Journal of Personal Injury Law

September 2015

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Editorial

Welcome to the September 2015 edition of JPIL.

This is a "bumper" edition packed with material to ease you back into work mode after the summer break.

As I finalise this edition the Ashes series has just started and so it seems very appropriate to invite the views of an Australian lawyer on the UK PI market. The influence of Australian legal firms in the UK is becoming very significant and *Simon Morrison*, Managing Director of Shine Lawyers in Australia gives us his perspective on the impact of the LASPO reforms and considers what further tort reform may be on the horizon based on the Australian experience to date.

Summer holidays can also produce a spate of travel-related injury claims and *Philip Mead* guides us through the likely changes to the package travel and consumer protection regulations which may impact on how such claims are handled.

We are also likely to see further reform to the compulsory motor insurance system and *Nick Bevan* maps out the reform he considers is necessary to make the UK system fit for purpose and compliant with European requirements.

On the quantum front *Harry Trusted* looks at the issues arising from the meaning of dependency under the Fatal Accidents Act 1976.

In our procedure section we feature not one but two articles from JPIL Board member *John McQuater*. Continuing his occasional series on the development of CPR Pt 36, in Part 9 he looks at the recent changes to the Pt 36 rules. In his second article he outlines the recent changes introduced as a consequence of new protocols for personal injury and clinical negligence.

Robert Weir QC and *William Latimer Sayer* analyse the recent Court of Appeal decision on anonymity in *JXMX* looking at the guidelines laid down by the court and providing some useful draft precedents.

Andrew Hopper QC discusses the current issues facing PI lawyers in terms of professional regulation and in particular looks at the way in which regulation of referral fees has driven wider regulatory changes.

Tim Wallis looks at the future of dispute resolution and in particular the developing role online dispute resolution is likely to play in determining personal injury claims.

My thanks to all those who have contributed to this edition and to the Digest Editor Nigel Tomkins, the JPIL Editorial Board and the team at Sweet and Maxwell.

Muiris Lyons
General Editor

UK Tort Reform: An Australian Perspective

Simon Morrison*

LT Australia; Comparative law; Costs; Damages; Damages-based agreements; Personal injury; Success fees

As we pass the two-year anniversary of the introduction of the Jackson reforms and LASPO, Simon Morrison gives us an Australian perspective on the impact of those reforms and also looks at what has happened in Australia and suggests what may still be likely to happen in terms of further UK tort reform.
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Introduction

The "Concept" of Tort Reform

Tort reform is inevitable. It necessarily involves a change to a tort or insurance scheme for which there will be a winner and a loser. "Reform" is defined as: "makes changes in something, (especially an institutional practice) in order to improve it."[1] Few plaintiff lawyers would argue that tort reform achieves the stated definition. In some corners attempts at tort reform have been more properly categorised as tort "deform". The Oxford definition for "deform" is "distort the shape or form of; make misshapen".[2]

Why Reform Occurs?

So the question is asked: Why does tort reform occur? In the author's view there are broadly two reasons why reform occurs. First, it necessarily involves a change to a tort system or an insurance scheme brought about by a changing environment. Typically in Australia, reform has occurred in circumstances where insurance schemes have come under pressure for varying financial reasons. These may involve the economic climate that is falling investment returns placing pressure on underwriting results for insurers, claims frequency and payments increasing at a rate faster than actuarially forecasted, or other financial factors impacting the performance of the scheme. Secondly, reform can occur at the hands of ideology from the political sphere.

We can live with the first reason. It is essential that insurance schemes underpinning the tort process perform economically and sustainably. It is cold comfort for anyone to advocate for the absolute insistence of no change to a tort scheme in circumstances where the insurance scheme underpinning it cannot support it.

For the reasons discussed below, it is critical that lawyers, as key stakeholders in the process play a productive part in negotiating any reform outcomes with decision makers. This is because we have intrinsic knowledge of the workings of tort schemes and the insurance implications that can follow them.

In his paper "Reforming Tort Law in Australia: A Personal Perspective" Peter Cane proffers the view that[3] "policy entrepreneurs participating in these debates [about personal injury law, in the context of reform], fall into three main groups that we may loosely call conservatives, radicals and moderates". Cane goes on to argue that conservatives, falling into two categories being compensationists and economic

* Simon Morrison, Managing Director, Shine Lawyers Australia. He can be contacted by email at smorrison@shine.com.au.
[1] John Simpson and Edmund Weiner (eds), *Oxford English Dictionary*, 2nd edn (Oxford: Clarendon Press, 1989) definition of "reform".
[2] *Oxford English Dictionary* (1989) definition of "deform".
[3] Peter Cane "Reforming Tort Law in Australia: A Personal Perspective" (2003) *Melbourne University Law Review* 649, 651.

rationalists oppose reforms primarily for two reasons. Compensationists focus on the fact that usually people need to be compensated by the wrongdoings of others, while economic rationalists focus on the fact that the purpose of personal injury law is not compensation but rather risk management. Mr Cane goes on to define radicals as those who regard tort law being "about as bad as it could be, whichever way you look at it".[4]

The final category of moderates find that too much money is spent compensating people and restriction needs to occur coupled with the need for a better balance between those injured and those who injure with regard to respective responsibilities. Mr Cane is well versed in this area as an academic in the Law Program, Research School of Social Sciences at the Australian National University. In addition he sat on the panel of eminent persons that oversaw the design for the most significant national tort reform program in Australia back on 2002.

Whatever category one falls into in the reform debate, it is difficult to argue against the proposition that whatever the design of a tort reform and accompanying insurance scheme, it must be economically sustainable in the long term.

The stakeholders

Having been involved in plaintiff personal injury work and associated policy work for more than two decades, it is instructive to observe the role that plaintiff lawyers have historically taken in the debate, at least in Australia. Historically the reform process proceeded as follows.

(1) Speculation starts to mount that a reform is on the horizon, precipitated by poor performance in the statutory or private insurance scheme underpinning a tort process.
(2) The announcement by a sitting government that changes need to be made to the scheme in order to ensure its survival.
(3) Opponents of the change publicly and privately lobbying to resist the change, coupled with proponents in favour of the change lobbying their respective position publicly and privately.
(4) Government making a decision typically to restrict the scheme.
(5) Public opposition to the change via the electoral cycles.

As plaintiff lawyers, amongst other things, it is our duty to do everything in our power to protect the rights of those that we represent. This includes a key role in the policy arena on tort reform.

I would advocate that, that role, although historically has focused on resisting any change that might interfere with the rights of injured people, must necessarily involve us stepping up and negotiating sensible solutions with an economic solution in mind for insurance schemes that underpin tort reform processes. We have all heard the infamous quote: "Don't come to me with problems; come to me with solutions."

If insurance schemes are under pressure, we possess intricate knowledge of what changes might occur to improve the tort process whilst not eradicating the underlying rights of those injured. All too often decisions are made at a policy level by those with a less than perfect understanding of how the tort and insurance schemes function.

I once famously witnessed former President Bill Clinton addressing a group of plaintiff lawyers in the US encouraging them to step up and take a constructive role in the debate around tort reform as opposed to merely resisting any change. Former President Clinton acknowledged the difficulty faced by politicians in addressing these issues but urged plaintiff lawyers to enter the debate in a more constructive way. This I believe was sage advice for the reform process into the future.

[4] Cane "Reforming Tort Law in Australia: A Personal Perspective" (2003) *Melbourne University Law Review* 649, 651.

Different types of reform

Reform can broadly occur in two categories:

(1) the changes to liability and damages provisions in tort and insurance schemes, designed to reduce the claims frequency and reduce claims payments; and
(2) changes to procedures, designed to reduce scheme costs and other associated costs.

In Australia we have had our fair share of reform in both categories, the most significant national reform being the introduction of the Civil Liability Legislation covering predominantly the first category. The Australian reforms will be discussed further in this article.

UK reforms

In 2008 the Master of the Rolls Lord Justice Jackson was appointed to "a fundamental review of the rules and principles governing the costs of litigation and to make recommendations in order to promote access to justice at proportionate cost".[5] The terms of reference for the review included:

- establish how present costs rules operate and how they impact on the behaviour of both parties and lawyers;
- establish the effect case management procedures have on costs and consider whether changes in process and/or procedure could bring about more proportionate costs;
- have regard to previous and current research into costs and funding issues—for example any further government research into conditional fee agreements—"no win, no fee", following the scoping study;
- seek the views of judges, practitioners, government, court users and other interested parties through both informal consultation and a series of public seminars;
- compare the costs regime for England and Wales with those operating in other jurisdictions; and
- prepare a report setting out recommendations with supporting evidence by 31 December 2009.[6]

The Jackson reforms

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") followed a review of civil procedure by Lord Justice Jackson. The reform was one of the more significant areas of reform for UK lawyers. From a distance, we observe that some of the issues underpinning the reforms were:

(1) a perception that the cost of litigation in the UK needed to be brought back under control;
(2) the cost for accessing justice for claimants was prohibitive; and
(3) the civil litigation schemes needed reform to be sustainable.

The following were key reforms in that process.

Success fees

Success fees following the reform were no longer recoverable from a losing party in the litigation. In lieu thereof a successful party would need to fund success fees from damages recovered. Whilst philosophically

[5] "Review of Civil Litigation Costs" (Courts and Tribunal Judiciary, May 15, 2014). Courts and Tribunal Judiciary*https://www.judiciary.gov.uk/publications/review-of-civil-litigation-costs/* [Accessed July 21, 2015].
[6] Courts and Tribunal Judiciary, "Review of Civil Litigation Costs: Final Report" (The Stationery Office, 2010), para.1.2.

contrary to the loser pays principle, this reform has indeed been present in the Australian civil legal system for some many years.

In some jurisdictions, it is not unusual for a claimant to have to pay all of their legal costs from their damages. Whilst we have argued long and hard in this country that this violates significantly the loser pays principle, it nonetheless was a reform introduced by Australian governments in a reported attempt to bring litigation under control.

It has been over a decade since this type of reform was enacted in Australia and one observation that could be made is that damages recovered either by way of alternate dispute resolution or verdict from a court may have subconsciously superimposed to make allowances for this principle. What the reform certainly has forced Australian lawyers to do is to conduct claims in a far more efficient manner bearing in mind the changing environment.

After the event insurance premiums

Following the implementation of these reforms after the event insurance premiums paid are not recoverable from the losing party but must be funded by the insured themselves. In Australia there has never been the opportunity to claim an insurance premium as part of damages recovered.

Damages based agreements

As part of the reforms damages based agreements ("DBAs") will be introduced as a vehicle for plaintiffs to secure legal services. This will see the introduction of contingency fees allowing solicitors to recover by way of fees, 25 per cent for personal injury claims, 35 per cent for employment related matters and 50 per cent for commercial claims. Whilst a number of international jurisdictions permit contingency fees, Australia to date has not allowed such a fee structure.

Following a review by the Australian Productivity Commission, a recommendation has been made to the Government to consider the introduction of contingency fees. The primary reason for this was to provide a further vehicle to widen access to justice for claimants. In a policy sense, Australian lawyers have long argued for the introduction of contingency fees for a number of reasons. First, the model creates a far more simplified approach to legal fees for all stakeholders concerned. The model provides absolute certainty for claimants contemplating litigation. The model will reduce significant costs associated with determining legal costs in a given piece of litigation. Finally, the model will reduce time spent associated with the assessment of legal costs.

The primary argument proffered by those opposing contingency fees revolves around a perception that the introduction of contingency fees will see the Australian legal system "following the American path". By implication it will suggest that there could be an explosion of litigation claims, particularly unmeritorious claims. The Law Council of Australia has prepared a submission for the Australian Government for its consideration in respect of the introduction of damages based agreements. Our view is that DBAs will be a helpful tool for the UK jurisdiction, to enable both claimants and their lawyers a more appropriate methodology in which to conduct and cost civil litigation.

Referral fees banned in personal injury cases

The UK model of claims being referred into lawyers on commercial terms from other parties, particularly non-lawyers, is a concept that is not permitted in the Australian jurisdiction per se. The exception is that in some jurisdictions, lawyer to lawyer commercial referrals are permitted provided the existence of the referral is disclosed to the client. Our observation from afar is that there appeared to be a perception that

the existence of referral fee arrangements encouraged a disproportionate increase of claimants entering the civil litigation jurisdiction. It is for others to determine the robustness of these assertions.

The introduction of fixed costs for fast track claims under the road traffic act for claims of £25,000

The introduction of fixed fee costs in the Australian jurisdiction is not new and has been historically implemented in an attempt to control smaller claims. Prior to the introduction of costs restrictions into the Australian jurisdiction, concerns were held that lawyers were charging significant sums of money disproportionate to damages recovered. In some remote cases, examples were uncovered of lawyers charging fees in excess of damages recovered. The Government and other opposing stakeholders saw these practices as repugnant and in need of immediate intervention.

Two models have been introduced in the Australian jurisdiction over time. One includes fee cap formulae and the second being fixed costs regimes. There is no doubt that the introduction of fixed costs focuses one's mind on the ability to successfully conclude litigation for a client but in a commercial manner.The obvious tension arising on a fixed cost regime is whether the lawyer can responsibly discharge his or her duties in obtaining all of the necessary evidence and completing all of the necessary work to produce an optimum result for the client whilst being compensated appropriately for that work within the framework of a fixed cost regime.

In the Australian jurisdiction, having the introduction of fixed costs has certainly forced lawyers to make a better use of technology to arrive at greater efficiencies in the conduct of litigation, redeploy less significant tasks to unqualified people working under supervision by qualified lawyers, and to find ways to bring cases to a speedy conclusion in the interests of all parties. A good example of pricing restrictions (albeit in a different context) in Australia forcing lawyers to significantly improve the efficiency of legal work came about two decades ago with the advent of fixed price conveyancing. Prior to the introduction of fixed price, fees were largely determined in accordance with consideration of the property the subject of the conveyance.

As a result of a pricing war between conveyancing lawyers, fixed fees regardless of consideration were introduced and at significantly lower levels than previously experienced. Today in Australia, it is not unusual for a conveyance for a purchase of a residential property to be fixed at $500 and a sale at $300. This has necessitated the significant streamlining of process by conveyancing lawyers in order to make the work commercially viable.

The introduction of a qualified one-way cost shifting

This model will cap any amount that a claimant who loses a piece of litigation must pay to the defendant. This provision will apply provided claimants conduct their claims in accordance with the rules. In addition, new cost sanctions are introduced to encourage the earlier settlement of claims. It was suggested that the introduction of the cost protection regimes was a method of avoiding the need for after the event insurance.

In Australian jurisdictions similar cost provisions have been introduced for over a decade. It can be said, that the introduction of these provisions has certainly focused the mind of the lawyer on two key issues:

(1) Ensuring that the claimant's lawyer has "clean hands" and conducts the litigation appropriately.

(2) To focus the mind heavily on the reasonableness of formal offers made to an opposing party.

When these reforms were introduced into the Australian jurisdiction significant concern was held about disadvantage to a claimant in the sense that the ability to take advantage of the provisions only applied in

the cases that were determined at trial as opposed to cases resolved by settlement. This unwittingly allowed a defendant to theoretically allow a case to run as long as possible thereby potentially placing more pressure on the plaintiff.

More than a decade on, I think it is fair to say that the provisions have, over time, worked.

These days, offers made by both parties at early stages both formal and informal appear to be more focused than occurred over a decade ago. If there was one suggestion to improve these sanctions at least in the Australian jurisdiction, it would involve the ability of a party who settles a case on more favourable terms than a formal offer, being able to apply to a Court for the invoking of the necessary cost sanction provisions.

An increase of 10 per cent in general damages for personal injuries and other civil claims

It is rare to see governments increase the availability of damages for claimants in tort systems. It is clear that the introduction of this change was an offset mechanism against some of the more restrictive changes introduced. Any effort by a government to improve the level of damages recovered by claimants is to be applauded. Finally, a number of other provisions were introduced but these were the ones that were of most significance and offered some key parallels to reforms in the Australian jurisdiction.

UK Stakeholder reaction

As with any reform, significant opposition was made to a number of the changes. In his article "Insult to Injury" Professor Dominic Regan of City Law School said:[7]

> "Injury lawyers are scum. More than a few of their clients are too. That is the terrible public perception generated by a cosy cabal of media and of some politicians. The injury professional has been singled out for despicable treatment."

Professor Regan raises a good point. All too often when reform is proposed, it is off the back of innuendo and distortion of facts. That is not to say that on many occasions reforms were not needed having regard to the state of tort and insurance schemes, but it is a tragedy when stakeholders overplay their hand seeking out reforms in certain environments. It is yet to be determined whether the reforms have swung the pendulum too far but time will no doubt tell.

In its response to the introduction of the reforms, the Bar Council in its final report noted:[8]

> "despite recognising this need for reform, barrister interviewees with primarily privately funded civil practice were deeply concerned that the reforms implemented had gone too far in that they had not restored balance to litigation but simply moved litigation from being overly claimant friendly to excessively defendant friendly."

A flavour developing from the Jackson Reforms on one view is that the reforms have significantly overreached and the prejudice to claimants will become all too obvious in the coming years. I will discuss below steps that might be appropriate in an attempt to get greater balance to reforms prospectively.

Australian tort reform

Australian tort schemes have been the subject of reform for many decades. Predominantly at state level, insurance schemes notably in workers' compensation and motor accident insurance have been the most

[7] Professor Dominic Regan, "Insult to Injury" (New Law Journal, May 9, 2014). New Law Journal*http://www.newlawjournal.co.uk/nlj/content/and-loser* [Accessed July 21, 2015].

[8] Bar Council, *The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO): One Year On—Final Report* (September 18, 2014), p.42.

active when it comes to restrictive reform. The single biggest national reform occurring in Australia came about in 2002 following the intersection of a series of events that impacted the insurance industry in our country. These included the collapse of HIH, the second largest general insurer at the time in Australia, the provisional liquidation of United Medical Protection ("UMP") Australia's then largest medical defence organisation, the impact of the World Trade Centre events and underwriting losses on policies written the previous decade following a reduction in investment returns.

Commentators have debated what the most significant contributor to this problem was however it cannot be understated that the collapse of the second largest general insurer in the Australian market following a significantly aggressive pricing reduction on premium approach in the years preceding that played a major role in the subsequent reforms. The result was the introduction of state-based legislation co-ordinated around the country introducing reform in respect to liability provisions, damages recovery and costs. A summary of key reforms that have occurred in the last decade and a half in Australia is as follows.

Liability provisions

Many jurisdictions have introduced more restrictive tests forcing a greater standard of proof on plaintiffs. These include the introduction of "obvious risk" provisions when seeking to prove negligence. In many jurisdictions that includes the requirement to prove that firstly a risk is not insignificant and secondly that applying the reasonable man test, a person in the same position might have taken appropriate precautions. A key aspect of obvious risk is that a risk may be regarded as obvious notwithstanding the probability of that risk materialising is low. Specific provisions have been enacted to protect government utilities in respect to key risks facing them. Specific provisions have been introduced around torts involving the consumption of alcohol by plaintiffs inferring contributory negligence relative to blood alcohol readings.

Restrictions on general damages

Many jurisdictions have introduced whole person impairment thresholds before general damages can be accessed. In addition some jurisdictions have introduced monetary thresholds prior to general damages being accessed.

Caps: non-economic loss

Many jurisdictions have capped non-economic loss in their tort schemes, the lowest in the country being South Australia where non-economic loss is capped at $256,480 and the highest (for which a cap applies) being New South Wales capped at $427,000.

Economic loss: caps

Many jurisdictions cap the recovery for damages for economic loss at three times average weekly earnings.

Interest on non-economic loss

Most jurisdictions now prohibit the recovery of interest on past non-economic loss.

Punitive damages

Punitive damages have been largely removed in most jurisdictions and those that retain the punitives are restricted in who they can be recovered from.

Discount rates

Discount rates across the country broadly vary between five and six per cent.

Legal costs

Some jurisdictions fix legal costs at particular sums. For example, in New South Wales, in some practice areas, for claims up to $100,000 the maximum legal costs are the greater of 20 per cent of damages recovered or $10,000. Other jurisdictions have a cap directly relevant to damages. For example, in Queensland legal costs are capped at 50 per cent of damages after the deduction of refunds and disbursements. As previously pointed out, in some jurisdictions no legal costs can be recovered from an opposing party on a standard basis in certain circumstances.

The introduction of many of these reforms in Australia has been met with mixed views. The introduction of the Civil Liability Acts around the country following the collapse of HIH saw some of the most intrusive reforms referred to in the list above. Justice David Ipp of the Supreme Court of New South Wales who led the review recommending many of these reforms was himself questioning whether they had gone too far, many years later.

Prominent legal affairs journalist Chris Merritt wrote in 2007:[9]

> "Ipp told his audience that Tort Reform had gone too far and those seeking changes had 'really good points'. On referring to what he said in his 2002 Report, Ipp said he believed that legislation put in place had gone further 'and sometimes much further' than what he had recommended."

By contrast the Insurance Council of Australia celebrated the reforms claiming a win for key stakeholders. In its "Industry in Focus" publication it said:[10]

> "Overall it is clear that the objectives of the tort reforms that followed the liability crisis of 2002 have been met—public liability insurance is now more readily available, and is also more affordable."

So where to from here?

Peter Cane in his article "Reforming Tort Law in Australia: A Personal Perspective" concluded:[11]

> "In the current Australian political climate, what can be said about the prospects for more radical reform of tort law? Some people saw the review as a lost opportunity to recommend abolition of tort and the introduction of a no fault scheme."

There is no doubt that a number of self-interested stakeholders would gladly extinguish the basic rights for common law remedies for those had been injured or wronged. In many jurisdictions around the world where the right to common law recovery remains, lurking in the background are those with strong views that no such rights should exist and any form of compensation should be on a purely no fault statutory basis.

A valuable lesson learnt by Australian lawyers in the last decade and a half is that taking a public position to simply seek to protect our clients' common law rights is not enough. Whilst governments intuitively understand this, they are persuaded and influenced significantly by other stakeholders when the economics of tort and insurance schemes are under scrutiny.

The Australian Lawyers Alliance ("ALA"), our sister body to the Association of Personal Injury Lawyers, undertook a novel approach to a state-based tort reform in this country several years ago. Faced with an

[9] Chris Merit "Liability of Flawed Law Reform", *The Australian*, April 14, 2007.
[10] Insurance Council of Australia *Industry in Focus* (October 2009).
[11] Cane "Reforming Tort Law in Australia: A Personal Perspective" (2003) *Melbourne University Law Review* 649.

insurance scheme that was under considerable financial pressure following an increase in claims frequency and payments, as a stakeholder the ALA could have followed tradition and sought to oppose any change on the basis that it interfered with the common law rights of the clients that we represent day by day.

In contrast a different methodology took place. Actuaries were deployed to assess a whole range of initiatives aimed at restoring the financial position of the relevant insurance scheme.

This necessitated some compromise in respect to aspects of liability and damages provisions but significantly less than those opposing common law access were promulgating to government. As a body of professionals representing claimants, work was completed to cost out key changes that achieved two outcomes:

(1) the preservation of key common law rights for claimants; and
(2) the ability for the insurance scheme to recover from its financial predicament.

Happily legislation was passed largely in accordance with the model put up by the ALA.

As a lawyer involved intimately in that process at the time, I can commend to our English colleagues the importance of getting on the front foot any time a reform is under consideration. Being part of the solution and not the problem by proactively recommending necessary changes to achieve the key outcomes, and not waiting for opponents to invoke harsh and aggressive changes, has served us well as a stakeholder in tort and insurance schemes.

Some may form the view that governments will make their decisions regardless and that the might of other stakeholders will always overpower the role lawyers play in representing the interests of their clients in these debates. In Australia we can say with some confidence that taking a more proactive approach to crafting out design solutions for governments has served us well by having a more active role in ultimate decisions taken, and obtaining more credibility in the context of the reform debates. Sadly though reform will continue into the future. How we approach that reform will be the determinant of the outcomes for our worthy clients who ultimately are the victims of any restrictive changes in tort and insurance schemes.

Updating the Package Travel Directive Whilst Maintaining a High Level of Consumer Protection

Philip Mead*

Compensation; Consumer protection; EU law; Holiday claims; Linked transactions; Package holidays; Personal injury

Philip Mead examines the changes in the proposed new Directive for package travel and assisted travel holidays and looks at the likely issues arising from the changes for personal injury claims.

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Introduction

Directive 90/314 on package travel, package holidays and package tours[1] was passed at a time when conventional purchases of holidays often were made via travel agents, and when the internet did not exist. Technological change, which brought about the sale of travel services via the internet, combined with market changes, including the availability of cheaper air travel, has led to a revolution in how holidays are sold and how travel services are consumed. For these reasons, and in order to update the legal regime established by the 1990 Directive, the European Commission issued a Proposal for a Directive on package travel and assisted travel arrangements, amending Regulation 2006/2004, Directive 2011/83 and repealing Directive 90/314.[2] The purpose of this article is to describe the emerging proposed new regime, by reference to claims which may be brought for personal injury for breach of obligation under the package contract, or domestic legislation implementing the European Directive.

New Directive: New terminology

The approach the drafters of the proposed new Directive ("PND") have chosen is to recast the language and phraseology used in the text.[3] This leads to uncertainty as to whether the change in terminology leads to a conclusion that the proposed revised text has a changed meaning. A comparison may illustrate the difficulty. Under Directive 90/314, art.5(1) stipulates:

> "Member States shall take the necessary steps to ensure that the organizer and/or retailer party to the contract is liable to the consumer for the proper performance of the obligations arising from the contract, irrespective of whether such obligations are to be performed by that organizer and/or retailer or by other suppliers of services without prejudice to the right of the organizer and/or retailer to pursue those other suppliers of services."

The draft text of art.11(1) PND reads:

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[1] Directive 90/314 on package travel, package holidays and package tours [1992] OJ L158/59.

[2] Proposal for a Directive on package travel and assisted travel arrangements, amending Regulation 2006/2004, Directive 2011/83 and repealing Directive 90/314 COM(2013) 512 final. See also the European Commission Communication bringing the EU package travel rules into the digital age COM(2013) 513 final.

[3] The latest text available to the author from the General Secretariat of the Council dated May 21, 2015 sets out the political agreement of the negotiating parties.

> "Member States shall ensure that the organiser is responsible for the performance of the travel services included in the contract, irrespective of whether those services are to be performed by the organiser or by other service providers."

At first blush, there appears not to be absolute conformity of concept. However, the heading to draft art.11 is: *"Liability for the performance of the package"*. Understanding what the core obligation in art.11(1) comprises, becomes more important when a comparison between art.5(2) of Directive 90/314 and draft art.11(2) of the PND is made. Article 5(2) states:

> "With regard to the damage resulting for the consumer from the failure to perform or the improper performance of the contract, Member States shall take the necessary steps to ensure that the organizer and/or retailer is/are liable …"

Draft art.11(2) of the PND reads: "If any of the services are not performed in accordance with the contract, the organiser shall remedy the lack of conformity." Lack of conformity is defined at draft art.3(12) of the PND as meaning "lack of or improper performance of the travel services included in a package."

Directive 90/314 had at its heart the imposition of an obligation in contract to provide certain services and a liability in damages where such an obligation was broken. The new Directive does not necessarily require (as opposed to merely permitting) an equivalent approach. If a Member State were to impose obligations of an administrative or criminal nature in circumstances of a lack of conformity would that be in breach of the PND? If the context in which the PND is considered to be interpreted is fundamentally the same, namely a liability regime predicated on obligations articulated in the contract for the provision of travel services, then it would be better for legal certainty and consistency to say so, and to use terms referable to duties contained in private law, rather than requiring implementation of statutory concepts.

Core concepts in the new Directive

"Package" is defined as meaning a combination of at least two different types of travel services for the purposes of the same trip or holiday, when those services are combined in prescribed circumstances. Travel services are defined as meaning (draft art.3(1) of the PND):

- "(a) carriage of passengers;
- (b) accommodation other than for residential purposes which is not intrinsically part of carriage of passengers;
- (c) rental of cars, or other motor vehicles … or of motorcycles;
- (d) any other tourist service not intrinsically part of a travel service within the meaning of letters (a), (b) and (c)."

The circumstances when a combination of travel services becomes a package is defined in draft art.3(2) of the PND, if

- "(a) those services are combined by one trader, including at the request or according to the selection of the traveller, before a single contract on all services is concluded, or
- (b) irrespective of whether separate contracts are concluded with individual travel service providers, those services are:
  - (i) purchased from a single point of sale and at least two different travel services have been selected before the traveller agrees to pay;
  - (ii) offered, sold or charged at an inclusive or total price;
  - (iii) advertised or sold under the term 'package' or under a similar term;
  - (iv) combined after the conclusion of a contract by which a trader entitles the traveller to choose among a selection of different types of travel services;

(v) purchased from separate traders through linked online booking processes where the traveller's name, payment details and e-mail address are transmitted from the trader with whom the first contact is concluded to another trader or traders and a contract with the latter trader or traders is concluded not more than 24 hours after the confirmation of the first travel service."

A combination involving a travel service under draft art.3(1) sub-paras (a) or (b) or (c) in conjunction with one or more travel services under sub-para.(d) do not constitute a package if the latter services do not account for a significant proportion of the value of the combination and are not advertised as and do not otherwise represent an essential feature of the combination, or are selected and purchased only after the performance of a travel service in the sense of points (a), (b) or (c) has started (see draft art.3(2) of the PND). Packages covering a period of less than 24 hours are not covered unless overnight accommodation is included (draft art.2(2)(a) of the PND).[4]

The definition of "package" under Directive 90/314, despite some appeal court guidance, has been a significant risk issue in personal injury claims.[5] The difficulty in knowing, from the perspective of a consumer, whether what you are buying is covered by the definition of a package continues. Such a complicated definition will, no doubt, attract the attention of the courts, particularly where a contrast is drawn with the level of protection provided for linked travel arrangements ("LTAs").

Linked travel arrangements

The relatively complex definition of a package is to be contrasted with the definition of a "linked travel arrangement" set out at art.3(5) of the PND, as follows: "linked arrangement" means at least two different types of travel services purchased for the purpose of the same trip or holiday, not constituting a package within the meaning of para.2(b), resulting in the conclusion of separate contracts with the individual travel service providers, if a trader facilitates:

"(a) on the occasion of a single visit or contact with its point of sale, the separate selection and separate payment of each travel service by travellers; or

(b) in a targeted manner, the procurement of at least one additional travel service from another trader and where a contract with such other trader is concluded not more than 24 hours after the confirmation of the first travel service."

The PND foresees a two-tier market: LTAs are subject to the substantive provisions governing insolvency protection (draft arts 15–16 and art.17 which regulates LTAs but not packages in respect of minimum information requirements) but not the provisions on liability and remedy/redress (draft arts 11 and 12), or other substantive provisions described below. One of the difficulties the European negotiations encountered was how to define with clarity and certainty the distinction between a package and an LTA.

Substantive protection provided to the consumer of a package

The PND specifies the following substantive protection for consumers of packages.

[4] The detailed definitions should be read and understood in the context of extensive recitals seeking to describe what could constitute a package: see draft recitals (8)–(20)

[5] *R. (on the application of Association of British Travel Agents Ltd (ABTA)) v Civil Aviation Authority* [2006] EWHC 13 (Admin); [2006] A.C.D. 49:

"The factual question to be resolved—on a case by case basis—is whether the services are being sold or offered for sale as components of a combination; or whether they are being sold or offered for sale separately, but at the same time."

(1) Pre-contractual information and minimum requirements for the content of the contract (draft arts 4–6) with a burden of proof on the trader to demonstrate compliance with such requirements (art.6a).
(2) Changes to the contract before the start of the package (concerning transfer of the contract to another traveller) (draft arts 7–10), including:
    a) alteration of the price;
    b) alteration of other contract terms; and
    c) termination of the contract and the right of withdrawal before the start of the package.
(3) Insolvency protection (draft arts 15–16).
(4) Particular provisions regulating the performance of the package (draft arts 11–14).

The principal provisions of interest to personal injury practitioners are: draft art.11 on liability for the performance of the package, and draft art.12 on price reduction, compensation for damages.

As described above, by draft art.11(1) of the PND, the organiser[6] is responsible for the performance of the travel services irrespective of whether those services are to be provided by the organiser or another service provider.[7] Member States have a discretion to impose the same obligation on a retailer[8] in addition to an organiser (draft art.11(1), second paragraph).

If any of the travel services are not performed in accordance with the contract, there is a duty on the organiser to remedy the lack of conformity unless that is either impossible or implies disproportionate costs (draft art.11(2) of the PND). Where a significant proportion of the services cannot be provided as agreed in the contract, there is a duty, where possible, to provide for suitable alternative arrangements of services of equivalent or higher quality than those specified in the contract and/or price reduction where such alternative arrangements reduce the quality of the package (draft art.11(3)of the PND).

Price reduction and termination

Draft art.11(4) of the PND provides that where there is a lack of conformity which substantially affects the performance of the package which the organiser has failed to remedy within a reasonable time set by the traveller, the traveller may terminate the contract[9] and, where appropriate, request price reduction and compensation in accordance with draft art.12 (unless the lack of conformity is attributable to the traveller: see draft art.12(1) of the PND).

Compensation

Draft art.12(2) of the PND reads:

> "The traveller shall be entitled to receive appropriate compensation from the organiser for any damage which the traveller sustains as a result of any lack of conformity. Compensation shall be made without undue delay."

[6] Defined as a "trader who combines and sells or offers for sale packages … either directly or through another trader or together with another trader or, the trader who transmits the traveller's data to another trader" as referred to in sub-para.(v) of the definition of package set out above (draft art.3(8) of the PND).

[7] Unless the organiser is established outside the EEA, in which case the retailer established in a Member State shall be subject to the obligations laid down in the Directive in certain circumstances: see draft art.18 of the PND.

[8] Defined as a "trader other than the organiser who sells or offers for sale packages combined by an organiser" (draft art.3(9) of the PND).

[9] Termination being at the option of the traveller: see draft art.11(4), second paragraph.

Restrictions on the right of an injured claimant to claim compensation

Having set out the right to compensation, there are then a series of clauses whose purpose would appear to be to restrict the right to claim compensation in certain circumstances.

Paragraph 1a of draft art.11 PND stipulates that the traveller:

> "shall inform the organiser without undue delay, taking into account the circumstances of the case, of any lack of conformity which he perceives during the performance of a travel service included in the contract."

Apart from the obvious question of what constitutes "undue delay", and whether that is a question which the organiser can define in its terms and conditions, the implication is that where a traveller fails to inform the organiser timeously, such a failure could impact on the right of the traveller to claim a price reduction or a right to terminate and/or a right to compensation. Can (should) such an obligation apply to a claim for damages for personal injury? If so, with what effect? Such a clause is likely to be of considerable utility in circumstances where claims for compensation and/or price reduction are made in non-personal injury claims after the traveller has returned home without first making complaint. However, unscrupulous operators may well rely on this clause to deter injured claimants as well (even where implementing legislation does not make particular provision in this respect).[10]

Paragraph 4 of draft art.12 of the PND makes provision for limits to compensation in three circumstances:

(1) where international conventions binding the EU limit the extent of or the conditions under which compensation is to be paid by a provider carrying out a service which is part of a package, the same limitations shall apply to the organiser (first sentence of para.4);

(2) in relation to international conventions not binding the Union which limit compensation to be paid by a service provider, Member States have a discretion to "limit compensation to be paid by the organiser accordingly" (second sentence of para.4);

(3) "In other cases, the contract may limit compensation to be paid by the organiser as long as that limitation does not apply to personal injury or damage caused intentionally or with negligence and does not amount to less than three times the total price of the package" (third sentence of paragraph 4).

Draft art.12(6) of the PND stipulates a prescription period for introducing claims under this Article "shall not be shorter than two years" which would appear to include claims for personal injury. Draft art.13 of the PND further provides in this respect for the possibility to contact the organiser via the retailer so that the traveller may address "messages, requests or complaints in relation to the performance of the package". The draft Article then continues:

> "For the purpose of compliance with time-limits or prescription periods, receipt of the notifications by the retailer shall be considered as receipt by the organiser."

The purpose of draft art.12(6) when read with draft art.13 of the PND is not absolutely clear for jurisdictions such as England and Wales where limitation law does not allow for the interruption or suspension of limitation periods by means of formal notification of a complaint or claim. Introducing a claim might (or might not) be said to be something different from bringing a claim before the courts. The use of the word "prescription" would appear to preclude time limits being imposed in contractual terms and conditions, but suggests a possible limit on the right of injured consumers to bring a claim for personal injury more than two years after the date of the accident/injury (should the Member State implementing the Directive so choose).

[10] Draft art.21(3) of the PND prevents the circumvention of the rights conferred on travellers by any contractual arrangements.

Progress of negotiations within the EU

Whereas the structure of the draft art.12 of the PND reflects similar provisions contained in the International Travel Convention system, those International Conventions provide for strict liability and a reversal of the burden of proof as compensatory benefits for injured claimants. Here, there appears to be a proposed legal graft of a similar legislative structure without the imposition of strict liability or reversal of the burden of proof.

The original drafting was not entirely free from potential ambiguity as to the extent of the exclusion of personal injury claims from any permitted contractual cap on compensation. The present form of words, in the third element of draft art.12(4), was introduced after the intervention of the European Parliament at its first reading which adopted a resolution amending the original text by replacing "or" for the word "and" (the original proposal read: "… as long as that limitation does not apply to personal injury and damage caused intentionally or with gross negligence …").

Most importantly, however, such a provision must be read in the light of the purpose of the proposed Directive which is set out in draft art.1 of the PND which provides that the purpose of the Directive is "… to contribute to the proper functioning of the internal market and to the achievement of a high and as uniform as possible level of consumer protection".[11]

The wording of the original European Commission draft proposal led to concerns that the consumer would be burdened with the restrictions from the International Travel Conventions and not receive any of the protections.[12] In the light of the reference to a high level of consumer protection and the revision to the scope of draft art.12(4), concerns as to unwarranted restrictions on injured claimants bringing claims for personal injury have been removed. There may, however, still be some complexity in other cases as to the correct interpretation of draft art.12(4) of the PND where, on the one hand recovery of compensation flows from a breach of the contract, but the limit on compensation is referable to concepts such as intention and negligence.

Conclusion

As with many European legislative initiatives, there is clearly a dual purpose to the proposed new Directive: to protect consumers and to harmonise internal market conditions in circumstances where Southern European businesses, in particular SMEs, rely heavily on the benefits of the package holiday industry. The general restrictions on the availability of a remedy applicable to consumers of packages under the PND will need to be interpreted with care. However, the express provision in draft art.1 of the PND of the requirement for a high level of consumer protection should limit the scope for technical arguments in relation to cases involving personal injury.

[11] See also the reference to art.38 of the Charter of Fundamental Rights of the European Union in draft recital 42.

[12] These and other questions were raised in the PEOPIL response to the Proposal for a Directive, in a paper submitted to the Commission and European Parliament dated September 6, 2013, prior to the adoption by the European Parliament of its position at first reading.

Tinkering at the Edges

Nicholas Bevan*

Compulsory insurance; EU law; Motor insurance; Road traffic accidents; Third party insurance

Nicholas Bevan looks at the issue of motor insurance. He examines the history behind the introduction of compulsory motor insurance and the policy decisions which have shaped how it developed. He identifies the current issues arising from exclusions and limitations and illustrates how these are in breach of European requirements and describes how in his view the current system is unfit for purpose. He then discusses the reform necessary.

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Every motor liability practitioner knows that their clients' compensatory recovery is predicated on motor insurance. We all pay a small fortune in premiums every year to ensure this. Unfortunately, as I hope to demonstrate, the product we are sold is not fit for purpose.

Compulsory third party motor insurance was introduced under the Road Traffic Act 1930 and over the years the scheme has been extended to include ancillary measures to protect innocent victims from the risk posed by uninsured and hit and run drivers. Now, 84 years on, the entire third party motor insurance is in a shambles and in urgent need of reform.

Origins

It is clear from the early case authorities and from Sir Felix Cassell's *Board of Trade report of the Committee on Compulsory Insurance*, Cmd. 5528 (1937) that the underlying objective of the 1930 legislation was as simple as it was compelling: to mutualise the financial hazard posed to private citizens from the risk of being injured by motor vehicles.

Instead of incepting a state-run scheme, the Government sensibly opted for a private sector solution that was already in place: one provided by a nascent motor insurance sector. The 1930 Act made it a criminal offence to use a motor vehicle on a road without third party cover. This pragmatic measure was intended to guarantee that motor accident victims were able to recover their full compensatory entitlement, independently of the wrongdoer's ability to pay.

It was the mass production of affordable cars that made statutory intervention necessary. The arrival of the Austin 7 in 1922 and other reasonably affordable vehicles transformed car ownership; it was no longer the preserve of the rich. This exposed members of the public to the increased likelihood that a wrongdoer might not be able to afford to satisfy the damages for which they were liable. The imposition of compulsory third party insurance was a common sense measure designed to bolster the civil law rights of motor accident victims.

Evolving scope

Responsibility for overseeing this scheme has reposed in a long succession of ministers, currently the Secretary of State for Transport, Patrick McLoughlin. This responsibility has three important facets. First

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and foremost, the moral imperative of ensuring that the motor insurers, whom the department for Transport licences to operate in this captive market, honour the original 1930s legislative objective of guaranteeing the compensatory entitlement of third party victims. Another is to modify our national law provision in this area so that it keeps pace with technological and social change. Thirdly, to honour the Government's treaty obligation to take all appropriate measures, whether general or particular, to fully implement the six European Motor Insurance Directives on motor insurance.

We might be excused for thinking that the quid pro quo for paying our expensive premiums under compulsion of the law is the knowledge that if we are unfortunate enough to be injured by a careless driver, then our full compensatory entitlement will be guaranteed, independently of the driver at fault's ability to pay. What is not so readily appreciated is that the haphazard way in which these provisions have evolved over the past 84 years has degraded the quality of the central social policy aim. They are in fact an eclectic mix of different statutory and extra-statutory initiatives, each developed and refashioned in response to various discrete issues and bolted on as accretions to the whole, sometimes without any apparent concern for the way they interact with one another. Small wonder then that such a regime should have its flaws or that some victims' should fall through the gaps that such an empirically derived regime inevitably produces.

Unfortunately, whilst the Government was quick to impose criminal sanctions on its citizens for driving without insurance it had been surprisingly reluctant to interfere with the insurers' autonomy to play the system by hedging their risk through numerous preconditions of cover, restrictions in cover and exclusions of liability.

Recent events have forced the hand of the Government. Two recent judgments have punctured any illusion the Government may have entertained as to its domestic law provision in this area being compliant with the minimum standards of protection required under European law; it isn't.

Adverse influence

The motor insurance industry has enjoyed its monopoly for over eight decades. And how it has prospered! It has grown into a multi-billion pound state-sanctioned cartel that is able to indulge in lavishly funded advertising and lobbying of ministers and MPs to win concessions at the expense of the hapless premium-paying public who are compelled by law to purchase their products. It also enjoys a strategic advantage over individual claimants in the way it can compromise claims that pose a threat to its commercial interests; which in turn, allows it to shape the common law by influencing the legal issues that are referred to the senior appellate courts. This confers a strategic and tactical advantage on insurers in any civil liability dispute that the courts are ill equipped to confront.[1] So it should come as no great surprise to find that the simple inclusive nature of the original 1930s legislative objective has been compromised.

A bad start

Shortly after the Road Traffic Act 1930 came into effect, its shortcomings became apparent. A swathe of technical challenges were raised by different insurers, who relied on various contractual restrictions and exclusions of liability to avoid their contractual liability to indemnify their insured; something a third party victim has no control or influence over. It soon became clear that the legislative aim of the 1930 Act was being frustrated because it did not confer a direct and independent right on third party victims: "direct", in the sense of conferring on third party victims a direct right of action against the responsible drivers' insurers; "independent", in the sense that the victim's statutory right would be free from any defence that an insurer might have against its policyholder. This was because the 1930 Act did not attempt to interfere

[1] Part 1 of the Civil Procedure Rules seeks to put the parties on an equal footing. However, in individual cases, insurers enjoy a huge disparity in resources allied with decades of accrued specialist knowledge of an unnecessarily complicated and over technical medley of different legal provisions.

with the common law doctrine of privity of contract by which a contract does not generally confer rights or impose obligations on those who are not party to the contract (the "third party rule"). Furthermore, in the exceptional instances where a third party is entitled to claim the benefit of a contract, such rights are deemed to be subject to any contractual conditions and defences that the promisee may have against the promisor. As Harman LJ so memorably put it, in *Post Office v Norwich Union Fire Insurance Society Ltd*,[2] a third party cannot "pick out the plums and leave the duff behind".

Parliament's reaction was to legislate again, unfortunately by half measures, so the Road Traffic Act 1934 proved to be something of a curate's egg. On the positive side, s.10 gave every appearance of abrogating the third party rule. It provided that once an insurance policy has been issued and delivered and a relevant judgment obtained against the insured:

> "then, notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments."

This survives in s.151 of the Road Traffic Act 1988.

Unfortunately the third party rights that s.10 conferred was promptly qualified by two additional provisions. First of these was s.10(3) which enabled motor insurers to avoid their newly imposed statutory liability by allowing it to seek a court declaration that the policy was void for a material non disclosure or misrepresentation. That measure survives as s.152 of the Road Traffic Act 1988. Secondly, in s.12, by nullifying the effects of eight categories of policy restriction against a third party, it opened the door to the argument that by implication all other policy conditions and restrictions not so nullified remain valid against the very third party victims the system is supposed to protect. This survives in s.148 of the 1988 Act and this argument was deployed with devastating effect by insurers and most recently in the Court of Appeal in *Bristol Alliance Partnership v Williams*.[3]

Exclusions of liability

In *Bristol Alliance Partnership v Williams* an ostensibly fully insured motorist attempted to commit suicide by driving his car into a department store in Bristol. He caused extensive damage to the building and badly injured another motorist. All three Lords Justices held that the insurer's policy term that excluded liability for deliberate damage was effective against third party victims because it was effectively permitted by implication in the statute.

The ruling appears to give insurers a free hand to restrict or exclude their statutory liability to third party victims; save where expressly precluded from doing so by the Road Traffic Act 1988. Unfortunately the Act only addresses a limited number of specific exclusions, leaving insurers a free hand to hedge their liabilities elsewhere; at the expense of the law abiding road-using community and the wider public interest.

The same court also came to the bizarre conclusion that whilst motorists must ensure that *any* use they actually make of a vehicle is always covered by third party insurance, there is no corresponding obligation on motor insurers to provide such a wide-ranging scope of cover.

The result is that every year thousands of accident victims' claims are treated as uninsured driver claims even though some motor cover is in place. Insurers exploit the restrictive nature of the protection afforded by the 1988 Act to evade liability in numerous scenarios. This would not matter quite so much if the

[2] *Post Office v Norwich Union fire Insurance Society Ltd* [1967] 2 Q.B. 363 at 376.
[3] *Bristol Alliance Ltd Partnership v Williams* [2012] EWCA Civ 1267

Government's extra-statutory regimes for uninsured and untraced drivers[4] provided an equivalent level of protection, but they do not.

Both of the uninsured and untraced driver schemes are riddled with vicious, oppressive and disproportionate, strike out clauses that permit the Motor Insurers' Bureau ("MIB") to escape any liability even for the smallest procedural infraction. They also exclude liability for certain heads of loss and permit deductions from an applicant's proper compensatory entitlement in situations that would not be permitted in a normal civil action against an insured driver. These are decidedly third-rate schemes.

This author provided a detailed critique of the judgment in *Bristol Alliance* in this journal back in 2013,[5] arguing in robust terms that it was wrong both in law and logic. The fundamental failing is that Court of Appeal's conclusions are impossible to reconcile with a long line of Court of Justice rulings, referred to below. In the two years that have followed, not a single dissenting opinion has been published or otherwise made known to this author, yet the *Bristol Alliance* decision endures as an unfortunate and misleading legal precedent.

Restrictions in the scope of cover

Another major flaw in our national law safeguards is the restricted geographic and technical scope of the third party insurance requirement. The statutory scheme only extends to the use of motor vehicles "on a road or other public place". This excludes all private property, even forecourts and driveways leading onto public highways. The insurance requirement is also restricted to motor vehicles "intended or adapted for use on a road". This anachronistic restriction exempts many off-road motor vehicles from the duty to insure, even when used on public highways.

The Association of Personal Injury Lawyers, Personal Injuries Bar Association, Motor Accident Solicitors Society and a number of law firms joined this author in highlighting this problem in our responses to the Minister's abortive review of the MIB Agreements[6] back in April 2013.

Better, simpler, fairer European law

The qualified and restrictive nature of our national law provision contrasts sharply with the European Directives on motor insurance that the UK Government is obliged to implement.

A consistent line of Court of Justice rulings, originating in *Ruiz Bernaldez*,[7]—*Candolin v Pohjola*,[8] *Churchill Insurance Company Ltd v Wilkinson*[9] and *Csonka v Allam*[10]—confirms that under European law only one exclusion of liability is capable of affecting a motor insurer's liability to compensate a third party.[11] This single derogation from cover is limited to a passenger whom the insurer can prove knew the vehicle he was riding in was stolen.

The basic premise of the European Directives on motor insurance is that third party cover should to be good for any use made of the vehicle, provided it is consistent with its normal function, at least in so far as it concerns a third party victim's claim. The Directives stipulate that an insurer's liability to compensate a third party victim is independent of any contractual restrictions between the insurer and the policyholder.

[4] The Uninsured Drivers' Agreement 1999 and Untraced Drivers' Agreement 2003.
[5] Nicholas Bevan, "Marking the Boundary" [2013] J.P.I.L. 151.
[6] Department for Transport, *Review of the Uninsured and Untraced Drivers Agreements* (HMSO, February 2013).
[7] *Criminal Proceedings against Bernaldez* (C-129/94) [1996] E.C.R. I-1829; [1996] 2 C.M.L.R. 889.
[8] *Candolin v Vahinkovakuutusosakeyhtiö Pohjola* (C-537–442/10) [2005] E.C.R. I-5745; [2005] 3 C.M.L.R. 17.
[9] *Churchill Insurance Company Ltd v Wilkinson* [2010] EWCA Civ 556; [2010] P.I.Q.R. P15.
[10] *Csonka v Magyar Allam* (C-409/11) [2014] 1 C.M.L.R. 14.
[11] In *Candolin* [2005] E.C.R. I-5745 at 23 the Court of Justice said:
"It follows that the second subparagraph of Article 2(1) of the Second Directive must be interpreted as meaning that a statutory provision or a contractual clause in an insurance policy which excludes the use or driving of vehicles from the insurance may be relied on against third parties who are victims of a road accident only where the insurer can prove that the persons who voluntarily entered the vehicle which caused the injury knew that it was stolen."

So under European law (and subject to the single proviso mentioned above) provided the vehicle has some insurance in place, the insurer on risk must satisfy a third party claim, regardless. Furthermore, the MIB has no authority to deal with the non-contractual use of an ostensibly insured vehicle; except in that single instance.

All this makes perfect practical sense from a social policy perspective. It protects local authorities and the State from the risk of incurring responsibility for funding the extensive long-term care of seriously injured but destitute motor accident victims.

The obligation imposed on Member States is to put in place suitable measures to ensure that third party victims' compensatory entitlement is guaranteed. Unfortunately, there are over 40 instances where our defective national law fails to fully implement this simple imperative.

Ministerial inaction

I have been campaigning for reform in this area for some time now and the Minister for Transport is well aware of the many defects in the national law provision he is responsible for and how this exposes accident victims to the risk of either of being undercompensated and in extreme cases to recovering nothing at all.

In early 2013 an Under Secretary of State for Transport initiated what was possibly a well-intentioned but misconceived consultation on reforming both MIB Agreements. A number of law firms and claimant representative organisations joined me in explaining why the proposals did not go nearly far enough and in calling for a much wider-ranging review of the Government's provision in this area. My consultation response provided a detailed critique of the defective national law provision for third party victims. He was informed that the geographic and technical scope of the duty to insure and the nature and extent of the insurance requirement specified within the Road Traffic Act 1988 was far too narrow to conform with the minimum standards imposed under European law. He was provided with chapter and verse for the numerous unlawful exclusions, limitations and restrictions of liability under both MIB Agreements.

His response was to reject calls for a dialogue and later to simply abandon the review, without offering any explanation. Later on he blocked the involvement of the Law Commission when it offered its assistance.

It seemed that the Minister was unequal to the task of bringing the powerful insurance lobby into line. The only people who benefit from these flaws in the UK implementation of European law are the motor insurance companies, who exploit the numerous loopholes. The Minister was warned that if he did not act, others were ready and willing to encourage him.

A detailed infringement complaint has been lodged at the European Commission. And now two judgment's that vindicate some of these earlier criticisms look set to finally force the Minister's hand: one delivered by the Court of Justice of the European Union,[12] the other by a brilliant High Court Judge,[13] and recently upheld by the Court of Appeal.[14]

The *Vnuk* ruling

In September last year, in *Damijan Vnuk v Zavarovalnica Triglav dd*,[15] the Court of Justice confirmed that the third party insurance requirement extends to:

- *any* motor vehicle,
- *any* use made of it (provided its use is consistent with its normal function); and
- that this applies to *any* location, whether on public or private property.

[12] *Vnuk v Zavarovalnica Triglav dd* (C-162/13) EU:C:2014:2146.
[13] *Delaney v Secretary of State for Transport* [2014] EWHC 1785 (QB); [2014] R.T.R. 25.
[14] *Delaney* [2014] R.T.R. 25.
[15] *Vnuk* EU:C:2014:2146.

Compare this to the qualified and geographically restricted scope of the third party insurance requirement that we have become so used to working with under our statutory and extra-statutory provision in the UK. At the very least, we are bound to see some changes to Pt VI of the Road Traffic Act 1988 being proposed sometime this year. This is one infraction that the European Commission cannot ignore.

The same court also elevated the importance of the protective aim of the Directives on motor insurance to joint equal place with the liberalisation of the movement of people and vehicles across the EU. This means that any failure by a Member State to fully implement the objectives of a Directive in this regard will almost certainly be treated as a serious breach of European law. This has implications for state liability in a *Francovich* action.

The Delaney decision

In March this year the Court of Appeal upheld a first instance finding by Mr Justice Jay that the Department for Transport was guilty of a serious breach of European law when it introduced a new exclusion of liability in the Uninsured Drivers Agreement 1999. He held that the meaning of the European Directives on motor insurance would have been clear and obvious back in 1999 and that Minister had no discretion to introduce his own idiosyncrasies into what is a highly regulated regime for guaranteeing victims compensatory rights. The Department was held liable to compensate the victim under the *Francovich* principle. This writer has provided a detailed commentary on this case in this Journal.[16]

Of even greater significance is the way the Court of Appeal upheld the first instance finding to the effect that the protective principle which the Court of Justice announced in *Bernaldez* has a wide and general application. This is impossible to reconcile with its earlier judgment in *Bristol Alliance*.

Stark contrasts

Vnuk and *Delaney* leave us in no doubt that our national law, as interpreted and applied by the Court of Appeal in *Bristol Alliance* is inconsistent with the superior and binding effect of the Court of Justice's ruling in *Bernaldez* 19 years ago and as such it is bad law. Similarly there can be little doubt that ss.143, 145, 185 and 192 of the 1988 Act are all inconsistent with *Vnuk*. Unfortunately the UK's defective implementation of the European Directives on motor insurance is not confined to the geographic and technical scope of the compulsory third party motor insurance requirement imposed under art.3 of the Sixth consolidated Directive; they are legion.

European law in a nutshell

The European third party motor insurance requirement can be summarised in the following six core principles:

1) The duty to insure and the scope of third party motor insurance cover are coextensive. In other words, authorised motor insurers must provide third party cover that is fit for purpose.
2) The nature of the third party cover is wide and inclusive and it extends to:
   (a) almost any use;
   (b) almost any motorised vehicle; and
   (c) anywhere on land.
3) Member states have no discretion to introduce their own exclusions or restrictions of liability.
4) The Motor Insurers Bureau's role, as the art.10 compensating body, is strictly circumscribed. It is a last resort, only to be utilised where:

[16] Nicholas Bevan, "A World Turned Upside Down" [2014] J.P.I.L. 3.

(a) the vehicle responsible for causing the loss or injury is untraced;
(b) where there is absolutely no insurance in place; or
(c) where the insurers can prove the claimants had actual knowledge at the time they entered the vehicle in which they was riding that it was stolen, where the insurer has also excluded that particular liability in its policy terms

5) The Motor Insurers Bureau must compensate at least up to the limits of the third party motor insurance obligation. In doing so it must apply the EU law principles of equivalence and effectiveness.

6) The Motor Insurers Bureau can only exclude liability to compensate a victim of an uninsured driver where it can prove that the victim had actual knowledge at the time they entered the vehicle in which he or she was riding that it was uninsured.

The irony

The legislative objectives of the European Directives on motor insurance bear a very close affinity to the original social policy aims that engendered the passing of the Road Traffic Act 1930, which coined the very concept of compulsory third party motor insurance.

Unfortunately over the past eight decades, a well-resourced and highly influential motor insurance lobby has managed to extract numerous concessions from a succession of credulous and easily manipulated ministers, beginning as we have seen in 1934[17] and more recently in a series of unlawful revisions to its arrangements for victims of untraced drivers.[18] This has undermined the effectiveness of the 1930's objective of protecting accident victims. For all its many faults, the EU is less susceptible to this kind of unconstitutional interference. We have every reason to be grateful to these sensible and pragmatic Directives and the European law remedies that enable us to challenge the longstanding indifference of successive ministers and the insurance industry that cynically exploits this captive market for its own ends.

Lack of legal certainty

Meanwhile, we cannot take our national law at face value. Incompatibility defects riddle Pt VI of the Road Traffic Act 1988. They also infest the European Communities (Rights against Insurers) Regulations 2002 and both the Uninsured Drivers Agreement 1999 and the Untraced Drivers Agreement 2003. All of this law fails to fully implement the European Directives on motor insurance. The Government's failings are so egregious and wide-ranging as to be unsustainable in the face of a properly prepared legal challenge.

The inevitability of reform

It is no longer a question of whether there will be reform, only the form it will eventually take: whether by the Government's own initiative or as a result of a succession of legal challenges that apply a European law consistent interpretation of our defective national law provision.

[17] See above under "A bad start".

[18] In *Byrne v Motor Insurers' Bureau* [2008] EWCA Civ 574; [2009] Q.B. 66 Mr Justice Flaux held that the MIB's strict and arbitrary three year limitation period imposed in cl.4(3) for bringing a claim infringed the European law principle of equivalence and wrongly denied a minor from bringing a claim when s.28 of the Limitation Act 1980 would have stopped time running in a normal civil action against an identified driver. That was subsequently amended by a supplemental agreement that is only available on request or from the MIB website. However, nothing was done to strike out the arbitrary and draconian strike out penalty for failing to report the accident to the police under cl.4(c) that clearly infringe the principles that underscore rationale from *Bernaldez*. Then in 2011 the 2003 Agreement was amended again to exclude property damage for the vast majority of claims by the deviously way it defined "significant personal injury" (intended by the European Council simply to refer to an injury of sufficient note to result in an independent record being made of the incident — as a means of enabling Compensating Bodies to counteract the risk of fraud in untraced driver claims) with what is in effect a grievous injury requirement. It achieved this by substituting the natural meaning of "significant" with "serious" by restricting property damage to claims that feature a "bodily injury resulting in death or for which 4 days or more of consecutive in-patient treatment was given in hospital, the treatment commencing within 30 days of the accident."

The Department for Transport has revealed that it is planning to amend the geographic scope of the duty to insure and the insurance requirement in Pt VI of the Road Traffic Act 1988, in the light of the *Vnuk* decision. One would expect that a minister acting in good faith in the light of the *Delaney* decision will remove all the unlawful exclusions and exceptions of liability within the uninsured and untraced drivers agreements. The shameful fact remains that the Minister was warned about these very defects in explicit terms in his own consultation exercise back in February 2013 but chose to do nothing. If the Minister confines his reforms to the immediate and obvious implications of *Vnuk* and *Delaney*, he will simply be tinkering at the edges of the problem. Profound and widespread revision is necessary if he is to avoid further costly legal challenges in the years ahead.

Recipe for reform

The scale of the reform is indicated by the following non-exhaustive mandatory to do list:

- Removal of the unlawful geographic and technical restrictions in the scope of the duty to insure and the insurance cover required under ss.143, 145, 195 and 192 of the Road Traffic Act 1988 as well as in the corresponding provisions in both MIB Agreements. Regulation 2 of the European Communities (Rights against Insurers) Regulations 2002 should have the UK restriction removed.
- The abolition of every exclusion or restriction of liability to third party victims: whether contained within our UK statutory provision, within the Minster's arrangements with the MIB or in the motor insurance policies that the Minister is responsible for regulating. This should encompass revising s.151(4) of the 1988 Act and discarding the nullifying provision in s.148 and the car sharing exception in s.150. All those offensive and oppressive procedural conditions precedent of MIB liability that enable the MIB to evade any liability to compensate for the most trivial procedural infraction should be excised, along with those absurd exclusion in cl.13 of the 1999 Agreement and cl.4 of the 2003 Agreement for failing to report the incident to the Police. Indeed any exclusion or restriction of liability not expressly permitted by European law should be removed, with retrospective effect in view of the fact that they have been clearly in conflict with European law since the *Bernaldez* ruling 1996, in which the UK Government intervened unsuccessfully. The common law policy of ex turpi causa non oratur actio will need to be reviewed in the light of the Court of Justice's comments in *Candolin*[19] and *Churchill Insurance v Wilkinson*; *Evans v Equity Claims*.[20] The notional wording added to s.151(8) of the Road Traffic Act 1988 as part of the emergency repair effected by the Court of Appeal in *Churchill Insurance v Wilkinson*; *Evans v Equity & Secretary of State for Transport*[21] will need to be incorporated into the amended statute and an explanation of precisely what is meant by a proportionate reduction would also be helpful.
- The abolition above involves the abrogation of the common law third party rule in so far as it affects the right of third party motor accident victims to exercise the free standing direct right of action conferred under art.18 of the Sixth European Directive on motor insurance. This will require statutory provision to amend s.153 of the 1988 Act and possibly also the

[19] The Court of Justice ruled, at [28] of its judgment in *Candolin* [2005] E.C.R. I-5745, that "The national provisions which govern compensation for road accidents cannot, therefore, deprive those provisions of their effectiveness". It also ruled, in the context of a case where the victims were passengers who had knowingly entered a vehicle driven by someone whom they knew to be intoxicated: "It is only in exceptional circumstances that the amount of the victim's compensation may be limited on the basis of an assessment of his particular case."

[20] *Churchill Insurance Co Ltd v Wilkinson* (C-442/10) [2013] 1 W.L.R. 1776; [2012] R.T.R. 10. Where the Court of Justice ruled, in the context of a policyholder who had knowingly permitted an uninsured/unauthorised individual to drive him, that (at [49]): "national rules, formulated in terms of general and abstract criteria, may not refuse or restrict to a disproportionate extent the compensation to be made available to a passenger by compulsory insurance against civil liability in respect of the use of motor vehicles solely on the basis of his contribution to the occurrence of the loss which arises.'

[21] *Churchill Insurance Co Ltd v Fitzgerald* [2012] EWCA Civ 1166; [2013] 1 W.L.R. 1776.

Third Parties (Rights against Insurers) Act 2010, when that eventually comes into force. It will require reg.3 of the aforementioned 2002 Regulations to be amended as it wrongly dilutes the direct right of action by expressly permitting the insurer to raise any defence it has against its policyholder against a third party claimant.

- Attention will need to be given to s.144 of the Road Traffic Act 1988 which exempts certain legal persons from the compulsory insurance obligation, to ensure that unauthorised use of such vehicles is covered by the MIB Agreements.
- The commonplace practice whereby motor insurers treat statutorily insured claims as uninsured claims under the prejudicial terms of the Uninsured Drivers Agreement 1999 needs to be abolished.
- Minors and other protected parties should no longer be prejudiced by the absence of any effective safeguards for their fair treatment. The Minister would be well advised to study the Supreme Court's judgment in *Dunhill v Burgin*.[22] Over the years, many thousands of settlements have been concluded without any independent approval mechanism, raising serious doubt as to their validity.
- All unauthorised deductions from the compensatory entitlement of victims of uninsured and untraced drivers should be abolished and those affected reimbursed.

This seems to be an opportune moment to rescind both MIB Agreements and to substitute them both by a much shorter, clearer codified scheme. The operative provisions for compensating uninsured drivers should be confined to no more than two A4 sides of paper and both agreements need to be in plain English, easily available from a government website and regularly updated. The governance of the MIB could also be improved and made more accountable, as suggested in 2011 by this writer within this very journal.[23]

The Uninsured Drivers Agreement 2015

My original article was submitted on June 15, 2015, since when the Government has announced its new scheme for uninsured drivers. This development warrants further comment by way of a postscript.

Don't be fooled, it's business as usual

Any hope of a Damascene change of mind by the Department for Transport in the wake of the *Vnuk* and *Delaney* decisions appears to have been misplaced.

After a delay of more than two years from its aborted 2013 consultation, the Government announced on July 6, 2015 that it had agreed a new scheme with the MIB. The new agreement was presented as a fait accompli, coming into effect on August 1, 2015. The timing is noteworthy. The surprise 2013 consultation was announced just weeks before what many in our blighted sector have since dubbed "Jackson day": when our profession was preoccupied fire-fighting the government's botched implementation of the most extensive and damaging civil justice reforms in living memory. Now, the announcement just happens to coincide with the summer vacation.

The new agreement is misleadingly presented as the product of the 2013 consultation exercise; it is nothing of the kind. It is a chimera made up of: (i) the MIB's original proposals; (ii) the minimum changes necessary to implement the more obvious implications of *Delaney* without risking an outright accusation of bad faith; and (iii) new provisions that present the MIB with further opportunities for windfalls that clearly conflict with European law.

[22] *Dunhill v Burgin* [2014] UKSC 18; [2014] 1 W.L.R. 933.
[23] Nicholas Bevan, "Why the Uninsured Drivers Agreement 1999 needs to be scrapped" [2011] J.P.I.L 123.

The minister has studiously ignored the numerous calls for wide-ranging reform to bring our statutory and extra statutory implementation of the European directive on motor insurance into line with the minimum standards of compensatory protection required under that law. Not only does this new scheme fail to remove all the clear and obvious obstacles to full compliance in its 1999 predecessor but it compounds its default by introducing entirely new infractions.

Some welcome changes

One significant innovation is the excision of the two unlawful passenger exclusion clauses which it was warned about in the consultation responses. Yet these are presented as being introduced so as to comply with the Court of Appeal's ruling in *Delaney*, as though to demonstrate the 2013 consultation was a sham.

Another welcome change includes the removal of the MIB's ability to strike out valid claims for trivial procedural infractions and the simplification of the claims process, which are both positive steps and they make the agreement that much shorter. This is gratifying for someone who has campaigned for the removal of these pointless and unjust anachronisms for several years.[24]However, they should never have been permitted in the first place. Nothing has been done to revoke their application to the thousands of claims left to run under the current discredited regime that remains in force for all accidents predating August 1, 2015.

Serious flaws

Unfortunately the Uninsured Drivers Agreement 2015 contains a number of serious flaws and basic drafting blunders. These include a number of exclusions of, and restrictions in, the MIB's liability to compensate that are not only unjust in so far as they prejudice the legal entitlement of accident victims but they also conflict with European law. Take, for example, the unlawful concession in cl.6 that allows the MIB to offset life assurance or other such payments triggered by virtue of the accident in circumstances that are ignored under normal civil law quantification rules.

Then there is the flagrant introduction of the terrorism exclusion in cl.9. It doesn't make any sense in policy terms. Presumably car bombs are the chief threat it envisages but as such use is clearly inconsistent with the normal function of a motor vehicle it is excluded from the insurance requirement under European law anyway. What possible public good is achieved from the arbitrary distinction that allows a claim by a child cyclist who is grievously injured by an uninsured get-away driver escaping from a bank heist where a cashier has been murdered but not where the uninsured driver is an anti-abortionist lunatic who has just assassinated a physician at a local clinic?

There are also grave concerns about the way cl.17 removes the right to appeal the reasonableness of the MIB's decisions to the Secretary of State for Transport and substituting this with a paper appeal process to an arbitrator whose decision will be final and determined on the strict wording of the agreement without reference to the European law context. This offends basic rules of law and HRC principles. So it has been distressing to see at least one well-known practitioner in this field provide an ill-considered endorsement of the new regime.

We have been here before

This agreement's much discredited predecessor was introduced in 1999 without proper consultation and that agreement contained numerous drafting errors and bodges along with provision that conflicted with the minimum standards of protection required under the European directives on motor insurance.[25] That

[24] See Nicholas Bevan, "Why the Uninsured Drivers Agreement 1999 needs to be scrapped" [2011] J.P.I.L. 123.
[25] See my earlier articles in J.P.I.L. and elsewhere.

agreement needed immediate rectification and a number of its provisions were later successfully challenged and either amended by the courts applying a European law consistent interpretation or they were the subject of a award in damages against the Secretary of State for Transport under *Francovich* principles.

It seems that history is repeating itself. The minister has, once more without proper consultation, approved a bodged scheme in which the MIB has abrogated to itself powers to exclude claims and to restrict its liability in circumstances that clearly contravene European law.

Call to action

The Government is clearly unequal to the task of standing up to the undue influence exerted by the powerful insurance lobby. It is therefore down to the legal profession to uphold the legal rights of our fellow citizens and to challenge the infractions in the new 2015 Agreement and its predecessor as well as the numerous breaches of European law that infest Part VI of the Road Traffic Act 1988, the EC Rights Against Insurers Regulations 2002, and the Untraced Drivers Agreement 2003.

Our national law provision is so defective that it cannot be taken at face value. Competence in this area of practice requires a working knowledge of basic European law principles, a detailed knowledge of the consolidated directive on motor insurance (2009/113/EC), the extensive corpus of Court of Justice rulings interpreting its meaning and effect, and the relevant remedies under European law.

The author's public training on the new Uninsured Drivers Agreement 2015 is provided through the Association of Personal Injury Lawyers.

The Meanings of Dependency: Problems Arising from Section 3(1) of the Fatal Accidents Act 1976

Harry Trusted*

Apportionment; Children; Damages; Defences; Dependency claims; Fatal accidents; Loss of earnings; Loss of services; Spouses

Harry Trusted traces the development of the law permitting recovery by dependents in fatal claims and looks at the issues that still arise from the operation of s.3(1) of the Fatal Accidents Act 1976. He analyses the case law in this area and concludes that uncertainties still remain that can create real challenges for parties in assessing the value of any dependency claim.

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Historically, the common law did not award compensation for the families of those killed by the negligence of another. Such claims were permitted for the first time by the Fatal Accidents Act 1846, which was passed in response to the high number of fatalities in railway accidents. The statute allowed a jury to award plaintiffs

> "… such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought …"

Various reforms were then instituted and the Fatal Accidents Act 1976 ("FAA") eventually appeared as a consolidating statute. The FAA was itself amended by the Administration of Justice Act 1982 (which, for instance, allowed a statutory bereavement award for the first time).

The law at present permits claims for the deceased's estate which still proceed by the Law Reform (Miscellaneous Provisions) Act 1934. This deals with such items as funeral expenses, pain and suffering before death, and past claims for losses of earnings and costs of care whilst the deceased was still alive.

However, the FAA deals with dependency claims which, as we shall see, raise difficult conceptual and practical questions. The key—and badly worded—provision is s.3(1) of the FAA which provides that:

> "In the action, such damages, other than damages for bereavement, may be awarded as are proportioned to the injury resulting from the death of the dependants."

Liability

Any defence available inter vivos will also apply to fatal claims. Hence in *Murphy v Culhane*,[1] the deceased was killed in an affray which he had started. The Court of Appeal ordered that the case should go to trial to determine whether defences of ex turpi causa or volenti non fit injuria might have prevented the deceased from suing. In that event, the dependency claims would also fail in law.

This is, of course, the same principle which will apply to contributory negligence pursuant to s.5 of the FAA as amended by s.3(2) of the Administration of Justice Act 1982. This means that if (for example) the deceased were 50 per cent to blame for a road accident, the FAA and Law Reform (Miscellaneous Provisions) Act 1934 damages would be 50 per cent of the full award. One gloss to this arises from the

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[1] *Murphy v Culhane* [1977] Q.B. 94; [1976] 3 W.L.R. 458.

decision in *Dodds v Dodds*[2] in which it was held that even though a widow was responsible for her husband's death, the son of the marriage still had a valid claim against her as a dependant. This may, however, disclose a claim by the defendant against the negligent dependant pursuant to the Civil Liability (Contribution) Act 1978, the terms of which are outside the scope of this article.

What if the deceased has committed suicide in circumstances where the tortfeasor is potentially to blame? In *Reeves v Commissioner of Police of the Metropolis*,[3] the House of Lords considered a claim by the widow of a man who had died because the Police negligently failed to prevent his suicide. The damages were reduced by 50 per cent for contributory negligence. Conversely, in *Corr v IBC Vehicles*,[4] it was held that the deceased's suicide, consequent on injury caused by tortfeasor negligence, was actionable under the FAA and that no deduction for contributory negligence should be made. Their lordships accepted that the deceased had suffered from depression which flowed directly from the index tort.

Who is a dependant?

The answer is defined by statute. Section 1(3) of the FAA as amended provides that dependants who can bring a fatal claim are defined as: spouses, civil partners, any person who was living as a spouse or civil partner for two years prior to death and was so living immediately before the date of death, parents and ascendants, children or descendants, persons treated as a child of the family and, finally, siblings of the deceased and children of those siblings. A relationship by marriage or civil partnership is treated as being one of consanguinity and half-children and stepchildren are treated as being full children. An illegitimate person is treated as being the child of its mother and reputed father and, if the parents are both female, a descendant is treated as being the child of the mother and the person defined as a female person by s.43 of the Human Fertilisation and Embryology Act 2008.

In *Shepherd v Post Office*,[5] the Court of Appeal observed that it might be simpler if anyone could make a dependency claim if they could demonstrate the requisite loss. This alteration, if effected, would then presumably allow the Court to decide whether in each case the individual claimant could in fact prove dependency—irrespective of family relationship. I comment that at least the present system of defined dependency offers the virtue of certainty. As we shall see, those parts of a dependency claim which are less clearly defined have been the subject of abundant argument and litigation.

What does "dependency" mean?

Since the task of assessing the loss of dependency was, historically, for the jury, there were no prescribed methods of assessment. To a considerable extent this remains the case today and it makes a striking contrast with the strict statutory definition of who is (or is not) a dependant. As Latham LJ observed in *Cape Distribution v O'Loughlin*,[6] as long as a loss can be quantified in money terms, the Court must:

> "… examine the particular facts of the case to determine whether or not any loss in money's worth has been occasioned to the dependants and, if it determines that it has, it must then use whatever material appears best to fit the facts of a particular case in order to determine the extent of that loss …"

[2] *Dodds v Dodds* [1978] Q.B. 543; [1978] 2 W.L.R. 434.
[3] *Reeves v Commissioner of Police of the Metropolis* [2000] 1 A.C. 360; [1999] 3 W.L.R. 363.
[4] *Corr v IBC Vehicles* [2008] UKHL 13; [2008] 1 A.C. 884.
[5] *Shepherd v Post Office* , The Times, June 15, 1995.
[6] *O'Loughlin v Cape Distribution Ltd* [2001] EWCA Civ 178; [2001] P.I.Q.R. Q8.

Hence a dependant may bring a claim for loss of income which the deceased brought to the household (*Grzalek v Harefield*),[7] the loss of pension received by the deceased (*Feay v Barnwell*)[8] and the loss of fringe benefits such as a company car (*Clay v Pooler*).[9] Claims may also be brought for loss of services which can be replaced commercially (by hiring alternative help) or non-commercially by family or friends stepping into the role of the deceased. All of these possible claims raise their own problems.

Losses of earnings

Where the deceased was in work at the time of death and had a regular wage, the calculation of loss will probably be straightforward (see *Heatley v Steel Co of Wales*).[10] More complex problems may arise if the deceased was a professional person. Such claims may involve more unpredictable income, tax issues, uncertain duration of working life and possible questions of inheritance but for the premature death (see *Daniels v Jones*).[11] At the other end of the social scale, if the work record of the deceased is sufficiently poor, the dependants' claim for loss of earnings may fail completely. So in *Burns v Edman*,[12] the Court assessed at nil a dependency claim brought by the widow of a "ne'er do well" who had persistently failed to find work or support his family. But provided that there is a reasonable expectation of financial support, either a loss of income or loss of a one-off benefit may be awarded. For instance, in *Betney v Rowland and Mallard*,[13] a daughter was able to claim for the anticipated claim which her deceased parents would have made to the wedding.

Claims made by parents in the expectation of support from their children have succeeded. An early example was *Taff Vale Railway v Jenkins*,[14] in which the parents of a 16-year-old daughter successfully claimed for the loss of part of her anticipated earnings as a dressmaker. More recently, in *Kandalla v British European Airways Corp*[15] parents also recovered an income dependency arising from the deaths of their children. The facts were that the parents had intended to leave Iraq and be supported by their daughters working in London, but the children were killed in an air crash caused by the defendant's negligence.

In certain circumstances, dependants may even claim for apparently remote economic loss. Hence in *Davies v Whiteways Cyder Co Ltd*,[16] dependants were able to claim damages for the estate duty which they had to pay because the deceased had died less than seven years after transferring capital. And in *Singapore Bus Service v Lim Soon Yong*,[17] the Privy Council upheld a claim by dependants who had suffered a loss of benefit from the deceased's endowment insurance as a result of the death. But for the accident, the deceased and the deceased employer would have contributed to the fund which would, at a future point, have provided income and/or capital to his dependants. Even more surprisingly, perhaps, in *Nance v British Columbia Electric Co Ltd*,[18] dependants successfully sued the tortfeasor on the basis that their inheritance was reduced as a result of the death.

Conversely, in *Burgess v Florence Nightingale Hospital* [1955] 1 QB 349,[19] the court rejected a claim by a husband in respect of losses of income from a dancing partnership. The husband and wife had been dancing partners and he contended that her death deprived him of the share of income which they earned

[7] *Grzelak v Harefield and Northwood Hospital Management Committee* [1968] 112 S.J. 195.
[8] *Feay v Barnwell* [1938] 1 All E.R. 31.
[9] *Clay v Pooler* [1982] 3 All E.R. 570.
[10] *Heatley v Steel Co of Wales* [1953] 1 W.L.R. 405.
[11] *Daniels v Jones* [1961] 1 W.L.R. 1103.
[12] *Burns v Edman* [1970] 2 Q.B. 541; [1970] 2 W.L.R. 1005.
[13] *Betney v Rowland Mallard* [1992] C.L.Y. 1786.
[14] *Taff Vale Railway Co v Jenkins* [1913] A.C. 1.
[15] *Kandalla v British European Airways Corp* [1981] Q.B. 158; [1980] 2 W.L.R. 730.
[16] *Davies v Whiteways Cyder Co Ltd* [1975] Q.B. 262; [1974] 3 W.L.R. 597.
[17] *Singapore Bus Service (1978) Ltd v Lim Soon Yong* [1985] 1 W.L.R. 1075 PC.
[18] *Nance v British Columbia Electric Railway Co Ltd* [1951] A.C. 601 PC.
[19] *Burgess v Florence Nightingale Hospital for Gentlewomen* [1955] 1 Q.B. 349; [1955] 2 W.L.R. 533.

as a couple. Although the husband could still work, he earned less as a single man. The claim failed for remoteness. A similar problem arose in *Sykes v North Eastern Railway*,[20] where a husband failed to recover lost business income because his son's death had deprived him of the help and experience needed to win the work

The court will not allow a claim which is just a speculative possibility (*Franklin v SE Railway*),[21] but provided the dependant is able to demonstrate that there a reasonable level of support (past and/or future), the inevitable uncertainties of future loss will not be a bar to recovery (*Lindley v Sharp*).[22]

This principle of "reasonable expectation" extends to a variety of circumstances. A wife who had separated from her husband but alleged that he would have supported her because they would have achieved reconciliation was required to demonstrate that this was likely (*Davies v Taylor*).[23] And a husband whose dependency claim assumed that his deceased wife would have returned to work once the children grew up succeeded by showing that this was a settled intention (*Regan v Williamson*).[24]

The dependant must, of course, show that a loss has been caused by the death. Hence, in *Cox v Hockenhull*,[25] the Court of Appeal refused to allow a claim for a carer's allowance which a husband lost after the death of his wife. The Court found that the allowance was paid to him in respect of care which was no longer provided. The husband had not, on this analysis, sustained any loss by reason of the tort. Conversely, in *Oldfield v Mahoney*,[26] the dependant husband was a schoolmaster in a private school. It was held that he had good prospects of promotion to a housemaster within nine years of his wife's death. However, the position was only available to a married man and the trial judge allowed the widower's claim for consequent loss of salary.

The timing of the assessment of the dependency may also disclose difficulties. In *The Swynfleet*,[27] the Court assessed claims brought by the dependants of seamen who had died in a collision in 1939. Since the date of their deaths, seamen's wages had risen dramatically because of the Second World War and the damages reflected that increase. However, the Court of Appeal in *Welsh Ambulance Services v Williams*[28] refused to accept defence submissions that damages should be reduced because the dependants in fact made a greater success of a business than would have been expected at the date of death. This is, perhaps, a rare instance of the judicial dislike of "speculation" working to the advantage of claimants!

Apportionment

In a standard case of one spouse supporting a non-working spouse and children, the court will assume that the value of the dependency is three-quarters of the deceased's earnings for the period when the children are dependant and two-thirds thereafter (*Harris v Empress Motors*).[29] Where both parents work, the formula of *Coward v Comex*,[30] is now generally applied. This gives the dependant two-thirds of the pre-accident joint income less two-thirds of the dependant's income. It is fair to say that *Harris* and *Coward* cover the substantial majority of fatal claims and these principles of calculations are not usually contentious.

Difficulties may arise if the children have a claim but the spouse does not (if, for instance, both parents are killed in the same accident). Hence in *Hav v Hughes*,[31] separate multiplicands were arrived at on the basis of the father's income and the mother's services.

[20] *Sykes v North Eastern Railway* [1875] 44 L.J.C.P. 191.
[21] *Franklin v South Eastern Railway* 157 E.R. 448; (1858) 3 Hurl. & N. 211.
[22] *Lindley (A Minor Suing by Mother) v Sharp* [1974] 4 Fam. Law 90.
[23] *Davies v Taylor* [1974] A.C. 207 HL.
[24] *Regan v Williamson* [1976] 1 W.L.R. 305 QBD.
[25] *Cox v Hockenhull* [2000] 1 W.L.R. 750 CA (Civ Div).
[26] *Oldfield v Mahoney* , unreported, July 12, 1968.
[27] *The Swynfleet* (1947–1948) 81 Ll. L. Rep. 116.
[28] *Welsh Ambulance Services NHS Trust v Williams* [2008] EWCA Civ 81; (2008) 105(9) L.S.G. 30.
[29] *Harris v Empress Motors Ltd* [1984] 1 W.L.R. 212 CA (Civ Div).
[30] *Coward v Comex Houlder Diving Ltd*, unreported, July 18, 1988, CA (Civ Div).
[31] *Hav v Hughes* [1975] Q.B. 790.

Suppose one parent is the tortfeasor (and hence has no claim) and there is a young child. How is the value of that dependency to be assessed? In *Dodds v Dodds*,[32] Balcombe J held since the father had been killed and the mother was the tortfeasor, the only child should recover a sum equivalent to what the deceased father had spent on that child and on any joint family expenditure. The court assessed this (on the facts) as being equivalent to 47.5 per cent of the deceased father's net income.

Services dependency

The deceased may have contributed services rather than income or capital to the family. In *Berry v Humm*,[33] the Court of Appeal held that such losses could disclose a financial claim. The same principle had also been applied in *Franklin v South Eastern Railway Co*. Practitioners will know that in practice, services dependency claims can be made in many different circumstances. Claims for domestic work such as cooking, cleaning and DIY can be made. Hourly rates are to be found in the relevant section of *Facts and Figures 2014/15*.[34]

The principle has been extended to allow claims for the loss of a spouse or parent's love and care so that a modest sum of damages (a few thousand pounds) will generally be awarded. See *Regan* and *Beesley v New Century Group*.[35] It is not easy to see that these are, strictly speaking, financial losses and they are more analogous to claims for bereavement. However, the courts appear to have accepted the principle that relatively small sums are an appropriate token for the "service" of love and affection.

Looking after young children

If a parent dies, the survivor must decide how to provide appropriate care for any children. This will involve emotional as well as practical support—especially since there will have been recent bereavement and a traumatised family on that account.

In *Bordin v St. Mary's Trust*,[36] the Court awarded the costs of a commercial nanny (who had been employed by the time of the trial) but also allowed claims for non-commercial care from relatives, whose contribution was valued at 65 per cent of the commercial rate. But in *Corbett v Barking, Havering and Brentwood HA*,[37] the Court of Appeal held that it would be artificial to award the full costs of a commercial nanny throughout a child's life because the cost would probably never be incurred. The Court allowed one half of the cost from the time that the child was aged six, citing the likely involvement of relatives and the diminishing need for care.

Finally, in *Stanley v Saddique*,[38] the Court of Appeal found that the deceased mother's care would have been so unsatisfactory anyway that the award must be reduced to reflect that. I comment that although this finding may have been a fair reflection of the evidence, it will be rare for such an unappealing submission to win judicial support.

The parent giving up work to care for children

A surviving spouse cannot claim both for the loss of earnings and, additionally, for the care provided. This would amount to double-claiming (see, for instance, *Manning v King's College Hospital*).[39] However, in principle, a claim for loss of earnings caused by the need to care for children is allowable. Hence, in

[32] *Dodds v Dodds* [1978] Q.B. 543; [1978] 2 W.L.R. 434.
[33] *Berry v Humm & Co* [1915] 1 K.B. 267.
[34] *Facts & Figures 2014/15: Tables for the Calculation of Damages*, 19th edn (London: Sweet & Maxwell, 2014), pp.305–307.
[35] *Beesley v New Century Group Ltd* [2008] EWHC 3033 (QB).
[36] *Bordin v St Mary's NHS Trust* [2000] Lloyd's Rep. Med. 287 QBD.
[37] *Corbett v Barking, Havering and Brentwood HA* [1991] 2 Q.B. 408; [1990] 3 W.L.R. 1037.
[38] *Stanley v Saddique* [1992] Q.B. 1; [1991] 2 W.L.R. 459.
[39] *Manning v King's College Hospital NHS Trust* [2008] EWHC 3008 (QB).

Cresswell v Eaton,[40] the court assessed damages for a child's care dependency by reference to an aunt who had given up her job as a traffic warden to care for the child of the deceased. The aunt's earnings were less than the commercial costs of a nanny, so that loss was recovered in full. Given the modest claim and obvious need, the damages were plainly "reasonable". Had the aunt been a surviving parent, it seems likely that the claim would have succeeded for the same reasons.

Suppose, however, the parent wishes to stop doing well-paid work in order to provide childcare following the premature death of the main carer. Emotionally, the choice is understandable, but will it be reasonable and will the defendant be required to compensate?

In *Mehmet v Perry*,[41] the mother had been killed by the tortfeasor and the father gave up his job to look after two children who suffered from a rare blood disorder and needed optimum emotional security and support; no relatives were willing or able to help. The Court allowed his claim for the father's losses of earnings in these circumstances, even though that claim may have exceeded the commercial costs of care.

Conversely, in *Batt v Highgate Private Hospital*,[42] a father who gave up a well-paid job to look after his daughter failed to recover his loss of earnings of £700,000 because he could have provided for his daughter by spending £200,000 on suitable help. The father claimed that it was reasonable for him to look after his child irrespective of the high loss of earnings, but the insurers successfully contended that the father should have mitigated his loss.

Similarly, in *Martin v Grey*,[43] Mr Bernard Livesey QC, sitting as a High Court Judge rejected a claim for losses of earnings which substantially exceeded the costs of employing a housekeeper. The Judge commented that, in his view,

> "… it would not be reasonable as between the dependant and the defendant to assess damages on this basis [ie on the basis of the loss of the father's earnings]. Nor do I think that where, as here, the commercial cost of employing a housekeeper was not incurred, the jury would award damages on the basis that it had. In my judgment, a jury would have had 'an eye to' the cost of employing a housekeeper when assessing its award."

Perhaps not all judges (or juries) would necessarily agree with Mr Livesey QC that the insurers should not pay a premium to allow the surviving parent to care for children. This demonstrates that damages awards in these cases may be difficult for either side to predict. Practitioners will appreciate that in terms of deciding whether to accept or make a Pt 36 offer, both parties would tread warily on facts of this kind.

Similar problems may arise if the surviving parent suffers a partial loss of income. Whereas a court may well refuse a high claim for losses of earnings if commercial help can be hired more cheaply (per *Batt*), judges have been readier to accept the submission that a surviving parent has "soft-pedalled" an otherwise promising career in order to give young children the love and support which they need. So in *Stephens v Basu*,[44] a dependant husband received compensation for loss of overtime payment as a railway guard so that he could be at home with the children at night. Similarly, in *Watkins v Lovegrove*,[45] the father of two children aged three and five gave up his job in the Royal Navy and took a less remunerative civilian job ashore. Goff J held that the pecuniary loss was recoverable as part of the children's dependency damages.

Again, however, I suspect that a less sympathetic judge might have assessed damages differently. The principle of "reasonableness" will be a matter of subjective assessment rather than hard law. Putting it

[40] *Cresswell v Eaton* [1991] 1 W.L.R. 1113 QBD.
[41] *Mehmet v Perry* [1977] 2 All E.R. 529 DC.
[42] *Batt v Highgate Private Hospital* [2004] EWHC 707 (Ch); [2005] P.I.Q.R. Q1.
[43] *Martin v Grey* (1999) 99(3) Q.R. 8 QBD.
[44] *Stephens v Basu* , unreported, December 19, 1968.
[45] *Watkins v Lovegrove* , unreported, November 8, 1991.

another way, if Goff J had decided *Martin* and Mr Livesey QC had decided *Watkins*, how would the dependency claims have been assessed?

These cases also demonstrate that the quantification of claims arising from fatal accidents is—like so much else in the law—a barometer of social change. The contemporary world in which men and women have equal access to the professions and will often both work while raising families, is very different to that of the Victorian railway accidents which prompted Parliament to pass the first Fatal Accidents Act. The difficult questions—then for a jury, now for a judge—remain.

Mind your own business!

Robert Weir QC*

William Latimer Sayer**

Anonymity; Children; Open justice; Personal injury claims; Protected parties; Reporting restrictions; Settlement

Robert Weir QC and William Latimer-Sayer review the recent landmark judgement in JXMX[1] *and consider subsequent cases to see how the principles laid down by the Court of Appeal are being applied. They represented PIBA, the Personal Injury Bar Association, before the Court of Appeal in the* JX MX *case.*

RW/WLS

PROCEDURE

Background

By virtue of CPR r.21.10, court approval is required for all settlements on behalf of children and protected parties. These hearings are in public. That creates a tension because severely injured claimants often receive substantial awards which they would rather keep private.

Claimants or their families may have a range of legitimate reasons for seeking anonymity. These are generally related to not wishing people in their local community to become aware of the details of their injuries or the size of their settlement. Frequently claimants have fears about their personal safety and security, especially in relation to would-be thieves targeting their homes if their addresses become public. However, there might also be anxiety about receiving begging letters from charities or less fortunate individuals who may have suffered similar adversity but lack any entitlement to compensation. Other concerns relate to re-negotiating contracts with carers and therapists who may push for salary increases if they believe the claimant can afford it. Sometimes there may be an issue regarding relationships with treating clinicians and a concern that the claimant may be treated differently if they knew that a successful claim had been brought against staff at the same hospital. In short, whilst some people are happy for others to know about the details of their settlement, others are not. With real justification, they would rather remain anonymous. Many of the reasons given apply to a large number of claimants in receipt of substantial awards of damages.

The well-intentioned purpose behind the need for court approval by virtue of CPR r.21.10 is to protect vulnerable claimants from under-settling their cases. It is, therefore, particularly unfortunate that the public approval hearing may lead to widespread reporting of the settlement and so expose the claimant and his or her family to unnecessary risk. At the very least, claimants who are not granted anonymity at such hearings suffer a significant invasion of their privacy. They may well also be anxious about the repercussions of such publicity even if no one actually targets them for their compensation.

The press commonly report the results of cases as though they were lottery wins. It is not unusual to see a headline such as "Mr Jones wins £10m in damages". The position of protected parties and lottery

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[1] It is unknown why the first instance decision is reported as "JXMX" and the Court of Appeal decision is reported as "JX MX", however, this distinction is worth bearing in mind when undertaking a database search of relevant case law.

winners is, in fact, quite different because lottery winners are generally entitled to seek anonymity as of right.[2]

The test to be applied on an approval hearing

The function of the court on an approval hearing was considered in the case of *Dunhill v Burgin* at [20].[3] Lady Hale, giving a judgment with which all the other Supreme Court Justices agreed, stated that the purpose of the rule requiring court approval "is to impose an external check on the propriety of the settlement." At [33], Lady Hale continued:

> "the policy underlying the Civil Procedure Rules is clear: that children and protected parties require and deserve protection, not only from themselves but also from their legal advisers."

At common law, a contract of compromise on behalf of an infant or patient would not bind the claimant unless it was proved to be to his or her benefit: *Rhodes v Swithenbank*.[4]

This test, whether the compromise is for the benefit of the claimant, still applied after rules of court were introduced in 1909 requiring court approval for claims compromised on behalf of infants and patients: see *Dietz v Lennig Chemicals* at 184 per Lord Morris[5] and *Jeffrey v Kent* at 929–930.[6]

First instance cases prior to *JXMX*

It became common for claimants in high value settlements to seek anonymity at approval hearings. Applications were initially made orally on the day of the approval hearing, without supporting witness evidence. Following the guidance given by Mr Justice Tugendhat in *LK v Sandwell and West Birmingham Hospitals NHS Trust*,[7] a practice developed whereby formal written applications were made, supported by evidence and a separate skeleton argument referring to relevant case law. In a raft of first instance judgments, often heard by Tugendhat J, anonymity orders were sought and granted: *LK v Sandwell and West Birmingham Hospitals NHS Trust*; *JXF(A Child) v York Hospitals NHS Foundation Trust*;[8] *Re A (A Child) (Publication of Report of Proceedings: Restrictions)*;[9] *U v Dr Sarker & St George's Healthcare NHS Trust*;[10] and *MXB v East Sussex Hospitals NHS Trust*.[11]

Applications for anonymity for children were advanced under s.39 of the Children and Young Persons Act 1933 ("the 1933 Act") and CPR r.39.2. Section 39 of the 1933 Act provides as follows:

> **"Power to prohibit publication of certain matter in newspapers.**
>
> (1) In relation to any proceedings in any court …, the court may direct that—
>
> (a) no newspaper report of the proceedings shall reveal the name, address or school, or include any particulars calculated to lead to the identification, of any child or young person concerned in the proceedings, either as being the person by or against or in respect of whom the proceedings are taken, or as being a witness therein:
>
> (b) no picture shall be published in any newspaper as being or including a picture of any child or young person so concerned in the proceedings as aforesaid;

[2] Camelot's website says: "Camelot takes its obligations and duty of care to protect winners' privacy very seriously. Unless a winner agrees to take full publicity and signs an agreement to that effect, no information about them can be released by Camelot into the public domain."
[3] *Dunhill v Burgin* [2014] UKSC 18; [2014] 1 W.L.R. 933.
[4] *Rhodes v Swithenbank* (1889) 22 Q.B.D. 577.
[5] *Dietz v Lennig Chemicals Ltd* [1969] 1 A.C. 170; [1967] 3 W.L.R. 165.
[6] *Jeffrey v Kent CC* [1958] 1 W.L.R. 927 QBD.
[7] *LK v Sandwell and West Birmingham Hospitals NHS Trust* [2010] EWHC 1928 (QB); [2011] Med. L.R. 1.
[8] *JXF (A Child) v York Hospitals NHS Foundation Trust* [2010] EWHC 2800 (QB); [2011] Med. L.R. 4.
[9] *Re A (A Child) (Publication of Report of Proceedings: Restrictions)* [2011] EWHC 454 (QB); [2011] E.M.L.R. 18.
[10] *U v Sarker*, unreported, May 4, 2011 QBD.
[11] *MXB v East Sussex Hospitals NHS Trust* [2012] EWHC 3279 (QB); [2013] Med. L.R. 13.

except in so far (if at all) as may be permitted by the direction of the court.

(2) Any person who publishes any matter in contravention of any such direction shall on summary conviction be liable in respect of each offence to a fine not exceeding level 5 on the standard scale."

The scope of s.39 was extended by s.57(4) of the Children and Young Persons Act 1963 so that the section (and others) now "apply in relation to sound and television broadcasts as they apply in relation to newspapers". But, as yet, there has been no extension of s.39 to apply to any other form of report, such as one made in the social media or the internet.

Given that an order made under s.39 of the 1933 Act is only valid until the claimant reached the age of majority[12] and is not wide enough to cover publications on the Internet, it is more common for anonymity applications to be pursued under CPR r.39.4, for children as much as for adults: see further *MXB v East Sussex Hospitals NHS Trust*.[13]

CPR r.39.2 provides as follows:

"(1) The general rule is that a hearing is to be in public.

(2) The requirement for a hearing to be in public does not require the court to make special arrangements for accommodating members of the public.

(3) A hearing, or any part of it, may be in private if—

(a) publicity would defeat the object of the hearing;

(b) it involves matters relating to national security;

(c) it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality;

(d) a private hearing is necessary to protect the interests of any child or protected party;

(e) it is a hearing of an application made without notice and it would be unjust to any respondent for there to be a public hearing;

(f) it involves uncontentious matters arising in the administration of trusts or in the administration of a deceased person's estate; or

(g) the court considers this to be necessary, in the interests of justice.

(4) The court may order that the identity of any party or witness must not be disclosed if it considers non-disclosure necessary in order to protect the interests of that party or witness."

Open justice

The principle of open justice is a fundamental tenet of English law. Although the principle is of ancient origin, the seminal authority of modern jurisprudence is the decision of the House of Lords in *Scott v Scott*,[14] a case involving a suit by a wife for a declaration of nullity on the grounds of her husband's impotence. The question for their Lordships was whether the court at first instance had jurisdiction to order a hearing in camera on the grounds of public decency and to punish as a contempt of court the subsequent publication of a transcript of the proceedings. Much of what was said assumed the existence of the principle of open justice and was directed to the circumstances in which the court might be justified in departing from it, but clear statements of its nature and importance can be found, in particular in the speeches of Lord Atkinson and Lord Shaw of Dunfermline. Lord Atkinson said at p.463:

"The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details

[12] See *R. (On the application of JC) v Central Criminal Court* [2014] EWCA Civ 1777; [2015] 1 W.L.R. 2865.
[13] *MXB v East Sussex Hospitals NHS Trust* [2012] EWHC 3279 (QB); (2013) 177 J.P. 31.
[14] *Scott v Scott* [1913] A.C. 417 HL.

> may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect."

Lord Shaw, quoting Bentham, said at p.477:

> "In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial. The security of securities is publicity."

Exceptions to open justice

Notwithstanding the undisputed importance of the principle of open justice, this needs sometimes to give way to the principle that justice in a broad sense needs to be done. Thus, in *Scott v Scott* Viscount Haldane LC said at 437:

> "While the broad principle is that the Courts of this country must, as between parties, administer justice in public, this principle is subject to apparent exceptions, such as those to which I have referred. But the exceptions are themselves the outcome of a yet more fundamental principle that the chief object of Courts of justice must be to secure that justice is done. In the two cases of wards of Court and of lunatics the Court is really sitting primarily to guard the interests of the ward or the lunatic. Its jurisdiction is in this respect parental and administrative, and the disposal of controverted questions is an incident only in the jurisdiction. It may often be necessary, in order to attain its primary object, that the Court should exclude the public. The broad principle which ordinarily governs it therefore yields to the paramount duty, which is the care of the ward or the lunatic. The other case referred to, that of litigation as to a secret process, where the effect of publicity would be to destroy the subject-matter, illustrates a class which stands on a different footing. There it may well be that justice could not be done at all if it had to be done in public. As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield. But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration. The question is by no means one which, consistently with the spirit of our jurisprudence, can be dealt with by the judge as resting in his mere discretion as to what is expedient. The latter must treat it as one of principle, and as turning, not on convenience, but on necessity."

In *Scott v Scott* their Lordships all accepted that cases involving wardship, lunatics (now protected parties) and cases involving secret processes provided exceptions, or apparent exceptions, to the general rule. The justification for excluding cases involving wards of court and protected parties was that the court was exercising a function of a kind essentially different from that involved in determining disputed causes. This is made clear in the above passage from the speech of Viscount Haldane and there are statements to similar effect in the speeches of Lord Halsbury, Lord Atkinson and Lord Shaw. Thus, Lord Shaw said at 483:

> "The three exceptions which are acknowledged to the application of the rule prescribing the publicity of Courts of justice are, first, in suits affecting wards; secondly, in lunacy proceedings; and, thirdly, in those cases where secrecy, as, for instance, the secrecy of a process of manufacture or discovery or invention—trade secrets—is of the essence of the cause. The first two of these cases, my Lords, depend upon the familiar principle that the jurisdiction over wards and lunatics is exercised by the

> judges as representing His Majesty as parens patriæ. The affairs are truly private affairs; the transactions are transactions truly intra familiam; and it has long been recognized that an appeal for the protection of the Court in the case of such persons does not involve the consequence of placing in the light of publicity their truly domestic affairs."

More recently, Lord Reed JSC recognised such exceptions to the scope of open justice in *Re BBC*,[15] in particular at [23]–[41]. In that passage Lord Reed accepted that there may be many different cases in which the court must have regard to the need to do justice in a wider sense than merely reaching a just determination of the issue between the immediate parties.

The necessity test (pre-*JXMX*)

A practice developed whereby applications for anonymity were considered on a case by case basis. This "opt in" system required a claimant to establish that a derogation from the principle of open justice was necessary. This would often involve a balancing exercise between protecting the rights of the claimant and his or her family to respect for their family lives under art.8 of the European Convention on Human Rights ("ECHR"), and the rights of the public and the press to freedom of expression and information under art.10 of the ECHR.

The test for justifying a departure from the principle of open justice is strictly one of necessity. Ultimately it is a matter of law not discretion whether the necessity threshold is met on the facts of a given case. The grant of derogations is a matter of obligation such that the court is under a duty to either grant the derogation or refuse it when the relevant test has been applied: *AMM v HXW* at [34].[16]

In *JIH v News Group Newspapers Ltd*[17] at [21] Lord Neuberger MR set out the following guidance:

> "(1) The general rule is that the names of the parties to an action are included in orders and judgments of the court.
>
> (2) There is no general exception for cases where private matters are in issue.
>
> (3) An order for anonymity or any other order restraining the publication of the normally reportable details of a case is a derogation from the principle of open justice and an interference with the Article 10 rights of the public at large.
>
> (4) Accordingly, where the court is asked to make any such order, it should only do so after closely scrutinising the application, and considering whether a degree of restraint on publication is necessary, and, if it is, whether there is any less restrictive or more acceptable alternative than that which is sought.
>
> (5) Where the court is asked to restrain the publication of the names of the parties and/or the subject matter of the claim, on the ground that such restraint is necessary under Article 8, the question is whether there is sufficient general, public interest in publishing a report of the proceedings which identifies a party and/or the normally reportable details to justify any resulting curtailment of his right and his family's right to respect for their private and family life.
>
> (6) On any such application, no special treatment should be accorded to public figures or celebrities: in principle, they are entitled to the same protection as others, no more and no less."

These principles were incorporated into the *Practice Guidance (Interim Non-disclosure Orders)*[18] which emphasised the fundamental principle of open justice and that any derogations from the general principle

[15] *Re BBC* [2014] UKSC 25; [2015] A.C. 588.
[16] *AMM v HXW* [2010] EWHC 2457 (QB); (2010) 160 N.L.J. 1425.
[17] *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42; [2011] 1 W.L.R. 1645.
[18] *Practice Guidance (Interim Non-disclosure Orders)* [2012] 1 W.L.R. 1003.

could only be justified in exceptional circumstances when strictly necessary as measures to secure the proper administration of justice.

Family and Court of Protection cases

Much of the court's jurisdiction in relation to the welfare of children and the administration of the affairs of those who lack capacity is governed by statute. At the heart of any determination regarding the welfare of the child or protected person is a consideration of the individual's best interests. Under the Family Procedure Rules 2010, proceedings to which they apply (even if contentious) are to be held in private unless the court directs otherwise (r.27.10).

There is not a complete derogation from open justice in family cases. Representatives of the media are normally allowed to attend private hearings in family proceedings by virtue of r.27.11(2)(f) of the Family Procedure Rules, but reporting of the proceedings is restricted. Section 97(2) of the Children Act 1989 prohibits the publication of material which identifies, or is likely to identify, a child involved in proceedings in which any power under the Children Act 1989 or the Adoption and Children Act 2002 may be exercised. Section 12 of the Administration of Justice Act 1960 has the effect of prohibiting the publication of information relating to proceedings before a court sitting in private if those proceedings relate to the exercise of the inherent jurisdiction of the High Court with respect to minors, are brought under the Children Act 1989 or the Adoption and Children Act 2002, or otherwise relate wholly or mainly to the maintenance or upbringing of a minor.

Similar provision is made in relation to Court of Protection cases by virtue of the Court of Protection Rules 2007 and Sir James Munby's *Practice Guidance (Court of Protection: Transparency)*.[19] In particular at para.20 of the Practice Guidance it states that protected parties and other members of their families "should not normally be named in the judgment approved for publication unless the judge otherwise orders". However, the anonymity in the judgment "should not normally extend beyond protecting the privacy of the [claimants] and other members of their families, unless there are compelling reasons to do so".

In *Independent News and Media Ltd v A*[20] Lord Judge CJ (delivering the judgment of the court, sitting with Lord Neuberger MR and Sir Mark Potter P) set out at [18]–[19] how:

> "18. …The affairs of those who are not incapacitated are, of course, decided and handled privately, usually at home, sometimes with, but usually without, confidential professional advice. None of these decisions is the business of anyone other than the individual or individuals who are making them. And that, as we emphasise, represents an entirely simple, and we suggest self-evident, aspect of personal autonomy. The responsibility of the Court of Protection arises just because the reduced capacity of the individual requires interference with his or her personal autonomy.
>
> 19. The new statutory structure starts with the assumption that just as the conduct of their lives by adults with the necessary mental capacity is their own affair, so too the conduct of the affairs of those adults who are incapacitated is private business. Hearings before the Court of Protection should therefore be held in private unless there is good reason why they should not. In other words, the new statutory arrangements mirror and re-articulate one long-standing common law exception to the principle that justice must be done in open court."

[19] *Practice Guidance (Court of Protection: Transparency)* [2014] 1 W.L.R. 235.
[20] *Independent News and Media Ltd v A* [2010] EWCA Civ 343; [2010] 1 W.L.R. 2262.

Disadvantages of the previous system

Inconsistency

Inconsistency developed as judges applied different approaches to anonymity applications. Some judges were generally happy to grant anonymity for claimants at approval hearings on the basis of little or no supporting evidence. Others would be less keen to make such orders, especially where the claimant had no siblings or the claimant lacked capacity and had a deputy to protect his or her finances.

There was further inconsistency regarding the approach to anonymity when applied for at the start or end of a case. Masters might routinely grant anonymity if requested at the outset of a case. When the case then came before a judge for approval at the conclusion of the claim, anonymity applications might be subjected to close scrutiny so that anonymity would not necessarily be maintained.

Unfairness and discrimination

Adult claimants are free to settle their cases without input of the court. Whilst the court is required to consider periodical payment orders and orders involving provisional damages, such orders are often approved on the papers without attracting any attention from the Press. Thus, children and vulnerable adults were at a serious disadvantage compared to their competent counterparts.

Uncertainty regarding procedure

There was some uncertainty following the decision in the case of *R. (on the application of M) v Parole Board for England and Wales*[21] as to whether or not the media needed to be notified in relation to the intention to apply for anonymity orders prior to an approval hearing. In this case the Divisional Court (constituting Pitchford LJ and Simon J) refused to give any general guidance. It was argued by the media interveners that s.12 of the Human Rights Act 1998 required the applicant requesting an anonymity order to put the media on notice of the application which might affect the exercise of the Convention right to freedom of expression. Different judges sitting in different divisions of the High Court took different approaches. In the Family Division the President's *Practice Direction (Application for Reporting Restriction Orders)*[22] explained that service of applications for reporting restrictions can be effected via the Press Association's CopyDirect service. Paragraph 3.4 of the Practice Direction emphasises that whilst the court retains the power to make without notice orders, such cases are exceptions and an order will always give persons affected liberty to vary or discharge it at short notice. Several judges sitting in the Queen's Bench Division took a similar approach and ordered that where notice had not been provided to the Press Association before making an application for anonymity, such notice was to be provided within seven days of the court making the order, together with service of the claimant's supporting witness evidence and skeleton argument. However, Tugendhat J took a different view in *CVB v MGN Ltd*[23] (which did not involve an approval hearing) and did not consider that there was any requirement under s.12(2) of the Human Rights Act or CPR Pt 23 for a claimant to give notice to an intended defendant or to anyone else of an application for an anonymity order derogating from CPR Pt 16.

Lack of information

Although the need for a public approval hearing is required by the Civil Procedure Rules, many judges would deliberately not say much about the details of the claim or the proposed settlement in open court.

[21] *R. (on the application of M) v Parole Board for England and Wales* [2013] EWHC 1360 (Admin); [2013] E.M.L.R. 23.
[22] *Practice Direction (Application for Reporting Restriction Orders)* [2005] 2 F.L.R. 120.
[23] *CVB v MGN Ltd* [2012] EWHC 1148 (QB); [2012] E.M.L.R. 29.

The intention was to protect the claimant. Sometimes, however, there would be a public interest in the publication of the circumstances surrounding a particular claim, especially when brought against a public body such as an NHS Trust. When anonymity is ordered, the judge is free to say more about the background to the claim and also to mention the figures involved. Thus, whilst the press may complain that without a name it is more difficult to sell the story, there may in fact be more of a story to tell.

Costs

In order to ensure that anonymity applications were successful, practitioners would issue formal applications supported by witness and expert evidence. The test of necessity placed a heavy burden on a claimant seeking such an order. The claimant had to demonstrate why the case was exceptional and justified a departure from the norm.

In London approval hearings at which an application for anonymity was sought were often listed before a defamation specialist. The focus of the approval hearing became the anonymity application rather than the appropriateness of the proposed settlement. In light of the need to closely scrutinise the application for anonymity, this led to the bizarre situation that although the formal approval element of the hearing was over in a matter of minutes, significant time was spent attempting to persuade judges that anonymity was justified on the particular facts of the case in question.

Applications for anonymity became ever more sophisticated to maximise the chances of success. It was not unusual for applications to be supported by multiple witness statements and letters or reports from experts such as educational psychologists, psychiatrists and paediatricians. Further, counsel would be instructed to draft a detailed skeleton argument and to advise upon notification of the press. This added significantly to the costs of litigation. Moreover, it was not necessarily fair to expect defendants or insurers to have to pay for these additional costs when they usually took a neutral stance in relation to such applications.

JXMX: At first instance

In *JXMX (A Child) v Dartford and Gravesham NHS Trust*[24] the claimant was severely injured at birth. A claim was brought against the NHS Trust responsible for the care she received. An amicable settlement was achieved which involved the payment of a substantial lump sum together with periodical payments for care and case management. An application was made to approve the settlement. The claimant also made an application for anonymity which was listed to be heard at the same time as the approval hearing.

The approval hearing was listed before Tugendhat J. He had no problem approving the proposed settlement but he was unpersuaded that an anonymity order was justified. Noting the rise in the number of anonymity applications that were being made Tugendhat J said at [9]:

> "Until recently applicants for approval hearings did not ask for anonymity. Claimants in actions for damages for personal injuries have generally been named. This has been so even where the claims arose out of injuries sustained at birth, where the evidence included the highly private facts of the medical treatment of the mother as well as of the child. I am informed by counsel, in this and in other cases, and by other Queen's Bench judges, that applications for anonymity are now made in most approval hearings, if the order has not already been made by the Master".

The judge explained the fundamental importance of the principle of open justice and set out the necessity test that he had to apply. He criticised the witness statement that had been produced in support of the claimant's application as being formulaic. He considered that the concerns raised by the claimant's litigation

[24] *JXMX (A Child) v Dartford and Gravesham NHS Trust* [2015] EWCA Civ 96; [2015] C.P. Rep. 22.

friend regarding the claimant's vulnerability were no more than concerns and did not amount to evidence of identifiable risks which justified a derogation from open justice.

There were two journalists in court and Tugendhat J invited submissions from them, noting at [22]:

> "Mr Macmillan is a freelance journalist. He had not come to court prepared with anything to say. But in response to my invitation he said that he and his colleagues had no wish to cause distress to anyone. But they did want to report court proceedings. The old practice was for names to be used. Now almost every case is anonymised. In many cases journalists are not given copies of the orders or any other papers, and the anonymity orders make it difficult for them to apply to the court for copies from the file. The result is that the journalists cannot in practice report even those details of the case which the court might intend to be reportable."

Although Tugendhat J refused to grant an anonymity order, oddly, he ordered that there be no report of the address at which the claimant and her family live. He did not identify the reason why this derogation from open justice was justified but anonymity was not. Recognising that there was a real prospect of success, he granted permission to appeal, thus giving the Court of Appeal the opportunity to review practice and procedure in this area.

JX MX: The Appeal

The defendant took no part in the appeal, which was pursued by the claimant's counsel[25] acting pro bono. Since there was no party opposing the appeal, the Court of Appeal appointed a friend of the court, Mr Barr QC, to advise and put the contrary case. The Press Association was invited to intervene on the appeal and Mr Mike Dodd provided written submissions on their behalf. The Personal Injury Bar Association ("PIBA")[26] applied to intervene and was granted permission to make both written and oral submissions at the appeal hearing.

The claimant emphasised the inconsistency between the judge's decision in *JXMX* and previous similar decisions in which anonymity was granted. It was argued that the distinctions drawn by the judge were not material. Anonymity should be granted whether or not the claimant had a deputy and whether or not she had siblings who might be affected. In particular anonymity was justified to prevent interference with the claimant's private and family life and that of her immediate family.

PIBA submitted that there ought to be a radical overhaul of anonymity applications at approval hearings. It was submitted that instead of the existing "opt in" system there ought to be an "opt out" system. In other words anonymity should generally be made available to those that wanted it. PIBA put forward three reasons for this change in approach:

(1) When approving settlements, the court's function is fundamentally different from its normal function of resolving disputes between parties. On an approval hearing the court is essentially acting in a protective or administrative capacity. Further, the judge's decision is usually based upon a confidential advice from counsel which the defendant (and public) do not see.

(2) The publication of highly personal information about the claimant's medical condition inevitably involves a serious invasion of his and his family's right to privacy.

(3) Unlike adult litigants of full capacity, who are free to settle their claims in private, children and protected parties have no choice but to seek the court's approval of their settlements in proceedings open to the public and are thus placed at a significant disadvantage compared to other litigants. This amounted to a breach of protected parties' rights under art.14 of the European Convention on Human Rights.

[25] Elizabeth-Anne Gumbel QC and Henry Witcomb of One Crown Office Row instructed by Mark Bowman of Field Fisher.
[26] Represented by Rob Weir QC of Devereux Chambers and William Latimer-Sayer of Cloisters and assisted by Sian McKinley from Cloisters.

Mr Barr QC argued that the existing system should be maintained. He submitted that anonymity applications should continue to be decided on a case-by-case basis using the strict necessity test. Furthermore, he argued that the judge was correct not to grant anonymity in the instant case, which was not exceptional and where there was insufficient evidence to justify a derogation from the principle of open justice.

The decision

In a unanimous decision delivered by Moore-Bick LJ (who sat with Black and Lewison LLJ), it was accepted that there was a plain resonance between the categories of cases justifying a departure from the principle of open justice in *Scott v Scott* and the wider modern categories of cases involving children and vulnerable adults. Approval hearings, whether involving children or protected parties, were considered comparable in nature and deserve to be viewed in a similar light to family and Court of Protection cases. Thus at [29], Moore-Bick LJ set out that:

> "The function which the court discharges at an approval hearing is essentially one of a protective nature, as it was when it exercised the function of parens patriae on behalf of the Crown in relation to wards of court and lunatics. The court is concerned not so much with the direct administration of justice as with ensuring that through the offices of those who act on his or her behalf the claimant receives proper compensation for his or her injuries. The public undoubtedly has an interest in knowing how that function is performed and the principle of open justice has an important part to play in ensuring that it is performed properly, but its nature is such that the public interest may usually be served without the need for disclosure of the claimant's identity."

Moore-Bick LJ recognised that statements which attempt to deal with the potential consequences of an invasion of privacy may tend to be formulaic. It was difficult for a claimant or his family to put into words the effect that such an invasion of privacy might have. Nevertheless, the importance of maintaining the family's privacy should not be underestimated as a result.

Furthermore, at [30] the Court of Appeal accepted that children and protected parties were disadvantaged compared to competent adults who could settle their cases without the need to reveal highly personal information about themselves in public.

Although each application will have to be decided individually, it was held that a limited derogation from the principle of open justice will normally be necessary in relation to approval hearings to enable the court to do justice to the claimant and his or her family by ensuring respect for their family and private lives. Sometimes it may be possible to identify specific risks against which the claimant needs to be protected, which would create an additional reason for derogating from the principle of open justice; however, it was not thought necessary to identify such specific risks to establish a need for protection. Whilst the circumstances giving rise to the settlement would inevitably differ from case to case, the interference with the right to private and family life would essentially be the same in almost all cases.

Ultimately the Court of Appeal reached the conclusion at [34] that:

> "In our view the court should recognise that when dealing with an approval application of the kind now under consideration it is dealing with what is essentially private business, albeit in open court, and should normally make an anonymity order in favour of the claimant without the need for any formal application, unless for some reason it is satisfied that it is unnecessary or inappropriate to do so."

Guidance

To ensure consistency in the lower courts, the Court of Appeal set down the following guidance for courts and practitioners at [35]:

"(i) the hearing should be listed for hearing in public under the name in which the proceedings were issued, unless by the time of the hearing an anonymity order has already been made;

(ii) because the hearing will be held in open court the Press and members of the public will have a right to be present and to observe the proceedings;

(iii) the Press will be free to report the proceedings, subject only to any order made by the judge restricting publication of the name and address of the claimant, his or her litigation friend (and, if different, the names and addresses of his or her parents) and restricting access by non-parties to documents in the court record other than those which have been anonymised;

(iv) the judge should invite submissions from the parties and the Press before making an anonymity order;

(v) unless satisfied after hearing argument that it is not necessary to do so, the judge should make an anonymity order for the protection of the claimant and his or her family;

(vi) if the judge concludes that it is unnecessary to make an anonymity order, he should give a short judgment setting out his reasons for coming to that conclusion;

(vii) the judge should normally give a brief judgment on the application (taking into account any anonymity order) explaining the circumstances giving rise to the claim and the reasons for his decision to grant or withhold approval and should make a copy available to the Press on request as soon as possible after the hearing."

Example anonymity precedents

We have attached to this article the body of the anonymity order that was made by the Court of Appeal. Another example of an anonymity order subsequent approved by a master following the *JXMX* appeal is also attached. In cases where a settlement is achieved against insurers involving the payment of periodical payments, an amendment may be considered to allow the insurers to reveal the claimant's identity to potential annuity providers and a third example is attached with suitable wording permitting disclosure to such third parties for this purpose.

From a practical perspective, it is understood that the computer system in the Royal Courts of Justice in London only recognises groupings of at least three letters, i.e. AAA, ABC or DEF. Further, practitioners may wish to consider requesting a separate anonymity order rather than setting out the anonymity provisions in the body of the final approved order. The main advantage of a separate anonymity order is that such an order can be disclosed to would-be interested parties without needing to provide details of the settlement terms.

Ordinarily, it will not be necessary or appropriate to anonymise the name of the defendant unless there is a risk that by naming the defendant, the claimant's identity may be uncovered (if, for example, there had been previous press reports linking the two or the claimant and defendant are related). The judge will have then to consider whether it is necessary, not just desirable, to extend the anonymity to cover the defendant.

Discussion

Not all claimants seek anonymity.[27] Some want, indeed are keen, to be able to publicise their story to a wider audience. However, it has now become much easier for children and vulnerable adults seeking an anonymity order at an approval hearing, to gain such protection if they desire it, without needing to make a formal application.

The court rightly accepted that whilst there may be occasional special reasons which operate in particular cases for seeking anonymity, the main concerns are generic and apply across the board. Whilst proving that would-be thieves read the local press and target vulnerable recipients of large damages awards is difficult, there is no doubt that this is a genuine fear held by claimants. Many claimants and their families struggled to understand why they had to attend a public hearing supposedly for their protection at which their vulnerabilities and confidential settlement was revealed to all.

In effect, the Court of Appeal's decision reverses the burden of proving that it is necessary to grant anonymity at approval hearings. It is not an "opt out" system, since a request for anonymity still must be made. However, there is now a presumption that, if anonymity is requested at an approval hearing, it will be granted.

Many approval hearings will continue to be conducted before district judges or masters in private rooms. Whilst such hearings are technically held in public, it is unusual for the press to show any interest or attend. When an approval hearing is listed in open court, especially in London where there are usually one or more journalists in attendance, anonymity orders will now be ordered as a matter of routine, but without the same evidential burden to prove exceptional circumstances.

The Court of Appeal did not ignore the needs of the press. It was recognised that they have a legitimate interest both in observing the proceedings and making and receiving a report of them. Should they wish to challenge an anonymity order, it is up to the press to prove that an anonymity order is unnecessary or inappropriate. Furthermore, there is no obligation to notify the press formally that an application for an anonymity order will be made: see [34]. Although the press may not be keen that they are no longer to be notified that an anonymity order is to be applied for and that the granting of anonymity orders has become much more straightforward for claimants who want it, the requirement for judges to give short judgments explaining what the case is about and the reasons for the settlement may in fact give them more information than they used to get.

Wider application

It is noteworthy that *JXMX* decision applies equally to cases involving very modest injury to those where catastrophic injuries are sustained. David Barr QC had suggested that were the court to accede to PIBA's proposal of an "opt out" system that perhaps this should only apply to cases of substantial value, e.g. those worth over £500,000. This suggestion was specifically rejected by the court. This means that the claimant who recovers £1,500 for a modest whiplash injury has exactly the same entitlement to anonymity as the cerebral palsy victim who secures a £10 million damages award.

Crucially, the Court of Appeal in *JX MX* was only considering applications for anonymity at approval hearings. PIBA's submissions were strictly limited to approval hearings, not any other stage of proceedings. Materially, the discrimination against children and those lacking capacity under art.14 of the ECHR, which was an important element of the Court of Appeal's reasoning in *JX MX*, only applies in the context of approval hearings.

[27] See, for example, *Ellison v University Hospitals of Morecambe Bay NHS Foundation Trust* [2015] EWHC 366 (QB), *Robshaw v United Lincolnshire Hospitals NHS Trust* [2015] EWHC 923 (QB) and *Harman (A Child) v East Kent Hospitals NHS Foundation Trust* [2015] EWHC 1662 (QB) in which the claimants did not seek anonymity.

It remains to be seen how widely the principles in *JXMX* will be applied in the context of other hearings. For example, private information regarding the claimant's injuries and value of the claim will often be discussed at case management hearings or on applications for interim payments. The position at trial may well be different where competent adults are equally required to reveal sensitive information about their claims in public and do not usually benefit from anonymity.

Cases since *JX MX*

There have been numerous approval hearings since *JXMX* at which anonymity orders have been sought and obtained. We are here considering those cases in which the reasoning in *JXMX* has been applied or considered when seeking an anonymity order outside of the context of an approval hearing. There have been (at least) four recent reported High Court cases.

ABZ v St George's Healthcare NHS Trust[28] concerned a strike out claim brought on behalf of a number of defendant NHS Trusts. The claimant's father suffered from Huntingdon's disease, a genetic disorder which could lead to an interference with thinking and behaviour. The claimant became pregnant. There was a 50 per cent chance that the claimant and her unborn baby had Huntingdon's disease. The claimant submitted that the defendants owed her a duty of care to disclose her father's condition and that they had violated her rights under art.8 of the ECHR.

The claimant applied for an anonymity order at the outset of the hearing. Nicol J granted the application. There was no detailed analysis of the relevant law. The judge appeared to accept there was still a burden on the claimant to prove necessity; he considered such an order was necessary in order to protect the claimant's daughter from finding out that she has a 50 per cent chance of inheriting Huntington's disease. Nicol J accepted that there could be serious consequences if she found out about these matters through a report of the proceedings. Together with the claimant and her daughter's right not to have their private lives interfered with by the action of the court, this justified the making of an anonymity order.

A v East Kent Hospitals University NHS Foundation Trust[29] concerned a liability trial in respect of an alleged failure to advise the claimant that her baby might be suffering from a chromosomal abnormality. The claimant, Mrs A, alleged that had she been advised to undergo an amniocentesis this would have revealed the abnormality and she would have terminated her pregnancy. Her child, B, was subsequently born suffering from severe disabilities due to an unbalanced chromosome 4 and chromosome 11 translocation. At the commencement of the trial, the claimant made an application for anonymity to protect the identity of herself and her child.

The application for anonymity was initially advanced under s.39(1) of the Children and Young Persons Act 1933. This was later abandoned when it became apparent that the provisions of the 1933 Act did not extend to a child who was not a victim, party or witness: *R. v Jolleys (Robert) Ex p. Press Association*.[30]

In considering the application for anonymity, Dingemans J referred to *JXMX* and the position with regard to approval hearings and said at [10]:

> "In such approval hearings, when the reasons for seeking an order would generally be the same, it was not necessary to serve a witness statement. However such an exemption from the normal rules of evidence does not apply to this case, and after further submissions had been made a further witness statement from Mrs A was adduced. This was produced after Mrs A had given evidence in the trial, but both parties were content that I could rely on it for the purposes of the application for anonymity".

The application for anonymity was advanced on the basis of art.8 of the ECHR on two grounds. First, it was contended that members of the medical professional might treat B less well if they knew her mother

[28] *ABZ v St George's Healthcare NHS Trust* [2015] EWHC 1394 (QB).
[29] *A v East Kent Hospitals University NHS Foundation Trust* [2015] EWHC 1038 (QB); [2015] Med. L.R. 262.
[30] *R. v Jolleys (Robert) Ex p. Press Association* [2013] EWCA Crim 1135; [2014] 1 Cr. App. R. 15.

had brought proceedings. This argument was rejected as being entirely speculative. Secondly, it was argued that B reacts badly to confrontation and should be shielded from the knowledge regarding what her parents say they would have done had they known about B's genetic abnormality. The judge accepted this argument because there was evidence that B did react badly to confrontation due to her disabilities and there was evidence that others may confront Mrs A. Since the press were not in court when the anonymity order was made, Dingemans J gave permission for any person to apply to discharge the order on giving 48 hours' notice in writing to the claimant's solicitors.

An anonymity order was made at the outset of a preliminary issue hearing in the case of *GB v Home Office*.[31] The preliminary issue was whether the defendant owed the claimant a non-delegable duty of care. The claimant appears to have made an oral application at the start of the hearing relying only upon *JXMX* to argue that an anonymity order was appropriate. Coulson J was persuaded that for reasons of consistency it was necessary to make an anonymity order. In making the order, he noted there was in effect a reversal of the ordinary burden of proof in cases involving children and vulnerable people. There was no discussion about whether or not the principles in *JXMX* were limited to the context of approval hearings. It appears to have been assumed that Moore-Bick LJ's observations applied across the board to hearings of preliminary issues and presumably by logical extension to trials as well.

In the final case of *FB v Rana*[32] the claimant made an application for anonymity at the outset of a liability trial. Jay J granted the application "in line with the principles explained by the Court of Appeal in *JX MX*". It does not appear that Jay J required the claimant to submit any evidence in support of the application, nor to provide a skeleton argument demonstrating why such an order was necessary.

Clearly the approach of Nicol J and Dingemans J is to be contrasted with that adopted by Coulson J and Jay J. It appears that some judges are now much more willing to make anonymity orders in respect of children and protected parties for all types of hearing because the reasoning in *JXMX* creates a rebuttable presumption that such orders will be necessary. On the other hand, some judges such as Dingemans J draw a distinction between approval hearings and trials, the latter still requiring the claimant to prove on the basis of evidence and a skeleton argument explaining why a case is exceptional and anonymity is necessary before an anonymity order will be granted.

In time further guidance from the Court of Appeal may be beneficial regarding the wider impact of the reasoning in *JXMX* and how, if at all, it might be applied to hearings other than approvals. For the time being practitioners would be best advised to be cautious when applying for anonymity at other hearings, in particular at liability and quantum trials. In such circumstances, pending further guidance, it would be prudent to make a formal application supported by witness and expert evidence, together with a cogent skeleton argument setting out why the case is exceptional and the strict test of necessity is satisfied. In particular, it is noteworthy that competent adult claimants routinely have to suffer a significant infringement of their privacy during the course of a contested trial and applications for anonymity are often refused despite the fact that the hearing will involve the disclosure of private and sensitive information: see further *Spencer v Spencer*.[33] A public hearing is considered a necessary price to pay to achieve justice. Article 6 ECHR considerations may be relevant here as regards the public interest in maintaining the confidence of the public in the courts. In this regard, the well-known and binding speeches of Lord Atkinson and Lord Shaw in *Scott v Scott* were specifically cited with approval at [5] and [6] of Moore-Bick LJ's judgment in *JXMX*.

[31] *GB v Home Office* [2015] EWHC 819 (QB).
[32] *FB v Rana* [2015] EWHC 1536 (Admin).
[33] *Spencer v Spencer* [2009] EWHC 1529 (Fam); [2009] E.M.L.R. 25.

Conclusion

The Court of Appeal's decision in *JX MX* is to be welcomed. Against a background of case law which consistently emphasised the importance of the principle of open justice, the outcome resulting in a radical overhaul of the existing system had not been anticipated. The guidance makes a refreshing change, especially for those representing injured claimants at approval hearings in open court who previously had to jump through numerous hoops to prove why an anonymity order was justified on the facts of a particular case.

Before the Court of Appeal ruling, there had been a wide disparity of approaches between judges in different parts of the country. The guidance provided will no doubt be useful to first instance judges dealing with approval hearings. Fortunately their Lordships felt able to adopt the course they did without the delay and uncertainty that would have ensued had the matter been remitted to the Civil Rules Committee for consideration, which had been mooted as a potential option during the course of the appeal.

The new system will reduce the stress and anxiety felt by claimants and their families at the end of litigation. They can now settle their cases safe in the knowledge that they can remain anonymous if they want to. Furthermore, in the post-Jackson era it will lessen the burden on legal professionals, thereby reducing costs as well as shortening hearings and freeing up valuable court time. It remains to be seen how far the principles in *JX MX* will extend. The courts should be more cautious about derogating from open justice in the context of trials where children and vulnerable claimants are not at a disadvantage to their competent adult counterparts and claimants are routinely expected to suffer an invasion of their privacy as a necessary price to pay in order to maintain public confidence in the civil justice system.

Appendix 1: Body of anonymity order (as ordered by the Court of Appeal in *JX MX*)

"The Claimant, her mother and father shall hereinafter be referred to in these proceedings, respectively, as 'JX MX', 'AX MX' and 'BX MX'.

Pursuant to CPR rule 39.2(4) there shall not be disclosed in any report of the proceedings the name or address of the Claimant of the Claimant's parents or any details leading to the identification of the Claimant and the Claimant, her mother and her father, if referred to, shall only be referred to as 'JX MX', 'AX MX' and 'BX MX'.

Pursuant to CPR rule 5.4C a person who is not a party to the proceedings may obtain a copy of a statement of case, judgment or order from the court records only if the statement of case, judgment or order has been anonymised such that: (a) the Claimant, her mother and her father are referred to in those documents only as 'JXMX', 'AX MX' and 'BXMX', and (b) the address of the Claimant, her mother and father has been deleted from those documents."

Appendix 2: Body of anonymity order granted by Master following *JX MX* appeal

"IT IS HEREBY ORDERED PURSUANT to section11 of the Contempt of Court Act 1981, section 6 of the Human Rights Act 1998 and CPR Rule 5.4A to 5.4D and CPR Rule 39.2:

(1) There be substituted for all purposes of this case, in place of references to the Claimant by name and whether orally or in writing, references to 'Mrs GBX'. Likewise, the litigation friend shall be referred to as 'Mr GBX'.

(2) A non-party may not, without the permission of a Master, inspect or obtain any copy statement of case or document from the court file unless it has been anonymised in accordance with this direction and there has been redacted any information which might identify the Claimant or the Litigation Friend. Any application for such permission (i.e. to inspect or obtain a

non-anonymised version) must be made on notice to the Claimant and in accordance with CPR r. 5.4C(6).

(3) There shall be no publication in any newspaper or other media or other disclosure of any name, address, picture or information tending to identify the Claimant or the Litigation Friend."

Appendix 3: Body of order with insurance exception

"IT IS ORDERED that:

1. There be substituted for all purposes of this case, in place of references to the Claimant by name and whether orally or in writing, references to MSD and, in place of references to the Claimant's Litigation Friend by name, and whether orally or in writing, references to RMD.
2. A non-party may not, without the permission of a Master, inspect or obtain any copy statement of case or document from the court file unless it has been anonymised in accordance with paragraph 1 above and there has been redacted any information which might identify the Claimant, his siblings, his mother or Litigation Friend. Any application for such permission (i.e. to inspect or obtain a non-anonymised version) must be made on notice to the Claimant and in accordance with CPR r.5.4C(6).
3. There shall be no publication in any newspaper or other media (including but not limited to the Internet and social media) or other disclosure of any name, address, picture or information tending to identify the Claimant.
4. Nothing in paragraphs 1 to 3 above shall prohibit the Defendant, his insurer or his insurer's successors in title from disclosing the Claimant's name, address or any other information tending to identify him to their reinsurers, their legal and professional advisers, an annuity provider pursuant to paragraph 11 of the Consent Order made on 27/05/2015 or to HM Revenue & Customs (or its successor) or any other person required by law."

The Future of Part 36: Part 9

John McQuater*

Appeals; Costs; Detailed assessment; Part 36 offers

In the ninth in his series of articles on CPR Pt 36 John McQuater looks at the impact of the new Pt 36 rules introduced on April 6, 2015.

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PROCEDURE

Introduction

The eighth article in this series concluded by observing that the Civil Procedure Rule Committee ("CPRC") had re-drafted CPR Pt 36 and that the amended rule, set out in the Civil Procedure (Amendment No.8) Rules 2014, was to be introduced on April 6, 2015. The updated version of CPR Pt 36 is the first major amendment to the rule since 2007, that version of the rule being reviewed by the second article in this series. Although, this time round, the amendments largely codify the case law decided since 2007 which has interpreted, or highlighted, problems with the rule there are some important changes which practitioners need to be aware of.

Before reviewing the updated version of CPR Pt 36 it is worth tracing the history of the rule and identifying some key milestones, as these make sense of, and put into proper context, the most recent. This is also a useful opportunity to review further case law, not yet covered in this series, and also identify what were the key topics for the CPRC when setting about redrafting of the rule. The starting point is, therefore, a reminder of the background.

Background

Prior to the introduction of the CPR the only offer likely to carry costs consequences was an offer made by the defendant in the form of a payment into court. This changed in 1999 with the introduction of the CPR.

1999: The original Part 36

The original version of CPR Pt 36, introduced with the CPR in 1999, preserved the payment into court, now in the form of a Pt 36 payment, which was still required by a defendant in a money claim. The Pt 36 payment maintained, in the new rules, the costs consequences of a payment into court under the earlier regime.

CPR Pt 36 also introduced the new concept of a Pt 36 offer. Such an offer might be made by a defendant in response to a non-monetary claim, as well as prior to issue of court proceedings in a money claim, and, significantly, by a claimant. For the first time, therefore, a claimant might secure costs, and other, benefits if judgment was at least as advantageous to the claimant as the claimant's own offer.

One of the often misunderstood features of the new regime was that those drafting the rules recognised a claimant's Pt 36 offer would need "teeth", both to incentivise the claimant into making an offer and also to focus the mind of the defendant on settlement following receipt of such an offer. That is why, from the

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outset of the CPR, claimant Pt 36 offers have carried the potential for enhanced interest and indemnity costs.

Indemnity costs have traditionally been regarded as penal in nature but, whilst that remains the case when the court is exercising the general discretion as to costs conferred by CPR Pt 44, an assessment of costs on the indemnity basis is one of the important incentives for the claimant under CPR Pt 36 given that a successful claimant will usually recover costs in any event and so needs something extra. Consequently, where judgment is at least as advantageous to the claimant as the claimant's own Pt 36 offer the key question for the court is simply comparison of offer and judgment rather than any issue of conduct on the part of the defendant (a point recognised by Sir David Eady when giving judgment in *Downing v Peterborough and Stamford Hospitals NHS Foundation Trust*[1] a case reviewed by the last article in this series).

Conversely, whilst a defendant who makes what proves to be a good Pt 36 offer is likely to be entitled to costs from the end of the relevant period, where the claimant fails to obtain judgment more advantageous than the offer, there is no automatic entitlement to have those costs assessed on the indemnity basis. These principles, which have held good ever since 1999, were made clear, in the relatively early days of CPR Pt 36, by Simon Brown LJ in *Kiam v MGN Ltd* where he said:[2]

> "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 recover their costs on the standard basis; I know of no rule or practice in such cases for making indemnity costs orders."

2007: "On the table"

Following case law, which had blurred the distinction between the costs consequences of a Pt 36 payment and a Pt 36 offer by the defendant, CPR Pt 36 was last substantially amended in 2007. These amendments attempted to harmonise, where possible, the way the rule applied to claimants and defendants. Both claimants and defendants could, from 2007, make Pt 36 offers and the concept of the "relevant period" was introduced. That is the period of time within which the offer cannot be changed or withdrawn, without court permission, and during which, if accepted, automatic costs consequences will apply in favour of the claimant. The relevant period has remained a significant aspect of CPR Pt 36 ever since.

It is important to recognise that the relevant period is not the period of time for which the offer is open. The offer remains open unless and until changed or withdrawn (though in some circumstances other developments will mean that the offer can no longer be accepted). In *Gibbon v Manchester CC* Moore-Bick LJ observed that this meant Pt 36 offers would remain "on the table".[3]

In *C v D*[4] the Court of Appeal held that a time limited offer could not be a Pt 36 offer. Ambiguity would, however, be resolved, where the offer referred to CPR Pt 36, on the basis that the offer would be treated as a Pt 36 offer if possible. On this basis with what looked like a time limit, but crucially had been expressed

[1] *Downing v Peterborough and Stamford Hospitals NHS Foundation Trust* [2014] EWHC 4216 (QB); [2015] 2 Costs L.O. 203.
[2] *Kiam v MGN Ltd (Costs)* [2002] EWCA Civ 66; [2002] 1 W.L.R. 2810 at [8].
[3] *Gibbon v Manchester CC* [2010] EWCA Civ 726; [2010] 1 W.L.R. 2081.
[4] *C v D* [2011] EWCA Civ 646; [2012] 1 W.L.R. 1962.

to be "the relevant period", the court was able to find that the offer did comply with the requirements of CPR Pt 36, as it did meet all the other requirements on form and content in the rule. It was these changes, and this case law, which confirm that CPR Pt 36 operates as a self-contained code.

2010: "The portal"

2010 saw CPR Pt 36 divided into two sections with the existing rule comprising the new s.I and a new s.II dealing with CPR Pt 36 in stage 3 of what was then just the RTA Protocol (this part of the rule subsequently also embracing the EL/PL Protocol).

2011: "More advantageous"

A single, but significant, amendment was made to CPR Pt 36 in 2011 by the introduction of a new CPR r.36.14(1A). This rule provided that in relation to any money claim or money element of a claim the term "more advantageous" was to mean better in money terms by any amount, however small, and that the term "at least as advantageous" was to be interpreted the same way. That gave added certainty to the operation of CPR Pt 36 and mitigated the effect of the Court of Appeal ruling in *Carver v BAA Plc*.[5]

2013: "Jackson"

Further amendments to CPR Pt 36 in 2013 reflected the terms of the Jackson Report. The report contained a number of recommendations relating to CPR Pt 36 and, in particular, the need for this to be re-calibrated so that claimants had greater benefits. These proposals were implemented by an amendment to CPR r.36.14(3) so that where the claimant obtained a judgment "at least as advantageous to the claimant" as the claimant's own Pt 36 offer the claimant would be entitled, in addition to indemnity costs and enhanced interest, to an "additional amount", equivalent to 10 per cent of damages awarded but subject to a ceiling of £75,000. Further amendments to the rule made at this stage reflected the introduction of fixed costs in ex-RTA Protocol and ex-EL/PL Protocol claims. These amendments were reviewed by the seventh article in this series.

2014: "Soft tissue injury claims"

The final amendment to CPR Pt 36, prior to 2015, took effect from October 2014 when the concept of the "Soft Tissue Injury Claim" was introduced to characterise, and deal slightly differently with, what might loosely be termed "whiplash" claims being run through the RTA Protocol. Significantly, CPR Pt 36 now provided, with the intention of discouraging so-called "pre med offers", that in such a claim any offer would not be effective, in the event of late acceptance or judgment, until 21 days after the defendant receives the "fixed cost medical report". It is the 2007 version of CPR Pt 36, in the format finally reached by October 2014, which was revised with effect from April 2015.

2015

April 2015 saw the introduction of an updated version of the rule, though this remains largely based on the 2007 version. The issues identified by the CPRC, underlying this revision, are best considered once the further case law has been reviewed, as some of this has had an impact on the thinking behind the terms of the new rule.

[5] *Carver v BAA Plc* [2008] EWCA Civ 412; [2009] 1 W.L.R. 113.

Case law

The case law can usefully be considered by reference to the main topic decided by each of the cases.

Making offers

Earlier articles in this series have reviewed a line of cases all stressing the need for compliance with the rules on form and content when making Pt 36 offers. Whilst the Court of Appeal judgment in *C v D*[6] appeared to suggest a more relaxed approach to form and content so, perhaps, a mere reference to "Pt 36" might suffice to make the offer effective, that overlooks the emphasis placed in the very case on the need for compliance with the rules on form and content.

The pitfalls were highlighted by the judgment in *Thewlis v Groupama Insurance Co Ltd*[7] which at first sight seemed almost indistinguishable from *C v D* but which had some important differences of real significance to the validity of the offer for the purposes of Pt 36. Whilst the decision in *Thewlis* has been the subject of criticism the judgment in that case it has since been roundly supported by the Court of Appeal in *Shaw v Merthyr Tydfil CBC*.[8] That judgment in *Shaw* reflects the very strict approach to the rules on form and content taken under the pre-April 2015 version of CPR Pt 36, in particular the need for an offeror to comply precisely with the terms of the former CPR r.36.2(2).

Prior to the issue of proceedings the claimant made a Pt 36 offer. That letter was headed "Pt 36 Offer" and read:

> "Our client offers to accept the sum of £2,000 in full and final settlement for the claim for general and special damages, such sums to be inclusive of interest together with payment [of] her reasonable costs to be detailed assessed in default of agreement. This offer remains open for a period of 21 days from the date of receipt of the offer, after which time the offer may only be accepted if the parties agree their liability in respect of costs or the court provides its permission for late acceptance."

The claim was, though only following an appeal, successful with damages of £6,510 being awarded. When costs were being assessed the claimant contended she was entitled to the benefits conferred by CPR r.36.14, having beaten her own offer, including indemnity costs. The district judge assessing costs held that the claimant's offer was not a valid Pt 36 offer, following *Thewlis*. Accordingly, costs were assessed on the standard basis. The claimant appealed this ruling, but that appeal was dismissed by the Court of Appeal.

After observing that CPR Pt 36 provides for certain costs consequences Maurice Kay LJ went on to hold:

> "However, all this is predicated upon the offer having been compliant with the requirements of Part 36. Rule 36.2(2) is expressed in mandatory language and its requirements have been held to be mandatory—see *PHI Group Ltd v Robert West Consulting Ltd* [2012] EWCA Civ 588, especially at paragraph 25, per Lloyd LJ. Five mandatory requirements are set out including (b) that the offer states on its face that it is intended to have the consequences of section 1 of Part 36."

In this case the offer failed to expressly state that it was "intended to have the consequences" of CPR Pt 36. Furthermore, the offer did not identify a relevant period but, rather, was made in terms reflecting the language of the rule before amended with effect from April 6, 2007. Accordingly, Maurice Kay LJ held:

[6] *C v D* [2012] 1 W.L.R. 1962.
[7] *Thewlis v Groupama Insurance Co Ltd* [2010] EWHC 3 (TCC); [2012] B.L.R. 259.
[8] *Shaw v Merthyr Tydfil CBC* [2014] EWCA Civ 1678; [2015] P.I.Q.R. P8.

> "In these circumstances, as a matter of form, the offer did not satisfy the mandatory requirements of Part 36. Accordingly it was not a Part 36 offer, even though the letter described it as one. This case is indistinguishable from *Thewlis* which the judge followed with manifest reluctance."

It was in these circumstances that the Court of Appeal went on to reject criticism there had been of the judgment in *Thewlis*.

Detailed assessment

CPR r.47.20 expressly applies the terms of CPR Pt 36, with necessary modification, to detailed assessment proceedings. Two recent cases have considered the operation of CPR Pt 36 in the context of detailed assessment. In *Cashman v Mid Essex Hospital Services NHS Trust*[9] the claimant's claim against the defendant was settled on terms that the defendant would pay £90,000 damages together with costs to be assessed on the standard basis if not agreed. The claimant served a bill of costs for about £262,000. About seven months before the detailed assessment hearing the claimant made a Pt 36 offer, in the costs proceedings, of £152,500. Costs were assessed at £173,693.78 at the detailed assessment.

That judgment was "more advantageous" to the claimant than the proposal contained in the claimant's Pt 36 offer on costs. Accordingly, under the terms of CPR r.47.20, the provisions of CPR r.36.14(3) applied, unless that would be unjust. The Master held that it would not be unjust for the consequences provided for under CPR r.36.14(3) to apply, save for the additional amount. The Master concluded that it would be unjust to order the defendant to pay the claimant the prescribed additional amount, at 10 per cent of the costs as assessed, explaining:

> "Had the rule permitted me to allow a figure fixed by applying the prescribed percentage to the difference between the sum which the claimant offered to accept and the sum which was allowed, then I think that may have been a just result, but that is not what the rule anticipates. In circumstances where there has been a significant reduction in the claimant's bill, it seems to me that it would be unjust to reward the claimant with an additional amount prescribed by 36.14(3)(d)."

The claimant appealed. Giving judgment in the appeal Slade J concluded this was a case where the Master had fallen into the temptation referred to by Sir David Eady in *Downing v Peterborough & Stamford Hospitals NHS Foundation Trust*[10] when he said:

> "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."

Moreover, Slade J held:

> "The approach adopted by the Master penalises the Claimant for making what turned out to be a reasonable Part 36 offer. It is the terms of the Part 36 offer not the level of the sums claimed in the bill of costs which are to be considered under CPR 36.14(4). Whilst all the relevant circumstances are to be considered in deciding whether it would be unjust to make an award under any of the paragraphs of CPR 36.14(3), it was not suggested that there was any particular feature or consequence of the bill of costs other than its size which would render the making of an order under CPR 36.14(3)(d) unjust."

[9] *Cashman v Mid Essex Hospital Services NHS Trust* [2015] EWHC 1312 (QB); [2015] 3 Costs L.O. 411.
[10] *Downing v Peterborough and Stamford Hospitals NHS Foundation Trust* [2015] 2 Costs L.O. 203.

There being no reason advanced by the defendant, other than the high level of the bill of costs, why it would be unjust for there to be an order for an additional amount under CPR r.36.14(3)(d) Slade J ruled:

> "In those circumstances, properly directing himself, in my judgment the Master could only have concluded that it was not unjust to make an order under CPR 36.14(3)(d). Accordingly this court orders that the Claimant is entitled to an additional award calculated in accordance with that subparagraph."

In *Shepherd v Hughes*[11] the issue for the court was whether, following provisional assessment but prior to any detailed assessment, the offeree was at liberty to accept a Pt 36 offer on costs made prior to the provisional assessment, that offer being more advantageous to the offeree than the outcome of the provisional assessment.

A Pt 36 offer, which has not been withdrawn, can generally be accepted at any time but the terms of CPR r.36.9(3), as the rule read prior to April 2013, required the offeree to obtain permission from the court to accept an offer once "the trial has started". As HHJ Seys-Llewellyn QC observed, the key issue was whether "… the detailed assessment hearing has started, by reason that there was a provisional assessment or not?" The judge concluded the answer was to be found within the terms of CPR r.47.15 and found:

> "Thus, all of those provisions are subject to the introduction that this Rule, 47.15, '*applies to any detailed assessment proceedings*' (my emphasis). Thus, it seems, that enables and informs me to construe the reference in CPR 36.9(3) to a detailed assessment hearing as including the provisional assessment which is intrinsically a part of the structure which may lead to a detailed assessment hearing; and thus requiring that the court's permission is required to accept a part [36] offer where the provisional assessment has been made."

Civil Procedure Rule Committee

With all the issues highlighted by the case law in mind, perhaps not least the judgment in *Shaw*, the CPRC set about a review of CPR Pt 36 in 2014. A number of topics identified for specific consideration by the CPRC were mentioned in the relevant minutes which included the following:

- undue technicality;
- split trials;
- counter claiming defendants;
- costs budgeting; and
- "cynical" claimant offers.

The new, 2015, rule is the product of that review.

Part 36: 2015

The revised CPR Pt 36, introduced from April 6, 2015, usefully contains a number of sub-headings dealing with different aspects of that rule.

Preliminaries

The new CPR r.36.1(1) expressly states that CPR Pt 36 is "a self-contained procedural code", adopting the observations and language of Moore-Bick LJ in *Gibbon v Manchester CC*.[12] This emphasises the need

[11] *Shepherd v Hughes*, unreported, January 28, 2015, Mold CC.
[12] *Gibbon* [2010] 1 W.L.R. 2081.

to look at the terms of the rule itself, as explained by relevant case law, and, specifically, means the general law of contract does not prevail over express provisions in the rule itself, as confirmed in *Gibbon*. The express adoption of case law interpreting CPR Pt 36 might suggest the amended rule should be seen as codifying and clarifying the existing rule, except where that rule is expressly varied (where necessary to deal with problems which were highlighted in case law).

General provisions

CPR rr.36.2–36.4 contain some general provisions dealing with the scope and type of Pt 36 offers as well as the definition of terms found in the rule.

Scope of Part 36 offers

CPR r.36.2(2) provides:

> "Nothing in this Section prevents a party making an offer to settle in whatever way that party chooses, but if the offer is not made in accordance with rule 36.5, it will not have the consequences specified in this Section."

The rule contains a reminder that CPR r.44.2 requires the court to consider an offer to settle that does not have the costs consequences set out in this section in deciding what order to make about costs.

Where the consequences of a Pt 36 offer do not apply that may be important to the claimant, as there will not be the added certainty of deemed costs provisions, and will also be significant if the offeror seeks to rely on the offer for costs purposes because, away from CPR Pt 36, there will be no "automatic" consequences: *Widlake v BAA Ltd*;[13] *Saigol v Thorney Ltd*.[14]

Type of Part 36 offers

CPR r.36.2(3) provides:

> "A Part 36 offer may be made in respect of the whole, or part of, or any issue that arises in—
> (a) a claim, counterclaim or other additional claim; or
> (b) an appeal or cross-appeal from a decision made at a trial."

The distinction between "whole", "part" and "issue" may be significant in relation to costs, particularly costs on acceptance.

The former version of the rule referred broadly to "an offer to settle", although the rules on form and content required this to be in relation to the whole of the claim, part of the claim or an issue in the claim. The former rule expressly stated an offer could be made solely in relation to liability and whilst there is no corresponding provision in the new rule case law has confirmed offers on liability should be treated as offers on an "issue": *Onay v Brown*;[15] *Sonmez v Kebabery Wholesale Ltd*.[16]

The rule expressly provides for Pt 36 offers to be made in counterclaims, where the party bringing the counterclaim will be, for CPR Pt 36 purposes, the claimant. The amendment to the rule does not allow a defendant, who does not bring a counterclaim, to make a Pt 36 offer as though that party were a claimant, despite the views at first instance in *F & C Alternative Investments (Holdings) Ltd v Barthelemy*[17] that this was a "glitch" in the rules.

[13] *Widlake v BAA Ltd* [2009] EWCA Civ 1256; [2010] C.P. Rep. 13.
[14] *Saigol v Thorney Ltd (t/a Thorney Motorsport)* [2014] EWCA Civ 556; [2014] 4 Costs L.O. 592.
[15] *Onay v Brown* [2009] EWCA Civ 775; [2010] 1 Costs L.R. 29.
[16] *Sonmez v Kebabery Wholesale Ltd* [2009] EWCA Civ 1386.
[17] *F & C Alternative Investments (Holdings) Ltd v Barthelemy (Costs)* [2012] EWCA Civ 843; [2013] 1 W.L.R. 548.

Definitions

CPR r.36.3 deals with definitions, a number of these being necessary because of the amendment to the rule dealing with disclosure of Pt 36 offers following the trial of a preliminary issue.

Appeals

CPR r.36.4 deals expressly with appeals and provides:

"(1) Except where a Part 36 offer is made in appeal proceedings, it shall have the consequences set out in this Section only in relation to the costs of the proceedings in respect of which it is made, and not in relation to the costs of any appeal from a decision in those proceedings.

(2) Where a Part 36 offer is made in appeal proceedings, references in this Section to a term in the first column below shall be treated, unless the context requires otherwise, as references to the corresponding term in the second column—

Term	**Corresponding term**
Claim	Appeal
Counterclaim	Cross-appeal
Case	Appeal proceedings
Claimant	Appellant
Defendant	Respondent
Trial	Appeal hearing
Trial judge	Appeal judge"

In the event of an appeal the parties will need to consider repeating (or renewing as varied) offers made in the proceedings under appeal as well as offers made specifically for the purposes of the appeal.

Costs

CPR r.47.20, although not expressly referred to in CPR Pt 36, adopts the Pt 36 procedure, including costs consequences, for offers to settle in detailed assessment proceedings. The absence of reference to CPR Pt 47 in CPR Pt 36 suggests these are to operate as separate regimes, hence costs will not be regarded as an issue preventing the case being "decided" nor should Pt 36 benefits in the substantive claim prevent these being awarded, where appropriate, in subsequent costs proceedings.

Making offers

CPR rr.36.5–36.7 deal with making Pt 36 offers.

Form and content

CPR r.36.5 deals with the rules on form and content of a Pt 36 offer (necessary for an offer to have the consequences of Pt 36 given the terms of CPR r.36.2(2)). The new rule reflects the issue identified by the CPRC about technicality.

CPR r.36.5 provides:

"(1) A Part 36 offer must—

(a) be in writing;
(b) make clear that it is made pursuant to Part 36;
(c) specify a period of not less than 21 days within which the defendant will be liable for the claimant's costs in accordance with rule 36.13 or 36.20 if the offer is accepted;
(d) state whether it relates to the whole of the claim or to part of it or to an issue that arises in it and if so to which part or issue; and
(e) state whether it takes into account any counterclaim.

(Rule 36.7 makes provision for when a Part 36 offer is made.)

(1) Paragraph (1)(c) does not apply if the offer is made less than 21 days before the start of a trial.

(2) In appropriate cases, a Part 36 offer must contain such further information as is required by rule 36.18 (personal injury claims for future pecuniary loss), rule 36.19 (offer to settle a claim for provisional damages), and rule 36.22 (deduction of benefits).

(3) A Part 36 offer which offers to pay or offers to accept a sum of money will be treated as inclusive of all interest until—
(a) the date on which the period specified under rule 36.5(1)(c) expires; or
(b) if rule 36.5(2) applies, a date 21 days after the date the offer was made."

The only material change to the existing rule on form and content is replacing the requirement the offer "state on its face that it is intended to have the consequences of Section I of Part 36" with the stipulation the offer "make clear that it is made pursuant to Part 36". The objective of the CPRC was to avoid undue technicality without removing certainty. In practice parties have, perhaps, encountered more difficulty with the relevant period than reciting the intended consequences of the offer.

The target of the amendment appears to be the first instance decision in *Thewlis v Groupama Insurance Co Ltd*[18] where, paradoxically, the offer was made using the very wording now contained within the rule and, despite the endorsement of that case by the Court of Appeal in *Shaw v Merthyr Tydfil CBC*.[19] Under the new version of the rule offerors will need to decide what will suffice to "make clear" the offer is "made pursuant to Part 36".

The words "made pursuant to Part 36" would surely put the matter beyond doubt. But would simply referring to "Part 36" suffice? It is important to note that whilst "make clear" does not require the incantation of certain words the continued use of the word "must" means that this remains a mandatory requirement. Consequently, if courts were to follow the strict, literal, approach in cases such as *Shaw* arguments may remain.

A question which will doubtless arise, if experience of the amendment to CPR Pt 36 in 2007 is anything to go by, will be whether an offer which states on its face that it "is intended to have the consequences of Part 36" will "make clear that it is made pursuant to Part 36". It would be ironic if the result of the rule change would be to validate the offer in *Thewlis* but to suggest the offer made in *C v D*,[20] and other similar cases, would not be effective!

Whilst it is clearly sensible for an offer which is intended as a Pt 36 offer to be treated as such there are real dangers if there is any degree of ambiguity. In particular it is important for offerees to guard against an offeror framing an offer in such a way that, should this suit the offeror, it might be argued the offer is invalid (for example if the offeror wished to object to later acceptance) or, again if this later suits, valid (for example for costs purposes). Offerors may wish to continue using the practice form, Form

[18] *Thewlis v Groupama Insurance Co Ltd* [2012] B.L.R. 259.
[19] *Shaw v Merthyr Tydfil CBC* [2015] P.I.Q.R. P8.
[20] *C v D* [2012] 1 W.L.R. 1962.

N242A (as updated), whilst offerees should endeavour to clarify any ambiguity at the time the offer is made.

There is no change to the requirements, on form and content, with offers in personal injury claims which include a claim for future pecuniary loss, dealt with by the new CPR r.36.18, claims which include a claim for provisional damages, dealt with by the new CPR r.36.19, and Pt 36 offers made by a defendant, where payment to a claimant following acceptance would be a compensation payment for the purposes of the Social Security (Recovery of Benefits) Act 1997, dealt with by the new CPR r.36.22.

CPR r.36.22(3) provides:

> "A defendant who makes a Part 36 offer must, where relevant, state either—
> (a) that the offer is made without regard to any liability for recoverable amounts; or
> (b) that it is intended to include any deductible amounts."

Where the offer is intended to include any deductible amounts other provisions in the rule apply including CPR r.36.22(6) which stipulates:

> "Subject to paragraph (7), the Part 36 offer must state—
> (a) the gross amount of compensation;
> (b) the name and amount of any deductible amounts by which the gross amount is reduced; and
> (c) the net amount of compensation."

CPR r.36.22(7) confirms:

> "If at the time the offeror makes the Part 36 offer, the offeror has applied for, but has not received, a certificate, the offeror must clarify the offer by stating the matters referred to in paragraph (6)(b) and (c) not more than 7 days after receipt of the certificate."

Identification of the net sum, one way or another, is important because CPR r.36.22(8) provides:

> "For the purposes of rule 36.17(1)(a), a claimant fails to recover more than any sum offered (including a lump sum offered under rule 36.6) if the claimant fails upon judgment being entered to recover a sum, once deductible amounts identified in the judgment have been deducted, greater than the net amount stated under paragraph (6)(c)."

Defendant's offers

CPR r.36.6 confirms a Pt 36 offer by a defendant to pay a sum of money must be an offer to pay a single sum and that an offer including an offer to pay all or part of the sum at a date later than 14 days following the date of acceptance will not be treated as a Pt 36 offer unless the offeree accepts the offer. The latter provision protects, in particular, a claimant from arguments that because the offer failed to comply with the terms of CPR Pt 36 other provisions in the rule, such as the deemed costs order on acceptance, would not apply.

Time

CPR r.36.7 confirms a Pt 36 offer can be made at any time and will be made when served on the offeree (service being governed by the terms of CPR Pt 6).

Reviewing offers

An offeree will usually want to carefully review any offer which makes reference to CPR Pt 36, to establish whether the offer does indeed comply with the rules on form and content as well as assessing the terms

of the offer. That is important because of the significant differences between an offer to which the terms of CPR Pt 36 apply and any other offer, to which the general law of contract will apply.

Clarifying, withdrawing and changing offers

CPR rr.36.8–36.10 deal with clarifying, withdrawing and changing offers.

Clarification

CPR r.36.8 now deals with clarification of Pt 36 offers.

Withdrawing or changing offers in the relevant period

Specific provision is now made for the withdrawal or changing of a Pt 36 offer within the relevant period, by CPR r.36.10. This rule prevails over the more general provisions allowing offers to be withdrawn or changed found in CPR r.36.9. Under this rule there is now a sequence of events.

- If the offeror serves notice of withdrawal or change within the relevant period that notice will have effect, on expiry of the relevant period, unless the offeree has then served notice of acceptance.
- If the offeree does serve notice of acceptance that will take effect unless the offeror applies to the court for permission to withdraw or change the offer within seven days (or, if earlier, before the first day of trial).
- When application is made the court may give permission for the offer to be withdrawn or changed "if satisfied that there has been a change of circumstances since the making of the original offer and that it is in the interests of justice to give permission".

This test very much accords with the approach taken in *Evans v Wolverhampton Hospitals NHS Foundation Trust*.[21]

Withdrawing offers (time-limited offers?)

CPR r.36.9 confirms a Pt 36 offer can only be withdrawn if the offeree has not previously served notice of acceptance. An offer is withdrawn by serving written notice of withdrawal which will take effect when served, subject to CPR r.36.10 where this is within the relevant period. After the expiry of the relevant period an offer can be withdrawn without permission from the court.

CPR r.36.9(4)(b) contains a new provision allowing an offer to be automatically withdrawn in accordance with its terms. It is important to note that this provision does not validate a time-limited offer, in the sense of an offer that will lapse after the stipulated period of time expires. That would present difficulties because of the potential for an offer not formally withdrawn to still carry potential costs consequences yet not be "on the table". Hence in *C v D* Rix LJ held:[22]

> "It is true that Part 36 does not contain an express exclusion of a time limited offer. However, the essence of the matter is that a Part 36 offer, to have effect in terms of costs consequences after trial, has to be an offer which has not been withdrawn, but has remained on the table. The initial offer has to specify a period of at least 21 days during which the defendant remains liable for the claimant's costs until acceptance (rule 36.2(2)(c) and rule 36.10(1)). The offer cannot be withdrawn within that period without the permission of the court (rule 36.3(5)). After that period has expired, the offeror

[21] *Evans v Wolverhampton Hospitals NHS Foundation Trust* [2014] EWHC 3185 (QB); [2015] 1 All E.R. 1091.
[22] *C v D* [2011] EWCA Civ 646; [2012] 1 W.L.R. 1962.

> can withdraw the offer only by serving notice of withdrawal on the offeree (rules 36.3(6) and (7)). In the absence of withdrawal, the offeree can accept the offer at any time (rule 36.9(2)). The language of that rule's 'unless the offeror serves notice of withdrawal on the offeree' states a pre-condition which has to be fulfilled in order to prevent the offeree having the right to accept 'at any time'. That critical rule is made subject to a few limited exceptions (rule 36.9(3)), one of which is where the trial has commenced, but the expression of those exceptions only serves to emphasise that, in the ordinary way, unless the offer has been withdrawn before the expiry of the relevant period with the permission of the court, or the offer has been withdrawn after the expiry of that period by the service of a written notice of withdrawal, there is no room for an offer which is neither withdrawn before or after the expiry of the relevant period, but lapses as a matter of its own terms."

All the new rule permits is for a party to expressly give notice, in advance, of withdrawal provided that is contained in the terms of the offer. Crucially on withdrawal of a Pt 36 offer the usual costs consequences following judgment, now found under CPR r.36.17, will not apply (see CPR r.36.17(7)(a)).

This may be a useful provision for a party happy to hold an offer open, even though only for a defined period, for at least 21 days. Otherwise the provision may not be of much utility. Care will be required to ensure notice of withdrawal, within the terms of the offer, do not prevent that offer being open for the necessary relevant period.

Changing offers

The general rule is, again, found in CPR r.36.9. That allows, provided the offeree has not previously served notice of acceptance and once the relevant period has expired, an offer to be changed, the change taking effect when written notice is served. If the offeror wishes to change the offer, so that it is less advantageous to the offeree, within the relevant period the terms of CPR r.36.10 will apply, and the same procedure followed as when the offeror wishes to withdraw the offer during the relevant period.

CPR r.36.9(5) confirms that if an offeror changes the terms of a Pt 36 offer to make that offer more advantageous to the offeree that will not be treated as withdrawal of the original offer but the making of a new Pt 36 offer on the improved terms, with the claimant having a "relevant period" in which to accept the offer. The rules do not deal expressly with the consequences of changing an offer so it is less advantageous to the offeree. It seems likely the approach in *Burrett v Mencap Ltd*,[23] which was reviewed by the last article in this series, would be followed.

Following any preliminary trial it will be important, within the seven-day window provided for in CPR r.36.12, for the offeror to make a decision on whether to change or withdraw any Pt 36 offer made on an issue that has yet to be decided.

Accepting offers

CPR rr.36.11–36.15 deal with accepting offers.

General provisions

General provisions relating to acceptance of Pt 36 offers are now set out in CPR r.36.11. This makes no changes of note to the existing version of the rule.

[23] *Burrett v MENCAP Ltd*, unreported, May 14, 2014, Northampton CC.

Split-trial cases

CPR r.36.12 does, however, deal expressly with the potential problem of Pt 36 offers made in cases where there is a split trial. Sensibly, to avoid arguments about whether an offer survives such a trial, the new rule makes express provision to deal with this situation.

- If an offer relates only to parts of the claim or issues already decided such an offer can no longer be accepted after trial of a preliminary issue.
- Any other Pt 36 offers cannot be accepted earlier than seven clear days after judgment is given or handed down in such a trial, which affords the offeror a window to withdraw or change the offer which seems only appropriate given that the determination of the preliminary point may have a bearing on the appropriate terms for settlement of the remaining issues.

Costs consequences on acceptance

The well-known costs consequences applicable on acceptance of a Pt 36 offer, currently set out in CPR r.36.10, will now be found in CPR r.36.13. There is still a deemed costs order, now under CPR r.36.13(1), where an offer is accepted within the relevant period but that is now subject to the exceptions found in CPR r.36.13(2) and (4) which are as follows.

- Where a defendant's Pt 36 offer relates to part only of the claim (and when serving notice of acceptance the claimant abandons the balance of the claim).
- Where a Pt 36 offer which was made less than 21 days before the start of a trial is accepted.
- Where a Pt 36 offer which relates to the whole of the claim is accepted after expiry of the relevant period.
- Where (unless it is a Pt 36 offer by the defendant relating to part only of the claim and when accepting the claimant abandons the balance of the claim) it is a Pt 36 offer which does not relate to the whole of the claim, whenever that is accepted.

Where there is a deemed costs order in favour of the claimant CPR r.36.13(3) provides that, unless fixed, those costs are to be assessed on the standard basis if not agreed. In other circumstances CPR r.36.13(4) requires the liability for costs to be determined by the court unless the parties have reached agreement.

Where an offer is accepted after expiry of the relevant period CPR r.36.13(5) provides that, unless the court considers it unjust to do so, there will be an order that the claimant be awarded costs up to the expiry of the relevant period and the offeree pay the offeror's costs from that date up to the date of acceptance. CPR r.36.17(5) deals with what would be "unjust".

Pre-action costs

After confirming entitlement to the "costs of the proceedings" the rule now expressly adds that this includes recoverable pre-action costs but also makes express reference to CPR r.36.20 which deals with the costs consequences on acceptance of a Pt 36 offer where there are fixed costs in ex-protocol claims. There must be some concern that the express addition of the words "including their recoverable pre-action costs" may cause difficulties if a claimant accepts a pre-issue Pt 36 offer.

Before the addition of these words the word "proceedings" in this context had been given a broad definition. In *Solomon v Cromwell Group Plc* Moore-Bick LJ held:[24]

[24] *Solomon v Cromwell Group Plc* [2011] EWCA Civ 1584; [2012] 1 W.L.R. 1048.

> "It is quite true that the word 'proceedings' normally refers to proceedings already pending and Part 36 as a whole is primarily directed to that situation. In that context the extension of the Rules to enable Part 36 offers to be made before proceedings have been started might be considered to be somewhat anomalous, but the terms of Part 36 as a whole make it quite clear, in my view, that steps taken in contemplation of proceedings are to be regarded as 'proceedings' for the purpose of rule 36.10(1). That is the natural meaning of the language used and if it were not so the rules would be silent on the consequences of accepting a Part 36 offer made before proceedings had been issued. I think it unlikely that the Rule Committee simply overlooked that. It is far more likely that it intended the word 'proceedings' in rule 36.10(1) to be construed in the way I have indicated. I am fortified in that conclusion by the fact that a similarly broad approach to the construction of the word 'proceedings' was taken, albeit in another context, in *Crosbie v Munro* [2003] EWCA Civ 350, [2003] 2 All E.R. 856, paragraphs 26–33, citing *Callery v Gray (No.1)* [2001] EWCA 1117, [2001] 1 W.L.R. 2112. The effect of accepting a Part 36 offer made before a claim has been issued, therefore, is that the claimant is entitled to recover costs he has incurred in contemplation of the proceedings up to the date of acceptance insofar as they would have formed part of his recoverable costs if proceedings had already been issued."

The potential problem is the changing of context, by express reference to pre-action costs, so far as the word "proceedings" is concerned. Adopting a different interpretation to the meaning of "proceedings" would not, however, be a purposive approach to what is now, expressly, a self-contained code. The use of the word "recoverable" might raise issues in the event of late acceptance, pre-issue, by a claimant of a defendant's Pt 36 offer.

Late acceptance

Claimants need to think carefully about the question of late acceptance by the defendants of Pt 36 offers. If judgment is obtained the problem will be avoided, as then the costs consequences in favour of the claimant will follow unless that be "unjust". In other circumstances the claimant may be restricted to costs on the standard basis which does seem unfair, particularly if the claimant has now had to do much additional work.

Many defendants are presently warning claimants that if the claimant fails to beat a Pt 36 offer, or accepts late, the defendant will seek indemnity costs. There is no basis for any such argument under CPR Pt 36, hence indemnity costs would need to be claimed under CPR Pt 44 which, in turn, would mean late acceptance was "out of the norm". Claimants might regard such letters as helpful on the basis that if it could be said a decision to accept an offer late is something "out of the norm", justifying indemnity costs when these would not otherwise be available to a defendant, it is surely appropriate for the claimant to get indemnity costs, and other benefits, on late acceptance, given that this is the very incentive the claimant has to make a Pt 36 offer at all.

The terms of CPR r.36.13(4) appear to give the court an unfettered discretion on costs as there is no reference, unlike CPR r.36.13(3), to those costs being assessed on the standard basis. If, of course, a claimant obtained judgment that avoids these issues as the terms of CPR r.36.17(4) will then apply, unless that would be "unjust". The claimant can certainly obtain judgment if payment of sums due is not made within 14 days. There seems no reason why a claimant cannot obtain judgment on agreement of terms whether that be by acceptance of a Pt 36 offer or any other offer: *Ontulums v Collet*.[25]

[25] *Ontulmus v Collett* [2014] EWHC 4117 (QB).

ATE insurance in clinical negligence claims

The new rule says nothing about whether any entitlement to recover an insurance premium under The Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings (No.2) Regulations 2013 is deemed to be included as part of the "costs".

Stay

CPR r.36.14 deals with other effects of acceptance of a Pt 36 offer.

Multiple defendants

CPR r.36.15 deals with acceptance of a Pt 36 offer made by one or more, but not all, defendants.

Unaccepted offers

CPR r.36.16 deals with unaccepted offers, and the rules relating to restriction on disclosure of the fact and/or terms of such offers to the court. The fact that a Pt 36 offer has been made, and the terms of any such offer, must usually not be communicated to the trial judge until the case has been decided.

The term "decided" is defined, in CPR r.36.3, as meaning "when all issues in the case has been determined whether at one or more trials". However, CPR r.36.16(3)(d) provides an exception to the rule on disclosure where, although the case has not been decided, any part of, or issue in, the case has been decided and the Pt 36 offer relates only to parts or issues that have been decided.

CPR r.36.16(4) allows the trial judge, following a preliminary trial, to be told whether or not there are any Pt 36 offers other than those relating to the parts or issues of the case which have been decided. In these circumstances if no offers have been made by the defendant the claimant is likely to get a costs order there and then. If there have been Pt 36 offers the terms must not be communicated to the trial judge but the very fact there has been an offer means it is likely the court will defer making a ruling on costs so that when the claim as a whole is resolved the outcome can be compared with the offer and a decision on costs then made. The rule does not deal expressly with all the circumstances in which a judge who is not the trial judge may be referred to a Pt 36 offer or by whom such reference might be made.

Pre-CPR there was authority that the court might be referred to a payment into court (the precursor to a Pt 36 offer) on the hearing of an application for an interim payment and that such reference might be made by the offeree in the evidence fled in support of the application: *Fryer v London Transport Executive*.[26]

In *Fryer*, an interim payment of £15,000 had previously been made. There was before the Master an application for a further interim payment of £50,000 to include the interim payment of £15,000. In the affidavit in support of the application, there was reference to the fact that the sum of £48,194 had been paid into court. The Master declined to award an interim payment of £50,000 but he did make an interim payment totalling £20,000. The matter then came before Sir Douglas Frank, siting as an additional judge of the High Court, and he varied the order of the Master so as to permit an interim payment of £50,000. On appeal it was argued there was an error of law, in that the Master and the judge should not have been told about the payment into court and, in any event, the interim payment was excessive. Waller LJ in considering the provisions of Order 22, r.7 and Order 29, r.15 came to the conclusion that the application for the interim payment did not raise a question or issue as to damages in the way contemplated by the two rules. He expressed the view that whether or not an interim payment should be made and, if so, in what sum was not "an issue as to damages." Rather he said:

[26] *Fryer v London Transport Executive* , The Times, December 4, 1982, CA (Civ Div).

> "It is a question of what, in the interlocutory proceedings before the learned judge, should be done to meet the justice of the case."

Accordingly, he found that there was no error in law in the master and the judge being informed of the payment into court.

More recently in *Handyside v Lowery*[27] the claimant, on an application for an interim payment, wished to refer to a Calderbank offer made by the defendant, placing reliance in the decision in *Fryer*. Ruling that such reference could not be made by the claimant HHJ Freedman held:

> "It seems to me that if there were no material differences between a Calderbank offer and a Part 36 offer, there would be no purpose to be served in preserving the concept of a Calderbank letter. The party who makes a Calderbank offer risks not obtaining the benefits of making a Part 36 offer but, in my judgment, it is entirely reasonable that he should be entitled to another type of benefit which, in this instance, is the advantage of the offer not being made known to the court except when the question of costs comes to be considered."

Costs consequences following judgment

The current CPR r.36.14, dealing with costs consequences of Pt 36 offers following judgment, is largely replicated in the new CPR r.36.17 but this does contain an amendment which it is important to be aware of. It is also important to understand the context in which this amendment has been made. This rule deals with the situation where judgment is entered and either the claimant fails to obtain a judgment more advantageous than a defendant's Pt 36 offer or judgment against the defendant is at least as advantageous to the claimant as the proposals contained in the claimant's Pt 36 offer.

The new rule still provides that in relation to any money claim the term "more advantageous" means better in money terms by any amount however small as does "at least as advantageous". The new rule preserves the "additional amount" payable to the claimant, 10 per cent of damages up to a ceiling of £75,000 which was introduced as a result of the reforms following the Jackson Report, along with the other benefits of indemnity costs and enhanced interest. However, CPR r.36.17(4)(d) now limits the award of the additional amount to the time when the case has been "decided" and on the basis there has been no previous order under this sub-paragraph. That does not appear to rule out the award of an additional amount where, for example, a judgment which is at least as advantageous to the claimant as an offer on an issue such as liability, though that will have to be held over until the case as a whole has been "decided".

The change of significance is found in the new CPR r.36.17(5) which deals with the matters to be taken into account by the court when deciding whether it would be unjust to make usual costs orders where one party or another fails to obtain judgment which is more advantageous or at least as advantageous as an offer made by the other party. This provision requires the court to consider "whether the offer was a genuine attempt to settle the proceedings". The minutes of the CPRC suggest this is intended to deal with the "problem" created by *Huck v Robson*.[28]

In *Huck* the very argument advanced, by the defendant, was that the claimant had not made an offer in the sense of a genuine and realistic attempt to reach agreement. It is interesting to note that the judgment of Jonathan Parker LJ, setting out the background to the case, recorded that:

> "the judge commented that an 80:20 split might be realistic, and that he had even known of cases being resolved on the basis of a 90:10 split, but that he had never heard of a case being resolved at 95:5, and that he would regard such a result as 'nonsensical'."

[27] *Handyside v Lowery* , unreported, April 2, 2015, Newcastle upon Tyne District Registry.
[28] *Huck v Robson* [2002] EWCA Civ 398; [2003] 1 W.L.R. 1340.

Hence the judge at first instance ruled:

> "In my judgment 95% on the kind of value that we are talking about here was no kind of offer and it seems to me inevitable that the defendant would reject it. In those circumstances, in my judgment it would be unjust to award indemnity costs even though I have found that the claimant succeeds in the proportion of 100%."

In the Court of Appeal Jonathan Parker LJ was in the minority when he held:

> "… in order to qualify for the incentives provided by paragraphs (2) and (3) of the rule a claimant's Part 36 offer must represent at the very least a genuine and realistic attempt by the claimant to resolve the dispute by agreement. Such an offer is to be contrasted with one which creates no real opportunity for settlement but is merely a tactical step designed to secure the benefit of the incentives. That is not to say that the offer must be one which it would be unreasonable for the defendant to refuse; that would be too strict a test, and would introduce considerations of punishment and moral condemnation which (on the authority of *Petrotrade* and *McPhilemy*) are irrelevant in the context of paragraph (3) of rule 36.21. Indeed, the terms of the offer may reflect a degree of optimism and confidence on the part of the claimant/offeror. Provided only that the offer represents a genuine and realistic offer to resolve the dispute by agreement, it is for the claimant to decide at what level to pitch his offer. In some cases, an offer which allows only a small discount from 100 per cent success on the claim may be a genuine and realistic offer; in other cases, it may not. It is for the judge in every case to consider whether, in the circumstances of that particular case, and taking into account the factors listed in paragraph (5) of rule 36.21, it would be unjust to make the order sought."

The terms of CPR r.36.17(5) seem intended to pick up the language of Jonathan Parker LJ. It is worth noting, however, that all Jonathan Parker LJ concluded was that, on an appeal, it could not be said the judgment, which was a matter of discretion, could be impugned. In the majority Tuckey LJ held:

> "… I would however add that if it was self-evident that the offer made was merely a tactical step designed to secure the benefit of the incentives provided by the Rule (e.g. an offer to settle for 99.9% of the full value of the claim) I would agree with Jonathan Parker L.J. that the judge would have a discretion to refuse indemnity costs. But that cannot be said of the offer made in this case, which I think did provide the Defendant with a real opportunity for settlement even though it did not represent any possible apportionment of liability. I would therefore allow this appeal."

Schiemann LJ, agreeing with Tuckey LJ, concluded that what influenced the judge, erroneously, was that it was inevitable that if the case was fought the judge would not apportion liability 95:5 and therefore it was unjust for the consequences under CPR Pt 36 to follow but he added:

> "Nevertheless, I accept, like my Lords, that circumstances can exist where, notwithstanding that a claimant has recovered in full after making a Part 36 offer for marginally less, he will not be awarded costs on the indemnity basis. I do not consider that Part 36 was intended to produce a situation in which a claimant was automatically entitled to costs on the indemnity basis provided only that he made an offer pursuant to Part 36.10 in an amount marginally less than the claim."

The majority judgment in *Huck* could, therefore, be regarded as concluding, certainly on the facts of the case, an offer of 95 per cent on liability was a genuine offer, whilst an offer of 99.9 per cent would not have been. This view would accord with the approach that the amendments to CPR Pt 36 in 2015 are generally of a codifying nature.

CPR r.36.17(2) preserves the 2011 amendment to CPR Pt 36 by confirming, under the revised rule, the term "more advantageous" still means, in relation to a money claim or money element of a claim, "better

in money terms by any amount, however small". It would be unfortunate to introduce, in money claims, a distinction between offers expressed directly in monetary terms and those expressed indirectly, for example, a percentage offer on liability when that ultimately translates into monetary terms. Surely, with all such offers, the comparison must be in absolute terms between the offer and the judgment. Otherwise there is the risk of re-introducing all the uncertainty, and risk of disproportionate satellite litigation, which arose from the ruling in *Carver v BAA Plc*.[29]

However, a cautious offeror might take the view that, given all the judges involved in *Huck* appeared to have agreed this would have been a genuine attempt to resolve the dispute, that, in a case of this kind, an appropriate offer on liability, which would have to be regarded as a genuine attempt to settle the proceedings, would be 90 per cent. It is also worth considering, in this context, the comments of Briggs LJ in *PGF II SA v OMFS Co 1 Ltd* where he held:[30]

> "Part 36 is itself designed to encourage parties to make, and promptly to accept, realistic offers of settlement. It may fairly be described as lying at the interface between litigation and ADR, see paragraph 10.25 of the ADR Handbook. It is however also designed to provide parties with a measure of protection against costs risk: see *Matthews v Metal Improvements Co. Inc* [2007] EWCA Civ 215 and the *Hewitt* case (*supra*) at paragraph 75. It may for example be used by a defendant to encourage its opponent to accept a lower offer than its own valuation of the claim, on account of the claimant's limited appetite for costs risk. It is a procedure frequently used by parties determined to pursue litigation to trial, precisely for the purpose of obtaining one or more layers of insulation against the costs risk arising from an uncertain outcome."

Moreover, remembering that CPR Pt 36 is intended to promote parity between the parties it is difficult to see how an offer by the claimant to accept less than the court, in the event, awards is not a "genuine attempt to settle the proceedings" if the defendant is entitled to corresponding benefits even where the offer was for only marginally more than the claimant recovers.

Costs budgets

An issue addressed specifically by the new CPR Pt 36 is the problem of a party who fails to file a costs budget so, under the terms of CPR r.3.14, is treated as having filed a budget comprising only the applicable court fees, given that under CPR r.3.18, if the court then assesses costs on the standard basis the budget cannot be departed from unless there is good reason to do so. At face value this may conflict with the terms of both CPR r.36.13, dealing with costs on acceptance, and CPR.36.17, providing for costs on judgment.

For these reasons CPR r.36.23 expressly provides that for the purposes of CPR r.36.13(5)(b), which deals with the costs of the offeror after the expiry of the relevant period when a Pt 36 offer is accepted late, and CPR rr.36.17(3)(a) and 36.17(4)(b), which deal with costs where judgment is more advantageous or at least as advantageous as the relevant offer, "costs" will be 50 per cent of the costs assessed without reference to the limitation otherwise applied by CPR r.3.18, together with any other recoverable costs.

It is important to note, for the purposes of CPR r.36.17, that a claimant must obtain judgment, and this be "at least as advantageous" as the claimant's Pt 36 offer whilst a defendant may not need to obtain judgment, as the onus is on the claimant to "obtain a judgment more advantageous" than the defendant's Pt 36 offer. That could have the potential for some unfairness in the application of this rule unless the courts are ready to enter judgment for a claimant reflecting terms of agreement, as for example occurred in *Ontulmus v Collett*.[31]

[29] *Carver v BAA Plc* [2008] EWCA Civ 412; [2009] 1 W.L.R. 113.
[30] *PGF II SA v OMFS Co 1 Ltd* [2013] EWCA Civ 1288; [2014] 1 W.L.R. 1386.
[31] *Ontulmus v Collett* [2014] EWHC 4117 (QB)

A party seeking to recover costs in this way might, perhaps, need to consider giving an estimate of costs as the matter progresses, as might a party who hopes to obtain an order for indemnity costs and hence exceed the amount of the budget.

Costs consequences where Section IIIA Part 45 applies (fixed costs claims)

There are no material changes to what was, ultimately, the final version of s.II Pt 36 in the former version of the rule.

Transitional provisions

Transitional provisions are found in r.18 of The Civil Procedure (Amendment No.8) Rules 2014 which provides, so far as relevant to CPR Pt 36, as follows:

> "18.— (1) The amendments made by rules 7 to 9, 10(b), (d) and (e), 11 and 12 of and Schedule 1 to these Rules apply only in relation to Part 36 offers made on or after 6th April 2015, except as provided in paragraph (2).
>
> (2) Rules 36.3, 36.11, 36.12 and 36.16 in Schedule 1 to these Rules also apply in relation to any Part 36 offer where—
>
> (a) the offer is made before 6th April 2015; but
>
> (b) a trial of any part of the claim or of any issue arising in it starts on or after 6th April 2015.
>
> (3) The amendments made by rule 10(a)(i)(aa) and rule 10(f)(i)(aa) apply only to claims where the claim notification form is submitted on or after 6th April 2014."

Conclusion

CPR Pt 36 remains a vital procedural topic for both claimant and defendant practitioners. Experience from the last major change to the rule, in 2007, confirms the importance of keeping up to date with the terms of the rule in both practical use and advice given.

Whilst many of the revisions to the rule will be welcome, by giving greater clarity or dealing with problems that have arisen in practice, there is no doubt that other changes will generate future case law as the revised terms of CPR Pt 36 are considered by the courts and the role of the rule is tested in the new litigation era.

There is no doubt CPR Pt 36 still has a future.

Professional Regulation and Personal Injury Litigation: An Historical Perspective

Andrew Hopper QC*

Fees; Funding arrangements; Personal injury; Referrals; Solicitors Regulation Authority

Andrew Hopper QC examines the current issues facing PI lawyers in terms of professional regulation and traces the historic development of the Rules. He questions why PI lawyers seem to have borne the brunt of regulatory change and enforcement action and suggests the vexed issue of referral fees has been the catalyst for change.

ML

It used to be so simple. There was a rule—r.1 of the Solicitors' Practice Rules 1936—that prohibited solicitors from advertising or "touting". In fact, there were only four practice rules altogether at that time, if you excluded those concerned with waiver, interpretation and commencement:

1) no touting;
2) in no circumstances charge *under* the scale fees for conveyancing;
3) no fee-sharing with non-lawyers; and
4) no association with claims assessors, which were the ambulance-chasers of their day.

The rule against touting and advertising remained until 1987 when for the first time, under the Solicitors' Practice Rules of that year, solicitors were permitted to advertise or publicise their practices, provided they complied with the Solicitors' Publicity Code. The latter contained the still familiar prohibition of unsolicited personal visits and telephone calls. The same Rules, however, stated that "A solicitor may not enter into an arrangement with another person for the introduction of clients to the solicitor", though this did not apply to arrangements that solicitors might have amongst themselves. It must have dawned on the rule-makers fairly quickly that this provision, r.3 of the 1987 Rules, was unworkable and had the effect of prohibiting perfectly reasonable and proper arrangements, such as an understanding between a firm of solicitors and a firm of accountants for mutual recommendation.

Thus followed r.3 of the Solicitors' Practice Rules 1988 and the Solicitors' Introduction and Referral Code 1988, which permitted arrangements with introducers but sought to regulate them by stipulating, amongst other things, that "A solicitor must not reward an introducer by the payment of commission or otherwise", normal hospitality being excepted.

The problem with this was that it was unworkable for rather different reasons. It was entirely incapable of being policed or enforced. At that time I was regularly acting for the Law Society in investigating complaints against solicitors and in prosecuting in the Solicitors Disciplinary Tribunal and my experience, which I shared freely with those instructing me, was that r.3 and the associated Code were unenforceable. Complaints by conveyancing firms that their work dried up following the opening of a new firm, or new branch office of a rival, on the first floor of a building which happened to have an estate agency on the ground floor, and that "we all know what is happening" were incapable of being pursued; there was simply no evidence that was ever going to be discovered (at least in usable form in a tribunal operating on the criminal standard of proof). I did once acquire some evidence of payments to an estate agent, in an

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unguarded comment from the estate agent in question, but that was only going to be evidence against the solicitor if the estate agent repeated that in the witness box, which was singularly unlikely. In the same way we all "knew" what the going rate was to ensure a helpful telephone call from the cells officer to the firm which seemed to be acquiring the lion's share of the local criminal cases, but nothing was ever going to be proved. At that time of course there was no market in personal injury cases; no claims management companies or commercial introducers. Those clients simply came through the door on the basis of reputation or (non-commercial) recommendation. There was also legal aid, and, what is more, legal aid that paid reasonable rates without an excess of bureaucracy. Heady days indeed.

Then along came the Access to Justice Act 1999 and a complete upheaval of the personal injury claims process. Conditional fee agreements, after the event insurance and the concept that solicitors must stand the risk of claims failing; that solicitors and insurers should essentially fund personal injury litigation between them, so that public funding could be removed. I wonder whether the Ministry of Justice (or at the time successively the Lord Chancellor's Department and the Department of Constitutional Affairs) ever calculated the cost to the public purse of court time taken up in the "costs wars" that followed; *Callery v Gray*,[1] *Sarwar v Alam*,[2] the *Claims Direct*[3] and *Accident Group* test cases,[4] and their ilk. Surely someone would have worked out that loading the cost of personal injury litigation on to the shoulders (principally) of the liability insurers rather than the taxpayer was going to be a bit unpopular with the aforesaid insurers, and that insurers have a slight and occasional reluctance to parting with money, especially in favour of lawyers, and that this was going to cause a bit of a fuss.

The same dynamic changes had two particular further consequences; a realisation that to survive in the new world firms needed to be able to attract high volumes of client instructions. If they were to be carrying the risk of not being paid in unsuccessful claims they needed a spread of cases; a sufficiently large number that the occasional loss could be sustainable. And a realisation by those of an entrepreneurial mind that this meant that solicitors would pay for cases. A new marketplace was created. The regulatory background, however, remained the same; the unenforceable Introduction and Referral Code, by now the 1990 version but not materially different from that of 1988.

There was a different reason for the Code being unenforceable in relation to PI referrals, for which it was relatively easy to find evidence of payment (because brown envelopes wouldn't work). That was because no-one could reliably interpret it. As the Chief Executive of the Law Society was to say in a formal speech, and presumably not therefore in an unguarded moment:

> "The wording is too vague and too broad, making it difficult to interpret—and difficult, therefore, to enforce. Practitioners have interpreted it in a variety of ways. For example, some solicitors are making payments to introducers under the guise of 'marketing fees' in respect of various types of referral schemes, either in disregard of the Code or believing that their arrangements comply with the Code".

As a—surely unintended—by-product of an Act of Parliament a whole new industry was created. Claims management companies had arrived. That needed another Act of Parliament, six years later, the Compensation Act 2006, to ensure that they were regulated.

In the meantime, as a result of a collision between the Office of Fair Trading and the Law Society the professional ban on the payment of referral fees was abandoned in March 2004. In place of it there were requirements for transparency—for disclosure to clients of all payments to or financial arrangements with introducers regardless of whether they were "for" the referral. This remains the basis of the present system of regulation in respect of everything other than personal injury claims. But again there was a problem;

[1] *Callery v Gray (No.1)* [2002] UKHL 28; [2002] 1 W.L.R. 2000.
[2] *Sarwar v Alam* [2001] EWCA Civ 1401; [2002] 1 W.L.R. 125.
[3] *Claims Direct Test Cases, Re* [2003] EWCA Civ 136; [2003] 4 All E.R. 508.
[4] *Sharratt v London Central Bus Co Ltd (No.2)* [2004] EWCA Civ 575; [2004] 3 All E.R. 325.

the rules were exceptionally complex and burdensome. For example, disclosure had to be made "immediately upon receiving the referral and before accepting instructions to act". The natural and convenient time to inform the client was in the client care letter, but Law Society investigators asserted that this was too late because the firm had by then accepted instructions. Convoluted arrangements were artificially required for compliance purposes. In addition, solicitors were required to police compliance by the introducer and agreements had to contain specified terms. Introducers had to undertake to comply with the regulatory provisions. I was distantly involved in a case in which, in all seriousness, a referral agreement containing an "assurance" that the introducer would comply, was claimed to be in breach of the Introduction and Referral Code because the word "undertaking" was not used.

There was even a school of thought which maintained that as a last rear-guard action against the loss of the referral fee ban, to which most conveyancers in particular were committed, the Society had made the rules so complicated that it would be almost impossible to comply with them, which might have resulted in solicitors electing not to make the attempt. This of course failed altogether to take account of the ingenuity of practitioners.

Nevertheless, it was unsurprising that amongst the first initiatives of the Solicitors Regulation Authority, when it came into existence to the extent that it was identifiably different from the Law Society, was a decision to "crack down" on "toxic" referral arrangements. Nor was it surprising, after many months, when there was an SRA announcement that it had established that there was wholesale non-compliance. However, there was little or no sign of any regulatory or disciplinary action as a result of all this effort. The reason for this emerged months later and with rather less of a fanfare; it was true that there had been high levels of non-compliance, because of the burdensome and complex rules. But it was also true that it really did not make any difference. In particular clients were wholly unconcerned, not least because they had not been prejudiced by any such failures. In general clients cared little for commercial arrangements of this kind. What they wanted was that claims proceeded without undue delay, that there were good levels of communication, and that they were given good advice.

Some of the petty restrictions were removed on adoption of the 2007 Code of Conduct and others in the 2011 Code; a degree of stability was reached—but all too briefly before the referral ban in relation to personal injury cases was re-imposed by being wedged into the Legal Aid, Sentencing and Punishment of Offenders ("LASPO") Bill by late amendment; in such a manner that debate was very much curtailed. It does seem very odd that the practice which caused most annoyance to members of the public at the time and which appeared to give impetus to the debate—cold-calling by phone or text inviting claims from people who had never had an accident—was ignored. Indeed, proposed amendments introduced into the Bill during its passage through the House of Lords which would have tackled this issue were opposed by the Government and withdrawn.

Personal injury lawyers were now under assault from two angles; the threatened loss of a flow of work from introducers expecting to be paid, and the savage reduction in recoverable fees. It was not difficult to create or adapt business models which enabled money to flow from solicitors to introducers from which instructions could be derived, either from group marketing or recommendation schemes. Rather the problem was how to make a living from the work so acquired.

Looked at with an historical perspective one wonders what exactly personal injury lawyers had done to deserve all this.

We have moved from a relatively benign "no worse than anyone else" regulatory regime, to a situation in which personal injury lawyers were obliged to share the risks of litigation with their clients—to which the common law of champerty was directly inimical (we have travelled far in that respect and it was for this reason that conditional fee agreements had to be authorised by statute)—and then obliged to seek volume, to balance those risks, and then undermined in seeking to attract work, because all advertising or client-getting carries a cost, and recoverable fees are constantly eroded.

Against that hostile business environment personal injury claimant lawyers are without doubt the sector of the legal profession in which the Solicitors Regulation Authority ("SRA") shows most interest, ironically not only in relation to compliance with the rules but because there is a perception that the constant financial pressures create an environment in which there might be non-compliance, or businesses may become financially unstable, or both. Many PI claimant firms were targeted as part of the "financial stability project" of the SRA. Firms relying on legally aided criminal work were similarly "of interest". The logic underpinning this massive use of resources was by no means clear. It was not as if the SRA was capable of making anything better for a business which was struggling (rather it usually made things much worse), and it has generally not been the function of a regulator to prevent business failure. Although the party line is that this was worthwhile and that regulatory oversight had its successes, some insiders are privately prepared to admit that it was thoroughly misguided and a huge waste of time and money (not unlike the earlier "cracking down" on other issues attracting transient enthusiasm). The principal effect noted by regulatory lawyers like myself was that so much time, effort and staff commitment were diverted to the (dreadful abbreviation): "FinStab" that there seemed to be very few left to get on with the day job of routine regulation, and applications to the Solicitors Disciplinary Tribunal sank to an all-time low.

In truth the SRA has shown relatively little interest in policing the LASPO ban on referral fees, as such; rather it has considered the consequences of it in business terms, and whether firms have been placed in financial difficulties as a result. Questions have been asked as to how the ban is being complied with and legitimate "work-arounds" have been examined, but there are so many ways in which the ban can be properly avoided that this has not seemed to be a particular issue of concern.

It remains to be seen whether there is a legislative will to tighten up the terms of LASPO, but so far there has never been anything but a small number of conflicting rumours.

One wonders whether politicians really believe that all these legislative initiatives—including MedCo and the latest ban on inducements implemented by ss.58–61 of the Criminal Justice and Courts Act 2015—will truly cause motor insurance premiums to be substantially and permanently lowered. Having no personal act to grind (save sympathy for my many PI lawyer clients who are trying to get it right) I will cynically observe that I will believe it when I see it.

Pre-Action Protocols Update

John McQuater*

Clinical negligence; Personal injury claims; Pre-action protocols; Professional negligence

April 2015 saw the introduction of new protocols for personal injury, clinical negligence and professional negligence. John McQuater looks at the changes that have been introduced.

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Introduction

Revised and updated pre-action protocols came into effect on April 6, 2015 with little advance warning. The terms of the updated protocols are important for practitioners, whether acting for claimants or defendants, as there are some important changes and the protocols now have the potential for added "teeth".

The most significant pre-action protocols for readers of the Journal of Personal Injury Law are the Pre-Action Protocol for the Resolution of Clinical Disputes ("Clinical Negligence Protocol"), the Pre-Action Protocol for Personal Injury Claims ("PI Protocol") and the Pre-Action Protocol for Professional Negligence ("Professional Negligence Protocol"). This article will, accordingly, be confined to the terms of those updated protocols which will be considered in turn.

Pre-Action Protocol for the Resolution of Clinical Disputes

The original Clinical Negligence Protocol was introduced in 1998 ahead of, and anticipating, the CPR. The reason for the protocol was identified in para.1.1 of that protocol which stated:

> "The number of complaints and claims against hospitals, GPs, dentists and private healthcare providers is growing as patients become more prepared to question the treatment they are given, to seek explanations of what happened, and to seek appropriate redress. Patients may require further treatment, an apology, assurances about future action, or compensation. These trends are unlikely to change. The Patients' Charter encourages patients to have high expectations, and a revised NHS Complaints Procedure was implemented in 1996. The civil justice reforms and new Rules of Court should make litigation quicker, more user-friendly and less expensive."

The protocol continued:

> "It is clearly in the interests of patients, healthcare professionals and providers that patients' concerns, complaints and claims arising from their treatment are resolved as quickly, efficiently and professionally as possible. A climate of mistrust and lack of openness can seriously damage the patient/clinician relationship, unnecessarily prolong disputes (especially litigation), and reduce the resources available for treating patients. It may also cause additional work for, and lower the morale of, healthcare professionals."

On this basis the protocol went on to observe:

> "If that mistrust is to be removed, and a more co-operative culture is to develop—

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- healthcare professionals and providers need to adopt a constructive approach to complaints and claims. They should accept that concerned patients are entitled to an explanation and an apology, if warranted, and to appropriate redress in the event of negligence. An overly defensive approach is not in the long-term interest of their main goal: patient care;
- patients should recognise that unintended and/or unfortunate consequences of medical treatment can only be rectified if they are brought to the attention of the healthcare provider as soon as possible."

The protocol then set out a process, with timescales, which provided for disclosure of health records, obtaining expert evidence, a letter of claim and a response. Subsequently, some minor modifications were made to the protocol, in particular extending time for the healthcare provider to respond to the letter of claim from three months to four months.

2015 Protocol

The updated Clinical Negligence Protocol came into effect on April 6, 2015. This version preserves the basic structure, and timescales, of the existing protocol but brings it up to date, reflecting other procedural changes, and makes some other modifications. Whilst not changing the context in which the protocol was first introduced the updated version, sensibly, omits much of that background and focuses more on the detail of the information that should be exchanged between the parties.

Introduction

The scope of the protocol is confirmed by para.1.1 which states:

> "This Protocol is intended to apply to all claims against hospitals, GPs, dentists and other healthcare providers (both NHS and private) which involve an injury that is alleged to be the result of clinical negligence."

The protocol still expressly recognises the parties, as patient and healthcare provider, may well have an ongoing relationship and hence para.1.3 states:

> "It is important that each party to a clinical dispute has sufficient information and understanding of the other's perspective and case to be able to investigate a claim efficiently and, where appropriate, to resolve it. This Protocol encourages a cards-on-the-table approach when something has gone wrong with a claimant's treatment or the claimant is dissatisfied with that treatment and/or the outcome."

It would appear that the word "perspective" was chosen to emphasise the importance of trying to clarify exactly what each party is actually trying to achieve (for example whether an apology and/or an explanation is going to be just as important as financial compensation) and to identify any misunderstandings that might prevent resolution (for example, a patient's interpretation of an entry in the medical records may be completely different to that of the clinician who wrote it)".

Objectives

Paragraph 2.2 identifies specific objectives of the Protocol.

- Openness, transparency and early communication of perceived problems between patients and healthcare providers.

- To help healthcare providers identify whether notification of a notifiable safety incident has been, or should be, sent to the claimant in accordance with a duty of candour under s.20 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014.
- Prompt disclosure of information to encourage early resolution or narrowing of the issues in dispute so healthcare providers can identify cases whether an investigation is required and involve the NHS Litigation Authority or relevant defence organisation at an early stage.
- Exploring mediation before issue of proceedings.
- Identifying issues that may require a preliminary hearing.
- Supporting efficient management of proceedings where litigation cannot be avoided.
- Discouraging the prolonged pursuit of unmeritorious claims.
- Discouraging the prolonged defence of meritorious claims.
- Promoting rehabilitation.
- Encouraging an early apology where appropriate.

Compliance and sanctions

The protocol now expressly reflects the importance attached to compliance with its terms and deals with sanctions that may be imposed in the event of default.

Paragraph 1.4 confirms:

> "This Protocol is now regarded by the courts as setting the standard of normal reasonable pre-action conduct for the resolution of clinical disputes."

Consequently, para.1.7 explains:

> "Where either party fails to comply with this Protocol, the court may impose sanctions. When deciding whether to do so, the court will look at whether the parties have complied in substance with the Protocol's relevant principles and requirements. It will also consider the effect any non-compliance has had on any other party. It is not likely to be concerned with minor or technical shortcomings (see paragraph 4.3 to 4.5 of the Practice Direction on Pre-Action Conduct)."

The express reference now made to the Practice Direction—Pre-Action Conduct makes that Practice Direction even more significant and, accordingly, its terms will be returned to later in this article.

Whilst para.1.5 confirms the protocol "sets out the conduct that prospective parties would normally be expected to follow prior to the commencement of any proceedings", it is recognised that the timetable may need to be varied to suit the circumstances of the case. Consequently, the stages of the protocol, and associated timescales, need to be read with this in mind.

Records

The first stage of investigation remains the obtaining of health records by the patient.

The protocol now expressly provides that this stage may include a request for any relevant guidelines, analyses, protocols or policies and any documents created in relation to an adverse incident, notifiable safety incident or complaint. This should avoid arguments that such documents are only subject to disclosure when that stage of any court proceedings is reached.

The spirit, if not the letter, of the revised protocol should also embrace any documents which relate to the duty of candour (under the terms of the Care Act 2014 and the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014). There is no change to the standard forms seeking records or the 40-day time limit.

The protocol, anticipating model directions given in most clinical negligence claims, now expressly provides, in para.3.5, that:

> "At the earliest opportunity, legible copies of the claimant's medical and other records should be placed in an indexed and paginated bundle by the claimant. This bundle should be kept up to date."

The protocol still requires the healthcare provider to explain quickly any problem in disclosure of records within 40 days but now goes on to state in para.3.7 that:

> "If the defendant fails to provide the health records or an explanation for any delay within 40 days, the claimant or their adviser can then apply to the court under rule 31.16 of the Civil Procedure Rules 1998 ('CPR') for an order for pre-action disclosure. The court has the power to impose costs sanctions for unreasonable delay in providing records."

Paragraph 3.8 deals with additional relevant health records required from a third party. These should be requested by the claimant. The protocol specifically provides that third party healthcare providers should co-operate and refers to CPR r.31.17 where third party disclosure is required.

Other information

Paragraph 3.4.2 confirms that the claimant may, in addition to seeking records, make a request under the Freedom of Information Act 2000.

Rehabilitation

The need to consider rehabilitation at the earliest opportunity is now expressly reflected in the protocol, at para.3.9. Accordingly, this protocol now reflects the importance attached to rehabilitation in the PI Protocol. There is a link through to the Rehabilitation Code. That code is under review so the link will be updated with any revised version for continued ease of reference where the protocol is accessed electronically.

Letter of notification

Paragraph 3.10 introduces a new stage to the protocol, the letter of notification. The protocol gives guidance on the use and significance of any letter of notification.

- The letter is not mandatory but may be sent by the claimant on receipt of initial supportive expert evidence.
- As well as prompting an acknowledgement, within 14 days, identifying who will be dealing with the matter the sending of a letter of notification will require the defendant to consider whether to commence investigations and to pass any information to the claimant which might narrow the issues.

The advantage, to the claimant, of sending a letter of notification is that this may mean it is more difficult for the defendant to seek an extension of time, beyond four months from the letter of claim, if no initial investigation followed the letter of notification. For the defendant receipt of this letter is confirmation that this is a case which will require resources to be deployed for the purposes of investigation, if that has not already been done.

A template letter of notification is found in annexe C to the protocol, confirming that only limited information will be provided at this stage. Care may be required in the event the defendant makes an

admission of liability in response to a letter of notification as, technically, that would not be a letter of claim for the purposes of CPR r.14.1A.

Letter of claim

The letter of claim remains an important stage of the protocol. Paragraph 3.16 provides that the letter of claim should still contain:

- a clear summary of the facts (including alleged adverse outcome);
- the main allegations of negligence;
- a description of the claimant's injuries (and present condition and prognosis); and
- an outline of the financial loss incurred (with an indication of heads of damage and scale of loss unless impracticable).

Paragraph 3.16 now also provides that the letter of claim should confirm the method of funding and whether any funding arrangement was entered into before April 2013. This provision reflects legal aid regulations, if the claimant is legally aided, and the CPR and Costs Practice Direction as in force on March 31, 2013 (which still apply, under the transitional arrangements, to a claim funded by a "pre-commencement funding arrangement").

If the claim is funded by a conditional fee agreement made on or after April 1, 2013 but the claimant will seek to recover part of an ATE insurance premium, in accordance with the Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings (No.2) Regulations 2013, it may still be necessary for notice of funding to be given and that will, in any event, ensure the protocol is complied with. Consequently, notice of issue or notice of funding, where appropriate, ought to suffice to comply with this requirement. Usually, in other situations, it will not be necessary to give details of the funding arrangements made.

Paragraph 3.16 also stipulates the letter of claim should contain the discipline of any expert from whom evidence has already been obtained. It is notable this requires provision of the "discipline" not the "identity" of the expert. Relevant disciplines, at this stage, are likely to be those dealing with breach of duty and causation. Indeed, the claimant may have carried out only limited investigations into quantum at this stage which was accepted as appropriate, and amounting to compliance with the protocol, in *Thompson v Bruce*.[1]

Offers

Paragraph 3.21 confirms that at the stage of the letter of claim the claimant may want to make an offer to settle. This paragraph now expressly contemplates an offer on liability as well as an offer to settle the whole claim. That reference to offers on liability in the protocol, and for such offers to be made under Pt 36, endorses the view these are appropriate in clinical negligence claims, even though there may still be issues about causation, and that such offers should thus have potential for carrying the usual costs consequences. Consequently, it is surely inappropriate to treat any such offer as not being a genuine attempt to resolve the claim, so the consequences provided for by Pt 36 would be "unjust", when expressly envisaged by the protocol.

In the event of an offer to settle the whole claim the protocol suggests that should generally be supported by a report dealing with condition and prognosis and a schedule of loss with supporting documentation. The protocol recognises, however, such documentation should not be necessary where there is no significant continuing injury and/or the claim is of low value. That acknowledges the sense of providing an early letter of claim, with offer to settle, in a case of modest value, before significant costs have been incurred.

[1] *Thompson v Bruce* [2011] EWHC 2228 (QB).

Whilst the protocol suggests possibly including any costs incurred to date care is necessary to ensure that such information, if given, is purely for clarification and not regarded as part of the offer, as that would then be a term on costs which might invalidate the offer under Pt 36: *Mitchell v James*; *Shepherd Investments Ltd v Walters*.[2]

Letter of response

Paragraph 3.24 deals with the letter of response and identifies both timescale the matters that this letter should deal with.

- The letter should be sent within four months of the letter of claim.
- If the claim is admitted the response should say so in clear terms.
- If only part of the claim is admitted the letter should make clear which issues of breach of duty and/or causation are admitted and which are denied and why.
- The letter should state whether it is intended that any admissions will be binding.
- If the claim is denied the letter should include specific comments on the allegations of negligence and if a chronology of relevant events has been provided, and is disputed, the defendant's version of those events.
- If supportive expert evidence has been obtained the letter should identify which disciplines have been relied upon and whether they relate to breach of duty and/or causation.
- The letter should indicate whether the defendant requires copies of any relevant medical records obtained by the claimant.
- The defendant should provide with the letter copies of any additional documents relied on, such as an internal protocol.
- If the healthcare provider is not indemnified by the NHS the letter should give details of the relevant indemnity insurer.
- The letter should inform the claimant of any other potential defendants to the claim.

Consequently, there are some additional useful provisions, particularly that the defendant give information on expert evidence and relevant insurance cover.

The new protocol replicates the provision, in the 1998 protocol, that the response state whether it is intended that any admissions be binding. However, the original protocol pre-dated the amendment to the CPR when pre-action admissions were introduced by the new CPR r.14.1A. That provides admissions made in response to a letter of claim will be binding, unless the party to whom the admission was made agrees otherwise or the court gives permission for the admission to be withdrawn. The terms of the CPR should prevail where there is a "pre-action admission" for the purposes of CPR r.14.1A.

Paragraph 3.26 confirms, once again, that if the claimant has made an offer to settle the defendant should respond to that offer in the letter of response and may want to make an offer which it is envisaged will be in accordance with CPR Pt 36. There is, curiously, a reference to giving details of costs when, at least at this stage, such costs may not be recoverable. Nevertheless, as the protocol provides that this information be given, it may be sensible to ensure this is given in appropriate cases.

If an extension of time, to the four-month period from the letter of claim, is required a request should be made as soon the defendant becomes aware that will be required, and in any event within four months.

Paragraph 3.27 allows the parties if they wish to explore the possibility of resolution with no admission on liability to agree a reasonable timescale for that to be investigated. There may be occasions when exploring settlement with no admission is appropriate but usually the claimant will want to see a decision

[2] *Mitchell v James (Costs)* [2002] EWCA Civ 997; [2004] 1 W.L.R. 158; *Shepherd Investments Ltd v Walters* [2007] EWCA Civ 292; [2007] C.P. Rep. 31.

on liability from the defendant to know how the case stands and to ensure that, where possible, this issue is disposed of. Accordingly, this provision may be of most significance in a low value claim where the focus is on early, and proportionate, resolution and a formal decision on liability may not be necessary for that purpose.

Paragraph 3.28 expressly provides that where no agreement is reached on liability the parties should discuss whether the claimant should start proceedings and the court be invited to direct an early trial of a preliminary issue whether that be breach of duty and/or causation. This appears to endorse the appropriateness of a split trial where liability is an issue in a clinical negligence claim.

Paragraph 3.29 states that, on receipt of the letter of response, if the claimant is aware there may be a delay of six months or more before deciding if, when and how to proceed then the claimant should keep the defendant informed generally.

Experts

Section 4 of the protocol deals with experts, recognising the need for expert evidence on a number of issues:

- breach of duty;
- causation;
- condition and prognosis; and
- valuing aspects of the claim.

ADR

Section 5 of the protocol deals with ADR, identifying the need to consider a number of different potential methods which are listed:

- discussion and negotiation;
- mediation;
- arbitration;
- early neutral evaluation; and
- Ombudsman schemes.

Paragraph 5.4 provides that if court proceedings are issued the parties may be required to provide evidence that ADR has been considered and that, whilst recognising a party cannot be forced to enter any form of ADR, silence in response to an invitation to participate in ADR may be considered unreasonable and lead to the court ordering that party to pay "additional court costs".

Stocktake

Section 6 is a new part of the protocol providing, in line with the PI Protocol, for a stocktake.

- The parties should review their positions before proceedings are issued.
- If proceedings cannot be avoided the parties should continue to co-operate and prepare a chronology of events identifying facts or issues that are agreed and those that remain in dispute as well as procedural directions for efficient case management.

The stocktake is a useful opportunity for the claimant to check that the defendant has complied with the protocol, and particularly the requirements found in para.3.24 concerning the letter of response. If not, the claimant may wish to remind the defendant about outstanding matters and of the potential consequences of failing to comply with the protocol under the terms of the Practice Direction—Pre-Action Conduct.

Wales

The protocol is part of the Law of England and Wales although, of course, the introduction of the Redress Scheme means that many Welsh claims will be dealt with in a different way to English claims. What might be regarded as developing Welsh jurisprudence is not yet reflected in the protocol but may yet be dealt with by a future amendment.

The Pre-Action Protocol for Personal Injury Claims

The PI Protocol, like the Clinical Negligence Protocol, was introduced in 1998 anticipating the introduction of the CPR. The protocol, as it originally read, had a number of key features including the following.

- A letter of claim, providing the defendant with information necessary to decide liability.
- A time limit for the defendant to make a decision on liability.
- Provision, where liability was admitted, for the defendant to be given information on quantum and then have a window in which to settle the claim, so as to avoid court proceedings.
- Clear timescales which if not met by the defendant would justify the claimant issuing court proceedings.
- Better provision of information, where liability was not admitted, so the claimant could properly assess the merits of any defence before incurring the costs of court proceedings, including reasons for any denial as well as any alternative case and the provision of documents relevant to liability.
- Joint selection of experts (reflecting the intention of the Practice Direction—Pre-Action Conduct that the parties should try to agree a single expert, even if not a joint expert, wherever possible).
- Encouragement towards ADR.

2015 Protocol

The revised PI Protocol, again effective from April 6, 2015, contains a number of important changes to the original protocol.

Linkage with the RTA Protocol and the EL/PL Protocol

The PI Protocol remains significant even with the subsequent introduction of the portal protocols, namely the RTA Protocol and the EL/PL Protocol. These new protocols are collectively now described in the PI Protocol as the "low value protocols" (although it is important to remember where claims start will not just depend on value but also the type of claim).

Claims may enter the PI Protocol in a number of ways:

- Claims which enter, but then leave, a low value protocol will usually go into the PI Protocol.
- Claims which might be suitable for a low value protocol in terms of value but are otherwise excluded will enter the PI Protocol from the outset.
- Clams which are likely to exceed the relevant upper limit of a low value protocol (that is potential multi-track claims) will go straight into the PI Protocol.

Paragraph 1.1.1 of the PI Protocol makes clear that its terms do not apply while a claim is proceeding under a low value protocol.

Starting the claim

How the claim starts within the PI Protocol will depend on whether the claim is an ex-low value protocol claim or a non-low value protocol claim.

Ex-low value protocol

Paragraph 1.3.1 of the PI Protocol confirms that where a claim exits a low value protocol because the defendant considers there is inadequate mandatory information in the claim notification form ("CNF") the claim will proceed on the basis the claimant must send a letter of claim in accordance with the PI Protocol.

In other circumstances para.1.3.2 confirms the claim will proceed under the PI Protocol on the basis the CNF will be treated as the letter of claim. The claimant may wish, even if a letter of claim is not required, to raise matters with the defendant that would have been raised in the letter of claim including disclosure, if liability is not admitted, and arrangements for expert evidence.

Paragraph 1.2 of the PI Protocol confirms that claims which exit a low value protocol prior to stage 2 will proceed on the basis of the terms of the protocol from which the claim has exited as well as the terms of the PI Protocol. The low value protocols specifically identify circumstances in which Pt 7 proceedings can be commenced, so nothing in the PI Protocol should be seen as undermining those provisions.

Where the low value protocol does not expressly provide for Pt 7 proceedings to be issued, the terms of the PI Protocol will determine when that is appropriate (important in such cases as these are likely still to be subject to fixed costs and hence a very important consideration is when the next stage in the costs matrix can be reached).

Non-low value protocol

If a claim is not within the scope of either the RTA Protocol or the EL/PL Protocol, but is covered by the scope of the PI Protocol, a letter of claim, complying with the terms of the PI Protocol, should be sent at the outset.

Letter of claim and response

There may be a letter of claim sent under the PI Protocol or, given the terms of the protocol, a CNF sent under one of the low value protocols which will stand as the letter of claim. Unless there has been an "insurer response", whilst the claim is still in one of the low value protocols, the defendant will need to provide a response to the letter of claim, or CNF standing as a letter of claim, which accords with the requirements of the revised PI Protocol.

Letter of claim

A revised template for the letter of claim is found in the protocol at Annex A. Using this template should ensure the requirements of a letter of claim, set out in paras 5.1–5.4, are complied with. Key features of the protocol requirements for the letter of claim include the following.

- The letter does not require the claimant's national insurance number to be given, many practitioners have already been holding back details of this kind until a letter has been received from the relevant insurer to minimise the risk of identity theft.
- The letter should state the functional limitations of the injury suffered by the claimant, as that will help the defendant allocate the claim to the appropriate level of claims handler and also help assess rehabilitation needs.

- The letter should now identify the documents, from the standard lists in the protocol, considered relevant, which is intended to avoid the defendant having to spend time tracking down unnecessary documents to provide by way of disclosure.

Letter of response

The PI Protocol now provides a template letter of response. That is helpful as it should ensure consistency of approach by insurers, in the same way that defendants have had a consistency of approach from use of the standard letter of claim by claimants. Furthermore, a standard format of response will allow any deficiencies to be more readily identified and ensure the claimant knows exactly what the defendant's stance on liability really is.

There are some important points to note from the template letter of response.

- The response should now help identify any parties against whom the claim should be directed. This is important in the era of QOCS, given the risk for a claimant who succeeds against one defendant but fails against another defendant.
- The letter provides standard wording, reflecting the terms of the protocol, so there is no ambiguity about the nature of any admission of liability.
- There is reference, in admitted cases, to information about medical experts the claimant proposes to instruct. It is worth emphasising this does not change the current practice of the claimant nominating a number of experts for the purpose of joint selection, without being obliged to identify which experts are instructed.

Liability and quantum

The PI Protocol, like the low value protocols, ensures that a defendant who narrows the issues by admitting liability will be given the opportunity to settle the claim, because the claimant must then provide information on quantum and give the defendant reasonable time to put forward proposals for settlement.

Liability

Paragraph 6.3 provides that the defendant will have a maximum of three months from the date of acknowledgement of the letter of claim (or of the CNF where the claim commenced in a low value protocol) to investigate and no later than the end of that period must reply stating whether liability is admitted.

Picking up the clarity of the approach to admissions of liability in the low value protocols the PI Protocol now states that an "admission of liability" means:

- the accident was caused by the defendant's breach of duty;
- the claimant suffered loss (which clearly means loss in the sense of some damage which is caused by the breach of duty); and
- there is no defence under the Limitation Act 1980.

If the defendant denies liability (the protocol goes on to state "and/or causation" but this really amounts to the same thing) the defendant must give disclosure of documents material to the issues. The claimant, anticipating the possible need for disclosure, should have identified documents from the standard lists in the letter of claim.

The protocol, in para.6.6, expressly refers to CPR r.14.1A and gives a reminder that an admission by the defendant may, as a result of this provision in the CPR, be binding.

Quantum

Paragraph 8.1.1 provides that where a defendant admits liability (which the protocol emphasises means a breach of duty that must have caused some damage) the claimant should send to the defendant:

- any medical reports obtained under the protocol on which the claimant relies; and
- a schedule of any past and future expenses and losses, even if the schedule is necessarily provisional.

The reference to a provisional schedule is new, and helpful, recognising a definitive schedule may not be possible at this stage. The schedule should, nevertheless, contain as much detail as reasonably practicable and identify those losses which are ongoing as well as indicating whether the schedule is likely to be updated before the case is concluded. In many cases a provisional schedule, identifying figures for past losses to date and estimating broad heads of likely future loss, should suffice at this stage.

Paragraph 8.1.2 requires the claimant to delay issuing proceedings for 21 days from the disclosure of medical evidence and schedule (unless necessary for limitation reasons).

Paragraph 10.1 clarifies an ambiguity in the former version of the protocol by confirming the claimant will send the defendant a schedule only if the defendant admits liability. There is, once again, recognition that the schedule may be provisional.

Negotiate or issue?

The claim may have left the RTA Protocol or the EL/PL Protocol in circumstances where that protocol confirms Pt 7 proceedings can be issued, which is reflected by the terms of para.1.2 of the PI Protocol. In other circumstances the claimant will need to have regard to the terms of the PI Protocol and the Practice Direction—Pre-Action Conduct to determine the stage at which Pt 7 proceedings can be commenced.

Disclosure

Paragraph 7.1 of the PI Protocol deals with disclosure of documents by the defendant, with para.6.4 confirming relevant documents should be disclosed where liability is denied.

Annex C contains non-exhaustive lists of documents likely to be relevant in different types of claim. These lists, as well as giving guidance about the scope of pre-action disclosure, are highly relevant to the scope of standard disclosure in any subsequent proceedings, given that CPR r.31.6(c) includes within that definition documents a party is required to disclose by a relevant practice direction (and the PI Protocol is supported by the Practice Direction—Pre-Action Conduct).

It is notable Annex C, as revised and updated, continues to include documents relevant to workplace health and safety regulations, confirming that the terms of the Enterprise and Regulatory Reform Act 2013 do not render those regulations irrelevant to EL claims brought under common law (as those regulations remain part of the criminal law they are likely to at least inform the nature and scope of the defendant's common law duty).

The protocol also now emphasises that the defendant is under a duty to preserve documents subject to disclosure and specifically identifies CCTV, observing that if documents are destroyed this could be an abuse of the court process. Defendants need to be very aware of this as a breach of this provision might, in an appropriate case, lead to an application by the claimant to strike out the defence (deploying arguments, now bolstered by the terms of the protocol, of the kind of advanced by the defendant in *Matthews v Herbert Collins & Sons)*.[3]

[3] *Matthews v Collins (t/a Herbert Collins and Sons)* [2013] EWHC 2952 (QB).

Experts

The PI Protocol continues to encourage joint selection of quantum experts and, on occasion, liability experts. The protocol now has the proviso that this is save for cases likely to be allocated to the multi-track. The claimant must, therefore, decide whether or not to nominate experts in such cases.

The court may, even if there has been joint selection, allow a further expert, in the same field of expertise, when giving case management directions. CPR r.35.4(3A), however, provides that where a claim has been allocated to the fast track permission for expert evidence will normally be given for evidence from only one expert on a particular issue. In such circumstances the "one expert" ought surely to be the jointly selected expert, where there has been such selection. Consequently, joint selection under the protocol may be significant.

The potential risk of nominating experts for the purposes of joint selection is that should the claimant then obtain, but not rely upon, evidence from a jointly selected expert the court may, as a condition of giving permission to rely on expert evidence when giving case management directions, impose a condition that the claimant waive privilege and produce the evidence of the jointly selected expert: *Edwards-Tubb v JD Weatherspoon Plc*.[4]

A further potential advantage of nominating experts for joint selection, even in a multi-track case, is that a court can take this into account in deciding whether the defendant reasonably requires expert evidence in the same field of expertise. Furthermore, nomination should fulfil any obligation to have considered the use of a jointly instructed expert.

Settlement

Paragraph 8.1.1 of the PI Protocol provides that where a defendant admits liability (and again the protocol expressly recites that this means breach of duty causing some damage) then, before proceedings are issued, the claimant should send any medical reports obtained under the protocol on which the claimant relies and a schedule of losses and expenses with as much detail as reasonably practicable, indicating whether the schedule is likely to be updated before the case is concluded.

Paragraph 8.1.2 provides the claimant should delay issuing proceedings for 21 days from disclosure of medical evidence and schedule so the parties can consider whether the claim is capable of settlement.

Paragraph 8.2 states that the parties should always consider whether it is appropriate to make a Pt 36 offer before issuing. As with the earlier version of the protocol the requirement is to "consider", rather than necessarily make, a Pt 36 offer at this stage.

Paragraph 9 deals specifically with ADR expressly identifying potential methods, and explaining what these mean, as the following:

- Discussions and negotiation (which may or may not include making Pt 36 offers).
- Mediation (a third party facilitating a resolution).
- Arbitration (a third party deciding the dispute).
- Early neutral evaluation (a third party giving an informed opinion on the dispute).

The protocol recognises that if proceedings are issued the parties may be required by the court to provide evidence that ADR has been considered.

Compliance and sanctions

Paragraph 1.5 of the PI Protocol confirms that where either party fails to comply with the terms of the protocol the court may impose sanctions and express reference is made to the terms of the Practice

[4] *Edwards-Tubb v JD Weatherspoon Plc* [2011] EWCA Civ 136.

Direction—Pre-Action Conduct. Accordingly, as with the Clinical Negligence Protocol, sanctions may be applied by the court in the event of non-compliance. A defendant who ignores a claim or fails to respond in accordance with the terms of the relevant protocol is now clearly at risk of sanctions being imposed.

Rehabilitation

The protocol continues to emphasise the importance of rehabilitation, particularly at an early stage.

Paragraph 4.1 provides that the parties should consider as early as possible whether the claimant has reasonable needs that could be met by medical treatment or other rehabilitative measures and should discuss how these needs might be addressed.

The protocol, like the Clinical Negligence Protocol, has, in electronic form, a link through to the Rehabilitation Code (which again will readily allow update as and when that code is changed).

Paragraph 4.4 confirms any immediate needs assessment report or documents associated with that obtained for the purposes of rehabilitation shall not be used in the litigation except by consent and any person involved in that assessment will not be a compellable witness at court.

The Pre-Action Protocol for Professional Negligence

A number of personal injury and clinical negligence practitioners may undertake professional negligence work and so need to be familiar with the terms of the Professional Negligence Protocol.

Paragraph 2 now describes the protocol as a "code of good practice" containing "the steps which parties should generally follow before commencing court proceedings in respect of a professional negligence claim".

Paragraph 3 confirms that, in these circumstances, the court must decide whether any sanctions should be imposed on a party as a result of substantial non-compliance.

Paragraph 6 deals with the letter of claim and has some new provisions.

- The letter of claim should now include any reasonable requests which the claimant needs to make for documents relevant to the dispute and which are held by the professional.
- The letter of claim should explain how the alleged error has caused the loss claimed, including details of what happened as a result of the claimant relying upon what the professional did or omitted to do and what might have happened if the professional had acted correctly.

If the professional considers the letter of claim does not comply with s.6 that should be stated as soon as reasonably practicable and the claimant informed of the reasons and what information the professional reasonably requires.

Key documents are now to be identified in the letter of response with copies enclosed.

A new section on documents encourages the parties to cooperate in the exchange of relevant information and documentation. ADR, in this protocol, is identified as including the following:

- mediation;
- arbitration;
- early neutral evaluation; and
- adjudication (an independent adjudicator providing the parties with a decision that can resolve the dispute either permanently or on a temporary basis pending subsequent court determination).

There is also now a stocktake provision in this protocol.

Practice Direction—Pre-Action Conduct

As the pre-action protocols now make express reference to this Practice Direction it is worth reviewing the main provisions. The Practice Direction—Pre-Action Conduct links compliance with the pre-action protocols to sanctions which may be applicable under the CPR, at the appropriate stage, in the event of default.

Paragraph 2.1 confirms the Practice Direction describes the conduct the court will normally expect of prospective parties prior to the start of proceedings.

Paragraph 4.1 is a reminder that, once proceedings have commenced, the extent of compliance with the protocol will be relevant to case management of claims, in accordance with CPR r.3.1, and to costs, under CPR r.44.3(5)(a).

The focus should, however, be upon compliance with the substance of the protocol rather than minor or technical shortcomings. Specific examples of non-compliance, which are more likely to attract sanctions, include the following:

- failing to provide sufficient information to enable the other party to understand the issues;
- failing to act within a time limit set out in the protocol;
- unreasonably refusing to consider ADR; and
- failing to disclose documents without good reason.

Accordingly, tactical manoeuvring about technical non-compliance, and efforts to try and show a failure to comply when the alleged failing can have had no significant effect, should be avoided.

It remains important, however, to highlight, and deal appropriately with, a material failure which does have consequences on the other party. This is also reflected in the general principles, set out in para.6, about the need for proportionality and to avoid the generation of unnecessary costs in relation to compliance with the Practice Direction.

Paragraph 4.6 of the Practice Direction specifically identifies sanctions the court may impose which include:

> "(1) staying (that is suspending) the proceedings until steps which ought to have been taken have been taken;
>
> (2) an order that the party at fault pays the costs, or part of the costs, of the other party or parties (this may include an order under rule 27.14 (2) (g) in cases allocated to the small claims track);
>
> (3) an order that the party at fault pays those costs on an indemnity basis (rule 44.3 (3) sets out the definition of the assessment of costs on an indemnity basis);
>
> (4) if the party at fault is the claimant in whose favour an order for the payment of a sum of money is subsequently made, an order that the claimant is deprived of interest on all or part of that sum, and/or that interest is awarded at a lower rate than would otherwise have been awarded;
>
> (5) if the party at fault is a defendant, and an order for the payment of a sum of money is subsequently made in favour of the claimant, an order that the defendant pay interest on all or part of that sum at a higher rate, not exceeding 10% above base rate, than would otherwise have been awarded."

If proceedings are started the claimant, to comply with para.9.7, should state in the claim form or particulars of claim whether the Practice Direction, and protocol, have been complied with.

Conclusion

The revised pre-action protocols bring these better into line with the current terms of the CPR. The terms of the protocols, particularly now there is direct reference to the Practice Direction—Pre-Action Conduct, are likely to be important in the future as the courts focus on the need for compliance. The amendments to the protocols are, therefore, of real importance to both claimant and defendant practitioners.

Online Dispute Resolution: Will the Talk Turn to Action?

Tim Wallis*

EU law; Online dispute resolution; Personal injury claims; Small claims

Tim Wallis reviews recent developments in ODR, considers whether they are relevant to personal injury practitioners and asks whether this is all "pie in the sky"—or something for us to build into our strategic forward planning.

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Introduction

In February 2015 the Civil Justice Council published *Online Dispute Resolution for Low Value Civil Claims*,[1] a radical report prepared by its Online Dispute Resolution ("ODR") Advisory Group. It is also known as the "Susskind Report" after its chief editor, Professor Richard Susskind. This report is but one of a number of ODR developments in recent months, so this seems a good time to carry out a review of ODR, to discuss the relevance of ODR for the PI practitioner and to consider the likelihood of various recommendations about ODR being implemented.

The Susskind Report has had its supporters and its critics. The Master of the Rolls has welcomed it, saying that it "… convincingly demonstrates one of the ways in which we should develop the justice system to make it more accessible and more efficient, speedy and affordable than it now is".[2]

Similarly, an HM Courts and Tribunals Service spokeswoman said:

> "We welcome the publication of this important and thought-provoking report. We agree that ODR is an important area and one that we are actively exploring in more detail in the context of the reform of court and tribunal services. We are keen to continue to engage with the ODR advisory group on its report and any future work that the Civil Justice Council may commission it to do."

One Law Society *Gazette* reader thought this was all a "no-brainer": "Anyone who hasn't seen this coming in the past 10 years should consider whether private practice is a good career path."[3]

Many suggested, however, that a lack of funding meant the Report's recommendations were destined for the long grass. Others were more sceptical still:

> "… The suggestion that a person who goes to the bother of issuing a claim will be happy for it to be resolved by a judge hiding behind a computer and rely on a 'facilitator' or indeed even pay a facilitator is frankly nonsense."[4]

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[1] ODR Advisory Group, *Online Dispute Resolution for Low Value Civil Claims* (February 2015). Court and Tribunals Judiciary, *https://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf* [Accessed July 21, 2015]. See also the supporting website with recorded interviews: *https://www.judiciary.gov.uk/publication-type/interviews/*.

[2] Lord Dyson, Master of the Rolls, "Delay too Often Defeats Justice" (April 22, 2015). Court and Tribunals Judiciary, *https://www.judiciary.gov.uk/wp-content/uploads/2015/04/law-society-magna-carta-lecture.pdf* [Accessed July 21, 2015].

[3] Tony Hatfield, "Readers' Comments" (February 16, 2015, 15.28). The Law Society Gazette, *http://www.lawgazette.co.uk/law/online-courts-will-cut-need-for-lawyers-it-guru/1/5046796.article?PageNo=1&SortOrder=dateadded&PageSize=10#comments* [Accessed July 21, 2015].

[4] Anonymous, "Readers' Comments" (February 16, 2015, 14.17). The Law Society Gazette, *http://www.lawgazette.co.uk/law/online-courts-will-cut-need-for-lawyers-it-guru/1/5046796.article?PageNo=1&SortOrder=dateadded&PageSize=10#comments* [Accessed July 21, 2015].

The writer asks the reader to keep in mind two questions when considering this review: Is it fanciful to suggest that the ODR plans considered below will come to fruition? Or is it more fanciful to suggest that they will not?

The IT and communications revolution

Just before coming to the recent ODR developments it is helpful to set them in context by noting some more general changes experienced by practitioners. As we all know, the whole litigation environment is subject to fast, ongoing and turbulent change. Jackson and LASPO are but recent initiatives following a long line of others. An example is alternative dispute resolution ("ADR"). This once wholly alien concept is becoming part of mainstream practice for many.

Also, our communications technology is also developing rapidly, so much so that it is changing our lives in respect of both work and leisure. We now, as a matter of course, conduct many of our daily communication functions and activities using tablets, smartphones and even smart watches. These mobile devices have only been available for a few years, but already more people access the internet by a mobile device then by a PC. The percentage of the population aged 14 years and over said to be online is 78 per cent.[5] According to US website *adweek.com*, 85 per cent of litigators maintain an electronic social network (eg LinkedIn) and 35 per cent of lawyers have obtained clients from such sources.

IT developments have had a significant impact on the following:

(1) The conduct of litigation (examples include electronic case management and practice management, the Claims Portal[6] and electronic time recording/capture).[7]

(2) The way we communicate with clients. Some clients might still receive an update on their claim by letter, but others might instead receive an email, an SMS text or a message via a client app.[8]

Many of us would prefer to avoid change, that is simply human nature, but the fact that many lawyers are prepared to embrace technology and change in litigation, rather than resist it, was apparent from the Hodge Jones and Allen report "Innovation in Law Report 2014".[9] Of those surveyed, 90 per cent agreed that the use of IT has delivered results in improved outcomes for clients, 57 per cent supported compulsory electronic communication of all documents in the court process and 50 per cent supported the use of virtual courts in certain circumstances. The innovative recommendations put forward by the HJA report included introducing online solicitor and barrister access to all information and documents relating to cases.

So, this is the environment in which the recent developments in ODR have taken place. One final point, before coming to the review of those developments is to consider what in fact people mean by the acronym ODR.

ODR defined

ODR is a form of dispute resolution which has arisen as a consequence of the recent, rapid development of, and the relationship between, ADR and IT. The growth of the internet has led to e-commerce, and businesses and consumers have become accustomed to carrying out business and other activities online and then to finding ways to resolve associated disputes online.[10]

[5] William H. Dutton, Grant Blank and Darja Groselj, *Cultures of the Internet: The Internet in Britain. Oxford Internet Survey 2013* (Oxford: Oxford Internet Institute, 2013): "In 2013, 78% of the UK population said that they use the Internet."

[6] *www.ClaimsPortal.org.uk* [Accessed July 21, 2015].

[7] For example: *www.rekoop.com* [Accessed July 21, 2015].

[8] For example: inCase App: *www.aequitaslegal.co.uk* [Accessed July 21, 2015].

[9] "Innovation in Law" (November 2014). Hodge Jones and Allen*http://www.hja.net/campaigns/innovation-in-law-report/* [Accessed July 21, 2015].

[10] An example is Nominet, the domain name registry company, which responded to conflict over names to be registered developed an online "Dispute Resolution Service". See *wwwNominet.org.uk* [Accessed July 21, 2015].

Online ADR already exists in various forms such as online mediation[11] and online arbitration.[12] Sometimes "ODR" is equated with online ADR, but that would be too restrictive as a definition, because ODR covers a greater range and depth of activities. ODR can be regarded as similar to disruptive technology because it is, at least in part, about changing how, where and with who dispute resolution works, not merely automating existing processes concepts.

ODR guru Colin Rule[13] suggests that ODR can be taken to mean any use of technology to complement, support or administer a dispute resolution process. As Table 1 shows, this definition is broad enough to include traditional dispute resolution supported by IT as well as online ADR. Some activities, such as online arbitration and interlocutory court hearings by telephone conference, are capable of being placed in more than one definition "box", so one person's ODR might be another's IT assisted litigation.

Table 1

	Offline	**Online**
Traditional	*Traditional dispute resolution*[14]	*e- Justice*[15]
ADR	e.g. court / arbitration	e.g. electronic court room
	Face to face ADR[16]	e.g. Money Claim Online
		ODR[17]
		e.g. online ADR
		e.g. automated negotiation

IT has the potential to play a much greater role in dispute resolution than merely providing assistance with communications. It can also provide systems, such as automated negotiation or other forms of artificial intelligence that do not require human intervention to operate. Neutrals in dispute resolution, such as a judge or a mediator, are sometimes referred to as the third party. The potential role for technology in providing both a communication environment and actively assisting in the dispute resolution process has been recognised by the suggestion that the technology be referred to as the "fourth party".[18]

Review of recent ODR Developments

Civil Justice Council Report "Online Dispute Resolution for Low Value Civil Claims"[19]

The Susskind Report calls for radical change, on the basis that the current court system is too costly, too slow and too complex, especially for litigants in person with small claims. The Report recommends the introduction of a new system, based on online dispute resolution, which would offer increased access to justice, a more user friendly service and a substantial saving in costs. The key recommendation is for a completely new internet-based service, not the current service with some IT bolted on.

The Report envisages a three-tier system which would employ both IT, in respect of communications, and dispute resolution techniques, to assist with early resolution of disputes. The system does not seek to

[11] *www.modria.com*; *www.themediationroom.com*; *www.odro.com*; *www.juripax.com* [Accessed July 21, 2015].
[12] *http://www.wipo.int/amc/en/arbitration/online/index.html*; *https://www.equibbly.com/; www.modria.com* [Accessed July 21, 2015].
[13] Colin Rule, *Online Dispute Resolution for Business* (Hoboken: Wiley, 2002).
[14] Parties attend in person, whether or not the process is assisted by ICT
[15] All or most of the process is delivered online
[16] Parties attend in person, whether or not the process is assisted by ICT
[17] All or most of the process is delivered online
[18] E. Katsh and J. Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (San Francisco: Jossey-Bass, 2001),
[19] ODR Advisory Group, *Online Dispute Resolution for Low Value Civil Claims* (February 2015). Court and Tribunals Judiciary, *https://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf* [Accessed July 21, 2015].

replace lawyers but is intended to provide an effective dispute resolution system for disputants without access to lawyers.

The first tier would provide *online evaluation and information* for claimants about options and remedies. The object would be to assist potential claimants to classify and categorise their problems, to recognise their rights and obligations, and to help them understand the options and remedies available to them. The potential for IT and software to support and facilitate these tasks means that the work of the first tier would not be as demanding of resource as might first appear.

The second tier would provide *online facilitation*, a service to be provided by facilitators including mediation and negotiation. The initial IT support would be by telephone conferencing and by telephone conferencing, with automated negotiation and video conferencing being deployed at a later stage. Facilitators would review documents and help parties by mediating and negotiating.

The third tier would provide *online judges* who would decide suitable cases online—in effect, an online court. The third tier judges would decide suitable cases or parts of cases, based on papers submitted to them electronically. Again, this would be supported by telephone conferencing and, in the future, by video links.

The Report seeks to demonstrate that ODR is not theoretical rocket science, that might give us cause for thought in five years' time or more, by providing detail about 11 ODR schemes that are already running or in the late stages of development in both this and other jurisdictions. They include the following.

(1) **Civil Resolution Tribunal, British Columbia**

This is an embryo online tribunal established by statute[20] that is due to launch in 2015. It provides an alternative pathway to the court for resolving small claims through a process that is designed to be more convenient and less costly. It will deal with claims under CAD 25,000 in value relating to debts, damages, recovery of personal property, and certain types of condominium or time-share disputes. The system requires parties to explore possible solutions and then provides an online negotiation platform, which is subject to short timelines and supported by templates for statements and arguments. If a settlement is not reached, a mediation process takes place online or over the telephone. Finally, where necessary, an adjudication will decide the outcome. The adjudicator will communicate with the parties via the online platform, over the phone, or, when necessary, through video-conferencing, and will then make a final and binding decision.

(2) **The UK Financial Ombudsman Service**

The function of the FOS, established by statute in 2000, is to resolve disputes between consumers and UK-based financial businesses quickly and with minimum formality. Once a complaint is referred to the service, its process is geared towards early and informal resolution. Its case-handlers ("adjudicators") attempt to facilitate an amicable resolution to the dispute between the two parties, usually resulting in adjudicators writing to parties with their view on what the fair and reasonable outcome should be. If both parties agree (which typically happens in around 90 per cent of cases), the dispute is resolved. But either party may disagree and ask for the case to be referred to an ombudsman for final, binding, determination. The service has trialled new ways of working that will allow some disputes to be settled even more informally and quickly—that is, in hours and days. An ombudsman's determinations can be accepted or rejected by a consumer, but if a consumer accepts the decision then it is binding. These decisions are not appealable, but are subject to judicial review. In 2013/2014, the Financial Ombudsman Service resolved 518,778 disputes, of

[20] Civil Resolution Tribunal Act 2012.

which 487,749 were resolved by adjudicators and 31,029 by ombudsmen. There are usually less than 20 face-to-face meetings with adjudicators or ombudsmen per annum. The average cost per case for 2014/2015 is expected to be £567.

A website associated with the Susskind Report carries audio and video interviews of people who are working on some of the existing ODR systems outlined in the Report.[21]

The Susskind Report suggested that next steps should include pilot schemes for certain types of claim. Small claims, road traffic claims and housing disputes were all considered as possibilities. The conclusion, however, was a call to pilot the new scheme in one area initially, namely small claims in the County Court.

The JUSTICE Report: "Delivering Justice in an Age of Austerity"[22]

This report, published very shortly after the Susskind Report, made recommendations for a streamlined dispute resolution process that is designed to be accessed by unrepresented parties, supported by: (a) an integrated online and telephone information; and (b) an advice and assistance portal.

The JUSTICE model is not fundamentally different from the Susskind model and in that respect the two sets of recommendations are mutually supportive, in that they reach a similar view having considered the same problems. For example, both reports place the emphasis on resolving the majority of disputes quickly and informally. One significant difference is that the Justice model features a primary dispute resolution officer called a registrar. The role of the registrar would be to identify the relevant issues, the applicable law, the appropriate procedure and the evidence needed to resolve the case. The registrar would deal with some cases and refer others to a judge.

The Report does not suggest that its proposed model will work for all types of disputes. It suggests that the most suitable areas for this approach would be where there are high numbers of unrepresented parties, there are difficulties in extracting the necessary information before the final hearing, there are high numbers of successful appeals and/or litigants struggle to understand the relevant law and comply with the required procedure. It is envisaged that some claims in the small claims and fast tracks in the County Court, and some High Court divisions are likely to be suitable.

Under the JUSTICE model, litigants are not expected to know the law or legal procedure. Instead, the combination of investigation, direct communication, and the relatively informal resolution of the bulk of cases using registrars offers a system that is intended to be more efficient and likely to deliver significant long-term cost savings, while simultaneously increasing access to justice for ordinary users to higher levels than previously achieved.

Legal Education Foundation update report: "Digital delivery of legal services to people on low incomes"[23]

This Report was also published in spring 2015. It includes a roundup of digitally based legal delivery services both in this jurisdiction and abroad. Two of the updates are on specific projects mentioned in the Susskind Report namely the Canadian Conflict Resolution Tribunal (see above) and the Dutch Rechtwijzer.[24] The author, Roger Smith, explains that the reason for starting a regular update report is simply the number of developments in this area and the speed at which things are moving. The project is supported by the

[21] *https://www.judiciary.gov.uk/publication-type/interviews/* [Accessed July 21, 2015].

[22] JUSTICE, "Delivering Justice in an Age of Austerity" (April 23, 2015). JUSTICE, *http://2bquk8cdew6192tsu41lay8t.wpengine.netdna-cdn.com/wp-content/uploads/2015/04/JUSTICE-working-party-report-Delivering-Justice-in-an-Age-of-Austerity.pdf* [Accessed July 21, 2015].

[23] Roger Smith, "Digital delivery of legal services to people on low incomes" (Legal Education Foundation, 2015). The Legal Education Foundation, *http://www.thelegaleducationfoundation.org/digital-news* [Accessed July 21, 2015].

[24] *rechtwijzer.nl* [Accessed July 21, 2015].

Legal Education Foundation, which has prioritised legal technology as one of its major areas of interest, and further update reports are planned for the summer and the autumn.

ODR developments in the EU[25]

There are over 750 ADR schemes in the EU today. They include schemes providing arbitration, mediation, ODR, ombudsmen, and complaints boards. Some schemes cover only specific consumer disputes, e.g. for financial services, but others cover all consumer disputes. Most of the schemes are free for consumers or below €50, and are settled within 90 days on average.

In 2013, new EU legislation on ADR and ODR was published:

- **A Directive on consumer ADR.**[26]

  This will, from July 2015, enable consumers to turn to ADR entities for all kinds of contractual disputes that they have with traders. It will not matter what they purchased (excluding disputes regarding health and higher education) and whether they purchased it online or offline, domestically or across borders.

- **A Regulation on consumer ODR.**[27]

  This provides for the establishment (in January 2016) of an EU-wide online platform which will be set up for disputes that arise from online transactions.

This legislation is likely to have quite an impact on those who trade with consumers, for they will have to fund much of what is required of them. It will also influence how consumers think about using ODR.

The relevance of online dispute resolution to personal injury claimants and lawyers

Can we sigh with relief that the pilot recommended by the Susskind Report concerns the small beer (in terms of lawyers' profitability) of small claims by consumers and litigants in person? Here are four reasons to suggest that the answer is "No" and that these developments have the potential to impact on personal injury work in the near to medium future.

First, ODR for personal injury claims is not dissimilar to and could build on existing software services relating to the evaluation of *quantum*. Practitioners will be familiar, or only too familiar, with the following:

(1) **CSC's "Colossus"**

The proprietor's blurb describes it as:

> "… the insurance industry's leading expert system for assisting adjusters in the evaluation of bodily injury claims. Colossus provides adjusters access to your company's claims data within a defined business process management framework for evaluating injuries, treatment, resolution, impairment and general damage settlements."[28]

(2) **"ISO Claims Outcome Advisor"**

This is said to provide "… claims adjusters with reliable tools that use your company's claims experience and claim information from investigations to facilitate consistent

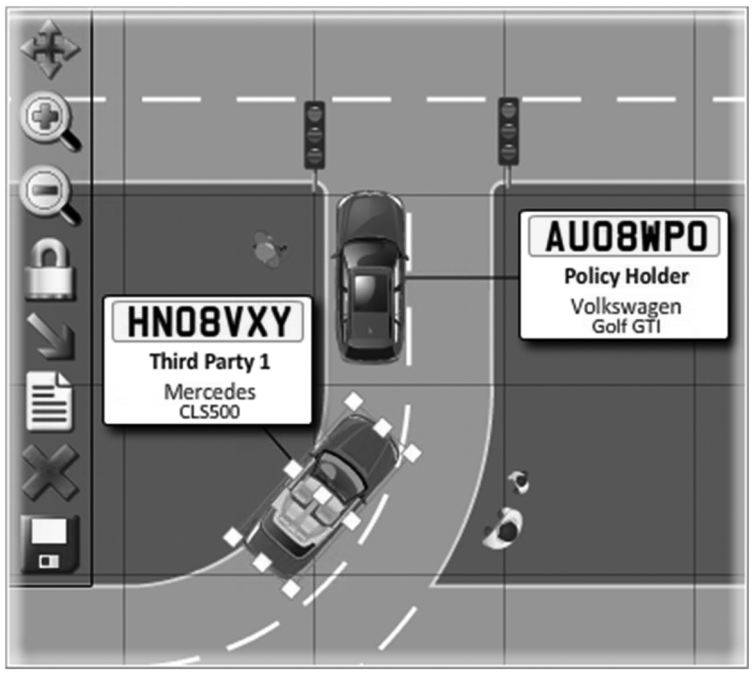
[25] *http://ec.europa.eu/consumers/solving_consumer_disputes/non-judicial_redress/adr-odr/index_en.htm* [Accessed July 21, 2015].
[26] Directive 2013/11 on alternative dispute resolution for consumer disputes and amending Regulation 2006/2004 and Directive 2009/22 [2013] OJ L165/63.
[27] Regulation 524/2013 on online dispute resolution for consumer disputes and amending 2006/2004 and Directive 2009/22 [2013] OJ L165/1.
[28] *http://www.csc.com/p_and_c_general_insurance/offerings/26121/57637-colossus* [Accessed July 21, 2015].

settlements across a wide range of accident scenarios".[29] The use of such software is currently controversial, but this is generally because of how such systems are used and in particular how they are calibrated, rather than their ability to perform a function.

Secondly, an ODR system for personal injury claims could build on existing software services that deal with disputed *liability* claims. The Claims Portal deals with quantum only claims but software systems to deal with liability disputes have been developed. Here are four examples.

(1) **Validus' "WhoseFault"**

This product is said to "… provide handlers with the facility to make quick and consistent liability decisions based on the known facts available, including road layouts, traffic markings and local terrain".



"The platform extends to both parties via the internet so that claimant and policyholder versions are overlaid and the common points of agreement identified. The circumstances relating to the accident that are not common can then be investigated and discussed in more detail, so that only the relevant facts are taken into account by both sides when negotiating apportionment or admission of liability."[30]

[29] *http://www.iso.com/Products/Tools-for-managing-claims/ISO-Claims-Outcome-Advisor-COA-settle-bodily-injury-liabiity-worker-comp-claims.html* [Accessed July 21, 2015].
[30] *http://www.validus-ivc.co.uk/Productsandservices/Productsandservicesnavigator.aspx#tabs-1* [Accessed July 21, 2015].

(2) **ISO "Liability Advisor"**

This is said to "… help claims professionals identify and evaluate accident-related comparative liability claims and determine liability for vehicle, pedestrian, and slip-and-fall cases …".[31]

(3) **New York motor claims**

In 2014 a Modria-powered[32] "AAA New York Insurance ADR Center" was launched. This provides an online ODR platform for 100,000 cases annually. It allows plaintiffs, insurers and their attorneys to bring together arbitration, negotiation and mediation modules to support a dispute resolution processes. The platform includes features for discussion and caucusing, document management, scheduling and case management, and award drafting.[33]

(4) **Telematics**

The use of telematics, including Global Positioning System technology integrated with computers and mobile communications technology in car navigation systems, also has the potential to form part of any ODR system relating to motor claims.

Thirdly, an ODR system for personal injury claims could build on existing software services and the early deployment of *artificial intelligence* that assist with the *outcome* of disputed PI claims.

(1) **Hodge Jones & Allen**

This firm has been reported as working with a world-leading academic to pioneer a predictive model of case outcomes that will enable the firm to better assess the viability of its personal injury caseload. Professor Andrew Chesher, Professor of Economics and Economic Measurement at University College London, examined case data and used a combination of statistical techniques to examine the factors contributing to which cases were won or lost, the damages that were received by claimants in successful cases, and the costs received.[34]

(2) **"Picture It Settled"**[35]

This US-based predictive analytics software might be described as "big data meets artificial intelligence". Data from the negotiations to thousands of litigated cases in a wide variety of jurisdictions and claim types has been entered into a database. The data is in the form of the respective parties' bids during the negotiations and the actual outcome. The software can then be used to predict the likely outcome of negotiation in any given case, once it has been provided with the type of case and the opening offers of the respective parties. According to the proprietor's website the system "… predicted the outcome of an IP dispute within 3.5% after just two rounds—and those predictions improved with additional offer data (17 total rounds)."

The proprietor adds:

[31] *http://www.iso.com/Products/Tools-for-managing-claims/ISO-Claims-Outcome-Advisor-COA-settle-bodily-injury-liabiity-worker-comp-claims.html* [Accessed July 21, 2015].

[32] *http://www.modria.com/* [Accessed July 21, 2015].

[33] *http://www.legaltechnews.com/id=1202645505719/New-Yorkers-to-Resolve-No-Fault-Insurance-Disputes-in-Cloud?slreturn=20150507092833*; *https://aaa-nynf.modria.com/* [Accessed July 21, 2015].

[34] *http://www.hja.net/press-releases/hodge-jones-allen-pioneers-predictive-modelling-technique-in-personal-injury/* [Accessed July 21, 2015].

[35] *www.pictureitsettled.com/*; see also *http://www.adrtoolbox.com/* [Accessed July 21, 2015].

> "… users are able to increase their settlement rates by using a data-informed negotiation strategy. Picture It Settled doesn't replace honed intuition; it puts a scope on the human controlled gun."

"All very American", some might comment, but in terms of the potential relevance of ODR to personal injury practitioners the fact is that these systems are being used today.

(3) **IBM's "Watson" and "Ross"**

IBM demonstrated that artificial intelligence needed to be taken seriously when, in 2011, its "Watson" won $1 million on US TV show Jeopardy, beating two of their best ever human winners in the process. "Watson" was then developed, by students of the University of Toronto, to become the first ever artificial intelligence attorney, and then named "Ross". Ross is able to understand natural language questions, such as "What is the leading case in Ontario of an employee starting a competing business?" and he will return one precise answer (rather than thousands of possible matches) along with references to support his answer, and suggest further reading material. Ross will also calculate a confidence rating to help lawyers prepare for cases. Further, because Ross is a cognitive computing platform, it learns from past interactions, meaning that its responses will grow to be more accurate as lawyers continue to use its system.[36]

The reasons outlined above make it difficult to argue that ODR is irrelevant to personal injury claimants and practitioners. The likelihood is that they will soon be faced with the choice of about whether to embrace with such changes or compete with them. How soon that will be might depend on whether the Susskind Report is implemented.

The likelihood of the recommendations on ODR being implemented

Here are three reasons that suggest that ODR is likely to develop in this jurisdiction in the near future. First, funding may well be available. As mentioned above, the warm welcome for the Susskind Report from the Master of the Rolls and HM Courts and Tribunals Service was countered by sceptics who gave little credence to funds being available. It seems, however, that funds may, in fact, be on hand and that deployment of same to develop ODR is entirely consistent with Ministry of Justice policy. Back in 2012, the then Lord Chancellor announced an ambitious plan to transform the court services by delivering digital services:

> "… digital will be at the heart of achieving a transformed justice system that is more effective, less costly and more responsive for our users."

The plan, which was subsequently awarded a budget of £75 million, included the following:

"3. **VISION**

Our vision for the Ministry of Justice is to put the user first in designing services that are digital by default. We will achieve this by:

- …
- Making the Ministry of Justice a digitally capable organisation by 2015.
- Digitally redesigning all current services by 2018.

[36] See Jo Hodges, "Is Artificial Intelligence a threat or an advantage to law firms?" (LinkedIn, March 18, 2015). LinkedIn, *https://www.linkedin.com/pulse/artificial-intelligence-threat-advantage-law-firms-jo-hodges; www.poweredbyross.com/lawyers*; and *http://www.lawgazette.co.uk/analysis/comment-and-opinion/lawyers-v-robots/5049109.article* [Accessed July 21, 2015].

- Digitising every aspect of the justice system possible by 2020."[37]

Perhaps this makes it less than surprising that the recently appointed Chief Executive of HMCTS has a track record of leading digitisation programmes.

Secondly, ODR is already happening—abroad, but also in this jurisdiction. Many examples have been cited but mention should also be made of recent developments regarding the possibility of personal injury arbitration online; see *http://www.picarbs.co.uk*. Given the continuing developments in communications and technology generally, the existing ODR schemes are likely to develop and users are likely to become more familiar with them.

Thirdly, and this is perhaps a restatement of the second point, the technology (hardware, software, algorithms) that is necessary to develop ODR is, demonstrably, already available.

Some critics of the Susskind Report have expressed concerns about the court system being taken over by eBay-style adjudicators, with a consequent nosedive in terms of both access to justice and the quality of justice. This is missing the main point, which is simply that the eBay technology platform demonstrates that a system dealing with millions of claims per annum has been running for some time. The barriers to the development of ODR are financial, political and cultural, not technological.

Conclusion

None of the above is intended to support a notion that lawyers will be redundant, that machines will provide all the advice that clients need or that ODR is ready to take on high value, complex disputes. There does seem, however, to be at least some evidence to suggest both that ODR could be relevant to personal injury practitioners and that ODR is likely to develop.

The writer concludes by returning to the question posed at the head of this review: Is it fanciful to suggest that the recommendations in the Susskind Report will come to fruition?

[37] *http://open.justice.gov.uk/digital-strategy/moj-digital-strategy.pdf* [Accessed July 21, 2015].

Case and Comment: Liability

Graham v Commercial Bodyworks Ltd

CA (Civ Div) (Longmore LJ, Underhill LJ, Sharp LJ) February 5, 2015 [2015] EWCA Civ 47

Personal injury—negligence—accidents at work—employer's liability—fire—risk—vicarious liability—wrongful acts

LT Employers' powers and duties; Hazardous substances; Personal injury; Vicarious liability; Wrongful acts

On June 11, 2009 at the defendants' bodywork repair shop in Graveley, Cambridgeshire, Mr Peter Wilkinson a friend and co-employee of the claimant used a cigarette lighter (it was held by the judge) in his vicinity. Paul Graham's overalls had been sprinkled with a highly inflammable thinning agent called "Gunwash". His overalls went up in flames. The fire started around his midriff, moved quickly up to his shoulders and caused Mr Graham very considerable injury.

Mr Graham had no memory of the incident and Mr Wilkinson disappeared without trace and gave no evidence at the trial. It was not suggested that the defendants were themselves negligent. Employees were permitted to decant only the approximate amount of thinner required for whatever job was being done (usually the cleaning of panels prior to repainting) and were then required to pour unused thinner into a waste tank. There was a sealed unit for the rags which had been used for the application of thinner. Smoking was not permitted anywhere within the workshop. No similar incident had ever occurred before.

There was evidence that the two men had been "mucking around" and chasing each other just before the incident and Wilkinson had been seen to spray something out of a container onto the back of Graham's overalls.

There was no suggestion that Wilkinson intended to cause serious harm to Graham, who was his long-standing friend and co-worker. The company described the incident as "horseplay". The trial judge regarded that as a gross underestimate of Wilkinson's actions, which he categorised as a "serious assault", and held that the company was not vicariously liable for Wilkinson's actions.

The claimant appealed and submitted that the employer had created the risk of injury to its employees by requiring them to work with an inherently dangerous substance, namely the thinning agent, so that the risk of injury from misuse of that substance was inherent in the nature of the business. Therefore, Wilkinson's conduct was so closely connected with what he was employed to do that the employer should be held vicariously liable.

The Court of Appeal held that every decision on the question whether an employer is vicariously liable for a wrongful act giving rise to injuries caused by his employee must start with the formulation contained in the first edition of *Salmond Law of Torts* (now 21st edition) that a wrongful act is deemed to be done in the course of the employment, if:

> "it is either (1) a wrongful act authorised by the master, or (2) a wrongful and unauthorised mode of doing some act authorised by the master. It is clear that the master is responsible for acts actually authorised by him: for liability would exist in this case, even if the relation between the parties was merely one of agency, and not one of service at all. But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorised, provided they are so

connected with acts which he has authorised that they may rightly be regarded as modes — although improper modes — of doing them."

They held that the relevant inquiry here was whether Wilkinson's conduct was "so connected" with acts which the employer authorised that they might rightly be regarded as modes—albeit improper modes—of doing them. They confirmed that Since *Lister v Hesley Hall Ltd*,[1] it was no longer the law that intentional acts were not usually to be regarded as connected with acts authorised by an employer. However, on the facts of this case, although the employer did create a risk by requiring its employees to work with thinning agents, they concluded that it could not be said that the creation of that risk was sufficiently closely connected with Wilkinson's highly reckless act of splashing the thinner onto Graham's overalls and then using a cigarette lighter in his vicinity.

The court considered the five factors set out by McLachlin J in *Bazley v Curry*[2] in determining the sufficiency of the connection between the employer's creation or enhancement of the risk and the wrong complained of. When related to intentional torts, the relevant facts may include, but are not limited to the following:

1) The opportunity that the enterprise afforded the employee to abuse his or her power.
2) The extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee).
3) The extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise.
4) The extent of power conferred on the employee in relation to the victim.
5) The vulnerability of potential victims to wrongful exercise of the employee's power.

They concluded that only the first of the five factors was relevant to determining the sufficiency of the connection between the employer's creation or enhancement of the risk and the wrong complained of was present in this case.[3]

The court noted that UK authorities tended to resolve themselves into two groups, namely cases in which the use of reasonable force or the existence of friction was inherent in the nature of the employment;[4] and cases such as those arising from intentional acts at the workplace, whether horseplay or more serious conduct, which did not usually give rise to vicarious liability.[5] This case fell into the latter category.

The most recent English authorities on pranks at work brought to the attention of the court were *Aldred v Naconco*[6] and the obiter comments of Singleton J in *Smith v Crossley Brothers*.[7] However, since those cases pre-dated *Lister* the court placed greater reliance on the Scottish cases of *Wilson* and *Vaickuviene*.[8]

Accordingly, the fact that the employer had vested discretion in Wilkinson to use the thinners and that he was obliged to do so carefully by reason of his contractual obligations did not carry the matter any further. That was little different from any employer–employee relationship. The fact that the employer could be said to have created the risk was not sufficient to impose liability. The real cause of Graham's injuries was the reckless conduct of Wilkinson, which could not be said to have occurred in the course of his employment.

The appeal was dismissed.

[1] *Lister v Hesley Hall Ltd* [2001] UKHL 22; [2002] 1 A.C. 215 followed.
[2] *Bazley v Curry* (1999) 174 D.L.R. (4th) 45.
[3] *Bazley v Curry* (1999) 174 D.L.R. (4th) 45 considered.
[4] S*eeMattis v Pollock* [2003] 1 W.L.R. 2158 and *Gravil v Redruth Rugby Football Club Ltd* [2008] I.C.R. 1222; [2008] I.R.L.R. 829.
[5] *Wilson v Exel UK Ltd (t/a Exel)* [2010] CSIH 35, [2010] S.L.T. 671 and *Vaickuviene v J Sainsbury Plc* [2013] CSIH 67; [2014] S.C. 147 considered.
[6] *Aldred v Naconco* [1987] I.R.L.R. 292.
[7] *Smith v Crossley Brothers* (1971) 95 S.J. 655.
[8] *Aldred v Naconco* [1987] I.R.L.R. 292 and *Smith v Crossley Brothers* (1971) 95 S.J. 655 considered.

Comment

The term "horseplay" covers a multitude of sins and situations. Over the years in legal cases it has been used as a description ranging from the light banter of the workplace, which may possibly consolidate bonhomie and teamwork, right through to the malevolent pranks and abusive bullying which endangers wellbeing and can cause death or serious injury. Following its notorious usage as a plea in the trial and conviction of the Pennsylvania State football coach Jerry Sandusky for multiple molestations of boys in 2012, when his defence was "horseplay" in the shower room, the definition may need to be re-evaluated as rather more sinister in meaning than "playfulness", "pranks", or "fun".[9] While it is difficult to quantify the level of personal injuries from this aspect of misbehaviour at work there is no doubt that what was described in this case by the defendant company as "mucking around" and "horseplay" had tragic consequences.

But what should an employer's responsibility be in these settings? There is inevitably going to be a demarcation line between the employee behaviour that pins primary or vicarious responsibility on an employer, and the excessively outrageous behaviour which gives only a remedy for the victim against the perpetrator, usually a "person of straw" and very likely to be uninsured. Since the classic formulation in 1834 by Parke B, that a master is not liable for the torts of his servant when that tortfeasor is "going on a frolic of his own",[10] there have been a series of cases which have taxed the ingenuity of the courts in determining whether what is a form of strict liability for vicariousness would apply. Much of course depends on the facts and circumstances. But in grappling with the general principles it is perhaps possible to see some useful classifications well beyond the formulation by Sir John Salmond used in the first edition of his book in 1907, which has been a customary test over the last century.[11] The simple two-fold Salmond assertion, still of course useful, was that the wrongful act was deemed to have been carried out in the course of employment if it is "either (a) a wrongful act authorised by the master, or (b) a wrongful and unauthorised mode of doing some act authorised by the master". But this is now not enough.

First, and straightforwardly, there are torts committed by "command" of the employer. Professor Glanville Williams traced the modern law on vicarious liability back to Sir John Holt CJ, who then extended the rule by stating that the master was not only liable for acts expressly commanded, but also for those done by his "implied command".[12] In that case in 1697, *Turberville v Stampe*, the servant lit a fire, in a manner contrary to instructions, which spread out of control to damage the neighbouring property; vicarious liability followed, as the "servant kindled the fire in the way of husbandry and proper for his employment, though he had no express command of his master".[13]

Secondly, there is the consideration of the boundary between the "employee" and the "independent contractor". Historically, the "control" test, but more recently the American "integration" test, the "multiple" test and now the "social reality" test have attempted to winnow out cases here.[14] There are very few cases beyond employment of the use of vicarious liability. However, sometimes there is an impact of the "non-delegable duty of care" in employer's liability, which might include "control" of those not directly in the employment of the defendant; for example in the House of Lords case of *McDermid v Nash Dredging Co*,[15] there was vicarious liability for a third party not employed by them for the injuries caused by an unsafe system of work, which caused a deck hand to lose his leg. While the ramparts against the inclusion

[9] Sandusky: It was "Horseplay", *Wall Street Journal* (November 15, 2011).
[10] *Joel v Morrison* 6 C. & P. 501, at 503 (1834).
[11] *Salmond on Torts* (1st edition, 1907) p.83.
[12] See Glanville Williams (1957) 20 M.L.R. 200 at 228.
[13] (1697) 91 E.R. 1072.
[14] See generally Baron Bramwell in *Yewens v Noakes* (1881) 6 QBD 530; McCardie J in *Rights Society v Mill* [1924] 1 K.B. 762; Denning LJ in *Stevenson, Jordan and Harrison Ltd v MacDonald and Evans* [1952] 1 T.L.R. 101 at 11; *Mersey Docks and Harbour Board v Coggins and Griffiths (Liverpool) Ltd.* [1946] 2 All E.R. 345; *Ready Mixed Concrete (South East) Ltd. V Minister of Pensions and National Insurance* [1968] 1 All E.R. 433; and *Ferguson v Dawson* [1976] 3 All E.R. 817.
[15] [1987] 2 All E.R. 878.

of the "self employed" are still in place it may be that the tide of modern vicarious liability is starting to gnaw at this defensive line.[16]

Thirdly, there is the definitional issue that the tortious act be committed "in the course of employment", which is the opposite of being "on a frolic". A straightforward example of the way the courts have interpreted this point is in *Kay v ITW*, where a storekeeper found his way blocked by a large lorry, so jumped in to the driving seat in an attempt to move the vehicle, and crushed a victim by failure to understand the gearbox. The Court of Appeal held this was poor judgment but not so gross or extreme as to take the action outside the course of employment.[17] Perhaps the high point in this line of cases is *Century Insurance Co Ltd v Northern Ireland Road Transport Board*, where a tanker driver lit a cigarette and flung down a match when delivering petrol.[18] This was, of course, in flagrant defiance of signage, instructions and common sense. Nevertheless the House of Lords held his employer to be vicariously liable for the conflagration. It was perhaps odd that this case was not referred to in *Graham* on behalf of the claimant, as the use of a borrowed cigarette lighter in conjunction with the highly flammable "Gunwash" has a resonance.

However, there is in *Graham* a reference to two fairly recent Scottish decisions, one the most extraordinary case of *Vaickuviene v J Sainsbury PLC*, where at first instance an employer was found vicariously liable for the racist murder of an employee by a fellow worker on the night shift. Lady Clark of Calton's judgment in the Outer House of the Court of Session looked in detail at vicarious liability cases, concluding that the principles "are not entirely consistent, that the cases are very fact dependent, and that policy considerations have been and remain a major influence".[19] On appeal, and still on a preliminary issue of law, Lord McGhie indicated that the short point was that it was not possible to categorise this murder "as sufficiently closely connected with his employment to give rise to any vicarious liability on the part of the employers".[20]

At first instance in *Vaickuviene* a distinction had been drawn with the other Scottish case, *Wilson v Exel*—"a straightforward situation in which one employee had assaulted a fellow employee in the course of a 'prank' as Lord Carloway concluded"[21]—but on appeal in *Vaickuviene* Lord Carloway, while acknowledging that "Society has moved on",[22] nevertheless concluded that the "laudably succinct summary of the law" in the *Salmond* test remained.[23] It followed that "The present case ought to be approached in a similar manner as the court viewed the facts averred in *Wilson v Excel*"; this was where a supervisor repeatedly crept up behind a typist, grabbed her ponytail, and made ribald remarks in "horseplay". The Scottish appellate court regarded that behaviour as a "prank" and therefore "an unrelated and independent venture of his own: a personal matter, rather than a matter connected to his authorized duties".[24] With respect, such a view is not exactly the approach that might impel employers to deal effectively with sexual harassment in the workplace. In the light of Lord Carloway's remark that "Society has moved on" it has perhaps not moved on enough to secure the protection of employees, particularly female.

What has perhaps changed in the 70 years since *Century Insurance* is a culture of health and safety precepts, and the acknowledgement that employees are themselves responsible for their safety and that of their fellow employees. Section 7 of the Health and Safety at Work Act 1974 enshrines this. But there is also here an interplay with the common law doctrine of *volenti non fit injuria*, ("to a willing person, injury is not done"). In the monumental folly of *O'Reilly v National Rail & Tramway Appliances* there

[16] See Ewan McKendrick, "Vicarious Liability and Independent Contractors: A Re-Examination", 53 M.L.R. (1990) 770–784.
[17] [1967] 3 All E.R. 22.
[18] [1942] 1 All E.R. 491.
[19] [2012] CSOH 69, at [23]. See for a discussion Julian Fulbrook, "The outer limits of vicarious liability: An employer's responsibility for murder" [2012] J.P.I.L. 201.
[20] [2013] CSIH 67 at [50].
[21] Per Lady Clark of Calton, Para 40, [2012] CSOH 69.
[22] [2013] CSIH 67 at [18].
[23] Loc cit.
[24] 1999 SC 255.

was the jocular suggestion, in a scrap metal yard, of hitting a live shell with a sledgehammer, with the resultant explosion. Neild J held that this was clearly acting outside the scope of employment. *Per curiam* it was noted that the defence of *volenti* would have been open to the defendants against the instigator. Interestingly, the workers gave evidence that rolling the shell backwards and forwards was "intended as a sort of joke".[25]

Another case of complete foolhardiness is *Smith v Crossley Brothers Ltd*, where an apprentice was ambushed by two others, who inserted a compressed air pipe in his rectum and ruptured his colon. The Court of Appeal held the two malevolent apprentices were "on a frolic of their own", and the employers had no prior warning of any just misbehaviour.[26] Lack of any prior knowledge of the predilections of employees to engage in "horseplay" is a decisive factor when employers are absolved of responsibility. Ormrod J made this point in another case involving a "practical joker", *Coddington v International Harvester*;[27] in kicking a fire ball near a furnace on to a fellow worker there was nothing in previous conduct to suggest he would do that. That case certainly seems similar to *Graham v Commercial Bodyworks*, at least in the description given by HH Judge Yelton in the Cambridge County Court that the two men had been "very good friends", before Mr Graham had been set on fire, but that there had been nothing untoward before the day that disaster struck.[28]

Conversely, where there is prior knowledge of "horseplay", then this would tend towards a finding of poor supervision under the non-delegable provisions enunciated by Lord Wright in *Wilson's and Clyde Coal Co v English*,[29] which are *inter alia* to provide a competent staff and adequate supervision. For example, in *Hudson v Ridge Manufacturing Co Ltd.* a persistent practical joker, had "an almost incurable habit of tripping people up, or otherwise engaging in horseplay and skylarking". The aggressor had been repeatedly warned and reprimanded about his conduct over a four-year period. The claimant had often been tripped up as part of this "horseplay", and was then as a result of another "foolish prank" flung to the floor, fracturing his wrist. Streatfeild J distinguished *Smith v Crossley*, as in this case the propensities of the perpetrator were well known to the employer, and they had failed in their primary duty to prevent or remove this "dangerous horseplay".[30]

Is there a trend more to inclusion in vicarious liability, partly because of the very serious injuries in some of the cases and the litigation vacuum if vicarious liability fails? Pill LJ in the conjoined cases of *Weddall v Barchester Health Care* and *Wallbank v Wallbank Fox Designs* points out the "irony" that the "outrageousness" of conduct can deprive a victim of any remedy in the workplace.[31] That decision is discussed in *Graham* and illustrates also the "case sensitive" nature of analysis; although both *Weddall* and *Wallbank* concerned cases of violence. In *Weddall* the perpetrator was at home, "very drunk", but provoked by a telephone call into unreasoning anger, then cycling to his workplace and pummelling his manager. In *Wallbank* a request by a manager to work together to speed up the manufacturing process was suddenly met with unreasoning violence. The Court of Appeal determined that the first instance was an "independent venture" when the assailant was "acting personally for his own reasons".[32] In the second instance the Court of Appeal were "persuaded, not without hesitation" that the employer "should bear vicarious liability for the spontaneous force by which the employee reacted".[33]

One interesting case where there was no known previous shoddy behaviour is *Harrison v Michelin Tyre Co Ltd*. There a tool grinder standing on the duck-board of his machine was injured when another employee

[25] [1966] 1 All E.R. 499. See also the famous explosion case *ICI v Shatwell* [1964] 2 All E.R. 999, where two brothers involved in negligent shotfiring operations were given short shrift on grounds of *volens*.
[26] (1951) 95 SJ 655.
[27] (1969) 6 K.I.R. 146.
[28] *Hunts Post* (February 11, 2015).
[29] [1937] 3 All E.R. 628.
[30] [1957] 2 All E.R. 229.
[31] [2012] All E.R. (D.) 01 at [56].
[32] [2012] All E.R. (D.) 01 at [45].
[33] [2012] All E.R. (D.) 01 at [55].

"decided to indulge in some horseplay" by pushing his hand truck under the duck-board and tipping it over. It was held by Comyn J that although this act was "of a kind which would never have been countenanced by the defendants, it was none the less part and parcel of his employment".[34] In a thoughtful judgment he applied the principle in *Century Insurance*. However, that decision by Comyn J was then doubted in *Aldred v Nacanco*,[35] a Court of Appeal decision referred to in *Graham* as the "most recent English authority on pranks at work".[36]

In *Aldred* an employee pushed a washbasin, known to be unsteady, up against another employee in order to frighten her. Applying the traditional *Salmond* test the Court of Appeal (Sir John Donaldson MR, Glidewell LJ, Sir Frederick Lawton) held that the co-employee's act was not so connected with the authorised act of going into the washroom that it was appropriate to impose vicarious liability. With respect, there seems to have been little notice taken of the non-delegable duty on an employer to provide a safe system of work, competent fellow workers, or adequate supervision. It would appear that the injury was not significant, and perhaps if the injuries sustained were more substantial then perhaps there would be a different result in the modern era.

On sexual abuse cases there has of course been a very significant change in vicarious liability. Starting with the Canadian Supreme Court cases, *Bazley v Curry* and *Jacobi v Griffiths*,[37] and then with *Lister*[38] in the UK, there has been a transformation in liability. Professor Peter Cane has described this as "a genuine advance on the unauthorised conduct/unauthorised mode distinction".[39] Sexual abuse is perhaps going to remain a discrete area, as being unlikely to be observed and certainly not countenanced by defendants. The extension of the principles of vicarious liability in sex abuse cases therefore play an important protective role, particularly in "closed institutions" where grooming and exploitation has been rife. However, those cases and their "close connection" test have also had an impact on general principles relating to what Longmore LJ describes in *Graham* as the adjacent "field of intentional (non-sexual) wrongdoing".[40]

In a helpful analysis the learned Lord Justice divides this topic into two separate zones: cases "in which the use of reasonable force or the existence of friction is inherent" and another area where there is "normal friction in the workplace which gets out of hand".[41] As instances of the first trajectory he cites *Mattis v Pollock*,[42] where the unlicensed doorman at the Flamingos Nightclub seems to have been encouraged to act in an intimidating and aggressive manner, albeit his subsequent knifing attack was certainly pushing the boundaries. There was also the "off the ball incident" in *Gravil v Redruth Rugby Football Club Ltd*,[43] where a punch led to a blow out fracture of an eye socket after an altercation on the field of play. The relevant authorities in both situations might dispute that violence is "inherent", either in the night-time economy or in rugby. But one can perhaps understand why such activities might be foreseeable in the light of past experience, and why there might be a policy reason to enable vicarious liability to give a remedy to an innocent victim.

Mattis is of course another extraordinary case. The trial judge found that the stabbing was not part of employment because of a "lapse of time and intervening events",[44] whereas Judge LJ held that this "represented the unfortunate, and virtual culmination of the unpleasant incident which had started within the club, [a brawl] and could not fairly and justly be treated in isolation from earlier events".[45] This was

[34] [1985] 1 All E.R. 918.
[35] [1987] I.R.L.R. 292.
[36] *Graham* at [21].
[37] (1999) 174 DLR(4th) 45; (1999) 174 DLR(4th) 71.
[38] *Lister v Hesley Hall Ltd* [2002] 1 A.C. 215.
[39] "Vicarious Liability for Sexual Abuse", (2000) 116 L.Q.R. 21 at 24.
[40] *Graham* at [15].
[41] *Graham* at [16].
[42] [2003] EWCA Civ 887.
[43] [2008] EWCA Civ 689.
[44] [2002] EWHC 2177 at [77].
[45] [2003] 1 W.L.R. 2158 at [32].

a clear indication of the post-*Lister* "close connection" extension of vicarious liability, and perhaps also relevant was the tragic consequence that the claimant was rendered paraplegic.

Longmore LJ in *Graham* then deals with his second arena in his description of the "field of intentional (non-sexual) wrongdoing", giving as an "instructive contrast" the two cases in *Weddall* and *Wallbank*, with different outcomes on civil liability. Both were concerned with "friction" in the workplace, although as we have seen the perpetrator in *Weddall* was actually at home, drinking excessively having "had a bad day", before going to the workplace and launching his unprovoked attack. The degree of violence may also be important here; the assailant in *Weddall*, with a premeditated assault, was sentenced to 15 months' imprisonment. By contrast in *Wallbank* the assailant was also convicted of grievous bodily harm, but this attracted a compensation order of £600 given the circumstances.[46]

However the demarcation line here is certainly very difficult; in *Berry v Arriva Cymru Ltd*, a case purporting to apply the Court of Appeal decision in *Weddall* and *Wallbank*. The supervisor of a bus driver gripped him by the arm and pushed him into the path of an oncoming bus. Unfortunately his hold slipped, and what was "intended as an hilarious prank" ended in injury. The trial judge ostensibly applied the "close connection" test and concluded that it would not be fair and just for the employer to be held liable, even though the incident occurred on the employer's premises and within working hours.[47] This seems a very surprising conclusion, but perhaps illustrative of Pill LJ's remark of the "irony" that the more outrageous the behaviour the more likely this will leave the victim without a realistic remedy for their personal injuries.

While Longmore LJ's reasoning in *Graham* is very helpful, policy reasons suggest that this topic may need to be re-visited. While accepting that there are some very difficult demarcation lines here between the analytical probes of activity being either "in the course of employment" and or a situation where a perpetrator is "on a frolic of their own", the individual who may be left out of the equation altogether is the luckless victim of "horseplay". Professor Fleming indicated that the policy rationales for vicarious liability were that it provides "a just and practical remedy" and that it should be a means of "deterring future harm".[48] As we have seen in several of the cases, and some in the modern era, it is not just Paul Graham set alight by his colleague who is left without a "just and practical remedy" in the law of torts against someone who has vanished from the scene. But rather more importantly, by careful extension of the "close connection" rule the courts could send out a very serious declaratory message to both employers and employees that "horseplay" is not a matter to be taken nonchalantly in the light of potentially such serious consequences.

Practice Point

- In a case involving the elastic concept of "horseplay" at work, the Court of Appeal gives useful analysis to the "field of intentional (non-sexual) wrongdoing". Longmore LJ breaks this topic down into two separate areas. The first is where the use of reasonable force is "inherent", so that there will be liability when a "close connection" is established with the workplace. By contrast there are cases where there may be potential "friction" in the workplace, and then a delineation needs to be made between where the assailant is "acting personally for his own reasons" and therefore outside the "course of employment", or where it would be just and fair to fix vicarious liability on an employer for the injuries caused. On the facts of these particular circumstances in *Graham v Commercial Bodyworks Ltd* there was no advance knowledge of the recklessness which led a work colleague to spray flammable

[46] Para 5, para 11.
[47] LTL 7/6/12. See note by Sarah Prager, "Vicarious Liability: Are we moving away from *Lister v Hesley Hall*?"at *http://1chancery lane.com*.
[48] John G. Fleming, *The Law of Torts* (1998) p.410.

substances on the clothing of his friend and then to set this alight with a borrowed cigarette lighter. He was therefore "on a frolic of his own".

Julian Fulbrook

Montgomery v Lanarkshire Health Board

SC (Lord Neuberger PSC, Lady Hale DPSC, Lord Kerr JSC, Lord Clarke JSC, Lord Wilson JSC, Lord Reed JSC, Lord Hodge JSC) March 11, 2015 [2015] UKSC 11

Liability—clinical negligence—birth defects—Bolam test—causation—consent to treatment—doctors—duty of care —medical advice—patient's rights—risk

LT Birth defects; Clinical negligence; Doctors; Duty of disclosure; Informed consent; Medical treatment; Scotland

Nadine Montgomery gave birth to a baby boy on October 1, 1999 at Bellshill Maternity Hospital, Lanarkshire. As a result of complications during the delivery, the baby was born with severe disabilities. In these proceedings Mrs Montgomery sought damages on behalf of her son for the injuries which he sustained. She attributed those injuries to negligence on the part of Dr Dina McLellan, a consultant obstetrician and gynaecologist employed by Lanarkshire Health Board, who was responsible for Mrs Montgomery's care during her pregnancy and labour. She also delivered the baby.

Mrs Montgomery had been treated by Dr McLellan during her pregnancy because she was diabetic, and was therefore likely to have a large baby. The risk of shoulder dystocia occurring was 9–10 per cent, but Dr McLellan did not inform Mrs Montgomery of the risk because, in her estimation, the risk of a grave problem for the baby arising as a result of shoulder dystocia was very small.

During the delivery, shoulder dystocia occurred and the baby was deprived of oxygen due to occlusion of the umbilical cord. He was born with severe disabilities. It was Mrs Montgomery's case that she should have been advised about the risk of shoulder dystocia, and of the alternative possibility of delivery by caesarean section. The Court of Session rejected that argument, following the approach in *Sidaway v Board of Governors of the Bethlem Royal Hospital*[1], namely that the question of whether a doctor's omission to advise a patient of risks involved in treatment amounted to a breach of duty of care should be decided primarily on the basis of expert medical evidence, applying the *Bolam* test. It also concluded that, even if Mrs Montgomery had been advised about the risk of serious harm to her baby as a consequence of shoulder dystocia, she would not have opted for a caesarean.

The Supreme Court noted that Lord Scarman's dissenting judgment in *Sidaway* took as a starting point the patient's basic human right to make his own decision. He held that if a patient suffered damage as a result of an undisclosed risk which would have been disclosed by a doctor exercising reasonable care to respect the patient's right to decide whether to incur the risk, and the patient would have avoided the injury if the risk had been disclosed, then the patient would have a cause of action based in negligence. In England and Wales, lower courts had tacitly ceased to apply the *Bolam* test in relation to the advice given by doctors to their patients, and had effectively adopted Lord Scarman's approach.[2]

[1] *Sidaway v Board of Governors of the Bethlem Royal Hospital* [1985] A.C. 871.
[2] *Pearce v United Bristol Healthcare NHS Trust* [1999] E.C.C. 167 approved; *Wyatt v Curtis* [2003] EWCA Civ 1779 considered.

In *Chester v Afshar*,[3] Lord Walker observed that during the time which had elapsed since *Sidaway*, the importance of personal autonomy had been more widely recognised, and that, in making a decision which might have a profound effect on her health and wellbeing, a patient was entitled to information and advice about possible alternative or variant treatments.[4] Recent guidance issued by the Department of Health and the General Medical Council had treated *Chester* as the leading authority. It had become increasingly clear that the paradigm of the doctor-patient relationship implicit in the speeches in *Sidaway* had ceased to reflect the reality and complexity of the way in which healthcare services were provided, or the way in which the providers and recipients of such services viewed their relationship.

Under the stimulus of the Human Rights Act 1998, the courts had become increasingly conscious of the extent to which the common law reflected fundamental values, including the value of self-determination. The analysis of the law by the majority in *Sidaway* was unsatisfactory, in so far as it treated the doctor's duty to advise the patient of the risks of proposed treatment as falling within the scope of the *Bolam* test, subject to two qualifications of that general principle, neither of which was fundamentally consistent with that test. There was no reason to perpetuate the application of the *Bolam* test in that context any longer.

An adult person of sound mind was entitled to decide which, if any, of the available forms of treatment to undergo, and her consent had to be obtained before treatment interfering with her bodily integrity was undertaken. The doctor was under a duty to take reasonable care to ensure that the patient was aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments. The test of materiality was whether, in the circumstances, a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor was or should reasonably be aware that the particular patient would be likely to attach significance to it.

There was no doubt that it was incumbent on Dr McLellan to advise Mrs Montgomery of the substantial risk of shoulder dystocia if a vaginal delivery were attempted, and to discuss with her the alternative of a caesarean section. The Court of Session had erred in focusing upon the consequent risk that the baby might suffer a grave injury, which was relatively small.

There was a compelling reason for concluding that the Court of Session had failed to consider relevant evidence in relation to causation.[5] The only conclusion available was that, had Dr McLellan advised Mrs Montgomery of the risk of shoulder dystocia and discussed with her dispassionately the potential consequences, and the alternative of an elective caesarean, Mrs Montgomery would probably have opted for the caesarean. It was not in dispute that the baby would then have been born unharmed. The appeal was allowed.

Comment

The Supreme Court decision in *Montgomery* has been described as a landmark case and for once the hyperbole is perhaps justified. It is not often that the Supreme Court rolls up its sleeves and gets stuck in to a clinical negligence case and, when it does, practitioners should pay particular attention. Previous decisions of the Supreme Court (House of Lords as was) have had a significant impact on the way we act for our clients and on their ability to obtain access to justice. Relatively recent decisions such as *Gregg v Scott*[6] and *Chester v Afshar*[7] along with *Rees v Darlington Memorial Hospital*[8] and *McFarlane v Tayside*

[3] *Chester v Afshar* [2004] UKHL 41; [2005] 1 A.C. 134.
[4] *Chester* applied.
[5] *Thomas v Thomas* [1947] A.C. 484 considered.
[6] [2005] UKHL 2—Liability for the loss of a chance of a more favourable outcome should not be introduced into clinical negligence claims.
[7] [2004] UKHL 41—A neurosurgeon who failed to warn a patient of the small risk of injury inherent in surgery, even if properly performed, was liable to the patient when that risk eventuated, even though the risk was not increased by the failure to warn and the patient had not shown that she would never have had an operation carrying the same risk.
[8] [2003] UKHL 52—A disabled mother who gave birth to a healthy child after a negligently-performed sterilisation was not entitled to recover the extra costs of child care occasioned by her disability. However, a conventional award of £15,000 would be made to mark her injury and loss of the benefit that she was entitled to expect.

Health Board[9] are good examples of the impact these judgments can have and arguably *Montgomery* may have greater impact.

In short, *Montgomery* introduces a new legal test for assessing the standard of care in cases involving advice on, and consent to, treatment cases. In place of the established *Bolam* test[10] the Supreme Court has substituted a new test relating to the materiality of the risk involved and this is to be assessed by reference not to a responsible body of medical opinion but by reference to a reasonable person in the patient's position.

This is a very different approach and the Supreme Court had to move away from what was considered to be the ratio of their previous decision in *Sidaway*. As many academics and commentators have pointed out and the Supreme Court itself recognised the previous decision in *Sidaway* was not as clear-cut as perhaps it had been assumed to be. Indeed the introduction of the new legal test is not so much a rejection of Lord Diplock's approach, that *Bolam* applied to advice and consent cases, but a recognition that Lord Scarman was right in *Sidaway* and was ahead of his time in placing emphasis on the importance of patient autonomy and informed consent.

At the heart of the case was the evidence. Mrs Montgomery was told that she was having a larger than usual baby. She was not told about the risks of mechanical problems during labour. She was not told about the risk of shoulder dystocia (9–10 per cent risk in Type 1 diabetic mothers). The consultant Dr McLellan confirmed that although the pregnancy was termed a "high risk" one in her view the risk (9–10 per cent) was "very small". She said in evidence:

> "If you were to mention shoulder dystocia to every [diabetic] patient, if you were to mention to any mother who faces labour that there is a very small risk of the baby dying in labour, then everyone would ask for a caesarean section and its not in the maternal interests for women to have caesarean sections."

This perhaps rather tellingly typifies the paternalistic "doctor knows best" approach.

Mrs Montgomery said if she had been told of the risk of shoulder dystocia she would have wanted an explanation and further information about the risks. If she had considered it to be a significant risk she would have asked for a caesarean section.

The Lord Ordinary, Lord Bannatyne, decided the case by reference to medical practice following the approach of the majority in *Sidaway*. Put simply, the *Bolam* test of a responsible body of medical opinion is used to decide what advice is given to a patient. The advice in this case met the *Bolam* test so there was no breach. The judge also found that causation had not been established because even if advised of the risk Mrs Montgomery would not have elected for a caesarean section.

That decision was upheld on Appeal by the Inner House who held that they were bound by the House of Lords judgment in *Sidaway* to apply the *Bolam* test to cases involving consent and advice to treatment.

The Supreme Court were invited to depart from the decision in *Sidaway*. In their judgment the Supreme Court observed that since *Sidaway* was decided in 1985 the law (and medical practice) had developed. Concepts of patient autonomy and the primacy of consent had been developed along with an emphasis on Human Rights. More information was available to patients and the GMC had steered the medical profession away from the paternalistic approach implicit in Dr McLellan's evidence. The Court was sympathetic to a doctor seeking professionally to make the best decision objectively for the patient but that was not the law.

[9] 200 SC (HL) 1—In an unwanted pregnancy case, a mother could recover damages for the pain, suffering and loss of amenity during the pregnancy and childbirth, but not the economic loss and costs of ordinary childcare thereafter.

[10] *Bolam v Friern Hospital Management Committee* (1957) 1 W.L.R. 582. This was not a House of Lords case but a High Court decision regarding the reasonableness of administering electro-convulsive therapy without the use of muscle relaxant drugs or effective restraints and of the failure to warn the patient of the risks. It resulted in the "classic" definition that a doctor who acts in accordance with a practice accepted as proper by a responsible body of medical opinion skilled in the particular form of treatment in question was not guilty of negligence

The Court undertook a careful analysis of the decision in *Sidaway* and suggested that the decision was not as clear cut as perhaps it seemed. Whilst Lord Diplock had argued for the application of the *Bolam* test in relation to diagnosis, treatment and advice Lord Scarman had preferred the patient autonomy route on advice—the patient's right to make their own decision. They decided that the judgment in *Sidaway* was "unsatisfactory".

In place they introduced a new test:

> "An adult person of sound mind is entitled to decide which, if any, of the available forms of treatment to undergo, and her consent must be obtained before treatment interfering with her bodily integrity is undertaken. The doctor is therefore under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in the any recommended treatment and of any reasonable alternative or variant treatments."

They further explained:

> "The test of materiality is whether in the circumstances of the particular case, a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it."

There would exceptions for where it would be detrimental to patient's health or in the event of necessity and they provided further guidance on its application.

Returning to the facts of the case and applying the new test they concluded that a vaginal delivery was high risk and Mrs Montgomery should have been advised of that even if the risk was small. The found that Dr McLellan did not advise of the risk precisely because she recognised that Mrs Montgomery would probably have opted for a caesarean section. On that basis causation was also established. They awarded judgment for the claimant for £5 million.

In a lovely cameo judgment, agreeing with the majority judgment but no doubt feeling compelled to add her own thoughts as the only female Supreme Court justice in a case about maternal choice, Lady Hale observed that Dr McLellan was making a value judgment that natural birth was in some way morally preferable to a caesarean section. She noted both the pros and cons of both procedures and the joys of natural childbirth but firmly reiterated that it is the mother's choice. She concluded:

> "Gone are the days when it was thought that, on becoming pregnant, a woman lost, not only her capacity, but also her right to act as a genuinely autonomous human being."

Practice Points

- The judgment of the Supreme Court in *Montgomery*, taken together with the judgment in the Court of Appeal in *Border v Lewisham and Greenwich NHS Trust*[11] mean that advice and consent to treatment cases must now be looked at very differently by practitioners. A simple failure to obtain consent is a breach of duty per *Border* and the test is not the *Bolam* test but is now the new *Montgomery* test. This is arguably a far more patient centred and straight forward approach involving an assessment of what the reasonable patient would want to know.
- It would be sensible to review any existing cases that have become mired down in arguments on *Bolam* breach and causation and go back a step to revisit whether in fact there was appropriate advice given and consent obtained.

[11] [2015] EWCA Civ 8 CA (Civ Div) (Richards LJ; Tomlinson LJ; Newey J) 21/01/2015 discussed at [2015] J.P.I.L C72.

- It will arguably be far more straightforward to identify material errors in the advice given and to challenge whether proper consent was provided than to prevail in the "battle of the experts" on *Bolam* issues of breach.
- Issues of advice on treatment and consent to treatment should be the first issues to be analysed by clinical negligence lawyers on behalf of their clients

Muiris Lyons

AB v Chief Constable of X Constabulary

QBD (Males J) January 8, 2015 [2015] EWHC 13 (QB)

Personal injury—liability—employer's liability—police officers—psychiatric harm—causation—Ex turpi causa—misuse of drugs

Causation; Employers' liability; Ex turpi causa; Misuse of drugs; Police officers; Psychiatric harm

The claimant was a former undercover police officer who alleged psychiatric injury in the form of an adjustment disorder arising from a breach of the duty of care owed to him by the Chief Constable, who for the purposes of this claim has accepted vicarious liability for the acts and omissions of the collaborative police unit within which the claimant worked. The context is the claimant's deployment to another region (outside the area covered by the collaborative unit) as an undercover officer tasked with the obtaining of intelligence in relation to a serious organised criminal group.

The claimant misused cocaine on more than one occasion and failed to report it at the time. This failure made it inappropriate for him to continue as an undercover officer. He was offered alternative employment within the police once the cocaine misuse came to light although there was an issue as to what was offered and its suitability. Ill-health retirement was granted by the medical appeal board. The basis of the claim was that the defendant breached his duty of care in failing to provide the claimant with appropriate support during the period undercover. He complained about the quality and extent of the cover. This alleged breach caused his injury.

Breach of duty was denied, with a further denial that the matters complained of had any causative relevance. It was contended that any psychiatric injury suffered was attributable to the claimant's own misconduct in abusing cocaine and its discovery. The defendant argued that the claimant was barred by public policy from recovering damages, because he would be recovering damages for the consequences of his own illegal acts and serious misconduct in abusing cocaine.

The Trial was heard in private to protect a significant number of witnesses including the claimant himself. The judgment was delivered in two parts for the same reasons. The claimant was admired and respected as an outstandingly effective and successful undercover officer. His taking of cocaine and the consequences had proved disastrous for him. They led almost overnight to the loss of his status as a successful and well-respected undercover officer. The claimant would not, however, accept that he was responsible for his misuse of cocaine.

It was common ground between the psychiatric experts that the claimant suffered from a chronic adjustment disorder. The court held that there was no objective evidence of any symptoms of such a disorder before the claimant was confronted with his misconduct. The court concluded that the chronic adjustment disorder from which the claimant suffered was caused by the fact that he was confronted with

his own misconduct and that he had to face the traumatic consequences of this including a sudden loss of status and identity.

There was no evidence that he was suffering from any mental disorder before that confrontation occurred, but when it did occur it was sufficient to account for and is the only explanation of the mental disorder which he then suffered. Even if there was a failure by the defendant properly to care for the claimant's welfare or to supervise and monitor his mental health, any such breach would be causally irrelevant, since it would not be such breach that caused the psychiatric injury for which he claimed damages.

Even if the claimant could prove that the defendant was in breach of duty by failing properly to care for his welfare or to supervise and monitor his mental health, it would remain the case that the cause of his psychiatric injury was the fact that he was confronted with his own misconduct and its consequences. The principle ex turpi causa non oritur actio applied. It was inescapable that the damage which the claimant suffered (his psychiatric injury) was caused by his own criminal act (his voluntary misuse of cocaine[1]). That is so even if there were breaches of duty by the defendant in failing properly to care for his welfare.

Although deciding that the claim must fail as a matter of causation and by reason of the ex turpi causa principle regardless of any breach of duty the court did go onto to consider breach of duty. Reference was made to Hale LJ's 16 propositions set out in *Barber v Somerset CC*.[2] Foreseeability of the risk of psychiatric injury was not in issue in this case. A generic risk assessment for undercover work had been prepared expressly referring to the risks and identified various measures to control those risks, which were described in "the Confidential Annexe".

It followed that the defendant was under a duty to take such steps as were reasonable in the circumstances to ensure that the claimant did not suffer psychiatric injury due to the stress which he would experience as an undercover officer, which was inevitably, potentially, a highly stressful occupation, involving as it did the daily risk of exposure and the dire consequences to which that would lead. The measures identified by the defendant were reasonable in all the circumstances if properly applied and were here properly implemented.

Breaches of duty alleged were not established and the case was dismissed.

Comment

Comment on the facts of this case is necessarily somewhat limited: Due to the sensitivity of the subject matter, the case was heard in private to protect witnesses and on-going under-cover police operations, and so the judgment released to the public was short on factual detail, and deliberately vague.

Public policy dictates that one cannot benefit from ones own criminal act. *Gray v Thames Trains Ltd* is a fascinating case. The claimant was a passenger injured in a train crash, for which the defendant was liable, and he suffered from post traumatic stress disorder as a result. He argued that his psychiatric injuries caused him later to kill a drunken pedestrian in a "road rage" incident. He pleaded guilty to the pedestrian's manslaughter on the grounds of diminished responsibility but claimed from the train company for financial losses consequent upon his incarceration for the crime he committed. Lord Hoffman in the House of Lords summed up the principle in his typically pithy manner: "you cannot recover for damage which is the consequence of your own criminal act."[3]

So for sound reasons, Mr Gray did not recover damages. Likewise here AB's case failed where the judge found that his psychiatric injury was caused by his own voluntary criminal act (taking cocaine) or more accurately, when his employers confronted him with the consequences for his career as a result of him taking cocaine. AB's counsel attempted to rely on a later Supreme Court decision *Hounga v Allen*,[4]

[1] *Gray v Thames Trains* [2009] UKHL 33 applied.
[2] *Barber v Somerset CC* [2002] EWCA Civ 76.
[3] *Gray v Thames Trains* [2009] UKHL 33 at [32].
[4] *Hounga v Allen* [2014] UKSC 47; [2014] 1 W.L.R. 2889.

a claim for damages for injured feelings as a result of being unfairly dismissed. As a child, the claimant had knowingly used false documents to enter the country illegally, although in fact she was likely to have been a victim of human trafficking, having been forced to work under violent conditions and effectively imprisoned by the defendant.

Lord Wilson recognised the problem of causation—did the claimant's unlawful act in entering the country and the contract illegally "cause" or was it "inextricably linked to" the damage she later complained of? He preferred to step back and compare competing public policies: The first, and the one that founded the defence, that one should not profit from ones own criminality (*ex turpi causa*), the second, the need to protect victims of human trafficking.

Here it was found that the claimant was not profiting from her illegal conduct in entering into the contract, but was to be properly compensated for the injury to her feelings from having the contract terminated unlawfully on racially discriminatory grounds. Damages were awarded to *Hounga* because the court was able to "preserve the integrity of the legal system" (another important public policy) and in that *Hounga* did not contradict *Gray* (although this surely leads to a most imprecise test).

Practice Points

- Lord Hoffman's statement of principle in *Gray v Thames Trains* on ex turpi causa is not at odds with and survives the later decision of the Supreme Court in *Hounga*, even though the opposite result was achieved for the claimant.
- What *Hounga* does however is allow a wider consideration of the circumstances of the case when a defence of ex turpi causa is raised; other competing public policy issues may trump it.
- In any claim for psychiatric harm, however "tough" the victim would appear to be, thought must be given to the vulnerability of the witness[5] or party and in time it is hoped that special measures can be put in place to allow all witnesses to give their best evidence in court and for the impact of the litigation process to be moderated.[6]

Jonathan Wheeler

Milroy[1] v British Telecommunications Plc

QBD (William Davis J) 05/03/2015 [2015] EWHC 532 (QB)

Personal injury—liability—health and safety at work—employer's liability—electricity lines—training—vocational training—work equipment—Provision and Use of Work Equipment Regulations 1998—Electricity at Work Regulations 1989—contributory negligence

Contributory negligence; Electricity lines; Vicarious liability; Vocational training; Work equipment

[5] Mr Justice Males in AB recorded in his judgment that bringing this claim had done the claimant no favours. The judge described the claimant as appearing "highly distressed" during the course of the trial and noted that the experts agreed that the stress of the litigation had impacted upon his psychiatric disorder and obstructed his recovery. "It was sad" said Mr Justice Males "to see [the claimant] in court, holding his head in his hands at the thought of what he had thrown away in a few moments of weakness".

[6] I am involved with The Advocates Gateway in a project to bring these issues to light to the benefit of all court users. For further information, see *http://www.theadvocatesgateway.org/*.

[1] Ian Andrew Milroy (a protected party by Mrs Sharon Maria Milroy, his litigation friend).

In 1989 Ian Milroy began working for BT as an engineer. In 2003 he attended a one-day BT course in order to qualify as a Mobile Elevated Work Platform ("MEWP") operator. He was trained to operate a Type 5 MEWP which is a modified Ford Transit van with a boom rising from the roof of the van. The working platform is a bucket at the end of the boom which can accommodate two people. The raising and other movement of the boom is controlled either from a set of controls inside the bucket or from controls at ground level at the rear of the van. Initially Mr Milroy only worked intermittently as a MEWP operator. From 2004 he worked permanently in that capacity.

Until early 2009 each MEWP was manned by two trained operators. One operator would work from the bucket whilst the other would act as ground support. Mr Milroy fulfilled both functions. From early 2009 onwards each MEWP was manned by a single operator. When a MEWP was required by an engineer working on site for high level access, whether on the highway or at a building, the engineer would contact a line manager who then would send a MEWP. The engineer would be required to act as ground support for the trained MEWP operator whilst the MEWP was being used.

On the August 26, 2009 Mr Milroy responded to a request for the attendance of a MEWP on a country lane near Catsfield, East Sussex. Keith Bradley, an engineer, was on site there and he needed to gain access to the top of a carrier pole. Running alongside the lane were overhead high voltage power lines ("HVPL"). When Mr Milroy was operating the MEWP in its raised position, he came into contact with the current running through the HVPL either because his head touched the power line or because there was arcing of current from the power line. As a result he suffered serious injury.

What exactly happened immediately before the accident was unclear, but there was evidence that Mr Milroy came into contact with the power line after moving the bucket in response to a request from a lady on a horse who needed to get past. His case was that his employer failed to provide a safe system of work because it was in breach of the Electricity at Work Regulations 1989 reg.4[2] and the Provision and Use of Work Equipment Regulations 1998 reg.9(1).[3] He also alleged that it was vicariously liable for ground support failings by the site engineer.

The employer disputed liability, asserting that it had provided sufficient training and that its guidance in relation to working near high power voltage lines specified a 2m clearance distance, which the engineer had breached.

The judge held that determining liability involved examining the detail of the engineer's training in 2003. An e-learning slide had depicted a power line and stated "33Kv keep 2 metres clear". After the training day, employees had been given a filofax of manuals, one of which contained a short paragraph about working in the vicinity of power and repeated the information about the 2m clearance.

There was no evidence that the relevant paragraph had been drawn to Mr Milroy's attention. His understanding from his training was that he should not go within the area of a notional 2m diameter from any high voltage power line. That amount of clearance was not enough to safeguard against the risk of serious injury or death.

The employer gave evidence that the 2m clearance was supposed to be horizontal, but that was not clear from the documentation. In 2007, the employer changed its guidance to "clarify" that point. The filofaxes had been superseded by laptops, so the new document was provided only in electronic form. It constituted

[2] 4(1) All systems shall at all times be of such construction as to prevent, so far as is reasonably practicable, danger. (2) As may be necessary to prevent danger, all systems shall be maintained so as to prevent, so far as is reasonably practicable, such danger. (3) Every work activity, including operation, use and maintenance of a system and work near a system, shall be carried out in such a manner as not to give rise, so far as is reasonably practicable, to danger. (4) Any equipment provided under these Regulations for the purpose of protecting persons at work on or near electrical equipment shall be suitable for the use for which it is provided, be maintained in a condition suitable for that use, and be properly used.

[3] 9(1) Every employer shall ensure that all persons who use work equipment have received adequate training for purposes of health and safety, including training in the methods which may be adopted when using the work equipment, any risks which such use may entail and precautions to be taken. (2) Every employer shall ensure that any of his employees who supervises or manages the use of work equipment has received adequate training for purposes of health and safety, including training in the methods which may be adopted when using the work equipment, any risks which such use may entail and precautions to be taken.

a comprehensive revision of the system of working in the vicinity of power and a significant change to the working practice of platform operation.

The judge held that it was not acceptable for the employer to introduce such a change by placing updated material in an electronic file containing many other documents without any further notification to affected employees.

In 2008, Mr Milroy had further training, undertaking 13 activities each lasting a few minutes. One activity was about working safely with elevated platforms. Mr Milroy was required to answer written questions afterwards. He achieved a mark of 90 per cent. He had no recollection of that training, possibly because of the large number of training topics in a short space of time.

The judge held that the training was not, however, adequate, because the questions he was required to answer did not trigger him to rehearse the critical element of the new system. It was, therefore, foreseeable that a single piece of computer-based training delivered on the same day as a dozen other pieces of training was insufficient to ensure that the engineer had absorbed the very significant change made to the system concerning platform work in the vicinity of power. Mr Milroy did not appreciate that there was a new system or what it was.

The judge found that the provision of inadequate training was a breach of reg.9(1) of the 1998 Regulations and was a significant cause of the accident. For the same reasons, it was also a breach of reg.4(3) of the 1989 Regulations because it "gave rise … to danger".

The judge also held that Keith Bradley was in breach of his duty to the claimant for several reasons, including the fact that he got into the bucket instead of remaining on the ground. Those breaches were a substantial cause of the accident and the employer was vicariously liable for them.

Mr Milroy was held to be contributorily negligent. The judge found that he displayed lack of care in moving the bucket so close to the power line, and in allowing the site engineer Keith Bradley into the bucket with him. His contribution was assessed at one third.[4]

Comment

Two interesting aspects of the decision in this case relate to training and negligence of a fellow employee. In work related accident cases these aspects often arise but perhaps aren't scrutinised as closely as they should be. Accordingly it is worthwhile considering the approach that was taken by the Court.

Training. The Court relied on reg.9(1) Provision and Use of Work Equipment Regulations 1998. This states:

> "Every employer shall ensure that all persons who use work equipment have received adequate training for purposes of health and safety, including training in the methods which may be adopted when using the work equipment, any risks that such use may entail and precautions to be taken."

Of course, reliance can no longer be placed on a breach of statutory obligation. Nevertheless, it is at the very least arguable that the statutory requirements set the benchmark for employers obligations at common law. Indeed, it is difficult to anticipate the Court moving away from such an obligation regarding training. What is interesting in this case is that the Claimant did actually receive training. Nevertheless and in spite of this, the Court was prepared to scrutinise in detail the training that was offered and formulated a very critical view.

The Court was concerned with training in the use of MEWPs in the vicinity of HVAPL. There was an introduction of a new system of working to substantially revise the previous unsafe system where the possible consequence of failing to follow the new system would have very serious consequences. On this basis Davis J found that the training was lacking in a number of important respects:

[4] Applying *Jackson v Murray* [2015] UKSC 5.

- It was given many months after the new system was introduced.
- It was one piece of training delivered on a day where a significant amount of other unconnected training was provided.
- Questions which formed part of the training did not address the critical aspects of the working method.
- There was no follow up of the training given the potential importance of it.
- The training was given in relation to an operation which was unusual to carry out. The Claimant had never been in the type of situation where the training would be relevant before the actual incident in question. If training in the use of equipment is likely to be put into practice on a regular basis the training will be reinforced by its practical application. However, in this case the circumstances in which the Claimant found himself was very unusual, yet extremely risky and this it was felt underlined the inadequacy of the training.

Having found that the training was inadequate it was of course necessary for the Court to find that had the proper training been given it would have made a difference. Here, Davis J was satisfied that the Claimant was a good and careful operator. That was the evidence of the witnesses for the Defence as well as the Claimant. Accordingly, Davis J was content to find that the Claimant will have followed the correct procedures had proper training been given.

The second issue mentioned concerns the negligence of a fellow employee. On the day in question the Claimant was working with Mr Bradley. Mr Bradley had knowledge of the systems involved as well as the dangers. Davis J held that even though Mr Bradley was not a fully trained MEWP operator, he should have appreciated the dangers that were involved. It was commented that on the following day, the job was done by use of a ladder and without using the MEWP at all. Davis J found that Mr Bradley should have been alive to the possible alternatives and adopted a different system of work to that which was imposed. The Defendants were, of course, vicariously liable for his negligence.

It is also worthwhile noting that the Claimant was found one third at fault for being involved in creating what was a dangerous system of work. However, Davis J made reference to the recent Supreme Court decision in *Jackson v Murray*.[5] Here he applied the general principle of achieving a balance between causative potency and blameworthiness as applied to the circumstances of the case.

Practice Points

- In accident at work cases, where there is a training issue involved, it is always worthwhile examining in detail what training was actually provided and whether it was adequate.
- It is also worthwhile bearing in mind that where other employees were involved at the time of the incident, they may also be at fault.

Colin Ettinger

[5] *Jackson v Murray* (2005) UKSC 5.

Edwards v Kumarasamy

CA (Civ Div) (Lewison LJ, Christopher Clarke LJ) January 28, 2015 [2015] EWCA Civ 20

Personal injury—defective premises—disrepair—easements—landlords' duties—leasehold covenants—Landlord and Tenant Act 1985 s.11(1A)

Breach of covenant; Defective premises; Desrepair; Landlords' duties; Notice; Tripping and slipping

On a summer evening in 2010 Samuel Edwards was taking rubbish out from a second floor flat which he and his partner rented from Mr Kumarasamy. He tripped over an uneven paving stone in the pathway between the front door of the block and the communal bins in the car park, as a result of which he injured his knee. The pathway is 10–12 feet long and is the essential means of access to the block. The tenancy under which Mr Edwards rented the flat was an assured shorthold tenancy to which the implied repairing obligations in s.11 of the Landlord and Tenant Act 1985 applied.

Edwards had not given notice of any defect to Mr Kumarasamy before the accident and Mr Kumarasamy had given no notice to his own landlord. A deputy district judge found that the paved area was part of the structure or exterior of the flat and awarded Edwards damages. On appeal, a judge held that Mr Kumarasamy was not liable under the extended covenant implied into the tenancy by the Landlord and Tenant Act 1985 s.11(1A)[1] because it was a precondition to liability that notice of the defect had to be given. Edwards appealed and submitted that liability arose as soon as the disrepair existed and was not conditional on notice having been given.

The Court of Appeal held that whether something was part of the structure and exterior of a house depended on the facts. On the basis of the deputy district judge's findings of fact, the paved area was short and part of the essential means of access to the front hall in which Mr Kumarasamy had an estate or interest and it could properly be described as the exterior of the front hall.

In principle, the extended covenant applied. The general rule was that a covenant to keep premises in repair obliged the covenantor to keep them in repair at all times, so that there was a breach of the obligation as soon as a defect occurred. There was an exception where the obligation was the landlord's and the defect occurred in the demised premises itself, in which case he was only in breach of his obligation when he had information about the existence of the defect such as would put him on inquiry as to whether repair works were needed and he had failed to carry out the necessary works with reasonable expedition thereafter.[2] Where a defect occurred in the external part of the building that was not demised to the tenant, the landlord was liable even thought he had no notice of the disrepair.[3]

The critical distinction, under common law, was between that which was demised and that which was not. Where, as in this case, there had been an express grant of an easement the grant carried with it an ancillary right on the part of the dominant owner to carry out repairs on the servient owner's land in order to make the easement effective. A landlord's liability on his covenant to repair only required notice where the defect was within the demised property itself. Parliament had not included any requirement of notice. With implied terms, necessity rather than mere reasonableness was the touchstone. The court disagreed with the authors' opinion in Dowding & Reynolds[4] that notice was required even in the case of extended covenants.

[1] Repairing obligations in short leases.
[2] *British Telecommunications Plc v Sun Life Assurance Society Plc* [1996] Ch. 69 followed.
[3] *Murphy v Hurly* [1922] 1 A.C. 369 followed.
[4] 5th ed. para 20-37.

The appeal was allowed.

Comment

Introduction

Section 11 of the Landlord and Tenant Act 1985 is a useful provision which may be relied on, as a cause of action, whenever injury occurs from lack of repair to the "structure and exterior" of a dwelling-house that is subject to a lease within the scope of the Act. The judgment in this case deals with a number of issues on the scope and application of this provision in the particular context of a personal injury claim.

The Scope of the Act?

Leases to which s.11 of the 1985 Act applies are identified by a general rule set out in s.13, which is subject to exceptions given in s.14. Section 13 applies the provisions of s.11 to a lease of a dwelling-house granted on or after October 24, 1961 for a term of less than seven years.

A lease determinable at the option of the lessor before the expiration of seven years is treated as a lease for a term of less than seven years whilst a lease shall not be treated as a lease for a term of less than seven years if it confers on the lessor an option for renewal for a term which, together with the original term, amounts to seven years or more. Consequently, the Act will apply to what might be termed weekly or monthly tenancies and so many leases are subject to the statutory covenant provided for by s.11.

However, s.14 provides that s.11 does not apply to a lease of a dwelling-house which is a tenancy of an agricultural holding (as defined by the Agricultural Holdings Act 1986) or a farm business tenancy (as defined by the Agricultural Tenancies Act 1995) and does not apply to a lease granted on or after October 3, 1980 to:

- a local authority;
- a National Part Authority;
- a New Town Corporation;
- an Urban Development Corporation;
- the Development Board for Rural Wales;
- a registered social landlord;
- a co-operative housing association;
- bodies making student lettings;
- a housing action trust (established under Part III of the Housing Act 1988); or
- the Crown;
- A government department

Who Owes the Duty of Repair?

The judgment confirms that liability, as a result of the statutory covenant, may attach not just to the head lessor but any under-lessor, such as the defendant in this case. Furthermore, that duty extends, even with an under-lessor, to the structure and exterior of any part of the building in which that lessor has an estate or interest (even though the area in question might not be regarded as a "building" such as the paved area where the claimant fell in this case).

Is Notice of the Defect Required?

If notice of the relevant defect must be given to the lessor that will often be problematic for the claimant either because no notice has been given or there is a factual dispute about whether notice was given.

A crucial aspect of the judgment in this case is the ruling that if the relevant part of the structure and exterior is not within the demise of the relevant lessor then notice of the defect is not required as a preliminary to liability, which potentially arises as soon as the disrepair exists. That is an important point given the judgment of the Court of Appeal disapproves, on this point, the view expressed by the leading textbook on dilapidations, which must now be read in the light of this judgment.

This approach brings the Landlord and Tenant Act 1985 into line with the Defective Premises Act 1972, at least when the defect is not within the demised premises. In *Sykes v Harry*[5] the Court of Appeal confirmed that the duty under s.4 of the Defective Premises Act 1972 was a duty of reasonable care in all the circumstances which was not dependant on actual or constructive notice of the defect being given to the relevant landlord. Where, as in *Sykes*, the defect was within the demised premises notice would still be necessary to establish liability under the 1985 Act and, in the absence of such notice, reliance must still be placed on the 1972 Act.

What will be a Breach?

A claim under s.11 of the Landlord and Tenant Act 1985 is contractual in nature so the focus will simply be on whether or not the structure and exterior of the premises were kept in repair, an issue of property law. That approach avoids issues that may arise on reasonableness and foreseeability where the cause of action is based in tort.

For What Damage will there be Liability on Breach?

The claimant will need to establish damage has been caused by the breach of the statutory covenant, that is by failing to keep the structure and exterior of the building in repair. Personal injury, as this case illustrates, is a type of damage for which a lessor will be liable in the event of a causative breach.

Practice Points

- Where the terms of s.11 1985 Act apply the claimant should rely on that provision.
- In such cases the focus will be on establishing lack of repair in the "structure and exterior", and if the defendant is the lessor of only part of a building in establishing the repair relates to the structure and exterior of part of the building in which the defendant had an estate or interest, as well as proving that lack of repair caused injury to the claimant.
- Knowledge of property law, and how that should be applied, is important in this type of personal injury claim, reflecting the complexities there can be even with claims of relatively modest value, here a case involving damages of £3,750 where the law had to be resolved by the Court of Appeal. That should be reflected in what is regarded as proportionate so far as costs are concerned.

John McQuater

[5] *Sykes v Harry* [2001] EWCA Civ 167.

Kerr v Thomas Cook Tour Operations Ltd

QBD (NI) (Maguire J) 22/01/2015 [2015] NIQB 9

Personal injury—liability—hospitality and leisure—hotels—tour operators—package holidays—evidential burden—Package Travel, Package Holidays and Package Tours Regulations 1992 (SI 1992/3288) reg.15(1)

Foreseeability; Northern Ireland; Package holidays; Personal injury; Stray animals; Tour operators

In this case the Plaintiff, who is now aged 32 years, sues the Defendant for damages for breach of contract, breach of statutory duty and negligence arising out of a package holiday she contracted for at the Iberostar Chich Khan Hotel, Yasmine Hammamet, Tunisia.

On April 1, 2010 Bronagh Kerr went to a "Thomas Cook's" shop in Belfast. She indicated that she was interested in a holiday and was recommended one at the Iberostar Chich Khan Hotel, Yasmine Hammamet, Tunisia. The holiday was for one week and Kerr and her partner were both to travel. In the brochure the hotel was described as part of the Defendant's "Style Collection" and was indicated to have a four-star rating. On June 16, 2010 Kerr and her partner travelled to Tunisia and the holiday started.

Unfortunately on June 19, just a few days into the holiday, Kerr was attacked by a cat while she was in the hotel grounds. The cat jumped out at her from a bush, scratching and biting her right lower leg, which was uncovered as she was wearing shorts. After the attack the cat disappeared into the bushes. The injuries received which consisted of deep cuts and scratches required immediate treatment in the resort and still further treatment when she returned to the UK.

She sued "Thomas Cook" contending that they were liable pursuant to the Package Travel, Package Holidays and Package Tours Regulations 1992 reg.15(1).[1] Subject to the issue of liability, the court valued the injuries at £12,500.

Kerr told the court that prior to the attack, she had noticed the presence of a large number of cats in the hotel grounds which appeared to roam freely. They did not appear to be owned by anyone. The court was satisfied that this situation had long pre-dated the accident not least because there were numerous TripAdvisor reports which mentioned the cats. Importantly, however, none of the reports made any reference to a cat attacking anyone. The Defendant called no evidence in the case so the Plaintiff's account of the incident was therefore un-contradicted.

The judge found as a fact that the hotel management and the Defendant must have known of the presence of a large number of cats in or around the hotel. The Defendant carried out monthly health, safety and quality audits at the hotel and the court was satisfied that the person or persons carrying these out would have been likely to observe a large number of cats in or around the hotel, notwithstanding that there was no entry on any of the inspection records provided in discovery which records the presence of cats.

The judge felt that this situation would give rise to some obligation on the part of the hotel management to use reasonable skill and care to control them in an appropriate way. He also accepted that "the obligation which arises, moreover, at … a general level, would apply equally, whether the hotel in question is in Tunisia or the United Kingdom or elsewhere." However, he went on to accept that that "differential standards of care may well exist as between one country and another in relation to a matter of this kind".

[1] 15(1) The other party to the contract is liable to the consumer for the proper performance of the obligations under the contract, irrespective of whether such obligations are to be performed by that other party or by other suppliers of services but this shall not affect any remedy or right of action which that other party may have against those other suppliers of services.

The Defendant's case was simply that a long line of authority[2], from *Wilson v Best Travel* in 1993 made it clear that a claimant had to prove a breach of local safety standards in order to succeed. Kerr had not adduced any such evidence in this case and the claim must therefore fail. The Court agreed, albeit "reluctantly".

The judge also went on to find that the cats could not properly be described as "feral" in the sense of having aggressive or dangerous characteristics. Accordingly the court held that the attack was not foreseeable and the damage sustained by Kerr was too remote.

The case was dismissed.

Comment

There are some cases that one is left wondering how they actually came to trial. Maybe because of what is perceived as the modest value of the claim against the likely costs to be incurred; in others it may be the apparent hopelessness of the evidence or indeed the law to be overcome. A casual viewing of this case would suggest that all of these were triggered here.

In this case we had the nice starting point that there was no argument that this had to be a package holiday and therefore fell within the package holiday regulations. However it is a common misconception that this provides strict liability if one pursues a claim for personal injury compensation under them. This is only true to the extent that there is vicarious liability between the package tour organiser and the supplier ultimately held to be culpable. In real terms it remains very much a fault-based regime and indeed this has been exacerbated by the continuing view of the courts that it must take into account the local standards when measuring the culpability of the supplier and therefore the tour operator. This does not necessarily mean an advice on the law in the country where the accident took place but often something more basic than that.

This was another of the growing legion of cases to involve reference to the website "Trip Advisor". It appears to be the Trip Advisor evidence that the judge accepted because it was uncontradicted that there were numerous reports of cats roaming the hotel grounds. As this accident was in Tunisia, it was not in a safari park and it seems reasonable therefore to presume that the reference to a cat is a domestic one and not a lion. Perhaps not surprisingly the judge accepted as a fact that the hotel management at least would have known about the number of cats being present and although it does not say so one assumes they had also considered what threat, if any, they provided.

To that end, however, whilst the judge understandably considered that this must produce some obligation of control on the part of the supplier he noted that you could not be judging a Tunisian hotel with the UK standards. It does often seem that judgments in package tour cases relating to local standards do seem to bring out the worst of the empirical attitudes of the British who seem always to presume that their standards must by definition be higher than those where the holiday occurred.

It is not entirely clear what danger it was thought that a tourist in the hotel was likely to face from these cats, still less what the hotel owners were supposed to do about it. In the event, this claimant had not produced any evidence of local standards to address this and whilst the court apparently thought the claim should fail and took this view "reluctantly" perhaps more significantly was the acknowledgement presumably even if local standards had been breached, that there was a problem with foreseeability. In the absence of any evidence of real danger from these animals, the owners could not have been expected to see the severity of injury that this poor claimant suffered to justify a level of damages of £12,500.

Those representing claimants in overseas accidents are constantly frustrated by this need to identify local standards and then to prove a breach. More often than not it is the first step that is the most challenging.

[2] *Wilson v Best Travel Ltd* [1993] 1 All E.R. 353; *Evans v Kosmar Villa Holidays* [2007] EWCA Civ 1003; *Griffin v My Travel UK Ltd* [2009] NIQB 98; *Goldbourn v Balkan Holidays Ltd* [2010] EWCA Civ 372; and *Lougheed v On the Beach Ltd* [2014] EWCA Civ 1538.

Is it evidence from an engineer? Is it evidence from a lawyer? Is it even evidence from the local town mayor?

In some cases it is relatively easy. If there are building regulations as for instance as are found in Greece in relation to the construction of staircases after a certain time then if one can demonstrate that the building does not comply as it should do then the breach is relatively easy to identify. More often than not one is dealing more with customs than regulation. Despite a long line of authority, in this case alone there was a listing of five cases cited by the defendant, there still remain very significant questions marks over the local standard issue.

For example, is it reasonable to judge the owner of a seven star luxury hotel by the standards of a considerately poorer and unsophisticated environment that lies outside the boundary walls? The hotel has been marketed on the basis of its comfort and sophistication of a level commensurate with the country where the wealthy traveller comes from. The EU from where the Directive emanated to produce the package tour regulations intended to level the playing fields for the consumer. As seems all too often to be the case, the courts are uncomfortable with the extent to which there is apparently no requirement to establish fault or to take a short cut to that end point of filing in favour of the claimant.

It was all too evident in the interpretation by the courts of the so called "six pack" regulations in employers' liability; it has been seen in the field of product liability and remains the case in package tour cases. Where the holiday company is being held responsible for the actions of a supplier, the courts appear to ignore the significant investment and its return that is enjoyed by a holiday company with what appears to be a lack of responsibility for what actually goes on in resort through the actions or inactions of its contracting supplier.

Until this interpretation is changed by the appeal courts however, claimants are reminded that there are two challenges in these injury claims: establishing the appropriate breach of duty and supporting it with local standard evidence.

Practice points

- Identify the breach of duty.
- Identify an expert who can confirm local standards.
- Apply any breach of local standards to the causation of the injury.

Mark Harvey

Browne v Commissioner of Police of the Metropolis

QBD (Judge Coe QC) December 1, 2014 [2014] EWHC 3999 (QB)

Personal injury—liability—torts—assault—police officers—powers of search—unlawful arrest—aggravated damages

LT Personal injury; Police powers and duties; Powers of search; Unlawful arrest; Use of force

James Browne had been drinking in a pub from about 10pm the previous day before going to a party. He had not slept. He was known for his "minding" skills. The next morning he was asked to clear up some wraps and drug paraphernalia as he left the party. He did so and picked up eight or so wraps containing drugs or traces thereof, intending to dispose of them outside the premises.

Suspecting that Browne might be in possession of illegal drugs, a police officer followed him into a convenience store. He then forcibly removed Browne and took him outside, where he was restrained and handcuffed. He was searched and the wraps were found, although no action was taken in respect of the very small amount of drugs found.

During the restraint Browne sustained a serious knee injury. He brought a claim for damages for assault and battery against the police. His case was that he had been the subject of a deliberate assault in the store by the police officer.

The defence denied liability. It alleged that Browne failed to comply with a request to be searched; attempted to flee and sought to discard the wraps by swallowing them; he became violent and struggled when the police officer attempted to remove a wrap from his hand or prevent him from swallowing it. The defence claimed that the officer had used only such force as was reasonable and that Browne's knee injury was an unfortunate accident brought about by the reasonable force that was required given his resistance.

The judge held that in breach of the Police and Criminal Evidence Act 1984 s.2,[1] the officer had not taken reasonable steps before commencing the search to bring to Browne's attention his name, the police station to which he was attached, the object of the search or the grounds for it. There was no particular urgency. His failure to comply with s.2 rendered any use of force in such circumstances unlawful.

The judge also held that Browne had not sought to dispose of the drugs or to destroy evidence. The use of force was not therefore justified under the Criminal Law Act 1967 s.3. In any event, the force the officer had used was excessive and unreasonable, although he did not deliberately assault Browne.

Browne's injury had been caused by the officer and he was entitled to damages, including aggravated damages. The judge held that the officer had behaved in a high-handed and/or oppressive manner.[2]

Judgment was entered for the claimant.

Comment

The comedian and TV celebrity Noel Fielding—he of *The Mighty Boosh* and *Never Mind the Buzzcocks* fame—was a key witness in this case and added a touch of glamour to some very unglamorous facts and findings. HHJ Coe QC set the scene at [2] of her judgment, when she commented that at the material time: "Mr Fielding was still wearing his stage outfit consisting of dungarees, gold boots and a ladies' checked jacket. At that time his hair was dyed yellow blonde. Mr Browne was more conservatively dressed …"

The judge found that crucial evidence had been destroyed, being the only copy of the CCTV footage inside the shop where the assault by the police officer was alleged by the claimant to have taken place. PC O'Leary was the claimant's alleged assailant. The officer's evidence was found to be "simply incredible",[3] he "deliberately exaggerated the Claimant's behaviour in his statements and accounts",[4] and his evidence in one respect "was a case of deliberate dishonesty".[5] Serious stuff! His former colleague Mr Tucker was "doing his best to support his former colleague"[6] but there were inconsistencies and aspects of his evidence were also rejected. That said, the claimant himself was not entirely honest[7] when it came to his financial loss claim; a less than ideal experience for any judge.

At the heart of the case, the court was asked to establish how the claimant came by his serious leg injury in the course of his arrest. Whilst the burden of proof is on the claimant, the case of *Sheppard v Secretary*

[1] Provisions relating to search under s.1 (Power of constable to stop and search persons, vehicles etc.) and other powers.
[2] *Thompson v Commissioner of Police of the Metropolis* [1998] Q.B. 498 considered.
[3] *Browne v Commissioner of Police of the Metropolis* [2014] EWHC 3999 (QB) at [31].
[4] *Browne v Commissioner of Police of the Metropolis* [2014] EWHC 3999 (QB) at [47].
[5] *Browne v Commissioner of Police of the Metropolis* [2014] EWHC 3999 (QB) at [48].
[6] *Browne v Commissioner of Police of the Metropolis* [2014] EWHC 3999 (QB) at [50].
[7] *Browne v Commissioner of Police of the Metropolis* [2014] EWHC 3999 (QB) at [47].

of State for the Home Department[8] dictates that the defendant is obliged to provide an explanation. Here, the explanation was that the claimant broke his leg as he was forced to the floor outside the shop but the CCTV which did exist did not show the sort of excessive force that would be required to cause that injury. That evidence was rejected and the judge found that the assault took place in the shop.

As for damages, the judge awarded £55,000 for general damages for the closed comminuted fracture to the claimant's right tibial plateau (classification Schatzker 6). The claimant had to wear an external fixator for 18 months, and the award included damages for a pin-site infection requiring hospital treatment just over a year after the assault. The claimant had been a fit man leading an active lifestyle and prior to the assault he enjoyed hobbies of fencing, skydiving and running. His injured right leg is now permanently deformed and somewhat shorter than his left. He may require hip or knee joint replacements in the future, he has a permanent limp, and he has to use a crutch or a walking stick and sometimes a wheel chair to get around. He developed depression as a result of his injury.

He was awarded further general damages following a fall after the fixator was removed and he was wearing a cast when he fell downstairs due to the weight of the cast and the weakness and wasting of his injured leg. For those injuries, he received an extra £6,700 for a fractured femur and £5,000 for a fractured elbow.

The claimant did not fare as well in his financial loss claim. He signed a statement of truth on a schedule which claimed a loss of earnings based purely on his own oral evidence as to how much he earned "cash in hand" as a close protection officer. Without any tax records, bank statements, witness evidence, or other documentation, such a claim just isn't going to fly. Here, it annoyed the judge. Even a claim based on the minimum wage was bound to fail where there was no evidence of the claimant's work history, nor a record of continuous employment.

A substantial claim for taxi fares was discounted as they were not proven, and nor were lost earnings on a multiplier/multiplicand basis. The only evidence of lost earnings was the claimant's own word that he earned £500 per night on close protection work, which was never seemingly declared to the tax authorities nor evidenced through bank account records. The claimant's solicitors alternatively made a claim for lost earnings based on the minimum wage but the judge again was unconvinced—there was no evidence of any proper work history or exactly how the claimant earned his living. Doing the best she could, the judge awarded £25,000 to reflect a permanent disadvantage in the labour market, pursuant to *Blamire v South Cumbria Health Authority*.[9]

Aggravated damages were also appropriate, limited to the sum of £5,000 so as not to doubly compensate the claimant. Total damages awarded: £108,491.

Practice Points

- In cases where assault is alleged in custody, whilst the burden of proof does not alter, the defendant is obliged to provide an explanation pursuant to the *Sheppard* case.
- Claims for financial losses must be evidenced: a solicitor pleading as this was runs the risk that his client's evidence will be looked at more critically in other respects.
- A far better option is to plead disadvantage or a general loss of occupational opportunity—the *Blamire* case mentioned above remains a very helpful decision.

Johnathan Wheeler

[8] *Sheppard v Secretary of State for the Home Department* [2002] EWCA Civ 1921, applying European jurisprudence from *Strasbourg-Behiye Salman v Turkey* (2000) (2002) 34 E.H.R.R. 17

[9] *Blamire v South Cumbria Health Authority* [1993] P.I.Q.R. Q1 .

Hicks[1] v Young

QBD (Edis J) 24/04/2015 [2015] EWHC 1144 (QB)

Personal injury—liability—torts—negligence—passengers—taxis—making off without payment—false imprisonment—foreseeability—intervening events—causation

LT Breach of duty of care; Causation; False imprisonment; Foreseeability; Intervening events; Making off without payment; Passengers; Personal injury; Taxis

On November 2, 2010 Kristopher Hicks hired Michael Young's taxi at the Abbey taxi rank in the centre of Bath shortly before 11.00pm. He was with his then girlfriend Abigail Noad. They asked Young to drive them to the claimant's home address at No.100 Queens Drive and Young did so. On the way, they stopped twice. First, very soon after they hired the cab, they got out and went into a pizza takeaway shop. They came out without a pizza as they had ordered one to be delivered to their home. Then, about half way through the journey, they asked the driver to stop so that Ms Noad could get out of the car and buy cigarettes.

When they reached the home address, Ms Noad got out first. As Kristopher Hicks was moving to stand up to alight from the taxi Young drove off, with the taxi door open, back towards the taxi rank which was the original starting point of the journey. Despite the protestations of Hicks the defendant Young continued to drive on. The claimant, who was then 23 years old, sustained a very severe brain injury when he fell from the moving taxi and hit the road surface.

It was the defendant *Young*'s case that the movement of the taxi caused the door to close so he thought that his passenger was safely in the back of the taxi until he deliberately chose to leave it. The taxi had a locking system, which only worked intermittently and which the defendant did not try to apply. He alleged that the claimant "jumped" from the taxi about three-quarters of a mile from home when the vehicle was travelling at something over 20mph.

The reason why Young behaved as he did was that he had formed the view that the claimant and his girlfriend were not going to pay the fare. He raised the public policy defence of illegality, relying on the decision in *Beaumont v Ferrer*.[2] However, during the trial he accepted that he might have been mistaken. He also stated that the claimant had seemed resigned to what was happening, and that there was nothing to warn him that the claimant was going to jump out.

The defendant submitted that the claimant's act, in jumping out of the taxi, was not a foreseeable consequence of his driving. Alternatively, that the claimant's decision to jump out of the taxi was an intervening event which broke the chain of causation between any breach of duty by him and the damage sustained by the claimant.

Edis J held that Young drove from Hicks' home with him in the back when he had no right to do so. That caused Kristopher Hicks to try to escape, which he did making a serious error of judgment about the level of risk to himself in jumping out of a taxi at 20mph. Kristopher Hicks was not committing the criminal offence of making off without payment when he sustained the injuries and accordingly the defence of illegality did not bar his right to damages.[3]

[1] A Protected Party by his Mother & Litigation Friend Gillian Hicks.
[2] *Beaumont v Ferrer* [2014] EWHC 2398 (QB); [2015] P.I.Q.R. P2.
[3] *Beaumont* considered.

There was no doubt that at all times the defendant owed a duty to drive his vehicle with reasonable care for the safety of the claimant and driving away while the claimant was standing up in the rear of the taxi with the door open was a breach of that duty. However, that action caused the claimant to sit down and did not cause him any injury. The injury occurred a few minutes later, at which time the defendant was not driving in an unsafe manner.

However, the judge held that it was foreseeable that the claimant Hicks would want to escape and an attempt to do so would involve some level of risk of injury to him. Accordingly, the defendant was in breach of his duty to drive his car with reasonable care for the safety of the claimant. The taxi was not suitable for conveying prisoners safely, whether the detention of the passenger was lawful or not. The presence or absence of working locks was not decisive of the issue, but should have operated as a warning to the defendant of the risk that his prisoner might try to escape. The reason for the detention was not relevant to the negligence claim, at least on primary liability.

Edis J held had no doubt that it was certainly foreseeable that Hicks would try to leave the taxi and that it might be moving when he did so. The fact that he might misjudge the risk and jump out at a very dangerous speed causing catastrophic injuries was less foreseeable, but it was foresight of the kind of damage which occurred, namely personal injury, which was required and not the precise mechanism by which it occurred.[4]

Where the conduct which resulted in detention was part of the same series of events as the incident which caused the loss then the defence of contributory negligence arose, and this was such a case.[5] The claimant's conduct was careless, in that it involved a serious misjudgment of the level of risk. It was done because he had been unlawfully abducted and wanted to be at liberty, as he was entitled to be. In the circumstances, it was not an intervening act but was sufficiently careless to justify a significant reduction in the damages payable for negligence. Accordingly, the damages payable in negligence were reduced by 50 per cent.

Finally, the judge turned to the fact that Hicks was abducted and unlawfully imprisoned. The defendant had to pay damages for the direct consequences of that deliberate act and the defence of contributory negligence was not available.[6] The claimant was held to be entitled to the sum of £250 in damages as sufficient to mark the defendant's wrongful conduct leaving the injuries aside.

Judgment was entered for claimant.

Comment

While the outcome of this case may raise eyebrows amongst claimant colleagues, it does nevertheless show how the common law continues to evolve. I suspect it is also a case we have not heard the last of. There are two strands to the case; the claim in negligence and the claim for the intentional tort of false imprisonment. It is in respect of this aspect where the Mr Justice Edis has developed the law by applying differing tests of causation to the claims of false imprisonment and negligence.

The Claimant in this case, who was 23 years old at the time of accident, could not give evidence. His girlfriend at the time of the accident declined to give evidence, though the court did have the benefit of her statements to the police. The Defendant seems to have given his evidence in a straightforward manner. His evidence was that he was fearful that the Claimant would not pay the fare for the use of his taxi. This seems to have been around £4.00, a modest sum even for 2010. The girlfriend, who says that she had a £20 note in her hand, had already exited the taxi though she may have gone to take delivery of and pay for the pizza ordered on their way home. The Claimant stood up in the taxi so as to exit. At this point, the taxi driver thought that Hicks would do a runner. Thinking this, the Defendant drove off so as to return

[4] *Bolton v Stone* [1951] A.C. 850 and *Simmons v British Steel Plc* [2004] UKHL 20 considered.
[5] *Spencer v Wincanton Holdings Ltd (Wincanton Logistics Ltd)* [2009] EWCA Civ 1404 considered.
[6] *Co-operative Group (CWS) Ltd v Pritchard* [2011] EWCA Civ 329, [2012] Q.B. 320 followed.

to the taxi rank in the centre of Bath. The motion of the taxi driving off was sufficient to close the sliding rear doors. The taxi driver did not lock the rear door as he was out of the practice of so doing as there was a fault with the lock.

It would seem that in the short journey from the Claimant's home towards the taxi rank that the Claimant sat back down on the rear seat and that there was a brief exchange of words between driver and passenger. According to the taxi driver, Hicks seemed resigned to what was happening and gave no indication that he might try to get out of the taxi, even though arguably he had the opportunity of so doing when the taxi slowed for junctions and traffic lights. However, after about three quarters of a mile, when the taxi was travelling at about 30mph Hicks jumped out and in so doing hit the road surface at over 20mph and sustained catastrophic injury. Why he did so remains a mystery. It may be that he only had a small amount of money on him and would have been unable to pay for the extended taxi journey. He certainly was not drunk. It might have been that he did not fancy a two mile walk from the taxi rank home at around 11.00pm at night. Whatever the reason, he jumped. Edis J was trying the issue of liability both in respect of negligence and also the tort of false imprisonment.

The Defendant sought to rely on the public defence policy of illegality in that it had been the intention of Hicks and his girlfriend to do a "runner" and not to pay the taxi fare. Edis J quickly rejected this assertion and found that the Claimant was not engaged in any criminal act. Having so found he then had to determine the issues of tort of negligence and false imprisonment.

Dealing with false imprisonment first. False imprisonment is trespass to the person and actionable *per se* and the Claimant is entitled to damages without proof of loss. He would also be entitled to claim damages for any physical or mental injury flowing from the false imprisonment. Although Edis J held that the Claimant had been falsely imprisoned when the Defendant drove off with Hicks still inside, the issue was whether the injury sustained by Hicks "escaping" from unlawful imprisonment by jumping from the taxi was directly caused by his false imprisonment. Edis J decided that the Claimant's injury stemmed from a decision he took and not directly from the false imprisonment. On this basis, the judge decided that the injury sustained was too remote and thus adopted a different approach to remoteness than in the claim for negligence. £250 was awarded in respect of the Defendant's wrongful conduct of false imprisonment.

With regards to the claim for negligence Edis J accepted that it was not straightforward but decided that there was no illegality defence open to the Defendant. He also decided that the taxi driver driving off with Hicks standing up in the rear while the sliding door was still open was a breach of the duty of care owed to Hicks and was negligent. However, negligence did not cause injury. Hicks sat down and exchanged words with the taxi driver. It was only after three quarters of a mile or so that he decided to jump from the taxi. By this time there was no evidence to suggest that the taxi driver was driving in an unsafe or negligent manner. As per Edis J:

> "The case in negligence must therefore be put on the basis that it was negligent to drive the vehicle at all with a person detained in it who may attempt to escape because the driver knows he wants to get out. The possibility of escape would be particularly clear because the doors were not capable of being locked. It was foreseeable that he would attempt to escape and that any such attempt would involve some level of risk to the Claimant …
>
> In my judgement once the duty and breach are explained in that way it becomes clear that the Defendant was in breach of his duty to drive his car with reasonable care for the safety of the Claimant. The taxi was simply not suitable for conveying prisoners safely."

That then left the issue of contributory negligence or, in the alternative, whether *novus actus interveniens* applied.

As we know, these are points for the Defendant to prove. Why Hicks decided to jump when he did is not known. Mr Justice Edis again:

> "All that I can safely say about the Claimant's conduct is that it was not a criminal act done in an attempt to avoid paying the fare. It was certainly careless in that it involved a serious misjudgement of the level of risk. It was also done because he had been unlawfully abducted and wished to be at liberty as he was entitled to be. In these circumstances I find that it was not a *novus actus interveniens* but was sufficiently careless to justify a significant reduction in damages payable for negligence. If I found that he had jumped through fear, and misjudged the risk in the agony of the moment the reduction, if any, would have been small. I cannot make that finding in the absence of any evidence. Whatever the reason, it was a grave misjudgement … It was certainly a causative factor of great potency. In these circumstances I reduce the damages payable in the tort of negligence by 50%."

So, Hicks had made a stupid mistake and misjudged the risks in jumping from the cab. Pedestrians also make stupid mistakes and misjudge the risks. Some claimant practitioners might look to *Lunt v Khelifa*[7] or *Eagle v Chambers*[8] and raise eyebrows as the percentage reduction in respect of contributory negligence in both those cases was less than in this case. On the other hand the findings are more in line with other, more recent, cases such as *Belka v Prosperini*.[9] I doubt we have heard the last of this case. Some might find it strange that there was no discussion of the extent of contributory negligence in other cases where the claimant had acted rashly.

Next time I get a taxi I will make it absolutely apparent that I have every intention of paying!

Practice Points

- Issues of contributory negligence do not arise in claims for trespass of the person.
- Compensation in such cases applies to the direct consequences of the tort only, hence the decision that injury sustained when jumping from the taxi was too remote.
- Different tests apply to cases of negligence where the damage must be of a kind which was foreseeable.
- Although there was no discussion or consideration of similar cases involving pedestrians it does, however, provide a useful reminder in respect of causative potency. In this instance, the claimant's actions in jumping from a taxi moving at 25–30mph were more causatively potent that those of the taxi driver in driving off with the claimant still in the back.

David Fisher

[7] *Lunt v Khelifa* [2002] EWCA Civ 801—one third contributory negligence on part of pedestrian stepping out into the road when drunk.
[8] *Eagle v Chambers* [2004] RTR 9—40 per cent contributory negligence on part of pedestrian wandering down middle of the road.
[9] *Belka v Properini* [2011] EWCA Civ 623—two thirds contributory negligence on part of pedestrian crossing a dual carriageway at night in the vicinity of a roundabout.

Case and Comment: Quantum Damages

Jackson v Murray

SC (Lady Hale DPSC; Lord Wilson JSC; Lord Reed JSC; Lord Carnwath JSC; Lord Hodge JSC) February 18, 2015 [2015] UKSC 5

Personal injury—damages—contributory negligence—pedestrians—road traffic accidents

Children; Contributory negligence; Foreseeability; Pedestrians; Road traffic accidents; Scotland

Lesley Jackson sustained severe injuries on January 12, 2004 when she was knocked down by a car driven by Andrew Murray. Lesley, who was then 13, had stepped out from behind her school minibus into the path of Murray's car. The accident had occurred at around 4.30pm, when the light was fading. At first instance, the judge Lord Tyre found that Murray had failed to drive with reasonable care. He ought to have kept a proper look-out and identified the bus as being a school bus, or at least a bus from which children were likely to alight. He ought then to have foreseen that there was a risk that a person might, however foolishly, attempt to cross the road.

He went on to find that Murray had failed to modify his driving. He did not reduce his speed from 50mph (the speed limit was 60mph) as he approached the bus. A reasonable speed in the circumstances would have been between 30 and 40mph. However, Lord Tyre also found that the main cause of the accident was the girl's "recklessness" in attempting to cross the road without taking proper care to check that it was clear. He assessed her contributory negligence at 90 per cent. On appeal, the Extra Division reduced her contributory negligence to 70 per cent.

The Supreme Court[1] held that it was not possible for a court to arrive at an apportionment which was demonstrably correct. The apportionment of responsibility under the Law Reform (Contributory Negligence) Act 1945 s.1(1) was inevitably a somewhat rough and ready exercise. The test to be applied by an appellate court was whether the court below had gone wrong. In the absence of an identifiable error, such as an error of law, or the taking into account of an irrelevant matter, or the failure to take account of a relevant matter, it was only a difference of view as to the apportionment of responsibility which exceeded the ambit of reasonable disagreement that would warrant a conclusion that the court below had gone wrong.

Nevertheless they held that the Extra Division had gone wrong in this case. It had rightly considered that Lesley did not take reasonable care for her own safety. Either she did not look to her left within a reasonable time before stepping out or she failed to make a reasonable judgment as to the risk posed by the respondent's car. On the other hand, as the Extra Division recognised, regard had to be had to Lesley's circumstances.

Lesley was only 13 and a 13-year-old would not necessarily have the same level of judgment and self-control as an adult. As the court also pointed out, she had to take account of Murray's car approaching at speed, in very poor light conditions, with its headlights on. As the court recognised, the assessment of speed in those circumstances was far from easy, even for an adult. It was also necessary to bear in mind that the situation of a pedestrian attempting to cross a relatively major road with a 60mph speed limit, after dusk and without street lighting, was not straightforward, even for an adult.

[1] Lords Hodge and Wilson dissented as they were not persuaded that the Extra Division's determination was outside the "generous limits" of reasonable disagreement.

The Extra Division considered that the driver's behaviour was "culpable to a substantial degree". He had to observe the road ahead and keep a proper look-out, adjusting his speed in case a potential hazard presented itself. As the Extra Division noted, he was found to have been driving at an excessive speed and not to have modified his speed to take account of the potential danger presented by the minibus. The danger was obvious, because the minibus had its hazard lights on. Notwithstanding that danger, he continued driving at 50mph.

As the Lord Ordinary noted, the Highway Code advised drivers that "at 40mph your vehicle will probably kill any pedestrians it hits". That level of danger pointed to a very considerable degree of blameworthiness on the driver's part. They found it to be impossible to discern in the Extra Division's reasoning any satisfactory explanation of its conclusion that the major share of the responsibility should be attributed to the child. The driver's conduct played at least an equal part in causing the damage and was at least equally blameworthy. They concluded that the proper assessment of contributory negligence was 50 per cent.

Comment

In many cases a particularly troublesome issue for personal injury litigators will not be whether a finding of contributory negligence is likely, but what the apportionment will be. We are grateful when we are aided by clear and authoritative judicial guidance which can be applied across a wide range of facts such as that given by the Court of Appeal in *Froom v Butcher*[2] regarding the wearing of seatbelts.

Despite the rarity of straightforward RTA's coming before the Supreme Court (on what basis can it be said that a point of law of general public importance will be raised?) the present case could, perhaps, be considered one of missed opportunity. This might have been an occasion when our highest court chose to give simple to apply guidance on the approach to be adopted to contributory negligence in a situation of car versus pedestrian. This did not really happen. The Court affirmed the well established principles that:

1) a car is more causatively potent of damage than a pedestrian; and
2) that a pedestrian will rarely be more to blame than the motorist,

but that is really as far as the judgment went on the issue. The reason for this is probably the obvious one, namely that the factual matrices are so many and varied, any other guidance would be impossible.

There were essentially two issues in the appeal. One was how responsibility ought to be apportioned in a case such as the present. The second was what principles should govern the review of an apportionment by an appellate court.

Apportionment

The difficulty for litigators anticipating how the courts will apportion contributory negligence is clearly illustrated by what happened in this case. The judge at first instance found the child's contribution to be 90 per cent. On appeal to the Extra Division the child's contribution was reduced to 70 per cent. The majority of Supreme Court (3:2) then reduced it further to 50 per cent, whilst the dissenting minority considered that there was no basis to interfere with the Extra Division's 70 per cent finding as it was not outside the generous limits of reasonable disagreement.

The majority, which included Lady Hale, drew heavily on the analysis of Hale LJ (as she was then) in *Eagle v Chambers*,[3] where it had been observed that the "destructive disparity" between the parties could be taken into account as an aspect of blameworthiness, contributory negligence being a function of relative blameworthiness and causative potency. It was noted that the courts have consistently imposed a high

[2] (1976) QB 286.
[3] [2003] EWCA Civ 1107.

burden on car drivers to reflect the potentially dangerous nature of driving (though nothing approaching the strict liability imposed on motorists in some of our neighbouring European countries), and the fact that "a car is potentially a dangerous weapon".

The Extra Division had, naturally, concluded that the causative potency of the driver's conduct was greater than the child's. It therefore followed that if the lion's share of responsibility was apportioned to the child (i.e. 70 per cent), the Extra Division must have considered the child to be far more blameworthy than the driver. This the majority of the Supreme Court could not accept on the facts found, namely that if the child had waited until the motorist passed, there would have been no collision. Equally, if the motorist had slowed to a reasonable speed for the circumstances and kept a proper lookout, he would have avoided the child.

When Should an Appellate Court Interfere with the Apportionment of a Lower Court?

Another vexing question for litigants is whether a judicial apportionment is likely to be reviewed on appeal. The present case leaves no very clear signals about this given that the majority (3:2) were prepared to interfere with the Extra Division's decision, but the two other members of the Court were not.

The Court accepted that a court must deal broadly with the problem of apportionment;[4] that it is a rough and ready exercise; that it is not possible for a court to arrive at an apportionment which is demonstrably correct; and that such matters are incapable of precise measurement. They commented that an appellate court will treat apportionment in the same way it does with an assessment of damages, namely that it will interfere if the judge has gone wrong in principle, or is shown to have misapprehended the facts, or is clearly wrong. Having reviewed the authorities cautioning against interference with a trial's judge's assessment they quoted Lord Fraser:

> "the appellate court should only interfere when they consider that the judge of first instance has not merely preferred an imperfect solution which is different from an imperfect solution the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which reasonable disagreement is possible."[5]

The Extra Division had not made an error or misdirected itself, but the majority considered that it had reached an apportionment which was not reasonably open to it; that the outcome was not just and equitable. As noted above, the majority considered that the child being found much more responsible than the motorist was substantially different from their own view that the parties were equally responsible.

The minority disagreed. They did not consider the court below to have "manifestly and to a substantial degree gone wrong",[6] though they accepted the trend to attribute more responsibility to vehicle drivers. Lord Hodge cautioned that "there is a danger of an appellate court attaching significance to findings [of the trial judge] which they do not carry and reinterpreting them and what may have lain behind them in a way which the judge, who heard the evidence, did not intend".[7]

Conclusions

This case illustrates to us how, on the same set of facts, individual judges assess contributory negligence differently. As litigators we therefore need to continue to assess contributory negligence within a fairly

[4] Per Lord Reid in *Stapley v Gypsum Mines Ltd* [1953] A.C. p.682.
[5] *G v G* [1985] 1 W.L.R. 651, at 652.
[6] Per Lord Hodge at [46].
[7] At [51].

wide margin. Finality is important, and one sympathises with Lord Hodge's sentiments that appellate courts are in danger of misunderstanding the findings of the trial judge.

Nevertheless, the judgment is a useful analysis of how causative potency and destructive disparity should be analysed. It may well help in bringing more uniformity in how the courts deal with apportionment in RTAs involving pedestrians, and further supports the principle that rarely will pedestrians be found more liable than car drivers.

Practice Points

- An appellate court will interfere with the apportionment of a lower court if it considers it to have exceeded the generous ambit within which reasonable disagreement is possible.
- There may be no reliable way of knowing precisely where the boundaries of this "generous ambit" lie in any individual case.
- The trend in running down cases is clearly to attribute more responsibility to the driver than the pedestrian. This is particularly so in cases of car versus child.
- Each case requires very careful analysis of the actions of the parties involved as well as their experience of the type of situation they encountered.
- Causative potency and destructive disparity ought to be deployable in a wide range of RTA cases—e.g. car versus motorcycle; car versus horse; or bicycle versus pedestrian.
- Each case must depend upon its own facts and courts get little assistance from comparisons of outcomes in other cases.

Nathan Tavares

Totham[1] v King's College Hospital NHS Foundation Trust

QBD (Elisabeth Laing J) January 22, 2015 [2015] EWHC 97 (QB)

Personal injury—damages—birth defects—brain damage—cerebral palsy—general damages—future loss—life expectancy—loss of earnings

Birth defects; Cerebral palsy; Future loss; Life expectancy; Loss of earnings; Measure of damages

Eva Totham (aged seven at the date of the hearing) sustained a grade 2 hypoxic ischaemic injury during her delivery at King's College Hospital on October 4, 2007 and suffered from cerebral palsy. The defendant Trust accepted liability for her injuries.

Eva lacked muscle strength and dexterity in her hands and arms and found it hard to control the position and movement of her head. She had difficulties in sitting and could only walk with help. She had a manual wheelchair which she could not propel, a walker, and an adapted tricycle which she was able to pedal. Eva was on medication to control her dribbling and her startle response to loud noises. She was generally continent and slept well, although she woke up at least once in the night.

Eva attended a mainstream primary school with one-to-one support. She needed help to get any benefit from the curriculum and required longer than other children to complete each task. Her understanding was greater than her ability to speak, which caused frustration as she could not always express her needs

[1] Eva Rose Totham (Protected Party suing by her Mother & Litigation Friend Sarah Elizabeth Totham).

clearly. She suffered from dramatic mood swings which she was unable to control and which disrupted her learning and family life. Eva's life expectancy was 47.

Some heads of damage were agreed but a number remained in dispute. Eva claimed loss of earnings and pension up to the age of 93.6 years, notwithstanding the judgment in *Croke (A Minor) v Wiseman*[2] which restricted such a claim to the period of life expectancy.

The judge held that in relation to future pecuniary losses, it was necessary to assess the reasonableness both of the claimed head of loss and its amount.[3] The chances of future events had to be assessed and reflected in the amount of damages awarded. Eva was under a duty to take reasonable steps to mitigate her loss, and it was a foreseeable consequence of the trust's negligence that she would do so.[4] Any loss which was caused by a failure to mitigate was not recoverable.

The judge accepted that there would often be a range of potentially reasonable options for a claimant to choose from when mitigating her loss. Provided Eva's choice was within that range, the trust could not reduce its liability by arguing that she should have chosen a cheaper option from that range. If she acted reasonably to mitigate her loss, she could recover for any loss which she incurred in doing so, even if the resulting damage was greater than it would have been had she taken no such steps.

Eva's injuries were felt not at the very top of the relevant bracket in the Judicial College Guidelines. Her functioning on verbal tasks was in the range between borderline learning difficulties and low average, whereas her functioning on performance tasks not involving fine motor skills was in the range between severe and moderate learning difficulties. That meant she would have insight into her condition which, alongside life expectancy and physical limitations, was one of the factors indicated in the guidelines as influencing the level of general damages to be awarded for pain, suffering and loss of amenity. The balance of competing factors was different in each case. In this case, the judge concluded that the appropriate amount of general damages was £275,000.

The judge was bound by and had to follow *Croke*. The rationale for the decision in *Croke* was that the court should not speculate as to whether a claimant might in future have had children who would require support. However in the light of the views of the Court of Appeal in *Iqbal v Whipps Cross University Hospital NHS Trust*,[5] she made two points. First, she expressed the view that the decision in *Croke* was inconsistent with the principle of full compensation. Second she agreed with Rimer LJ in *Iqbal* that the policy justifications referred to in *Croke* were inconsistent with *Pickett v British Rail Engineering Ltd*[6] and *Gammell v Wilson*.[7] In *Iqbal* the Court of Appeal granted permission to appeal to the House of Lords but the appeal was then settled.

If she had not been bound by the decision in *Croke*, Mrs Justice Laing would have awarded the sum of £32,694 per annum would have been awarded for those future losses up to the age of 70, and £12,000 per annum thereafter.[8]

Taking into account the expert evidence about the impact of cognitive deficits on a person's ability to be a parent, the judge held that there was no more than a fanciful chance that Eva would have children. Accordingly, no award was made for the costs of future childcare. The agreed items (approved by the court) totalled £3,624,913 plus an additional capitalised sum for periodical payments for future care of £5,107,642. The grand total with the sums awarded by the court came to £10,135,511.

[2] *Croke (A Minor) v Wiseman* [1982] 1 W.L.R. 71.
[3] *Sowden v Lodge* [2004] EWCA Civ 1370; [2005] 1 W.L.R. 2129 followed.
[4] *Rialis v Mitchell*, *The Times*, July 17, 1984 followed.
[5] *Iqbal v Whipps Cross University Hospital NHS Trust* [2007] EWCA Civ 1190.
[6] *Pickett v British Rail Engineering Ltd* [1980] A.C. 136.
[7] *Gammell v Wilson* [1982] A.C. 27.
[8] *Croke* followed.

Comment

Introduction

Whilst any judgment on quantum is inevitably fact sensitive a review of the approach taken by the court will always make for interesting reading. That is because the damages claimed in one case can provide a useful reminder about the appropriateness, and approach to valuation, of claims made in other cases.

The judgment given in this claim deals with a number of issues, relating to quantum, likely to arise in similar claims and is, therefore, of assistance in helping to formulate and value those claims.

The judgment also deals with a specific topic which does not reflect well on the jurisprudence of England and Wales, namely the issue of "lost years" claims for children. That is an issue which, unfortunately, seems no nearer to resolution by the courts.

It is worth, before returning to the topic of the lost years claim, analysing the approach of the judge to various heads of claim on points that may be of relevance and assistance when assessing quantum in other cases.

Full Compensation

It is always worth reiterating, as Laing J did when giving judgment, the underlying principle applicable to the assessment of damages in a personal injury claim. This is the "full compensation" principle, usually traced back to the words of Lord Blackburn in *Livingston v Rawyards Coal Co*[9] where he said that the court should award, "that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation". Hence, in this case, Laing J held there were some fundamental points arising from this principle:

> "The first is that the purpose of an award of damages in these circumstances is, so far as is possible, to put Eva in the position she would have been in had the Trust not negligently injured her. Eva is entitled to be compensated as nearly as possible in full for all pecuniary losses … Subject to the obvious qualification that perfection in the assessment of future compensation is unattainable, the 100% principle is well established and based on high authority": see per Lord Steyn in *Wells v Wells*[10]. The application of this principle to past losses is relatively straightforward. Past losses are ascertainable with some accuracy. Its application in practice to future pecuniary losses is necessarily more difficult.
>
> The second fundamental point is that deciding whether a head of loss is recoverable, and, if so, its amount, involves an assessment of the reasonableness both of the claimed head of loss and of its amount: *Sowden v Lodge*.[11] This principle was explained in two ways by Stephenson LJ in *Rialis v Mitchell*.[12] First, the duty to mitigate loss is a duty to take reasonable steps; and second, it is a foreseeable consequence of a defendant's negligence that a claimant will take reasonable steps to mitigate the loss caused by that negligence. The touchstone of reasonableness means that there will often be a range of potentially reasonable options for a claimant to choose from when mitigating her loss. Provided her choice is within that range, the defendant cannot reduce his liability by arguing that Eva should have chosen a cheaper option from that range."

Related to these points is the reminder given by the judge that the duty to mitigate loss is only a duty to take reasonable steps. It is, as Laing J recognised, a touchstone of reasonableness that there will often

[9] *Livingston v Rawyards Coal Co* (1880) 5 App. Cas. 25.
[10] *Wells v Wells* [1999] A.C. 345 at 382–383.
[11] *Sowden v Lodge* [2004] EWCA Civ 1370.
[12] *Rialis v Mitchell*, *The Times*, July 17, 1984, at pp.24–26 of the transcript.

be a range of potentially reasonable options for a clamant to choose from when mitigating loss. Hence, provided the choice made is within that range, the defendant cannot argue the claimant should have chosen a cheaper option.

A further important point made about mitigation is that, again provided a claimant acts reasonably, damages can be recovered for any loss incurred in attempting mitigation, even if that results in the damages being greater than they would have been had the claimant not taken any such steps.

Another facet of the full compensation principle, also identified by the judge, is the different approach adopted to past and future losses.

- With past losses a claimant must satisfy the court, on a balance of probabilities, any loss claimed has been incurred and was reasonably incurred. Then, subject to any qualification, that loss will be recoverable.
- With future losses it is necessary to assess the chances of future events and reflect those chances, whether they are more or less than even, in the amount of damages awarded.

Damages for Pain, Suffering and Loss of Amenity

The judge, as will often be the case, was assisted by the Judicial College Guidelines, though on the basis that no two cases are ever alike. The significance, and potential usefulness to the judiciary, of those guidelines is worth remembering across the whole range of personal injury claims. Judges, as this case illustrates, may well have regard to the guidelines in a case of catastrophic injury. Equally, a judge deciding the appropriate level of damages for pain, suffering and loss of amenity on the basis of information contained within the settlement pack at a stage 3 hearing in the RTA Protocol or EL/PL Protocol is also likely to pay close attention to the guidelines. Accordingly, practitioners may wish to base submissions on appropriate figures around those guidelines.

It is important to remember, whatever the value of damages for pain, suffering and loss of amenity, the potential uplift of 10 per cent on this, and similar, heads of claim. This case confirms that the guidance given by the Court of Appeal in *Simmons v Castle*[13] is applicable, now, to all judgments, unless the claimant has been funded by a conditional fee agreement with recoverable additional liabilities. Whilst not apparent from the terms of the judgment it seems likely the claimant, in this case, had legal aid and so, in the absence of a conditional fee agreement with recoverable additional liabilities, the uplift was payable. The same uplift would be applicable if, for example, the claimant had pursued the claim with BTE insurance.

Past Gratuitous Care

The judgment is a reminder that when gratuitous care is provided partly during evenings and weekends it will usually be appropriate to adopt the aggregate hourly rate from the National Joint Council figures.

That rate will, however, act as a ceiling, even when those providing the gratuitous care have suffered a loss of earnings, in order to provide that care, which exceeds the rates allowed.

There will, unless the circumstances are exceptional, be a discount on the rates allowed for gratuitous care, to reflect notional tax and national insurance deductions. That discount will be appropriate even when those providing the care have suffered a loss because the rates allowed for care do not match the earnings foregone in order to provide that care. The discount, however, should not now be more than 25 per cent, even though at one time a discount of 30 per cent or more may have been more usual. That is because, since then, the general incidence of income tax and national insurance has reduced. It is notable that judge in this case declined to apply a discount of more than 25 per cent, despite being specifically asked to do so by the defendant.

[13] *Simmons v Castle* [2012] EWCA Civ 1039; [2012] EWCA Civ 1288.

Case Management

Defendants are increasingly ready to challenge the costs of case management when it is perceived that this does not reflect proper value to the claimant for the sums charged. Such challenges, though on a somewhat arbitrary basis, have met with success, for example *Loughlin v Singh*.[14]

Limiting the recovery of sums paid for case management might be regarded as a little harsh, for the reasons well illustrated by the facts of this case. That is because the tortfeasor has caused an injury for which the claimant reasonably requires the input of a case manager. The claimant, or claimant's family, are, in those circumstances, placed by the tortfeasor in the difficult position of having to decide what support is required and who is to provide that support. Accordingly, it is surely foreseeable that the crisis created by the defendant's wrongdoing may mean, from time to time, arrangements such as case management do not work ideally.

Here care was clearly taken in the selection of case managers and it is notable the judge concluded that the loss, in terms of the difference between the cost of case management and the value received by the claimant, should fall on the defendant.

Where there are such challenges in the future, concerning the value of case management, it may be important, as in this case, for the claimant to have factual evidence outlining the steps taken to appoint and monitor case managers as well as action taken to deal with any problems experienced.

Conversely, a defendant who wishes to challenge the value of case management received by the claimant, and hence sums claimed by way of reimbursement, may wish to rely on the absence of factual evidence, explaining steps taken to set up case management arrangements, along with any identifiable inadequacies in the services provided when contesting a claim for the cost of case management.

Factual or Documentary Evidence

It is, obviously, helpful if the claimant has documentary evidence backing up each and every item of loss claimed in the schedule. Too much emphasis can, however, sometimes be put on the need for documentary evidence when there is factual evidence available to support the relevant head of claim.

Hence the judge was inclined to accept factual evidence about a disputed item in the claim for holidays, reflecting the need for the claimant just to prove heads of loss on a balance of probability and to do so by any appropriate evidence.

Lost Years Claim

This case has raised, yet again, the jurisprudential issue about claims for lost years by children. Unfortunately, that issue remains unresolved, which does seem unfair to the claimant in this case and other, future, litigants. To understand the issues surrounding this topic it is necessary to trace some of the history relating to claims for lost years.

Prior to *Pickett v British Rail Engineering Ltd*[15] there was no award for the lost years but in that case the House of Lords allowed such a claim. On the basis of *Pickett* the existence, or otherwise, of dependents would seem irrelevant to a lost years claim by a living claimant. However, in *Croke v Wiseman*[16] the Court of Appeal took a contrary view, effectively ruling out a lost years claim for children.

In *Iqbal v Whipps Cross University Hospital NHS Trust*[17] the trial judge held that, whilst a decision of the Court of Appeal, *Croke* was made on practical grounds, as they were perceived to have been nearly a quarter of a century earlier. The judge noted the decision in *Croke* created an anomaly between infant

[14] *Loughlin v Singh* [2013] EWHC 1641 (QB).
[15] *Pickett v British Rail Engineering Ltd* [1980] A.C. 136.
[16] *Croke v Wiseman* [1982] 1 W.L.R. 71.
[17] *Iqbal v Whipps Cross University Hospital NHS Trust* [2006] EWHC 3111 (QB).

claimants with curtailed life expectancies, who will have no dependents, and the situation which prevails with adult claimants having curtailed life expectancies, with no dependents and who for one reason or another are very unlikely to have them in the future. Accordingly, the judge held the practical justification, which persuaded the court in *Croke*, should not survive when awarding damages to children grievously injured to the point of never being able to work or to look after themselves but who have a significantly abbreviated, though still considerable, life expectancy.

On appeal, in *Whipps Cross University NHS Trust*[18] the Court of Appeal, after carefully reviewing the authorities, concluded the decision in *Croke* was not consistent with the earlier decisions of the House of Lords in *Pickett* and *Gammell*. That meant the court then had to consider whether it, and the trial judge, were nonetheless faced with a binding precedent. This had to be determined by considering whether any of the exceptions to the doctrine of *stare decisis*, as described in *Young v Bristol Aeroplane Co Ltd*[19] and subsequent cases, applied.

- The court did not accept the argument that the decision in *Croke* was impliedly overruled by the subsequent House of Lords decision in *Wells v Wells*,[20] as that concerned solely the assessment of damages to which the claimant was entitled.
- There was an earlier decision of the Court of Appeal with which *Croke* was inconsistent. This exception was held not to apply to an earlier decision of the House of Lords, unless *per incuriam*. That was because if the first Court of Appeal had considered the earlier House of Lords decision, and either wrongly distinguished it or misinterpreted its effect, the second Court of Appeal would be simply disagreeing with the reasoning of the first Court of Appeal, which the doctrine of *stare decisis* forbids.
- It could not be said the decision in *Croke* was *per incuriam* as the court in that case had been referred to both *Pickett* and *Gammell*.
- Although there were cases that suggested the court should not follow an earlier decision which was "manifestly wrong" the decision in *Croke*, although inconsistent with earlier House of Lords authority, was held not to fall within this category.
- In all the circumstances the Court of Appeal held that the proper course was to give the claimant leave to appeal to the House of Lords for any earlier error by the Court of Appeal to be corrected, despite the claimant's arguments that this approach was hardly consistent with the overriding objective.

The claim subsequently, as so often happens in such circumstances, settled before the hearing of the appeal. No doubt the defendant made the claimant an offer in terms which, understandably, the claimant was advised to accept and which was motivated by a concern that the House of Lords might reverse the decision in *Croke* to the benefit of future claimants. Such is the inequality between individual claimants, having to make a decision on the particular case, and institutional defendants, able to allocate resources on a much broader basis. That, in many respects, is an issue the overriding objective, in Part 1 CPR, fails to address.

Hence, nearly a decade after the judgment in *Iqbal*, another High Court judge has concluded the decision in *Croke* is wrong and the matter should be revisited by the Supreme Court. Regrettably, as the judge observed, the defendant would not agree to any appeal going direct to the Supreme Court, requiring the claimant to pursue, first, an appeal to the Court of Appeal which, as Laing J recognised, the Court of Appeal would be bound to dismiss given the precedent set by *Croke*.

[18] *Whipps Cross University NHS Trust v Iqbal* [2007] EWCA Civ 1190.
[19] *Young v Bristol Aeroplane Co Ltd* [1944] K.B. 718.
[20] *Wells v Wells* [1999] A.C. 345.

Consequently, as matters stand, the unsatisfactory state of the law in relation to claims for lost years by children remains. Moreover, all of this reflects the imbalance between claimants and defendants, certainly in personal injury and clinical negligence claims, which it would appear the overriding objective is unable to resolve despite the express aim of "ensuring that the parties are on an equal footing".

Loss of Chance

The claim for childcare is a reminder that, with future losses and expenses, the court needs to evaluate the chance of that loss or expense and can make an award of damages even if the chance is less than even, provided it is more than fanciful.

Consequently, whilst the claimant was not awarded damages for future childcare, on the facts of the case, such an award might have been allowed in a slightly different factual scenario and it is interesting to note that, had an award been made, the judge would have discounted the figure by 60 per cent. In other words even though this loss would have been less, rather than more, probable an award would have been appropriate if it had been supported by the evidence.

Practice Points

Although fact specific, which is inevitable in a judgment dealing with quantum, the case does provide some useful practice points.

- The Judicial College Guidelines are an important reference point for judges assessing damages, so practitioners may want to make express reference to those guidelines when making submissions to the court on the appropriate level of damages for pain, suffering and loss of amenity.
- Claimants should claim for all expenses and losses reasonably incurred as, if reasonable in amount, these can properly be pursued.
- Whenever appropriate to do so aggregate rates should be claimed for care and attendance.
- Where there is a dispute about the cost of case management factual evidence on steps taken to appoint and monitor case managers may be important.
- A lost years claim should always be pursued on behalf of a child given that this will either be bought off or, eventually, be the case that does go to the Supreme Court.
- It is important to remember the loss of chance approach to future expenses and losses.
- Heads of claim, or items of loss, can be proved by factual, not necessarily documentary, evidence.

John McQuater

Bianco[1] v Bennett

QBD (Warby J) March 12, 2015 [2015] EWHC 626 (QB)

Personal injury—damages—road traffic accidents—fatal accident claims—applicable law—dependency claims—EU law—life insurance—subrogation—Fatal Accidents Act 1976—Law Reform (Miscellaneous Provisions) Act 1934—reg.883/2004 art.85—reg.864/2007

LT Applicable law; Dependency claims; EU law; Fatal accident claims; Foreign nationals; Life insurance; Road traffic accidents; Subrogation

The claimant's husband had been hit by a car driven by the defendant in the UK. He died from his injuries. The defendant Anthony Bennett had admitted that he was two-thirds to blame. The claimant claimed damages under the Fatal Accidents Act 1976 and pursuant to the Law Reform (Miscellaneous Provisions) Act 1934. The claimant and her family were Italian and lived in Italy. In her schedule of loss, she made "subrogated claims" under the 1976 Act relating to sums paid and to be paid to the family by the Italian Workers Compensation Authority ("UNAIL") and by her husband's employer. It stated that, under the terms of an insurance policy with UNAIL, the claimant was contractually obliged to seek a subrogated claim where a third party was at fault. The preliminary issue was whether such claims were recoverable.

The defendant submitted that there was no head of loss under the 1976 Act which was apt to include the subrogated claims and that payments from the husband's insurer and employer were disregarded in the assessment of her claim as irrelevant. He argued that any claim based on Italian law would have to be pleaded and proved by expert evidence. The claimant argued that the sums claimed were recoverable pursuant to Regulation 883/2004 art.85.[2]

The court held that under English law, the content of foreign law was a question of fact, and if foreign law was to be relied on it had to be pleaded and proved as a fact by expert evidence. In the absence of satisfactory evidence of foreign law, the court would apply English law. The schedule of loss made no reference to art.85. However, the 2004 Regulation, as a directly enforceable instrument of EU law, was part of English law and a party did not have to plead matters of domestic law.

The position was different in relation to the provisions of Italian law, which was the foundation of the subrogated claims. The defendant was entitled to object to the claimant's reliance on the Italian law which had since been identified as founding her case under art.85. The Italian law case had not been pleaded and there was no admissible evidence to support it. The subrogated claims as pleaded could not succeed.

Warby J confirmed that Regulation 864/2007[3] applied to claims in respect of accidents and the applicable law was that of the country in which the damage occurred. The claim was governed by English law and the only available basis for a claim in respect of her husband's death was under the 1976 Act and the 1934 Act. The subrogated claims were not causes of action possessed by the husband before his death so the 1934 Act was not applicable and they could not be brought within the terms of the 1976 Act. The claimant had the benefit of s.4 of the 1976 Act which provided that all benefits coming to a dependant as a result of death were to be left out of account.

The judge also held that art.85(1)(a) was a choice of law provision by which the home law of the institution providing benefits in respect of an injury would govern whether the institution was subrogated

QUANTUM/DAMAGES

[1] Daniela Bianco (Administratrix of the Estate of Vladimiro Capano, Deceased).
[2] On the coordination of social security systems.
[3] On the law applicable to non-contractual obligations (Rome II).

to rights enjoyed by the beneficiary against the wrongdoer and, if so, the extent of the subrogation. That provision did not require the court of the foreign member state to apply the law of the institution's home jurisdiction to the claim against the defendant. *Deutsche Angestellten-Krankenkasse v Laererstandens Brandforsikring G/S* was not authority for the proposition that the law of the institution's home country applied to determine the existence and extent of the rights to which the institution was subrogated.[4] The preliminary issue was determined in favour of defendant.

Comment

A sad case where the recent movements toward clarity of the application of Rome II has meant that a tragic event where, as here, liability had been substantially admitted, but the family are denied their compensation for several years. In this case, Mr Capano was an Italian who worked for an engineering and design company living in Turin but commuting weekly to England to work for McLaren in Woking. It was on one of these trips in February 2011 that he was run down by a car driven by the defendant, dying in hospital three days later.

Judgement was entered some three years later subject to deduction of 33% for contributory negligence. The claim brought by the widow and on behalf of her children amounted to a little under £500,000. The claim was brought in the conventional manner under the Fatal Accidents Act 1976 and pursuant to the Law Reform (Miscellaneous Provisions) Act 1934. However, perhaps unusually in addition to these conventional claims brought following a death, the claimant sought what she described as "subrogated claims". They represented payments by way of death benefits from the Italian state compensation scheme and from his employer. These sums having been advanced to the family, the widow understood that she was obliged to seek their recovery from the defendant.

This judgment arose from a preliminary issue and related solely to whether or not the subrogated claims were recoverable. The judge made clear early in his judgment that there was perhaps an unusual position in that the order for the preliminary issue was formulated by reference to the actual pleading and in particular what appeared in paragraphs 7, 8 and 9 of the schedule of loss which dealt with the subrogated claims, but in particular there was no order for the service of any evidence to deal with this part of the dispute. The relevance here is that the pleading made no reference to the subrogated claim by referring only to the conventional death related statutes.

The subrogated claim from the state authority was a very significant sum of just over £400,000 which represented a past and future instalment loss basis for the widow and her children. The claimant had not pleaded the provisions of any Italian law. It would seem that the claimant's lawyers simply assumed that the legal obligation under the Italian civil code by which the widow was required to "seek a subrogated claim" was assumed to be a compelling one.

English law has always held that foreign law must be pleaded if the court should have regard to it and apply it. Then it must be proved by expert evidence hence the relevance of the judge picking up on the absence of an order for evidence on the preliminary issue. The judge made reference to the leading text books of Dicey Morris and Collins on the *Conflict of Laws*[5] "in the absence of satisfactory evidence of foreign law the court will apply English law to such a case". This rule had only been endorsed by the Court of Appeal as recently as 2014.[6] Although the direction questionnaire filed at court in 2014 identified an Italian law expert as a potential witness accompanied by an application for permission, no application was ever actually made.

[4] *Deutsche Angestellten-Krankenkasse v Laererstandens Brandforsikring G/S* (C428/92) [1994] E.C.R. I-2259 considered.
[5] 15th Edition rule 25(1) and 25(2).
[6] *OPO v MLA* [2014] ECWA Civ 1277.

The defendant resisted the claimant's argument of the absence of pleading meaning the obligation to repay was found in art.85 of reg.(EC) 883/2004 on the coordination of social security systems. Article 85 says:

> "1. If a person receives benefits under the legislation of one Member State in respect of an injury resulting from events occurring in another Member State, any rights of the institution responsible for providing benefits against the third party are liable to provide compensation for the injury shall be governed by the following rules:
>
> a) where the institution responsible for providing benefits is, under the legislation it applies, subrogated to the rights which the beneficiary has against the third party, such subrogation shall be recognised by each member state;
>
> b) where the institution responsible for providing benefits has a direct right against the third party, each Member State shall recognise such rights."

Naturally the defendant saw this argument as simply "objectionable as an illegitimate attempt to introduce in support of the subrogated claims matters which require pleading and proof, that are neither pleaded nor the subject of any evidence".[7]

The judge acknowledged and accepted that there is no requirement in the CPR to plead matters of domestic law on which it relies but he did remain of the conventional view that foreign law must be pleaded. The judge considered the claimant's subsequent filing of the Italian code was actually evidence that should have been properly proved or supported by an expert witness. He dismissed the claimant's proposal that effectively they would adjourn the preliminary trial when the matter had been determined to then amend the pleading to provide specifically for the Italian law.

The judge considered that Rome II was the applicable law here and pursuant to art.15(f) the claimants were entitled to claim as dependents under the Fatal Accidents Act but the provisions of the two death related statutes were in fact the only bases available to the claimant to pursue their claim. Whilst the judge was already against the claimant on the preliminary issue, at the invitation of the defendant he went further to consider whether in fact even if it had been pleaded the claimant would have been able to successfully prosecute her subrogated claims and the judge decided that she did not. The claimant appeared to contend that the subrogation under Italian law confers an immediate Italian law right of action which the judge did not accept. The judge did not accept that the subrogated rights were recoverable in English law and could not therefore be recovered on behalf of the subrogated parties.

This case raises two or three interesting practical points. The first self-evidently is the importance of fully understanding such a specialised subject as conflict of laws. This is a continually evolving subject where decisions are coming increasingly quickly from the courts interpreting the implications of various European Union regulations and directives not just Rome II. In this case it would seem that the pleaders overlooked the original fundamental tenet of pleading that one must plead foreign law to have the court consider it and then it must be evidenced. This would usually be in the form of an expert opinion.

The second aspect is that it is a reminder that the heads of loss recoverable in a fatal accidents claim may, in fact, be different to those brought by a living claimant. It appears that there is in fact no basis for bringing a claim for the death of a person at common law; there are only the statutory routes available and these prescribe and therefore limit the damages that are recoverable: namely bereavement, loss of dependency and funeral expenses. Claims brought under the Law Reform Act are restricted to the causes of action that the deceased could have brought immediately before the death. Therefore anything that doesn't fall within those provisions is irrecoverable.

A minor but important practice point here as well was the importance of the drafting of an order particularly in relation to the scope of preliminary hearing. In this case the order was arguably flawed by

[7] at [16].

reason of the absence of reference to evidence albeit that without the actual pleading of foreign law the issue was doomed anyway.

Practice Points

- If foreign law is to be relied upon it must be pleaded.
- It is important to obtain full expert opinion on foreign law to understand the basis for heads of loss being sought.

Mark Harvey

McCracken v Smith

CA (Civ Div) (Richards LJ; Underhill LJ; Christopher Clarke LJ) April 22, 2015 [2015] EWCA Civ 380

Personal injury—road traffic accidents—damages—negligence—torts—causes of action—Ex turpi causa—contributory negligence—costs

LT Contributory negligence; Criminal conduct; Dangerous driving; Ex turpi causa; Motorcycles; Passengers; Road traffic accidents

Some years ago the police in Carlisle were receiving a number of complaints about trials bikes, the sort used in scrambling. They were being ridden dangerously in an area to the west of the city. It was decided to mount a special operation to monitor the extent of such incidents called Operation Minx. The problem was a real one. The operation commenced in February 2006.

It used information from members of the public as well as information which the police unearthed in the course of their investigations. The intelligence which the police had was that Stanhope Road—in particular the part of it which consisted of the cul-de-sac in which the McCracken family lived—was the centre of much of that activity. It was where the bikes disappeared when they had been followed or chased by the police. But the McCrackens' home had not been visited by the police in 2006, and there was no intelligence that any bikes were being stored there. The police suspected that they were being stored elsewhere. Only a month after this operation was discontinued an accident took place on January 31, 2007.

At about 2.30pm Damian Smith, a 16-year-old boy, was speeding along a cycle-track alongside Wigton Road, Carlisle. He was riding a trials bike which had been stolen or unlawfully taken and was not allowed on normal roads. He was carrying a pillion passenger, another 16-year-old boy Daniel McCracken, even though the bike was not designed for passengers. Neither of them were wearing helmets.

On the stretch of road where the accident took place, the speed limit was 30mph and the road had a single lane in each direction as well as cycle paths on both sides of the road between the road and the footpaths for pedestrians, which were separated from both the road and the footpaths by green verges on either side of them.

Damian Smith did not have a driving licence or insurance. He did not stop at give way markings on the track as it passed across the entrance to a Community Centre. A bus was travelling in the same direction. It turned right into the Community Centre and across the path of the bike. The bike collided with the bus. Both boys were seriously injured in the accident. Daniel McCracken was badly brain injured.

Claims were brought against the uninsured 16-year-old driver of the bike Damian Smith, the MIB, and the driver of the bus Darren Michael Bell. Bell was found to have been negligent in failing to see the bike.[1]

Damian Smith took no part in the case. The other two defendants raised an ex turpi defence, arguing that McCracken was part of a joint criminal enterprise to drive dangerously and without insurance on a bike that was stolen and was not adapted for use on the road. The accident was precisely the type of risk that he was taking.

The judge found that Smith was liable to the claimant in negligence. He rejected the defence of ex turpi causa relied on by Smith and the MIB, and, by implication, Bell. The judge also found that the MIB had not proved that the claimant had known or should have known that the bike was stolen, but had proved that he knew it was being used without insurance and that the bureau's liability was therefore excluded. He found that Bell had driven negligently, but reduced the claimant's damages by 45 per cent for contributory negligence. He apportioned liability between Smith and Bell in the ratio 80:20 but ordered that Bell was to pay 90 per cent of the MIB's costs.

Bell appealed and submitted that the judge had erred in four respects:

1) rejecting his defence of ex turpi causa;
2) finding that he had been negligent;
3) his characterisation of the claimant's role as "just going for a ride" rather than a "joyride" and, consequently, in the reduction of only 45 per cent for contributory negligence; and
4) making the costs order.

Applying *Les Laboratoires Servier v Apotex Inc*[2] the Court of Appeal held that the claimant's conduct undoubtedly amounted to "turpitude"[3] for the purposes of the ex turpi causa defence. The question was whether his claim against Bell was founded on that turpitude so as to provide a defence. There had been a joint enterprise to ride the bike dangerously and, although the negligent act was that of Smith, the claimant was jointly responsible and could not bring a claim against Smith in respect of his own negligent act. The judge had therefore been wrong to reject the defence of ex turpi causa in relation to the claimant's claims against Smith and the MIB.[4]

Even so it did not necessarily follow that that applied to the claim against Bell. The dangerous riding of the bike had no effect on Bell's duty of care or on the standard of care reasonably expected of him. However, they found the causation analysis was more problematic. The accident had two causes: the dangerous riding and the negligent driving of the minibus and they concluded that it would be wrong to treat one as the true "cause".

The fact that the criminal conduct was one of the two causes was not a sufficient basis for the ex turpi causa defence to succeed. The correct approach was to give effect to both causes by allowing the claimant to claim in negligence against Bell but, if negligence was established, to reduce any damages for contributory negligence.[5]

They confirmed that there was nothing wrong with the judge's finding that Bell had been negligent in failing to check for bikes on the cycle path. The judge had carefully explained why Bell should have been aware of the possibility that one or more bikes were approaching. There was no basis to interfere with that assessment, founded as it was on the particular circumstances of the case. Once that factor was accepted, the finding of negligence inevitably followed.

[1] *London Passenger Transport Board v Upson* [1949] A.C. 155 applied.
[2] *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55; [2015] A.C. 430.
[3] The starting point was to determine what acts constituted "turpitude" for the purpose of the defence. "Turpitude" meant criminal acts and quasi-criminal acts because only those acts engaged the public interest. Torts, other than those of which dishonesty was an essential element, breaches of contract, and statutory and other civil wrongs, offended against private, rather than public interests and there was no reason to depart from ordinary remedies of corrective justice.
[4] *Joyce v O'Brien* [2013] EWCA followed, *Pitts v Hunt* [1991] 1 Q.B. 24 considered.
[5] *Revill v Newberry* [1996] Q.B. 567 applied, *Gray v Thames Trains Ltd* [2009] UKHL 33 considered.

They went on to hold that a finding of negligence would have been appropriate even in the absence of that factor. On any view, Bell should have looked over his shoulder along the cycle path before turning right. If he had looked, on the judge's findings, the bike was there to be seen. Either he did not look or, despite looking, failed to see it.

However, they held that the judge had erred in his characterisation of the claimant's role. He had been unduly generous to him in distancing him from Smith's dangerous riding. It was "joyriding" and the proper inference was that the two boys were parties to a joint enterprise, the essence of which was that the bike was to be ridden dangerously. That joint enterprise rested on an implied agreement between them to participate. If, at the time of the accident, the claimant was party to such a joint enterprise, his participation had to be regarded as a cause of his injuries. He was therefore the author of his own misfortune to a greater extent than allowed by the judge.

They decided that a fair reflection of that greater degree of blameworthiness and causative potency of his conduct was an overall deduction of 65 per cent in his damages. That represented 50 per cent plus the agreed deduction of 15 per cent for his failure to wear a helmet.[6]

Finally the order that Bell should pay the MIB's recoverable costs was considered to be within the reasonable ambit of the judge's discretion and was not interfered with.

Comment

Practitioners dealing with brain or other catastrophic injury claims will be all too familiar with the disastrous consequences that can arise when teenage boys in particular misbehave with cars and motorbikes. A significant proportion of such cases arise out of the use (and often serious misuse) of a vehicle by this particular cohort of the population. Where the injured party was involved in anti-social, irresponsible or illegal use of a vehicle at the time of the accident, it gives rise to the question of the extent to which they can recover damages from any other party whose tortious act may have caused them harm. Does the injured claimant's conduct mean they should have no entitlement to damages at all or should this be dealt with as a reduction for contributory negligence?

The long established legal doctrine of *ex turpi causa non oritur actio* provides a defence to a claim founded on the claimant's illegal behaviour. Its first clear expression was probably by Lord Mansfield in the 18th Century who stated that "no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act".[7] A much more contemporary judicial description of the doctrine was provided recently by Lord Sumption in *Les Laboratoires Servier v Apotex Inc*:[8]

> "The *ex turpi causa* principle is concerned with claims founded on acts which are contrary to the public law of the state and engage the public interest. The paradigm case is … a criminal act. In addition, it is concerned with a limited category of acts which, while not necessarily criminal, can conveniently be described as 'quasi-criminal' because they engage the public interest in the same way …"

Ex turpi causa is a rule of law based on public policy. In theory it is a straightforward and common sense concept based on the notion that it is unpalatable that a criminal can recover for damage which is the consequence of their own illegal act. However, in practice it has thrown up many difficulties as the appeal courts have attempted to set down consistent guidelines. The authorities, whilst not always easy to reconcile, suggest that the approach the courts should take to this defence is to first consider whether the claimant's acts amount to turpitude and then to assess the relationship between the turpitude and the

[6] *Jackson v Murray* [2015] UKSC 5; [2015] S.L.T. 151 followed.
[7] *Holman v Johnson* 98 E.R. 1120; (1775) 1 Cowp. 341.
[8] *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55 at [25].

claim. Recent cases have focused in particular on the need for a causal link between the illegal behaviour and the harm complained of.

In *Joyce v O'Brien*[9] the claimant and the defendant had stolen some ladders and were fleeing the scene in a van at speed with the defendant driving and the claimant standing at the back of the van which had its rear doors open. The claimant was seriously injured when he fell from the van as the defendant negotiated a tight bend at speed. The van driver pleaded guilty to dangerous driving. The claimant brought a claim in negligence against the driver of the van but this was rejected at first instance on the basis of *ex turpi causa*. He appealed the decision arguing that his claim arose out of the dangerous driving of the defendant rather than his criminal activity in stealing the ladders.

It was contended that his illegal behaviour may have been why he was in the van but this was merely incidental to the accident and not the cause of it. The Court of Appeal rejected the claimant's appeal. They found that the claimant and defendant were involved in a joint criminal enterprise. The character of this activity was such that it was it was foreseeable that the participants could be subject to particular and increased risk of harm in carrying out their criminal objectives. If such a risk materialises then it can properly be said that the harm was caused by their own behaviour even if it results from the negligent or intentional act of another party to the illegal enterprise.

Here in the case brought by Daniel McCracken the Court of Appeal took a similar view of any claim he had against the 16-year-old driver of the off-road scrambling motorbike on which he was riding as a pillion passenger at the time of the accident. They found that the two boys were engaged in a joint enterprise to joyride on a stolen bike that was to be ridden dangerously. Richard LJ points out that it was plainly foreseeable that participating in such an activity gave rise to a risk of harm from the bike being ridden in this way and that Daniel's injury can therefore be said to have been caused by his own criminal conduct even though the accident resulted from his friend's negligent driving.

However, Daniel Mc Craken's injuries arose from an accident that was not only caused by the negligence of his partner in crime. It also involved the negligence of the driver who turned into a side entrance without ensuring that it was clear to do so. The Court of Appeal had to go on to consider the question of whether the claimant's joint participation in the motorbike being ridden dangerously negated any claim he might have against the driver who negligently turned across the path of the approaching motorbike?

In the lead judgment Richard LJ addressed this issue by explaining that this is a situation where there are two negligent causes of the accident. He concluded that cases involving a claim by one party to criminal joint enterprise against another party to that joint enterprise are materially different from such a situation. Where you have a further joint tortfeasor unconnected with the criminal activity, that defendant could not rely upon the doctrine of *ex turpi causa* to defeat the claim. The right approach was to allow the claim against such a defendant but with an appropriate reduction for contributory negligence to reflect the claimant's own fault and responsibility for the accident. Contributory negligence was assessed in this case at 50 per cent plus an additional 15 per cent already agreed by the parties for the claimant's failure to wear a helmet.

Practice Points

- When assessing if an *ex turpi causa* defence might apply to a case it is first necessary to consider whether the claimant's conduct is of sufficient seriousness to amount to turpitude. Some strict liability or road traffic offences, whilst amounting to criminal offences, may not be considered to be sufficiently serious for the defence to be engaged.

[9] *Joyce v O'Brien* [2013] EWCA Civ 546.

- Consider the link between the illegal behaviour and the harm. Was the criminality merely incidental and only giving occasion to the tortious act (in which case the defence would not apply) or was it causative of the harm (in which case it would)?
- If the claimant was engaged in a joint criminal enterprise when they were injured it is necessary to consider if that behaviour increased the risk of harm or involved specific risks and whether the injury was caused by those risks materialising.
- Consider if there are any other potential tortfeasors in any joint enterprise claim as, whilst the claim may fail against the other party involved in that enterprise, the defence of *ex turpi causa* may not apply to any other party whose negligence was also causative of the accident.

Richard Geraghty

Delaney v Secretary of State for Transport

CA (Civ) (Richards LJ; Kitchin LJ; Sales LJ) March 9, 2015 [2015] EWCA Civ 172

Personal injury—damages—road traffic accidents—European Union—directives—motor insurance—uninsured drivers—Motor Insurers' Bureau—Uninsured Drivers Agreement cl.6.1(E)(III)—exclusion of liability—criminal conduct—compensatory damages—EU directives

LT Criminal conduct; EU law; Exclusion of liability; Joint enterprise; Knowledge; Motor Insurers' Bureau; Passengers; Road traffic accidents; Uninsured drivers

On November 5, 2006 Shane Pickett, negligently drove the Mercedes 500 SL sports car in which Sean Delaney was the front seat passenger, head on into an oncoming Toyota people carrier. Delaney was very seriously injured. When being rescued from the car, Pickett was found to have sufficient cannabis to make 170 cigarettes stuffed down his sock, while Delaney had a package sufficient to make 1,200 cannabis cigarettes under his jacket.

Delaney's substantial claim for damages against Pickett was dismissed by HH Judge Gregory[1] as was his claim against Tradewise Insurance Services Ltd[2] brought under the provisions of the Uninsured Drivers Agreement made on August 13, 1999. The judge rejected the claimant's case that Pickett had taken him out for a drive in his new car. Instead he held that the two men were in possession of the cannabis with intent to supply it.

He accordingly held that Delaney's claim had arisen ex turpi causa and therefore failed. As against the insurers, he found that liability was excluded under the cl.6(1)(e)(iii) of the Motor Insurers' Bureau Agreement because the vehicle was being driven in the course or in furtherance of crime. Permission to appeal was given to consider both the extent of the ex turpi causa defence and the proper interpretation of the Agreement.

The Court of Appeal[3] held on the facts[4] that the judge had been correct to find on the balance of probabilities that the transportation of illegal drugs had been the purpose of the journey. He had therefore

[1] Sitting in the Coventry County Court on January 26, 2011.
[2] Pickett's insurer who had avoided his policy.
[3] *Delaney v Pickett* [2011] EWCA Civ 1532.
[4] Ward L.J. dissenting as to the judge's factual findings and on the MIB Agreement issue. His view was that the MIB Agreement had to be construed restrictively as it was an exception to the purpose of the Directive. Clause 6(1)(e)(iii) could not mean that compensation was excluded if the vehicle was being used for any crime, as that could be disproportionate; "crime" had to mean serious crime. The crime in the this case had not been heinous enough to be the kind of crime covered by the clause.

proceeded on a correct factual basis when considering ex turpi causa and the MIB Agreement issue. However the judge had been wrong to uphold the ex turpi causa defence. The damage suffered by the claimant had not been caused by his, or his and the defendant's, criminal activity. It had been caused by the defendant's tortious act in the negligent way in which he drove his car. In those circumstances the illegal acts were incidental and Delaney was entitled to recover his loss from Pickett.[5]

They concluded that although the MIB Agreement was intended to give effect to Directive 2009/103,[6] the Directive gave only limited assistance in the interpretation of cl.6(1)(e) as it contained nothing corresponding to the clause. The most that could be derived was that a restrictive interpretation of the clause was required by the fact that it was an exclusion from the general principle of compensation set out in the Directive.

In the majority view it was obvious on the facts that the vehicle was being used in the furtherance and in the course of a crime within the meaning of the clause. "Crime" could not be read as being restricted to "serious crime"; that would leave the clause with little practical purpose. In any event, possession of a commercial quantity of cannabis with intent to supply was a serious crime to which the clause applied; given the finding that the very purpose of the journey had been the transportation of the drugs, the situation fell squarely within the wording of the clause. Use of the vehicle did not have to constitute an ingredient of the offence for the exclusion to apply; in any event, the vehicle had been an essential element in the crime, as the men would not have wanted to carry so large a packet of drugs on public transport. The appeal was dismissed.

On November 16, 2012 the Claim Form was issued in this fresh set of proceedings. The claim was for damages "arising as a result of the Defendant being in breach of Article 1(4) of Directive 84/5". The Particulars of Claim alleged that cl.6(1)(e)(iii) was incompatible with Article 1(4) and that, "in so far as the Claimant has been unable to obtain compensation from Tradewise by reason of the exclusion under cl.6(1)(e)(iii) of the 1999 Agreement, the UK is in breach of its Community law obligations under Article 1(4) of the Directive" (para.8e). Paragraph 8f of the Particulars of Claim averred that the breach was sufficiently serious to accord to the Claimant an entitlement to *Francovich*[7] damages under Community law principles.

No argument was addressed to the Court of Appeal on these issues and no findings were made in that regard. A belated attempt was made to advance that issue in the Application for permission to appeal to the Supreme Court, but it led nowhere, because the application was refused.

The first Issue was whether art.1.4 of the Second Council Directive, either read in isolation or in conjunction with art.3.1 of the First Directive, art.2.1 of the Second Directive and art.1 of the Third Directive, imposed obligations on Member States in respect of damage caused by vehicles in relation to which a valid policy of insurance was taken out, but where that policy was subsequently avoided by the insurer. The answer was yes.

The second Issue was whether arts 1.4 and 2.1 of the Second Council Directive required Member States to ensure that compensation is paid in all circumstances save those expressly set out as exclusions within the text of these provisions. The answer again was yes.

The third Issue was whether the exception in cl.6(1)(e)(iii) was consistent with, and did not undermine, the specific exceptions permitted by arts 1.4 and 2.1 of the Second Council Directive. This time the answer was no. That meant that the fourth Issue had to be considered. Was the defendant liable to the claimant for any loss suffered as a consequence of this breach, by reason of the matters alleged in the Particulars of Claim?

[5] *Gray v Thames Trains Ltd* [2009] 1 A.C. 1339 and *Pitts v Hunt* [1991] 1 Q.B. 24 followed.

[6] Directive 2009/103/EC of the European Parliament and of the Council of September 16, 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability.

[7] *Francovich v Italy* (1991) C-6/90.

Mr Justice Jay found the defendant to be guilty of a serious breach of Community law in circumstances where its room for manoeuvre under the Directives was closely circumscribed. He continued:

> "It did not have a wide discretion. Its obligations under the Directives, and their relevant confines, were quite clear, and—in the absence of knowing the actual reason for this policy decision—the best that may be said is that the defendant decided to run the risk, which was significant, knowing of its existence…I conclude with little hesitation that the defendant's breach is so serious that, subject to the final issue of causation, it must pay compensation to the claimant under the *Francovich* principle."

However, the defendants had a last ditch fall-back position. They contended that there was a break in the chain of causation at the final stage. This was because cl.6(1)(e)(ii) applies to these facts: the claimant knew, or was wilfully blind to the fact, at the time of entering the vehicle, that the vehicle was uninsured for the purposes of the journey he was taking. The claimant did not dispute that, if cl.6(1)(e)(ii) were held to apply, it would operate to defeat his claim for the reason proposed. However his case was that it did not apply.

The judge's approach[8] on the issue was to consider whether the claimant had information from which he drew the conclusion that the driver might well be uninsured but deliberately refrained from asking questions for fear that his suspicions would be confirmed; or whether he was simply careless, giving no thought to the question of insurance, even though an ordinary prudent passenger in his position and with his knowledge, would have made inquiries. On the material before him, the judge concluded that the likely position, by a considerable margin, was that the claimant gave no thought to the question. It followed that the defendant's case on causation failed too.

The judge confirmed that the relevant European Directives clearly state that there are only certain limited exceptions to liability in these circumstances, and that must be the end of the matter as a matter of Community law. He held that the law is clear, the defendant was in serious breach of it, and there must be judgment for the claimant on the issue of liability, with damages to be assessed.[9] The defendant appealed.

In a unanimous decision the Court of Appeal held that on the natural reading of art.1(4), the only permitted exclusions were those set out expressly in the article itself. There was nothing in the text to suggest that other exclusions were permitted. A reference in the recitals of Directive 84/5 to "certain limited exclusions" was not a sound basis for interpreting art.1(4) as authorising an uncertain number of additional exclusions. It was a general principle of EU law, specifically applied in the text of these Directives in *Candolin v Vahinkovakuutusosakeyhtio Pohjola*[10] that derogations from a general rule were to be strictly construed.[11] A strict construction left no room in art.1(4) for exclusions beyond those expressly listed and ran counter to the use that the secretary of state sought to make of the reference to "certain limited exclusions" in the recitals. His construction of art.1(4) also ran counter to the aim of protecting victims that was stated repeatedly in the Directives and suffused the ECJ case law.

They also held that allowing Member States to introduce exclusions additional to those specified in the Directive would clearly undermine the aim of avoiding disparities of treatment between different Member States.[12] In order to alleviate the financial burden on the body provided for by art.1(4), a Member State was permitted "to exclude the payment of compensation by it in certain cases or to provide for excesses".[13] However, the extent of that permission was expressly defined in the article itself, and the alleviation of the financial burden could not be treated as a conflicting aim that was capable of being weighed against

[8] Applying the purposive construction of the clause mandated by *White v White and The Motor Insurers Bureau* [2001] UKHL 9.
[9] *Delaney v Secretary of State for Transport* [2014] EWHC 1785 (QB).
[10] *Candolin v Vahinkovakuutusosakeyhtio Pohjola* (C-537/03) [2005] E.C.R. I-5745.
[11] *Candolin* followed.
[12] *Criminal Proceedings against Bernaldez* (C-129/94) [1996] E.C.R. I-1829 followed.
[13] *Csonka v Magyar Allam* (C-409/11) [2014] 1 C.M.L.R. 14 followed.

the aim of protection of victims so as to justify exclusions additional to those listed. The reasoning in decisions from *Ruiz* to *Farrell v Whitty*[14] had a direct bearing on the interpretation of art.1(4).[15]

This case fell within art.1(4) only because the driver's insurer succeeded in avoiding the policy, which had the consequence that the vehicle fell to be treated as uninsured. If the policy had not been avoided, the insurer would not have been able to rely on any equivalent to cl.6.1(e)(iii) to defeat Delaney's claim: such an exclusion was not permitted by art.2(1) of Directive 84/5. Given the aims of the Directives they said that it would be very surprising if such an exclusion was nonetheless available to the body provided for by art.1(4). Mr Justice Jay had been right to find that cl.6.1(e)(iii) was incompatible with art.1(4) and that the UK was thereby in breach of its obligations under EU law (see [33]–[34] of judgment).

The court noted that Directive 84/5 gave Member States a legislative choice as to the means by which they fulfilled the obligation to set up or authorise the body provided for by art.1(4). However they confirmed that the scope of that body's obligation to pay compensation, including the permitted exclusions, was clearly defined by art.1(4) itself. Mr Justice Jay was right that Member States had no discretion to adopt additional exclusions. Furthermore, the UK had originally implemented Directive 84/5, in relevant part, through the 1988 version of the agreement, without cl.6.1(e)(iii) or any equivalent. It could not be taken to have been making a relevant legislative choice in relation to implementation of the Directive by introducing such a clause in 1999, thereby removing from the scope of protection a category of victim previously included within it.

The judge had applied the correct approach to the ECJ decisions. He had attached primary importance to the Directive's wording but he relied on *Ruiz Bernaldez* as showing that the introduction of cl.6.1(e)(iii) into the agreement was incompatible with the Directive. Although *Ruiz Bernaldez* was concerned specifically with the obligation to provide insurance cover and not with the obligation under art.1(4), they accepted that the reasoning in it had a bearing on art.1(4) and supported the judge's interpretation.

They stated that the Advocate General's opinion in *Ruiz Bernaldez* was no basis for the view that it was lawful to introduce additional exclusions such as cl.6.1(e)(iii). Although *Candolin* pre-dated Delaney's accident by a few months, it post-dated the introduction of cl.6.1(e)(iii) by several years, the UK was not a party to it, and the decision by itself would not necessarily have been picked up as signalling the need for urgent review of the agreement. The seriousness of the breach lay in the circumstances that existed at the time when cl.6.1(e)(iii) was introduced. The secretary of state should have taken legal advice about that introduction. The judge's analysis was not flawed by material error or omission and his conclusion was correct. The appeal was dismissed.

Comment

In simple terms, a result of this decision, the crime exception under cl.6.1(e) (iii) of the Uninsured Drivers Agreement 1999 will no longer be a valid defence to either art.75 Insurers or the MIB. The UK Government will need to amend the Uninsured Drivers' Agreement to rectify the breach. But that is just the start of it.

In his J.P.I.L. article "*A World Turned Upside Down*,"[16] Nick Bevan described Mr Justice Jay's first instance judgment in *Delaney v Secretary of State for Transport*[17] as probably the most important decision on civil liability insurance for nearly two decades. This Court of Appeal decision has done nothing to change that. It is an endorsement of the first instance decision and an incitement of the UK government's attempts to perpetuate an indefensible position.

[14] *Farrell v Whitty* (C-356/05) [2007] E.C.R. I-3067.
[15] *Farrell* considered.
[16] [2014] J.P.I.L. 136.
[17] *Delaney v Secretary of State for Transport* [2014] EWHC Civ 1785 (QB).

When this decision is considered with the CJEU decision in *Vnuk v Zavarovalnica Triglav D.D.*[18] it is clear that we cannot take any of our national law provision in this area at face value. Significant parts of UK law, supposedly providing safeguards for accident victims, totally fails to do it's job. At best it's misleading but in reality it is simply unlawful as it conflicts with the primary source of law derived from the Directives. Major reform is inevitable and it seems that this is accepted by the government.

Happily it is not necessary to wait for reform to remedy the defective domestic law as the courts are obliged to construe our national law, so far as is possible, in conformity with EU law. There are some remarkably able first instance judges who seem to have understood the issues rather better than the Court of Appeal. A good example is Mr Justice Tugendhat in *Bristol Alliance Partnership v Williams*.[19]

In the early hours of December 12, 2008, the car driven by the James Williams collided with the House of Fraser store at Cabot Circus in Bristol. The damage claimed was in excess of £200,000. The property insurer Bristol Alliance Ltd Partnership paid the cost of the damage and subsequently claimed by subrogation against Williams. Judgment was entered against Williams for damages to be assessed. The damage caused was the result of a deliberate act by Williams. The question in this litigation was which of two insurers should bear the cost of the damage done to the store.

The property insurer (Bristol) maintained that Williams had caused the damage through his negligence and that under the Road Traffic Act 1988 s.151[20] it intended to enforce against EUI (the RTA insurer) any judgment obtained against him. EUI maintained that Williams had caused the damage deliberately in an attempt to commit suicide. They submitted that if the damage was caused deliberately, Williams was not covered by the policy and so, under s.151(2)(a),[21]s.151 did not apply and therefore Bristol could only recover damages from the Motor Insurers' Bureau. EUI also argued that Directive 72/166[22] and Directive 84/5[23] did not apply as Bristol was not a victim[24] within the meaning of art.2(1) of Directive 84/5.

Mr Justice Tugendhat held that in order to comply with s.145 of the Act, which required an insurance policy to cover any liability which might be incurred in respect of damage to property arising out of the use of a vehicle, the policy had to be read to include liability against an innocent third party arising out of a deliberate act, but to exclude it so that the insured person could not take the benefit himself where the liability arose out of such an act.[25] That gave effect to the policy of the legislation that innocent third parties should be protected from harm inflicted by dangerous and criminal drivers. He also held that adopting that interpretation of s.151 would achieve by a direct route what was already the indirect effect of the MIB scheme, at least in all but a minority of cases.

In relation to the Motor Insurance Directives, the judge concluded that there was nothing to justify a definition of "victim" which excluded third parties who had suffered personal injury or damage to property, but who were also insured, and whose insurers exercised their rights of subrogation. The judge held that such a limitation of the definition appeared to be inconsistent with the principle of subrogation.

So in his view, applying the principle set out in *Marleasing*,[26]Pt VI of the Act[27] had to be interpreted as requiring the user of a motor vehicle to be insured under a policy that satisfied the minimum requirements

[18] *Vnuk v Zavarovalnica Triglav D.D.* [2014] J.P.I.L. C225-C230.

[19] *Bristol Alliance Partnership v Williams* [2011] EWHC 1657 (QB).

[20] Duty of insurers or persons giving security to satisfy judgment against persons insured or secured against third-party risks.

[21] "Subsection (1) above applies to judgments relating to a liability with respect to any matter where liability with respect to that matter is required to be covered by a policy of insurance under section 145 of this Act and … (a) it is a liability covered by the terms of the policy or security to which the certificate relates, and the judgment is obtained against any person who is insured by the policy or whose liability is covered by the security, as the case may be …"

[22] Council Directive 72/166/EEC of April 24, 1972 on the approximation of the laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability.

[23] Second Council Directive 84/5/EEC of 3 December 30, 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles

[24] Victims of an accident are covered.

[25] *Charlton v Fisher* [2001] EWCA Civ 112 considered.

[26] UK law must be interpreted, so far as possible, to give effect to European Directives in accordance with *Marleasing SA v La Comercial Internacional de Alimentacion SA* C-106/89 [1990] ECRI-4135.

[27] Third-Party Liabilities.

of the Motor Insurance Directives. Interpreting the policy by reference to the purpose for which it was issued, and having regard to the statements in the policy that it provided the cover required by law, the insurance cover in this case did meet those minimum requirements.[28] Bristol was accordingly entitled to recover from EUI even if the damage to the premises was the result of a deliberate act.

When the case came before the Court of Appeal[29] the first instance decision was wrongly overturned. Ward LJ admitted that if *Bernaldez*[30] was to be read so as to give a purposive *Marleasing*[31] meaning to ss.151 and 145 of the 1988 Act:

> "then the way the Road Traffic Act combined with the MIB scheme has always operated is not compliant with the Directive."

The ruling was considered in at some length in this Journal,[32] and rightly criticised.

The European Commission is actively investigating the UK's defective transposition of the motor insurance directives. Over forty instances where our domestic law appears to infringe EU law[33] are involved. The Secretary of State for Transport must know that the UK provisions for road accident victims have serious defects that breach the minimum standards of protection required under EU law. The Minister has a constitutional duty to implement European law properly.

Following *Delaney* and *Vnuk* the Secretary of State needs to take decisive action. A prompt review of the entire UK statutory and extra-statutory provision[34] for victims of motor accidents is essential. Rectifying the numerous defects should be a priority. His department has already incurred a substantial liability for *Francovich* damages in the *Delaney* case. This could be just the first of many.

Practice Points

- The crime exception under cl.6.1(e)(iii) of the Uninsured Drivers Agreement 1999 is not a valid defence to either art.75 Insurers or the MIB.
- Do not take any of the UK law provision in this area at face value.
- In RTA practice a working knowledge of EU law is an essential requirement.
- If you are considering running a case under the *Francovich* principles the conditions for a successful outcome on liability are.
  - — the rule of law infringed was intended to confer rights on individuals;
  - — the breach was sufficiently serious to give rise to liability; and
  - — there was a direct causal link between the breach of the obligation and the damage sustained by the injured party.

Nigel Tomkins

[28] *Criminal Proceedings against Bernaldez* (C-129/94) [1996] E.C.R. I-1829 considered.
[29] *EUI v Bristol Alliance Partnership Ltd* [2012] EWCA Civ 1267; see also the case comment by Nicholas Bevan at [2012] J.P.I.L. C91.
[30] *Criminal Proceedings against Bernaldez* (C-129/94) [1996] E.C.R. I-1829.
[31] *Marleasing SA v La Comercial Internacional de Alimentacion SA* C-106/89 [1990] ECR I-4135.
[32] See *Marking the Boundary*, Nicholas Bevan, [2013] J.P.I.L. 151.
[33] *Bevan v UK* , August 2013, EU Infringement Pilot Scheme reference 5805/13/MARK.
[34] The Uninsured Drivers Agreement 1999, the Untraced Drivers Agreement 2003 and the so called art.75 procedure.

Case and Comment: Procedure

Senior v Rock UK Adventure Centres Ltd

QBD (Judge Robinson) April 21, 2015, unreported elsewhere

Personal injury—civil procedure—Employers' liability insurance—measure of damages—requests for further information—specific desclosure

Accidents at work; Employers' liability insurance; Insurance policies; Periodical payments orders; Specific disclosure

The claimant Joshua Senior had been grievously injured in a climbing accident in the course of his employment with the company. The company's liability was not disputed and judgment was entered against it. The trial for assessment of damages was due to begin in July 2015. The claimant's schedule of loss specified that he sought damages in the form of a lump sum, as well as an order for periodical payments.

The claimant applied for an order requiring the first defendant company to disclose details of its employers' liability insurance cover. He argued that it was appropriate to require the company to disclose details of its insurance company because, in order for the trial judge to decide if it was appropriate to make any periodical payment order, he had to be satisfied that continuity of payment under such an order was reasonably secure.

The judge agreed and held that the court clearly had jurisdiction to make the order sought[1]. The level of the company's cover was important. The trial judge would want to know the details of such cover and, whilst there was no prejudice to the company in requiring it to provide such information, the failure to have such information available would likely result in problems arising at trial. In those circumstances, it was appropriate to order the company to provide details of its insurance cover.

The application was granted.

Comment

For a Periodical Payment Order to be awarded it must be deemed secure as set out in the Damages Act as Amended. For a PPO funded by an insurer meeting its obligations under a contract of insurance, it must satisfy s.2(4)(b) of the Damages Act as Amended. The Scheme stated in this section is the Financial Services Compensation Scheme ("FSCS"). Therefore contract of insurance must be protected by the FSCS for a PPO to be deemed secure.

The FSCS state which contracts of insurance they protect and call them "a Protected Contract of Insurance". To determine whether an insurance contract is a protected contract of insurance certain criteria must be met. This is different for different types of claims.

So for a work based accident:

- The date the Defendant's insurance contract was effected with the insurer must be known.
- Confirmation that the insured person or establishment was habitually resident in the UK (Companies House searches needed).

[1] *Harcourt v FEF Griffin* [2007] EWHC 1500 (QB); [2008] Lloyd's Rep. I.R. 386 applied.

- Confirmation that the accident occurred in the UK.
- Confirmation that the Defendant's insurance policy was issued through an establishment based in the UK.
- Confirmation of the limit of liability.

These are just starters, there are a number of nuances especially if the contract of insurance was written via an EEA authorised insurer, the accident happened outside the UK or the contract of insurance was written outside the UK.

It is anticipated that a more detailed article will be prepared for JPIL in due course dealing with these points.

What is essential though is that in any Periodical Payment case, the contract of insurance that was in operation and covered the incident in question must be obtained.

Practice Point

- Always obtain the relevant contract of insurance when seeking a PPO.

Colin Ettinger

Grainger v Cooper

QBD (HHJ Robinson[1]) April 23, 2015 [2015] EWHC 1132 (QB)

Personal injury—procedure—damages—interim payments—Civil Procedure Rules 1998 r.25.7(4)

Interim payments; Measure of damages; Reasonableness; Road traffic accidents

The claimant Kirsty Grainger was born in 1990. In 2012 she was thrown from a motorcycle which she was riding as a pillion passenger. She suffered severe injuries including a spinal cord injury resulting in paraplegia. Liability was not disputed and judgment was entered with damages to be assessed. A trial date was set for January 2016. Substantial interim payments were made. The amount for which credit would have to be given at trial was £1,011,764.

At the time she was living with her parents and their house had been adapted to meet her needs. She wanted to buy her own property which would also need to be adapted. She made a further interim payment application for the net amount of £425,000.

The judge recognised that the starting point was CPR r.25.7(4), which stated that a court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment. The assessment comprised two stages.[2] Under the first stage the judge had to assess the likely amount of the final judgment leaving out of account the heads of future loss which the trial judge might wish to deal with by way of a periodical payment order. The allowable heads of loss might comprise general damages for pain and suffering and loss of amenity, special damages to date, interest on those heads, capitalised accommodation costs including future running costs.

The assessment had to be carried out on a conservative basis. Provided that was done, a reasonable proportion might be high; proportions as high as 90 per cent had been awarded in the past. However,

[1] Sitting as a Judge of the High Court.
[2] *Eeles v Cobham Hire Services Ltd* [2009] EWCA Civ 204 followed.

where the interim payment requested exceeded a reasonable proportion of the likely award assessed, recourse might be had to the second stage.

Under the second stage the judge might include in the assessment of the likely amount of the final judgment that capitalised amounts of future losses. However, he could only do that if he could confidently predict that the trial judge would wish to award a larger capital sum than that covered by the items falling within the first stage. In addition, the judge had to be satisfied that there was a real need for the interim payment requested.

The judge decided that following a stage one assessment the amount available to award was £133,396. That was not enough to purchase the property so the second stage had to be considered. The compelling problem for this claimant was that it was manifestly obvious that there was no immediate reasonable necessity to purchase another property before the trial. The court took into account the fact that the claimant wished to commence living independently of her parents in her own property and that suitable properties were scarce in the area where she wanted to live. However, the fact was that she was adequately accommodated in a property that had been recently adapted to cater for her needs.

The judge concluded that there was no reasonable necessity for the claimant to spend any money in respect of alternative accommodation before the conclusion of the trial. In any event the case was not one where the court could confidently predict that the trial judge would necessarily wish to capitalise heads of future loss.

Although a further interim payment was awarded by the judge, the claimant's prime objective of receiving a further interim payment sufficient to purchase another property was unsuccessful.

Comment

Introduction

Where the claimant has been seriously injured it is not usual to see applications, often a number of applications, for very significant interim payments. That is exactly what occurred in this case.

Applications for substantial sums by way of interim payment are often contested because of arguments about the need for a "level playing field". It is this issue which, sometimes expressly and sometimes impliedly, is often the real dispute between the parties on the application.

The "level playing field" argument can be difficult for the defendant to run, however, when the focus of all concerned should be on putting right the wrong which the claimant has suffered and especially where there is no doubt a substantial interim payment will improve the quality of the claimant's life sooner rather than later and hence form part of the rehabilitation programme.

The introduction of damages awards by periodical payments order ("PPO") led to the development of new arguments on interim payment applications. These arguments have revolved around the issue of whether the interim payment ordered will be at a level which has the potential to preclude the award of a PPO at trial, and hence should not be made at such a level.

The opportunity of a PPO at trial should not, however, prevent the claimant seeking sufficient funds to make significant, and necessary, changes whilst the claim is proceeding, particularly in the provision of accommodation. Consequently, the law has developed, to reflect all of these issues, with general guidance being offered by the Court of Appeal in *Eeles v Cobham Hire Services Ltd*.[3] The judgment in that case is worth reviewing to put the decision on the application for an interim payment in this case into proper context.

[3] *Eeles v Cobham Hire Services Ltd* [2009] EWCA Civ 204.

The Guidance in Eeles.

Smith LJ, giving the judgment to the court in *Eeles*, observed:

> "This appeal raises the question of what is the correct approach to the making of an interim payment in a heavy personal injury claim where the damages, when finally assessed, are likely to include one or more periodical payments orders pursuant to section 2 of the Damages Act 1996 as amended by the Courts Act 2003."

Smith LJ reviewed the practice, described as "well-established", on interim payment applications prior to the amendment of the Damages Act commenting:

> "We can summarise the position by saying that the judge would usually make a conservative preliminary estimate of the likely final award. For that he would need both sides' schedules of loss, in so far as they could be provided at that stage. He would have to make a broad assessment of the merits of each side's contention and would err on the side of caution. He would order an interim payment which allowed a comfortable margin (or headroom) in case his preliminary estimate turned out to be too generous."

Smith LJ went on to note that:

> "Before making an order, the court would not necessarily need to enquire as to what the claimant intended to do with the interim payment[4]. If of full age and capacity, the claimant would be entitled to do with it as he wished. If he was a minor or patient, control of the money would be exercised by the Court of Protection. Nonetheless, claimants often wished to explain why they wanted a particular sum at the time. Typically, a claimant might want to demonstrate the need to buy or adapt accommodation or to provide a care regime. He might wish to demonstrate the need for such a facility in order to show that the final award would be of sufficient size to warrant the making of an interim payment of the amount sought."

Furthermore, Smith LJ recognised that:

> "Judges were warned against making an interim award which would have the effect of creating a status quo in the claimant's way of life which might have the effect of inhibiting the trial judge's freedom of decision; it was said that such an order might create 'an unlevel playing field'."[5]

Smith LJ noted the change in the law brought by the amendment to the Damages Act was significant because:

> "In a case in which a PPO is made, the amount of the final judgment is the actual capital sum awarded. It does not include the notional capitalised value of the PPO, which sum is irrelevant for the purposes of determining an interim payment in a case of this kind."

On this basis the Court of Appeal summarised the approach a judge should take when considering whether to make an interim payment in a case in which the trial judge might want to make a PPO. That guidance, as the judge observed in this case, is widely regarded as comprising two stages.

Stage one: Smith LJ held:

> "The judge's first task is to assess the likely amount of the final judgment, leaving out of account the heads of future loss which the trial judge might wish to deal with by PPO. Strictly speaking, the assessment should comprise only special damages to date and damages for pain, suffering and loss

[4] See *Stringman v McArdle* [1993] 1 W.L.R. 1653.
[5] See *Campbell v Mylchreest* [1999] P.I.Q.R. Q17.

> of amenity, with interest on both. However, we consider that the practice of awarding accommodation costs (including future running costs) as a lump sum is sufficiently well established that it will usually be appropriate to include accommodation costs in the expected capital award. The assessment should be carried out on a conservative basis. Save in the circumstances discussed below, the interim payment will be a reasonable proportion of that assessment. A reasonable proportion may well be a high proportion, provided that the assessment has been conservative. The objective is not to keep the claimant out of his money but to avoid any risk of over-payment."

Smith LJ also observed:

> "For this part of the process, the judge need have no regard as to what the claimant intends to do with the money. If he is of full age and capacity, he may spend it as he will; if not, expenditure will be controlled by the Court of Protection."

Stage two: Smith LJ held:

> "We turn to the circumstances in which the judge will be entitled to include in his assessment of the likely amount of the final judgment additional elements of future loss. That can be done when the judge can confidently predict that the trial judge will wish to award a larger capital sum than that covered by general and special damages, interest and accommodation costs alone."

However, Smith LJ continued:

> "Before taking such a course, the judge must be satisfied by evidence that there is a real need for the interim payment requested. For example, where the request is for money to buy a house, he must be satisfied that there is a real need for accommodation now (as opposed to after the trial) and that the amount of money requested is reasonable. He does not need to decide whether the particular house proposed is suitable; that is a matter for the Court of Protection. But the judge must not make an interim payment order without first deciding whether expenditure of approximately the amount he proposes to award is reasonably necessary. If the judge is satisfied of that, to a high degree of confidence, then he will be justified in predicting that the trial judge would take that course and he will be justified in assessing the likely amount of the final award at such a level as will permit the making of the necessary interim award."

Other Caselaw

There are numerous examples, of which this case is a single instance, considering how the guidance in *Eeles* should be applied. A couple of relatively recent decision are worthy of particular note. In *Moore v Plymouth NHS Trust*[6] the claimant's argument that if evidence put before the court by the Defendant on the interim payment application was accepted at face value the case was not one in which a PPO would be ordered at trial, so *Eeles* did not apply at all, was accepted.

In *Smith v Bailey*[7] the court rejected the defendant's contention that the claimant's accommodation needs might be met by renting and hence potentially subject to a PPO and thus outside stage 1 in *Eeles*. Popplewell J held:

> "Accommodation costs are usually to be included in stage one on an application for an interim payment because the Court can have a high degree of confidence that they will be awarded as a capital sum despite including future losses."

[6] *Moore v Plymouth NHS Trust* [2013] EWHC 3193 (QB).
[7] *Smith v Bailey* [2014] EWHC 2569 (QB).

Popplewell J, in *Smith*, went on to observe that "whenever there is serious injury, it will very rarely be reasonably to require a claimant to rent rather than buy a property". He also emphasised that if the defendant wishes to contend contributory negligence is a factor relevant to the amount of the interim payment then "there is an evidential burden on the defendant to put before the court material raising an issue of contributory negligence". He additionally gave an important reminder that if the defendant raises the "level playing field" issue that is only a factor to be taken into account and not a bar to an order being made emphasising that:

> "… the interim payment represents the minimum amount to which the Claimant is entitled. He is to receive it before trial on the basis that his damages at trial, awarded as a capital sum, will be no less. If and when awarded at trial, he is free to spend his damages as he wishes (subject to supervision by the Court of Protection if not of full age and capacity). Similar freedom should attach to the interim payment, which does no more than ensure that the Claimant does not have to wait longer than necessary for at least part of his damages."

Practical Issues

Before embarking on the exercise required to apply the *Eeles* approach it is worth assessing whether this approach will apply or not, as, for example, in *Smith*. Either way it will be important as Smith LJ said in *Eeles* for the court to take into account both the claimant's schedule of loss and the defendant's counter schedule. In a case where the two stage approach will be applied it is important the claimant's schedule gives sufficient information for the judge to be satisfied, in accordance with the guidance given in *Eeles*, about the likely award under relevant heads of claim. If the defendant does not provide a counter schedule, but argues against the interim payment on broad grounds, that may be a risky strategy. However, a detailed counter schedule is something the defendant also faces risks with.

A realistic counter schedule, making appropriate concessions, is likely to be regarded as indicating a figure which is an "irreducible minimum" for damages, to pick up the language of Popplewell J in *Smith*. Moreover, as in this case, the court may not necessarily work with those figures. HHJ Robinson expressly rejected an argument that, for these purposes, the figures in the counter schedule should be adopted. That reflects the observation in *Smith* that the figures may be regarded as a minimum because, as the claimant contended in that case, "no defendant ever gets its way on every point".

If, mindful of all this, the defendant argues for figures which later prove to have been unreasonably low, or fails to make appropriate concessions, that may, particularly when the document must contain a statement of truth, be a matter which carries consequences later, not least on costs.

Both parties are likely to file evidence, and if appropriate skeleton arguments, setting out the figures and how it is argued these should be approached in line with the caselaw. A useful way of doing that, as adopted in this case, may be a table drawing together the figures for ease of comparison.

Practice Points

- Whenever possible claimants should apply for interim payments.
- In appropriate cases applications for substantial sums which will allow real changes to be made to the claimant's life sooner rather than later.
- If the court may ultimately award a PPO any application for an interim payment should approach the figures following the guidance in *Eeles* and it will be unusual for accommodation costs not to fall within stage 1 .
- Parties should adopt a sensible approach to the figures, ideally by exchanging schedules, to narrow the issues and help further the overriding objective.

- Evidence, and argument based upon it, will be important for the claimant to ensure the court approaches this kind of application by correctly applying the legal principles which have emerged from the caselaw.
- If the defendant wishes to make assertions, for example on contributory negligence or that renting will better meet the claimant's future accommodation needs, evidence must be before the court dealing with and supporting any such assertion.

John McQuater

Cumulative Index

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