessment of loss of earnings); no award for the loss of the first five days of earning capacity; minima for the award of gratuitous care; prescription of the discount rate at five per cent (on which see, *Stylianou* [2013] EWHC 2188 (QB) at [96] per Sir Robert Nelson); credit for payments made by an insurer.

Recital (33)

The somewhat convoluted legislative processes of the EU institutions can be traced in recital (33) which represents a compromise reached by the Council and Parliament (it is clear from the *travaux préparatoires* that the Parliament was much keener on this provision than the Council and Commission):[26]

> "According to the current national rules on compensation awarded to victims of road traffic accidents, when quantifying damages for personal injury in cases in which the accident takes place in a State other than that of the habitual residence of the victim, the court seised should take into account all the relevant actual circumstances of the specific victim, including in particular the actual losses and costs of after-care and medical attention."

In *Stylianou* Sir Robert Nelson said this about recital (33):[27]

> "The solution to the problem lies, in my judgment, not in the choice of any particular law as Mr Weir submits, but in the court looking at the actual costs, for example, of aftercare in the victim's place of residence, and taking those into account when assessing damages, but only insofar as the applicable law permits it to do so. Recital (33) cannot override the proper interpretation of Article 4(1) which expressly chooses, as recital 17 makes clear, the law of the country where the damage occurs ie. where the damage was sustained, rather than the law of the victim's habitual residence."

Similarly, in *Winrow* Slade J repeated the views of Sir Robert Nelson in this regard without adding any further insights into the meaning and effect of recital (33). Clearly, recital (33) must mean something and its reference to "actual losses" (which are quantifiable according to domestic legal principles) would seem to envisage some residual role for the law of the RTA victim's home jurisdiction. However, English judges have so far been reluctant to give meaning to recital (33) for fear of watering down the certainty that can be achieved by straightforward application of arts 4(1) and 15(c). It seems, therefore, that we will have to wait a little longer for an English judge to rescue recital (33) from its "extreme obscurity".[28]

The question of interest

In spite of recent decisions, it remains unclear whether interest on damages is a procedural or substantive matter. In *Maher v Groupama Grand Est*, a case decided by reference to Pt III of the 1995 Act, rather than Rome II, Moore-Bick LJ said this: [29]

> "In these circumstances I agree with the judge that the existence of a right to recover interest as a head of damage is a matter of French law, being the law applicable to the tort, but whether such a substantive right exists or not, the court has available to it the remedy created by section 35A of the 1981 Act. Having said that, the factors to be taken into account in the exercise of the court's discretion may well include any relevant provisions of French law relating to the recovery of interest. To that extent I agree with the judge that both English and French law are relevant to the award of interest."

A similar approach to interest was taken in the more recent High Court decision in *Hyde v Sara Assicurazioni SPA*, a personal injury road traffic accident case involving the application of Italian law, also decided by reference to Pt III of the 1995 Act, in which the following appears in the judgment:[30]

[26] An interesting summary of the legislative processes can be found in A. Dickinson, *The Rome II Regulation: the Law Applicable to Non-contractual Obligations* (Oxford: Oxford Private International Law Series, 2008), paras 14.26–14.32.
[27] *Stylianou* [2013] EWHC 2188 (QB) at [78] per Sir Robert Nelson.
[28] *Stylianou* [2013] EWHC 2188 (QB) at [75] per Sir Robert Nelson: "The status and effect of recital (33), however, are 'extremely obscure' as Dicey states."
[29] *Maher v Groupama Grand Est* [2009] EWCA Civ 1191; [2010] 1 W.L.R. 1564 at [40].
[30] *SARA Assicurazioni SPA* [2014] EWHC 2881 (QB) at [5.2] per HH Judge Moloney QC.

> "following the Maher case … the English court has the discretion to award interest or not in accordance with its own principles as a procedural or remedial matter, whether or not Italian law would give any substantive right to interest or impose any limit on it."

While the pre-Rome II case law is a little uncertain—issues of interest neither fish nor fowl when it comes to determining which law to apply—it seems likely that in Rome II cases interest will continue to be regarded as a procedural matter for the English court in accordance with art.1(3).[31]

Conclusion

The first thoughts of English judges on the application of Rome II have emphasised certainty and predictability of outcome.[32] The result has been a marked reluctance to depart from the law which art.4(1) directs should be applied: namely, "the law of the country in which the damage occurs." The practical effect of pursuing such certainty is likely, in many cases, to be under-compensation where the English claimant will suffer a significant gap between the losses that he or she is actually experiencing in the home jurisdiction (England) and the losses that can be awarded in the country where, however briefly, the claimant happened to be when the tortious event occurred. However, as this paper has sought to argue, Rome II is more flexible than the recent English case law would appear to acknowledge and, even in this case law, there are certain currents which reference and echo the more flexible and responsive approach that preceded Rome II.[33] It may be that, in due course, the instinct of most English Judges to do justice in the individual case and to provide adequate and fair compensation will give a more distinctively common law flavour to the interpretation of Rome II. It seems unlikely that considerations of justice and full compensation will ultimately be sacrificed in favour of certainty and predictability of outcome.

[31] Compare R. Garnett, *Substance and Procedure in Private International Law* (2012), para.11.55, "all questions relating to the award of pre-judgment interest [under Rome II], including the right to claim interest and at what rate, are governed by the law applicable to non-contractual obligation. Post-judgment interest , however, given its role in facilitating the enforcement of judgments, may continue to be regarded as procedural and to be governed by the law of the country in which judgment was rendered."

[32] Exemplars of this approach: *Erste Group Bankl AG (London) v JSC (VMZ Red Octover)* [2015] EWCA Civ 379 at [97] and *Moreno v MIB* [2015] EWHC 1002 at [74].

[33] T.S. Eliot, "Burnt Norton" in *Four Quartets*: "Time present and time past/ Are both perhaps present in time future/ And time future contained in time past."

Case and Comment: Liability

Dusek v Stormharbour Securities LLP

(QBD, Hamblen J, January 19, 2015, [2015] EWHC 37 (QB))

Liability—fatal accident claims—negligence—health and safety at work—duty of care—employers' powers and duties—risk assessment—safe equipment—safe systems of work—transportation—charter flights—helicopters

Breach of duty of care; Employers' powers and duties; Fatal accident claims; Helicopters; Safe systems of work

Tomas Dusek was in Peru for his work on a project known as "Nueva Esperanza" (New Hope) which concerned a proposed hydroelectric complex being built in the province of Carabaya in the region of Puno, south-east Peru. Mr Dusek was an employee of the defendant StormHarbour Securities LLP. StormHarbour is an independent global markets and financial advisory firm and an English limited liability partnership.

Thomas Dusek was working on securing funding to develop the project along with a Peruvian investment company. Two Korean companies were identified as potential investors. It was decided that it was necessary for the investors to visit the site and the investment company advised one of the Korean companies that the site was reachable either by long overnight jungle walks or by a road trip to an airfield and then a helicopter ride.

The Korean companies requested that a representative of StormHarbour was present and so they sent Mr Dusek on the trip. The Peruvian company chartered a helicopter from Cusco to Mazuco. One of the quotes received advised against flying from Cusco and instead recommended starting from Mazuco to avoid crossing the Andes because of the remote and inhospitable terrain. The Peruvian company went with HeliCusco, an operator willing to fly the route it wanted.

A Sikorsky S58-ET helicopter was used. The first leg of the trip from Cusco to Mazuco, although completed, was delayed due to poor weather conditions, and the maximum permissible density altitude and weight were exceeded. The parties then flew around the project site but returned to Mazuco because of poor weather conditions.

On June 6, 2012 the crew made a flawed decision to fly back to Cusco the same day and ran into operational difficulties as a result. They crashed at an altitude of some 16,026ft above sea level into a mountain known as "Mama Rosa" in the Andes mountain range in Peru. The helicopter disintegrated and caught fire, killing all 12 passengers and two crew on board. One of those passengers was Mr Tomas Dusek.

Mr Dusek's widow and children brought this claim under the Fatal Accidents Act 1976 and the Law Reform (Miscellaneous Provisions) Act 1934. It was alleged that StormHarbour was in breach of its duty as employers to provide Mr Dusek with a safe place of work, safe equipment and a safe system of working. Mr Dusek was 37 years old when he was killed and had two children then aged eight and five. There were three issues:

1) whether the scope of the employer's duty of care extended to the helicopter charter and flight;
2) if there was such a duty, did the employer breach it; and

3) if the employer breached its duty, did that breach cause the employee's death.

Mr Justice Hamblen held that Mr Dusek had been on the helicopter for the purposes of his employment and his employer owed him a duty to take reasonable care not to subject him to unnecessary risk. Irrespective of whether it had organised the helicopter trip or whether the employee was looking to it to take reasonable care of his safety, the employer owed him a duty to take reasonable care to ensure that he was reasonably safe while travelling to and from work abroad where he was required to go.[1]

It was clear to the judge that there were obvious potential dangers involved in the trip, namely unsafe operation or performance of the helicopter. The employer knew that their employee Mr Dusek would be going on a chartered helicopter trip to visit a site in a remote, inhospitable, inaccessible and mountainous area. It owed a duty to safeguard him from the danger involved by inquiring into the safety of the trip and conducting a risk assessment. It had no knowledge of whether the companies that organised the trip had flown with the helicopter operator previously, had carried out a risk assessment or had any safety concerns. Its health and safety officer accepted in evidence that something should have been done. In doing nothing, the employer breached its duty of care.

The judge also held that as the employer StormHarbour should have inquired of the Peruvian company as to details of the flight operator, the helicopter to be used, the flight route and how they satisfied themselves as to the safety of the flight route. The Peruvian company had been advised to take a coach from Cusco to Mazuco as it was safer to begin helicopter travel from there because of the dangers of flying over the Andes. If the employer had made the safety inquiry required to make an appropriate risk assessment, it would have instructed its employee not to take the flight because of safety concerns, and he would have listened. The employer's breach was held to have caused the employee's death. Judgment was entered for claimants.

Comment

Since 1891 our law has been clear, an employer owes a personal, non-delegable duty to all of their employees to take reasonable care for their physical safety. That this was the employer's duty was made clear by Lord Herschell in *Smith v Baker*.[2] An employer must "so to carry on his operations as not to subject those employed by him to unnecessary risk".[3] An unnecessary risk is :

> "any risk that the employer can reasonably foresee and which he can guard against by any measures, the convenience and expense of which are not entirely disproportionate to the risk involved."[4]

The employer's duty does not just relate to the premises occupied by him and the system of work provided there. It can also extend to third party premises where the employee is sent to work. Obviously what the duty of reasonable care requires will depend on the circumstances and is likely to be very different. In *Wilsons & Clyde Coal*[5] Lord Wright divided up the duty of a master into three main headings: the provision of a competent staff, the provision of adequate material such as equipment, and a proper system and effective supervision. All three are really expressions of the same duty of the employer to take reasonable care when carrying out his operations so as not to subject those employed by him to unnecessary risk.

In *Smith v Austin Lifts Ltd*[6] Lord Denning put it like this:[7]

[1] *Palfrey v Ark Offshore Ltd* , unreported, February 23, 2001, QBD applied.
[2] *Smith v Charles Baker & Sons* [1891] A.C. 325 HL.
[3] *Smith v Charles Baker & Sons* [1891] A.C. 325 at 362.
[4] *Harris v Brights Asphalt Contractors Ltd* [1953] 1 Q.B. 617 QB at 344.
[5] *Wilsons & Clyde Coal Co Ltd v English* [1938] A.C. 57 HL.
[6] *Smith v Austin Lifts* [1959] 1 W.L.R. 100 HL.
[7] *Smith v Austin Lifts* [1959] 1 W.L.R. 100 HL at [117].

> "employers who send their workmen to work on the premises of others cannot renounce all responsibility for their safety. The employers still have an overriding duty to take reasonable care not to expose their men to unnecessary risk. They must, for instance, take reasonable care to devise a safe system of work[8]: and if they know or ought to know of a danger on the premises to which they send their men, they ought to take reasonable care to safeguard them from it. What is reasonable care depends, of course, on the circumstances."[9]

Working abroad brings different dangers in different circumstances. *Cook v Square D Ltd*[10] concerned an employee sent to work on a short-term assignment abroad in Saudi Arabia. Although it was held that the employer had a duty, which could not be delegated, to take all reasonable care to ensure the safety of the employee while working abroad, the Court of Appeal decided that on the facts there had been no breach of such duty. In reaching that conclusion it was stressed that the employer had been satisfied that the site occupiers and the general contractors were both reliable companies and aware of their responsibility for the safety of workers on site and as Mustill LJ put it:

> "the suggestion that the home-based employers have any responsibility for the daily events of a site in Saudi Arabia has an air of unreality."

Just as the employer's duty may extend to third party premises abroad, so it may also extend to transport to and from such a place of work.

A good example (considered in this case) is *Palfrey v Ark Offshore Ltd*.[11] The claimant was the widow of a former employee of the defendant Ark Offshore. Her husband had died from malaria after travelling twice to West Africa in order to work on an oil rig operated by a third party. These trips involved an overnight stay on an island where her husband had been bitten by mosquitoes. The widow claimed that when her husband had asked a director of Ark Offshore what medical protection he would need, he was told that he would not need any as he would be based offshore.

The case against Ark Offshore was that, as Mr. Palfrey's employers, they ought to have had, but did not have, an effective policy for the provision of advice as to health precautions to be taken by an employee sent to the area of Cameroon in Equatorial Guinea in the course of his employment. Because they had no such effective policy they failed to give Mr. Palfrey any, or any appropriate and accurate, advice as to such precautions, so endangering his safety. That was in breach of their duty to take reasonable care for the safety of their employee. In particular, breach of the duty to take reasonable care to see that he was reasonably safe whilst travelling to and from and at his place of work abroad where he was required to go in the course of his employment.

The evidence was to the effect that there was no need for medical precautions to be taken whilst on the rig offshore but that there was such a need whilst onshore in the course of travel to the rig. Onshore there were endemic diseases giving rise to a high risk of serious illness. The failure to have a practice of ensuring their employees went to their GP or took other medical advice to receive relevant inoculations was held to be a clear failure on the part of the employers to take reasonable care of Mr. Palfrey in the course of his employment, which included travel to and from the rig.

Another case worthy of note is *Durnford v Western Atlas International Inc*.[12] It provides an illustration of the liability of an employer for breach of duty of care in relation to transport abroad. It also provides an illustration of the potential need to consider the safety of such transport arrangements.

Mr Durnford was employed by the defendants who were involved in oil exploration off the coast of Nigeria. In the course of his employment, he was required to travel from his home in the north-east of

[8] See *General Cleaning Contractors v Christmas* [1953] A.C. 180 HL.
[9] See *Wilson v Tyneside Window Cleaning Co* [1958] 2 Q.B. 110 CA.
[10] *Cook v Square D Ltd* [1992] I.C.R. 262 CA (Civ Div).
[11] *Palfrey v Ark Offshore Ltd* applied.
[12] *Durnford v Western Atlas International Inc* [2003] EWCA Civ 396.

England to Nigeria to work on a sea-going vessel. His travel involved being transferred to a coach to travel from Port Harcourt airport to the port, accompanied by armed naval personnel and the defendant's shore surveyor. The journey should have taken about one and a half hours. Unfortunately the coach broke down about 10 minutes into the journey.

Mr Durnford and his colleagues then waited at the roadside for about an hour or so while alternative transport was arranged. This consisted of two camper-type mini-buses. He was placed in a cramped position in the minibus on a folded down seat with little padding and no armrests or back support. The journey in the mini-bus lasted about one hour and a quarter and Mr Durnford suffered an acute prolapse of an inter-vertebral disc. The employer was liable as they had not taken reasonable care in providing the minibus transport for the claimant.

The root of liability in cases of this type is lack of proper risk assessment and/or risk reduction. In *Fytche v Wincanton Logistics Plc* Baroness Hale put it like this:[13]

> "Not surprisingly, the overall strategy was that prevention is better than cure. The Management of Health and Safety at Work Regulations 1999 … require every employer to 'make a suitable and sufficient assessment of … the risks to the health and safety of his employees to which they are exposed whilst they are at work … for the purpose of identifying the measures he needs to take to comply with' his obligations under the [Health and Safety at work Act 1974] and any health and safety regulations: see regulation 3."[14]

Lady Justice Smith expanded that in *Uren v Corporate Leisure (UK) Ltd*[15] saying:

> "It is obvious that the failure to carry out a proper risk assessment can never be the direct cause of an injury. There will, however, be some cases in which it can be shown that, on the facts, the failure to carry out a proper risk assessment has been indirectly causative of the injury. Where that is shown, liability will follow. Such a failure can only give rise to liability if a suitable and sufficient assessment would probably have resulted in a precaution being taken which would probably have avoided the injury. A decision of that kind will necessitate hypothetical consideration of what would have happened if there had been a proper assessment."

So what of StormHarbour's knowledge of the risks? Their senior management knew that at least one of their employees would be going on a chartered helicopter trip from Cusco for a site visit to a remote, inaccessible, inhospitable and mountainous area of the Andes in Peru. That visit was likely to involve attempts to land at various different project site areas. They would also have known that Cusco was sited at high altitude. There were reasonably foreseeable and obvious potential dangers involved in such a trip. The judge put it like this:

> "A reasonable and responsible employer would have realised that if their employee was to fly on a helicopter from high altitude across the challenging mountainous environment of the Andes mountains to land at and visit remote sites there was a real risk of danger to their employee; that the personal safety of their employee would be entirely dependent on the safe operation and performance of that chartered helicopter flight; that this would be dependent on the helicopter operators and/or crew acting in strict compliance with all relevant air safety/travel requirements necessary to ensure the safety of their passengers, and on the helicopter crew and/or operators being suitably qualified, equipped, trained and/or skilled to take all necessary precautions to ensure the safety of their passengers in the geographical and/or climatic conditions to be found there."

[13] See *Fytche v Wincanton Logistics Plc* [2004] UKHL 31; [2004] 4 All E.R. 221 at [58].
[14] Management of Health and Safety at Work Regulations 1999, reg.3.
[15] *Uren v Corporate Leisure (UK) Ltd* [2011] EWCA Civ 66; (2011) 108(7) L.S.G. 16.

The proposed flight clearly raised obvious and foreseeable safety risks. The essential nature of the risk was unsafe operation or performance of the helicopter flight. There was a real prospect of that risk eventuating given the challenging nature of the flight. If such risk did eventuate the likely consequence was catastrophic, namely death or at least serious personal injury.

The judge rightly concluded that it was not necessary for StormHarbour's employees to be exposed to that risk. StormHarbour always had the option of instructing Mr Dusek not to go on the flight. This would have involved minimal inconvenience and no expense. On StormHarbour's own case it was not necessary for them to be on the site visit. It was simply advisable as a matter of good client management given Samsung's request that a StormHarbour representative be present.

If Mr Dusek was nevertheless to be exposed to that risk, as his employer, StormHarbour owed a duty to take reasonable care to safeguard him from the danger involved. They should at least have made some form of inquiry into the safety of the trip and carried out some form of risk assessment. Such an inquiry would have involved minimal time and little, if any, cost.

StormHarbour's case was it was not required to do anything. That is a total misunderstanding of the law and their duty as employers. StormHarbour was in breach of its duty of care in doing nothing to investigate into the safety of the proposed helicopter flight. Lady Justice Smith got it absolutely right in *Threlfall v Hull*:

> "For the last 20 years or so, it has been generally recognised that a reasonably prudent employer will conduct a risk assessment in connection with his operations so that he can take suitable precautions to avoid injury to his employees. In many circumstances, a statutory duty to conduct such a risk assessment has been imposed. Such a requirement (whether statutory or not) has to a large extent taken the place of the old common law requirement that an employer had to consider (and take action against) those risks which could be reasonably foreseen. The modern requirement is that he should take positive thought for the risks arising from his operations."[16]

There was no positive thought by StormHarbour. As *Valentine v Ministry of Defence*[17] confirms even when statutory duty does not apply risk assessment does. So there is no reduction in the duty owed by an employer because of s.69 of the Enterprise and Regulatory Reform Act 2013. The standard set in 1891 is undiminished.

Practice points

- An employer owes a personal, non-delegable duty to all of their employees to take reasonable care for their physical safety.
- An employer must not to subject those employed by him to unnecessary risk.
- The employer's duty does not just relate to the premises occupied by him, it can extend to places and third party premises where the employee is sent to work.
- Both statute and the common law require that an employer must conduct suitable and sufficient risk assessments and act upon them.
- The Enterprise and Regulatory Reform Act 2013 neither alters nor reduces these duties of employers.

Nigel Tomkins

[16] *Threlfall v Hull CC* [2010] EWCA Civ 1147; [2011] I.C.R. 209 at [35].
[17] *Valentine v Ministry of Defence* [2010] CSOH 40; 2010 S.L.T. 473.

Border v Lewisham and Greenwich NHS Trust[1]

(CA (Civ Div), Richards LJ, Tomlinson LJ, Newey J, January 21, 2015, [2015] EWCA Civ 8)

*Liability—personal injury—clinical negligence—*Bolam *test—breach of duty of care—consent to treatment—breach of duty*

Breach of duty of care; Clinical negligence; Consent to treatment

The claimant had been taken to the accident and emergency department of a trust hospital with a suspected broken right humerus. The doctor on duty, a senior house officer, put a cannula into her left arm for the purpose of intravenous access. He did so even though the patient told him that she had recently had a left mammectomy and axillary node clearance, and that inserting a cannula into her left arm carried the risk of oedema. The patient developed an infection at the cannula site, resulting in an oedema and a permanent and material level of disability. She claimed damages from the defendant Trust who denied liability.

The claim was litigated and at trial the judge concluded that the doctor had acted in accordance with accepted practice and had not been negligent. He found that he had made a quick and silent decision that the left arm was the only viable site for the cannula, and that he had inserted it without communicating his decision in any detail or obtaining the patient's positive consent. He found, however, that the doctor had been faced with the choice of following standard practice and inserting the cannula into the left arm immediately, or delaying insertion until the situation warranted it.

The judge found that the latter course would have been a very bold decision for a senior house officer, given that a very substantial school of thought favoured the former approach. He dismissed the claim and the claimant appealed.

The Court of Appeal held that the only tenable reading of the judgment was that the doctor had inserted the cannula without the patient's express or implied consent. At trial, there had been a clear-cut, factual dispute between the doctor and the patient as to how much the doctor had said about his decision to insert the cannula, and as to whether the patient had consented. As far as they were concerned the judge had clearly preferred the patient's evidence on those matters. He concluded that the doctor had made a quick and silent calculation about the best cannula site, had not communicated his decision in detail, and had inserted the cannula so quickly that the patient hardly had time to realise what was happening.

They accepted that the judge gave an adequately reasoned basis for preferring the patient's evidence and took account of relevant matters. There was no basis on which they, as an appellate court, could interfere with his finding. However, despite having found a lack of consent, the judge moved on to consider whether the immediate insertion of the cannula was in accordance with accepted practice.

The judge appeared to have been under the misapprehension that the issue of consent was irrelevant and that what mattered was whether the insertion of the cannula had been the right thing to do, in the sense of being in accordance with accepted practice. He might have been thinking of the principle that, in a medical emergency, when the patient was incapable of giving consent, a doctor could proceed without consent provided he was acting in the patient's best interests. However, this case was not such a case. The patient had been fully conscious and capable of giving or withholding her consent. In those circumstances, he had been wrong to regard the issue of consent as unimportant.

Although counsel for the patient did not view the absence of consent as being an important part of her case at trial, the court noted that it was within the scope of the patient's pleaded case. It was therefore

[1] Formerly South London Healthcare NHS Trust.

open to her to contend, on appeal, that the finding of a lack of consent should have led the judge to find a breach of duty, even though that was not the way she had advanced her case at trial. Moreover, that contention had to succeed. A finding of absence of consent to the insertion of the cannula led inexorably to a finding of breach of duty in inserting it. The duty to obtain the patient's consent to treatment was a fundamental tenet of medical practice.

Because of the way the patient's case had been pursued at trial, the judge had not needed to make any finding as to whether she would have consented to the insertion of the cannula had she been given a fuller explanation of the relative risks. That was a finding that now had to be made by the trial judge rather than the appellate court. The case would, therefore, be remitted to the trial judge to determine the outstanding issue of causation and, if liability was established, to reach a final determination as to damages. The appeal was allowed.

Comment

Having just concluded two clinical negligence High Court trials in six weeks (won one, lost one—subject to appeal—since you asked) what is clearer than ever to me is that often what one starts off thinking the case is about, turns out not to be the case. As the factual evidence emerges and as the experts develop their thinking in their oral evidence, issues which had not appeared to be important or relevant can come to the fore in place of issues which had appeared to be fundamental. That is all part and parcel of litigation risk and illustrates precisely why trials are so risky.

This case is a good illustration of that with neither party considering "consent" to be an issue and yet the Court of Appeal ultimately deciding it was, in fact, the entire rationale of the case. Indeed, counsel for the claimant did not raise the issue of consent in his skeleton and both parties indicated to the judge during the trial that consent was not the issue. As the Court of Appeal noted "… the judge was right to consider that neither party was attaching importance to the issue at the trial".

And yet the Court of Appeal determined the appeal by concluding that there was an absence of consent. There was no "implied consent" by the claimant and that to therefore insert the cannula into the patient's left arm in the absence of consent was in itself a breach of duty. The issue of causation was remitted back to the trial judge but on the facts one would have thought that was a matter that would be concluded in the claimant's favour if not on the "but for" or "material contribution" basis then almost certainly on the "material increase in risk" basis. The claimant had said she did not want the cannula inserted in her left arm because of the increased risk of oedema due to her pre-existing morbidity, the doctor inserted the cannula without her consent and the oedema occurred.

Patient consent and autonomy is becoming a fundamental part of clinical negligence law. The landmark Supreme Court decision in *Montgomery v Lanarkshire Health Board*[2] decided by seven members of the Supreme Court (four days ago at the time of writing and which will be dealt with far more comprehensively in the next edition of the Journal) has reinforced this. The case of *Border* illustrates the simplicity of the application of the point and what a powerful tool it can be.

Practice points

- Consent to treatment should be the starting point for any analysis of a potential clinical negligence claim.
- The absence of consent constitutes a breach of duty and does not involve a "*Bolam*" test analysis post-*Montgomery*.

[2] *Montgomery v Lanarkshire Health Board* [2015] UKSC 11; [2015] 2 W.L.R. 768 on appeal from *Montgomery v Lanarkshire Health Board* [2013] CSIH 3; 2013 S.C. 245.

- Clinical negligence trials remain risky!

Muiris Lyons

Sobolewska[1] v Threlfall

(QBD, Foskett J, December 12, 2014, [2014] EWHC 4219 (QB))

Liability—personal injury—negligence—road traffic accidents—causation—contributory negligence—intervening events—burden of proof—permitted inference

Causation; Contributory negligence; Intervening events; Personal injury; Road traffic accidents

On February 10, 2012 after leaving work Iwona Sobolewska, then aged 39, was found on the ground in the car park of Whiteheads (a convenience store and off licence) in Great Harwood, Blackburn. She had sustained a fracture to her ankle and a significant head injury, which caused brain damage leading to aphasia, cognitive deficits and a weakness in her arm. As a result of her head injury she could not remember what had happened, but her case was that her injuries had been caused when the defendant Threlfall's car had come into contact with her in the car park, sending her to the ground.

It was not in issue that Threlfall's car had been travelling very slowly at the material time. Threlfall was also uncertain about what exactly had occurred, but in his witness statement he recounted that, upon driving off in the car park, he had noticed a shadow on his left hand side which suddenly disappeared. He accepted that the ankle injury had been caused by him making contact with the claimant in the car park, but he argued that the head injury had been caused other than as a result of the contact between her and his car. He contended that insufficient force would have been applied to the claimant in the low velocity collision for her to have fallen and impacted with the ground with adequate force to cause an injury as severe as that which she had sustained. The court was required to determine liability.

The judge was satisfied that the evidence clearly showed that there had been contact between Threlfall's car and the claimant, that she had fallen to the ground as a result, and that in the process had injured her ankle and head, the head injury being caused by her impact with the ground. Foskett J determined that it was wholly clear that the injuries were of a kind likely to have been caused by falling to the ground after being run into by a car.[2] For the head injury to have been caused in some way before the accident involving Threlfall's car, it had to be envisaged that the claimant had either fallen and hit her head on the ground sometime earlier in her journey to the car park, or that she had been the victim of a serious assault at some stage which had involved her head being struck.

Mr Justice Foskett concluded that it was inconceivable that at some stage in the period of about 10 minutes from leaving work to being found on the ground of the car park, having had some interaction with Threlfall's car, she had suffered a head injury which had rendered her temporarily unconscious, and had then recovered sufficiently to get to the car park only to suffer a second, unrelated period of unconsciousness. Applying common sense to the defendant's own account of what had happened, it suggested plainly that the claimant had fallen with sufficient force to cause her head injury. The judge accepted as tolerably clear that an awkward fall onto a car park surface, where the hands of the person

[1] Iwona Sobolewska (A Protected Party by E.W.A. Sobolewska, her Litigation Friend).
[2] *Drake v Harbour* [2008] EWCA Civ 25, 121 Con. L.R. 18 followed.

falling did not move sufficiently quickly or in the right direction to break the fall, could easily lead to the kind of injury that the claimant had sustained.

The judge held that in manoeuvring as he had done, it had been incumbent on the defendant to check that it was safe from the point of view of pedestrians and other users of the car park. He had not done so and thus had deprived himself of the opportunity of seeing the claimant who, notwithstanding the lack of lighting in the car park, would have been visible if he had looked carefully.

Accordingly, in the absence of any other credible explanation for the claimant's injuries, the judge decided that the picture was clear enough to infer that the injuries were probably caused as a result of whatever had happened between the claimant and the defendant's car. It was likely that the claimant had approached Threlfall's car from the left and that she had been close to the car before it had started to move. If so, she would not have been in the direct line of view of the car's front or rear lights. On that basis, she was not at fault at all. The evidence did not suggest that she had been distracted by listening to music or focusing on her mobile telephone shortly before the accident. There was therefore no basis for a finding of contributory negligence. Judgment was entered for the claimant with damages to be assessed.

Comment

This is a useful case on liability with application specifically to road collision cases, as well as more generally to cases where the claimant has little or no memory of the circumstances of the accident, which can open the door to defendant and insurer arguments about liability, causation and contributory negligence.

The claimant in fact suffered a significant brain injury, causing aphasia (difficulty communicating), some cognitive deficiency as well as a weakness in her right arm. The claimant's resultant amnesia and the lack of any other witnesses meant that only the defendant's evidence of the accident was available to the court. For example, his evidence of the very slow movement of his vehicle was accepted. The defendant gave evidence that he had no appreciation that he had even struck the claimant. This affected the way in which the accident was initially investigated.

Unfortunately, and wrongly, those attending the scene thought the claimant was under the influence of alcohol. Additionally, the police considered alternative explanations for the injury, including assault by an unidentified third party. The defendant's unawareness of impact and the initial investigations lead the defendant's representative to defend on the basis that both the head and the ankle injury were caused before the claimant's arrival at the car park. However, Tim Horlock QC for the defendant acknowledged at trial that the ankle injury was probably caused by the defendant's car, since evidence emerged of contact between the claimant's left foot and a tyre on the defendant's car, but the defendant position was maintained throughout that the head injury was not part of the same accident.

Foskett J rejected as "highly improbable" any scenario in which the head injury was caused other than by a fall following collision with the defendant's car. He referred to *Clerk & Lindsell*[3] drawing the conclusion that the fact he rejects the defendant's hypothesis as highly improbable, does not mean that necessarily he should reject another more probable hypothesis, namely that of the claimant that the head injury was caused by the car park collision with the defendant's car.

Foskett J referred to and applied another pivotal passage in *Clerk & Lindsell*:[4]

> "The burden of proving causation rests with the Claimant in almost all instances. The Claimant must adduce evidence that it is more likely than not that the wrongful conduct of the Defendant in fact resulted in the damage of which he complains. On the other hand, there are occasions when the court is permitted to draw an inference that there must have been a causal link, taking a common-sense

[3] Professor Michael Jones, Professor Anthony Dugdale and Mark Simpson, QC (eds), *Clerk & Lindsell on Torts*, 21st edn (London: Sweet & Maxwell, 2014).

[4] *Clerk & Lindsell on Torts* (2014), para.2.07.

> and pragmatic approach to the evidence, in circumstances where the evidence is somewhat equivocal. So if the Claimant proves that the Defendant was in breach of duty and that damage occurred which was of a kind likely to have been caused by such a breach this may be enough for the court to infer that the damage was probably caused by the breach, even if the Claimant is unable to prove positively the precise causal mechanism."

Further, Foskett J quotes the final sentence to *Drake v Harbour*[5] the words of Toulson LJ, as he then was, in *Drake*:[6]

> "In the absence of any positive evidence of breach of duty, merely to show that a Claimant's loss was consistent with breach of duty by the Defendant would not prove breach of duty if it would also be consistent with a credible non-negligent explanation. But where a Claimant proves both that a Defendant was negligent and that loss ensued which was of a kind likely to have resulted from such negligence, this will ordinarily be enough to enable a court to infer that it was probably so caused, even if the Claimant is unable to prove positively the precise mechanism. That is not a principle of law nor does it involve an alteration in the burden of proof; rather, it is a matter of applying common sense. The court must consider any alternative theories of causation advanced by the Defendant before reaching its conclusion about where the probability lies. If it concludes that the only alternative suggestions put forward by the Defendant are on balance improbable, that is likely to fortify the court's conclusion that it is legitimate to infer that the loss was caused by the proven negligence."

The judgment in *Sobolewska* goes on to apply common sense to the totality of the evidence. First, it is noted that there is no definitive answer as to how the claimant's brain injury was caused. The uncertainties, it is concluded, do not undermine the conclusion that on the balance of probabilities the claimant's injuries resulted from the collision with the defendant's car.

The judge goes on to explore the alternative scenarios. He concludes that the claimant most likely left work at around 20.00 and took a route taking her into the convenience store car park which would have taken her around nine minutes, and that the ambulance was called at 20.11, following the collision. All this is consistent with a single collision or incident. The injury, according to the one accident and emergency consultant (Mr Wilson) would have made it impossible for the claimant to walk.

There were no witnesses to any other assault or incident. There was no associated theft; the claimant was carrying a ruck sack. There was consultant evidence that the claimant, following the head injury, would not have been able to have got to her feet immediately.

There was evidence from the defendant that the claimant was glazed and dazed, which supported the fact that immediately post collision with the defendant's car the claimant was on balance likely to have been concussed. The defendant gave evidence that he noticed a shadow which appeared and disappeared to his left. In probability this shadow was, or was caused by, the claimant. The claimant's falling mechanism may well have increased the velocity of her fall.

All indicators point to the unlikelihood of any cause other than the collision of the defendant's vehicle, namely: the probability of the defendant's car collision; insufficient time for another collision or assault; the claimant's post-injury immobility; and the lack of evidence of assault, another collision or related theft. Whilst Foskett J goes on to examine the medical evidence in greater detail, he finds causation of the injury established.

Liability, whilst at the lower end of the negligence scale, is held established. The defendant fails to give evidence that he looked over his left shoulder. He should have done so. The momentary inattention was sufficient, it was held, to prove primary liability.

[5] *Drake v Harbour* [2008] EWCA Civ 25; 121 Con. L.R. 18 (applied in *Vaile v Havering LBC* [2011] EWCA Civ 246; [2011] E.L.R. 274).
[6] *Drake* 121 Con. L.R. 18 at [28].

Turning to contributory negligence, the judge concluded that the probability was that the claimant was not in front of the defendant's car, and was therefore in no position to take evasive action. There was no evidence of earphones, mobile phone or other distraction to the claimant. There was no logical likelihood that the claimant was travelling in a direction which could have reasonably implied contributory neglect.

The judge rejects any contributory negligence, in the absence of any evidence applying the same "common sense" approach.

Practice points

- The lack of definitive evidence of liability and causation need not be fatal to a claim.
- Use of the "common sense" test articulated in *Clerk & Lindsell* and applied in *Drake* and indeed in *Sobolewska*, entitles the judge to draw reasonable inference on the balance of probabilities.
- The same approach can also be used to refute allegations of contributory negligence.
- Beware of rival but implausible defendant-postulated hypotheses. These can be, and should be, rejected where appropriate using the same "common sense" approach.
- By definition claimant amnesia cases often will involve serious brain injury where the liability gateway to damages may well be fiercely contested.

John Spencer

Coia v Portavadie Estates Ltd

(IHCS, Lord Menzies, Lord Bracadale, Temporary Judge C A L Scott, QC, January 6, 2015, [2015] CSIH 3)

Employers' liability—"work equipment"—Provision and use of Work Equipment Regulations 1998—Workplace (Health, Safety and Welfare) Regulations 1992—Health and Safety at Work etc. Act 1974 s.52—"at work"

LIABILITY

℄ Employers' liability; Living accommodation; Personal injury claims; Place of work; Scotland; Work equipment

Matthew Coia was a chef employed by the defenders, a hotelier and lodge operator. Coia had rented a lodge from the defenders using an informal agreement which required him to keep the lodge clean and to vacate it if it was required for customers. Subsequently, the employers told Coia that the lodge was required.

Coia had stored some of his personal possessions on a shelf in a wardrobe in the lodge. Within the wardrobe was a metal pole from which clothing would normally be hung. It was not secured safely to the wardrobe. It was not of the correct size and had not been securely fixed in place nor otherwise stabilised. The edges of the pole were sharp and had not been smoothed.

In the course of removing his belongings from a shelf in the wardrobe the metal pole dislodged and fell and struck the pursuer's foot, causing him injury. He sued his employers.

His claim was based on the alleged breach by the defenders of various statutory duties, namely:

1) Regulations 4 (Suitability), 5 (Maintenance), 12[1] and 20[2] of the Provision and Use of Work Equipment Regulations 1998 (the Equipment Regulations);
2) Regulation 10[3] of the Work at Height Regulations 2005;
3) Regulation 5[4] of The Workplace (Health, Safety and Welfare) Regulations 1992 (the Workplace Regulations); and
4) Regulation 3[5] of the Management of Health and Safety at Work Regulations 1999.[6]

The defenders denied liability and averred that none of these Regulations applied. However, in the event of liability being established, parties agreed quantum in the sum of £3,250 by means of joint minute. At trial the sheriff granted decree of absolvitor, holding that the pole was not work equipment, Coia was not at work when he was in the lodge, and Coia was not acting in the course of his employment when the accident occurred. Coia appealed.

On appeal three central issues arose.

1) Was the wardrobe pole which fell and injured the pursuer "work equipment provided by the defenders for use or used by an employee of theirs at work" for the purpose of the Provision and Use of Work Equipment Regulations 1998 when the accident happened?
2) Was the pursuer at work when the accident happened?[7]
3) Was the lodge in which the accident happened a workplace for the purpose of the Workplace (Health, Safety and Welfare) Regulations 1992 when the accident happened?

The court had no doubt Coia was not at work when the accident happened, he was removing his personal possessions from the lodge and there was nothing in the evidence to establish that he was doing so as a result of an instruction given to him in the course of his employment. The wardrobe was held not to be in the lodge for use at work. It was not work equipment in terms of the Provision and Use of Work Equipment Regulations 1998 when the pole had fallen and injured Coia. Further the lodge was not, at the time of the accident, a workplace for the purpose of the Workplace (Health, Safety and Welfare) Regulations 1992. The appeal was dismissed.

Comment

This case has a very simple a set of facts. A metal pole designed to hang up clothes in a wardrobe was accidentally dislodged as clothes were being removed. It fell causing injury. Should it have been capable of being dislodged accidentally? If so, one could argue that this was just an unfortunate accident. If not, there would seem to be a clear case in negligence. However, this case seems not to have been run in negligence at all. Instead the case was based upon no less than seven alleged breaches of statutory duty. The question is why?

[1] Provision and Use of Work Equipment Regulations 1998 (Equipment Regulations) reg.12(1): "Every employer shall take measures to ensure that the exposure of a person using work equipment to any risk to his health or safety from [3(a) any article or substance falling or being ejected from work equipment] is either prevented, or, where that is not reasonably practicable, adequately controlled."

[2] "Every employer shall ensure that work equipment or any part of work equipment is stabilised by clamping or otherwise where necessary for purposes of health or safety."

[3] Work at Height Regulations 2005 reg.10(1): "Every employer shall, where necessary to prevent injury to any person, take suitable and sufficient steps to prevent, so far as is reasonably practicable, the fall of any material or object."

[4] Workplace (Health, Safety and Welfare) Regulations 1992 (the Workplace Regulations) reg.5(1): "The workplace and the equipment, devices and systems to which this regulation applies shall be maintained (including cleaned as appropriate) in an efficient state, in efficient working order and in good repair." Regulation 5(2): "Where appropriate, the equipment, devices and systems to which this regulation applies shall be subject to a suitable system of maintenance."

[5] Management of Health and Safety at Work Regulations 1999 reg.3(1): "Every employer shall make a suitable and sufficient assessment of—(a) the risks to the health and safety of his employees to which they are exposed whilst they are at work; and (b) the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking."

[6] Alleged breaches (3) and (4) were abandoned on the appeal.

[7] Health and Safety at Work Etc. Act 1974 s.52(1)(b): "an employee is at work throughout the time when he is in the course of his employment, but not otherwise."

The reality of the statutory obligations imposed on the employer meant that if the pursuer was at work at the time of the accident there were a number of statutory breaches, some imposing strict liability. It was conceded that if the pole was, properly construed, work equipment, there were breaches of regs 4, 5 and 20 of the Equipment Regulations. The employer said that Matthew Coia was not at work and that the wardrobe pole was not work equipment. In addition, liability in terms of the Workplace Regulations was denied.

The court's starting point was to establish the purpose of the wardrobe and pole. What was it for? If it was for use at work, then it was work equipment.[8] The purpose of the wardrobe was to store clothes, of those the defenders permitted to occupy the lodge in return for payment. That included their employee Matthew Coia. The scope of work equipment is limited by the words in reg.2(1) of the Equipment Regulations "for use at work (whether exclusively or not)". In *Smith v Northamptonshire CC*[9] Lord Hope put it like this:

> "The words 'for use at work' indicate that the item must have some practical purpose in connection with work. This excludes items that are for storage only or for decoration for example, or which cannot be 'used' at all such as the floors, walls or ceilings of a building. Whether those words are satisfied will depend on what is done in or by the undertaking that is under consideration."

Who used the wardrobe? The answer was the paying guests or others occupying the lodge. The court held that cleaning and housekeeping staff did not use it. There was no evidence that cleaners were instructed to do anything such as hanging clothes which might be lying on the bed in the wardrobe. They had no doubt that the fact that an item might be cleaned (wrongly in my view) did not render it work equipment.

As Lord Hoffmann put it in *Spencer-Franks*,[10] you must first decide whether some apparatus is work equipment or not and then you decide whether the Regulations apply in respect of it. To do that they considered what activities were being carried out at work in the undertaking. They concluded that the fact that something was being cleaned did not render it work equipment. Although a cleaner or housekeeper might come into contact with the wardrobe, or the pole within the wardrobe, merely coming into contact with something was held not enough to render it work equipment.

These two further paragraphs from *Spencer-Franks* were considered relevant:[11]

> "84. The definition of 'work equipment' embraces items for use at work 'whether exclusively or not', and so recognises that it is possible, and in some contexts common, for an item to be for use at work at one time, but not at another. Take the company car used for an entirely private journey, quite possibly not even by the employee. Or take the tools of an employed or self-employed builder's trade, which he uses at home to repair his own sink. On the other hand, an item does not cease to be 'for use at work' merely because it is not actually being used at a particular moment in time, though standing by in a work context with a view to such use.[12]
>
> …
>
> 96. Once a particular item is 'work equipment', at least from the perspective of a particular employer, it seems to me that it cannot cease to be work equipment (save perhaps in cases such as that of the company car when used for an entirely private journey, as mentioned by Lord Mance at the beginning of para 84). Accordingly, in this case, given that the door closer was 'work equipment', it did not cease to become so simply because it was being repaired, rather than used as a door closer. In this connection, I agree with your Lordships that the

[8] *Spencer-Franks v Kellogg Brown & Root Ltd* [2008] UKHL 46; [2009] 1 All E.R. 269 per Lord Hoffman.
[9] *Smith v Northamptonshire CC* [2009] UKHL 27; [2009] 4 All E.R. 557.
[10] *Spencer-Franks* [2009] 1 All E.R. 269 at [19].
[11] *Spencer-Franks* [2009] 1 All E.R. 269 at [84] and [96] per Lord Mance and Lord Neuberger.
[12] See *Given v James Watt College* [2006] CSOH 189; 2007 S.L.T. 39.

> reasoning of the Court of Appeal in *Hammond v The Commissioner of Police of the Metropolis* [2004] ICR 1467 (which could be said to be a weaker case than this for the employer, as the claimant in that case was his employee) cannot be supported."

So something can cease to be work equipment when it is put to private use such as a car. Here the wardrobe was being used for an entirely private use, i.e. the storage of Matthew Coia's private possessions. However, he would do his own housekeeping. It was his responsibility to keep the lodge clean and tidy. So surely the wardrobe was potentially work equipment for him when acting as housekeeper. The problem was that it was not work equipment for him, when he was using it on a purely private basis. Odd though this seems that is how the Regulations work.

I agree with the court that the Equipment Regulations did not apply in this case. If they had applied then *Kennedy v Chivas Brothers Ltd*[13] and *Hide v Steeplechase Co (Cheltenham) Ltd*[14] would have been relevant. On the basis of those cases the effect of the Regulations would have been straightforward. Once Matthew Coia showed that he suffered an injury as a result of contact with work equipment which was, or might be, unsafe, the burden would have been on his employers 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. It seems to me on the facts that the employers could not have defended the case.

As far as the Workplace Regulations were concerned, to apply, the lodge needed to fall within the definition of "workplace" provided by reg.2(1), namely

> "any premises … which are not domestic premises and are made available to any person as a place of work and includes (a) any place within the premises to which such person has access while at work".

Matthew Coia was in a quite different situation from the employee in *Robb v Salamis*,[15] who had no option but to use the sleeping accommodation on the offshore platform he was working on. Unlike Robb when on the platform, Coia was not obliged to take up any offer of accommodation. Their view was that the Regulations operated to protect those workers to whom premises were made available as a place of work.[16] The lodge was never made available to him as a place of work.

Practice points

- Health and safety Regulations protect employees who are at work throughout the time when they are in the course of their employment, but not otherwise.
- An item of "work equipment" can cease to be work equipment when used for an entirely private purpose.
- Accidents caused by an item of "work equipment" are in most cases likely to be impossible to defend.
- Someone injured by an item which has ceased to be "work equipment" because it is being used entirely for a private purpose will have lost the protection of the Regulations and be forced to rely upon negligence and/or occupiers liability.
- The Workplace Regulations do not apply to domestic premises.

[13] *Kennedy v Chivas Brothers Ltd* [2013] CSIH 57.
[14] *Hide v Steeplechase Co (Cheltenham) Ltd* [2013] EWCA Civ 545.
[15] *Robb v Salamis (M & I) Ltd* [2006] UKHL 56.
[16] *Brown v East Lothian Council* [2013] Scot CS CSOH 62 considered.

- It is always advisable to plead negligence and, where applicable, breach of occupier's liability in addition to breaches of health and safety Regulations in case application of such Regulations is contested.

Nigel Tomkins

Heneghan[1] v Manchester Dry Docks Ltd

(QBD, Jay J, December 11, 2014, [2014] EWHC 4190 (QB))

Personal injury—employers' liability—negligence—asbestos—causation—lung cancer—smoking—material contribution—apportionment—measure of damages—Fatal Accidents Act 1976—Law Reform (Miscellaneous Provisions) Act 1934

LT Apportionment; Asbestos; Cancer; Causation; Material contribution; Measure of damages

James Heneghan was born on March 8, 1938. During the course of his working life, he was exposed to respirable asbestos fibres and dust. In November 2011 Mr Heneghan began to develop symptoms of adenocarcinoma of the lung, and a diagnosis to that effect was made in early 2012. He died from the disease on January 3, 2013. He had been employed by the six defendants on a sequential basis between 1961 and 1974. There were earlier employers who had not been sued.

The parties had agreed that James Heneghan's exposure to asbestos over the course of his working life could be quantified and that the total exposed "share" of the defendants sued was 35.2 per cent. The parties' medical experts had agreed that his risk of contracting lung cancer had been increased both by asbestos exposure and by his having smoked and that, on the balance of probabilities, he would not have developed lung cancer had he not been exposed to asbestos. The sole issue was whether each defendant was liable for damages in full (£175,000) or for only £61,600, being 35.2 per cent of that sum.

Mr Justice Jay held that in cases of this kind, there were two categories to consider. The first embodied the conventional common law approach: in a case where medical causation was in issue, strict adherence to logic and principle demanded proof on the balance of probabilities either of the whole of the damage suffered or of a material part of it.[2] The second category comprised cases which were covered by the principle in *Fairchild*,[3] in which it was held that the test of causation was whether the employer had materially increased the risk of harm to the claimant.

The claimant argued that the common law had recognised a category of case which fell between the conventional approach and the Fairchild "extension". It was said that if a case fell within that intermediate category, it would be sufficient to prove on the balance of probabilities that the risk of injury or damage was materially increased. The claimant asserted that such a principle could only apply when medical causation was proved under the conventional test and the issue was whether the defendant under scrutiny had caused the claimant's loss.

The judge held that the claimant's intermediate category did not exist. It was in fact the same as the second category. Although causation was a unitary concept, it was often convenient and helpful in a multi-party case to state that there were two stages to the inquiry. At the first stage, the court considered whether medical causation had been made out. Here medical causation involved considering whether the

[1] Carl Heneghan suing as Son & Administrator of the Estate of James Leo Heneghan, Deceased.
[2] *Bonnington Castings Ltd v Wardlaw* [1956] A.C. 613 HL and *McGhee v National Coal Board* [1973] 1 W.L.R. 1 HL applied.
[3] *Fairchild v Glenhaven Funeral Services Ltd (t/a GH Dovener & Son)* [2002] UKHL 22; [2003] 1 A.C. 32.

claimant had proved that James Heneghan's lung cancer had been caused by asbestos fibres and dust rather than by smoking. At the second stage, the court considered whether causation was proved against each of the defendants. Given the opinion of the medical experts, the claimant succeeded at the first stage. However, he failed at the second stage.

The judge's view was that it was simply a question of doing the basic arithmetic and concluding that the contributions of each of the defendants, whether viewed individually or collectively, amounted to less than 51 per cent. He held that it made no sense to say that each defendant's exposures materially contributed to the disease process. The evidence did not establish that every asbestos fibre, or exposure, was or must have been implicated in that process.

The aetiology of lung cancer was different from silicosis or pneumoconiosis. In those cases, which depended on the gradual accumulation of lung dust, the disease process was continuous and the concept of material contribution had an intelligible role. In lung cancer cases, there was no analogue to the gradual accumulation in the lungs of asbestos or cigarette smoke. The risk of the disease eventuating was proportionate to the quantum of exposure, but that was a statistical judgment, not an assessment which could be linked to the physical presence of deposits of dust in the lung. This case was instead covered by the *Fairchild* principle. That principle had been held to apply in mesothelioma cases; however, lung cancer and mesothelioma were legally indistinguishable; the preconditions set out in the authorities for the application of the principle were met in lung cancer cases.[4]

The claimant had conceded for the purposes of this action (but not any appeal) that should it be found that the *Fairchild* principle applied, he could not avoid apportionment given the decision in *Barker v Corus UK Ltd*.[5] Damages were therefore limited to the sum of £61,600.[6]

The claimant plans to appeal.

Comment

The aftermath of asbestos exposure, bringing immense grief and suffering in its wake, reaches into many a family. As Mr Justice Jay notes in this case of lung cancer following extensive exposure to asbestos the claimant is Professor Carl Heneghan, a distinguished Oxford epidemiologist, acting as executor for his father's estate.[7] According to his mother, Doreen Heneghan, it had been her husband's "dying wish for the family to achieve victory in the courts".[8] As this first instance decision is currently on appeal, and may also be subject to a view in the pending Supreme Court determination of *International Energy Group Ltd v Zurich Insurance Plc UK*,[9] it is perhaps too early to say if that "victory" can yet be achieved.

Mr Heneghan senior had, in the classic scenario of this industry, worked for several firms and in particular the six defendants in the period between 1961 and 1974 when he was exposed to asbestos fibres. Together this had amounted to some 32 per cent of his period of asbestos exposure. An additional factor was that the deceased was a smoker, an issue which since the publication of "Smoking and Health" in 1964 by the Surgeon-General's Advisory Committee in the US has drawn the blunt causal conclusion that cigarette consumption is pivotal in developing lung cancer.

The view of another distinguished Oxford epidemiologist, Sir Richard Peto, is that half of all regular smokers are killed by their habit, with lung cancer alone accounting for about half of that mortality. Indeed, his forecast, first given at a conference in China, is that if present trends continue there will be one billion smoking-related deaths in the 21st century.[10] A serious difficulty is that most cases of lung cancer in victims

[4] *Fairchild* [2003] 1 A.C. 32 applied and *Sienkiewicz v Greif (UK) Ltd* [2011] UKSC 10; [2011] 2 A.C. 229 considered.
[5] *Barker v Corus UK Ltd* [2006] UKHL 20; [2006] 2 A.C. 572.
[6] *Barker* [2006] 2 A.C. 572 applied.
[7] *Heneghan v Manchester Dry Docks Ltd* [2014] EWHC 4190 (QB) at [3]. See also *http://www.carlheneghan.com/* [Accessed April 27, 2015]
[8] "Family in fight over £175,000 asbestos tragedy payout", *Manchester Evening News*, November 28, 2014.
[9] See also *International Energy Group Ltd v Zurich Insurance Plc UK* [2013] EWCA Civ 39; [2013] 3 All E.R. 395.
[10] "Smoking will 'kill up to a billion people worldwide this century'", *Independent*, October 28, 2012.

who also smoked cannot be individually counted as to a range of causalities, since the cancer is clinically indistinguishable from the far greater number of cancers caused by tobacco. However, in such cases engineering evidence can show the level of asbestos exposure over the course of working life. The evidence in Mr Heneghan's case was that he had been exposed to very high levels, at an aggregate figure of 133 fibres/ml years, well above the threshold exposure dosage established in the case of an ex-smoker, *Shortell v BICAL Construction Ltd*, of 40 fibre/ml years.[11] That engineering evidence also provided a breakdown of the exposure from each of the six defendants, amounting to 35.2 per cent of Mr Heneghan's total dose, ranging from 10.1 per cent down to 2.5 per cent of the total exposure figure. As so often with historic cases with technical problems such as insolvency, "date of knowledge", periods of self employment and a lack of available records, the judge indicated that there were "earlier employers who have not been sued",[12] and later named a missing party, W. Blackwell, who was responsible for 56 per cent of the exposure.[13]

Fortunately, issues of contributory negligence and quantum in the case had "fallen away".[14] In recent years a more realistic view has been taken of the incidence of tobacco consumption, and although there are many medical mysteries, prior smoking is no longer a bar to litigation in industrial disease cases such as those relating to pneumoconiosis, silicosis and asbestosis. Some heavy smokers live remarkably unaffected lives, while other occasional smokers crumple after minimal exposure. Because of the presence of tar—an early popularized attack on smoking in 1950 noted this habit was equivalent to coating your lungs with "15 full cocktail glasses" of tar a year "if you smoke a pack a day"[15]—working with asbestos fibres while maintaining a smoking habit is intrinsically hazardous.

The pre-eminent medical expert on asbestos-related diseases, Dr Robin Rudd, who gave evidence in *Heneghan*, indicated that "the effects of smoking and asbestos exposure were not merely synergistic but multiciplative". And in this particular case the risk for the deceased of "developing lung cancer at these levels of asbestos exposure were more than five times greater than they would have been had he just been a smoker".[16] Indeed, in *Shortell*, where the claimant was "a fairly heavy smoker" the epidemiological evidence was that the risk of contracting lung cancer is 50 times greater than the risk that would be present in a non-smoker who is not exposed to asbestos.

However, the critical engineering evidence on the levels of asbestos exposure to Mr Heneghan, when considered in the light of the "Helsinki criteria"—drawn up by an international panel of experts in 1997—showed that his case was one where the cumulative exposure enabled an inference to be drawn that his lung cancer was "attributable" to asbestos, having gone well above the exposure levels and beyond the "minimum 10 year interval from first exposure to onset of the cancer".[17]

The full level of damages was also agreed at £175,000, but the nub of this case was the contention by the defendants that they should only make payment of £61,600, the equivalent of the 32.5 per cent of the total "exposed share" of the six defendants, and then be apportioned accordingly.

Jay J gives a detailed analysis of the medical evidence provided by Dr Rudd, and where and how it differed from that given by Dr John Moore-Gillon for the defendants. He notes that the case "gives rise to problems of some difficulty and importance" and expresses surprise there has been no previous determination of the point.[18] There is, of course, a long history of a swaying battle on these issues of causality, particularly in industrial disease litigation. Lord Reid in *Bonnington Castings v Wardlaw* pointed

[11] There was a 15 per cent reduction for contributory negligence in that case, where the smoker had quit tobacco for some 20 years; *Shortell v BICAL Construction Ltd*, unreported, May 16, 2008, QBD (Liverpool).
[12] *Heneghan* [2014] EWHC 4190 (QB) at [2].
[13] *Heneghan* [2014] EWHC 4190 (QB) at [61].
[14] *Heneghan* [2014] EWHC 4190 (QB) at [4].
[15] Roger Riis, "How Harmful are Cigarettes", *Readers Digest*, January 1950, pp.1–11.
[16] *Heneghan* [2014] EWHC 4190 (QB) at [14].
[17] *Heneghan* [2014] EWHC 4190 (QB) at [9]. See also Antti Tossavainen, *Helsinki Criteria for Asbestos-Related Disease* (January 1997).
[18] *Heneghan* [2014] EWHC 4190 (QB) at [5].

out that pneumoconiosis occurs with a gradual accumulation of silica inhaled over the years, and the real question should therefore be whether dust from an "innocent source", as opposed to one where there had been a clear breach of statutory duty, should exculpate liability.[19] The House of Lords noted that the latter source "materially contributed" to the onset of disease and awarded damages.[20] That led on to *McGhee v NCB*, a case on dermatitis where Lord Reid indicated that the courts "must take a broader view of causation" and that this legal concept "is not based on logic or philosophy".[21]

Then classically there was *Fairchild v Glenhaven Funeral Services*[22] where there were two employers and three potential defendants in respect of mesothelioma and yet the widow could not show where the "fatal fibre" came from. Liability was rejected by the Court of Appeal on this "rock of uncertainty" (per Lord Bingham of Cornhill summarising that argument in the House of Lords). However, on appeal their Lordships overturned that view, on the basis that "policy considerations weighed in favour of allowing the employee to recover against both employers": the so-called *Fairchild* exception, where claimants need only prove that a defendant's tortious conduct had "materially increased" a risk of contracting mesothelioma and that risk then materialised.[23] The *Fairchild* special rule was then developed in *Barker v Corus*[24] and then refined by legislation in s.3 of the Compensation Act 2006. But as Lord Phillips indicated in the Supreme Court in *Sienkiewicz v Greif*:[25]

> "Mesothelioma is a hideous disease that is inevitably fatal … Unusual features of the disease led the House of Lords to create a special rule governing the attribution of causation to those responsible for exposing victims to asbestos dust."

He further indicated this special rule, derived from statute "grafted onto the *Fairchild*/*Barker* principle" was only applicable to mesothelioma and that it had "draconian consequences for an employer who has been responsible for only a small proportion of the overall exposure of a Claimant to asbestos dust, or his insurers".[26]

Should the *Fairchild* special rule be extended or adapted to lung cancer caused by asbestos exposure? Some assistance can be gained from the "Phurnacite litigation" which resulted in *Jones v Secretary of State for Energy and Climate Change*.[27] These claims in respect of approximately 250 claimants were not about exposure to asbestos but involved a range of cancers, including lung cancer, from the Abercwmboi works manufacturing briquettes.

Divided into two Schedules, Sch.A related to non-malignant respiratory disease such as chronic obstructive pulmonary disease and chronic bronchitis. Schedule B consisted of claims for lung cancer, bladder cancer and skin cancer. Dr Rudd, a principal expert witness in *Jones* indicated that, if he had had the benefit of current scientific understanding when he gave evidence in *Fairchild*, he might have been able to identify the source of asbestos fibres that caused a "full house" which led to cancer. Indeed, that may well have prevented the need for the *Fairchild* exemption.

In *Jones* Swift J was therefore able to review the latest evidence on lung cancer cases and asked Dr Rudd about his view that every exposure to a carcinogen will play a part in the process of disease.[28] Jay J in *Heneghan* quotes this passage from *Jones* at length, and in particular the "impossibility of establishing

[19] *Bonnington Castings* [1956] 2 W.L.R. 707 at 617.
[20] *Bonnington Castings* [1956] 2 W.L.R. 707 at 613.
[21] *McGhee v National Coal Board* [1973] 1 W.L.R. 1 HL at 4 and 5.
[22] *Fairchild* [2003] 1 A.C. 32.
[23] See [2002] 3 All ER 305 "Rock of uncertainty" at [43G–H]. Note that the "single fibre" analysis of the time is now doubted, even "discredited"; see in particular [102] in *Sienkiewicz* [2011] 2 A.C. 229.
[24] *Barker* [2006] 2 A.C. 572.
[25] *Sienkiewicz* [2011] 2 A.C. 229 at [1].
[26] *Sienkiewicz* [2011] 2 A.C. 229 at [58].
[27] *Jones v Secretary of State for Energy and Climate Change* [2012] EWHC 2936 (QB).
[28] *Jones* [2012] EWHC 2936 (QB) at [8.21].

causation" from various sources and therefore the "necessity for the creation of the *Fairchild* exception".[29] Jay J notes that "the "single fibre" theory has fallen into desuetude"[30] and that in *Jones*:[31]

> "Dr Rudd said that, if he were asked the same questions now as he had been asked in *Fairchild*, he would say that it was probable that the asbestos fibres from each source had contributed to the carcinogenic process."

Faced with this shift in medical opinion on mesothelioma, what should then be the position with the causation of lung cancer, which is thought to be asbestos "dose related"? Note however, this is not exactly in the same way that, for example, silica dust causes pneumoconiosis, where: "The greater the accumulation of such dust in the lungs; the greater the damage that is being caused to the lung tissue of an individual patient with that disease."[32] Jay J points out that much of this medical analysis remains "an open question", but in the current state of thinking on the "probabilistic" perspective it is accepted that "The greater the exposure to asbestos fibres … the greater the risk that lung cancer may result".[33]

Jay J then goes on to analyse in some detail the rival submissions. He notes that, unusually, the roles of claimants and defendants are reversed in this instance, with the defendants arguing for a "*Fairchild* extension" and the claimant contending against that.[34] In fact the argument put forward by David Allan QC for the claimant is for a new "middle way".

In the first stage he contends that the "but for" test was "amply satisfied", because the experts are all agreed that the occupational exposure caused the lung cancer. But he then argues that a second stage of the analysis would include any defendant who made "a material contribution to the exposure [and thereby] made a material contribution to the injury".[35] This is a position deriving sustenance from *Bonnington Castings* but, in the view of Jay J, attempting to "find a comfortable middle ground which did not find itself sinking like quicksand directly into the mire of *Fairchild*".[36]

On the other hand, David Platt QC for the defendants argued for an extension of the *Fairchild* proportionality structure, drawing sustenance from the wide-ranging article by Professor Jane Stapleton, "Factual Causation and Asbestos Cancers", which has been much discussed.[37] Drawing on authorities in Australia and the US, Professor Stapleton propounds the view that the first question is the "what" of medical causation, and here that was clearly asbestos or smoking or both. That question is answered by applying the conventional test of the balance of probabilities, and in *Heneghan* the engineering evidence decisively points to a work-related asbestos exposure. There is then the "who" question, and the submission of the defendants is that no medical investigation was yet possible to determine a differentiation between tortfeasors; it followed that percentage proportionality was then appropriate. Unless that *Fairchild* exception applied, and apportionment ensued, then the claim failed altogether. Jay J observed that the defendant's perspective on Mr Allan's "middle ground", which he was seeking to occupy, was "illusory and contrary to authority".[38]

Causation as a legal concept is, of course, notoriously difficult. From the "dual causation" issues of two hunters shooting grouse on Vancouver Island and both peppering the luckless plaintiff with shot,[39] through to the DES pharmaceuticals taken in pregnancy by a mother which caused a malignant tumour

[29] *Heneghan* [2014] EWHC 4190 (QB) at [21].
[30] *Heneghan* [2014] EWHC 4190 (QB) at [32].
[31] *Heneghan* [2014] EWHC 4190 (QB) at [21].
[32] *Heneghan* [2014] EWHC 4190 (QB) at [30].
[33] *Heneghan* [2014] EWHC 4190 (QB) at [30].
[34] *Heneghan* [2014] EWHC 4190 (QB) at [53].
[35] *Heneghan* [2014] EWHC 4190 (QB) at [36].
[36] *Heneghan* [2014] EWHC 4190 (QB) at [39].
[37] Professor Jane Stapleton, "Factual Causation and Asbestos Cancers" (2010) Law Quarterly Review 351.
[38] *Heneghan* [2014] EWHC 4190 (QB) at [45].
[39] *Cook v Lewis* [1952] 1 D.L.R. 1.

to a plaintiff[40] and, in no particular order, on to the vexed issues of thalidomide, BSE, Chernobyl fallout, and Bhopal, courts and legislatures around the globe have been wrestling with intractable problems. Jay J in *Heneghan* observes that:

> "The disadvantage of strict adherence to logic and principle is that frank injustice may arise in certain types of case, and therefore the common law constantly strains at the leash of the intellectually pure approach."[41]

It is a nicely turned phrase. The upshot is that Jay J declares "there is no intermediate category of the kind Mr Allan is seeking to identify".[42] An "holistic view of the evidence" leads to "the robust conclusion that the relative risk of asbestos being the culprit in the deceased's case is more than 2:1; or as the common law would express the same point, the case has been proved on the balance of probabilities"[43] but without the possibility of devising any sort of test to find out which exposures caused the lung cancer in the varying employments the learned judge comes to the view that damages should be apportioned among the defendants on the basis of their percentages. This, he says, is not so much a matter of epidemiology but of "basic arithmetic".[44]

In weighing up a decision where he would "either [arrive] in the enclave of *Fairchild* or at zero recovery"[45] Jay J opts for "proportionate recovery", which he concedes "may not be a particularly principled" view. He notes also some observations, mainly obiter, which might suggest that *Fairchild* is unique to mesothelioma, but carefully negotiates these. The reverse view, he notes, would be "adherence to the conventional common law approach, which is entirely principled, [but] would lead to no recovery at all" in *Heneghan*. It will be fascinating to see what transpires on appeal.

Practice point

- While the aetiology of mesothelioma and lung cancer caused by asbestos exposure is clearly different, Jay J concludes that the *Fairchild* special rule should be appropriately extended to lung cancer cases of this type. He claims that there are no specific judicial dicta which might block such a view. Damages should therefore be apportioned to defendants in the light of their percentage exposure of the claimant to the risk.

Julian Fulbrook

NA v Nottinghamshire CC

(QBD, Males J, December 2, 2014, [2014] EWHC 4005 (QB))

Child abuse—duty of care—foster carers—historic offences—professional negligence—social workers—vicarious liability

LT Child abuse; Duty of care; Foster carers; Historic offences; Limitation periods; Local authorities' powers and duties; Professional negligence; Social workers; Vicarious liability

[40] *Sindell v Abbott Laboratories* 26 Cal. 3d 588 (1980).
[41] *Heneghan* [2014] EWHC 4190 (QB) at [50].
[42] *Heneghan* [2014] EWHC 4190 (QB) at [55].
[43] *Heneghan* [2014] EWHC 4190 (QB) at [58].
[44] *Heneghan* [2014] EWHC 4190 (QB) at [61].
[45] *Heneghan* [2014] EWHC 4190 (QB) at [71].

The claimant, NA (aged 37), had a very unhappy childhood. She alternated between periods of living with her mother (and sometimes her mother's violent and abusive partner) and a variety of foster placements, followed eventually by a succession of residential children's homes. Her unhappy childhood experiences cast a long shadow over her life.

In this action NA made three claims against the defendant local authority. First, she said that while in her mother's care she suffered physical and emotional abuse by her mother and her mother's partner, a man called Paul Marsden whom she regarded as her father, and that the defendant failed in the common law duty of care which it owed her by failing either to remove her from her mother's care at a young age or to put in place measures to protect her from the abuse which she suffered.

Secondly, she said that while in the foster care of Mr and Mrs A between March 25, 1985 and March 27, 1986 when she was aged seven and eight, she suffered physical and emotional abuse by Mrs A for which the defendant was responsible in law. Thirdly, she said that while in the foster care of Mr and Mrs B between October 23, 1987 and February 23, 1988 when she was aged 10, she suffered sexual abuse by Mr B and physical abuse by Mrs B for which again the defendant was responsible in law. She claimed that even though the local authority had exercised reasonable care in terms of her foster placements, it was responsible for the foster carers' abuse, either on the basis of vicarious liability or on the basis that it owed her a non-delegable duty of care.

Her claims had been time-barred since July 1998 so she asked the court to exercise its discretion under the s.33 of the Limitation Act 1980 to disapply the limitation period. The local authority claimed that, given the passage of time, a fair trial was impossible. In any event, it claimed that it had dealt with NA's case appropriately. At trial the issues were whether:

- the limitation period should be disapplied; and
- the local authority had breached its duty of care to NA in respect of either of her claims.

The judge held that it was possible to have a fair trial, and it was fair and just to disapply the limitation period.[1] In cases involving historic child abuse, delay was critical only to the extent that it affected the defendant's ability to defend. If a fair trial was not possible, that was the end of the matter, but if a fair trial was possible, the balance of injustice had to be considered. Ultimately the court's discretion was wide and unfettered.[2] Although s.33 was principally concerned with delay after the expiry of the limitation period, delay beforehand was not necessarily irrelevant. However, where the claimant was a child for much of that period, any such delay was likely to be less significant than it otherwise would have been.

The judge was satisfied that NA had a reasonable excuse for the post-expiry delay: when she first disclosed the abuse, she felt that she had not been believed, and between the ages of 18–21 she had been addicted to heroin and had not been in any condition to commence proceedings. Many claimants in historic sex abuse cases turned to drugs or alcohol as result of their experiences, and the inhibitions caused by the abuse often made it difficult for them to describe what had happened. Such considerations could provide a good reason for delay. The prejudice caused to the local authority was relatively limited. Although many of the social workers had either died or had little recollection of events, substantial contemporary documentation survived, providing a reasonably comprehensive picture. Moreover, the parties' experts were able to express their views, despite the passage of time.

The judge then considered the merits of both the failure to remove and the failure to protect claims. The allegations of negligence were wide ranging, unspecific, and unsupported by expert evidence. The social workers had been dealing with a challenging situation requiring balanced judgments. In such

[1] *Cain v Francis* [2008] EWCA Civ 1451; [2009] Q.B. 754 applied.
[2] *B v Nugent Care Society* [2009] EWCA Civ 827; [2010] 1 W.L.R. 516 followed.

circumstances, the judge recognised that professional negligence would not be established without expert evidence.[3] Those claims failed.

NA's claim that the local authority was responsible for the foster carers' abuse also failed. Although many of her allegations against the foster carers were proved, the judge held that the local authority could not be fixed with either vicarious liability or a non-delegable duty of care. In terms of vicarious liability, it did not have the requisite degree of control over its foster parents.[4] It did not have day-to-day control over how they looked after the children placed with them. Foster carers were not providing family life on behalf of the local authority; the local authority was simply promoting the welfare of children in its care by placing them in foster homes where possible.

The five defining features of a non-delegable duty of care identified in *Woodland v Swimming Teachers Association*[5] were present. At the relevant time, NA was a vulnerable child in the care of the local authority, and she had no control over how it performed its obligations. By placing her in foster care, the local authority had delegated both its ability to make day-to-day decisions and its duty to care for her and protect her from harm.[6]

However, the judge held that it was not fair, just or reasonable to impose a non-delegable duty. Males J concluded that to do so would impose an unreasonable financial burden when it was in the public interest that local authorities should be able to use their scarce resources to provide fostering services. There was also a danger that imposing a non-delegable duty might make local authorities unnecessarily risk-averse in relation to foster care. While placing a child with foster carers might be regarded as inherently risky, the benefits made it a risk worth taking, provided that reasonable care was taken to ensure that the placement was suitable.

The case was dismissed.

Comment

Claimant lawyers have been trying to hold local authorities liable for the actions of their foster carers for years. When the concept of "a relationship akin to employment" gave rise to a potential vicarious liability in *Various Claimants v Institute of the Brothers of the Christian Schools*,[7] this was thought to be a new way in. Then, somewhat out of the blue and even more recently, *Woodland v Swimming Teachers Association* formulated the idea that a defendant in certain circumstances can owe a non-delegable duty of care, and the gloves were off. Lawyers representing clients who alleged abuse by foster carers were taking on cases they would have deemed too risky just a few years before on the strength of these "big beast judgments" from the Supreme Court. So Mr Justice Males in NA rather bursts our bubble.

The vicarious liability question

Prior to all this Supreme Court activity, the law concerning the liability of local authorities for the actions of foster parents was encapsulated in *S v Walsall MBC*.[8] The case centred on the Boarding-Out of Children Regulations 1955, which governed fostering arrangements at the time of NA's case too. Oliver LJ noted that the whole scheme was designed to allow the child in care to be brought up as a member of the foster parents' family and that was in no way consistent with the idea that foster parents were acting as agents (and for "agent" it was established thinking that one should also read "employee") of the local authority.

[3] *Sansom v Metcalfe Hambleton & Co* 57 Con. L.R. 88 CA (Civ Div) applied.
[4] *Various Claimants v Institute of the Brothers of the Christian Schools* [2012] UKSC 56; [2013] 2 A.C. 1 followed, *S v Walsall MBC* [1985] 1 W.L.R. 1150 CA (Civ Div) and *KLB v British Columbia* [2003] 2 S.C.R. 403 applied.
[5] *Woodland v Swimming Teachers Association* [2013] UKSC 66; [2014] A.C. 537.
[6] *Woodland v Swimming Teachers Association* [2014] A.C. 537 followed.
[7] *Institute of the Brothers of the Christian Schools* [2013] 2 A.C. 1 per Lord Phillips "the law of vicarious liability is on the move".
[8] *S v Walsall MBC* [1985] 1 W.L.R. 1150 CA (Civ Div).

As notions of vicarious liability have shifted over the years, a challenge to *S v Walsall* was always on the cards. However, a more recent case in the Supreme Court of Canada, *KLB v British Columbia*,[9] rather dampened our ardour. McLachlin CJ, giving the leading judgment in that case, identified clear water between the relationship of foster carer and contracting local authority:

> "Foster families serve a public goal—the goal of giving children the experience of a family, so they may develop into confident and responsible members of society … they discharge this public goal in a highly independent manner, free from close government control … they alone are responsible for running their home … [t]he government does not supervise or interfere".[10]

However, since the *Institute of the Brothers of the Christian Schools* case the point had been raised again by claimants and cases strong on their facts had settled. NA's case appears to be the first High Court case where the arguments were ventilated, and, in this case, found wanting. I find this surprising. Taking Lord Phillips' judgment in *Institute of the Brothers of the Christian Schools*, why cannot foster carers be considered to be in a relationship "akin to employment" with the local authority? They are, after all, being paid for their services (a fact which is not mentioned once by Males J in his judgment in NA). The local authority exercises a degree of control over foster parents through investigating their backgrounds, approving them, supervising placements, and with the power to de-register them (as indeed happened to foster parents Mr and Mrs A in NA's case, but after the event of her abuse). In my argument, all the reasons given by Lord Phillips in the *Institute of the Brothers of the Christian Schools* case for vicarious liability to be a "just, fair and reasonable" imposition on a defendant apply. Just read "local authority" for "employer" and "foster carer" for "employee" as set against Lord Phillips' test[11] below.

1) The employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability.
2) The tort has been committed as a result of activity being taken by the employee on behalf of the employer.
3) The employee's activity is part of the business activity of the employer.
4) The employer, by employing the employee to carry on the activity will have created the risk of the tort being committed by the employee.
5) The employee will, to a greater or lesser degree, have been under the control of the employer. It was specifically noted that some employees will have skills which are not susceptible to direction by a superior, the significance of "control" is that the employer may direct what the employee does, not how he does it.[12]

Mr Justice Males in NA felt that the first and fourth features of the test above were met in the case of foster carers but the rest were not. I cannot see why. As for (2), the activity that the foster parent is carrying out is carried out on behalf of the employer. In these circumstances the local authority's function in taking a child into care is to promote its welfare and protect it from harm[13] which is exactly the foster carers' role. If one accepts that that is part of the local authority's "business" (its statutory function) then (3) is satisfied. If one accepts as Lord Phillips did that these days "control" is directing what the employee does but not how he does it, then (5) is satisfied too.

It is in my view wrong for the court to make the very artificial distinction that the provision of "family life" by foster parents is not an activity of the local authority. It is a way (and I am sure in many cases a very good way) of promoting the welfare of the child in its care and protecting it from harm. It can do

[9] *KLB v British Columbia* [2003] 2 S.C.R. 403.
[10] *KLB v British Columbia* [2003] 2 S.C.R. 403 at [23] per McLachlin CJ.
[11] As per Lord Phillips in *Institute of the Brothers of the Christian Schools* [2013] 2 A.C. 1 at [35].
[12] *Institute of the Brothers of the Christian Schools* [2013] 2 A.C. 1 at [36].
[13] This is accepted by Males J in *NA v Nottinghamshire CC* [2014] EWHC 4005 (QB); [2015] Fam. Law 133 at [193].

this in any number of ways. Where a child is in care and placed in a children's home, its "institutional parent" is represented by the care workers at the home on the local authority's pay-roll. If the child is abused by one of them, the local authority is vicariously liable. If a child is in care and placed in a foster home, its institutional parent is represented by the foster parents, who are paid under a contract for services by the local authority. For a child to be abused by one of them, and for the local authority not to be liable in such an instance is surely an anomaly. Males J is cognisant of that fact but opines "that is not an anomaly which needs to be corrected by an unprincipled extension of the law of vicarious liability".[14] That, in my view, can be colloquially termed a "cop out"!

I have to accept that my views on the applicability of the doctrine of vicarious liability to the facts here were not accepted either by HHJ Godsmark QC pronouncing on a very similar case in Nottingham County Court.[15] However, where Mr Justice Males and HHJ Godsmark parted company was the application of a non-delegable duty to the issues raised here.

The non-delegable duty question

The case of *Woodland v Swimming Teachers Association* presented a fresh opportunity to win such a case where vicarious liability failed. That case was concerned on its facts with the duties of a (state) school to its pupils where it contracted out the provision of certain teaching (obligatory under the national curriculum) to a private organisation. The Supreme Court held that the school could not hide behind the fact that where it had outsourced its function to teach, it remained responsible for the health and welfare of its pupils. The judgment rests on Lord Sumption's five features which have to be in place for a defendant to be found to be liable for a non-delegable duty (although as Lady Hale later added "such judicial statements are not to be treated as if they were statutes and can never be set in stone").[16]

1) The claimant is a patient or a child … dependent on the protection of the defendant against the risk of injury.
2) There is an antecedent relationship between claimant and defendant independent of the negligent act or omission, such that the claimant is in the actual custody, charge or care of the defendant, from which one can impute to the defendant a positive duty to protect the claimant from harm. This is likely to involve an element of control over the claimant by the defendant.
3) The claimant has no control over how the defendant chooses to perform its obligations, whether personally, through employees or through third parties.
4) The defendant has delegated some function to a third party which is an integral part of the positive duty the defendant has assumed towards the claimant; and the third party therefore exercises the defendant's custody or care of the claimant and the element of control that goes with it.
5) The third party has been negligent in the performance of the function assumed by the defendant and delegated to him.[17]

Like HHJ Godsmark QC before him, Males J accepted that all these features applied to a case involving the abuse by foster carers of a child in local authority care. It was particularly noted that:

> "[w]here a non-delegable duty arises, the defendant is liable not because he has control but in spite of the fact that he may have none. The essential element in my view is not control of the environment

[14] *NA v Nottinghamshire* [2015] Fam. Law 133 at [179].
[15] *JB v Leicestershire CC*, unreported, June 6, 2014.
[16] *Woodland v Swimming Teachers Association* [2014] A.C. 537 at [38].
[17] *Woodland v Swimming Teachers Association* [2014] A.C. 537 at [23].

> in which the claimant is injured, but control over the claimant for the purpose of performing a function for which the defendant has assumed responsibility."[18]

However, where Males J departed company with his County Court colleague, was that despite the five features being present, the claimant would not win because it was not "fair just and reasonable" for her to do so. Entering into the choppy waters of public policy, the judge rows back from compensating the claimant, citing Lord Sumptions' exhortation: "The courts should be sensitive about imposing unreasonable financial burdens on those providing critical public services."[19]

Is there not something unattractive in allowing a local authority to divest itself of its legal responsibilities by outsourcing? The judge says that this is not present in the case of fostering,[20] but I would argue that it is. If one accepts, as Males J does,[21] that the local authority is under a duty to care for the child in its care, to promote its welfare and protect it from harm, how can the use of foster carers be seen as anything other than "outsourcing" that duty to a third party (assuming the alternative argument that the foster carers are agents or in a relationship akin to employment with the local authority has already been lost, and foster carers are therefore to be seen legally as third parties).

The judge accepts that the vulnerable must have a remedy. But finding it is not fair, just and reasonable to pin liability on the defendant in this case does not deprive her of one: She has a claim directly against the foster carers (who may or may not have the means to satisfy a judgment against them). Males J points to an unreasonable financial burden being imposed on local authorities if they are found to be liable in such circumstances. He cites evidence that he heard in the course of this case that since Baby P, there had been an unprecedented rise in the number of children in care in Nottinghamshire (from 488 in 2008 to 838 in February 2014, of which 634 were placed in foster care). The judge does not appear to require evidence to conclude that if local authorities are liable to pay out for historic abuse, funds will not be there to support the children currently in care. Insurance cover is no answer as money spent on increased premiums will not be available for other purposes. In my view he makes a very dangerous observation as the rationale for his judgment:

> "the financial compensation which is all that the law of tort can provide constitutes a blunt and unsatisfactory form of recompense for the abuse which the claimant has suffered. A monetary award cannot restore to the claimant that part of her childhood which was blighted by the abuse inflicted by her foster parents. Nor can it wipe away the painful and disturbing memories of that abuse or eliminate such part of her ongoing problems as are attributable to the abuse. But the money which would have to be paid to the claimant (and others in her position) if a non-delegable duty were to be imposed could make a real and tangible difference to the life chances of vulnerable children currently in need of foster care."[22]

This requires detailed consideration. We all accept the limitation of remedies for tortious harm. The law cannot turn the clock back. Monetary compensation is a marker that what happened was wrong, that someone has been harmed. It may pay for much needed psychological treatment, or lift the claimant out of poverty and a life on benefits, a situation a claimant finds herself in because of the compromised life chances she has endured as a result of the abuse by others in charge of her care in her early years. The court is there to administer the law. It is not there to weigh up what may or may not be competing demands on a local authority's budget. Males J is not the chief executive of Nottinghamshire Council. Nor did he seem to have heard any evidence of the budgetary issues facing the Council. He further justifies his refusal of an award to the claimant on the basis that the defendant would engage in "risk averse fostering", as

[18] Per Lord Sumption in *Woodland v Swimming Teachers Association* [2014] A.C. 537 at [24].
[19] *Woodland v Swimming Teachers Association* [2014] A.C. 537 at [25].
[20] *NA* [2015] Fam. Law 133 at [187].
[21] *NA* [2015] Fam. Law 133 at [192].
[22] *NA* [2015] Fam. Law 133 at [203].

foster parents may well require additional (and objectively in his view unnecessary) checks. This will cost money and will mean that kids in care in Nottinghamshire will go without. This is just nonsense.

The judge was concerned that imposing a non-delegable duty in these circumstances would apply not only to foster parents, but also a child in care being placed with a family member, even a parent. This has logic. The claimant's side did not accept this, saying that a line should be drawn between "approved" carers and those not approved, but that was as artificial as many of the defendant's arguments. I would argue that the claimant's side made the wrong call. It is not the position of the carer, but the circumstances of the tortious act which are of relevance. Where a local authority accepts responsibility for a child in its care, it has wide discretion to delegate its caring function. As long as the local authority continues to exercise control of the child, it is legally responsible for it. That may mean it could be liable if the child comes to harm with a family member or a parent. Where a local authority has a full care order, the parent in that instance no longer has parental control. Applying the doctrine to a school scenario, let us say that the school delegates the care of a pupil to a paid third party—maybe to a private teacher. A pupil is harmed as a result of the negligence of that teacher. Under *Woodland*, the school would ostensibly be liable. Would the position change if the teacher was in fact a family member of the child injured or indeed a parent? Does it not depend on the role of the third party rather than the personal relationship that may exist in fact between the teacher and the child?

Some further observations

In this case after the claimant's expert "disintegrated"[23] under cross examination, the judge felt that there was nothing left of the case as pleaded and advanced in opening. Nevertheless, the claimant doggedly pursued the negligence aspect, only to lose on all counts. Negligence cases are difficult to prove where the case is historical (events here went back 25–30 years) and it may be tactically disastrous to do so where one needs to seek the court's indulgence to pursue a case out of time; narrower points (such as here, abuse by the foster parents) are easier. The judge in *NA* was not at all impressed by the scattergun approach adopted, particularly where it nevertheless impugned professionals' conduct and reputations. Professor Payne, the liability expert called by the claimant, had over 50 years' experience but was not a practising social worker at the time of the events that gave rise to the allegations in this case. He admitted apparently that he had struggled to understand the *Bolam* test, despite his great experience.[24]

When one reads the judgment, one is struck by the awesome feat the claimant must accomplish to obtain compensation: not only engaging with the issues above but also proving the abuse, establishing your own credibility as against a slew of witnesses ranged against you, and convincing the court of the reasonableness of your delay in bringing the case out of time. To get over all those hurdles, and to get a technical "win" on non-delegable duty taken away from you through policy concerns involving the allocation of the defendant's resources must be bitterly disappointing. I understand[25] that the claimant will be appealing this judgment. I hope Mr Justice Males' reasoning for denying the claimant a remedy will be overturned.

Practice points

- If you are pursuing a claim in negligence, particularise it in detail. A claimant needs to set out:

[23] Mr Justice Males in *NA* [2015] Fam. Law 133 at [113]. See also at [104]:
"I asked Mr Davy [Claimant's counsel] to show me where in his report Professor Payne [Claimant's expert] identified a negligent failure by social workers to protect the claimant which the Professor said would have made some difference to the eventual outcome, but Mr Davy was unable to do so"
Ouch!
[24] *NA* [2015] Fam. Law 133 at [110].
[25] From the claimant's counsel's website.

- — the defendant's default (act or omission);
- — how that was negligent (with reference to the accepted practice at the time, i.e. the *Bolam* test);
- — what the defendant should have done instead; and
- — how the outcome for the claimant would have been affected for the better had the defendant done what it should have done.

- Note that whilst this case is binding on the lower courts, it is not binding (although may be persuasive) in the High Court. Whilst cases being brought on similar facts should proceed with caution they should not be abandoned.
- HHJ Godsmark's judgment on similar facts in *JB v Leicestershire* is compelling and whilst effectively this has been overruled by *NA*, an appeal is likely to proceed.
- I would also argue that the vicarious liability approach should continue to feature alongside non-delegable duty in cases against local authorities where abuse by foster carers is alleged.

Jonathan Wheeler

Nadeem v Shell UK Oil Products Ltd

(QBD, Judge Gore QC, December 15, 2014, [2014] EWHC 4664 (QB))

Personal injury—bullying—stress—harassment—consequential loss—duty of care—employment status—contracts—Employment Rights Act 1996 s.230

LTC Agreements; Contractors; Contracts of employment; Duty of care; Employment status; Harassment; Service stations; Stress

The claimant operated a number of petrol stations for Shell under a retail business agreement. He had given a bank guarantee and a personal guarantee to support his obligations under the agreement. He was obliged to buy fuel and other products as Shell directed and the proceeds were paid into a bank account from which Shell could draw what was owed to them by direct debit. Nadeem was also permitted to stock and sell other goods and retain the profits.

The claimant alleged that he had been subjected to serious ill-treatment by Shell's employees, who supervised his operations, amounting to bullying and harassment. The claim was not one of institutional ill-treatment. He claimed to be suffering from a stress-related illness and to have suffered consequential financial damage. He had received a "yellow card" letter from Shell alleging serious breaches of the retail business agreement, and then a "red card" letter terminating the agreement.

Nadeem claimed that he was owed a duty of care by Shell as an employee under a contract of service, or alternatively that he was a "worker" within s.230 of the Employment Rights Act 1996.[1]

The judge was satisfied that the retail business agreement contained the whole agreement between the parties and it was not a contract of service.[2] Its terms were held to be consistent with the claimant being an independent contractor. That was clearly the case in respect of the products he was allowed to sell

[1] "In this Act 'worker' (except in the phrases 'shop worker' and 'betting worker') means an individual who has entered into or works under (or, where the employment has ceased, worked under) (a) a contract of employment, or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to a worker's contract shall be construed accordingly."

[2] *Autoclenz Ltd v Belcher* [2011] UKSC 41; [2011] 4 All E.R. 745 and *Jivraj v Hashwani* [2011] UKSC 40; [2011] 1 W.L.R. 1872 followed.

himself. The judge pointed out that it would have been surprising if he was an independent contractor in respect of those goods, but an employee in respect of fuel and the core goods. Likewise he was obliged to employ staff and it was unlikely that he would be both an employer and an employee. In addition Nadeem was also liable for any losses arising from certain credit card transactions which would not be usual for an employee. Similarly he was obliged to keep financial and accounting records.

The judge held that the fact that Shell closely supervised and controlled certain aspects such as hours of work, disciplinary matters and dealing with suppliers did not create a contract of service. There was also a genuine right of substitution which negated any contract of service. Therefore Shell did not owe the claimant a duty as an employee not to expose him to stress.

The judge went on to hold that if the claimant was a worker under the Act, he would have to show foreseeability, proximity and that imposing a duty of care was fair, just and reasonable.[3] His psychiatric illness was held not reasonably foreseeable at the time when it was said to have developed. It was caused by significant stress in his family life because his daughter had undergone heart surgery, and to the extent that it was work-related it was caused by the fact that his business was in terminal decline. In addition it could not be said that at the relevant time there were signs that would make it plain to any reasonable employer that something needed to be done.[4]

The judge accepted that the tort of harassment could be found in the workplace but concluded that it would be unusual, since it required conduct which crossed the line from unreasonable to oppressive and which was targeted and calculated.[5] Although Shell's employees had been concerned only about business performance, the judge accepted that they had not left the claimant completely without support. Although they might have paid lip service only to business coaching and mentoring, their conduct did not amount to harassment.

The claim was dismissed.

Comment

As any personal injury practitioner knows, workplace stress claims are one of the more difficult actions to bring. They are even more problematic when there is no clear relationship of employer and employee as in this case. The claimant's contention that he was engaged under a contract of service was rejected by the judge for what, on the face of the judgment, appear to be sound reasons. Being aware that this contention might not succeed, he was armed with two alternative arguments: first, that a common law duty of care not to cause psychiatric harm was owed in any event; and secondly, that there was a breach of statutory duty under the Protection from Harassment Act 1997.

The claim for breach of statutory duty failed for want of evidence of conduct sufficient to amount to harassment. The real point of legal interest in this case, however, concerned the arguments regarding the existence or otherwise of a common law duty of care not to cause the claimant psychiatric harm.

Could one party to an agreement owe the other party such a duty even though their relationship was found to be purely under a commercial contract for services? This fell to be considered under the *Caparo* three-stage test, the first stage of which is foreseeability of harm. When dealing with psychiatric harm, a primary victim, as the claimant was in this case, usually has to be at risk of some physical injury or risk to give rise to a foreseeable risk of psychiatric harm (assuming he is not an employee). Alternatively, a foreseeable risk could arise where the alleged tortfeasor has been guilty of intentional infliction of mental injury on the victim.[6] Neither situation arose in the present case so the defendant was not in a situation

[3] *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605 HL followed.
[4] *Barber v Somerset CC* [2002] EWCA Civ 76; [2002] 2 All E.R. 1 followed.
[5] *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34; [2007] 1 A.C. 224, *Ferguson v British Gas Trading Ltd* [2009] EWCA Civ 46; [2010] 1 W.L.R. 785 and *Veakins v Kier Islington Ltd* [2009] EWCA Civ 1288; [2010] I.R.L.R. 132 followed.
[6] See for example, *Wilkinson v Downton* [1897] 2 Q.B. 57 QBD.

where foreseeability of harm would normally arise. Moreover, the judge found on the facts of the case that psychiatric harm would not have been foreseeable in practice.

As for the second stage of the *Caparo* test, namely proximity of the parties, little was said, but the judge appeared to accept that proximity may be established in the circumstances. The novel point in the case concerned the third stage of the test, i.e. whether it should be adjudged fair, just and reasonable to impose a duty of care. In a purely commercial relationship in which there is no assumption of responsibility for the other party's health or welfare, or some other special relationship, it would not be usual to impose a tortious duty of care to prevent harm. The claimant in this case was unable to advance any authority or decided case where a tortious duty of care to prevent psychological harm had been imposed absent any assumption of responsibility such as in a relationship of employer and employee, occupier and visitor, or transport-undertaking and passenger. In the circumstances the judge felt compelled to find that this was not a case in which a tortious duty of care arose.

In passing, it ought to be said that damages for psychiatric harm can in principle be awarded even for breach of contract if such harm was reasonably foreseeable—see for example *Cook v Swinfen*[7] in the context of a solicitor–client relationship. This authority was not considered, and the claimant's case did not appear to be based in contract, but in any event the trial judge was clear in his conclusion that psychiatric harm was not foreseeable.

A further argument advanced by the claimant was that he was a "worker" within the meaning of the Employment Rights Act 1996. The judge accepted that this was so, but held that the mere fact of being a "worker" did not mean the defendant owed him a duty of care as if he were an employee. Again, the claimant was required to satisfy the *Caparo* test if any duty of care was to be imposed, and the judge held that he failed to do so.

An interesting point for consideration in subsequent cases therefore, or at appellate level, is whether a special duty of care akin to that owed to an employee and/or an assumption of responsibility ought to be deemed to have arisen when the claimant is a worker within the Employment Rights Act. The lack of prior authority hindered the judge in this case, and he was not prepared to impose a duty of care in what he saw as a novel situation. In *Reeman v Department of Transport*,[8] Phillips LJ explained the approach to new duties of care as follows:

> "When confronted with a novel situation the court does not … consider these matters [foreseeability, proximity and fairness] in isolation. It does so by comparison with established categories of negligence to see whether the facts amount to no more than a small extension of a situation already covered by authority, or whether a finding of the existence of a duty of care would effect a significant extension to the law of negligence. Only in exceptional cases will the court accept that the interests of justice justify such an extension."

It may be that the judge in the present case had an eye to the possible far-reaching consequences of imposing an employer-employee type relationship on Shell UK, which has very many independent contractors/franchisees under contracts similar to the claimant's.

Practice points

- Psychiatric injury claims generally turn on the foreseeability of harm whether being brought in tort or contract, and whether or not an employer-employee relationship exists.
- Concentration must therefore be placed on ensuring very good evidence exists on the foreseeability of harm point.

[7] *Cook v Swinfen* [1967] 1 W.L.R. 457 CA.
[8] *Reeman v Department of Transport* [1997] 2 Lloyd's Rep. 648 CA (Civ Div) at 625.

- This is particularly so if a duty of care is to be sought in a novel case; establish the foreseeability and the issues around the precise cause of action will no doubt become less problematic.

Nathan Tavares

West Sussex CC v Fuller

(CA (Civ Div), Moore-Bick LJ, Tomlinson LJ, Sir Robin Jacob, March 12, 2015, [2015] EWCA Civ 189)

Personal injury—employers' liability—health and safety at work—accidents at work—Management of Health and Safety at Work Regulations 1999 reg.3 and the Manual Handling Operations Regulations 1992 reg.4—negligence—breach of duty to risk assess—causation—burden of proof

LT Accidents at work; Breach of statutory duty; Contributory negligence; Employers' liability; Risk assessment; Tripping and slipping

In 2008 Kim Fuller, then 40, was employed part-time by West Sussex CC as an administrative assistant. Her main job was as a receptionist at the council's Haywards Heath premises, which housed their social services department. Until October 2008 one of the claimant's tasks was to sort incoming mail and to place it into various pigeon holes for collection by those who worked in the 10 or so sections of the department found within the building. On October 9, 2008 that changed and she was asked to deliver the post to the various areas of the building.

On December 12, 2008, whilst engaged in her relatively new task of delivering post around the building, she had the misfortune to fall forward on a staircase. She put out her right hand to break her fall and was unlucky enough to injure her wrist. Although she was able to continue at work that day it transpired that she had sprained a ligament. She sued her employer.

She alleged that she was carrying a large amount of post which was bulky, awkward and of considerable weight about 7kg. She had to use both hands in order to carry the post preventing her from using either of the handrails on each side of the staircase. The bulk of the pile of post, including parcels, meant that she could not see where she was walking. As she was going up the stairs, one foot did not lift off as she was anticipating because of the presence of a sticky patch, most likely to be a piece of chewing gum. Her momentum in going up the stairs carried her forward and she fell forward, was unable to grab a handrail because of the bulk of the post she was carrying, had to put out her right hand to break her fall and was, in consequence, injured.

Her case was that the local authority was liable because it had failed to carry out a risk assessment under reg.3 of the Management of Health and Safety at Work Regulations 1999 and reg.4 of the Manual Handling Operations Regulations 1992. Liability was denied.

HH Judge Coltart did not accept the claimant's account of the accident and found her account dishonest. He found that she was not carrying a large amount of post, nor any large items. There was no mail or post spread about on the staircase as a result of her fall. There was only, if anything, something in one of her hands so that she had had at least one hand free. There was no hazard in the form of a sticky patch that caused or contributed to the fall. She had simply misjudged her footing, as she had explained at the time to one of her colleagues. The judge expressly found that the accident was entirely the claimant's fault.

However, the judge was persuaded against his better judgment, that the law compelled him to find for the claimant, and that he was "prohibited" from making any finding of contributory negligence. This was

because the defendant was in breach of its statutory obligation to make a risk assessment of the task to be carried out by the claimant in distributing post around the building, and to take appropriate steps to reduce the risk of injury to the lowest level reasonably practicable. The judge was not happy but was persuaded that he had no option but to accede to it. The local authority appealed.

The Court of Appeal confirmed that liability for breach of reg.3 of the 1999 Regulations or reg.4 of the 1992 Regulations could not be established without proof of a causal link between the breach and the injury suffered.[1] The burden of proving that causal link was on the claimant.

However, in many workplace situations, a failure by the employer to assess the risks of injury involved in a manual handling operation, and to take appropriate steps to reduce the risk of injury to the lowest level practicable, would effectively cast on to the employer the evidential burden of showing that its failure was not at least a cause of the accident. That was because there would be an obvious connection between the injury and the risks associated with the activity being undertaken. That was not the case where the cause of the accident was unconnected with the risk generated by the operation in question.

In this case, the local authority had arguably been in breach of duty in failing to carry out a risk assessment, but on the facts found by the judge the accident did not fall within the ambit of the risk that the local authority had arguably been required to assess. The employee had simply misjudged her footing when climbing a staircase while she happened to be carrying one or more items of post. Her accident was wholly causally unconnected with the circumstance that she had been carrying post.

The appeal was allowed.

Comment

The trial judge in this case did not accept the claimant's account of the accident. As Tomlinson LJ commented "not to put too fine a point on it, he found her account dishonest". Yet somehow the understanding the judge had of the workings of the law led him to conclude that the claimant had to win on a full liability basis. Clearly the judge was wrong and the fact that his decision was overturned on appeal is not at all surprising.

The claimant's case was that her employer was in breach of its statutory obligation to make a risk assessment of the task she was to carry out, namely distributing post around the building she worked in, and to take appropriate steps to reduce the risk of injury to the lowest level reasonably practicable. Judge Coltart's instinctive reaction was that the argument presented to him was "health and safety gone mad" nevertheless he accepted it. His lack of enthusiasm for the outcome meant that he immediately asked counsel for the defendant if he wanted permission to appeal, and granted it without waiting to hear whether that course was opposed.

The judge went wrong by failing to remember that lack of a risk assessment is not enough, a claimant needs to establish not just the breach of duty but a causative link between the breach and the damage. Clearly understanding how risk assessment is supposed to work is the place to start.

To see how risk assessment should work in relation to manual handling there is no better case than *Swain v Denso Marston Ltd*.[2] Alan Swain was injured in an industrial accident when he suffered a crush injury to his hand. He had been employed by the defendant company for 14 years, and on the day in question he was required to strip down part of a conveyor system at his employer's premises. Various components had to be removed including a roller. The claimant expected the roller to be hollow but it was

[1] *O'Neill v DSG Retail Ltd* [2002] EWCA Civ 1139; [2003] I.C.R. 222; *Davidson v Lothian and Borders Fire Board* 2003 S.L.T. 939 CS; *Egan v Central Manchester and Manchester Children's University Hospitals NHS Trust* [2008] EWCA Civ 1424; [2009] I.C.R. 585, and *Ghaith v Indesit Co UK Ltd* [2012] EWCA Civ 642; [2012] I.C.R. D34, applied.

[2] *Swain v Denso Marston Ltd* [2000] EWCA Civ 3021; [2000] I.C.R. 1079.

solid, weighing about 20kg, and as he removed the last bolt it trapped his hand causing the injury. Walker LJ[3] said:

> "On the known facts of this case Denso Marston Ltd had a health and safety officer. The employer knew who had manufactured and supplied the conveyor in question. Any proper assessment by or on behalf of the employer would have been a systematic assessment under the control of either an outside consultant or the health and safety officer (even if part of the task was delegated to a person who was an experienced employee).
>
> The assessment would have considered whether repairs and non-routine maintenance for specialised plant and machinery should be carried out by the employer's staff, or by the manufacturer. The assessment would have had to consider what manual handling tasks were involved in repairs and non-routine maintenance.
>
> If no brochure or specification was available the assessment might have involved making inquiries of the manufacturer. If none of that had been possible (or none of that had disclosed the weight of the roller) then prudence would have dictated the assumption that it might be unexpectedly heavy.
>
> That assumption might have been communicated to those employees who needed the information under Regulation 4 (1) (b) (iii)."

The court had no doubt that the breach caused the accident and Mr Swain recovered in full in essence for a breach of the last resort obligation "giving appropriate instructions to the workers".

So is a very detailed assessment needed in all cases? The answer is no. *Koonjul v Thameslink Healthcare Services*[4] is a case in point. The claimant had hurt her back when attempting to change a low-level bed. It had been necessary for the lady to move the bed from its position against the wall. In so doing, she chose to get hold of the end of the bed where there were no castors on the legs and found it harder to achieve than she expected. Consequently, she hurt herself.

The court held that the risk of injury need not be significant before the Regulations apply. They referred to the case of *Hawkes v Southwark LBC*.[5] In that case, Aldous LJ referred to there having to be a "real" risk for the purpose of the Regulations. They considered the Scottish case of *Cullen v North Lanarkshire CC*, where the court referred to the risk of injury needing to be "no more than a foreseeable possibility; it need not be a probability".[6]

The court was quite prepared to accept those statements as to the level of risk which is required to bring the case within the obligations of reg.4 of the 1992 Regulations; that there must be a real risk, a foreseeable possibility of injury; certainly nothing approaching a probability.

Lady Justice Hale continued saying:[7]

> "I am also prepared to accept that, in making an assessment of whether there is such a risk of injury, the employer is not entitled to assume that all his employees will on all occasions behave with full and proper concern for their own safety. I accept that the purpose of regulations such as these is indeed to place upon employers obligations to look after their employees' safety which they might not otherwise have. However, in making such assessments there has to be an element of realism."

She later continued:[8]

> "It also seems to me clear to be that the question of what does involve a risk of injury must be context-based. One is therefore looking at this particular operation in the context of this particular

[3] Now Baron Walker of Gestingthorpe.
[4] *Koonjul v Thameslink Healthcare Services* [2000] EWCA Civ 3020; [2000] P.I.Q.R. P123.
[5] *Hawkes v Southwark LBC*, unreported, February 20, 1998, CA (Civ Div).
[6] *Cullen v North Lanarkshire CC* [1998] S.C. 451 CS at 455.
[7] *Koonjul* [2000] P.I.Q.R. P123 at [10].
[8] *Koonjul* [2000] P.I.Q.R. P123 at [13].

> place of employment and also the particular employees involved. In this case, we have a small residential home with a small number of employees. But those employees were carrying out what may be regarded as everyday tasks, and this particular employee had been carrying out such tasks for a very long time indeed. The employer in seeking to assess the risks is entitled to take that into account."

The court noted that the guidance on the Regulations pointed out, in Appendix 1 at para.3 was "a full assessment of every manual handling operation could be a major undertaking and might involve wasted effort". They held that it was impracticable to carry out an assessment of every task carried out by an experienced care assistant at a small residential home for children, including the making of an unusually low bed. She lost. Absence of a specific risk assessment was not enough to create liability.

O'Neill v DSG Retail Ltd[9] emphasises the need to find a causal link between breach and damage. That was a case where the employer had failed properly to train a warehouse manager whose work included stacking and moving electrical goods. In particular, he had not been shown a video designed to train people out of the instinct to twist when carrying a load. Whilst carrying a microwave oven, the claimant responded to a call by a work colleague and turned, twisting his body without moving his feet. He suffered injury to two discs in his lumbar spine.

Chadwick LJ recognised the role of causation saying:

> "89. There were, therefore, two questions for the judge to consider: (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."

In the same case Peter Gibson LJ put it like this:

> "103. The more difficult question in this case is whether causation is established, given that the Judge expressly found that there was nothing that the Defendant did or did not do which could have prevented the accident and that it was not any breach of any regulation which was the causative effect of the accident. …
>
> 107. In these circumstances I reach the conclusion that the Judge failed to consider the evidence on causation before her properly, as she should have done in the light of the breach of Regulation 4 (1)(b)(ii). Had she done so, I think that she would have been compelled to reach the conclusion that the breach was a probable, though not a certain, cause of the injury."

The importance of a risk assessment in a manual handling case has been addressed many times by the Appeal Court. A number of members of the Appeal Court have taken the view that where the task is an "everyday task",[10] or where nothing more could have been done by the employer in any event,[11] the lack of a risk assessment by the employer is not damning.

The confusion in this case may have come from what Longmore LJ said in *Ghaith v Indesit Company UK Ltd* when referring to causation:[12]

> "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

[9] *O'Neill v DSG Retail Ltd* [2002] EWCA Civ 1139; [2003] I.C.R. 222.
[10] *Koonjul* [2000] P.I.Q.R. P123 per Hale LJ.
[11] *Alsop v Sheffield CC* (2002) EWCA Civ 429 per Kennedy LJ.
[12] *Ghaith v Indesit Company UK Ltd* [2012] EWCA Civ 642; [2012] I.C.R. D34 at [23].

> case, not on the employee to prove the negative proposition that, if all possible precautions had been taken, he would not have suffered any injury."

As Tomlinson LJ put it: "It may be that this passage has been misunderstood." The problem is that the quote runs together two separate concepts, breach of duty and causation. The context is important. It was a case where the very risk inherent in the operation of repeated lifting of heavy or awkward loads had eventuated, *viz*, back injury. The employer had not carried out a sufficient risk assessment. In other words it was one of those plain cases where the claimant demonstrated a prima facie causal connection between the inherently risky operation and the injury.

It was also a case where the employer was in breach of duty in having failed to carry out a sufficient risk assessment so to exonerate himself needed to show that he had nonetheless taken appropriate steps to reduce the risk of injury to the lowest level reasonably practicable. Those were the circumstances in which Longmore LJ said that causation was not a separate hurdle for the employee. It was not a separate hurdle because the employee had already made out a prima facie case, based on the occurrence of the risk inherent in the manual handling operation he was asked to undertake.

It is still open to the employer to show that his breach of duty has not in fact been causative of the injury where, for example, the employee suffers a heart attack which can be demonstrated to be wholly unconnected with the manual handling operation. The reverse being that once a prima facie connection is established between the risky activity and the injury, it is for the employer to disprove causation, not for the employee to prove that, if all possible precautions had been taken, he would not have suffered injury.

In this case the employer was arguably in breach of duty in failing to carry out a risk assessment in relation to the task which it asked Kim Fuller to perform. Her problem was that on the facts found by the judge, her accident did not fall within the ambit of the risk which the employer was arguably required to assess. She simply misjudged her footing when climbing a staircase at a time when she happened to be carrying one or more items of post. Her accident was not causally connected with the fact that she was at the time carrying one or more items of post. It was the occasion for her injury, but it was not a cause of it.

Practice points

- Breach of duty alone does not win cases, causation is required.
- The law requires employers to conduct suitable and sufficient risk assessments and act upon them.
- The failure to have carried out such a risk assessment reverses the burden of proof on causation where the claimant demonstrates a prima facie causal connection between an inherently risky operation and their injury.
- The Enterprise and Regulatory Reform Act 2013 does not change the way causation works.

Nigel Tomkins

Case and Comment: Quantum Damages

Campbell v Peter Gordon Joiners Ltd

(IHCS, Lord Brodie, Lord Drummond Young, Lord Malcolm, February 3, 2015, [2015] CSIH 11)

Personal injury—damages—indemnity—employers' liability—directors' liabilities—insurance—company law—Employers' Liability (Compulsory Insurance) Act 1969

LT Accidents at work; Directors' liabilities; Employers' liability insurance; Legislative intention; Scotland

William Campbell suffered an injury in June 2006 in the course of his employment as an apprentice joiner with the first defenders, Peter Gordon Joiners Ltd. The accident involved an electrically powered circular saw. The company went into voluntary liquidation in December 2009 and there were no funds of theirs available to meet his claim. In addition the employers' liability insurance taken out by the company excluded any legal liability arising out of the use of electrically powered woodworking machinery such as the circular saw. So the claim against the company was worthless.

Accordingly Campbell also sued the second defender, Peter Gordon, who was the sole director of the company. His case was that the company was in breach of s.1 of the Employers Liability (Compulsory Insurance) Act 1969[1] and that Mr Gordon, who as sole director arranged the insurance, was liable under s.5[2] of that Act. Campbell also advanced a common law case against Gordon on the basis that as sole director Gordon was in breach of his common law duties to him.

They were alleged to include a duty to act with reasonable diligence to take reasonable care to arrange insurance cover insuring employees of the company against injury sustained by them in the course of their employment, a duty to take reasonable care to read any insurance policy to ensure that it provided such cover and/or to take reasonable care to ensure that employees such as him did not use any machinery in respect of which insurance cover was not in place.

Gordon sought dismissal of the action on the ground that the claim against him was irrelevant. Campbell argued that the 1969 Act allowed a director to be held civilly liable for breach of his qualified statutory duty not to permit the employer company to carry on its business without having in place an approved insurance policy insuring the employer against liability for bodily injury or disease sustained by employees in the course of their employment. At first instance[3] Lord Glennie dismissed the common law case against Gordon, but held that there was no reason to conclude that a breach of the 1969 Act did not give rise to civil liability on the part of the employer or of a director or other officer of the employer.

Gordon appealed arguing that he was not made liable to Campbell by the terms of the 1969 Act. He submitted that no civil liability attached to him for any breach of its provisions, and that the obligation created by the 1969 Act was imposed on the employer and not, where the employer was a corporation, on the directors. His case was that it could not be said that it was Parliament's intention to impose civil

QUANTUM/ DAMAGES

[1] "1(1) … every employer carrying on any business in Great Britain shall insure, and maintain insurance, under one or more approved policies with an authorised insurer or insurers against liability for bodily injury or disease sustained by his employees, and arising out of and in the course of their employment in Great Britain in that business."

[2] "An employer who on any day is not insured in accordance with this Act when required to be so shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding …; and where an offence under this section committed by a corporation has been committed with the consent or connivance of, or facilitated by any neglect on the part of, any director, manager, secretary or other officer of the corporation, he, as well as the corporation shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly."

[3] *Campbell v Peter Gordon Joiners Ltd* [2013] CSOH 181; [2014] S.L.T. 178.

liability on a director in the event of a corporate employer's failure to insure and to do so would be to "pierce the corporate veil" to an "intolerable extent".

For Campbell it was submitted that the fact that parliament had not expressed its intention in explicit terms did not relieve the court from its "obligation" to construe the statute in question. The "primary purpose" of the 1969 Act was to "protect employees", and the "right to recover went hand in hand with the obligation to insure".

Delivering his opinion, Lord Brodie said:[4]

> "The particular risk of an employee being avoidably injured in the course of his employment is part of the risks undertaken and created by the employer's enterprise. It is rational and indeed just that the employer should bear that particular risk and all its financial consequences irrespective how substantial they may be. That is hardly the case with, say, a manager or company secretary or, indeed director of a limited company. By entering into a contract of employment or accepting appointment he is not undertaking to shoulder all the risks associated with the company's enterprise or to act as an insurer for the company's employees. The company can limit its liability. It can obtain insurance. The company's officers cannot limit their liability."

Lord Malcolm agreed that the provisions of the 1969 Act did not reveal a "legislative intention" to impose civil liability upon directors saying:[5]

> "The 1969 Act imposes a duty to insure upon employers, not upon others — see section 1. Section 5 backs this up with criminal sanctions…enforceable against both employers and any recalcitrant directors or officers. There is no mention of any intention or non-intention to make employers and/or officers liable in damages to anyone harmed by an absence of insurance."

However, in a powerful dissenting judgment, Lord Drummond Young held ss.1 and 5 of the 1969 Act did impose civil liability upon any director who had consented to a corporation's failure to insure, or who had connived in or facilitated any such failure to insure. He stated:[6]

> "The statutory duty is clearly an important part of the statutory regime governing health and safety of employees, and I can see nothing unfair in placing the burden of securing insurance on the directors who are responsible for the overall management of the company."

Nevertheless by a 2:1 majority, the appeal was allowed and the action against the director dismissed.

Comment

The Employers' Liability (Compulsory Insurance) Act 1969 introduced a legal obligation upon an employer to take out insurance against claims for injury brought against them by their employees. Criminal sanction in the form of a fine can be imposed for a failure to comply with this duty. Moreover, these sanctions can be imposed against a director, manager or officer of the employer rather than simply against the company itself. Parliament must clearly have considered the need for all employers to have liability insurance to be an important matter.

But a legal obligation to take out insurance does not mean it will always be taken out by employers. Even where insurance is taken out, it may not cover all of the activities undertaken by the employer. The insurer may also be entitled to avoid the policy if the employer has failed to co-operate or has not paid their premiums. So the provisions of the 1969 Act do not mean that injured employees will never find themselves seeking to recover damages against uninsured. It is, of course, still open to the employee to

[4] *Campbell* [2014] S.L.T. 178 at [26].
[5] *Campbell* [2014] S.L.T. 178 at [61].
[6] *Campbell* [2014] S.L.T. 178 at [54].

pursue such a claim and the employer would have to meet any liability to pay damages from their own funds. But what if the employer is insolvent or does not have the means to satisfy a claim? Does an injured employee have any way of obtaining redress in such circumstances?

In this particular case an attempt was made by a party injured in an accident at work to bring the claim against a director of the uninsured and insolvent company they had been employed by. This was based upon an assertion that the 1969 Act created a civil liability against an official of the company who had caused it to be without insurance cover.

There is no express provision within the 1969 Act confirming that it gives rise to a potential civil liability on the part of the officers or officials of a business. The courts have generally approached the question of whether an Act gives rise to a civil liability as turning on the construction of the particular legislation in question. Here the majority of the House of Session concluded that the 1969 Act could not be construed as giving rise to a civil liability on the part of a company director, although there was some force in the arguments set out in the dissenting judgment of Lord Drummond Young that the intentions and objectives of the 1969 Act would be frustrated if such a civil liability did not arise.

The conclusion of the majority of the Court of Session in Scotland mirrored that of the Court of Appeal in England in the earlier decision of *Richardson v Pitt-Stanley*.[7] The Court of Appeal in that matter had also been required to consider whether the 1969 Act created a civil liability against an official at a company who was responsible for its lack of insurance. The Court of Appeal also rejected the argument, holding that the breach of the obligation to insure had not been a direct *cause* of the injury to the claimant. The breach had merely left the claimant without an ability to recover damages and had therefore caused only pure economic loss, for which no claim could arise in this context.

Ultimately it must perhaps be conceded that if Parliament had intended for the 1969 Act to create a civil liability against those officers of a company responsible for taking out insurance it would have expressly said so. As things stand it would now appear clear that a claimant seeking to bring a claim against an uninsured and impecunious employer will be left without any means of obtaining compensation. It would take legislative change to correct this position.

It should be pointed out that the law makes very different provision for those injured in road traffic accidents, where there is also a compulsory requirement to insure. The provisions of the Road Traffic Act 1988 and the existence of the Motor Insurers' Bureau mean that a party injured as a result of an uninsured driver usually retains the ability to recover damages. It is a criminal offence for an employer to fail to take out insurance just as it is for a motorist to drive without insurance, and yet the law provides no such fall back protection for those injured at work.

Practice points

- Obtaining judgment against an uninsured employer is a pyrrhic victory unless the business has the means to satisfy the claim.
- There would appear to be no civil right of redress against a director or other official of a company who deliberately or neglectfully failed to take out liability insurance.
- A defendant employer who is failing to report the accident or co-operate with their employers' liability insurers should be reminded of the potential criminal sanctions that could arise not just for the body corporate but also for the directors, managers or other officers of the corporation should their acts or omissions result in the insurance cover being invalid.

Richard Geraghty

[7] *Richardson v Pitt-Stanley* [1995] Q.B. 123 CA (Civ Div).

Tate[1] v Ryder Holdings Ltd

(QBD (Liverpool), Kenneth Parker J, December 16, 2014, [2014] EWHC 4256 (QB))

Personal injury—negligence—damages—brain damage—care costs—causation—compensation—disturbed behaviour—future loss—personality disorders—road traffic accidents

Brain damage; Care costs; Loss of earnings; Measure of damages; Negligence; Personality disorders; Road traffic accidents

The claimant Paul Tate was born on June 20, 1990. On August 15, 2001, when he was 11 years old, he was knocked down by a bus causing a severe brain injury. He also suffered a fractured right pelvis and a contused lung which healed promptly and completely. The Court had previously approved a 70:30 apportionment of liability in the claimant's favour. He was aged 24 at the date of the assessment of damages hearing.

The claimant had learning difficulties before the accident. After the accident, he was noticeably more aggressive and impulsive, with concentration and memory difficulties. He suffered cognitive and behavioural difficulties which meant that he could not live independently as an adult and required 24-hour care. He lacked awareness of danger and was easily led. He was diagnosed with a severe personality disorder. He lived in supported lodgings from age 19, but had problems with drugs and alcohol, and was taken advantage of by others. He was admitted to a transitional rehabilitation unit but began to abscond and commit criminal offences.

The defendants accepted that the claimant's personality disorder had been caused by his brain injury, but asserted that he would have lived a life of irregular employment, compounded by substance abuse, in any event given his learning difficulties, vulnerability and poor resistance to temptation.

There were five issues to be determined:

1) whether the claimant's compensation should be discounted to take account of his poor future prospects before the accident;
2) the type of future care the claimant would require;
3) the amount of general damages;
4) the claimant's loss of earnings; and
5) damages for miscellaneous items.

Mr Justice Kenneth Parker found that there was no evidence that any living, adult relative of the claimant had been in paid employment. His childhood was impoverished and benefit-dependent. The assessments in respect of special educational needs prior to the accident revealed a boy who had significant learning difficulties, delayed language skills, poor concentration, weak memory and who was easily led. However, he held that although there was considerable force in those points, the defendants' argument could not be accepted for two reasons.

First of all it was clear from the expert evidence that by reason of the organic brain injury, the claimant lacked capacity in important respects. He lacked capacity to decide for himself where to live; how to choose what care, support and rehabilitation he needed; and whether to take alcohol and drugs. His condition could only reasonably be treated by a regime of 24-hour personalised care, which would need to be continued indefinitely. The need for such 24-hour care arose directly by reason of the organic brain

[1] A Protected Party, by his Litigation Friend the Official Solicitor

injury. The judge held that it would therefore be wrong in principle to discount the amount of damages in the light of an alleged risk as to how his life might have turned out if he had not suffered the injury.

Secondly, it was extraordinarily difficult to evaluate in any acceptable or convincing way how the claimant, aged only 11 at the time of the accident, would have developed, and what the nature and quality of his life might have been. He had faced formidable difficulties, but the defendants' scenario was exceptionally bleak and pessimistic, and invited speculation which could be seriously unfair to the claimant.

The annual cost of future care was £175,000, representing an average of the figures for residential accommodation and accommodation in the claimant's own home. However, it was common ground that there would be periods when he was likely to lose his liberty, either by virtue of the Mental Health Act 1983, or when in custody. Accordingly the judge reduced that figure to £170,000 per annum to reflect the non-negligible risk of periods in custody. The judge also held that there was also a substantial risk that the claimant would not comply with any care regime. He concluded that the only equitable solution was to discount the amount of compensation for future care to reflect the significant risk of non-compliance. A discount of 20 per cent was held to be fair and proportionate in the circumstances.

The claimant's injuries fell within "moderate brain damage" according to the *Judicial College Guidelines*.[2] The judge awarded £140,000 for pain, suffering and loss of amenity. The court adopted an average of the annual survey of hours and earnings for median earnings in the Yorkshire and Humber region for refuse occupations, shelf fillers and hospital porters, which gave a net figure of £14,437 per annum. That was discounted by 33 per cent given the claimant's disabilities and vulnerability. A multiplier of 26.49 was taken to reflect retirement at 68.

As the claimant would always be a protected beneficiary he would need a professional deputy under the supervision of the Court of Protection. The court allowed £14,000 plus VAT for professional fees per annum, plus various other fees. An award of £50,000 was made for past gratuitous care at a commercial rate, which was discounted by 25 per cent.

Damages were assessed accordingly.

Comment

On any view, the injuries sustained by the claimant were extremely serious in this case. It is the writer's experience that in such cases strenuous efforts are made to obtain as much evidence as is available in order to support the claimant's claim for losses and expenses both in the past and in the future. The aim is to be as forensic as possible so that the claimant is in the position to be able to prove all items on the schedule down to the last penny.

However, no matter how much effort goes into preparation of the case in order to establish quantum at the correct level, it is invariably the position that the Court is invited to speculate as to what the future holds. The introduction of periodical payments assisted the Court in dealing with certain aspects of the case to avoid such considerations. However, this has not resulted in removing the necessity of judges being required to make speculative decisions.

This case is no exception. The claimant was 11 when this incident happened. His injury was very serious, a fracture to the base of the skull and contusion to both temporal lodes. It was agreed that he cannot live independently and needs 24-hour support and is a patient under the supervision of the Court's protection.

The two issues that the Court had to resolve that were of a speculative nature, were these. First, an assessment of what the claimant's life would have been even if this incident had not occurred. Secondly, what account has to be taken of the likelihood of the claimant not adhering to any care regime.

In respect of the first issue Mr Justice Kenneth Parker made reference to the submissions made on the behalf of the defendant summarised as follows:

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

> "The Claimant would have lived a life of irregular, menial employment and unstable, probably chaotic, relationships. He would not have sought recreation or relaxation other than with family and friends and those he mixed with would all have been (as they are) bad, substance abusing influences. His 'pro-sociality' or anxiety to please, compounded by vulnerability and poor resistance to temptation would have overlaid an already challenged life with substance abuse and petty criminality".

The defendant relied on this evidence that was before the Court concerning the claimant's family and friends. The defendants put together what was described by the Court as a formidable case.

- The claimant's father was a violent and serious sexual offender who had spent long periods in prison.
- His mother was an alcoholic who did not work and committed petty crimes and had attempted suicide.
- His sister was feckless and possibly dishonest.
- His cousin was referred to sporadically through the trial as a heavy drinker and somewhat "unsavoury individual" to whom the claimant was attracted and whose influence appears to have been no way but official.
- Other cousins had similar problems with drink and prohibited drugs.
- The family was tight and cross-involved.
- None of the family group was called to give evidence.
- No adult relative close to the claimant had been in paid employment.
- The claimant's childhood was impoverished and benefits-dependent.
- The claimant had significant learning difficulties, delayed language skills, poor concentration, weak memory and was easily led.
- His attendance record at school was unsatisfactory.

On this basis, the defendants argue that it would be right in law to discount appropriately any award of compensation. In respect of past losses this was because the nature and quality of life would depend in large measure on the actions above us mainly his friends and family. As to the future, the balance of probabilities played no part in assessing future risks and chances and the prospects of the claimant's life being "on the straight and narrow should be discounted for the risks and chances that it would not".

In spite of this "formidable case" Kenneth Parker J did not accept the submission for two reasons. First, it was clear from the evidence that the claimant lacks capacity because of his brain injury. His condition resulting from the brain injury can only be reasonably treated by a regime of 24-hour personalised care. There was also no dispute that the regime would have to be continued indefinitely:

> "It would therefore be wrong in principle to discount the amount of damages required to provide such care in the light of an alleged risk as to how his life might have turned out if he had not suffered the organic brain injury."

Secondly, the judge found the defendant's scenario "exceptionally bleak and pessimistic" and the judge acknowledged that he was being invited to speculate on a highly sensitive issue where his speculation could be quite wrong and seriously unfair to the claimant. The judge also referred to medical evidence that said that the claimant could have had various support had it not have occurred which would improve the style of life that the defendants had set out for him.

What is not clear is how the defendants wished to have the damages reduced. There is no suggestion that there is a claim for loss of earnings and we assume had there been, then the factors raised by the defendants referred to above could be taken into account. But to ask for an overall reduction in damages in particular impacting on the care regime appears to the writer, to have been rightly rejected.

The second issue that the Court had to consider was this. The defendants contended:

> "that the weight of the evidence in this case showed at least a very substantial risk that the Claimant simply would not comply with any care regime, whether that be accommodation in a facility or with support in his own home."

The Court had found that the claimant is entitled to a 24-hour care regime and had preferred the claimant's evidence on this part which was that the claimant should live in his own home at a total cost of about £170,000 per annum. However, the Court did take into account this argument from the defendants. The Court found that it would be challenging to achieve a reasonable level of compliance by the claimant for any regime that objectively considered was for his own welfare and development but that he himself might not proceed in those terms.

Again, Kenneth Parker J identified that it was necessary to speculate as to the outcome. He held "it appears to me that a fair balance has to be struck on this difficult issue". Having weighed up both sides' arguments he came to the view that a discount of 20 per cent was "fair and proportionate from the care claim".

Practice points

- In very many cases courts are asked to speculate in order to reach a view on various issues in a case. This case is a good example of this.
- Nevertheless, it is strongly recommended that in cases of this nature, it is still necessary to secure as much evidence as possible in order to establish the extent of the loss.
- Courts will always have to "take a view" or do the best they can, when the evidence simply is unavailable. If there is relevant evidence, this should be put before the court.

Colin Ettinger

Case and Comment: Procedure

Everett v London Fire and Emergency Planning Authority (Costs)

(QBD, John Leighton Williams QC, November 7, 2014, Unreported)

Personal injury—civil procedure—costs—exaggerated claims—discretion—CPR r.44.2—CPR r.44.3—CPR Pt 36

LT Adjournment; Costs; Legal representation; Personal injury claims; Wasted costs orders

The claimant, Sheri Everett, sustained personal injury on August 16, 2009. In July 2010 Thompsons, solicitors, were instructed by her trade union to act for her in her claim for damages. A letter of claim was met with a denial of liability. Particulars of claim were issued in November 2011 and a defence denying liability was served in December 2011. On January 16, 2011 the claimant's application for a split trial was refused following objections by the defendants. Following a case management conference ("CMC") on May 16, 2012, trial was set for February 2013.

By December 2012 the parties had obtained their medical evidence. This evidence did not support the claimant's case that she had sustained a serious back injury. In particular Dr Yellowlees, who advised the claimant, and Dr Foster, who advised the defendants, in their joint statement dated October 30, 2012 agreed that there had been no neurological injury, that the mechanism of any injury would have been by way of a soft tissue injury to the back, and that recovery within three months would have been reasonable.

On November 20, 2012 Thompsons wrote to the defendants' solicitors stating they needed to discuss this joint statement with counsel and then prepare an updated schedule of loss. On February 7, 2013 Thompsons wrote again suggesting that after an updated schedule was served a joint settlement meeting should take place with a view to saving the costs of a trial. For some reason the trial due to take place in February was adjourned to a trial window beginning on May 8, 2013 with an estimate of five days. The updated schedule of loss dated April 4, 2013 claimed, to the nearest pound, £430,008 comprising past losses totalling £52,352 (including loss of wages of £34,227 and care/assistance of £14,625) and future losses of £377,656 (loss of income of £248,377, pension loss of £116,779 and £12,500 for medical treatment).

On April 10, 2013 the defendants' solicitors wrote to Thompsons describing the updated schedule of loss as "unrealistic" and making a *Calderbank* offer to bear their own costs if the claimant discontinued the claim, a so-called "drop hands" offer, stating that in the light of the medical evidence the claimant had no prospect of achieving a substantial award of damages. On April 15, 2013, the claimant attended counsel's chambers for a conference.

On April 29 Thompsons forwarded the trial bundle to the defendants. Then on May 1 they successfully applied to Master Leslie to come off the record and notified the defendants of this, stating that in future they should deal direct with the claimant. The defendants' immediate response was to write to the claimant on May 2 repeating the drop hands offer, stating that liability remained firmly in dispute and that should their offer be rejected they would seek recovery of costs incurred to date, estimated at £25,000, additional costs of £15,000 which would be incurred after 17.00 on May 3 on counsel's and experts' witness fees, and the costs of the trial estimated at £70,000. They encouraged her to take independent advice.

On May 3 the claimant rejected this offer stating she would settle for £216,000. At 16.34 that day she emailed the defendants repeating her rejection of the offer. She obtained an adjournment of the trial so that she could obtain fresh representation. She did not in fact obtain representation. At the trial in November 2013, she succeeded on liability but was awarded just £2,930 in damages.

Approaching a year after judgment was handed down the court considered the question of costs. Sheri Everett had hoped to obtain representation and evidence to support her claim for substantial damages, but in the event no representation was obtained, nor did she adduce any further evidence in support of her claim. The adjournment had produced no advantage for her. The court held that it had, however, resulted in increased costs. The agreed medical evidence did not support her claim for substantial damages, and balancing the agreed medical evidence against the likely costs of an adjournment ought to have made it clear to her that her best interests lay in not seeking an adjournment and that if she obtained one it would be at the risk of having to pay any wasted costs. The claimant was ordered to pay the defendants' costs of and occasioned by the adjournment.

As to the costs of the action generally, both parties had achieved a measure of success. On liability, the claimant had been vindicated. About 60 per cent of the trial was devoted to liability. However, the defendants had succeeded on quantum. By late 2012, it was apparent that the agreed medical evidence made the prospects of recovering substantial damages remote. However, with the trial fixed for May 2013, liability in issue and no offer from the defendants, it had been reasonable for the claimant's solicitors to press ahead.

From May 1, 2013, Sheri Everett had had to make her own decisions about whether to proceed with her claim and, if so, how. She knew then what the defendants' case was and what the medical witnesses were saying. In particular, she knew that if she won on liability there was still the significant issue of whether she had a "big" or "tiny" claim for damages. However, the defendants could have protected their position with a Pt 36 offer but failed to take that step. It had, however, been put to the expense of securing the attendance of its medical expert witnesses, given that the claimant had said that her witnesses would attend.

In the circumstances the court concluded that Sheri Everett should recover her costs down to and including May 1, 2013. Thereafter she should recover 60 per cent of her costs. However, those costs excluded the costs of her expert medical witnesses attending court and giving evidence. No order was made with regard to the defendant's costs save that the claimant was ordered to pay the costs of its expert medical witnesses attending court and giving evidence.

Comment

In the third century BC Pyrrhus of Epirus, a Greek general, who was the second cousin of Alexander the Great, invaded Italy to assist the Greek city state Tarentum (modern day Tarento) in its war against Republican Rome. Pyrrhus' victories at Heraclea (280 BC) and Asculum (279 BC) were so costly that the term "Pyrrhic victory" entered the language and has come down to modern English. Sherri Everett should have been wary of Pyrrhus and costly victories!

Remember *Widlake v B.AA Ltd*[1] and *Painting v University of Oxford*[2] and indeed other similar cases that examined what "success" in a case means when it comes to the question of costs? Well here is another one, though to my knowledge this is the first such case in the post-Jackson and post-*Denton*[3] era. It is, therefore, quite important even though it has not been widely reported or, indeed, commented on.

The case also emphasises some basic rules of litigation: cost follows the event and if you want to protect your position make an effective Pt 36 offer at the earliest opportunity. I cannot help but feel that once the

[1] *Widlake v BAA Ltd* [2009] EWCA Civ 1256; [2010] C.P. Rep. 13.
[2] *Painting v Oxford University* [2005] EWCA Civ 161; [2005] 3 Costs L.R. 394.
[3] *Denton v White* [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926.

"drop hands" offer had been rejected by Everett the sensible and prudent thing for the defendant to have done would have been to have got some costs protection in place. If the fire authority were to lose on liability, then Everett was bound to get something, even based on the defendant's medical evidence.

What distinguishes *Everett* from *Widlake* is that in *Everett* there was no suggestion of fraudulent exaggeration. Rather Everett wrongly ascribed her ongoing problems and pain to the original injury and some neurological cause as opposed to them being psychological in origin.

Sheri Everett sustained injury when she was part of a four-man team carrying out ladder drill as part of a training exercise. The exercise involved raising and turning the ladder to place it against a wall. It was alleged that another firefighter removed his foot from the stabilising bar causing the ladder to become unstable and in the process Everett jarred her back. Four years after the accident Everett had not returned to work and continued to experience pain and discomfort. The London Fire Authority disputed liability throughout and the matter eventually went to trial.

At trial the fire authority sought to argue that the accident was just that, an accident, and that it had occurred as a result of no lack of risk management, care or supervision on their part. This argument was rejected and liability was found for the claimant with no reduction for contributory negligence. What is remarkable is that by this stage Everett was a litigant in person. However, the real issue in this case, and at trial, was causation. Medical evidence was that the claimant had sustained a minor soft tissue injury to her back and associated depression. Three months post-accident, Everett's GP was suggesting a graduated return to work but Everett's recovery did not continue as expected and she became convinced that she had organic back pain. This was reflected in the schedule of loss dated April 4, 2013 which totalled some £430,000.

Despite earlier requests from the claimant solicitors for a joint settlement meeting, or at least a meeting, the service of the claimant's schedule merely prompted comment that it was totally unrealistic and a "drop hands" offer was made a few days later. Shortly afterwards the claimant's solicitors came off record and the claimant proceeded unrepresented, this prompted the defendant to repeat the "drop hands" offer. In response, and after service of the trial bundle, Everett made an offer to settle at £216,000. This, inevitably, was rejected and after some delay while Everett tried to obtain legal representation, the matter proceeded to trial. No doubt the defendant was buoyed up by the fact that no other solicitor came on record and that the claimant was unrepresented.

At trial, although the claimant succeeded on liability, only modest damages of £2,500 were awarded for pain and suffering and loss of amenity ("PSLA"), and £430 in respect of special damages; in other words about 1.4 per cent of the claimant's offer to settle that had been made before the trial.

So, in the context of being awarded costs, who "won" and what does "success" really mean?

In November 2014, approximately a year after the original trial, there was a judgement on costs. As we know, the general rule in respect of costs is that the successful party will be awarded costs. In his Final Report[4] and in his judgments,[5] Sir Rupert Jackson urged a clear "first past the post" approach to costs orders. But what happens when the claimant is successful on liability or causation but not successful on quantum? Further, judges are still reluctant to be as black and white as Jackson and others may wish as it appears unjust. So, in many respects I think this case further reflects the softening of Jackson seen in *Denton*. However, that still leaves the issue of how to determine "success".

In *Everett* Judge John Leighton Williams QC found that both parties had received a measure of success with the claimant having been successful on liability which she had contested all the way to trial. Although the defendant had lost on liability, they could be said to have been successful on quantum as the damages awarded were but a fraction of the amount sought by the claimant. By late 2012, some 12 months before the trial, it was likely that on the basis of agreed medical evidence, a court would find that the claimant

[4] Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (HMSO, January 2010).
[5] For example: *Jackson v Ministry of Defence* [2006] EWCA Civ 46.

had sustained little more than a soft tissue injury causing symptoms for some three months. Although, the defendant chose not to protect their position by making a Pt 36 offer, they had been put to the expense of having expert medical witnesses attend court and give evidence.

To balance these conflicting positions, the court awarded Everett costs in full up to May 1, 2013, the date on which her solicitors formally came off record and 60 per cent of her costs thereafter, excluding the costs of her medical witnesses attending court and giving evidence. No order was made in respect of the defendant's costs though Everett was ordered to pay for the defendant' expert medical witnesses attending court and giving evidence.

As Pyrrhus found, success can come at a price and it would seem that Everett paid that price here. Although she was successful, her victory must have left a bitter taste in her mouth. As for the defendant, had they protected their position in late 2012 or early 2013 when the agreed medical evidence was available with a realistic Pt 36 offer, the outcome may have been very different.

It is also worth remembering *Jackson v Ministry of Defence* and Jackson LJ's suggestion that the following principle should apply:

> "in a personal injury case where:
> (a) the claimant has pursued his claim in a reasonable manner;
> (b) the claimant recovers damages (other than nominal damages); and
> (c) there is no, or no sufficient, Pt 36 offer,
> the starting point should be that the claimant recovers his costs."

This case presents some salutatory lessons for both claimants and defendants.

Practice points

- Remember Pyrrhus; victories are not always sweet.
- For costs to follow the event, a party needs to be successful on the main issue in dispute.
- Stating the obvious: in order to succeed, a claimant needs to establish that there was a duty of care owed; that it had been breached; and that damage and/or loss that is foreseeable follows from the breach. The claimant then needs establish the extent of loss.
- If any of these points are at issue, whoever succeeds on that issue is likely to be regarded as having been successful in respect of the main issue for the period that it was denied.
- A proportion of costs are likely to follow the success.
- Consider split trials. A split trial here would have made an order for costs easier.
- In the absence of a split trial, a process of separating liability costs form quantum costs is likely to be adopted, but remember Jackson LJ's principles above!
- If you want to protect your position, make an early and realistic Pt 36 offer.

David Fisher

Broni v Ministry of Defence

(QBD, Supperstone J, January 20, 2015, [2015] EWHC 66 (QB))

Civil procedure—personal injury—costs—legal advice and funding—employers' liability—service personnel—success fees—CPR Pt 45 s.IV

Employers' liability; Employment status; Personal injury claims; Service personnel; Success fees

The claimants were three members of the armed forces. They had all successfully brought claims for damages against the Ministry of Defence in respect of injuries they had sustained at work.

Prior to April 1, 2013 Pt.45 s.IV of the CPR had provided for fixed success fees in certain employers' liability claims. r.45.20(1)(a) of the CPR provided that "this Section applies where … the dispute is between an employee and his employer". Rule 45.20(3)(b) stated that "employee" had the meaning given to it by s.2(1) of the Employers' Liability (Compulsory Insurance) Act 1969, which defined an "employee" as "an individual who has entered into or works under a contract of service or apprenticeship with an employer".

At first instance it was decided that the claimants were employees and that the fixed success fee regime therefore applied to their claims. They appealed.

On the appeal the Ministry of Defence sought to uphold the original decisions. They argued that the court should adopt a purposive approach to the construction of the words "contract of service" in s.2(1) of the 1969 Act so that the relationship between a serving member of the armed forces and the Ministry was treated as one of employer and employee.

Mr Justice Supperstone held that there was no good reason for giving the words "contract of service" in s.2(1) of the 1969 Act a construction broader than their usual meaning. There was no ambiguity in r.45.20(1)(a) and (3)(b) of the CPR. The rule addressed itself to the question of what the term "employee" meant: it was a person who fell within s.2(1) of the 1969 Act. There was in those circumstances no scope for giving a broad or purposive interpretation to r.45.20(1)(a) different from the specific meaning given to the term "employee" by s.2(1).

The judge also held that the words "contract of service" in s.2(1) had a single meaning which did not vary. The claimants were not engaged under a contract of service and the fixed success fee regime did not apply to their claims.[1] Accordingly the fixed success fee regime in Pt.45 s.IV of the CPR, as it stood before April 1, 2013, did not apply to claims brought by members of the armed forces in respect of injuries they had sustained at work. The appeal was allowed.

Comment

A conjoined appeal of three cases in which the costs judges all reached the same decision could only result in one outcome couldn't it? In fact Mr Justice Supperstone surprised many when he granted the various claimants' appeal against the findings that the employers' liability fixed success fee regime applied to service personnel's claims for personal injuries against the Ministry of Defence.

Mr Woof, was a military policeman in the Royal Marines who made a claim arising out of an injury to his left ankle whilst using sports equipment. Messrs Broni and Barbour claimed for non-freezing cold injuries sustained in basic training. The various parties and indeed very many others looking on, considered

[1] *Quinn v Ministry of Defence* [1998] P.I.Q.R. P387 followed.

PROCEDURE

this decision to be of considerable importance for their recoverability of success fees even though this had ceased for conditional fee agreements entered into after March 31, 2013. Sadly there remain many cases that are still continuing where this decision will have a significant impact on cash flow for the paying or receiving parties.

The fixed success fee regime provided for 100 per cent for trial and 25 per cent for non-membership organisation employers' liability claims and as well as the same 100 per cent for trial, either 27.5, 62.5 or 100 per cent depending on the condition in disease claims. If a claim had been properly risk assessed resulting in a higher than prescribed success fee then the prize was certainly worth the fight for the receiving party. Master O'Hare in *Woof* presumed that the fixed regime applied in these cases and indeed said:

> "I think it plainly does. I think there is a 'contract of service' although I am using those words in a way which is wider than the way in which they [are] used in the 1969 Act."

The clue to the judge on an appeal's thinking being the last sentence. Perhaps naively the Master went on to comment:

> "I think the common sense of the fixed success fee regime is that it should apply to armed forces as it applies to others."

He went further in *Woof* in saying:

> "It is easy to describe the claimant as an employee and the defendant as the agents of his employer, Her Majesty, even though there is no contract of service in the strict sense, but, nevertheless, there is a contact of service … the presence or absence of contractual rights are not determinative in this or other employers' liability cases and claims can be made against the employer by way of tort as well as by contract."

The claimant's position was a simple one. There was no contract of service in place and as such the definition of employee for the purposes of the 1969 Act are not triggered. This was not a new submission. In *Quinn v Ministry of Defence*, Justice Swinton Thomas said:[2]

> "For my part, I would have no doubt at all that when Mr Quinn enlisted in the Royal Navy pursuant to the King's Regulations, neither he nor the Crown had any intention to create legal relations. Further, as a matter of public policy, following the decisions to which I have referred there is binding authority that there is no such contract. In relation, to members of the Armed Forces as with Police Officers, I can see no reason to find that these long standing public policy considerations should be changed."[3]

The defendant here conceded that there was no contract of service but considered that one of the problems with the claimants' submission is that in every employers' liability case the court would have to investigate whether or not the claimant was working under a contract of service. It is not a straightforward exercise and very much factually dependent and taking into account the parties' true intentions on the engagement.

The defendant also contended that this would mean that a significant number of cases would now fall outside of the certainty of the fixed recoverable success fee regime including police officers, civil servants, doctors in private practice and members of the judiciary. (Although in the latter case it would be interesting to know just what injury would be contemplated.)

Finally, the defendant contended that the way in which a claimant puts their case should be a clue. If the claim involves an allegation of breach of common law or statutory duties with the defendant as an employer then by definition the claimant is an employee and the defendant the employer for the purposes

[2] *Quinn v Ministry of Defence* [1998] P.I.Q.R. 387 CA (Civ Div) at 396.

[3] *Quinn* was a challenge to Crown immunity in claims for asbestos disease. Mr Quinn had developed mesothelioma and the Court of Appeal ruled that the mesothelioma was caused by contact with asbestos before 1986 and so even though the injury developed later it was still covered by the legal principle of Crown immunity which was the pre-1986 law and precluded compensation claims from being pursued.

of the rule. This was a point that had been tested in the Court of Appeal in *Smith v Ministry of Defence*[4] where four soldiers killed and injured on active service in Iraq brought negligent-based personal injury and human rights claims. The Court of Appeal there confirmed, and indeed it had not been disputed, that the MOD owed a duty of care "as their employer".

Whilst acknowledging the practical difficulties that overturning the first instance decisions would cause, the judge did not consider that this was a suitable case for adopting a purposive approach as contended by the defendant and did not think it appropriate therefore for giving a wider meaning to "contract of service" within the 1969 Act than usual. He took the view that in *Smith* the duty of care was not as employer to employee but generally owed whether there was a contract of service or not. *Quinn* determined there was no contract of employment or contract for service on the express basis that there was no contract between the Crown and members of the armed forces.

For all of these reasons the judge could see no ambiguity to the rule. It defines "employee", being a person who falls within s.2(1) of the 1969 Act and the single meaning meant that these were not employee claims and the fixed success regime did not apply.

It is perhaps inevitable that this case is being appealed to the Court of Appeal and there will be, as indicated during the judgment, a large number of cases that this decision will impact upon. At the most basic level it is likely to extend cost disputes in the manner in which they can be resolved including unfortunately an interrogation of the pleaded case as to the parties' status and worst of all the submission and examination of written evidence of the same point in the assessment. This will be a problem in detailed assessments but is clearly going to be even more problematic in the ever growing provisional assessment.[5] This will mean the court being asked to determine these points on paper submissions which may well be unattractive.

Disease claims are governed by the same definitions within Pt 45 s.V of the CPR and of course recoverability in mesothelioma claims has been extended so this point will trouble parties and the courts for some time to come.

Practice points

- Pleading an employer-employee type claim will require careful drafting as to the definition of the relationship.
- If it is contended that the fixed success fee regime does not apply then the receiving party should expressly plead the point with supporting arguments in the bill.
- A paying party disputing the pleaded position will need to set out succinct easy to follow arguments to assist the judge in making the determination.

Mark Harvey

PROCEDURE

[4] *Smith v Ministry of Defence* [2013] 1 All E.R. 778.
[5] Assessment of bills with a value of up to £75,000.

Downing v Peterborough and Stamford Hospitals NHS Foundation Trust

(QBD, Sir David Eady, December 12, 2014, [2014] EWHC 4216 (QB))

Procedure—personal injury—clinical negligence—damages—part 36 offers—consequences—"at least as advantageous to the claimant"—indemnity basis costs—enhanced interest on costs—additional sums—obligation of the court—"unjust"—CPR 36.14

LT Costs; Indemnity basis; Part 36 offers; Personal injury claims

Richard Downing claimed in respect of what was characterised as the "catastrophic" consequences of an operation carried out on November 13, 2006 in the defendant's hospital with the intention of ameliorating his loud snoring. It made no difference to that condition and later investigations appeared to establish that it could not have achieved that purpose in any event.

A compromise was reached on liability and causation whereby the claimant was to receive 63 per cent of the damages that awarded on the assumption that he had succeeded on both issues (without any admissions being made). The total damages awarded were £1,508,524. The claimant had made a Pt 36 offer to settle in the sum of £1.2 million (inclusive of interest) plus costs. Having bettered the offer the claimant sought the benefits of Pt 36.

It was clear that the judgment against the defendant was "at least as advantageous to the claimant" as the proposals made in his Pt 36 offer of September 26 when he offered to accept £1.2 m (inclusive of interest) plus costs. The claimant therefore asked for[1] costs to be awarded on the indemnity basis from the relevant date and for interest on those costs at a rate not exceeding 10 per cent above base rate. The judge noted that the "court is obliged to make such an order unless it considers it 'unjust' to do so". Defendant counsel objected and called the indemnity costs provision "punitive" in character. The judge said:[2]

> "60. In one sense he is right, but one must be careful in the use of language in this context. It is quite clear that this rule, which obviously has legislative sanction, was not intended to 'punish' only conduct which is deemed in some way morally reprehensible or which was in breach of a rule or statutory requirement. A decision was taken, as a matter of public policy, to impose sanctions in order to encourage and facilitate the settlement of litigation and, correspondingly, to avoid parties incurring the costs involved in going to trial and also to save court time. Indemnity costs are, therefore, bound sometimes to be payable under CPR 36.14(3)(b) because an assessment of the merits proves not to have been justified or simply because an informed guess as to the outcome turns out to be wrong.
>
> 61. It is elementary 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. Naturally, one cannot define exhaustively what those circumstances might be. Each case will turn upon its own facts. Some very general guidance is given in r.36.14(4) of the CPR. Not surprisingly, the court will take all the circumstances into account including the terms of the offer, the stage when it was made, the information available to the parties at that time, and 'the conduct of the

[1] In accordance with the Civil Procedure Rules 1998 r.36.14(3)(b) and (c).
[2] *Downing v Peterborough and Stamford Hospitals NHS Foundation Trust* [2014] EWHC 4216 (QB); [2015] 2 Costs L.O. 203.

parties with regard to the giving or refusing to give information for the purposes of enabling the offer to be made or evaluated'.

62. One could imagine that a court might well think it 'unjust' to order indemnity costs if the individual defendant has rejected a Part 36 offer on the basis of inaccurate information through no fault of his own and, especially, where he has been misled by the claimant or his advisers through (say) non-disclosure of a material fact or document."

In this case, the defendant invited the judge not to award costs on the indemnity basis because one of the experts appeared in the witness box to take a less optimistic view of the claimant's prospects of recovery than that expressed in earlier written evidence. The defendant's psychiatrist, on the other hand, seemed to have changed his view in the opposite direction. In fact the experts in this case were all somewhat tentative and cautious as to the chances of significant improvement.

The judge concluded that there was nothing here to justify a departure from the presumption in favour of indemnity costs. In his view what happened was that the defendant's advisers made a particular judgment call which turned out to have been wrong. He commented that such an award did not carry with it any implied criticism of their professional skill or of their conduct. It was just one of the consequences imposed by the rules.

Accordingly, that costs were to be assessed from the relevant date on the indemnity basis with interest on those costs at 10 per cent above base rate under r.36.14(3)(c) of the Civil Procedure Rules 1998 (CPR). The judge also applied the provision in r.36.14(3)(d) of the CPR for an additional sum, not exceeding at the moment £75,000 and he awarded the maximum figure.

Comment

Introduction

This judgment is an important reminder of the proper approach to Pt 36 of the Civil Procedure Rules (CPR). In particular, the case confirms the approach the court should take when r.36.14(3) applies, when the claimant obtains a judgment "at least as advantageous" as the claimant's own Pt 36 offer, as well as the circumstances in which it would be "unjust" for the consequences provided for in that rule to apply.

Part 36 and Part 44 of the Civil Procedure Rules

Despite ample authority stretching back over the years since the CPR was introduced there continue to be arguments about the correct approach to, specifically, the award of indemnity costs under Pt 36 and how this calls for a different approach to the regime under Pt 44.

These arguments usually fail to reflect the policy underpinning the award of indemnity costs where this follows the claimant having obtained a judgment which is at least as advantageous as the claimant's own Pt 36 offer.

The judge was, perhaps, being somewhat benevolent towards the argument by counsel for the defendant, that indemnity costs would be "punitive", when he said:

> "In one sense he is right, but one must be careful in the use of language in this context. It is quite clear that this rule, which obviously has legislative sanction, was not intended to 'punish' only conduct which is deemed in some way morally reprehensible or which was in breach of a rule or statutory requirement. A decision was taken, as a matter of public policy, to impose sanctions in order to encourage and facilitate the settlement of litigation and, correspondingly, to avoid parties incurring the costs involved in going to trial and also to save court time. Indemnity costs are, therefore, bound

sometimes to be payable under CPR 36.14(3)(b) because an assessment of the merits proves not to have been justified or simply because an informed guess as to the outcome turns out to be wrong."

That is because, as a number of cases since the CPR was introduced in 1999 have confirmed, there is a sharp distinction between the award of indemnity costs under Pt 44, when the court is exercising one aspect of the general discretion conferred by the rule in relation to costs, and Pt 36, where the court is applying a specific provision in favour of a claimant which, moreover, should follow when the claimant obtains judgment "at least as advantageous" as the claimant's own offer unless that would be "unjust".

It is true that under Pt 44 the court should be wary of imposing indemnity costs, as these are regarded as punitive in that context. In, for example, *Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson (A Firm)*,[3] the Court of Appeal said that an order for indemnity costs was appropriate only where "there was some conduct or some circumstance which took the case out of the norm".

The very different context in which a claimant may be awarded indemnity costs under Pt 36.14(3), then Pt 36.21, was explained in the early days of the CPR by Lord Woolf in *Petrotrade Inc v Texaco Ltd*[4] when he held:

"62. … it would be wrong to regard (Part 36) as producing penal consequences. An order for indemnity costs does not enable a claimant to receive more costs than he has incurred. Its practical effect is to avoid his costs being assessed at a lesser figure. When assessing costs on the standard basis the court will only allow costs 'which are proportionate to the matters in issue' and 'resolve any doubt which it may have as to whether costs were reasonably incurred or reasonable proportionate in amount in favour of the paying party'. On the other hand, where the costs are assessed on an indemnity basis, the issue of proportionality does not have to be considered. The court only considers whether the costs were unreasonably incurred or for an unreasonable amount. The court will then resolve any doubt in favour of the receiving party. Even on an indemnity basis, however, the receiving party is restricted to recovering only the amount of costs which have been incurred (see Part 44.4 and Part 44.5).

63. The ability of the court to award costs on an indemnity basis and interest at an enhanced rate should not be regarded as penal because orders for costs, even when made on an indemnity basis, never actually compensate a claimant for having to come to court to bring proceedings. The very process of being involved in court proceedings inevitably has an impact on a claimant, whether he is a private individual or a multi-national corporation. A claimant would be better off had he not become involved in court proceedings. Part of the culture of the CPR is to encourage parties to avoid proceedings unless it is unreasonable for them to do otherwise. In the case of an individual proceedings necessarily involve inconvenience and frequently involve anxiety and distress. These are not taken into account when assessing costs on the normal basis. In the case of a corporation, corporation senior officials and other staff inevitably will be diverted from their normal duties as a consequence of the proceedings. The disruption this causes to a corporation is not recoverable under an order for costs.

64. The power to order indemnity costs or higher rate interest is a means of achieving a fairer result for a claimant. If a defendant involves a claimant in proceedings after an offer has been made, and in the event, the result is no more favourable to the defendant than that which would have been achieved if the claimant's offer had been accepted without the need

[3] *Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson (Costs)* [2002] EWCA Civ 879; [2002] C.P. Rep. 67.
[4] *Petrotrade Inc v Texaco Ltd* [2002] 1 W.L.R. 947 (Note) CA (Civ Div).

> for those proceedings, the message of Part 36.21 is that, prima facie, it is just to makes an indemnity order for costs and for interest at an enhanced rate to be awarded. However, the indemnity order need not be for the entire proceedings nor, as I have already indicated, need the award of interest be for a particular period or at a particular rate. It must not however exceed the figure of 10 per cent referred to in Part 36."

The same point was made by Chadwick LJ in *McPhilemy v Times Newspapers Ltd*[5] where he held:

> "22. An order, under paragraph (3) of CPR 36.21, for the payment of costs on an indemnity basis does not give rise to a risk of double compensation. The purpose for which the power to order the payment of costs on an indemnity basis is conferred, as it seems to me, is to enable the court, in a case to which CPR 36.21 applies, to address the element of perceived unfairness which arises from the fact that an award of costs on the standard basis will, almost invariably, lead to the successful claimant recovering less than the costs which he has to pay to his solicitor."

These views were also endorsed in *Kiam v MGN Ltd* when Simon Brown LJ observed:[6]

> "An indemnity costs order made under Rule 44 (unlike one made under Rule 36) does, I think, carry at least some stigma. It is of its nature penal rather than exhortatory."

Hence in this case Sir David Eady held:

> "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)."

Indemnity costs for the defendant under Part 36?

It is worth noting there is no corresponding provision in r.36.14(2) of the CPR for the defendant to recover costs on the indemnity basis if the claimant fails to obtain judgment "more advantageous" than a defendant's Pt 36 offer. The reason why the claimant but not the defendant can recover costs on the indemnity basis under r.36.14, a point which is sometimes overlooked, was explained by Simon Brown LJ in *Kiam* when he said:[7]

> "If the claimant thought that, even if he were to make and then beat an offer, he was going to get no more than his costs on the standard basis, why would he make it? It would afford him no advantage at all. He would do better simply to claim at large and recover his costs whatever measure of success he gained. His position is, in short, quite different from that of the defendant who plainly has every incentive to make a settlement offer, generally by way of payment into court, irrespective of the basis on which any costs order will be made. Take any ordinary damages claim. A defendant wishing to protect himself will pay money into court. The incentive to do so is self-evident. The incentive does not need to be created or stimulated by raising the defendant's expectation as to the level of costs he will recover. And, consistently with this, where payments in are not beaten, defendants routinely

[5] *McPhilemy v Times Newspapers Ltd (Costs)* [2001] EWCA Civ 933; [2002] 1 W.L.R. 934.
[6] *Kiam v MGN Ltd (Costs)* [2002] EWCA Civ 66; [2002] 1 W.L.R. 2810 at [12].
[7] *Kiam* [2002] 1 W.L.R. 2810 at [8].

recover their costs on the standard basis; I know of no rule or practice in such cases for making indemnity costs orders."

Why are indemnity costs important?

These observations, particularly those of Lord Woolf in *Petrotrade*, have added force following amendments to the CPR in April 2013 with a revised, and tougher, test of proportionality, making it all the more important that a claimant who makes a reasonable offer to settle should be able to recover costs on the indemnity basis.

Other Part 36 benefits

Even indemnity costs, and enhanced interest, were not considered sufficient incentive for claimants under Pt 36 by Sir Rupert Jackson, hence the introduction of the "additional amount" also awarded to the claimant in this case. Relevant aspects of the report include the following paragraphs:[8]

"1.2 **General success of Part 36.**

Part 36 has generally been regarded as a success, even by those who are otherwise critical of the Woolf reforms. In April 2000 a survey of the FTSE 100 companies revealed that 90% of respondents believed that the Woolf reforms would encourage earlier settlement of disputes. This was seen as the key benefit of those reforms. A survey of lawyers conducted by Morin for the Centre for Effective Dispute Resolution ('CEDR') in April 2000 showed a high level of overall satisfaction with the Woolf reforms, in particular with Part 36. Evaluations by the Lord Chancellor's Department in 2001 and 2002 came to similar conclusions.

…

3.4 **General tenor.**

Although the procedure for claimants' offers was generally welcomed, many respondents regretted that claimants' offers had much less 'teeth' than defendants' offers. A claimant's failure to beat a Part 36 offer can have dramatic consequences, sometimes wiping out the entirety of damages recovered. On the other hand, a defendant's failure to beat the claimant's offer has much milder effects and (it is said) even these are quite often reduced by the exercise of judicial discretion. A group of claimant clinical negligence solicitors urged this view upon me at a meeting held on 12th June 2009. They contended that there must be a hard financial penalty for failure to beat a claimant's offer. This would provide a real incentive for claimants to make reasonable offers. It would also provide a real incentive for defendants to accept such offers.

…

3.9 **Analysis.**

This is another area where the original, and very sensible, recommendations of Lord Woolf were never implemented. In most, but not all, cases the defendant's weapons from the armoury of Part 36 are more powerful than the claimant's weapons. The consequences which follow when a defendant rejects the claimant's adequate offer are less devastating than the consequences which follow when a claimant fails to beat the defendant's offer. As the law

[8] Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (HMSO, 2010).

now stands, the claimant is insufficiently rewarded and the defendant is insufficiently penalised, when the claimant has made an adequate offer.

…

3.10 **Remedy.**

In my view, the claimant's reward for making an adequate offer should be increased. The proposal of the Association of Her Majesty's District Judges is the best way forward, namely that there should be an uplift of 10% on damages awarded. Nevertheless, in respect of higher value claims, say over £500,000, there may be a case for scaling down the uplift. If my proposal is accepted in principle, this could be the subject of further consultation.

…

3.15 **Benefits of the proposed reform.**

I believe that there are three benefits to be gained from the proposed reform. The first benefit is that there will be a more level playing field as between claimants and defendants. The second benefit is that more cases will settle early. Defendants will be less willing to press on to trial, when claimants have made reasonable offers. The third benefit is that in those cases which do go to trial, despite the claimant having made an adequate offer, the claimant will recover a significantly larger sum.

…

3.16 **Importance of the third benefit.**

The third benefit is important, because of the proposals which I make in chapter 10 above in respect of conditional fee agreements ('CFAs'). If those proposals are implemented, claimants in successful cases on CFAs will have to pay success fees to their lawyers, but will not recover the success fees from the other side. As can be seen from chapter 2 above and from the tables in appendix 1 to this report, in cases which settle early the CFA success fees are generally modest and can be met by claimants out of their damages. It is cases that go to trial which generate the largest success fees. The claimants in those cases now will be able to increase substantially their financial recovery by making well judged offers. The various rewards and gains which the claimant will make should enable him to pay the success fee, and still be no worse off than he is under the present regime of recoverable success fees."

What is "Unjust"?

The consequences provided for under r.36.14, whether in favour of a claimant or a defendant, are, in a sense, automatic, That is, however, subject to those consequences not being "unjust". A number of authorities have highlighted that just because a party behaves reasonably this does not mean the consequences provided for in the rule will be unjust, for example *Huck v Robson*[9] and *Matthews v Metal Improvements Co Inc*.[10] Consequently, matters such as evidence not coming up to scratch, on which the defendant sought to rely, are unlikely to make the costs consequences provided for under Pt 36 "unjust". The judge had some helpful observations about what, in practice, this would mean when he said:

[9] *Huck v Robson* [2002] EWCA Civ 398; [2003] 1 W.L.R. 1340.
[10] *Matthews v Metal Improvements Co Inc* [2007] EWCA Civ 215; [2007] C.P. Rep. 27.

> "It is elementary 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."

It is interesting, and pertinent, the judge adopted the phrase "out of the norm", generally taken as the burden which the receiving party has to establish to obtain an order for indemnity costs under Pt 44, and uses that very term to define the burden on the paying party when the relevant provision is r.36.14(3). This emphasises how difficult it should be for the defendant to escape those consequences where judgment for the claimant is "at least as advantageous" as the claimant's own Pt 36 offer.

The judge did go on to identify some circumstances in which those consequences might be "unjust", observing:

> "One could imagine that a court might well think it 'unjust' to order indemnity costs if the individual defendant has rejected a Part 36 offer on the basis of inaccurate information through no fault of his own and, especially, where he has been misled by the claimant or his advisers through (say) non-disclosure of a material fact or document."

Consequently, the claimant was awarded indemnity costs, enhanced interest and an additional amount which, given the sums involved, was the maximum figure of £75,000.

Practice points

Important practice points are made in this judgment concerning r.36.14(3) including the following.

- The regime for awarding indemnity costs under Pt 36 is quite different to the exercise of the general discretion on costs, including the basis of assessment, found in Pt 44.
- Hence, under Pt 44 the presumption is for standard costs, with indemnity costs being reserved for cases "out of the norm", Conversely once r.36.14(3) is engaged the presumption is in favour of indemnity costs, with standard costs only being appropriate where the case is "out of the norm".
- On the same basis the claimant should generally recover both enhanced interest and, now, an additional amount where the judgment is at least as advantageous as the claimant's own Pt 36 offer.
- Judges may need to be reminded to apply the law rather than imposing a subjective, personal, view, as Sir David Eady recognised.
- That makes it important any advocate dealing with a trial where such issues may arise is armed with the relevant authorities.

John McQuater

Cumulative Index

This index has been prepared using Sweet & Maxwell's Legal Taxonomy.

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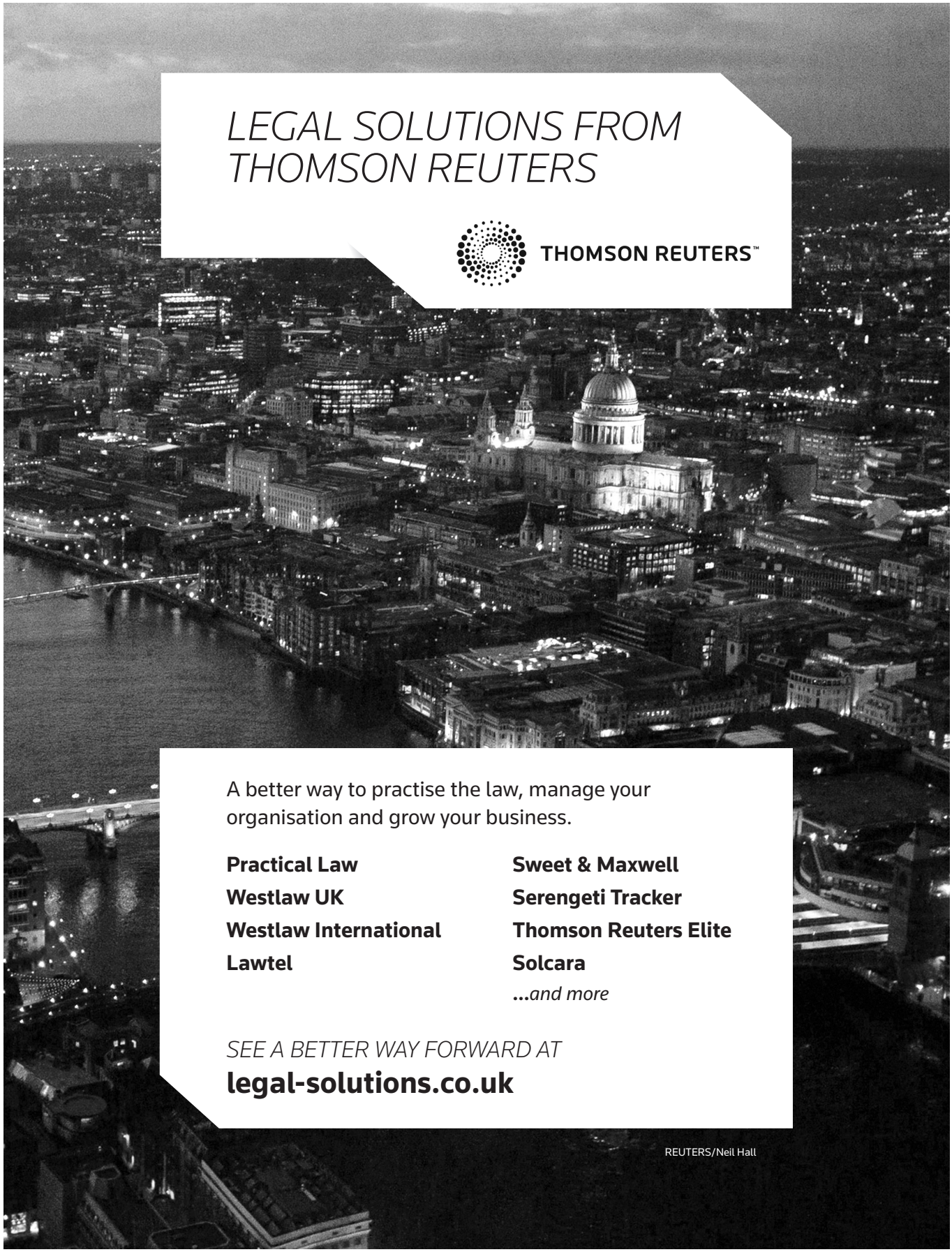
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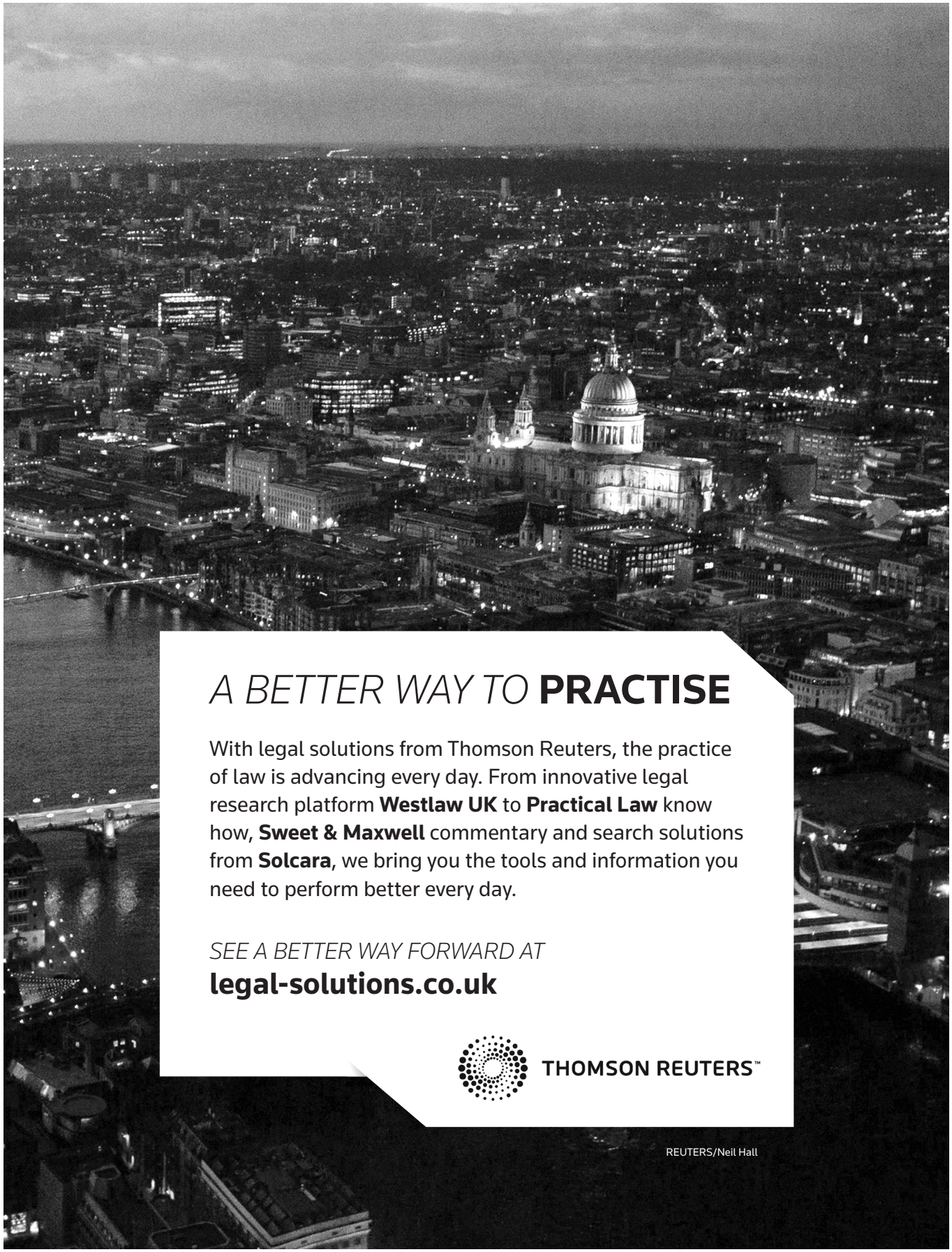

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