Journal of Personal Injury Law

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Editorial

Welcome to the December 2015 edition of JPIL.

In the last edition of 2015 we look at some interesting issues relating to liability. First in the context of the duty of candour owed by the medical profession, **Helen Blundell** APIL's Legal Services Manager examines the "Michigan Model" of early disclosure and offer which was introduced in Michigan, USA to improve patient safety and reduce the incidence and cost of clinical claims. She looks at its success and explores how such a model fits with the UK duty of candour.

The liability of sports coaches and professionals (whether amateur or professional) is never far from the news and **Neil Partington** looks at the law in this area with particular reference to the standard of care.

All readers will be familiar with *Donoghue v Stevenson* but in an interesting analysis **Heather Beckett** looks at the forensic approach adopted by Jay J in relation to the recent multimillion pound group litigation case of *Saunderson & Others v Sonae Industria (UK) Ltd* and contrasts that with the approach adopted in the case that gave us the classic "neighbour principle".

On the quantum front expert witness and labour economist **Dr Victoria Wass** looks at the Court of Appeal decision in *Billett v Ministry of Defence* and discusses further the definition of disability and the approach to be taken in applying the Ogden reduction factors.

In our procedure section **David Allen and Colin Ettinger** provide a practical approach to assessing capacity under the Mental Capacity Act with some helpful examples and insights into how to apply the core principles of the Act.

As the year draws to a close I would like to thank the Digest Editor Nigel Tomkins, the JPIL Editorial Board, and the team at Sweet and Maxwell for all their hard work and support.

Muiris Lyons
General Editor

Duty of Candour: Can the Michigan Model work in the NHS?

Helen Blundell*

Clinical negligence; Duty of candour; Michigan; NHS; Patients; Public safety; Settlement

APIL's Legal Services Manager Helen Blundell looks at the "Michigan Model" of early disclosure and offer introduced to improve patient safety and reduce the incidence and cost of medical claims in Michigan, US. She examines its introduction and success and discusses its merits. She explores the extent to which the model shares factors similar to the recently introduced duty of candour and whether the Michigan Model concept could be introduced to the NHS. She identifies a number of areas where the NHS would need to change or improve in order to properly implement a Michigan style model.

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What is the Michigan Model?

In late 2001 and early 2002, the University of Michigan Health System ("UMHS") changed the way it responded to patient injuries, applying what has become known as the Michigan Model, which has subsequently been described as an early disclosure and offer ("D&O") programme.

The D&O approach has successfully cut the costs associated with medical negligence claims while creating the safest possible environment for its patients. It was a deliberate decision to move away from a "circle the wagons" model where the traditional "deny and defend" modus was in operation: the result being a model which has led to fewer claims, fewer lawsuits and lower liability costs.

If the Model works in the US, could it work in the NHS? Could it reduce the amount of medical negligence and its associated costs both in human and monetary terms?

Before the Model: Does this sound familiar?

In 1985 the University of Michigan become self-insured and controlled the way in which it defended medical negligence claims. Lawyers employed by the university's general counsel's office managed the litigation and developed working relationships with various defendant law firms in private practice who investigated the claims, instructed experts, filed defences, calculated damages and so on, overseen by the university's in-house legal team.

In common with the way the NHSLA operates, those claims which were handed to external lawyers tended to be close to limitation period, or were those where proceedings had to be issued for various reasons. Claims were "routinely denied and defended".

Internally, the University lawyers reviewed defences and strategies and approved settlements or decisions to proceed to trial. Most claims settled either at trial or near to the trial date, after substantial costs had been incurred.

This approach was tacitly encouraged by the University's clinicians who instinctively would defend their actions and follow their lawyers' advice not to make admissions about the treatment to the patient or discuss its unfortunate outcome.

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Very little consideration was given by either the clinicians or the lawyers as to the effects this strategy had on the way in which patient safety was being affected.

This was the foundation of the UMHS's "deny and defend" strategy which assumed that when a patient suffered from medical negligence, a legal fight was inevitable and that fighting the claim was the best possible course of action in order to protect the medical institution's reputation and its finances.

Of course, medical negligence lawyers in the UK know that most patients first consult lawyers when they have failed to obtain an adequate explanation for their injury, to find out more and, if possible, to obtain an apology and ensure that the same mistake is not repeated with another patient in the future.[1] If their questions are stalled and gaps in their understanding are not filled correctly, patients come to their own conclusions about the standard of their treatment. Faced with a "deny and defend" response, their negative suspicions about their treatment will be reinforced.

Researchers examining the way in which Michigan conducted claims found that trial lawyers instructed by the injured patients assumed the role of litigators rather than mediators and aggressively created a case "within the context of an assumed adversarial relationship" with the defendant.

The researchers also found that the traditional "deny and defend" approach had a chilling effect on patient safety. Protecting the medical institution against the claim and its costs took precedence, healthcare workers did not talk about the errors for fear of jeopardising the litigation and the impulse to "use a medical injury to improve care and prevent future similar errors was snuffed out".[2]

So, how did this change?

In 2002, the UMHS recognised that the "deny and defend" model did not sit easily with its intention to become the safest hospital in the US. It was fighting a majority of claims made even though it had the resources to identify the difference between reasonable and unreasonable care early on. The litigation was time consuming and expensive and while it continued, settling claims (for whatever reason) in which the care was reasonable left its medical staff demoralised, while continuing to defend claims involving below-standard care incurred costs, undermined the hospital's safety goals and sent the wrong messages to all concerned.

The UMHS changed direction. It established three principles:

1) Where unreasonable medical care had injured a patient, compensation should be paid quickly and fairly.
2) Where the care had been reasonable, or did not adversely affect the clinical outcome, the UMHS would support its clinical staff and robustly defend the claim.
3) The UMHS would learn from its mistakes and reduce patient injuries, ultimately leading to a reduction in claims.

It encouraged its clinical staff to be accountable. To stop "cowering in the trenches waiting for a law-suit to drop" and instead, accept that a patient injury creates an obligation to address it in an honest and straightforward way to ensure that it does not happen again.

Staff were encouraged to be honest: to fill in those gaps in the patient's understanding and to stop stalling when asked about what had gone wrong. The UMHS and its clinical staff would act predictably: by adhering to the three principles the UMHS sent out a message of credibility, encouraging all those involved (courts, lawyers, patients, clinical staff, regulators) to engage in the overall aim of improving

[1] Letter from APIL to Jeremy Nolan (Department of Health) regarding the introduction of a statutory duty of candour (April 24, 2014) *http://www.apil.org.uk/files/pdf/ConsultationDocuments/2867.pdf* [Accessed November 6, 2015].

[2] Richard Boothman. JD and Margo M. Hoyler, "The University of Michigan's Early Disclosure and Offer Program" (March 2, 2013), Bulletin of the American College of Surgeons, *http://bulletin.facs.org/2013/03/michigans-early-disclosure/#* [Accessed November 6, 2015].

patient safety, fairly compensating the genuinely injured and reducing the costs both of litigation and of correcting or treating the clinical mistakes.

Main aspects of the Model

Data capture

Relying on voluntary disclosure from the staff concerned is not a reliable form of information gathering. UMHS tapped into information sources already at its disposal: billing information could identify safety indicators such as blood loss, haemorrhage after surgery, post-operative infections, and readmission rates, for example. This data can be captured quickly and used to prevent repeated errors.

Differentiation between medical errors and adverse outcomes

An honest and robust clinical evaluation of the care provided was necessary: unanticipated outcomes from clinical interventions are not always the result of medical mistakes. Determining the standard of care provided is a clinical question: getting an honest assessment from clinicians, devoid of defensiveness at an early stage removes the need for lawyers to litigate on that point.

The UMHS revamped its risk management department, employing experienced nurses on the basis that it was easier to teach claims handling to medical professionals than to train claims handlers in complex medical issues. Reviews by outside experts also helped to avoid any desire to protect their own interests and would ensure that identifying issues early would enable UMHS to act upon the findings as soon as possible.

Communication

The UMHS risk management consultants were all trained in mediation techniques and they were given legal resources on which they could call. Early communication after an adverse event is critical: if an explanation is not immediately forthcoming then the patient or the patient's family should be given a realistic timetable for when one might be given: as in many circumstances, unexplained delays or silences create an impression that information is being withheld. The UMHS teams were trained to share facts, not speculation, to avoid coming to the wrong conclusion too early.

Compensation

Offering a just financial figure by way of compensation avoids expensive litigation, enables staff and patients to "move on" and suggests that the hospital's desire to make amends is genuine, rather than merely a claims management tool.

The UMHS employs experts to value claims, including financial planners, care experts, benefits specialists and lawyers to calculate the value of the pain, suffering and loss of amenity. Compensation is measured against similar court settlements, to avoid unhappy patients seeking more through the courts.

It's not all about the money, though. As part of what we would recognise as rehabilitation, in the researchers' case study of Patient JW, the hospital's experts discussed with JW her fears of a recurrence of the breast cancer and its effect on her reluctance to return to work. They encouraged her to resume her work and enjoy her life. She described feeling euphoric that she had been listened to and that her outlook on life was now far more optimistic.[3]

[3] Richard C Boothman, Amy C Blackwell, Darrell A Campbell Jr, Elaine Commiskey and Susan Anderson, "A Better Approach to Medical Malpractice Claims? The University of Michigan Experience" (2009) J. Health & Life Sci. L. 125.

Learning from mistakes, measuring outcomes

It goes without saying that an organisation which fails to learn from its mistakes is doomed to repeat them. It is vital that proactive steps are taken to find the root cause of the error and rectify it as soon as is possible. To do otherwise is negligent: to consistently fail to do so means that the repetition of medical errors becomes an organisational habit.

The UMHS collected data to develop five-year plans to reduce the number of claims filed, the costs incurred and medical errors. Collection of data is vital to measure the effectiveness of its model.

The results in Michigan

Despite some commentators predicting that an open and honest disclosure programme would result in increased levels of litigation, researchers reviewing the programme found that between 1995 and 2007, the rate of new claims at UMHS decreased from approximately seven per 100,000 patients to fewer than five. The rate of lawsuits declined from 2.13 suits per 100,000 patients per month, to roughly 0.75. The median time from claim to resolution dropped from 1.36 to 0.95 years. Cost rates due to total liability, patient compensation and legal fees also decreased.

Getting the message out

The UMHS advertised its new approach as widely as possible: to the Bar and the courts, making it clear that it would not entertain settling claims where the care had been reasonable, but that it would engage early and fairly to settle those where the care had been unreasonable.

Researchers found that within the first year claimant lawyers changed their behaviour, engaging with the UMHS before filing claims, sending pre-suit notices and engaging in proactive discussions about the nature of the claim.

The UMHS is now able to resolve the majority of meritorious claims without the need to resort to litigation. Even more importantly, the number of unmeritorious claims has substantially decreased. Not only has this reduced the number of claims overall, but the number of defended claims has also decreased, reducing the UMHS's exposure to costs.

The researchers say that unlike other institutions which regard malpractice claims as an operational hazard and an inevitable business expense, UMHS treats them as an indicator of the quality of its patient care. "The UNHS has a strong sense of accountability for the remaining claims"—they are "sobering and disappointing" but analysis of them offers the opportunity to make positive changes.

Importantly, the researchers add:

> "the UMHS can no longer blame predatory lawyers and opportunistic patients for its malpractice losses. Isolating legitimate claims allows the health system to precisely examine patterns of behavior … and fixable problems."

Could it work in the NHS?

The Model has been adapted in other US-based health care systems: notably in the 28 hospitals in the Kaiser Permanente network (Hawaii), The Children's Hospital & Clinic of Minnesota and John Hopkins:

> "Owing to the success of the programme, Catholic Healthcare West has convinced the insurance carrier of its independent doctors to buy into the programme as well."[4]

[4] Boothman, Blackwell, Campbell, Commiskey and Anderson, "A Better Approach to Medical Malpractice Claims? The University of Michigan Experience" (2009) J. Health & Life Sci. L. 125. This article contains an excellent case study and sets out in detail the way in which the Model was implemented at UMHS. *http://www.med.umich.edu/news/newsroom/Boothman%20et%20al.pdf* [Accessed November 6, 2015].

But when trawling published articles, it was surprising to find very little analysis of whether it could be adapted for the NHS. Of course, the NHS is built on an entirely different scale to the US-based hospital groups which have adopted the model. It is the fifth largest employer in the world with only the US Department of Defense, The Chinese army, Walmart and McDonalds employing more people worldwide. But that does not mean that change is impossible.

In 2013, the online publication *LawFuel* published a short note by Stacey Aston who concluded that a "culture of secrecy, a reluctance for staff to engage in whistleblowing and a dismissive attitude to complaints" would make implementing the Michigan Model in the NHS "difficult".[5] This defeatist attitude is surprising, given the huge benefits which would flow from following the model in the NHS.

Communication in the NHS

Since Stacy Aston's note, the duty of candour has been introduced. This imposes a statutory duty on hospitals, community and mental health trusts to inform and apologise to patients if there have been mistakes in their care that have led to significant harm. It applies to the NHS and, since April 1, 2015, to all independent sector health providers. This goes some way towards the "communication" requirements of the Michigan Model, which is vital to encourage an open and transparent culture across all health and adult social care providers.

Separating medical errors from adverse outcomes

The NHSLA has been criticised by NHS Trusts for being perceived as a "soft touch" when it comes to settling claims while at the same time, accused of being too aggressive in its litigation approach.

This was one of the issues which the UMHS had to confront. In order to be credible, the NHSLA must be consistent in it approach, must settle obvious claims fairly and quickly while robustly defending those without merit and supporting the clinicians involved. By doing neither, one NHS Trust was quoted in a report by Marsh as saying that:

> "In short, insurance expediency has taken precedence over legal principle and until and unless the balance is re-struck, more claims will be pursued and settled, irrespective of merit, with an associated upsurge in adverse costs for the NHSLA."[6]

The Marsh Report commented that:

> "The NHSLA is considered to lack consistency in its approach to admitting liability—anecdotally the NHSLA settles some cases immediately, while contesting other claims despite the evidence being the same.
>
> There are times when the NHSLA is thought, based on interview feedback, to settle cases too quickly, in spite of members' views that cases could be defended. Equally views were expressed by members that the NHSLA does not always facilitate prompt resolution of claims, especially for those claims where negligence is felt to be apparent and settlement the obvious course of action. In this regard the approach adopted by the NHSLA is regarded as inflexible and lacking pragmatism."

As we know from Michigan, consistency in dealing with all claims and getting that message out to stakeholders is vital to reduce both the numbers of claims and associated costs, but also to ensure that the clinicians involved know where they stand when mistakes are made.

[5] Stacy Aston, "Can The NHS Learn From Michigan In Preventing Medical Negligence Claims?" (November 27, 2013), LawFuel, *http://www.lawfuel.com/medical-negligence-claims* [Accessed November 6, 2015].

[6] Marsh, *Department of Health NHS Litigation Authority Industry Report* (April 2011).

Data and learning from mistakes

In 2009, the National Patient Safety Agency offered funds of between £100 to £8,000 for research projects aimed at improving patient safety in its "Matching Michigan" Project. It resulted in a patient safety initiative which aimed to reduce catheter associated bloodstream infections in intensive care units.[7] Papers subsequently published suggest that this particular initiative has reduced these types of infections,[8] but both the initial funding project and the resulting patient safety initiative wilfully misunderstand the nature of the Michigan Model and fail to measure the effects of the pilot on medical negligence claim numbers and the resulting reduction of costs for the NHS. It is as if the pilot operated in a budget-free vacuum where the financial costs of improvement or failure were inconsequential.

Indeed, the BMJ editorial which accompanied the main paper published on the pilot, identified the main stumbling block to implementation in the NHS: data collection.

> "We must improve outcome measurement in patient safety. Many outcomes in the field involve fundamentally subjective elements: ventilator-associated pneumonia, preventable adverse events, 'unexpected' cardiac arrests in the setting of evaluations of rapid response teams, 'unintended medication discrepancies' and diagnostic errors, to name but a few. Social and psychological factors at the individual and institutional levels make accurate ascertainment of such outcomes, at the very least, a complex challenge, if not an unachievable goal. Technology-based innovations using objective data-derived elements to evaluate the true impact of safety interventions are urgently needed."[9]

Data collection is the first plank of the Michigan Model—if the NHS is does not automatically collect the right data, how can it hope to learn from its mistakes and ultimately, reduce the costs, both human and financial of its medical errors?

By way of example, the NHS Safety Thermometer has recently been introduced.[10] This provides what is described as a "temperature check" on harm "to measure local and system improvement". The tool allows clinical teams to measure harm and the proportion of patients that are "harm free" during their working day, for example at shift handover or during ward rounds. But it is a voluntary scheme and based around an Excel spreadsheet, so that data entry is manual, not automatic. This is a pitfall identified by the Michigan model and by the writers of the Matching Michigan pilot—manual or voluntary participation is not a reliable method of data collection. Technology-based generation and collection of data ensures objectivity and means that it can be implemented throughout the hospital or other care organisation, rather than ward by ward. While the Safety Thermometer is a step in direction, it may not be enough to have a nationwide impact.

More recently in June 2015, the Secretary of State for Health launched a patient safety campaign called Sign up to Safety, which aims to halve avoidable harm and in doing so save up to 6,000 lives in the next three years. Maybe this is another step in the right direction.

What should the NHS do?

In order to implement an effective disclosure and offer programme in the NHS, the following need to be considered:

[7] NHS Patient Safety Agency, *A pioneering patient safety initiative coming to a hospital near you soon* (December 14, 2009).

[8] The Matching Michigan Collaboration & Writing Committee, "Matching Michigan': a two-year stepped interventional programme to minimise central venous catheter-blood stream infections in intensive care units in England" (September 20, 2012) BMJ Quality & Safety, *http://qualitysafety.bmj.com/content/early/2012/09/20/bmjqs-2012-001325.full* [Accessed November 6, 2015].

[9] "Matching Michigan", Patient Safety First, *http://www.patientsafetyfirst.nhs.uk/Content.aspx?path=/interventions/matchingmichigan/* [Accessed November 6, 2015].

[10] "NHS Safety Thermometer", Health & Social Care Information Centre, *http://www.hscic.gov.uk/thermometer* [Accessed November 6, 2015].

- Hospitals *must* collect data in an objective and systematic way, with the clear aim of improving their patient safety outcome measurements and reducing the numbers of negligence claims made.
- Either the NHS Trusts should consider taking back control of claims management, or they should ensure that the NHSLA takes control of claims as soon as possible to ensure consistency of approach.
- NHS in-house legal teams and the NHSLA must be consistent in the way in which they identify and deal with medical errors along with a consistent approach to claims where the standard of care is up to standard.
- The NHSLA/Trusts should then be able to make early offers of fair settlements to injured patients whose care falls below the required standards, obviating the need for costly litigation, encouraging a less adversarial approach to claims handling.
- Communication: the duty of candour must be used correctly to ensure that patients are given the right information about their care and what, if anything, has gone wrong.

This will need a culture change within the NHS and NHSLA:

- Systematic data collection for something other than clinical care is novel in the NHS, but is necessary if errors are to be identified, tackled and repetition of them to be avoided.
- A consistent approach to the handling of claims made is vital: as with the UMHS, medical staff members need to feel confident that their clinical decisions are supported by the NHS/NHSLA when they are not negligent, and that the support is consistent and fair. Only then will they feel it is safe to make full and effective disclosure, facilitate early learning from mistakes and reduce the number of medical errors, improving the safety culture of the NHS as a whole.
- Similarly, lawyers dealing with injured patients need to know how their client's potential claims will be dealt with. That should discourage speculative claims, speed up settlement of meritorious claims and reduce the stress from the process for all concerned.
- Moving to a collaborative rather than adversarial approach to dealing with injured patients and their lawyers will ultimately save costs in both human and legal terms.

As the Michigan model researchers concluded in their report: "abandoning deny and defend can be a critical first step to recovery.

(For the descriptions of how the Michigan Model works I am indebted to the research papers and editorials produced by Richard C. Boothman, Sarah J. Imhoff, Darrell A. Campbell Jr, Elaine Commiskey, Margo M. Hoyler, and Susan Anderson, which are quoted extensively in this article).

Of Snails and Burning Wood. Make Sure the Science Stacks Up

Heather Beckett*

Personal injury claims—Science—Causation—Damages

Causation; Fire; Hazardous substances; Personal injury claims; Science; Sufficiency of evidence

The recent multimillion pound group litigation case of Saunderson v Sonae Industria (UK) Ltd[1] *starkly illustrates the robust scientific inquiry into causation which claimants in personal injury claims which reach court will face. Comparison is made with the historic case of* Donoghue v Stevenson*, where it is suggested that the facts as far as they are known could not withstand this modern forensic analysis.*

Every student of the law of tort is familiar with the case of *Donoghue v Stevenson*.[2] In that case, the relevance for the law lies in the "neighbour" principle of duty of care established by the words of Lord Atkin.[3] It is so famous that every student remembers the facts of that case. The revolting mental image conjured up by the remains of a decomposing snail slithering out of a part-drunk bottle of ginger beer in front of Mrs Donoghue, who had already drunk part of the bottle's contents, cannot fail to turn the stomach. It seems intuitive that she would have suffered from gastro-intestinal upset and shock as a result.

Not so many will be aware that there is some not inconsiderable doubt that the facts of *Donoghue v Stevenson* were actually ever as they were pleaded. There is even some doubt that Mrs Donoghue was ultimately successful in securing damages. Certainly there is doubt as to the amount of damages or settlement. It is known that £500 was claimed in the original action, an amount which the defence stated was excessive, being the equivalent of the order of £25,000 or even more in today's money. Mrs Donoghue may, it is said, have received something between £100 and £200 from the estate of Mr Stevenson.[4]

In short, there is doubt that the snail ever existed[5] or that Mrs Donoghue suffered illness and shock at all. There was no scientific forensic examination of the facts. The case on the legal principle of duty of care progressed right up to the House of Lords before it was sent back for the facts to be applied to the new established principle. By that time the case had secured its place in legal history, unlike the similar earlier case of *Mullen v AG Barr & Co Ltd*,[6] which involved a mouse in ginger beer. The real difference may well have been because the claimant in *Mullen v Barr* could not afford to take the case to the House of Lords. Mrs Donoghue was allowed to prosecute her ultimate appeal as a pauper, so there was no risk to her of costs. That's apparently how it was done in the early part of the twentieth century. There were no conditional fee agreements, just the goodwill of lawyers helping the impecunious to obtain justice. It was the same solicitor, a Mr Leechman, who acted for the claimants in both cases.[7] Perhaps that was mere coincidence, or perhaps Mr Leechman had identified a business opportunity.

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[1] *Saunderson v Sonae Industria (UK) Ltd* [2015] EWHC 2264 (QB).

[2] *Donoghue v Stevenson* [1932] A.C. 562 HL.

[3] *Donoghue v Stevenson* [1932] A.C. 562 at 599.

[4] M. Chapman, *The Snail and the Ginger Beer: The Singular Case of Donoghue v Stevenson* (London: Wildy, Simmonds & Hill Publishing, 2010).

[5] J. Edelman, "Fundamental Errors in Donoghue v Stevenson" (Speech to the Friends of University of Western Australia, London, July 2014)*http://www.supremecourt.wa.gov.au/_files/Fundamental%20Errors%20in%20Donoghue%20v%20Stevenson%20by%20Edelman%20J%20July%202014.pdf* [Accessed November 6, 2015].

[6] *Mullen v AG Barr & Co Ltd* 1929 SC 461 CSIH 2.

[7] Edelman, "Fundamental Errors in Donoghue v Stevenson" (Speech to the Friends of University of Western Australia, London, July 2014).

The pleadings in *Donoghue v Stevenson* included the following:

> "The pursuer suffered severe shock and a prolonged illness in consequence of the said fault of the defender and his servants. She suffered from sickness and nausea which persisted. Her condition became worse, and on 29th August 1928, she had to consult a doctor. She was then suffering from gastro-enteritis induced by the said snail-infected ginger beer. Even while under medical attention she still became worse, and on 16th September 1928 had to receive emergency treatment at Glasgow Royal Infirmary".

In defence:

> "Not known and not admitted. Explained that the alleged injuries are grossly exaggerated. Explained further that any illness suffered by the pursuer on or after 26th August 1928 was due to the bad condition of her own health at the time".

It is without doubt that had Jay J been in charge of fact-finding in *Donoghue v Stevenson* today, a most robust process would have been followed. It may not have changed the neighbour principle of the law of tort, but it may have rather undermined the subsequent immortality of the *Donoghue* snail.

In *Saunderson v Sonae Industria (UK) Ltd*,[8] a multimillion pound group litigation claim for personal injury, Jay J heard evidence over three and a half weeks in June 2015, from 20 test claimants and conducted a scientific examination of considerable rigour. He was not required to make a decision on whether the defendants owed the claimants a duty of care. They admitted that they did. However, he looked long and hard at whether the alleged breach actually caused the harm of which the claimants complained. The claimants lost.

The case is a salutary reminder that: "Where there's blame, there may not be a claim." A claimant still has to prove their particular case on the facts. The *Sonae* claim was also tainted by the actions of lawyers, the influence of social media and the fallibility of human nature.

Brief facts of the claim

The defendant company, Sonae Industria SGPS SA was a producer of wood-based products. One of its plants was in Kirkby, Merseyside. On June 9, 2011, a fire broke out at the plant. It was a serious fire, producing smoke, (which at times was thick and black in nature), heat, dust, ash and potentially toxic emissions. The fire and rescue service did not declare the incident as officially closed until July 7, 2011.

A number of firms of solicitors subsequently invited residents of Kirkby to bring claims in negligence against Sonae. People were cold-called. Some were visited at home and filled in claims questionnaires in which the questions were unacceptably leading. Pop-up shops were opened in Kirkby, inviting people to make claims if they had been affected by the fire.

Over 16,000 claimants made claims for personal injury, involving combinations of lower and upper respiratory tract symptoms, eye symptoms and skin problems. Forty test cases (20 chosen by the claimant solicitors and 20 by the defendant solicitors) were reduced to 20 who gave oral evidence at the hearing. With one exception, none of the test claimants could show that they had visited their GP specifically regarding symptoms, now long resolved, which they were now attributing to the fire.

A significant number of experts gave evidence on the scientific and the medical issues.

[8] *Saunderson v Sonae Industria (UK) Ltd* [2015] EWHC 2264 (QB).

Judgment

The judge acknowledged that there was a difference in the standard of proof required in science and that required in the legal context. He was not, however, prepared to allow the flexibility of the law in this regard to be unbounded.[9]

He acknowledged in particular the delay between the fire and the hearing and the consequent effect of the fallibility of human recollection. Again, he was prepared to make allowance, although not excessive, for this.[10]

He recognised the concept of "the suggestible witness"—not a witness who was deliberately intent on misleading, but one who could not remember what actually happened or who assumed something had happened because it fitted into the mind-set of what the breach must have caused. In particular, there was mention of the effect on the suggestible witness of there being no risk to their own resources when bringing a claim.[11]

He acknowledged that he needed to adopt a process of syncretism of the scientific, expert and lay (claimant) evidence, but eventually it would be his task to assess the relative weight of conflicting sources of evidence.[12]

The issue at its most basic was whether the package of chemicals or particles emitted as a result of the fire caused or materially contributed to the alleged personal injuries of the claimants. Put another way, either on the balance of probabilities they sustained an injury as a result of the tortious exposure or they did not.[13]

It was found that no claimant fell within "the envelope of risk", whereby their calculated exposure to potential injury, based on their geographical proximity to the fire and their length of exposure to any potentially injurious agent took them over even the minimum threshold levels required by the available science to cause the symptoms of which they later, in some cases very much later, complained. In the end the science emerged "unscathed", the lay evidence having made "no significant dent" into it.[14]

Some aspects of the case came in for especial judicial criticism. In particular, the actions of two of the firms of solicitors were thought to be so questionable that Jay J directed that a copy of the judgment be sent to the Solicitors Regulation Authority for investigation into the issues raised.[15] In addition, the judge described lawyers arriving on the scene in Kirkby many months after the fire and sensing "a business opportunity".[16]

Conversations recorded on Twitter between one of the claimants and another tweeter proved to be the undoing of that particular claim, evidencing the claimant's unreliability.[17]

The major criticism, however, was that of the scientific analysis at the outset:

> "There are clear lessons to be learned from this litigation. The claimants' legal team should have worked out the science at a much earlier stage … they should have investigated whether the case stacked up … perhaps they clung to the notion that the litigation would settle. Alternatively, they believed that the judge would not be that interested in the science … On all counts they have been proven wrong".[18]

[9] *Saunderson v Sonae Industria (UK) Ltd* [2015] EWHC 2264 (QB) at [189].
[10] *Saunderson v Sonae Industria (UK) Ltd* [2015] EWHC 2264 (QB) at [247].
[11] *Saunderson v Sonae Industria (UK) Ltd* [2015] EWHC 2264 (QB) at [456].
[12] *Saunderson v Sonae Industria (UK) Ltd* [2015] EWHC 2264 (QB) at [194].
[13] *Saunderson v Sonae Industria (UK) Ltd* [2015] EWHC 2264 (QB) at [183].
[14] *Saunderson v Sonae Industria (UK) Ltd* [2015] EWHC 2264 (QB) at [455].
[15] *Saunderson v Sonae Industria (UK) Ltd* [2015] EWHC 2264 (QB) at [380], [425].
[16] *Saunderson v Sonae Industria (UK) Ltd* [2015] EWHC 2264 (QB) at [463].
[17] *Saunderson v Sonae Industria (UK) Ltd* [2015] EWHC 2264 (QB) at [393]–[396].
[18] *Saunderson v Sonae Industria (UK) Ltd* [2015] EWHC 2264 (QB) at [466]–[467].

Looking back: *Donoghue v Stevenson*

What would Jay J have made of the available facts in *Donoghue v Stevenson*, based on what we know of them and his approach to the *Sonae* case?

First, he may well have considered the available information regarding the scientific possibility of a snail gaining access to the ginger beer bottle. The evidence from *Mullen v Barr* had been that the ginger beer manufacturers ran a very high standard of process in their bottling. This does not mean that a snail could not have gained access to the bottle, but more would have been needed. Would a snail of the size alleged, (how big was the alleged snail anyway?), actually have been able to get into a bottle of the relevant shape? Unfortunately, there is no available evidence that any snail was retained for analysis.

The concentration gradient of contamination of the upper part of a bottle of ginger beer in which a partially decomposed snail was in the bottom of the bottle would have been an issue on which scientific evidence may well have been necessary. How much ginger beer did Mrs Donoghue actually drink and how contaminated was it?

Expert evidence would be required in relation to the anticipated physical effects of ingesting a small amount of ginger beer containing partially decomposed snail.

The judge would have heard evidence from Mrs Donoghue, a witness who may have been considered to be "suggestible" and who, like the *Sonae* claimants, had nothing to lose in bringing a claim, as she was able to bring her claim as a pauper. He may well have considered that the level of claim in the face of the pleaded injury was excessive in all the circumstances in any event. The pleadings do not suggest the entire period of time over which the alleged illness continued. He would, no doubt, have wanted to examine the GP and hospital evidence. We do not have the benefit of either.

At the end of the day, there are, it is suggested, despite the very different subject matter, a number of significant similarities between the two cases. Mrs Donoghue is unlikely to have won her case on causation if it had been tried by Jay J. The lesson is clear, breach of duty is simply not enough if the science does not support causation and prospective claimants need to be realistic about scientific proof.

The remarkable truth is that on this analysis, the iconic case of *Donoghue v Stevenson* and the enduring legal precedent it established was founded in a case which today would almost certainly be just another personal injury case which fails on the facts.

Professional Liability of Amateurs: The Context of Sports Coaching

Neil Partington*

Bolam test; Coaches; Personal injury; Professional negligence; Sports; Volunteers

The developing intersection between the law of negligence and sports coaching in the UK provides a profoundly distinctive context, as compared to that of the more traditional learned professions, in which to critically examine the issue of professional liability. More specifically, detailed consideration of the Bolam *test in the context of sports coaching, where the majority of coaches are volunteers, reinforces the* Bolam *doctrine as a control mechanism designed to protect both claimants and defendants alike. Importantly, a fuller analysis of related jurisprudence, even in instances where defendant coaches lack a formal qualification, and/or may not have engaged in considered and reasoned decision-making, reveals the potential for the* Bolam *test to operate as a quasi-defence, thereby safeguarding coaches from negligence liability. Nonetheless, in discharging this heightened standard of care incumbent upon them, coaches must ensure that the coaching practices adopted are regular, approved, and capable of withstanding robust and logical scrutiny. Ultimately, this article's analysis of the principles of professional liability, in the specific circumstances of sports coaching, should prove to be of appreciably wider interest and utility for practitioners specialising in personal injury law.*

Introduction

> "[W]here you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."[1]

In situations where a person undertakes a task requiring some special skill, this legal statement is repeatedly applied.[2] As a foundational component of the *Bolam* test, it represents a basic threshold measurement of reasonableness in claims of professional liability.[3] Interestingly, sports coaching requires the exercise of some special skill or competence and aspires to be classified as a "profession".[4] Accordingly, careful scrutiny of the developing jurisprudence in this field confirms the negligence liability of coaches as being governed by the legal principles of professional liability, regardless of whether or not sports coaching should be legitimately classified as a profession.[5] Paradoxically, despite the majority of sports

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[1] *Bolam v Friern Hospital Management Committee* [1957] 1 W.L.R. 582 at 586 per McNair J.

[2] *Vowles v Evans* [2003] EWCA Civ 318; [2003] 1 W.L.R. 1607 at [27].

[3] M. Jones, "The Bolam Test and the Responsible Expert" (1999) 7 *Tort Law Review* 226.

[4] See generally, P. Duffy et al., "'Sport coaching as a 'profession': challenges and future directions" (2011) 5(2) *International Journal of Coaching Science* 93; B. Taylor and D. Garratt, "The Professionalisation of Sports Coaching: Relations of Power, Resistance and Compliance" 15(1) *Sport, Education and Society* 121.

[5] See further, D. Mangan, "The Curiosity of Professional Status" (2014) 30(2) *Professional Negligence* 74.

coaches being volunteers,[6] both amateur and professional coaches assume the same duty to coach properly in the particular circumstances. Consequently, the evolving "profession" of sports coaching provides an intriguing and novel context in which to critically analyse the characteristics of professional liability. Importantly, this careful and detailed doctrinal analysis reveals some serious concerns relating to the emerging issue of the negligence liability of coaches,[7] with suggested best practice recommendations highlighted in order to better safeguard coaches from professional liability.

The article begins by contextualising the issue of sports negligence. This is followed by a general introduction to professional liability, revealing this to be a flourishing aspect of the law of negligence. Next, the *Bolam* test, the celebrated benchmark of the standard of skill and care incumbent upon ordinarily competent and average professionals, is examined in considerable detail. Crucially, this reinforces the necessary function of this well-established legal control mechanism to protect the legitimate and genuine interests of *both* claimants and defendants alike.[8] Importantly, clarification of the relevant jurisprudence in this field reveals significant implications for the education, training and continuing professional development ("CPD") of modern sports coaches with regard to legal and ethical issues. More generally, since professional liability is confirmed as a developing and fluid aspect of the law of negligence, this article's focus on a "profession" profoundly distinctive in relation to the more traditional learned professions, provides a critical commentary that should be of wider interest and utility to practitioners specialising in personal injury law.

Context

It has previously been argued that imposing a duty of care on rugby union referees is harsh, unjust and would lead to undesirable "defensive" refereeing.[9] Nonetheless, despite further arguments indicating that holding that an amateur referee owes a duty of care to the players under her/his charge would have a "chilling effect", by discouraging volunteers from being prepared to serve as referees, the Court of Appeal has ruled otherwise.[10] Indeed, it is now well established that the ordinary principles of the law of negligence are applicable in the context of sport,[11] including claims brought against volunteer[12] and employed coaches and instructors.[13] Interestingly, *Scout Association v Barnes*[14] provides a further recent Court of Appeal decision concerning the negligence of volunteer scout masters.[15] Specifically, the duty of a coach may be regarded as exercising reasonable skill and care to ensure that those under the coach's charge are not exposed to unreasonable or unacceptable risk. Although this standard expected of sports coaches is fixed conceptually as the duty to take reasonable care, specific duties required of coaches have evolved,[16] it

[6] "Coach Tracking Study: A four-year study of coaching in the UK" (2012), Sportscoach UK, *http://www.sportscoachuk.org/sites/default/files/Coach-tracking-study.pdf* (Accessed November 9, 2015) at 17. The employment status of coaches in the UK classifying 76 per cent as volunteers (unpaid), with the national average of coaches holding a coaching qualification being 53 per cent.

[7] N. Partington, "Legal liability of coaches: a UK perspective" (2014) 14(3–4) *International Sports Law Journal* 232.

[8] See generally, R. Kidner, "The variable standard of care, contributory negligence and volenti" (1991) 11(1) *Legal Studies* 1, 23.

[9] *Smoldon v Whitworth* [1997] E.L.R. 115 at 122–123.

[10] *Vowles* [2003] 1 W.L.R. 1607 at [49].

[11] E.g., *Caldwell v Maguire* [2001] EWCA Civ 1054; [2002] P.I.Q.R. P6; *Condon v Basi* [1985] 1 W.L.R. 866 CA (Civ Div). See generally D. Griffith-Jones, "Civil Liability Arising Out of Participation in Sport" in A. Lewis and J. Taylor, *Sport: Law and Practice*, 2nd edn (Haywards Heath: Tottel, 2008), 715 and 740.

[12] E.g., *Petrou v Bertoncello* [2012] EWHC 2286; *Fowles v Bedfordshire CC* [1996] E.L.R. 51 CA (Civ Div). Interestingly, in *Petrou*, *Fowles* was cited as authority for the fact a volunteer can owe a duty of care arising out of his or her voluntary assumption of a responsibility within a club. Whilst a close reading of *Fowles* reveals that the defendant trainee youth worker was technically employed by Bedfordshire County Council, the legal principle advocated remains valid.

[13] E.g., *Davenport v Farrow* [2010] EWHC 550 (QB); *Cox v Dundee CC* [2014] CSOH 3.

[14] *Scout Association v Barnes* [2010] EWCA Civ 1476.

[15] Ultimately, the Scout Association being found vicariously liable for the actions of its agents.

[16] A. McCaskey and K. Biedzynski, "A Guide to the Legal Liability of Coaches for a Sports Participant's Injuries" (1996) 6 Seton Hall J. Sport L. 7, 15. Technically speaking, terminology making reference to "specific duties" may be regarded as somewhat misleading, since the precise degree and scope of responsibilities owed by coaches more accurately defines the standard of care, not the duty of care. Nonetheless, as noted by *Clerk and Lindsell on Torts*, formulating the standard of care in terms of a particular duty can be useful in a descriptive way: see, M. Jones and A. Dugdale (eds), *Clerk and Lindsell on Torts*, 20th edn (London: Sweet & Maxwell, 2010), para 8-137. Accordingly, it is submitted that reference to the specific duties

being suggested that coaches are required to discharge responsibilities that may be classified under three main headings which include: facilities and organisation; instruction and supervision; and medical care.[17] Crucially, the determining matter in cases of alleged sports negligence is not whether the coach, referee or leader sued may be a volunteer, "professional amateur",[18] or professional, but rather whether reasonable skill and care was exercised in the particular circumstances. In short, the legal principles of professional liability would apply should a volunteer coach be sued in negligence, the incumbent standard of skill and care being that of the reasonably average competent and responsible coach operating at that level.

Professional liability

Professionals by most conventional interpretations are regarded as "knowledgeable others"—they "profess".[19] Nevertheless, the definition of profession remains a contested concept,[20] and is inconclusive.[21] Accordingly, perceptions about what might constitute a "professional", or profession, are "indistinct, subjective, and continually changing".[22] As a result, there is a contemporary widened catchment of "profession",[23] with sports coaching appearing determined to satisfy this designation.[24] General endorsement of sports coaching being classified as a profession includes: the moral aspect of coaching, reflected in codes of conduct and ethics produced by national governing bodies of sport ("NGBs"), and additionally, by the "community" context in which much coaching is delivered; opportunities (or requirements) for membership of professional associations (e.g., for coach accreditation/CPD/insurance); and the apparent enhanced status of sports coaches in modern society.[25] This article will critically consider these factors, or indicators, revealing important ramifications linked to professional liability. For instance, despite publication of ethical guiding principles being integral to all professions,[26] mere production of a code of ethics is certainly not sufficient for sports coaching to be regarded as a profession.[27]

Fundamentally, as highlighted by *Clerk and Lindsell on Torts*:

> "the rules governing a professional person's liability for negligence are no different from those governing the liability of anyone else who undertakes a specific task and professes some special skill in carrying out that task."[28]

Since success and safety cannot be guaranteed, this seems entirely sensible, demanding a certain minimum degree of competence from professional persons discharging their duties.[29] Subsequently, the pivotal issue in cases of negligence liability brought against coaches would be determination by the court

incumbent on sports coaches provides a helpful and illuminating conceptual framework by which the legal responsibilities of coaches, derived from the law of negligence, can be unpacked and clarified. In this context, highlighting the practical content of the duty owed is of considerable importance given the somewhat nebulous and vague nature of reasonableness as a legal test: see further, Partington, "Legal liability of coaches: a UK perspective" (2014) 14(3–4) *International Sports Law Journal* 232, 236.

[17] J. Barnes, *Sports and the Law in Canada*, 3rd edn (Toronto; London: Butterworths, 1996), p.302.

[18] Duffy et al., '"Sport coaching as a 'profession': challenges and future directions" (2011) 5(2) *International Journal of Coaching Science* 93, 110. For instance, professional volunteers may represent amateur coaches with Senior/Master levels of coaching awards.

[19] B. Taylor and D. Garratt, "The professionalisation of sports coaching: definitions, challenges and critique" in J. Lyle and C. Cushion (eds), *Sports coaching: professionalisation and practice* (Edinburgh: Churchill Livingstone Elsevier, 2010), p.104.

[20] K Armour, "The learning coach … the learning approach: professional development for sports coach professionals" in J. Lyle and C. Cushion (eds), *Sports coaching: professionalisation and practice* (Edinburgh: Churchill Livingstone Elsevier, 2010), p.154.

[21] Jones and Dugdale, *Clerk and Lindsell on Torts* (2010), para.10–01.

[22] J. Powell and R. Stewart, *Jackson and Powell on Professional Liability*, 7th edn (London: Sweet & Maxwell, 2012), para.2-002.

[23] Mangan, "The Curiosity of Professional Status" (2014) 30(2) *Professional Negligence* 74, 74–75.

[24] Duffy et al., '"Sport coaching as a 'profession': challenges and future directions" (2011) 5(2) *International Journal of Coaching Science* 93; B. Taylor and D. Garratt "The Professionalisation of Sports Coaching: Relations of Power, Resistance and Compliance" 15(1) *Sport, Education and Society* 121.

[25] See generally, Powell and Stewart, *Jackson and Powell on Professional Liability* (2012), paras 1-005 to 1-006.

[26] H. Telfer, "Coaching practice and practice ethics" in J. Lyle and C. Cushion (eds), *Sports coaching: professionalisation and practice* (Edinburgh: Churchill Livingstone Elsevier, 2010), p.210.

[27] Duffy et al., '"Sport coaching as a 'profession': challenges and future directions" (2011) 5(2) *International Journal of Coaching Science* 93, 104.

[28] Jones and Dugdale, *Clerk and Lindsell on Torts* (2010), para.10-03.

[29] Powell and Stewart, *Jackson and Powell on Professional Liability* (2012), para.1-004.

of the objective standard of skill and care required in the particular circumstances. Crucially, this would reflect, and be shaped by, the special skill or competence expected of the ordinary coach, with the imposition of this responsibility or duty of care often regarded as "a badge of professional status".[30] Significantly, determination of the legal standard of care incumbent on different professionals in particular circumstances, and more specifically, the weight to be attributed to guidelines and standards published by NGBs in individual cases, is instrumental to the thriving area of professional liability.[31] Interestingly, this intersection between professional liability and sports coaching is contextualised by the varied, and somewhat unique, categorisation of coaches as volunteers, professionals and "professional volunteers". These distinctions may be further complicated and intensified by the particular coaching domains in which coaches operate, for instance "participation", "development" and "performance" pathways. In short, the negligence liability of coaches represents an important, evolving and fascinating instance of professional liability in a unique context.

Bolam test

General

The *Bolam* test may be regarded as a control device designed to set the limits of liability.[32] As a crucial preliminary issue, it should be noted that when courts inquire whether a defendant may have been careless and in breach of duty, ascertaining the standard of care required in law in the particular circumstances protects *both* claimants and defendants.[33] This benchmark of objective reasonableness is defined to safeguard the legitimate and genuine right of claimants (performers) not to be exposed to unreasonable risks, but crucially, providing defendants (coaches) discharge and meet this standard of skill and care, there can be no liability in negligence. Nonetheless, since the law of tort's primary goal may be regarded as compensation,[34] operating in a contemporary social context mindful of a perceived "compensation culture",[35] it is arguable whether the full significance of the standard of care's dual function and capacity is always fully articulated or emphasised. To somewhat bluntly borrow a maxim from contract law, the standard of care may be regarded as a sword for claimants in seeking to establish breach, but correspondingly, a protective shield for defendants providing conduct and practices are essentially reasonable. At first glance, this may appear trite law. However, in emphasising the perspective of (defendant) coaches, and this article's objective in seeking to be of practical utility and beneficial impact, considerable reassurance may be acquired from this knowledge and awareness. In short, providing coaches satisfy this threshold of regular, approved, responsible and justifiable practice, they should be protected and shielded from civil liability.

In this context, although the *Bolam* test may not formally be regarded as a "defence",[36] successful satisfaction of the *Bolam* test by professionals essentially shields and defends practitioners from professional liability. On a purely technical analysis of the law of negligence, the court's scrutiny of the *Bolam* test relates to the control mechanisms of standard and care and breach, not partial or absolute defences, including

[30] *JD v East Berkshire Community Health NHS Trust* [2005] UKHL 23; [2005] 2 A.C. 373 at [40] per Lord Bingham.
[31] M. Lunney and K. Oliphant, *Tort Law: Test and Materials*, 5th edn (Oxford: Oxford University Press, 2013), p.199.
[32] P. de Prez, "Something "old" something "new", something borrowed …The continued evolution of Bolam" (2001) 17 *Professional Negligence* 75.
[33] Kidner, "The variable standard of care, contributory negligence and volenti" (1991) 11(1) *Legal Studies* 1, 23.
[34] De Prez, "Something "old" something "new", something borrowed …The continued evolution of Bolam" (2001) 17 *Professional Negligence* 75, 84. In this regard, tort law may be regarded as distributing loss, increasingly by means of insurance provision. Further, tort law can prove instrumental in setting acceptable minimum standards and practices by defining what might constitute reasonable skill and care in particular circumstances.
[35] A. Morris, "Spiralling or Stabilising? The Compensation Culture and Our Propensity to Claim Damages for Personal Injury" (2007) 70 Mod. L. Rev. 349, 350.
[36] Mangan, "The Curiosity of Professional Status" (2014) 30(2) *Professional Negligence* 74, 85.

contributory negligence and volenti non fit injuria respectively.[37] However, adopting the viewpoint of coaches facing a professional liability action, reference to the *Bolam* test as a quasi-defence appears likely to be a source of readily understood encouragement, without fundamentally misrepresenting judicial reasoning or compromising the final judgments made by courts. Simply applied, framing the *Bolam* test as a "defence" encompasses the intricacies of contextualised factors informing determination of the applicable standard of care (e.g., when coaching children; coaching more hazardous activities). It also accounts for additional discrepancies between the legal principle of objective reasonableness and the sports torts related evidential threshold of "reckless disregard",[38] without over-complicating matters for defendants.[39] This is because reasonable and responsible coaching would be reflective of the full factual matrix of individual cases. In short, a detailed examination of the case law confirms adoption of practice found to be universal, approved and logically justifiable by professionals as affording conclusive and absolute protection from liability in negligence. As such, there appears some merit and usefulness in referring to the *Bolam* test as a "defence" in appropriate circumstances, including the education, training and CPD of coaches.

Importantly, the *Bolam* test is not confined to cases of medical negligence,[40] it being of general application when defendants exercise or profess to have a particular skill.[41] Despite attempts to define profession appearing inconclusive, should a coach be sued in negligence, the required standard of skill and care would be determined by reference to other members of the coaching "profession", not the objective reasonable person on top of the "Clapham omnibus".[42] Simply applied, any profession requiring special skill, knowledge, or experience, including the coaching of sport,[43] requires a higher standard of care to be displayed than would be expected of the ordinary reasonable person.[44] This recognises the enhanced difficulty and skill in the working practices of professionals.[45] Crucially, the *Bolam* test would also appear to be applicable to individuals not regarded as being members of a profession but whose functions demand the exercise of a special skill.[46] Arguably, this will include some volunteer coaches. Further, whether or not the coach may have some formal recognition of her/ his specialisation would appear immaterial,[47] as would classification as amateur or professional,[48] the standard required remaining appropriate to specialists in that designated field. Accordingly, the core dispute in professional negligence cases tends to concentrate on determining what might constitute "proper practice" or "ordinary competence" with reference to the particular practices being contested.[49]

[37] Importantly, the defence of volenti non fit injuria, or voluntary assumption of risk, is premised upon the notion of consent, and since it is reflected in the scope of the practical content of the identified standard of care in all of the circumstances (Griffith-Jones "Civil Liability Arising Out of Participation in Sport" in *Sport: Law and Practice* (2008), p.748), following *Caldwell* [2002] P.I.Q.R. P6, its application in this particular area of the law appears somewhat redundant (S. Gardiner, M. James, J. O'Leary and R. Welch, *Sports Law*, 3rd edn (London: Cavendish, 2006), p.643).

[38] *Caldwell* [2002] P.I.Q.R. P6 at [11]; *Morrow v Dungannon & South Tyrone BC* [2012] NIQB 50 QBD at [20]; See further, D. McArdle, "The Enduring Legacy of "Reckless Disregard"" (2005) 34(4) *Common Law World Review* 316; D. McArdle and M. James, "Are you experienced? 'Playing cultures', sporting rules and personal injury litigation after Caldwell v Maguire" (2005) 13(3) *Tort Law Review* 193.

[39] J. Steele, *Tort Law: Text, Cases and Materials*, 2nd edn (Oxford: Oxford University Press, 2010), pp.114–115, recognising that "duty of care" may be viewed as an abstract and challenging notion.

[40] Lunney and Oliphant *Tort Law: Test and Materials* (2013), p.198.

[41] *Gold v Haringey HA* [1988] Q.B. 481 CA (Civ Div) at 489 per Lloyd LJ; *Adams v Rhymney Valley DC* (2001) 33 H.L.R. 41 CA (Civ Div) at 10 per Morritt LJ; *Phelps v Hillingdon LBC* [2001] 2 A.C. 619 HL.

[42] Powell and Stewart, *Jackson and Powell on Professional Liability* (2012), para.2-128.

[43] E.g., *Fowles* [1996] E.L.R. 51; *Davenport* [2010] EWHC 550 (QB).

[44] Lunney and Oliphant *Tort Law: Test and Materials* (2013), p.198; Jones and Dugdale, *Clerk and Lindsell on Torts* (2010), para.10-03.

[45] Mangan, "The Curiosity of Professional Status" (2014) 30(2) *Professional Negligence* 74, 85.

[46] Lunney and Oliphant, *Tort Law: Test and Materials* (2013), p.198.

[47] Powell and Stewart, *Jackson and Powell on Professional Liability* (2012), para.2-130.

[48] J. Gardiner, "Should Coaches Take Care?" (1993) 143 N.L.J. 1598.

[49] M. Brazier and J. Miola, "Bye-Bye Bolam: A Medical Litigation Revolution?" (2000) 8(1) Med. Law. Rev. 85, 87.

"Reasonable average"

Enunciation of the *Bolam* test over 25 years ago by Bingham LJ is highly informative and worth recalling in full:

> "a professional man should command the corpus of knowledge which forms part of the professional equipment of the ordinary member of his profession. He should not lag behind other ordinarily assiduous and intelligent members of his profession in knowledge of new advances, discoveries and developments in his field. He should have such awareness as an ordinarily competent practitioner would have of the deficiencies in his knowledge and the limitations on his skill. He should be alert to the hazards and risks inherent in any professional task he undertakes to the extent that other ordinarily competent members of the profession would be alert. He must bring to any professional task he undertakes no less expertise, skill and care than other ordinarily competent members of his profession would bring, but need bring no more. The standard is that of the reasonable average."[50]

Whilst reinforcing the fundamental barometer of the "reasonable average", it is revealing that Bingham LJ's paragon of professionalism is committed to her/his own continuous improvement and ongoing (professional) development necessitated by relevant developments in her/his area of expertise. Further, this reasonably average person is ordinarily aware of deficiencies in their knowledge and the limitations on their skill. In a coaching context, this translates to the reasonable expectation that coaches will be committed to coach education, CPD, and significantly, perform only at a level consistent with their competence, experience and qualifications.[51] Interestingly, as performers progress to elite and excellence levels the required emphasis on more specialised training programmes creates new risks requiring coaches to ensure that they possess the necessary competence and expertise to operate safely in these amended circumstances.[52] For instance, determination of the range of acceptable increases in the intensity of training programmes for athletes of international potential may be best satisfied by a coach with the highest level of formal qualification.[53] Simply applied, the personified reasonably average professional would be mindful of, and effectively account for, any possible skills gap.

Further, in modern parlance, this reasonably average practitioner creates the impression of being an ordinarily alert and reflective practitioner, endorsing the assertion that the *Bolam* doctrine "is not a licence for professionals to take obvious risks which can be guarded against".[54] Put simply, as emphasised by *Bolitho (Deceased) v City and Hackney HA*, the practices of this hypothetical reasonably average professional would no doubt be logically justifiable.[55] Correspondingly, there now appears an increasingly general trend for courts to more closely question the practices of the professions.[56] Accordingly, although evidence of general and approved practice remains of significant importance, it is not automatically conclusive evidence of the exercise of due skill and care.[57] Indeed, although the law accounts for the considerable mechanisms of professional self-regulation,[58] courts may not be as hesitant to declare a

[50] *Eckersley v Binnie* [1988] 18 Con. L.R. 1 CA (Civ Div) at 80 per Bingham LJ.

[51] *Wilsher v Essex AHA* [1987] Q.B. 730 CA (Civ Div). Scrutiny of the actual post held by the coach, and the corresponding level at which the coaching is conducted, provides a crucial material factor to support the court in accurately defining the required standard of care in the circumstances. See, for instance, *Pitcher v Huddersfield Town Football Club* , unreported, July 17, 2001 QBD, Hallet J citing with approval *Wilsher* for authority that the level of performance (in this instance, a Nationwide Division 1 professional footballer) is a factor to be taken into account in assessing all the circumstances when determining the standard of care and skill expected.

[52] J. Labuschagne and J. Skea, "The Liability of a Coach for a Sport Participant's Injury" (1999) 10 *Stellenbosch Law Review* 158, 166.

[53] See generally, *Davenport* [2010] EWHC 550 (QB) at [59] per Owen J.

[54] *Adams* (2001) 33 H.L.R. 41 at 7 per Sir Christopher Staughton.

[55] *Bolitho (Deceased) v City and Hackney HA* [1998] A.C. 232 HL.

[56] Powell and Stewart, *Jackson and Powell on Professional Liability* (2012), para.2-128.

[57] Powell and Stewart, *Jackson and Powell on Professional Liability* (2012), para.2-128.

[58] Jones and Dugdale, *Clerk and Lindsell on Torts* (2010), para.10-03. This lack of professional self-regulation appears to remain a major obstacle to the legitimate classification of sports coaching as a profession: see, J. Lyle, *Sports Coaching Concepts: A Framework for Coaches' Behaviour* (London: Routledge, 2002), pp.203–205.

widespread practice to be negligent as with cases (previously) brought against medical practitioners.[59] Simply applied, following *Bolitho*, peer professional opinion which purportedly represents evidence of responsible practice can be discounted by the court in instances where that opinion is determined by the judge to be incapable of withstanding logical analysis, or is otherwise unreasonable or irresponsible. This may be of particular relevance to "new" or aspiring professions, including sports coaching, with validation of regular and ethical practices a key hallmark of professionalisation.[60] As a result, the outcome may be a more searching and rigorous judicial scrutiny of practice submitted to be proper or approved by coaches. More generally, an informed appreciation of this legal requirement for the practices of modern sports coaches to be reflective of ordinarily evolving and contemporary standards, should inform the shift towards professionalisation in coaching.

Common practice

Importantly, a coach would not be:

> "guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art … Putting it the other way round, a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view."[61]

Modern coaching methods and domains are often varied and complex, requiring "structured improvisation" by coaches.[62] As in the related field of education, there will be occasions where substantiating a case of fault against coaches will be set against a backdrop of a variety of professional practices.[63] Put differently, in light of the dynamic environment in which coaches operate, it must always be appreciated that there may be a number of perfectly proper standards.[64] Accordingly, the discretionary professional judgment of coaches must be acknowledged and respected when defining a standard of skill and care representative of the prevailing standards of this particular "art".[65]

Despite these flexible parameters, or latitude afforded towards professional judgment, in *Woodroffe-Hedley v Cuthbertson*[66] the court had little difficulty in finding a professional mountain guide negligent for failure to take adequate safety precautions, leading to the death of another climber. Dyson J came to the clear conclusion that the guide owed a duty of care to the fellow climber,[67] and further:

> "[I]n deciding to dispense with the second screw, Mr Cuthbertson fell below the standard to be expected of a reasonably competent and careful alpine guide. He was also negligent when he compounded that error by his decision not to use a running belay … It is for the very reason that the consequences of a fall in such circumstances are so catastrophic that it is universally recognised good practice that two screws should be used in making a belay, and that running belays should be used."[68]

Importantly, in crystallising a finding of negligence by benchmarking the acts or omissions of Mr Cuthbertson against that objectively expected of a reasonably competent mountain guide, the court acknowledged that a potentially catastrophic accident was plainly foreseeable. In other words, an ordinarily

[59] Jones and Dugdale, *Clerk and Lindsell on Torts* (2010), para.10-03.
[60] Telfer "Coaching practice and practice ethics" in *Sports coaching: professionalisation and practice* (2010), p.219.
[61] *Bolam v Friern Hospital Management Committee* [1957] 1 W.L.R. 582 at 587 per McNair J.
[62] See generally, Lyle and Cushion, *Sports coaching: professionalisation and practice* (2010).
[63] *Phelps* [2001] 2 A.C. 619 HL at 685 per Lord Clyde.
[64] J. Montrose, "Is Negligence an Ethical or a Sociological Concept?" (1958) 21 *The Modern Law Review* 259, 262.
[65] See generally, de Prez, "Something "old" something "new", something borrowed …The continued evolution of Bolam" (2001) 17 *Professional Negligence* 75, 84.
[66] *Woodroffe-Hedley v Cuthbertson* , unreported, June 20, 1997 QBD.
[67] *Woodroffe-Hedley v Cuthbertson* , unreported, June 20, 1997 at 3.
[68] *Woodroffe-Hedley v Cuthbertson* , unreported, June 20, 1997 at 7–8.

competent coach or instructor in the same circumstances, being aware of the importance of adopting recognised and approved practice, would have been expected to contemplate and anticipate that their acts or omissions were likely to result in very serious personal injury. Given the precise facts of *Woodroffe-Hedley v Cuthbertson*, and in particular, a failure to adopt regular and approved practice in the circumstances, establishing a breach of duty by the mountain guide appears somewhat straightforward. However, since the majority of cases that litigate may not be so clear cut,[69] a fuller analysis of the *Bolam* test is necessary in order to further clarify its application and the approach taken by courts when there may be a range of perfectly proper standards.

Analysis of Bolam test

Two significant and interesting considerations revealed following a detailed examination of the *Bolam* test relate to, firstly, the approach of courts to the scope or leeway of discretionary professional judgment as approved in *Woodbridge School v Chittock*.[70] Secondly, and of considerable practical importance and merit in facilitating the use of the *Bolam* doctrine as a shield for defendants, concerns the issues of whether there is a necessary requirement for defendants to: (i) possess a recognised formal qualification; and (ii) conduct a prospective conscientious analysis of the risks and benefits of a range of potential options or practices before making the decision or choice leading to the personal injury of the claimant. Critical scrutiny of case law determines whether failure to satisfy these preliminary requirements may in effect negate engagement of the *Bolam* "defence". These matters would likely be of crucial significance should coaches or instructors be sued in negligence. Accordingly, a thorough analysis of the relevant legal principles established by the higher courts is necessary.

The Court of Appeal's decision in *Chittock v Woodbridge School*, in recognising that the teacher's decisions when dealing with a sixth-form student who had failed to follow instructions on a school ski trip were "within a reasonable range of options",[71] appears to indicate that judges should afford appreciable latitude towards the professional judgement of teachers (and coaches). This was certainly the view advanced by counsel for the defendant ski instructor in *Anderson v Lyotier*.[72] A corresponding argument submitted in *Anderson* was that the decision, as to the suitability of the slope in relation to the ability and competence of the claimant, was "not negligent within the well-known *Bolam* principle".[73] This forced the court to address the fundamental issue of whether reliance on the *Bolam* test can be made in circumstances where defendants may not have embarked upon a responsible decision-making process. This aspect of the *Bolam* test, or "Rule",[74] led to a strong dissenting opinion in the Court of Appeal by Sedley LJ in *Adams v Rhymney Valley DC*.[75] His Lordship was of the view that the *Bolam* test should have no relevance in a case where the defendant has failed altogether to exercise her/his professional skill, since a requirement of the *Bolam* test is that the defendant "should have considered and reflected upon the alternative courses available and made a conscious choice between them".[76] Nonetheless, in representing the majority view, Sir Christopher Staughton's judgment addresses both application of the "Rule", and further, whether relevant professional qualifications are a precondition of the *Bolam* "defence":

> "The key question is whether the *Bolam* test still applies, although the particular defendant did not in fact have the qualifications of a professional in the relevant field of activity, and although he did

[69] R. Heywood, "The Logic of Boltho" (2006) 22 *Professional Negligence* 225, 228.
[70] *Chittock v Woodbridge School* [2002] EWCA Civ 915; [2002] E.L.R. 735.
[71] *Chittock* [2002] E.L.R. 735 at [21].
[72] *Anderson v Lyotier (t/a Snowbizz)* [2008] EWHC 2790 (QB) at [121].
[73] *Anderson* [2008] EWHC 2790 (QB) at [121].
[74] H. Evans, "Negligence and process" (2013) 29(4) *Professional Negligence* 212, 222.
[75] Also authority for the "Rule": *Goldstein v Levy Gee (A Firm)* [2003] EWHC 1574 (Ch); [2003] P.N.L.R. 35; see further Evans, "Negligence and process" (2013) 29(4) *Professional Negligence* 212, 213.
[76] *Adams* (2001) 33 H.L.R. 41 at [19].

> not go through the process of reasoning which a qualified professional would consider before making a choice. I know of no authority that the benefit of the *Bolam* test should be refused in either of those cases. Nor do I think that it should be refused."[77]

In concurring with this view, Morritt LJ continued:

> "If his action satisfies the *Bolam* test he is not liable: if it does not then he is liable however long and carefully he thought in advance about what to do. So in this case, the council is to be judged according to the standards of the reasonably skilful window designer and installer. Such a person would be entitled to the benefit of the *Bolam* test whether or not he had sat down and considered exactly which sort of lock to provide. The council is not to be made liable for selecting the same lock just because it did not make a reasoned choice."[78]

It has been suggested that utilisation of the "Rule" promotes too lenient an operation of the *Bolam* test by failing to more firmly reflect the reasonable expectations of claimants, this being to the detriment of the applicable tort standard of professional liability.[79] Further, it can be argued that concentrating on the outcome of the defendant's decision-making process, as opposed to the reasonableness of this thinking, departs from "common sense" notions of carelessness.[80] In this context, perhaps the principles of professional liability should be capable of regarding subjective carelessness, or flawed decision-making, as a "wrong", thereby establishing negligence if damage can be proved.[81] Indeed, there appears some merit to the submission that:

> "Whilst the defendant may have made no effort to comply with accepted standards of practice or to evaluate the proper course of action, the *Bolam* defence can be used as an escape route from liability if their conduct 'coincidentally' matches that of a responsible body of professional opinion. It is distasteful for negligence litigation, on facts where lives have been lost, to be successfully defended on the basis of 'coincidence' rather than 'competence'."[82]

Certainly, ordinarily competent coaches should not routinely seek to rely on the *Bolam* "defence" on the basis of "coincidence", it being contended that empowering coaches to become critical, reflective and ethical practitioners should become more of a priority for coach education and CPD. This would ensure that the practices adopted were responsible and capable of withstanding logical scrutiny. Nonetheless, as a matter of legal principle and coherence, the *Bolam* test is a control device designed to protect the legitimate interests of both claimants and defendants.

Accordingly, whilst insisting that the particular conduct resulting in personal injury is ultimately responsible and consistent with that of the reasonably competent professional, the reasoning of the majority in *Adams v Rhymney Valley DC* appears preferable. In practice, the "Rule" is widely applicable and not confined to particular professions,[83] affording some certainty and consistency to this aspect of professional liability. Indeed, in the main, it does not appear obviously unjust to adopt the "Rule".[84] Further, permitting reliance on the *Bolam* "defence", despite the possibility that the thought processes of defendants may be regarded as inadequate or mistaken, represents a realistic and efficient approach by courts to this issue, thereby negating associated evidential difficulties in order to ascertain what might amount to diligent

[77] *Adams* (2001) 33 H.L.R. 41 at [42]. This assumption was endorsed by Morritt LJ at [59].
[78] *Adams* (2001) 33 H.L.R. 41 at [65].
[79] Mangan, "The Curiosity of Professional Status" (2014) 30(2) *Professional Negligence* 74, 86.
[80] De Prez, "Something "old" something "new", something borrowed …The continued evolution of Bolam" (2001) 17 *Professional Negligence* 75, 88.
[81] De Prez, "Something "old" something "new", something borrowed …The continued evolution of Bolam" (2001) 17 *Professional Negligence* 75, 89.
[82] De Prez, "Something "old" something "new", something borrowed …The continued evolution of Bolam" (2001) 17 *Professional Negligence* 75, 83.
[83] Evans, "Negligence and process" (2013) 29(4) *Professional Negligence* 212, 213.
[84] Evans, "Negligence and process" (2013) 29(4) *Professional Negligence* 212, 217.

consideration.[85] Simply applied, the alternative approach, requiring inquiry into varying degrees of conscientious reasoning,[86] may be regarded as somewhat flawed by preferring "form to substance".[87] Accordingly, and of considerable significance to defendant coaches and legal practitioners, application of the *Bolam* test should not be dependent on the actual possession of the relevant formal qualification, nor indeed is completion of reasoned and responsible decision-making a prerequisite of proper and approved practice.

Curiously, in *Anderson v Lyotier*, Foskett J regarded a failure to evidence conscientious deliberation by the ski instructor as being problematic when stating:

> "I do not see that enunciation of the [*Bolam*] test as having much application in a situation such as this where … the evidence does not permit me to find that M. Portejoie did weigh up the risks and benefits of what he asked the group to do."[88]

Following *Adams v Rhymney Valley DC*, it is respectfully submitted that this reasoning seems flawed. It is not a requirement of the *Bolam* test that the reasoning of a coach or instructor, in arriving at a decision as to what amounts to proper practice in the circumstances, must be adequate. The court's inquiry should centre on the ultimate conclusion and not the decision-making process underpinning this.[89] Although on the facts of *Anderson v Lyotier* this would not appear to have been the pivotal issue, the slope determined by the judge to be beyond the capability of the claimant, prematurely discounting the *Bolam* doctrine signifies a disservice to the application of the principles of professional liability. Whilst this article contends that the *Bolam* test remains an instructive and valuable tool in protecting defendant coaches from liability in negligence,[90] in instances where coaches may be regarded as having made an error of judgment, further detailed analysis of whether the injury suffered by the claimant was reasonably foreseeable may prove necessary.[91]

Ultimately, this article's critical consideration of legal authority and academic commentary reveals the following important implications regarding application of the *Bolam* test in the context of sports coaching: (i) the principles of professional liability apply to all individuals exercising a special skill, including volunteers; (ii) the *Bolam* test remains the applicable legal control mechanism for determination of the appropriate standard of care demanded in the circumstances, irrespective of whether or not the defendant possesses formal qualifications; (iii) although a hallmark of best practice, failure by coaches to engage in mature, considered and reasoned decision-making should not prevent reliance on the *Bolam* principle; (iv) common or universal practice *may*, essentially, provide a conclusive and absolute "defence" in cases of professional negligence; and finally (v) as in all instances of negligence liability, the specific context and particular facts of individual cases are of utmost importance.

[85] Evans, "Negligence and process" (2013) 29(4) *Professional Negligence* 212, 217.
[86] Evans, "Negligence and process" (2013) 29(4) *Professional Negligence* 212, 217.
[87] *Adams* (2001) 33 H.L.R. 41 at [50] per Sir Christopher Staughton. Interestingly, His Lordship also noted that such a temptation was sometimes apparent in the world of health and safety.
[88] *Anderson* [2008] EWHC 2790 (QB) at [123] per Foskett J. This argument by counsel for the defendant instructor to some extent based on *Chittock* [2002] E.L.R. 735 at [18].
[89] In *Anderson* [2008] EWHC 2790 (QB), for the *Bolam* defence to have had any chance of succeeding, the skiing instructor was expected to have conducted a "prospective conscientious analysis of [the performer's] capacity to undertake" the physical activity (at [112]), this evidential threshold not being met on the facts.
[90] W. Norris, "The duty of care owed by instructors in a sporting context" (2010) J.P.I.L. 183, 186. See for instance, *Davenport* [2010] EWHC 550 (QB) at [59] per Owen J.
[91] Norris, "The duty of care owed by instructors in a sporting context" (2010) J.P.I.L. 183, 187–190. Importantly, the standards expected of ordinarily competent coaches, and informed by expert witness testimony, should have regard for the necessary precondition of foreseeability when defining the negligence standard in the particular circumstances.

Conclusion

The foregoing legal analysis of the interesting and somewhat novel issue of the professional liability of (predominantly) volunteer coaches uncovers significant implications for those exercising the "art" of coaching, and more generally, legal practitioners specialising in personal injury law. Most notably, established jurisprudence confirms that defendant coaches would be judged according to the benchmark of the ordinarily average competent coach if sued in negligence, regardless of being categorised as amateur, professional, "professional amateur", qualified, (in)experienced or accredited by an NGB. Further, as a "new" and emerging profession, rigorous and searching judicial scrutiny of what might amount to proper or approved practice, or *Bolam* "defence", emphasises the requirement for coaches to adopt universal good practice whenever possible. Failing this, practices employed by coaches must be responsible and robustly justifiable. Whether application of the ordinary principles of professional liability in the context of voluntary sports coaching is just, fair and reasonable, or whether this establishes unrealistic expectations,[92] appears open to further conjecture and debate.[93] Nonetheless, in view of the emerging intersection between sports coaching and the law of negligence,[94] as the law currently stands, coaches must be aware and informed of the heightened standard of care and skill required of the ordinarily competent coach. Importantly, this article's technical analysis of the legal obligations of professionals, derived from the law of tort,[95] reinforces the urgency of coach education and CPD affording considerably more importance to legal and ethical issues likely to be encountered by ordinary coaches. This would maximise the application of the *Bolam* test as an instructive and valuable mechanism in protecting defendant coaches from liability in negligence.

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[92] See generally, G. Nichols and P. Taylor, "The Balance of Benefit and Burden? The Impact of Child Protection Legislation on Volunteers in Scottish Sports Clubs" (2010) 10(1) *European Sport Management Quarterly* 31, 46.

[93] See for instance, N. Partington, "What Does The Social Action, Responsibility & Heroism Act 2015 Mean For Sports Volunteers And NGBs?" (April 3, 2015), LawInSport, *http://www.lawinsport.com/articles/item/what-the-new-social-action-responsibility-heroism-act-2015-means-for-sports-volunteers-and-ngbs-references* (Accessed November 9, 2015).

[94] Partington, "Legal liability of coaches: a UK perspective" (2014) 14(3–4) *International Sports Law Journal* 232, 234–235.

[95] Mangan, "The Curiosity of Professional Status" (2014) 30(2) *Professional Negligence* 74, 84.

Billett v Ministry of Defence:[1] A second bite

Victoria Wass[*]

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

Following on from her recent articles in JPIL on this issue, Dr Victoria Wass revisits the Ogden reduction factors and the definition of disability and considers these in the light of the Court of Appeal judgment in Billett v MOD.

ML

Background

I have written previously on the application of the reduction factors in the Ogden tables in the valuation of claims for loss of future earnings, including in this journal. Court decisions in this area have provided a rich seam of empirical material on the practical application of the reduction factors starting with the first reported decision using the new "Ogden six" approach in *Conner v Bradman*.[2] There followed a roundup of eleven decisions 2008–2011 undertaken with William Latimer-Sayer[3] and a review of the first instance decision in *Billett v MOD*.[4] A fourth article was in a question and answer format[5] which sought to provide some interim clarification on the application of the reduction factors between the seventh and eighth editions of the Ogden tables.

The 2014 *Billett v MOD* High Court decision raised the question of the definition of disability used in the Ogden tables which I sought to explain in my article of 2015. Here I consider the subsequent decision of the Court of Appeal later in 2015. I focus on a simple point that appears to have been overlooked in both trials and in the online discussion which has followed. The point concerns the definition of disability that is used to calculate the reduction factors being different from the definition used to classify Mr Billett. The courts can choose to define disability in any number of ways but they can only rely on the Ogden reduction factors to value the claim for one particular definition and that is the definition used to calculate the reduction factors. This definition is set out in this paper. As will be shown below, disability prevalence rates and employment rates are highly dependent on the definition of disability so that the reduction factors are only a reliable to guide to the future employment of the claimant if the definition of disability used to estimate them is also applied to the claimant.

The case

Mr Billett suffered a non-freezing cold injury in February 2009 while employed by the British Army. Despite continuing effects of injury he was assessed by his employer as "fit for deployment anywhere"[6] and he went on to serve a tour of Afghanistan in 2009–2010. He left the army for civilian employment as an HGV driver in 2011 for reasons unrelated to his injury. Continuing effects of injury include the use of

[1] *Billett v Ministry of Defence* [2015] EWCA Civ 773.

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[2] *Conner v Bradman & Co Ltd* [2007] EWHC 2789 (QB). Reviewed in V. Wass, "Discretion in the Application of the New Ogden Six Multipliers: The case of *Connor v Bradman*" (2008) J.P.I.L. 155.

[3] W. Latimer-Sayer and V. Wass, "Ogden Reduction Factor adjustments since *Conner v Bradman*" (2012) J.P.I.L 219.

[4] *Billett v Ministry of Defence* [2014] EWHC 3060 (QB), reviewed in V. Wass, "*Billett v MOD* and the meaning of disability in the Ogden Tables" (2015) J.P.I.L 37.

[5] W. Latimer-Sayer and V. Wass, "Ask the Expert: William Latimer-Sayer asks Victoria Wass some questions about the practical application of the Ogden Reduction Factors" (2013) J.P.I.L. 35.

[6] *Billett* [2015] EWCA Civ 773 at [57].

pain killers, foot powder and specialist footwear and Mr Billett is restricted in his ability to undertake outdoor work in cold weather. The judge at first instance decided that the claimant is disabled, though perhaps with some disquiet: "I find it hard to conceive of very many people who could be classified as disabled who are as fit and able as the claimant."[7] The claim for loss of future earnings was valued using the Ogden six methodology and an adjusted reduction factor was applied. The disability-related reduction factor of 0.54 was adjusted upwards to 0.73 (mid-point between 0.92 and 0.54)[8] in recognition of the mild nature of impairment. There was criticism of the approach to adjustment that I had recommended in my review of *Conner v Bradman*[9] and my later review[10] because, when applied to his case, it appeared to be inadequate.

The reduction factors and their evidence base

The reduction factors are an application of evidence-based estimates and methodology to the valuation of the claimant's loss of future earnings following the effects of injury. They estimate the proportion of the claimant's remaining working life that she/he can expect to be in employment. This proportion is lower in the disabled state, in the non-employed state and for those who are without skills. The purpose of the reduction factors is to allow the parties, their representatives and the courts to quantify the claim without recourse to an expert valuation. It is recognised that the benefits of greater simplicity, certainty and thrift come at the cost of a reduction in the precision of the estimate.

The evidence base upon which the reduction factors are estimated is the Labour Force Survey ("LFS"). The LFS continuously collects information on disability and employment from a rotating sample of around 60,000 households per quarter (about 80,000 working age individuals). It is the largest household survey within the UK and provides a statistically robust and representative picture of the employment situation for disabled individuals. The LFS is widely used by, and is recommended by, Government for the analysis of the relationship between disability and employment (see Bajekal, 2009; Black, 2007; and Cousins et al., 1998).[11] It was the first survey to operationalise the legal definition of disability and its consistent measurement of disability over a period of 14 years from 1998 has allowed for the calculation of the disability employment gap as a continuous series. The trend in this LFS-based indicator is used by governments, researchers and campaign groups to evaluate the impact of disability-focused interventions on the integration of disabled people into employment. These have included the impact of equality legislation, the raft of labour market activation and welfare to work policies from the New Deals under New Labour to the Work Programme from 2011, and the voluntary implementation of equal opportunities policies and practices in the workplace. The LFS will be used to evaluate the Conservative Party Manifesto commitment "to halve the disability employment gap [and] transform policy, practice and public attitudes so that hundreds of thousands more disabled people who can and want to be in work find employment".[12] There are other surveys which collect information on disability but they do not have the continuity and sample sizes offered by the LFS.

The reduction factors published in the Ogden tables (sixth and seventh editions) are calculated from data collected in each quarter of the LFS between 1998 and 2003.[13] The definition of disability is defined

[7] *Billett* [2015] EWCA Civ 773 at [59].
[8] *Billett* [2015] EWCA Civ 773 at [61].
[9] Wass, "Discretion in the Application of the New Ogden Six Multipliers: The case of *Connor v Bradman*" (2008) J.P.I.L. 155.
[10] Latimer-Sayer and Wass, "Ask the Expert: William Latimer-Sayer asks Victoria Wass some questions about the practical application of the Ogden Reduction Factors" (2013) J.P.I.L. 35.
[11] M. Bajekal, T. Harries, R. Breman and K. Woodfield, *Review of disability estimates and definitions* (2004) DWP In-house Report, p.128; C. Black, *Working for a Healthier Tomorrow: Dame Carol Black's Review of the Health of the Working Age Population* (The Stationery Office, 2008); C. Cousins, J. Jenkins and R. Laux, « Disability data from the LFS: Comparing 1997/8 with the past." (1998) *Labour Market Trends* 321.
[12] *Conservative Party Manifesto* (2015), p.19.
[13] See Government's Actuary Department, *Ogden tables: actuarial compensation tables for injury and death* (October 10, 2011), Explanatory Notes, para.29.

by the survey questions. When applying the reduction factors, it is the definition of disability used in the LFS which is relevant. I have called this the "Ogden definition" or "Ogden test"[14] but it is the definition based on the questions in the LFS. Importantly the questions, the responses and the guidance to respondents in the LFS between 1998 and 2003 precede the Equality Act 2010 and any subsequent interpretation of its meaning.

The Ogden definition of disability

The Ogden definition is founded upon the LFS questions which are reproduced below. A positive answer to 1, 2 and 3 results in the respondent being classified as disabled for the purposes of the calculation of the reduction factors.

"1. Do you have any health problems or disabilities that you expect will last for more than a year?
2. Do these health problems or disabilities, when taken singly or together, substantially limit your ability to carry out normal day to day activities? If you are receiving medication or treatment, please consider what the situation would be without the medication or treatment.
3. Does this health problem affect the kind of paid work that you might do? OR Does this health problem affect the amount of paid work that you might do?"

The first question establishes a long-standing illness or disability. The second establishes that impairment limits activities of daily living ("ADL"). The third question establishes that impairment is work-limiting. In order to assist interviewers and respondents in determining a respondent's disability status in relation to question 2, a set of Guidance Notes is provided. This is based upon ss.D15–D27 of the Disability Discrimination Act 1995 ("DDA") and is reproduced in the Explanatory Notes of the Ogden Tables at para.35.

For Mr Billet, the ongoing effects of injury affect his capacity in relation to mobility and the appropriate test for the purposes of determining the application of the reduction factors is whether or not the limitation to his mobility broadly matches that given in the illustrative example given in the guidance notes in relation to capacity in this area. These are as follows:

> "Mobility—for example, unable to travel short journeys as a passenger in a car, unable to walk other than at a slow pace or with jerky movements, difficulty in negotiating stairs, unable to use one or more forms of public transport, unable to go out of doors unaccompanied.
>
> Physical co-ordination—for example, the inability to feed or dress oneself; or to pour liquid from one vessel to another except with unusual slowness or concentration."

These examples are not intended to be exhaustive or exclusive but to be illustrative of the level of activity limitation which defines the threshold between disability and non-disability in the LFS and therefore in the reduction factors. This is the test used in the LFS and in the reduction factors but it is not the test used to decide disability in the case of Mr Billett by either court.

The "Langstaff J" definition of disability

The meaning of "substantial" is explained in the Equality Act as "one that is more than a minor or trivial effect"[15] and in the Guidance Notes to the DDA as "greater than the effect which would be produced by

[14] Wass, "*Billett v MOD* and the meaning of disability in the Ogden Tables" (2015) J.P.I.L. 37, 40.
[15] Office for Disability Issues, *Equality Act 2010: Guidance on matters to be taken into account in determining questions relating to the definition of disability* (May 2011), p.14.

the sort of physical or mental conditions experienced by many people which have only minor or trivial effects".[16]

The same examples are used in both sets of Guidance Notes as an indicator of the meaning of substantial. The first example considers the time taken to carry out a normal day-to-day activity. The indictor given is that of a 10-year-old child with cerebral palsy who takes *much* longer with eating, drinking, washing, and dressing.[17] A second indicator, this time in relation to *the way* in which normal day-to-day activities are carried out, is of a person with obsessive compulsive disorder who constantly checks and rechecks that electrical appliances are switched off and that doors are locked before leaving home.[18] Their purpose is to provide an indicator as to the extent of difference which constitutes substantial.

Subsequent to the Equality Act, "substantial" has been interpreted by Langstaff J in *Aderemi v London and South Eastern Railway Ltd*[19] as being that which is not trivial or not insubstantial. The context in this case is the extent of activity limitation which ought to have prompted Mr Aderemi's employer to provide some form of accommodation and/or adjustment to his job description. This appears to be the same interpretation of substantial used by Andrew Edis QC when classifying Mr Billett as disabled.[20] Jackson LJ makes specific reference to the Langstaff J definition in deciding whether or not Mr Billett is classified as disabled. I group all three together as the "Langstaff J" definition. The relevant paragraph of *Aderemi* is reproduced below:

> "Because the effect is adverse, the focus of a tribunal must necessarily be upon that which a claimant maintains he cannot do as a result of his physical or mental impairment. Once he has established that there is an effect, that it is adverse, that it is an effect upon his ability, that is to carry out normal day-to-day activities, a tribunal has then to assess whether that is or is not substantial. Here, however, it has to bear in mind the definitions of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading 'trivial' or 'insubstantial', it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other."[21]

I am not concerned with nor am I qualified to say whether the "Langstaff J" interpretation of disability is correct in the context of the application of the Equality Act in *Aderemi* but I am able to note that this definition of disability is not the same as the definition used in the Ogden reduction factors. While both definitions are concerned with activity limitation, share a focus on what the claimant cannot do and are two-way decisions (disabled or non-disabled), the thresholds at which the bifurcation occurs are very different. As I stated in Wass, 2015 "there is a gap between a disability which is more than minimal and one that satisfies the guidance notes".[22] It is my view that while Mr Billett's impairment might meet the "Langstaff J" definition, his impairment is not trivial or not insubstantial, it does not meet the Ogden definition which is based on respondents answering yes to the LFS question (question 2, quoted above) as interpreted by the LFS Guidance Notes which accompany the question and are also set out above.[23]

[16] Office for Disability Issues, *Disability Discrimination Act: Guidance on matters to be taken into account in determining questions relating to the definition of disability*, p. 9.

[17] Office for Disability Issues, *Disability Discrimination Act: Guidance on matters to be taken into account in determining questions relating to the definition of disability*, p.15; Office for Disability Issues, *Equality Act 2010: Guidance on matters to be taken into account in determining questions relating to the definition of disability*, p.9.

[18] Office for Disability Issues, *Disability Discrimination Act: Guidance on matters to be taken into account in determining questions relating to the definition of disability*, p.10; Office for Disability Issues, *Equality Act 2010: Guidance on matters to be taken into account in determining questions relating to the definition of disability*, p.15.

[19] *Aderemi v London and South Eastern Railway Ltd* [2013] I.C.R. 591 EAT.

[20] *Billett v MOD* [2015] EWCA Civ 773 at [58].

[21] *Aderemi* [2013] I.C.R. 591 at [14] quoted in *Billett v MOD* [2015] EWCA Civ 773 at [86].

[22] Wass, "*Billett v MOD* and the meaning of disability in the Ogden Tables" (2015) J.P.I.L 37 at 40.

[23] see also Wass, "*Billett v MOD* and the meaning of disability in the Ogden Tables" (2015) J.P.I.L. 37 at 38–39

Which is the correct definition of disability?

Disability is and can be defined in any number of ways. In the abstract, there is no correct, or even best, definition. The choice of definition depends on context and purpose. Disability has medical, functional and social components.[24] Public health professionals and epidemiologists focus on medical conditions and count diagnoses. For enumerating the population in need for care services, employment assistance, disability benefits and which has rights under the equality legislation, it is more useful to define disability as a set of constraints on functioning in relation to, for example, washing, dressing, eating, toileting or making or communicating with others rather than in terms of the medical conditions which might be the cause of functional impairment and activity limitation. This conceptual difference does not present a difficulty here because the DDA, the Equality Act and the LFS all define disability in terms of activity limitation. There is a second level of difference in definition and this relates to the extent of limitation to activity and participation and in the limitation to different aspects of living (for example daily living and/or working).

Burkhauser et al.[25] use the analogy of an archery target to understand relationships between different definitions of disability. Progressively smaller concentric rings represent ever tighter definitions of disability which include ever smaller population sub-sets. This is illustrated in Baumberg et al.[26] with reference to the sub-population who have glaucoma. The outer-ring comprises those who identify this health condition or pathology, of which those who report impairment (low vision) are a subset. Those identified as having functional difficulties (for example, unable to read regular-sized print) which arise from impairment are a smaller subset still. Those who have activity limitation (unable to read books, instructions etc. in regular-sized print) or participation limitations (unable to work in jobs which require reading regular-sized print) are a subset of those with functional impairment. Outside clinical medicine and public health, it is the limitation of activity and/or participation which defines disability. Here disability is understood to arise from interactions between personal characteristics (including functional limitation) and environmental barriers and supports (for example, accommodation through job description and/or adjustment to equipment (in this case, vision aids)). Definition determines the disability count or the prevalence rate with a higher proportion of any population in the outer health condition ring and progressively lower proportions as the definitions tighten and the rings get smaller. Importantly for this paper, each ring has its own reduction factor which, reflecting increasing restriction with tightness of definition, is lower for smaller rings.

Which ring represents the Ogden definition? Contrary to Cottrell[27] who describes the LFS definition as "A rather looser—and somewhat subjective definition of disability", the LFS definition is rather closely defined in terms of being long-lasting (at least a year), ADL-limiting and work-limiting with specific guidance to indicate how ADL-limiting should be interpreted. It uses a stricter standard to define disability than is used in most other surveys and a stricter standard than is used to classify Mr Billett. In the target analogy, the Langstaff J definition of disability (not trivial or insubstantial) is a mid- to outer-level ring while the Ogden definition (which satisfies the Guidance Notes) is an inner ring.

For the purpose of the application of the Ogden reduction factors, the Ogden definition is the correct definition. The reduction factors are calculated for those individuals who meet this definition. An alternative definition of disability would require an alternative set of reduction factors, a set of Langstaff J reduction factors. If it were possible to calculate such a set of reduction factors, they would be higher than the Ogden reduction factors and with wider confidence intervals reflecting the greater variation in activity limitation within the sub-group defined as disabled. The non-disabled reduction factors would also be higher because

[24] S. McDermott and M. Turk, "The myth and reality of disability prevalence: measuring disability for research and service" (2011) 4 *Disability Health Journal* 1.

[25] R. Burkhauser, A. Houtenville and J. Tennant, "Capturing the elusive working-age population with disabilities: Reconciling conflicting social success estimates from the current population survey and American Community Survey" (2014) 24(4) *Journal of Disability Policy Studies* 195, 196.

[26] B. Baumberg, M. Jones and V. Wass, "Disability prevalence and disability-related employment gaps in the UK 1998–2012: Different trends in different surveys?" 141 Social Science and Medicine 73–74.

[27] S. Cottrell, "Future imperfect" (2015) J.P.I.L. 42, 46.

they would be calculated for that group without or with only trivial limitations. The Ogden non-disabled reduction factors include those with non-trivial limitations which are below the standard in the guidance notes. I am not aware of data which would support a valuation of loss based on the Langstaff J definition of disability. It is not possible using the LFS.

Hitting the target

Although it is not possible to calculate statistics for the Langstaff J definition of disability, Figure 1 demonstrates the impact of definition on the disability prevalence rate and the disability employment rate and thus the importance of definition. Statistics are calculated from the LFS for quarter 2 of 2003. The disability prevalence rate measures the percentage of people within a population who report disability. The employment rate measures the number of people of working age in employment as a percentage of those of working age. The employment rate is not the same as the reduction factor, although the two are related.

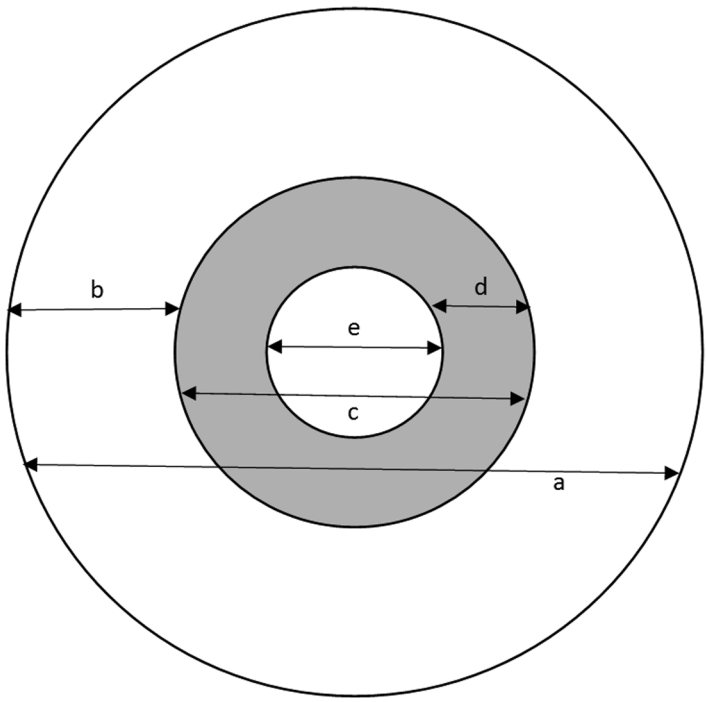

Figure 1 Prevalence rates and employment rates by disability definition

Target	Sub-group	Prevalence rate	Employment rate
a	Working age population males (MWAP)	100	79.3
b	MWAP no long-standing impairment (LSI)	73	85.7
c	MWAPLSI	27	61.8
d	MWAPLSI no limitation	15	82.4
e	MWAPLSI + limitation	12	34.9

Source: LFS 2003 Qtr 2. [28]

The target itself comprises the working age population of males ("MWAP") in 2003 for whom the employment rate was 79.2 per cent (a in Figure 1). This population is divided into those with a longstanding impairment ("LSI") (27 per cent) (c in Figure 1) and those without (73 per cent) (b in Figure 1). The LSI group are further divided according to those with (12 per cent) and without (15 per cent) activity limitation (e and d respectively). Since we are using the LFS, LSI is defined by question 1 and LLSI is defined by question 2 (see above). The employment rates are very different for each group. Within the LSI ring, the employment rate is 61.8 percent. For those whose LSI is activity limiting, the employment rate is 34.9 per cent. For those whose LSI is not activity limiting (i.e. those in the inner ring are excluded), the employment rate is 82.4 per cent.

The Ogden reduction factors are calculated for a target slightly smaller than e, for those who are LSI, ADL-limited and work-limited.

The difference between the Disability Discrimination Act and the Equality Act

The basic wording of the definition of disability did not change between Acts.

Section 1(1) of the DDA: "a physical or mental impairment which has a substantial and long term adverse effect on his ability to carry out normal day-to-day activities."

Section 6(1) of the Equality Act:

> "(a) a physical or mental impairment, and
> (b) the impairment has a substantial and long-term adverse effect on [his or her] ability to carry out normal day-to-day activities"

This wording is replicated in quarter 2 in the LFS between 1998 and 2012.

We have seen that the guidance on the meaning of substantial is also the same in both Acts (see above). What is different is the requirement to show that impairment affects one of the specific capacities set out in the DDA Guidelines. This list, set out in the Explanatory Notes and provided to LFS interviewers and respondents until 2013, was dropped from the Equality Act. It was not anticipated by the data collector (Office for National Statistics ("ONS")) that the removal of the "capacities list" would alter the definition of disability:

> "In general, the definition of disability in the EA is similar to that which applied for the purposes of the DDA. Unlike the DDA, it does not require a disabled person to demonstrate that, where their impairment adversely affects their ability to carry out a normal day-to-day activity, that activity involves one of a specified list of capacities, such as mobility, speech .or the ability to understand."[29]

Whether or not the removal of the capacities list/guidance notes was intended to reduce the disability threshold, the Langstaff J interpretation of "substantial" in *Aderemi* would have been more difficult if it had had to meet the guidelines set out in the list.

The data upon which the reduction factors are based are from 1998–2003 and predate any change in legislation or its interpretation. For this reason, it is unfortunate that para.35 refers to the Equality Act and not the Disability Discrimination Act.

The LFS disability question (question 2 above) changed in 2013 partly in order to achieve harmonisation with data collected elsewhere in the EU but also in response to data deficiencies in relation to the equality

[28] LFS is collected and deposited by the Office for National Statistics. It has been accessed via the UK Data Archive and is Crown Copyright. Neither organisation bears any responsibility for the analysis or interpretation of the data reported here.

[29] T. Howe, *Life Opportunities Survey User Guide to Defining and Coding Disability* (ONS, 2010), p.5.

legislation uncovered in ONS's *Review of Equality Data*.[30] LFS question 2 has been replaced with: "Does your condition or illness reduce your ability to carry out day-to-day activities? Yes, a little; Yes, a lot; and Not at all."

There is no reference in the question to "substantial" or to "normal" and the effects of medication are now included within the LFS question although they remain excluded within the Act. According to the guidance available, "reduced ability" is determined by the need for assistance with the activity.[31] There is no guidance as to how to interpret the threshold between "Yes, a little" and "Yes, a lot". In the context of the Langstaff J definition, it is interesting to note that during field testing for question wording when "substantial" and "severe" were used in relation to activity limitation instead of "Yes, a lot", respondents were found to under-report in this category.[32]

The reduction factors: Fit for purpose?

Billett v MOD is the highest decision on the application of the Ogden reduction factors and it falls some way short of providing an endorsement. The reduction factors did not work for Mr Billett and both judges were critical of the reduction factors and the mechanism for adjustment proposed by me in Wass, 2008[33] and Wass, 2013.[34]

I proposed an adjustment mechanism as an alternative to choosing the mid-point between the disabled and non-disabled reduction factors which the court applied in *Conner v Bradman*. Disability has a much greater impact on employment prospects than does any other personal characteristic (the reduction factors include age, sex, educational achievement and starting employment status). Therefore if the claimant meets the Ogden test on disability, then adjustments to employment risks made *within* the disabled sub-group provide a better guideline than do adjustments based on employment outcomes outside it. If the court considers the claimant to be disabled on the Ogden test but less disabled than the average for the disabled sub-group, then my proposed adjustment was to apply some combination of characteristics associated with higher employment prospects such as employed as opposed to non-employed, highly-qualified as opposed to low or mid-level qualified and/or younger, all measured within the disabled group. There is one group for whom this adjustment mechanism will not work—a young man who is disabled, employed and highly educated. When I apply this adjustment mechanism to Mr Billett in my concluding remarks (see below), the valuation is broadly in line with that of the Court of Appeal.

The Ogden methodology offers a simplification of a complex calculation and simplification comes at the price of precision. As with life expectancy, the valuation will be incorrect for the individual but, in the absence of bias, correct on average. Is there a preferred alternative? In terms of precision yes, a US-style individual calculation undertaken by a forensic economist but I doubt if the courts would find the additional cost and complexity acceptable. In the alternative, the adjustment mechanism offers a simple ready-reckoner approach consistent with the spirit of the Ogden tables.

My experience of the reduction factors is that they work well when they are applied as intended. They are not intended to cover impairments like Mr Billett's and so ought not be judged harshly when neither a strict application nor the recommended adjustment produce a credible result in his case. I have previously recommended that adjustments should be limited to cases "where the claimant is idiosyncratic in some way which we haven't already measured and we can predict the direction in which this will affect the

[30] C. White, *Update on the harmonisation of disability data collection in UK surveys (Part 1)* (Office for National Statistics Health Statistics, Quarterly 51).

[31] ONS, *Harmonised Concepts and Questions for Social Data Sources: Primary Principles. Long-lasting Health Conditions and Illnesses; Impairments and Disability* (Version 1.1), p.15.

[32] ONS, *Harmonised Concepts and Questions for Social Data Sources: Primary Principles. Long-lasting Health Conditions and Illnesses; Impairments and Disability* (Version 1.1), p.14.

[33] Wass, "Discretion in the Application of the New Ogden Six Multipliers: The case of *Connor v Bradman*" (2008) J.P.I.L. 155, 160–163.

[34] Latimer-Sayer and Wass, "Ask the Expert: William Latimer-Sayer asks Victoria Wass some questions about the practical application of the Ogden Reduction Factors" (2013) J.P.I.L. 35, 39–41.

claimant's employment prospects"[35] and I have also recommended that adjustments should be made with expert advice[36] and that the expert needs to understand the reduction factors and be able to quantify the claimant's employment risks relative to those published in the Ogden tables.

My opinion in and on this case

I was not asked for an opinion in the trial and I do not have access to the full information. However, I provided a steer on the size of the award in my previous article on this case.[37] This was based on the application of my suggested methodology but for an adjustment to the non-disabled reduction factor. This is consistent with my view that the modest nature of Mr Billett's limitation does not pass the Ogden test for the application of a disabled reduction factor. Adjusting the non-disabled reduction factor downwards by assuming that Mr Billett's starting status is non-employed and that he is either 10 years older or that he has only a low level qualification would produce an award in the region of £45,000.

The purpose of the Ogden reduction factors is to provide the courts with an alternative to the arbitrary *Smith v Manchester* award, one which would facilitate a more accurate and systematic valuation of future employment prospects and therefore greater accuracy, equity and predictability. Borrowing Glynn's[38] gateway to the tables metaphor, the first instance decision in *Billett* opens the gate at a lower level of limitation. The Court of Appeal decision in *Billett* introduces a second gateway, and a third category of claimant, within the Ogden mechanism. Here the claimant passes the first gateway based on the Langstaff J definition of disability but he is considered to be insufficiently limited to pass through the second gateway and thus apply the tables' A–D reduction factors. Such a claimant, it seems, can expect to get a *Smith v Manchester* award. If the test for the second gateway, and the application of the reduction factors, is the Ogden test, then the Court of Appeal's decision in *Billett* leaves previous understanding and practice unchanged.

A key point of conflict in loss of future earnings claims, and the key question for the parties in *Billett*, is how to define the level of disability which triggers the application of the reduction factors (the second gateway). This definition was not addressed by the Court of Appeal but I have addressed it in this paper. For me, the trigger is the "Ogden test" and this is defined in LFS question 2 with interpretation using the LFS Guidance Notes as set out in the Explanatory Notes at para.35. If claimants like Mr Billett, whose disability lies within the Langstaff J definition but outside the Ogden definition, are to be brought within the Ogden mechanism through gateway one, then an adjustment to the non-disabled reduction factors may provide a sensible, flexible and evidence-based guide to the valuation of their claims. There are real benefits in applying the Ogden methodology as opposed to a *Smith v Manchester* award: it provides an evidence-based starting point, it builds confidence in the existing framework, it is replicable in other cases and it provides an element of predictability in future awards.

[35] Latimer-Sayer and Wass, "Ask the Expert: William Latimer-Sayer asks Victoria Wass some questions about the practical application of the Ogden Reduction Factors" (2013) J.P.I.L. 35, 38.

[36] Latimer-Sayer and Wass, "Ask the Expert: William Latimer-Sayer asks Victoria Wass some questions about the practical application of the Ogden Reduction Factors" (2013) J.P.I.L. 35, 45; Wass, "*Billett v MOD* and the meaning of disability in the Ogden Tables" (2015) J.P.I.L. 37, 41.

[37] Wass, "*Billett v MOD* and the meaning of disability in the Ogden Tables" (2015) J.P.I.L. 37, 41.

[38] S. Glynn, "Billett v MOD—Ogden 7—a decision confined to its facts?" (July 15, 2015), Gough Square, *http://www.9goughsquare.co.uk/news/978* (Accessed Nov 9, 2015).

An Introduction to Carrying Out Assessments under the Mental Capacity Act

David Allen [*]

Colin Ettinger[**]

Mental capacity assessments

Colin Ettinger presents a practical guide to understanding and using the Mental Capacity Act. He looks at the definition of capacity and how an assessment should be carried out. He explores the different aspects capacity can have and looks at the five principles that underpin the Mental Capacity Act.

ML

PROCEDURE

The Mental Capacity Act 2005 ("MCA") was passed in order to reduce the risks faced by vulnerable people, (I will use the term client in this article), who are unable to make their own decisions. It stipulates what needs to be carried out when assessing a client's capacity to make decisions and sets in place safeguards to ensure that if a person is assessed as not having capacity to make decisions independently, that any decisions made on their behalf are appropriate and in their best interests.

In this article by reference to the MCA I will explain the principles of the MCA and then provide information about how the assessment of capacity is conducted.

The MCA is governed by five core principles. The first principle is to assume that the client has capacity to make decisions unless it can be demonstrated that they do not. The second principle is that all possible steps should be taken to assist the client to make decisions for themselves. The third principle is that clients have the right to make unwise decisions and that this in itself is not a demonstration that they do not have the capacity to make the decision. The fourth principle relates to decision making on behalf of those who lack capacity. The decision must be made in their best interest. The final principle is that any decisions made on someone's behalf must be the least restrictive option taking their preferences into account.

The MCA Code of Practice stipulates that a two-stage test must be carried out when assessing a person's capacity. For the Act to apply the requirements laid down in the "two-stage test" must be relevant to the person. The first requirement is the "diagnostic test". The person must have "an impairment of or a disturbance in the functioning of the mind or brain" in order for the Act to apply. This could be either a permanent impairment or of a temporary nature. If this is demonstrated then the second stage that must be demonstrated is that the impairment or disturbance is sufficient that the person lacks the capacity to make a particular decision. In order to determine if this is the case a "functional test" is carried out. The functional test focuses on how the decision is made, rather than the outcome or the consequence of the decision. The test relates to the client's capacity to understand the information relevant to the decision, to retain that information, to weigh that information as a part of the process of making a decision and to communicate their decision.

Establishing the fact that a client has a diagnosis is then clearly the first step. Unless the assessment is carried out by the person qualified to make the diagnosis the assessors will need to rely upon a clinician to provide it. It is important to note that the impairment or disturbance in the functioning of the mind or

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brain can be temporary or permanent. Where the diagnosis relates to a temporary disturbance it must be demonstrated that the assessment is required on a risk basis. If not then the assessment should not be carried out at that time. If it is required at that time then the assessment should also be repeated when there are signs of improvement.

There are several factors that need to be taken into account in deciding if an assessment of capacity is required and indeed what aspect of capacity you are considering. The decision could relate to day-to-day matters such as what the client might wear that day or to an issue with more significant consequences. Where the issue relates for instance to a person's capacity to decide what to wear, the same legal strictures apply as the issue relates to the person's ability to understand and remember the information long enough to take it into account and make a decision. As the decision is specific to the time and situation the person assessing should present the relevant information, for instance it may relate to the weather and what to wear, and then assist the client to make a relevant decision. It is not acceptable to simply make the decision for the person without first attempting to assist them to make a choice. This would be a deprivation of their right to choose. Even where the client's decision appears to be inappropriate the assessor should make a decision in their best interest on the basis of risk assessment in order to ensure that the least restrictive decision is made. In the situation where it is raining, the person might not want to wear a coat. Instead of insisting that they wear one, other options could be considered: it may be acceptable that an umbrella is used instead. There is no requirement in law that such day-to-day assessment needs to be recorded, but if it takes place in a formal setting such as a care home it is good practice to do so.

If a more formal assessment is required it is necessary to record the process used and the grounds for the resultant decision. Social Services departments for instance regularly carry out assessments as part of the safe guarding of adults process. These assessments are recorded in Social Services files. They often need to be carried out several times as a client's situation and ability changes. Social Services teams act to maximise people's independence and quality of life whilst at the same time seeking to reduce risk. Safeguarding alerts and investigations mainly relate to physical or financial abuse. As an illustration of the importance of carrying out assessments of a person's mental capacity at the appropriate time when the need to do so is identified I provide the following example that I am aware of. An elderly gentleman with a degenerative brain condition was a client of a Social Services team and concerns had been expressed about his capacity to make decisions in relation to his finances, but no assessment was carried out at the time that these concerns were identified. On the surface all appeared to be managing without incident, but later an allegation of financial abuse by his carer was made. Safeguarding and police investigation were required. As no assessments of capacity had at any point been carried out it was not possible to prove that an offence had been committed as it could not be demonstrated that he lacked capacity at the time that the events occurred. As assessments of capacity cannot be backdated an assumption that he had capacity to make decisions in relation to his finances at the time that the indicated financial abuse had occurred could not be disproved. Due to this the police could take no action as they could not generate sufficient evidence of an offence. The Crown Prosecution Service did not have a basis to pursue the case.

Another issue is the quality of communication between involved parties. Where a client suffers from an impairment of or disturbance in the functioning of the mind or brain the solicitor should ensure that a recent assessment of their mental capacity relevant to the decision is in place before any legal matters are concluded. This may seem obvious, but it isn't always done and can lead to disputes.

Under the Act capacity is regarded as time and decision-specific. I often visit care facilities where it is recorded on file that the client does not have capacity. This is both practically and legally a meaningless statement. A client may have capacity for instance to drive a car, but may not have capacity to manage their finances. Before carrying out the assessment the assessor should identify what the information relevant to the particular decision is. You should also record this information and explain which part of it the client is unable to understand, or retain, or use and weigh up.

In preparing to carry out the assessment the assessor has a duty under the MCA to ensure that all reasonable steps have been taken to facilitate the person's ability to engage with the assessment process. The assessor needs to find out what is the preferred method of communication for the client. In determining this it is important to talk to those involved with him. This may be family members, care providers or other assessors. If appropriate assessments are available they should be read prior to meeting the client and the information relating to their communication needs should be applied. If for instance a speech and language therapist's assessment is available this would be invaluable as would an assessment of a client's cognitive functioning. It is pointless to start to assess without first appraising oneself with this information. When assessing someone who is unable to communicate verbally, but is able to make their preferences known by gesture the assessor should satisfy themselves that the person's responses are consistent for example by presenting the same question several times during the course of the interview. Compensatory devices should also be used where appropriate. These can include for instance, a pointing board, electronic devices or visual aids. In addition to the method of communication the assessor needs to look at the persons familiarity with the concepts employed. If required the assessor should provide additional information in an accessible form. A client's unfamiliarity with the concepts must not lead to an erroneous determination of lack of capacity in relation to the decision to be made.

Having someone present who knows the person is another potentially useful factor that needs to be considered. They may know the client's communication preferences. The role that this person plays should be discussed as this may well have a bearing. When carrying out a capacity assessment with a family member present it should be remembered that they may hope that the person's capacity is greater, or lesser, than it is and may have erroneous beliefs about the person's capacity. The assessor needs to explore their contribution and determine its value. An example from my own practice is an assessment of a young man in a vegetative state. His family understandably were inclined to interpret movement such as tremors as communication. Their beliefs had to be taken into account and explored in relation to the information gathered during the assessment. Although in carrying out this assessment appropriate communicative strategies were employed the client was not able to demonstrate that he had capacity in relation to the question at issue.

Consulting with reports and others involved can also provide information about the most appropriate time to carry out the assessment. If for example the client has just begun a course of rehabilitation regarding financial management it would be more appropriate to wait until this is sufficiently advanced before conducting an assessment of their capacity to manage their finances. The best time of day to discuss the decision in question is another factor to take into account. With clients whose functioning fluctuates it may be the case that their capacity is greater at one time of day than another. Clients with head injuries for instance often experience fatigue if by researching you find that they tend to sleep in the afternoons then it is best not to plan to carry out the assessment at that time of day.

Another factor to consider is the location chosen to discuss the decision in question. The person's capacity may be greater if the assessment is held in a familiar place such as their home where they may feel more relaxed.

In carrying out the functional assessment of capacity there are four areas that the MCA stipulates need to be considered. The first is the person's capacity to understand the information relevant to the decision to be made. With regard to their capacity to understand it is not necessary that they understand every element of what is being explained to them. What is important is that they can understand the information relevant to the decision. It is the responsibility of the assessor to identify what the information is that is relevant to that decision, and to give consideration to the degree of understanding that needs to be demonstrated by the client. In determining the degree of understanding that is required the assessor must ensure that it is reasonable and that all practical steps have been taken to help the client to demonstrate

an understanding of the salient points. Sufficiently detailed information regarding relevant options and choices available needs to be provided in an accessible manner.

The client also needs to be able to demonstrate the capacity to retain the relevant information for a sufficient amount of time in order to make a decision. The Act specifies that even if they can only retain the information long enough to make the decision then this is sufficient. This is a significant issue as some people such as the elderly or those with deteriorating memories may still be able to make decisions and should be assisted to do so. One step that could be taken is to provide the information in an accessible form such as written in bullet points. Other compensatory devices or strategies can also be employed.

The third area that the MCA requires to be demonstrated is the client's capacity to weigh up the relevant information. This aspect of the test relates to the client's capacity to engage in the decision-making process itself and to be able to understand how the various pieces of information relate to each other and the consequences of the decision that is arrived at.

The fourth area is that of the person's ability to communicate their decision. As long as the person can make themselves understood this is sufficient. All appropriate steps must be taken to facilitate them to do so. If it is demonstrable that they cannot communicate capacity in relation to the question it can be determined that they do not have the capacity required to make decisions in regard to the area in question.

As I have outlined the process of assessing a person's capacity is necessarily thorough as it relates to potentially depriving them of the legal right to make decisions in relation to the area under question. In order for such a decision to be arrived at it must be demonstrated that there is a causal link between the disturbance or impairment and the inability to make the decision in question. In this article I have only touched upon the factors that should be taken into consideration. For a more thorough overview the Mental Capacity Act Code of Practice published by The Stationery Office on behalf of the Department for Constitutional Affairs should be consulted.[1]

[1] Department for Constitutional Affairs, *Mental Capacity Act Code of Practice* (The Stationery Office, 2007).

Case and Comment: Liability

Lowdon v Jumpzone Leisure UK Ltd

(CA (Civ Div), Tomlinson LJ, Kitchin LJ, Gloster LJ, June 16, 2015, [2015] EWCA Civ 586)

Personal injury—liability—negligence—hospitality and leisure—sports and leisure facilities—whiplash injury—breach of duty of care—risk assessment—foreseeability—measure of damages

LT Foreseeability; Measure of damages; Personal injury; Reasonable precautions; Sports and leisure facilities

On August 4, 2008 Jumpzone Leisure UK Ltd ("the defendant"), were operating a piece of equipment known as "The Hyper Jump" on Brighton beach. The "Hyper Jump" involved customers being strapped into a harness with elastic ropes on either side. The operator counted down from three and released the ropes when the rider signalled they were ready. Once released, the rider was propelled into the air and bounced up and down for a matter of seconds.

The claimant Jason Lowdon said that he was released without warning on his second ride. He also said that he was not aware of any injury at the time, but found his neck to be stiff and painful over the following few days. He then suffered a loss of vision and was found to have suffered a dissection of the vertebral artery. He made a claim against Jumpzone alleging that the persons who had been operating the jump had acted negligently in releasing him without warning.

At trial HH Judge Waddicor's unchallenged finding was that the claimant had been released without warning while his head was down. She held that the injury was sustained as a result of the company's negligent operation of the equipment and failure to give an adequate warning, and that such injury had been reasonably foreseeable. She referred to the fact that the company's guidelines highlighted the possible risk of death if security rules were not followed. Those rules included asking the customer if they were ready. She assessed general damages for pain and injury and loss of amenity at £17,000, which included £5,000 for being unable to drive a car for two years. The claimant was also awarded special damages of £6,500 for loss of profit on business mileage, plus interest, making a total sum of £25,616.34.

The company appealed on liability and against the general damages award. They argued that the jump had operated without injury for many years with thousands of customers, and that it was not reasonably foreseeable that a customer who was properly strapped in could be caused injury by being released without warning while their head was down.

The Court of Appeal held that the judge had not placed too much emphasis on the company's own guidelines when concluding that if no warning was given injury might result. The company's argument that the failure to adhere to its own strict guidelines did not give rise to a foreseeable risk of injury was in fact a late development. Its pleaded case admitted that the guidelines were intended to reduce the risk of injury to ride participants. Its case had been that the claimant had not been launched without warning and that his head had not been thrown about violently.

The judge properly considered, and rejected, the argument that it was not a breach of duty of care to launch a customer without warning. She concluded that the company normally strictly followed its guidelines in that respect, though that might be modified during the operation of a second ride to simply asking the customer if they were ready rather than giving a three, two, one countdown. There was nothing

in the expert evidence to support the company's thesis that risk of injury was not foreseeable in the absence of a warning. On the contrary, the expert evidence directly supported the proposition that there was an increased likelihood of injury being caused if the customer was not warned to brace themselves before launch. In the circumstances, they concluded that it was perhaps not surprising that there was no broader analysis about the extent to which personal injury, or neck injury, was the foreseeable consequence of an unexpected launch.

In fact the issue had not arisen as a significant issue before trial. The parties had not engaged in a broad assessment of the experiences of other businesses operating the ride in similar circumstances. In the absence of any previously reported injuries in the operation of the ride did not therefore, per se, demonstrate that such injury was not reasonably foreseeable. A number of factors could have contributed to the fact that the defendant had not been the recipient of previous complaints, including the fact that soft-tissue neck injuries rarely presented themselves until several hours after an accident and customers might not complain about short-lived symptoms.

The court held that the judge had been entitled to conclude that the risk of neck injury was a foreseeable consequence of launching a customer without warning when not braced. Therefore it was not appropriate to interfere with her findings of fact in relation to liability.

Turning to damages they held that the judge had been entitled to make an award of general damages which reflected the claimant's loss of use of his car, despite the fact that the result was an increase beyond the relevant guideline bracket.[1] She was also entitled to conclude that a total general damages figure of £17,000 accurately reflected the claimant's loss of amenity because of the special features of the claim. It was not appropriate to interfere with that assessment and the appeal was dismissed.

Comment

The issue that emerged in this case was whether or not the injury that was sustained was reasonable foreseeable. Gloster LJ confirmed that the correct approach is of course whether or not some injury was foreseeable as opposed to the actual injury that occurred.[2]

What is interesting is that Gloster LJ did not accept the defendant's strongest proposition that there were no previous incidents. This was the case although there must have been thousands of rides. She said that this in itself did not mean that the injury was not reasonably foreseeable. She mentioned a number of other factors that may have contributed to the fact that there had been no previous incidents or complaints. For instance:

- soft tissue neck injuries rarely present themselves until several hours after an incident sustained and so many customers may not complain if there is very short lived symptoms;
- might not have associated the symptoms with the fair ride; and
- injury itself is a rare complication of a soft tissue neck injury and therefore unlikely to present very often.

The defendants also complained that the judge at first instance had ignored expert evidence which may have undermined the contention that there was foreseeability. This too was rejected by Gloster LJ who found that on a review of that medical evidence it was clear that this would not have influenced the finding.

It was found that the defendants had been in breach of their own guidelines and had they followed these then not only would this incident have been prevented but also it would have been a foreseeable consequence that an injury would have been sustained.

[1] *Lagden v O'Connor* [2003] UKHL 64; [2004] 1 A.C. 1067 considered.
[2] See for example *The Wagon Mound (No.1)* (1961) A.C. 388 HL.

Practice points

- It is highly likely that the disclosure of the defendant's procedures in relation to safety when dealing with this ride were crucial in this case.
- In these types of cases it should be the case that there are appropriate risk assessments and guidance as to what safety precautions should be taken. Evidence needs to be obtained that these were not complied with.
- Alternatively, if no such guidance is provided then this would be good evidence of probable negligence so long as it can be shown that practical measures should have been introduced which were compiled for the prevention of the injury.

Colin Ettinger

Baxter v Barnes[1]

(QBD, Judge Collender QC, January 12, 2015, [2015] EWHC 54 (QB))

Personal injury—liability—negligence—breach of contract—contracts of hire—duty of care—equipment leasing—Supply of Goods and Services Act 1982 s.9(2)

Breach of contract; Contracts of hire; Equipment leasing; Implied terms; Personal injury; Product liability; Satisfactory quality

Christopher Baxter was an arborist. He was engaged by the owners of a substantial residential property, the Old Rectory in Milborne St. Andrew, Dorset, to prune a large copper beech tree, overhanging the house. He and his employees commenced work on the job in November 2010 and worked initially by gaining access to the branches to be pruned by means of ropes and harnesses. However, Mr Baxter decided that he would need a platform, to safely prune the remaining branches, which were growing over the house and garden.

Access to the site where Christopher Baxter was working was limited, and the tree was close to a slope. In the circumstances he decided that the appropriate machine for the job was a specialised type of mobile elevated work platform ("MEWP") known as a "Spider" specifically designed for use in such situations. This had been hired by the claimant from the defendant tree surgeon. Access to the site was limited and the tree was close to a slope. The platform was specifically designed for such situations. It was suitable for working on sloping ground, provided that the feet of the outriggers were properly supported on ground that was reasonably level, firm and stable.

The defendant delivered the platform to the site and helped to set it up in the first position from which the claimant was going to use it. Together with the platform, he supplied the claimant with hard plastic plates, to support the feet of the outriggers of the platform. Those plates had not been supplied by the manufacturer for use with that platform. After using the platform at the first position within the site, the claimant's employees moved the platform to another position. On December 1, 2010 he was engaged in the pruning of the tree whilst the platform was in use, it overbalanced and toppled over. When this happened Baxter and one of his employees, Mr Milbourn, were working from the basket and sustained serious injuries.

[1] T/A WE Barnes Tree Surgeons and/or Up and Out Platform Hire.

Subsequent investigations revealed that two outriggers had lifted up from the ground. The experts agreed that, on the balance of probabilities, the platform had become unstable and toppled because one or more of the outrigger feet slipped off the edge of the plate into the soft ground. Baxter claimed damages for breach of contract and negligence from the defendant.

Baxter submitted that the accident had been caused by defects in the platform and/or instructions which the defendant had given to him in relation to setting up the platform. The defendant asserted that the accident was solely due to errors by the claimant in setting up or operating the platform.

The judge found that the claimant was an experienced arborist who was generally careful for his own safety and that of his employees. Whilst he had not previously hired that type of platform, he was knowledgeable about the principles behind its operation. Further, on the day of the accident his employees had set up the machine in essentially the same way and position as the day before. They had not set it up in a position which the defendant had advised was unsuitable and they had followed the defendant's instructions in setting it up.

The judge held that it was clear on the evidence that the position was not unsuitable for the positioning of a platform of suitable quality. In particular, the manufacturer's evidence was that the ground appeared suitable for the platform and that the movement of the outrigger foot was as a result of the operation of the platform, not the collapse of the plate into soft ground. The cause of the accident was the slippage of the outrigger foot upon its bearing plate. That slippage occurred because the plate was not of suitable quality for the type of platform concerned. The platform was specifically designed for use on rough or soft terrain and on slopes and narrow or uneven surfaces, where it was liable to be subjected to lateral forces which could cause a foot, if unrestrained by its bearing plate, to move considerably. The platform should have been provided with bearing plates which were attached to the outrigger feet or so shaped or recessed that the feet were prevented from slipping off the plate. For that reason, the platform supplied by the defendant was not of a satisfactory quality for the purposes of the implied condition contained in s.9(2) of the Supply of Goods and Services Act 1982.

The platform also toppled over without any warning device or cut-out operating, whether because of a particular fault which had developed on that specific platform, or because the combination of the particular way the topple was initiated and the design of the platform resulted in the warning device and cut out not operating before the topple was initiated. The claim succeeded in contract, but the defendant did not have a separate liability to the claimant in negligence, nor was the claimant in any way negligent.

Judgment was entered for the claimant.

Comment

In contrast to the more usual personal injury action involving a fall from height—which generally concerns breaches of health and safety legislation or occupier's liability—this was essentially a product liability claim directly founded in contract. The claimant also relied upon negligence but, as noted above, the judge did not find there to be a separate liability in negligence though there was little analysis in the judgment as to his reasoning. Given that the claimant had himself hired the "Spider" directly from the defendant he was able to avail himself of the terms implied into the contract pursuant to the Supply of Goods and Services Act 1982.

The law applicable to the case was uncontroversial: there was an oral contact; there were statutorily implied terms as to satisfactory quality and fitness for purpose; on the facts of the case, the term as to fitness for purpose added nothing to the requirement for satisfactory quality; there could generally be no contributory negligence for breach of contract unless the contractual obligation in question was one to take reasonable care—which was not the present case.

The judge's finding of fact as to the cause of the Spider tipping over—i.e. the slippage of an outrigger upon its bearing plate which was not suitable for the application to which the Spider was supplied—meant

that he could readily find the product not to have been of satisfactory quality. As it happens, the judge held that the claimant had done nothing wrong in his operation of the Spider, and hence there was no basis for a finding of contributory negligence. In any event, the contractual nature of the claim meant that contributory negligence was no defence. There is a distinct advantage for claimants with such contractual claims as they would potentially be subject to the defence of contributory negligence if the product liability claim were founded only in negligence or under the Consumer Protection Act 1987.

The finding of fact as to the cause of the accident was based predominantly on expert evidence, though the judge did reject the defendant's factual contention that he had advised the claimant not to erect the Spider where he had. The judge preferred the evidence of the claimant's expert whom he noted had considerably more experience of MEWPs of this kind than the defendant's expert. This reminds us of the importance of selecting suitably qualified and experienced experts.

A particular handicap suffered by both parties' experts, however, was that the Spider had been destroyed by the defendant before it could be inspected by either of them. This meant that they could not test the machine to check whether it operated correctly. An HSE inspector had tested it shortly after the accident, but the parties' experts considered the HSE inspection to be deficient.

The judge was not prepared to attribute blame for the fact that the machine was disposed of prematurely. He noted that the claimant's solicitors had not specifically requested its preservation in their letter of claim, and that the defendant's solicitors had not advised the defendant not to dispose of it.

It is worth observing, however, that in suitable claims, the court can draw adverse inferences against a party who inappropriately disposes of or destroys relevant evidence. In the case of *Malhotra v Dhawan*[2] the Court of Appeal approved the trial judge's ruling that:

> "in a situation where one party is responsible for the unavailability of relevant evidence, the Court should not be slow to make such inferences or assumptions against that party's interests as are consistent with the other available evidence."

In conclusion, this case turned very much on its own facts, but being a product liability claim it is out of the norm for many personal injury lawyers. There is no magic in product liability claims, but they often do involve analysis of causes of action beyond the narrow confines of negligence.

Practice points

- PI lawyers should never forget to consider potential claims in contract, or the terms that can be implied into such contracts.
- Solicitors on either side of PI claims must be prompt to ensure the preservation of relevant documentary or real evidence. Early correspondence should be sent requiring such preservation and a request that disposal only takes place with the consent of all parties concerned.
- Ensure any liability expert instructed has adequate experience and expertise. This is where it is advantageous to see the proposed name (and possibly CV) of the other side's expert before committing to an instruction of one's own expert.
- Ensure that liability experts examine the accident site and/or equipment involved at the earliest opportunity. Often it is helpful to have a joint visit by each party's expert so long as the experts are instructed not to disclose their opinions prematurely.

[2] *Malhotra v Dhawan* (1997) EWCA Civ 1096; [1997] 8 Med. L.R. 319.

- If relevant evidence has been destroyed and foul play is suspected, adverse inferences may be drawn.

Nathan Tavares

International Energy Group Ltd v Zurich Insurance Plc UK

(SC, Lord Neuberger PSC, Lord Mance JSC, Lord Clarke JSC, Lord Sumption JS, Lord Reed JSC; Lord Carnwath JSC, Lord Hodge JSC, May 20, 2015, [2015] UKSC 33)

Employers' liability—employers' liability insurance—asbestos—mesothelioma—insurance policies—compensation—joint and several liability—apportionment—contributions—defence costs—Guernsey—Compensation Act 2006 s.3

LT Apportionment; Contribution; Employers' liability insurance; Guernsey; Insurers' liabilities; Mesothelioma; Personal injury

Alan Carré worked for 27 years (until December 31, 1988) for Guernsey Gas Light Co (Guernsey), a predecessor of the claimant ("IEG"). For the last six years of that period IEG was insured under a standard form of employer's liability policy by a company whose liabilities have been absorbed by the defendant Zurich. Mr Carré worked for another employer from January 1, 1989-April 15, 2008, when he retired. In July 2008 he was diagnosed as suffering from mesothelioma and he died a year or so later.

Before his death he issued proceedings against IEG in the Royal Court of Guernsey, claiming that his illness was caused by its negligence and breach of statutory duty in exposing him to asbestos dust and fibres. The claim was settled for £250,000 plus costs. IEG's total outlay including its own costs amounted to £274,431.60, for which it claimed indemnity from Zurich. The policy wording remained the same for each year that the policy was renewed. The insuring clause provided:

> "If any person under a contract of service or apprenticeship with the Insured shall sustain any bodily injury or disease caused during any period of insurance and arising out of and in the course of his employment by the Insured in the business above mentioned, the Company will indemnify the Insured against all sums for which the Insured shall be liable in respect of any claim for damages for such injury or disease settled or defended with the consent of the Company. The Company will in addition pay the claimants' costs and expenses and be responsible for all costs and expenses incurred with the consent of the Company in defending any such claim for damages."

At trial Cooke J held that IEG was entitled to a full indemnity in respect of its costs of defending Alan Carré's claim, but that otherwise its right of indemnity was limited to the proportion representing the period of his employment by Guernsey for which it was insured by Zurich. IEG appealed and Zurich cross-appealed arguing that it should be entitled as a matter of equity to a contribution from IEG in respect of the period for which Guernsey exposed Alan Carré to asbestos and was not insured by Zurich. However, the Court of Appeal held that Zurich was liable to indemnify IEG for 100 per cent of the compensation and defence costs awarded to Alan Carré.

In the Supreme Court the issues were:

1) Whether the proportionate recovery rule in *Barker v Corus UK Ltd*[1] still applied in Guernsey.
2) Whether the proportionate recovery rule applied to IEG's costs of defending the claim.
3) If *Barker* no longer represented the common law, whether an insurer who had covered only part of the whole exposure period bore the whole liability in the first instance and whether there was any right of recourse for such an insurer.
4) What the position was where an employer was insolvent.

The Supreme Court held that because the Compensation Act 2006[2] had not been enacted in Guernsey, the common law rule in *Barker* continued to apply. Guernsey common law should be treated as identical to English common law during the appeal. Neither the s.3 of the Compensation Act nor the decision in *Durham v BAI (Run Off) Ltd*[3] was inconsistent with the decision in *Barker*. In *Durham* there had been no issue about, or challenge to, the correctness of the reasoning or decision in *Barker*. Section 3 of the Act did not have any effect in jurisdictions where the common law position had not been statutorily modified.[4] This meant that an employer's liability for exposing an employee to asbestos should be proportionate to the length of its contribution to the exposure. In the UK, where s.3 of the Act applies, an employers' liability insurer is liable to indemnify an employer in full, but has rights to contribution from co-insurers and, in respect of any period where there was no insurer, from the employer as a self-insurer.

There were significant differences in relation to the costs of defending a claim. In this case, there was nothing to suggest that those costs would have been less if the claim had been confined to the six-year period covered by Zurich's policies. More significantly, the costs were incurred by IGE, with Zurich's consent, and were covered on the face of the policy wording. There was no reason to construe the policy wording as requiring some diminution in the insured's recovery, merely because the defence costs also benefitted another uninsured defendant. Accordingly there was no right of contribution in respect of defence costs.

The Supreme Court recognised that this appeal illustrated some of the problems arising from the special rule applied in *Fairchild*[5] and *Durham*, namely that a victim could hold liable all employers who negligently exposed him to asbestos. The rule allowed a person responsible for exposure to select any year during which he could show that he carried liability insurance and to pass the whole liability to the liability insurer on risk in that year, without regard to other periods of exposure.

The anomalies were self-evident: it was contrary to principle for insurance to allow an insured to select the period and policy to which a loss attached; a liability insurance would cover losses arising from risks extending over a much longer period than that covered by the policy, in respect of which no premium had been assessed or received by the insurer; an insured was able to ignore long periods in respect of which he had not taken out insurance; and an insured had no incentive to take out or maintain continuous insurance cover. Those anomalies required a broad equitable approach to be taken to contribution. A sensible overall result was only achieved if an insurer held liable in such a situation was able to have recourse for an appropriate proportion of its liability to any co-insurers and to the insured as a self-insurer in respect of periods of exposure for which the insurer had not covered the insured.

The fact that the parties might not have contemplated or made specific provisions about co-insurance and self-insurance was no obstacle to the court doing so. An employer therefore had a right to contribution against any other person who was, negligently or in breach of duty, responsible for exposing the victim to asbestos. After meeting the insurance claim, the insurer would be subrogated to that right to contribution

[1] *Barker v Corus UK Ltd* [2006] UKHL 20; [2006] 2 A.C. 572.
[2] Section 3 of the Compensation Act 2006 applies in England and Wales, Scotland, and Northern Ireland.
[3] *Durham v BAI (Run Off) Ltd* [2012] UKSC 14; [2012] 1 W.L.R. 867.
[4] *Barker v Corus* [2006] 2 A.C. 572 applied
[5] *Fairchild v Glenhaven Funeral Services Ltd (t/a GH Dovener & Son)* [2002] UKHL 22; [2003] 1 A.C. 32.

against the other responsible source of exposure. Zurich was also entitled to look to IEG to make a proportionate contribution as a self-insurer.[6]

In addition the court held that in cases where the person responsible for the exposure was insolvent, there was a strongly arguable case for treating the language of s.1(1) of the Third Parties (Rights against Insurers) Act 1930 as entitling the mesothelioma victim to recover against the insurer.

Comment

This is the fourth occasion that the House of Lords or the Supreme Court have considered the aftermath of the "*Fairchild* enclave" on that most pernicious of industrial diseases, mesothelioma. While the short technical point here is that the Compensation Act 2006 has not been enacted in Guernsey, so that Alan Carré's compensation case needed determination at common law, this four/three majority decision in *Zurich* is then the battlefield for two distinct and opposing judicial philosophies.

Giving the majority judgment Lord Mance indicates that the anomalies arising from *Fairchild* are "self evident"[7] and therefore further cases require a "broad equitable approach",[8] whereas Lord Sumption in his dissent urges a strict constructionist approach to contract law, asserting there is no need to "pick the pockets of the insurers"[9] and warning that Lord Mance's approach will "open up a dangerous seam of potential litigation."[10]

Much of the debate between these competing views (and the prolix nature of some of the passages and citations), puts one in mind of the judgments of the US Supreme Court. While not yet amounting to the level of Justice Antonin Scalia's blistering dissent in the recent "Obamacare" case, where he accused his colleagues of "interpretive jiggery-pokery",[11] there are certainly some surprisingly less than courteous words flung around in *Zurich*. We also appear to have the import from the US of the "swing vote" in our highest court, with a particularly lucid judgment from Lord Hodge. As someone with wide experience in Scotland, but also at one time a judge of the Courts of Appeal of Jersey and Guernsey, he tips the balance in support of what he describes as Lord Mance's "more radical" approach.[12]

Without the Compensation Act 2006 the fall-back position in the common law has to be *Barker v Corus*,[13] where by a majority the House of Lords held that the solvent employer should not be jointly and severally liable, but only proportionally liable. Lord Hoffman indicated that this proportional approach would "smooth the roughness of the justice" which joint and several liability creates.[14] Parliament of course had other views about how to achieve "justice" in mesothelioma cases, so many times blighted by insolvency. Section 3 of the Compensation Act 2006 therefore requires an employer's liability insurer to indemnify in full, but with rights to contribution from co-insurers and, in respect of any period where there was no insurer, from the employer as self-insurer.

Lord Mance comments that the courts "having, for wholly understandable reasons, gone down the *Fairchild* route … must … face up to the consequences, if necessary by further innovation."[15] Already in his judgment in the *Trigger litigation* Lord Mance had indicated his view that while the insurer in mesothelioma cases should bear the whole of any liability "the palliative in that situation was of course

[6] *Fairchild* [2003] 1 A.C. 32 and *Durham* [2012] 1 W.L.R. 867 applied
[7] *International Energy Group Ltd v Zurich Insurance Plc UK* [2015] UKSC 33; [2015] 2 W.L.R. 1471 at [43].
[8] *International Energy Group Ltd v Zurich Insurance Plc UK* [2015] 2 W.L.R. 1471 at [63].
[9] *International Energy Group Ltd v Zurich Insurance Plc UK* [2015] 2 W.L.R. 1471 at [172].
[10] *International Energy Group Ltd v Zurich Insurance Plc UK* [2015] 2 W.L.R. 1471 at [206].
[11] *King v Burwell, Secretary of Health and Human Services* 576 U.S.S.C. (2015) at 21 per Scalia J; other so-called "zingers" in that case included the commentary that the majority opinion was "quite absurd" and that "the Affordable Care Act should be called 'SCOTUScare'". See generally James Staab, *The Political Thought of Justice Antonin Scalia* (Maryland: Rowman & Littlefield, 2006).
[12] *International Energy Group Ltd v Zurich Insurance Plc UK* [2015] 2 W.L.R. 1471 at [101].
[13] *Barker v Corus* [2006] 2 A.C. 572.
[14] *Barker v Corus* [2006] 2 A.C. 572 at [43].
[15] *International Energy Group Ltd v Zurich Insurance Plc UK* [2015] 2 W.L.R. 1471 at [39].

that an employer/insured will have a right to contribution against the other responsible source of exposure."[16] In fashioning a common law approach to insurance in the post-*Fairchild* framework, Lord Mance calls in aid Lord Mansfield in dealing with the "fundamental principle of indemnity"[17] in 1758, with the view that "natural justice says that the several insurers shall all of them contribute pro rata."[18] He also reminds his colleagues of the comment by Lord Hoffmann that:

> "To say [the courts] never change the law is a fiction and to base any practical decision upon such a fiction would indeed be abstract juridical correctitude."[19]

The special rule in *Fairchild* is of course a concomitant of the extraordinary difficulty of proving that a particular asbestos exposure caused this agonising disease. This is an evidential problem compounded by the long latency period in many cases, the dearth of cover in the asbestos industry prior to compulsory insurance in 1969,[20] and what Professor Wedderburn called the "spectre" haunting many areas of law, but endemic for asbestos workers, the "spectre of self-employment".[21] Causation in tort cases has of course always been problematic. Professors Prosser and Keeton noted that:

> "There is perhaps nothing in the entire field of law which has called forth more disagreement or upon which the opinions are in such a welter of confusion."[22]

Eminent scholars from HLA Hart and Tony Honoré[23] through to Jane Stapleton[24] have grappled with its intricacies in torts. But the practical framework to so many tort cases is a relationship with a contract of employment or a contract of insurance, and there we have the additional turbulent mix of a competing set of legal rules.

Lord Sumption indicates that the majority decision here would be "contrary to a number of basic principles of the law of contract and to be productive of uncertainty and injustice".[25] But there are many academic and legal commentators who would like to break from the straitjacket of contract law, who would relish further development of the "uncertainties" of tort and restitution law, and who would find difficulty in his view of "justice". Particularly if that meant a recalibration of the "justice" achieved by *Fairchild* for the egregious suffering of mesothelioma victims and their families as against the alleged "unjust" treatment of the insurance industry. Much of course depends on the tension between contract and tort, and as Sir Thomas Bingham MR noted in *Henderson v Merrett Syndicates* tort law (and no doubt restitution law) "has developed, untidily but pragmatically, to enable the courts to do justice despite these rules" of contract.[26]

Lord Mance has, as his opening sally, that: "It is the role of the common law to adapt to meet new circumstances and challenges."[27] He recognises the conceptual difficulties following in the wake of "the *Fairchild* enclave", and from his own judgment in *Trigger*, but indicates that this aftermath requires "a broad equitable approach to be taken to contribution, to meet the unique anomalies to which they give rise".[28] He draws on the study by Professors Rob Merkin and Jenny Steele in *Insurance and the Law of*

[16] *Durham v BAI (Run Off) Ltd* [2012] 1 W.L.R. 867 at [1].
[17] *International Energy Group Ltd v Zurich Insurance Plc UK* [2015] 2 W.L.R. 1471 at [26].
[18] *Godin v London Assurance Co* 97 E.R. 419; (1758) 1 Burr. 489.
[19] *Deutsche Morgan Grenfell Group Plc v Inland Revenue Commissioners* [2006] UKHL 49; [2007] 1 A.C. 558 at [23].
[20] Guernsey did not have compulsory employers' liability insurance until 1993.
[21] K.W. Wedderburn, *The Worker and the Law*, 2nd edn (London: Penguin Books, 1971), p.61.
[22] *The Law of Torts*, edited by W.P. Keeton, 5th edn (St Paul, Minnesota: West Publishing Co, 1984), p.263.
[23] H.L.A. Hart and A.M. Honoré, *Causation in the Law* (Oxford: Clarendon Press, 1959).
[24] See in particular Jane Stapleton, "Factual Causation and Asbestos Cancers" (2010) 126 L.Q.R. 351, and earlier her Jane Stapleton, *Disease and the Compensation Debate* (Oxford: Clarendon Press, 1986).
[25] *International Energy Group Ltd v Zurich Insurance Plc UK* [2015] 2 W.L.R. 1471 at [112].
[26] *Henderson v Merrett Syndicates Ltd (No.1)* [1994] C.L.C. 55 CA (Civ Div). See generally Simon Whittaker, "Privity of Contract and the Tort of Negligence: Future Directions" (1996) 16 *Oxford Journal of Legal Studies* 191.
[27] *International Energy Group Ltd v Zurich Insurance Plc UK* [2015] 2 W.L.R. 1471 at [1].
[28] *International Energy Group Ltd v Zurich Insurance Plc UK* [2015] 2 W.L.R. 1471 at [63].

Obligations[29] to map out a new trajectory, considers carefully points from Professor Andrew Burroughs on restitutionary principles,[30] and notes the recent change brought about by the Mesothelioma Act 2014, which establishes an insurance industry fund to make payments when no solvent employer or identifiable insurer can be found.[31] Above all, this can be described as a "realistic" position, and as Lord Mance notes, "the reality is that the *Fairchild* enclave has necessitated adjustment from time to time of the legal and regulatory framework by the courts, the legislature and regulatory authorities".[32]

On the other hand Lord Sumption issues the stern warning that the contractual analysis has "the considerable advantage that it draws on a substantial body of existing legal principle, which can be expected to supply answers to unforeseen issues as they arise" and that the "alternative is for the law to move from each one-off expedient to the next".[33] No-one would of course challenge his assertion that the *Fairchild* line of cases were "legally unconventional rules for establishing liability in tort" and were "adopted for reasons of policy". However as Lord Bingham indicated in *Fairchild* this exceptional rule was formulated because of the "rock of uncertainty" in medical causation for malignant mesothelioma and because the overall object of tort law is to define cases in which the law may justly hold one party liable to compensate another."[34]

With a dozen or so victims dying every day from mesothelioma in the UK, and with long latency periods the probability of so many more deaths from asbestos exposure in the future, it does not seem wise for the courts to apply an oppressive and strict contractual approach when, as with *Barker v Corus* there would in all probability be a national outcry which would lead to a similar legislative overturning, as happened with the Compensation Act 2006. But Lord Sumption states that:

> "the desire to ensure an outcome which protects victims of occupational mesothelioma has had such a strong influence on recent case-law, that its relevance to the present issues is a question that needs to be confronted."[35]

It falls to Lord Hodge to provide a short but clear judgment on what should be the approach to a situation where the "precise pathogenesis of that terrible disease is unknown" and which in *Fairchild* led to the departure "from established legal principle and extended the law of causation".[36] In a wry aside he notes the Law of Holes, a proverb often ascribed to Denis Healey, that "having dug a hole, the courts should not keep digging".[37] Lord Hodge then gives six reasons for developing the law in the direction given by Lord Mance:

1) that this is consistent with the other "*Fairchild* enclave" cases;
2) that although this is a heavy burden on the insurer this is the result "that the London insurance market is prepared to live with";
3) that the decision is consistent with the UK Parliament's aim of protecting the employee victim in the 1969 and 2006 Acts, and more recently in the Mesothelioma Act 2014;
4) that the *Trigger* decision pointed to 100 per cent liability and not to pro rata liability;
5) that concern "about the dangers of infecting other areas of the common law with uncertainty" is not likely; and
6) that this is a practical solution.[38]

[29] Rob Merkin and Jenny Steele, *Insurance and the Law of Obligations* (Oxford: OUP, 2013), p.378.
[30] Andrew Burroughs, *The Law of Restitution*, 3rd edn (Oxford: OUP, 2010).
[31] Following a change on February 10, 2015 this is now a sum paid at 100 per cent of the industry schedule. See generally Judge Nicholas Wikeley [2014] 21 *Journal of Social Security Law* 65.
[32] *International Energy Group Ltd v Zurich Insurance Plc UK* [2015] 2 W.L.R. 1471 at [82].
[33] *International Energy Group Ltd v Zurich Insurance Plc UK* [2015] 2 W.L.R. 1471 at [114].
[34] *Fairchild v Glenhaven Funeral Services* [2002] UKHL 22 at [7] and [9] per Lord Bingham.
[35] *International Energy Group Ltd v Zurich Insurance Plc UK* [2015] 2 W.L.R. 1471 at [169] (my emphasis).
[36] *International Energy Group Ltd v Zurich Insurance Plc UK* [2015] 2 W.L.R. 1471 at [98].
[37] *International Energy Group Ltd v Zurich Insurance Plc UK* [2015] 2 W.L.R. 1471 at [111].
[38] See generally the arguments in *International Energy Group Ltd v Zurich Insurance Plc UK* [2015] 2 W.L.R. 1471 at [103]–[109].

Interveners in *Zurich* included both representatives of the insurers and campaigners on behalf of asbestos victims—the Association of British Insurers and the Asbestos Victim Support Group Forum UK. As they both endorsed this approach, this would appear to be a very weighty reason for the pragmatism of the majority. That may in itself have been decisive, and indeed would fit with the traditional role of the courts in adopting reasonable commercial practices as a way of shaping the common law. However, opinions on these matters are sharply indicated; Lord Neuberger and Lord Reed, dissenting with Lord Sumption, comment that while the majority are "well-intentioned" they were in danger of creating "a sort of juridical version of chaos theory".[39]

The evocative language of Charles Evans Hughes CJ was noted, perhaps prophetically, by Toulson LJ in the Court of Appeal in *Zurich*:

> "A dissent in a court of law of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."[40]

It may well be that the analytical cudgels left on the battlefield here will be picked up in future tussles. But it would also appear from all sides in the Supreme Court that the trajectory of the "*Fairchild* enclave" may not extend much further than dealing with this quirk of Guernsey law. Lord Mance's innovative reasoning filled in the lacuna in this case, but there are clear indications that the more general application of restitutionary principles, and the relaxation of causation rules, will be strongly resisted by his colleagues.

Practice points

- The Supreme Court in *Zurich* had on the one hand to determine a narrow point of whether the Compensation Act 2006 applied in Guernsey to a victim of mesothelioma—it did not—but on the other hand ranged widely across issues of tension between contract, tort, and restitution law. The decision is therefore unanimous in one respect, and highly fractious in another.
- There would seem little appetite to extend the development in the common law of the "*Fairchild* enclave", and while Lord Mance and the majority achieve a practical solution along the lines of UK legislation and the settlement arrangements of the insurance industry, Lord Neuberger as President perhaps has the last word when he states that "Enclaves are however notoriously difficult to police".[41] It therefore appears a remote possibility at present that the exceptional principle of *Fairchild* could be applied more generally.

Julian Fulbrook

Jones v Scottish Opera

(OHCS, Lord Boyd of Duncansby, June 2, 2015, [2015] CSOH 64)

Personal injury—liability—accidents at work—self-employed workers—post-Enterprise and Regulatory Reform Act 2013 accidents—negligence—tripping and slipping—work equipment—work at height—impact

[39] *International Energy Group Ltd v Zurich Insurance Plc UK* [2015] 2 W.L.R. 1471 at [191].
[40] Charles Evans Hughes, *The Supreme Court of The United States* (New York: Columbia University Press, 1928) p.68. *International Energy Group Ltd v Zurich Insurance Plc UK* [2012] EWHC 69 (Comm); [2012] Lloyd's Rep. I.R. 594.
[41] *International Energy Group Ltd v Zurich Insurance Plc UK* [2015] 2 W.L.R. 1471 at [207].

of Work at Height Regulations 2005—Provision and Use of Work Equipment Regulations 1998—Lifting Operations and Lifting Equipment Regulations 1998

LT Duty of care; Scotland; Self-employed workers; Tripping and slipping; Work equipment; Working at height

Martin Jones is a self-employed production manager. On December 4, 2013 Mr Jones was working as a technical manager at the Alhambra Theatre in Dunfermline. Amongst other things Scottish Opera provide a specialised delivery service for scenery, props and other theatre equipment to theatres. The delivery service is not confined to Scottish Opera productions.

The Alhambra Theatre management ordered scenery from a company in Norfolk. They engaged Scottish Opera to deliver the scenery. This was done by a truck and trailer owned by Scottish Opera and driven by one of their employees. On December 4, 2013 there was a delivery of scenery for the pantomime Jack and the Beanstalk. Martin Jones was one of the people engaged in unloading the vehicle. Towards the end of the operation while he was getting off the trailer Mr Jones alleged that he tripped on a metal ridge or lip at the edge of the trailer and fell sustaining injury.

He sued Scottish Opera alleging that they had failed to provide a ramp, and had they done so, his accident would have been avoided. In addition, had he not tripped, the height of the drop from the trailer to the ground, being approximately a metre, was, in itself, a hazard. His case was that the common law duty was to take reasonable care for his health and safety and to provide him with maintained and suitable work equipment. Relying upon *Hamilton v Anderson*[1] the pursuer's case was that common law duty was informed by the statutory duties imposed by the Work at Height Regulations 2005, the Provision and Use of Work Equipment Regulations 1998 and the Lifting Operations and Lifting Equipment Regulations 1998.

Liability was denied and Scottish Opera submitted that they owed Jones no duty of care as he was not their employee. They also denied that there was a lip or metal ridge on which he could have tripped and they claimed that they had provided a ramp. In the alternative if they owed him a duty of care and were in breach of it they alleged that he had been contributorily negligent.

The judge accepted, on the balance of probabilities, that there had been no ramp and had there been one, there seemed to be little doubt that Jones would have walked down it and avoided injury. The evidence clearly showed that the strip of metal that covered an inch or two of the floor at the edge of the trailer was not raised. Furthermore, there was no significant groove such as was likely to catch a foot. Accordingly, there was no hazard at the edge of the trailer which might pose a danger or risk to persons getting into and out of it.

The court held that it was Scottish Opera's responsibility to provide a ramp and it was standard practice for a company, such as them, delivering the scenery and props, to provide one. Accordingly there was the necessary degree of proximity between the parties. The injury to Jones was foreseeable where the drop from the trailer to the ground was not less than one metre. Accessing and egressing the trailer at that height, without a ramp or other means of access, carried inherent risks. It was just and reasonable that a duty should exist. Jones had proved that Scottish Opera owed him a duty of care and were in breach of it.[2]

The judge held that it would not be appropriate to make an award for contributory negligence as the danger had been created by Scottish Opera's failure to provide a ramp as safe means of accessing and

[1] *William Hamilton & Co Ltd v WG Anderson & Co Ltd* 1953 S.C. 129 at 137 per Cooper LP:
"[T]he cases cited by the Lord Ordinary seem to me to justify the conclusion that a claim by a workman against his employer, based upon breach of the Factories Act or any other statute or regulation for furthering the safety of employees in various branches of industry, may accurately be described as a claim at common law. 'Statutory negligence' is none the less negligence. It infers that breach of duty which underlies every common law action for *culpa*. In such cases the right to recover damages is not created by the statute but by the common law, the function of the statute being merely evidential, in prescribing certain minima of precautions the non-observance of which *per se* infers negligence, and renders it unnecessary to have recourse to the standard of the reasonable man, or the custom of good employers in like circumstances."

[2] *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605 HL applied

egressing the trailer. Had one been provided, the accident would not have occurred. The pursuer recovered on a 100 per cent basis.

Comment

It is of course a long established principle of law that an employer owes his or her employees a duty of care to have regard for their health and safety at work. This duty includes requirements to provide a safe place of work, a safe system of work, safe work equipment and safe work colleagues. But what is the nature and extent of the duty an employer owes to non-employees injured whilst working on their premises, using their equipment or as a result of the acts or omissions of their employees? Such a question was central to this first instance decision of the Court of Session in Scotland.

Mr Jones was not employed by the defenders whose lorry he was helping unload whilst he was at work. He fell from the rear of the lorry's trailer. There was no ramp available to assist with access to or from the trailer and the defendant company were expected to have provided this with the vehicle for use by those who would be unloading it. The failure to provide a ramp was held to be causative of Mr Jones' fall.

The defenders disputed liability, arguing that they owed no duty of care to Mr Jones who was not their employee. Their stance was that they merely had to deliver the trailer and it was for others—who they did not employ and over whom they had no control or supervision—to complete the task of unloading it. If those non-employees were injured as a result of the way they went about the task of unloading the trailer, the defenders could not be held accountable for such injury.

The Court rejected these arguments and found the defenders liable. They did so by going back to basic principles and considering the test set out in *Caparo Industries Plc v Dickman*[3] to determine when a duty of care is established. This three-limbed test prescribes that a duty of care exists where:

- the parties are in a relationship of proximity;
- it is reasonably foreseeable that the defendant's conduct may cause harm; and
- it is fair, just and reasonable to impose liability.

The relationship between the injured pursuer and the defenders satisfied the proximity test as he was expected to unload their vehicle and they were to provide a ramp for this purpose. Harm was a reasonably foreseeable consequence of the failure to provide a ramp for access to the trailer. The risk of a fall was such that the Court felt it was just and reasonable to impose liability.

The question of when a duty of care can be established against a non-employer by a claimant injured at work under the test in *Caparo* will always be fact specific. For example, in *Newton-Sealey v ArmorGroup Services Ltd*[4] it was held that employees of a security contractor who were working overseas could potentially be owed a duty of care by other companies. In contrast, in *Jennings v Forestry Commission*[5] the Court of Appeal rejected a claim by a contractor that he was owed a duty of care by the Forestry Commission for whom he was erecting fencing.

What is of note in the present case is that Mr Jones' accident occurred on December 4, 2013. This was just a few weeks after s.69 of the Enterprise and Regulatory Reform Act 2013 took effect (from October 1, 2013) and removed the right to sue for damages for a breach of duty imposed by health and safety regulations. Many of the statutory duties in the regulations made under the Health and Safety at Work Act 1974 could potentially apply to non-employees. For example, reg.4(2) of the Workplace (Health, Safety and Welfare) Regulations 1992 provides that they apply to every person who has, to any extent, control of a workplace in so far as they relate to matters within their control. Likewise the Provision and

[3] *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605.
[4] *Newton-Sealey v ArmorGroup Services Ltd* [2008] EWHC 233(QB).
[5] *Jennings v Forestry Commission* [2008] EWCA Civ 581; [2008] I.C.R. 988.

Use of Work Equipment Regulations 1998 apply not only to employers in respect of their employees but also to any person who has control of work equipment.

This raises the question of the extent to which the Enterprise Act has changed matters in respect of claims for accidents on or after October 1, 2013. Will a worker who could previously have brought a civil action for a breach of a statutory duty in respect of the workplace or work equipment against a non-employer still be able to establish the existence of a common law duty of care? These are matters that the appeal courts will no doubt be required to clarify over the next few years. It is, however, apt to note in this context the comments of the Lord President of the Court of Session in 1953 in *Hamilton v Anderson*:[6]

> "[T]he cases cited by the Lord Ordinary seem to me to justify the conclusion that a claim by a workman against his employer, based upon breach of the Factories Act or any other statute or regulation for furthering the safety of employees in various branches of industry, may accurately be described as a claim at common law. 'Statutory negligence' is none the less negligence. It infers that breach of duty which underlies every common law action for culpa. In such cases the right to recover damages is not created by the statute but by the common law, the function of the statute being merely evidential, in prescribing certain minima of precautions the non-observance of which per se infers negligence, and renders it unnecessary to have recourse to the standard of the reasonable man, or the custom of good employers in like circumstances."

This case was relied upon by the Pursuer in the current case to argue that common law duty of care was informed by the statutory duties. Arguably the health and safety regulations can be said to have set the bar as to appropriate standards of care, and to have created enhanced common law duties. The extent to which the courts will accept such arguments in the post-Enterprise Act era remains to be seen, particularly in respect of strict liability provisions in the regulations. But as the Lord President acknowledged over 60 years ago, the statute book sets out standards employers should be expected to follow and so a failure to do so should give rise to an inference of negligence. If those statutory duties apply to non-employees then it is difficult to see why this position should be any different in that respect.

Practice points

- When considering if a duty is owed to a non-employee injured whilst working you should have regard to any relevant statutory duties that may apply, irrespective of whether the accident occurred after October 1, 2013 and s.69 of the Enterprise and Regulatory Reform Act 2013 coming into effect. They are relevant to the question of whether a duty of care may be owed to that party.
- Consider the relationship between the injured party and the proposed non-employer defendant. Was their work subject to the defendant's factual control or supervision such that they could be considered to be owed an analogous duty to that owed to an employee, or that they might be held to be a temporary deemed employee?
- Consider if the injured party was practically involved in the activities of the non-employer in circumstances where they can be said to have assumed a responsibility towards him. Did the injured party have any choice other than to rely upon the non-employer conducting matters in a safe manner?
- Finally, consider the three limbed test in *Caparo* to assess if a duty of care might exist.

Richard Geraghty

[6] *Hamilton v Anderson* 1953 S.C. 129 at 137 per Cooper LP.

Welch v Waterworth

(CA (Civ Div), McCombe LJ, Beatson LJ, Sir David Keene, January 22, 2015, [2015] EWCA Civ 11)

Liability—personal injury—breach of duty of care—clinical negligence—contemporaneous statements—health records—surgeons

LT Causation; Clinical negligence; Contemporaneous statements; Inferences; Surgical procedures

At the age of 55 Mrs Welsh underwent an operation. She died three years later from unrelated causes. She had had an arterial bypass in a previous operation which had become blocked just below the arteries serving the kidneys. The surgeon decided that it was necessary to replace the bypass. Almost immediately after the operation, the patient suffered acute and irreversible kidney failure. She had to have regular dialysis for the rest of her life. Her husband sued the surgeon alleging negligence.

The judge concluded that the damage had been caused by a sequencing error in the operation, and that the surgeon had clamped the aorta closed before the blockage was removed. That would have caused waste material to be extruded into the renal arteries. In reaching that conclusion, reliance was placed upon the surgeon's notes of the operation. The surgeon contested liability and stated that his notes did not accurately describe what he had done. He asserted at trial that he had merely placed the clamp over the aorta in an open position, ready to close it when the blockage was removed. He appealed.

The surgeon submitted that if he had made the error found by the judge a number of "alarm bells" would have alerted him to it, including: the sensation of clamping across an occluded portion of the aorta; the subsequent attempt to clear the blockage against a closed section of the aorta; the need to consciously open the clamp after removal of the blockage; and the comparative blood flow after opening the clamp.

The Court of Appeal noted that none of the alarm bells relied upon by the surgeon formed part of his own evidence at trial, nor were they raised as an issue for discussion between experts before the trial. The simple fact was that the surgeon never appreciated the impact of what had occurred in the operation, and never suggested that such alarm bells would have operated upon his own mind if he had made the error suggested. They stated that he had a total lack of appreciation of what had occurred, not just intra-operatively, but for many years thereafter. To them it seemed apparent from the operation notes that he was oblivious to the consequences of what he was recording as the sequence of the operative actions, even when questions arose about them in the aftermath. The court held that that amply justified a finding that his operation notes provided very significant evidence of the clamping sequence that actually occurred.

The judge had referred to the number of operations performed by the surgeon in which the clamping procedure, erroneous in this case, would have been the correct one. That was also evidence upon which he could properly conclude that the surgeon thought that it was safe to close a clamp in that segment. The judge was entitled to fasten upon those aspects of the evidence which he found to be a reliable pointer to what had actually occurred, without trawling seriatim through every issue or speculation that arose. He was not required to address each and every one of the alarm bell points raised in the closing submissions at trial. The appeal was dismissed.

Comment

This case illustrates the importance of contemporaneous medical records in clinical negligence cases and confirms that a trial judge may draw inferences from those records as to what happened.

This often occurs in the context of clinical negligence claims and usually works against the claimant in favour of the defendant. For example, the claimant will say that "x" happened; the notes will reflect that "y" happened and the clinicians in question will simply say they cannot remember but they rely on the accuracy of the notes. The judge then concludes that the notes must properly reflect what happened and that the claimant is mistaken. However in this case the presumption in favour of the accuracy of the contemporaneous records worked in favour of the claimant with the defendant saying that although he wrote the notes they did not accurately describe what he did.

What happened in this case is that not only did the surgeon Mr Welch make the error that caused 55 year old grandmother Marjorie Waterworth to suffer irreversible kidney failure requiring a lifetime of dialysis, but he recorded the error in both his contemporaneous handwritten note of the operation and his subsequent typed note of the operation.

The operation was a technically difficult one known as a re-do aorto bifemoral bypass graft (a "re-do ABFG") and was being performed by a surgeon (the defendant) whom the experts agreed was likely to be one of the most experienced vascular surgeons in the UK.

McCombe LJ described it thus:

> "It was contended by the claimant and found by the judge that the damage had been caused by a 'sequencing error' in the procedure in that Mr Welch had clamped the aorta closed, across the material causing the blockage, before the aorta was cut and before the blockage was removed. The result would have been for waste material to be squeezed up the aorta and into the renal arteries—described as a type of 'toothpaste tube' effect. All were agreed that if this had been done by Mr Welch it would have been negligent. Mr Welch denied that this was what he had done. His case was that he had merely 'placed a clamp over the aorta, in an open position, before cutting the aorta and removing the embolism.'"

The difficulty for the surgeon was that he had clearly recorded in his notes, first in the contemporaneous manuscript note, "Aorta clamped below renal arteries" and secondly in his subsequent typed operation note, "Clamps applied" and these were recorded sequentially before the aorta was cut and the blockage removed.

The trial judge found (and the experts agreed) that the expectation is that the description of operations given in such notes is chronological and that surgical terms used are those commonly accepted. The trial judge further observed that Mr Welch's notes "did not serve him well".

The trial judge felt able to conclude that the notes did accurately reflect what had happened, that that would be a plausible (indeed the most likely) explanation for the damage that did in fact occur[1] and that the surgeon's subsequent attempt to explain that his notes did not mean what they said was a consequence of the surgeon not realising that he had made an error and still not accepting that he had done so:

> "A significant reason for accepting it [the manuscript note] as a reliable record of what Mr Welch had done would be his failure, when writing it, to recognize the significance of what he was recording and [sic: of] its reproduction, albeit in slightly different form in the later note."

The trial judge continued:

> "I am satisfied that the most likely rational reason for the outcome is that Mr Welch did sequence the clamping of the aorta as described in his notes and that whether that is described as a sequencing error or the compression of the aorta in a position where the radiology demonstrated that it was filled, it amounts to a negligent error which caused the relevant injury."

[1] The joint answer of the experts on this issue was that the cause of renal failure "was most likely to have been precipitated by intra-operative atheroembolisation".

On appeal, McCombe LJ agreed:

> "In my judgment, Mr Welch's oblivion as to what went on in the operation and thereafter amply justified a finding that his operation notes provided very significant evidence of the clamping sequence that actually occurred."

This was a case defended by the Medical Protection Society ("MPS") which on the face of it was always clearly going to be a difficult one to defend given the surgeon's own notes confirmed his negligent error. Yet it needed to go to the Court of Appeal before the claimant's family received justice.

Fixed costs in clinical negligence claims appear to be the latest threat to access to justice for those who suffer injury through clinical negligence and are a very real worry for practitioners and their clients. At the time of writing the suggestion from the Department of Health in its pre-consultation paper[2] is that fixed costs could be introduced into cases worth up to £250,000 in damages. That would capture this case where the judge awarded damages of £155,000. It's not clear what the costs of this case were but it took seven years to resolve including an appeal by the defendant to the Court of Appeal after losing comprehensively at trial. I suspect it would have been impossible to run the case successfully in a fixed costs environment. What price access to justice?

The justification for the introduction of fixed fees is to improve patient safety but it is difficult to see how restricting the ability of an injured person to bring a claim improves patient safety. If anything the opposite is true. It is only when patients seek redress that real change happens. Successful claims drive improvements in care. Lessons are learned and steps taken to avoid those mistakes recurring. The real reason for the introduction of fixed costs is to reduce claimant legal costs and to make it much less easy to obtain redress for negligent treatment.

Much is made of the duty of candour and how that should lead to more openness in such cases but how does that help where the clinician involved refuses to accept any responsibility even where his own notes effectively condemn him?

Practice points

- The starting point for any clinical negligence case is a careful analysis of what the records say happened.
- More often than not the court will accept that the records are an accurate and contemporaneous account of what happened.
- The court is then entitled to draw inferences from the records.
- This usually works in favour of the clinicians who can point to the records as evidence of what they did but on occasion they can be damning evidence against their own makers.
- Fixed costs? What price access to justice?
- Duty of candour? How effective is it where the doctor refuses to accept any culpability?

Muiris Lyons

[2] Department of Health, *Reducing Legal Costs in Clinical Negligence Claims—Pre-consultation* (2015).

Dunnage v Randall

(CA (Civ Div), Arden LJ, Rafferty LJ, Vos LJ, July 2, 2015, [2015] EWCA Civ 673)

Liability—personal injury—negligence—torts—duty of care—mental health—mental disorder—schizophrenia—tortious liability—insurance policies—entitlement to damages

Duty of care; Insurers' liabilities; Mentally disordered persons; Negligence; Personal injury

On October 14, 2007 Vincent Randall poured petrol over himself in the kitchen of his home. His nephew Terry Dunnage struggled unsuccessfully in an attempt to prevent Vince from igniting the petrol. Both men were engulfed in flames. The uncle died at the scene. Terry Dunnage jumped to safety from a balcony. He suffered extremely serious burns to his face and body. The uncle was diagnosed post-mortem as having suffered from florid paranoid schizophrenia.

Terry claimed damages for negligence from his uncle's estate and UK Insurance Ltd. They provided household cover for sums for which Vince became legally liable in damages for accidental bodily injury. The insurer assumed control of the defence. Although the incident took place in the uncle's home and there was an issue about whether it was covered by the household insurance policy under which the insurer had agreed to indemnify the uncle in respect of accidental bodily injury to any person.

There was a trial on liability. Two psychiatric experts filed an agreed joint statement, concluding that the uncle's delusional state would have been so overwhelming as to render him incapable of formulating any rational alternative action and that he had not been in control of his actions. HH Judge Saggerson held that the extreme nature of the manifestation of Vincent Randall's mental illness meant that the uncle had not been acting voluntarily and therefore owed no duty of care to the claimant. He dismissed the claim.

The claimant appealed. The issue was whether a person was liable in negligence where he was suffering from a mental disorder.

The Court of Appeal held that there is no principle which requires the law to excuse a defendant from liability in negligence where he failed to meet the normal standard of care partly because of a medical problem. The courts have consistently and correctly rejected the notion that the standard of care should be adjusted to take account of the defendant's personal characteristics. The single exception in respect of the liability of children should not be extended. Only defendants whose medical incapacity had the effect of entirely eliminating any fault or responsibility for the injury could be excused.

They confirmed that there is no reason for the law of negligence to differentiate between mental and physical illness. The actions of a defendant who is merely impaired by medical problems, whether physical or mental, could not escape liability if he caused injury by failing to exercise reasonable care. To say that a medical condition entirely eliminated any fault or responsibility for the injury simply meant that the defendant himself had done nothing to cause the injury, such as a person whose arm was holding a knife and who was overcome by another forcing him to stab a victim. It was only if the defendant could properly be said to have done nothing himself to cause the injury that he escaped liability.

The court pointed out that this approach avoided the need for medical witnesses to become engaged with difficult and undefined terms such as "volition", "will", "free choice", "consciousness", and "personal autonomy". Those formulations emanated from the rules applicable to insanity and automatism as defences in criminal law and were not helpful in the circumstances. In this case, the court referred to "a troubling proliferation of terms in play", in the judgment and in the experts' evidence. The words "involuntary"

and "irrational" had almost been used as synonyms. For example, the judge concluded that so long as incapacity altogether removed rational motivation there was no liability.

The Court of Appeal said it was not helpful to refer to cases which considered the position when, for example, the defendant lost control of his actions, lost the power of choice, ceased to act voluntarily, or lost consciousness. The judge at first instance had held that the uncle's ability to think and act rationally had been eliminated. However, their view was that no one would suggest that someone should be excused from liability for negligence if they acted irrationally. The uncle had been under a duty of care and the real issue was whether, unwell as he was, he had breached that duty by failing to measure up to the objective standard of care.

The experts had said that the uncle lacked control over his actions, but they meant that he did not have rational control. They were not saying that he had no physical control. His mind, although deluded, directed his actions.[1] His disease did not excuse him from needing to take the care of a reasonable man unless he was not acting or was completely free of any fault, which was not the case.

They held that the judge's conclusion had not been open to him. The uncle had breached his duty of care and was liable to the claimant in negligence. The liability was covered by the insurance policy. The policy excluded cover for any acts which were wilful or malicious. Here the injuries were truly accidental and could not have been wilful or malicious because the uncle had clearly lost control of the ability to make choices and could not be said to have intended to injure the claimant.

The appeal was allowed.

Comment

The Court of Appeal's judgement is absolutely right from a public policy perspective. The categories in which a tortfeasor can escape liability with reference to their physical and mental illness or disability are finite and should not be extended. Where on an objective and reasonable standard there is a duty, and according to the same standards a breach of duty is committed the court should conclude that a breach of duty has occurred notwithstanding any mental or physical illness issue pertinent to the alleged tortfeasor. However, since we are dealing with a tort there has to be some element of wrongdoing. Accordingly, it is only if the defendant can show to borrow words from the judgment of Rafferty LJ he "entirely eliminates responsibility",[2] whether through physical or mental illness or condition, that he will escape liability.

The Court of Appeal unanimously held that only entire elimination will suffice to prevent a breach. Indeed this is a case where the defendant "came very close to complete elimination",[3] but "almost" was not enough. Unless parliament intervenes to change the law the door will remain open for defendants to argue "entire elimination", and should they succeed a defendant will be found not to have breached his duty. The decision is welcome, since through it the Court of Appeal has narrowed cases where the defendant can succeed to an absolute minimum, which is surely desirable.

The post-mortem diagnosed Vince as suffering florid paranoid schizophrenia. The question for the LLJ's was whether this condition rendered him incapable of being in breach of the duty of care.

Vos LJ in his judgment rehearses four elements of the tort of negligence from *Clerk and Lindsell*;[4] a duty of care, breach, a causal connection, and that damage is foreseeable. The question for the court to answer is whether Vincent's mental health negated a breach. All other elements of the tort were clearly satisfied.

[1] *Morriss v Marsden* [1952] 1 All E.R. 925 QBD and *Corr v IBC Vehicles Ltd* [2008] UKHL 13; [2008] 1 A.C. 884 applied.
[2] *Dunnage v Randall* [2015] EWCA Civ 673 at [114].
[3] *Dunnage v Randall* [2015] EWCA Civ 673 at [114].
[4] Professor Anthony Dugdale, Professor Michael Jones, Mark Simpson, QC, *Clerk and Lindsell on Torts*, 21st edn (London: Sweet & Maxwell, 2014), para.8-04

The normal measure of the standard required is that of a reasonable man. It is well established that the standard should not be adjusted to take account of the personal characteristics of the defendant in question. The clear exception is with regard to the liability of children, where the standard of the ordinary, prudent and reasonable child of the defendant's age is substituted.[5] The other exception is where a specific mental state is required as in the case of intentional torts.[6]

The public policy imperative is obvious. It is undesirable that the door be opened to endless examination of the alleged wrongdoers' mental state. The insurer motive in this case is equally and oppositely clear, namely to avoid paying out under their policy for which no doubt an appropriate premium had been paid. The key question answered by this judgement is what degree of fault is required before breach can be established. In this case the insurers through their lawyers sought to require courts to enter a detailed qualitative examination of the tortfeasors mental state. This was rejected.

The LLJs all concluded that there is no different standard to be applied to mental from physical health conditions. A principle first established in *Page v Smith*,[7] which extended the rule as stated in *Smith v Leech Brain & Co*,[8] so as to include psychiatric injury. Various physical examples are referred to by the Court of Appeal. Vos LJ referred to *Waugh v James K Allen*.[9]

In *Waugh* the driver suffered a fatal coronary thrombosis at the wheel of his lorry and killed a pedestrian, but was found not liable in negligence. As in many cases of this sort the question needed to be answered as to whether the defendant appreciated the risk of such a debilitating attack? He was not, therefore no liability was established. In *Dunnage* this is not an issue that was raised, though one wonders if it might have been had the psychiatric experts given oral evidence and had the trial not proceeded on the papers alone.

LJ Vos concluded:[10]

> "if the claimant's injuries are sustained because the defendant suffers some entirely unheralded, unexpected and unforeseen incapacitating attack, then it would be inaccurate and inappropriate to say that the defendant was in breach of a duty of care. He did nothing. Something happened to him, which caused the accident. In the normal use of language, he cannot properly be said to have been in breach of his duty to take reasonable care to avoid injuring the claimant."

In other words the defendant has to be completely without responsibility for the tortuous act for there to be no breach of duty. The Court of Appeal rejected the usefulness of the position in criminal cases presented to it; specifically the M'Naghten Rules[11] applicable to insanity as a defence in criminal cases, and automatism.

They also ultimately rejected the applicability, as opposed to usefulness of the law in other jurisdictions, specifically referring to New Zealand, Canadian and Australian cases, acknowledging that different jurisdictions may legitimately reach different policy positions.

But, as Vos LJ puts it "a line must be drawn".[12] "It is only if the defendant can properly be said to have done nothing himself to cause the injury that he escapes liability".[13] He stated that this reflects the conceptual analysis favoured by at least three of the Justices[14] in the House of Lords in *Corr v IBC Vehicles Ltd*.[15]

[5] *Jackson v Murray* [2015] UKSC 5; [2015] 2 All E.R. 805.
[6] *Dunnage* [2015] EWCA Civ 673 at [155].
[7] *Page v Smith* [1996] A.C. 155; [1995] 2 W.L.R. 644.
[8] *Smith v Leech Brain & Co* [1962] 2 Q.B. 405 QBD.
[9] *Waugh v James K Allen Ltd* [1964] 2 Lloyd's Rep. 1 HL.
[10] *Dunnage v Randall* [2015] EWCA Civ 673 at [127].
[11] *R. v McNaughten* 8 E.R. 718; (1843) 10 Cl. & F. 200 HL.
[12] *Dunnage v Randall* [2015] EWCA Civ 673 at [130].
[13] *Dunnage v Randall* [2015] EWCA Civ 673 at [133].
[14] Lord Scott (at [31]), Lord Mance (at [51]–[52]), and Lord Neuberger (at [65]).
[15] *Corr v IBC Vehicles Ltd* [2008] UKHL 13; [2008] 1 A.C. 884.

"Impairment" versus "elimination" is examined in *Corr* with a conclusion consistent with this case: namely elimination is required, albeit with reference to contributory negligence.[16]

A word is required about the inadequacy of the joint statement expert evidence, and the 26 questions posed to the psychiatric experts. However, the expert evidence did acknowledge that the defendant's actions were directed by his mind (albeit deranged), and the "absence of volition" was placed between 95 and 100 per cent. Vincent fetched the petrol can and lighter. He also stated "Tell me the truth or we are all going to go up".[17] All these factors demonstrated to the court that the defendant did cause the claimant's terrible and tragic injuries, as well as equally tragically costing him his own life.

Similarly, Arden LJ found that the experts in their JS concluded that Vincent was in control, and their references to "control" in fact meant "rational control" referring to the fact that "[t]he experts agree that the acts causing the fire and injury to Mr Dunnage were directed and prompted by (Vince's) mind in its floridly deluded state" (i.e. it was not his healthy mind but his deranged mind that was responsible for causing the fire and the injury to Mr Dunnage).[18]

It was common ground that oral evidence from the experts would probably have assisted the first instance judge. However, at the PTR, HH Judge Madge rejected this although agreed by both parties, and this was not appealed, and prima facie it should have been. It has to be said, the Court of Appeal still felt able to reach its judgement without such evidence. A challenge at a subsequent interlocutory stage to call oral expert evidence also failed earlier in proceedings.

The 26 questions posed and answers given to the joint experts are referred to by Rafferty LJ[19] and from this we can see why the LLJ's felt able to reach a conclusion without requiring a remission of the case for oral evidence to be called. These include towards the end of [32]:

> "Was his capacity to make a reasoned and informed judgement eliminated by reason of his mental condition? Almost certainly eliminated meaning beyond reasonable doubt.
>
> Was his capacity to make such a judgement impaired by reason of his metal condition? It was at least grossly impaired and probably eliminated.
>
> If his capacity to make a reasoned and informed judgement were impaired and on a spectrum between at one end a person of sound mind acting voluntarily and at the other, one whose will and appreciation was completely overborne by his condition, where would he be? On a spectrum between completely healthy volition and absent volition he would likely be at least 95% impaired volition and probably 100% absent volition."

Following this evidence, the question has to be asked whether on the balance of probabilities informed judgement was in fact eliminated. In other words should a finding of "elimination" have been treated as a certainty? If so the defendant would of course have succeed in avoiding any liability.

In *Mallett v McMonagle*[20] the House of Lords confirmed that when considering what has happened in the past, anything more probable than not should be treated as certain, in contrast to the approach to assessing damages. In *Hotson v East Berkshire HA*,[21] the Lords accordingly held that a finding of causation should be made on the balance of probabilities, and then treated as a certainty. On this analysis cases on physical and mental condition on elimination of "responsibility" would prima facie be determined on the balance of probability and on this analysis the *Dunnage* appeal should have failed.

However, it is clear that in *Dunnage* the court reached a different conclusion. How is this so? In this case it meant that since there is "some" doubt that responsibility was eliminated on the part of the apparent

[16] In the context of Law Reform (Contributory Negligence) Act 1945 s.1(1).
[17] *Dunnage v Randall* [2015] EWCA Civ 673 at [136].
[18] *Dunnage v Randall* [2015] EWCA Civ 673 at [144].
[19] *Dunnage v Randall* [2015] EWCA Civ 673 at [32].
[20] *Mallett v McMonagle* [1970] A.C. 166 HL.
[21] *Hotson v East Berkshire HA* [1987] A.C. 750 HL.

tortfeasor, the defendant remained culpable. The court held that on the balance of probabilities that there was a doubt that responsibility was entirely eliminated, and therefore the duty of care was breached.

They were applying the balance of probabilities test on whether there was any doubt as to a "(total) elimination of responsibility". If there is any such doubt on the balance of probabilities the tortfeasor will remain culpable. Here the court determined there was doubt, and therefore there was a breach. This is an outcome few would argue with from a public policy position. Any change to remove even absolute proof of entire elimination of responsibility too as a basis for allowing defendants to escape liability is a matter for parliament. "Entire elimination of responsibility" is a new combination of words. Time will tell whether these words and their derivatives introduce more certainty. My hope and belief is they will.

The injuries in *Dunnage* were accidental. The expert evidence was clear that Vincent did not intend to injure the claimant and therefore the "wilful and malicious act" exclusion to the policy would not apply to prevent the insurer's doubtless primary aim to exclude their own liability, and open the door to themselves and even others in the industry to do likewise through policy inclusions and exclusions.

Practice points

- The *Dunnage* precedent applies to negligence, rather than any claim in damages more widely.
- It will almost always be appropriate for claimants to resist a denial of liability by the defendant on the basis of mental or physical ill health. Claimant practitioners only need expert evidence to demonstrate some element of control to defeat the defendant's argument.
- Conversely, the burden on the defendant is to prove a lack of control that is complete in every aspect; a very onerous burden indeed. Any expert or other evidence of control of body, actions and consequences should suffice to defeat insurer's arguments. The defendant will always have a herculean task to defend on the basis of a lack of control, whether mental or physical.
- Care should be taken to call oral evidence when necessary from experts in such cases, appealing as may be necessary as indeed it was thought to be appropriate in *Dunnage*, albeit attempts were made at least twice to adduce oral evidence. This case is a good authority to refer to in cases where judicial reluctance is encountered.
- There is a need to be clear when posing questions to your medical expert on the question or questions which need to be asked and the evidence required to establish there is a breach.[22]

John Spencer

[22] What the experts in the case would have answered to the questions Lady Justice Rafferty would like to have posed remains unknown since the case was not remitted to the court below for evidence to be called. Presumably, one question would be "whether the defendant's condition entirely eliminated his responsibility".

A v Trustees of the Watchtower Bible and Tract Society

(QBD, Globe J, June 19, 2015, [2015] EWHC 1722 (QB))

Liability—personal injury—breach of duty of care—causation—children—delay—foreseeability—Jehovah's Witnesses—knowledge—limitations—ministers of religion—prejudice—proximity—sexual abuse—vicarious liability

LT Child sexual abuse; Duty to warn; Jehovah's Witnesses; Knowledge; Limitation periods; Ministers of religion; Vicarious liability

The claimant was born in 1985. Between 1989 and 1994, when engaged in religious activities with Peter Stewart,[1] she was subjected to regular sexual abuse by him. She was then between about the ages of four and nine.

In 1990, Stewart admitted that he had abused another child in the congregation (M). According to the defendants' witness statements given in 2014, the elders had warned parents of the need to supervise their children and told them that Stewart had been removed as a ministerial servant. According to the claimant's mother, however, no such warning had been given and Stewart had returned to his previous duties after a few weeks as though nothing had happened. The claimant stated that she had heard her parents talking about the abuse of M around 2002 and had repeatedly sought clarification as to whether the elders knew about it at the time, but to no avail.

She brought proceedings in 2013, claiming that the trustees of the society of Jehovah's Witnesses were vicariously liable for the sexual assaults (the assault claim) and for the actions of the elders who had negligently failed to take reasonable steps to protect her from Stewart once they knew of the abuse of M (the safeguarding claim).

The claimant sought the disapplication of the limitation period under s.33 of the Limitation Act 1980 in relation to the assault claim but contended that the safeguarding claim had been brought within the primary limitation period pursuant to s.11 and s.14 on the basis that she did not have the requisite knowledge to bring that claim until the defendants' witness statements were received. The defendants accepted that Stewart had sexually abused the claimant but denied vicarious liability.

Globe J held that the claimant's complaints up to 2013 had produced no confirmation upon which to act. Her belief that the elders knew of the abuse of M was no more than a suspicion and was not sufficient to justify the issue of proceedings. Accordingly, she did not have sufficient knowledge within the meaning of s.14(1) until the statements were served in March 2014.

In relation to the assault claim, the psychiatric damage suffered by the claimant justified her inability to focus on the prospect of bringing proceedings until 2013.[2] Since Stewart had died and she had no redress against any other prospective defendant, a refusal to disapply the limitation period would mean the end of the action for her. The prejudice she would suffer was not outweighed by any prejudice to the defendants in allowing the claim to proceed. A fair trial remained possible. Accordingly, s.11 was disapplied.

The high level of control over all aspects of the life of a Jehovah's Witness by the judicial committee was at least akin to a relationship between employer and employee. A ministerial servant assisted and deputised for the elders and played an integral role in the organisation. Therefore, the relationship between

[1] Now deceased.
[2] *A v Hoare* [2008] UKHL 6; [2008] 1 A.C. 844 followed.

elders and ministerial servants on the one hand and the Jehovah's Witnesses on the other was sufficiently close in character to an employment relationship that it was just and fair to impose vicarious liability.

Notwithstanding Stewart's removal from the position of ministerial servant in 1990, he had continued to hold himself out as having ostensible authority to carry out his duties in the same manner as before. Therefore, Stewart's sexual abuse of the claimant did not result from mere opportunity, but from his specific role as a Jehovah's Witness.[3] Accordingly, vicarious liability had been established with regard to the assault claim.

By reason of Stewart's admitted conduct towards M in 1990, it was foreseeable that his continued presence within the congregation presented a risk of abuse and harm to other children. The elders had assumed responsibility to take steps to protect members' children from that risk, so that there was a sufficient relationship of proximity between the elders and those children. It was therefore fair, just and reasonable to impose a duty of care upon the elders to protect the children from sexual abuse by Stewart.

The scope of the duty assumed by the elders was to warn the congregation and individual parents about the risk posed by Stewart. However, those warnings had either not taken place at all or were inadequate. The defendants, who had overall responsibility for the society, were vicariously liable for the actions of the elders in relation to their breach of duty in 1990 and were therefore responsible for the abuse of the claimant in the safeguarding claim.

Judgment was entered for the claimant

Comment

Like many religious organisations, Jehovah's Witnesses have been mired in child protection scandals, forced to field allegations that they covered up abuse in the past to protect the Church's reputation.[4] It is then perhaps surprising that this was the first compensation case involving the organisation to find its way to a trial in England.

Certainly the English criminal courts have been no stranger to dealing with paedophiles in the Jehovah's Witnesses' community prior to A's case for compensation: in 2013 it was reported that the congregation of Moston in Manchester allowed a church elder called Jonathan Rose to question the children he had molested in a series of public meetings, following his release from a nine-month gaol sentence for sexual offences against children.[5] In June 2014, Mark Sewell who was an elder of the Jehovah's Witnesses' congregation in Barry, Wales was convicted of rape and other sexual offences against members of the Church, some of whom were children, and was sentenced to 14 years' imprisonment.[6]

The Charity Commission for England and Wales is currently investigating both the Moston and Barry congregations over their child protection procedures, a move which both congregations attempted to resist through judicial review proceedings and appeals to the Charity Commission's Tribunal (and which were all rejected).[7] Those investigations are ongoing. Further, in December 2014 two elders of separate

[3] *Lister v Hesley Hall Ltd* [2001] UKHL 22; [2002] 1 A.C. 215, *Maga v Birmingham Roman Catholic Archdiocese Trustees* [2010] EWCA Civ 256; [2010] 1 W.L.R. 1441, and *Various Claimants v Institute of the Brothers of the Christian Schools* [2012] UKSC 56; [2013] 2 A.C. 1 followed.

[4] See BBC Panorama, "Suffer the Little Children", July 14, 2002. There have been other allegations particularly emanating from the USA—for example see Laura Goodstein, "Ousted Members Say Jehovah's Witnesses' Policy on Abuse Hides Offences", *New York Times*, August 11, 2002, and Corrie Cutrer, "Sex Abuse: Witness Leaders Accused of Shielding Molesters", *Christianity Today*, March 5, 2001. More recently in the UK, see "Jehovah's Witnesses Sex Abuse Scandal: Church Accused of Cover-up to Protect Rapists and Paedophiles", *The Daily Mirror*, October 11, 2014.

[5] This was reported in the *Manchester Evening News*, "Convicted Paedophile Allowed to Grill His Victims at Jehovah's Witness Meeting", Manchester Evening News, May 21, 2014, and by *The Independent* "Jehovah's Witness Abuse Victims 'Quizzed by their Attacker' at Church", The Independent, May 22, 2014.

[6] "Jehovah's Witness Mark Sewell Jailed for Abusing Girls" (July 2, 2014), BBC News, http://www.bbc.com/news/uk-wales-south-east-wales-28127683 [Accessed November 4, 2015].

[7] Sam Burne James, "Charity Commission to Continue Statutory Inquiry into Jehovah's Witnesses Congregation" (April 13, 2015), Third Sector, *http://www.thirdsector.co.uk/charity-commission-continue-statutory-inquiry-jehovahs-witnesses-congregation/governance/article/1342350* [Accessed November 4, 2015].

congregations, one in Bournemouth and one in Plymouth, were convicted and sentenced for the sexual abuse of children.[8]

It is clear that Jehovah's Witnesses are not any more immune from damaging allegations than other organisations, and it is possible that a bigger scandal is waiting to be uncovered, as with the Catholic Church and the Church of England before them. So why did the Jehovah's Witnesses decide to defend this case? As with many "historical" cases, limitation was an issue. As far as the safeguarding claim was concerned, the date of knowledge argument perhaps somewhat surprisingly gained traction with the judge who found that it was not until the claimant had seen the defendant's witness statements served in March 2014 (a year after proceedings had been issued in the claim) that she had sufficient knowledge to bring that claim. Her belief that there may have been some kind of "cover up" and that the elders knew of Stewart's proclivities and could have saved her from his abuse was not sufficient to meet the test by Lord Wilson in *B v Ministry of Defence*[9] that the claimant's belief as to the defendant's culpability for a tort must be held:

> "with sufficient confidence to justify embarking on the preliminaries to the issue of the writ, such as submitting a claim to the proposed defendant, taking legal and other advice and collecting evidence".[10]

In A's case, the additional negligence claim was only added to the particulars once the defendants' witness statements had been received and considered, so after the issue of proceedings for the more straight forward trespass (assault) claim.

The defence to the trespass claim under s.33 of the Limitation Act 1980 followed rather standard lines. The defendants did not dispute that Stewart had abused the claimant over a lengthy period in the way she described. Stewart had admitted abusing a young girl in the congregation (not the claimant) to elders in 1990 and had been convicted in 1994 of abusing a young female relative and a young boy. In 2000, on the claimant's mother learning of her daughter's abuse, she wrote to Stewart and he confessed his crimes. The defendants felt they were prejudiced because Stewart had died before these proceedings (and indeed before any criminal proceedings could be brought for his abuse of the claimant).

The leading case in this area is *A v Hoare*[11] and Lord Brown's judgment on this issue is instructive. Here Globe J found that the defence was able to call all the witnesses they would have been able to call had the case been brought strictly in time—no witnesses had died during the period of delay. Equally, no documents of any relevance had been destroyed or lost during the period of delay. The judge correctly directed himself that he must have regard not only to the prejudice that may have been caused from the time when the action should have been brought but also to the whole period from cause of action to issue. However a fair trial remained possible. There were good reasons why the claimant had been unable to commence proceedings earlier, due to her mental health problems which were the subject of the claim. Having admitted that the abuse happened in the way alleged, it was a rather uphill argument for the defendants to mount to convince the judge not to exercise his discretion in favour of the claimant, particularly in view of the other circumstances in the case.

Having lost on limitation, the defendants fought further on the issue of vicarious liability, which has been dissected and determined in favour of claimants everywhere in similar (even weaker cases) recently. When the judge considered the test as expounded by Lord Phillips in *Various Claimants v Institute of the Brothers of the Christian Schools*[12] and applied in *E v English Province of Our Lady of Charity*,[13] the

[8] See "Jehovah's Witness Jailed for Five Years for Indecently Assaulting Young Girls", *Bournemouth Echo*, December 22, 2014 and "Mother Reveals Torment as Jehovah's Witness is Jailed for Sexually Abusing her Daughter", *Plymouth Herald*, December 19, 2014.

[9] *B v Ministry of Defence* [2012] UKSC 9; [2013] 1 A.C. 78.

[10] Lord Nicholls in *Haward v Fawcetts (A Firm)* [2006] UKHL 9; [2006] 1 W.L.R. 682, quoted with approval by Lord Wilson in *B v MoD* [2013] 1 A.C. 78 at [12].

[11] *A v Hoare* [2008] 1 A.C. 844.

[12] *Various Claimants v Institute of the Brothers of the Christian Schools* [2012] UKSC 56; [2013] 2 A.C. 1.

[13] *E v English Province of Our Lady of Charity & another* [2012] EWCA Civ 938; [2013] Q.B. 722.

relationship that a ministerial servant had to the governing/controlling body of the Jehovah's Witnesses was closer on the facts than that of a brother in a religious order (*Various Claimants*) or a Catholic priest to his bishop (*E*).

This vicarious liability test is the four-pronged approach to consider the elements of "control", "organisation", integration" and "entrepreneurship" (or the lack of them). Globe J found there was a high degree of control here, even more so than in a traditional employment relationship; a bishop certainly had less control over his priest. The Jehovah's Witnesses are as hierarchical as any institution of the Catholic Church and there is prescriptive guidance as to how elders and ministerial servants should behave which satisfied the organisation test. A ministerial servant like Stewart would perform important functions facilitating the work of the Church and assisting—even standing in for—the elders where necessary, and so the integration test was met: "a ministerial servant is part and parcel of the organisation and integral to it."[14] Was Stewart more like an entrepreneur or an independent contractor? Certainly not: "He is constantly working for the good of the organisation of Jehovah's Witnesses and not for himself."[15] It was therefore right to find the abuser Stewart in a relationship akin to employment with the governing body of his Church.

The judge then had to consider the synthesis between the employment relationship and whether the acts of sexual abuse were somehow connected to that relationship so as to confer vicarious liability upon his employers. Reference was made to the leading case of *Lister v Hesley Hall Ltd*[16] and more recently in an ecclesiastical context *Maga v Archbishop of Birmingham*.[17] In the latter case at [46], Lord Neuberger felt that the priest was "never off duty" in the context of a priest abusing a child who was not a Catholic and not part of the congregation.

The claimant A in this case was very much a member of the Jehovah's Witnesses congregation and Stewart had an integral role within that congregation as a ministerial servant. He would stand in for elders at bible study meetings, and he would take the claimant on field service missions, evangelising to others and spreading the word of God. He used his position to ingratiate himself with the claimant's mother, a devout member of the congregation, and to gain access to and abuse the claimant under the guise of shepherding her in the ways of the Church. The connection here between what he was employed to do, and what he was actually doing, was clearly close enough to establish liability.

The practices of the Jehovah's Witnesses are said by some to be a real barrier to members of the congregation reporting allegations of abuse. In particular, where a member of the Church denies an allegation of sinfulness, there must be two witnesses to his sin, else no finding of sinfulness can be made by the elders. Abusive relationships are, of course, rarely witnessed. In this case, however, Stewart had admitted to the abuse of a child. It was felt by the elders who interviewed him that he showed repentance and could therefore remain in the congregation but not as a ministerial servant. However the evidence that the judge accepted is that he was stopped for a few weeks from taking classes and leading field trips, and then returned as if nothing had happened. The congregation were not told of the subject of his confession (in accordance with the Church's normal rules) and he continued to act as a ministerial servant of the Church with unlimited access to other children in the congregation, until his arrest in 1994. It was during this crucial period when the claimant was being abused. Not surprisingly, the judge found that the elders—who knew that Stewart was a confessed paedophile in 1990, who did nothing to remove him from his office or their congregation, and did not warn their congregation of the dangers he posed to their children—were also liable to the claimant for a breach of their duty of care.

The elders did not report Stewart to the police on hearing his confession in 1990. Confessions place all churches in a difficult position because, on the one hand, there is the issue of confidentiality (and for

[14] *A v Trustees of the Watchtower Bible and Tract Society* [2015] EWHC 1722 (QB) at [69] per Globe J.
[15] *A v Trustees of the Watchtower Bible and Tract Society* [2015] EWHC 1722 (QB) at [70].
[16] *Lister v Hesley Hall Ltd* [2002] 1 A.C. 215.
[17] *Maga v Birmingham Roman Catholic Archdiocese Trustees* [2010] EWCA Civ 256; [2010] 1 W.L.R. 1441.

Catholics the need to uphold the sanctity of the confessional), and on the other the protection of children and upholding the law of the land. Currently there is no criminal sanction for failing to report. However, there has been much debate in Parliament and elsewhere on making reporting to the police mandatory in such cases.[18] If enacted, this may signpost churchmen and others as to their correct course, and do much to vitiate the temptation to cover up abuse for the sake of an institution's reputation.

It is reported that the claimant in A was awarded agreed damages of £275,000. The defendant is seeking permission to appeal.

Practice points

- Section 14 (date of knowledge arguments) still have a place in child abuse claims in certain circumstances and practitioners would do well to revisit the test formulated by Lord Nicholls in *Haward v Fawcetts* and Lord Wilson in *B v Ministry of Defence*.
- "The law of vicarious liability is on the move" said Lord Phillips in the *Various Claimants v Institute of the Brothers of the Christian Schools* case. "Close connection" to employment and "relationships akin to employment" may now give rise to a liability, whereas previously they may not have done. Recent child abuse claims such as *Various Claimants*, *E v English Province of Our Lady of Charity* and *Maga v Archbishop of Birmingham* have been instrumental in developing the law in this area in very recent times.
- Watch out for news on making mandatory reporting of child abuse a criminal offence, which campaigners anticipate to be a likely recommendation of the Goddard inquiry into child abuse in England and Wales.

Jonathan Wheeler

Maccaferri Ltd v Zurich Insurance Plc

(QBD (Comm), Knowles J, June 19, 2015, [2015] EWHC 1708 (Comm))

Personal injury—product liability—indemnification—insurance—insurance policies—insured event: notification

Insurance policies; Insured event; Notification; Product liability

Mr McKenna sustained an eye injury at work when using a Spenax gun to attach wire caging together. He sued his employer. The employer sued the insured, from whom the gun had been hired. Clause 2 of the insured's policy stated that:

> "The Insured shall give notice in writing to the Insurer as soon as possible after the occurrence of any event likely to give rise to a claim."

The accident happened in September 2011. The insured was told of the claim against it in July 2013 and it notified the insurer shortly afterwards. The insurer refused to provide an indemnity on the ground that the insured had not given notice as soon as possible after the accident, as cl.2 required. The claimant

[18] See for example Baroness Walmsley's amendment to the Serious Crime Bill 2014 tabled in the House of Lords on the October 28, 2014, supported by the Bishop of Durham and others. The amendment was withdrawn upon receipt of a promise by the Government to consult on mandatory reporting—that consultation is still awaited.

insurer sought a declaration that the defendant insurer was obliged to indemnify it under a public and product liability policy.

Knowles J held that when cl.2 used "likely to give rise to a claim" to describe an event that would engage the clause, it described an event with at least a 50 per cent chance that a claim against the insured would eventuate.[1] The words "as soon as possible" in cl.2 did not indicate that the obligation to notify arose when an insured could with reasonable diligence discover that an event was likely to give rise to a claim. Those words simply referred to the promptness with which the notice was to be given if there had been an event likely to give rise to a claim. That was the agreement by which the parties were bound. There was no room for a continuing assessment of claim likelihood to be required of a policyholder when the policy did not provide for it.

The judge held that on the evidence, when the accident occurred, there had not been at least a 50 per cent chance that a claim against the insured would eventuate. It had been a possibility that the accident had involved a fault in the gun, but it was also possible that there had been a fault in the use of the gun, or no fault at all. The insured had not been blamed at the time.

The possibility of a claim was not enough to engage the obligation in cl.2. There had therefore been no failure on the insured's part to comply with the condition precedent to the insurer's liability. The insurer was obliged to indemnify under the policy. The declaration was granted in favour of the claimant.

Comment

A successful outcome for a claimant bringing a personal injury action is dependent upon the proposed defendant having both a legal liability to pay damages and the practical ability to pay the money. The defendant's ability to pay will often be in doubt if they do not have the benefit of insurance cover. The current case is concerned with those circumstances in which an insurer can refuse cover because the policyholder has not given the required notice of a claim.

The claimant in this case was a company that hired out equipment for the construction industry. They had taken out a public and product liability insurance policy with the defendant insurance company which covered these activities. The policy required prompt notification to the insurer of both: (i) any claim being made against the insured; and (ii) any event occurring "likely to give rise to a claim". An individual was injured in an accident at work whilst using equipment which their employers had hired from a party who in turn had hired it from the claimant company. The injured worker sued his employers, who in turn sued the company they hired the equipment from, who then brought a claim against the claimant company. Nearly two years had elapsed between the accident and the claim being put to the claimant company. The claimants notified their insurers at that stage. The insurers argued that the claimants had breached a condition precedent of the policy by failing to notify them at an earlier stage. They refused cover claiming that the accident was an event "likely to give rise to a claim" which engaged the notification requirements.

Mr Justice Knowles found that in this context the likelihood of a claim cannot simply be inferred from the happening of an accident. The *possibility* of a claim was not sufficient to engage the notification requirement. For an event to be "likely to give rise to a claim" there had to be at least a 50 per cent chance that a claim against the insured would eventuate. Thereafter, he held, there was no obligation for a continuing or rolling assessment of the likelihood of a claim arising out of the event. Consequently he found that on the facts of the case there had not been a failure to comply with the notification requirements and the insurers were not entitled to refuse cover.

This case involved a dispute between an insurer and a policyholder. There are further considerations that arise when one is acting for an injured party in a claim against a defendant whose insurers are refusing cover. In road traffic claims the defendant's failure to give proper notice to their insurers is generally not

[1] *Layher Ltd v Lowe* 58 Con. L.R. 42 and *Jacobs v Coster (t/a Newington Commercials Service Station)* [2000] Lloyd's Rep. I.R. 506 applied.

an issue of concern as claimants retain the ability to recover damages from the insurer under the provisions of the Road Traffic Act 1988.[2] Likewise in employers' liability claims, where insurance cover is compulsory and regulated by statute, an employer's failure to comply with notification requirements cannot be grounds for the insurer to avoid the policy.[3] But for all other general public liability policies a failure to comply with notification requirements can potentially lead to a valid refusal to indemnify. The absence of insurance cover may be fatal to the claim unless the defendant has sufficient means to pay.

In such situations where the insurer is refusing to indemnify the defendant, the claimant faces a number of practical problems. The claimant will not be party to the communications between the insurer and the policyholder. They may not be able to gain access to the insurance policy to assess the requirements and conditions contained within it (see *XYZ v Various Companies*[4] for a review of the authorities considering whether disclosure of the relevant insurance documentation can be ordered). Attempting to assess if the insurer is indeed entitled to refuse to indemnify can be problematic.

Under the provisions of the Third Parties (Rights Against Insurers) Act 1930, a claimant can in certain circumstances enforce rights under a contract of insurance against the insurer. It is important to note that under the 1930 Act they cannot be placed in a better position than the party that took out the insurance. Therefore, if the insurer had the right to avoid the policy, this is binding on the claimant.

It is worth noting in this context that the position with late or non-notification of claims by policyholders is altered by the provisions of the Third Parties (Rights against Insurers) Act 2010. Under s.9 of the 2010 Act, notification of the claim by the third party will be treated as if it had been given by the insured.[5] However, the 2010 Act has yet to be brought into effect and at present no implementation date has been set.

Practice points

- A defendant's failure to comply with a clause making prompt notification of the claim a condition precedent of the policy will permit the insurer to avoid the policy.
- Not all insurance contracts have the same notice provisions nor are they always a condition precedent of the policy. The question of non-compliance entitling the insurer to refuse cover is a matter of the proper construction of the individual contract of insurance. It is important to consider the policy itself to assess the issue.

Richard Geraghty

[2] Road Traffic Act 1988 s.151
[3] Employers' Liability (Compulsory Insurance) Regulations 1998 reg.2(1)(a)
[4] *XYZ v Various Companies* [2013] EWHC 3643 (QB); [2014] 2 Costs L.O. 197.
[5] Third Parties (Rights Against Insurers) Act 2010 s.9(2) provides: "Anything done by the third party which, if done by the insured, would have amounted to or contributed to fulfilment of the condition is to be treated as if done by the insured."

Case and Comment: Quantum Damages

Casey v Pel-Air Aviation Pty Ltd

(NSWSC, Schmidt J, May 15, 2015, [2015] NSWSC 566)

Damages—torts—plane crashes—negligence of airline operator—bodily injury—injury to the mind—psychiatric disorders—PTSD—Montreal Convention art.17

LT Air accidents; Carriers' liabilities; International carriage by air; New South Wales; Personal injury; Post-traumatic stress disorder

In November 2009 CareFlight (NSW) Ltd sent a nurse and a doctor in its employ, Ms Karen Casey and Dr David Helm, from Sydney to help transport a seriously ill patient and her husband from Samoa to Melbourne. They were then to return to Sydney. The plane was operated by Pel-Air Aviation Pty Ltd. On the flight to Melbourne the plane was scheduled to land at Norfolk Island to refuel. It crashed during that leg of the flight and Ms Casey and Dr Helm were both seriously injured. They both claimed damages from Pel-Air.

The weather at Norfolk Island that night was so stormy, that over some 45 minutes four attempts to land were aborted. Eventually the pilot decided to ditch the plane into the ocean, advising the passengers that it had almost run out of fuel. Remarkably, all six people aboard the plane survived the resulting crash, but the plane soon sank.

A life raft had not been deployed and so the survivors all had to remain afloat in heavy seas, in the darkness, with no lights, no beacons or any form of communication. They were all rescued after some 90 minutes, by a fishing boat, which had set out from Norfolk Island.

Before it hit the water, the plane was travelling at such speed that the violence of the impact caused it to break up behind the wings. Both Ms Casey and Dr Helm had prepared themselves for the impact by putting on life jackets, using their lap seat belts and adopting the brace position. Still, they were flung violently around in their seats during the crash, each suffering injuries as a result, Ms Casey's more serious than those which Dr Helm suffered.

After the crash, they were together in the back section of the sinking plane with the patient. Ms Casey was trapped in her seat by her seatbelt. Water was rising quickly and both she and Dr Helm were in pain from their injuries. Luckily, both Dr Helm and Ms Casey were very fit. They were able to attend to the patient, who was strapped into a stretcher. No life jacket could be found for her and she needed their help to get out of the plane. Together Ms Casey and Dr Helm managed to free the patient, while Ms Casey remained trapped in her seat.

After Dr Helm and the patient escaped, Ms Casey also managed to free herself. She swam to the emergency exit, inflated her life vest and jumped into the ocean, where she was struck in the head by the wing of the plane. Only half of her life jacket inflated. She tried unsuccessfully to further inflate the jacket manually and then swam to join the others.

Ms Casey and Dr Helm assisted the others who were then all in the water, but who had no life jackets, to remain afloat. Ms Casey supported the patient by herself, with considerable difficulty because of the state of her vest and her injuries, for some 70 minutes. She described the state that she was in during that

time to have been cold, wet, in considerable pain, fatigued, terrified, swallowing water and vomiting, and beginning to drift into unconsciousness, when they were finally rescued.

Dr Helm supported the co-pilot during the time they were in the water, as well as trying to help keep the patient calm, in what he described as having been quite extraordinary circumstances. Dr Helm was shaken, distressed and severely bruised, when rescued. He did not suffer any permanent psychological injury. The pain in his back, however, gradually worsened over time. In Dr Helm's case, it was only the assessment of certain of the damages which he claimed which were finally in issue.

Ms Casey was initially treated at Norfolk Island Hospital for hypothermia, shock and pain and then evacuated, while sedated, by CareFlight to Sydney, where she was admitted and treated at Nepean Hospital, for a range of physical injuries for which she received ongoing treatment. In addition she suffered psychiatric injuries (post-traumatic stress disorder ("PTSD")).

Ms Casey and Dr Helm were injured as passengers on a plane. The flight was "international carriage" to which the Montreal Convention for the Unification of Certain Rules for International Carriage by Air 1999 applied. The issue was Ms Casey's PTSD. The defence case was that the PTSD was a psychiatric disorder which had been caused by the trauma which Ms Casey had experienced during the crash. They said that it was not a "bodily injury" falling within art.17 of the Montreal Convention.[1]

Justice Monika Schmidt in the NSW Supreme Court did not agree. She ruled that a person who was seriously injured in a plane crash has the right to claim damages for PTSD from the air operator. The judge accepted that the definition of the words "bodily injury" could include PTSD.

On the basis detailed assessment of all of the evidence, the court came to the conclusion that the PTSD which Ms Casey developed was not merely the result of an injury to her mind, caused by the shock, fear and other emotional trauma caused by the crash. On the balance of probabilities Ms Casey's PTSD also involved an injury to her brain and other parts of her body involved in normal brain function. This was a psychiatric injury caused by a physical route.[2]

The court therefore ruled that the nurse's PTSD was a "bodily injury" under art.17 of the Montreal Convention, and as a result she was entitled to compensation for her losses arising from this condition, as well as her other injuries.

Comment

If the facts of this case had been put in a film they would not have been believed. The two claimants' (Ms Casey's colleague also pursued a claim for personal injuries) experiences were extraordinary but then there was subsequent controversy over the crash investigation and then finally the legal damages recovery point. Unusually for the crash investigation there was considerable criticism of the conduct and procedures of the Australian Transport Safety Bureau leading to their determining that the aircraft captain was to blame for the accident.

Their report was discredited by a review of the Australian agency's procedures by the Transportation Safety Board of Canada, and this caused it to be withdrawn. These actions followed the Bureau having prepared its report after the completion of its investigation without the benefit of the flight data recorder. This remained on the sea bed because the Bureau refused to go and get it. A subsequent inquiry by the Australian Senate criticised the Bureau's chief commissioner and found that the aviation safety regulator, the Civil Aviation Safety Authority had suppressed an internal review which found that had it carried out its duties appropriately and thus noted several breaches by the airline of safety regulations then the accident might have been prevented.

[1] Enacted into the local law by the Civil Aviation (Carriers Liability) Act 1959 (NSW).
[2] As Lord Hope discussed in *King v Bristow Helicopters Ltd* [2002] UKHL 7; [2002] 2 A.C. 628.

Ms Casey's non-physical injuries included a complex pain syndrome, a major depressive and anxiety disorders and a PTSD.[3] In written and then oral submissions the defendant conceded all of the injuries save PTSD were compensable within the relevant legislation. The defendant's primary contention and which this judgment centred upon was,

> "even though the evidence established that Ms Casey had suffered serious physical injuries during the crash, that being the traumatic event which had caused her PTSD, the evidence did not establish that this disorder had either been caused by those physical injuries, or that the crash had caused any physical injury to Ms Casey's brain itself, of which her PTSD was a manifestation. In the result, it contended that she was not entitled to damages for the treatment she had received for PTSD and that her damages otherwise had to be assessed without regard to the consequences of that PTSD."[4]

Most external observers examine this judgment for the application of the international convention but in fact the court was examining Australian legislation, the Civil Aviation (Carriers Liability) Act 1959. The two issues were whether this act intended to depart from the Montreal Convention to include a broader scope of the definition of an injury and thus whether Ms Casey's PTSD was compensable under the Act?

The Montreal Convention 1999 updated the Warsaw Convention from 1929. Unfortunately the former chose to retain the archaic expression "bodily injury". The Convention's original language was French and the words used were "*lesion corporelle*". Many argue that this expression in 1929 reflected a lack of knowledge of psychological injury. There was no other reason why the injuries that should be compensated would exclude arguably the second most likely injury after a fracture arising from survival of an air crash.

The expression was examined in various jurisdictions during the 1980s and 1990s. The defining and most restrictive view was in the US where the Supreme Court decision in *Eastern Airlines Inc v Floyd*[5] held art.17 did not permit recovery for mental injury unaccompanied by physical injury. In Australia *Kotsambasis v Singapore Airlines Ltd*[6] the New South Wales Court of Appeal followed Floyd and held that bodily injury in art.17 did not include purely psychological injury.

However there was an advance in the US with *Weaver v Delta Airlines*[7] where the uncontradicted medical evidence was that extreme stress could cause actual physical brain damage. The judge observed, at p.1192, that "fright alone is not compensable, but brain injury from fright is". In other words, if it is accepted that the psychological reaction causes actual brain changes then it constitutes a bodily injury.

In the Britain the Supreme Court[8] dealt with a conjoined appeal of *King v Bristow Helicopters Ltd* where the claimant survived his helicopter crashing into an oil platform with no physical injuries, but developed a PTSD followed by a stomach ulcer and *Morris v KLM Royal Dutch Airlines* where a minor girl was assaulted by a passenger and suffered a psychological injury.

In the end the court would not re-examine the Convention with a modern interpretation and held that art.17 simply meant injury to a passenger's body which included injury to a passenger's brain or central nervous system, but shock, anxiety, fear, distress, grief and other emotional disturbances alone did not fall within art.17.

The court further acknowledged that whilst mental injury, or illness unaccompanied by physical injury, did not fall within art.17, it did not mean that mental injury caused by physical injury could not be included in a claim and, equally, if mental injury in turn caused physical injury that injury would fall under art.17. Lord Hobhouse suggested that if a passenger could prove that his or her brain was damaged as a result of the accident, the passenger would have suffered bodily injury. He felt that such a finding would not

[3] *Casey v Pel-Air Aviation Pty Ltd* [2015] NSWSC 566 at [16].
[4] *Casey* [2015] NSWSC 566 at [20].
[5] *Eastern Airlines Inc v Floyd* 499 U.S. 530 (1991).
[6] *Kotsambasis v Singapore Airlines Ltd* (1997) 42 NSWLR 110.
[7] *Weaver v Delta Airlines* 56 F.Supp. 2d 1190 (D. Mont. 1999).
[8] *King v Bristow Helicopters Ltd* [2002] UKHL 7; 2 A.C. 628.

contradict the *Floyd* decision, the court having recognised the necessity of international consistency of approach. Neither claimant offered any evidence to support a physical change to the brain and so *Weaver* was not considered. The judge in *Casey* cited this case.

Ms Casey contended that the Australian legislation had amended the application of the Montreal Convention and so the court was not constrained by the historic interpretation of the Convention. The court noted that where the legislation had sought to move away from the Convention it had expressly identified it doing so. On "bodily injury" there had been a change in the implementation of the legislation where "physical injury" was replaced with "bodily injury". The court considered this reinforced the application of the Convention. However, the court went on to say that this interpretation did not preclude PTSD from being a compensable injury.

> "the evidence establishes that the PTSD which Ms Casey suffers and for which she also has been unsuccessfully treated, is consequent on damage to her brain and to other of her bodily processes, which have had the result that her brain is no longer capable of functioning normally. Either the PTSD is at least in part a manifestation of that damage, or that damage has caused or contributed to the PTSD, or there is a combination of such cause and effect, which has put Ms Casey into the position she is now in. Whichever it is, the result is that the PTSD which Ms Casey suffers, is a compensable bodily injury."[9]

Whilst attention has focussed on the suggestion, wrong in the writer's opinion, that the court was setting a new precedent and interpretation of the Convention, in fact the medical evidence offered is the really interesting issue:

> "149. The experts also explained their clinical application of developments in neuroscience, which have led to an increased understanding by practicing clinicians such as they, of the role which neurotransmitter chemicals play in brain function and in the development and treatment of psychiatric disorders, including depression, anxiety and PTSD. Those advances have been accompanied by advances in neuropharmacology which they use to treat such disorders. Research and understanding of brain functioning continues to evolve, as does understanding of the mechanics of how such pharmacological treatments work, in clinical practice.
>
> 150. It is now known that certain psychiatric disorders are caused by alterations in neurotransmitter pathways in the brain and that the pharmacological treatments used to treat these disorders work by altering neurotransmitter pathways, which are malfunctioning. How particular patients respond to medication and treatments prescribed by clinicians differs. Effective treatment still has to be determined clinically, with each patient.
>
> 151. This evidence shed considerable light on significant objective evidence that revealed that not only had Ms Casey's mind initially been adversely affected by her understandable distress and the other emotional reactions she had, to what she had experienced during the crash and its aftermath, but that amongst the many bodily injuries which she suffered were injuries which damaged the ability of her brain to function normally. Despite ongoing intensive treatment, her body has never been able to recover its normal functioning."

Thus in these three paragraphs the court summed up why it was able to follow the lead given by the courts in *Weaver* and *King*. That being said, if there is an appeal there must be a real prospect of the decision being overturned on the court's interpretation of the medical evidence. Because although there was long discourse cited in the judgment of the opinions of the various medical experts, it may be said

[9] *Casey* [2015] NSWSC 566 at [109].

that in the end their conclusion did not warrant the judge determining that on the balance of probabilities the PTSD was a bodily injury.[10]

This decision so long as it remains does not set a new legal precedent or interpretation of the Montreal Convention but an interpretation of the current law brought about by a narrow view of the medical evidence specific to this case.

Practice points

- Air incidents require careful examination of the relevant statutes and the Montreal Convention to ensure damages can be recovered.
- Non-physical injuries warrant the medical evidence to be framed within the international interpretation of the "bodily injury".

Mark Harvey

Hassan v Cooper

(QBD (Preston), Judge Butler QC, March 2, 2015, [2015] EWHC 540 (QB))

Road traffic accidents—exemplary damages—fraudulent claims—dishonestly exaggerated claims—insurers—measure of damages—Pt 20 claims

Claims management; Exemplary damages; Fraudulent claims; Measure of damages; Road traffic accidents

In this case, the defendant to a claim for damages for personal injury and loss arising out of a road traffic accident sought to recover damages in the form of exemplary damages against the claimant in that original action and against the claims management company, now in liquidation, called Accident Claims Consultants Ltd which promoted and supported that claim.

A road traffic accident occurred at the junction of Lytham Road and Inkerman Street in Preston on the morning of Sunday January 15, 2012. It was a genuine collision between Mrs Sayera Hassan's car and Mrs Sandra Cooper's car. Mrs Hasson was making a right turn into a street out of which Mrs Cooper was turning, and the two vehicles collided. It was conceded from the outset that Mrs Cooper had been the negligent driver.

The very next day, Mrs Cooper told her insurers that that was the case. Two days later on January 17, 2012, a claim was made on behalf of Mrs Hassan by a firm of solicitors called Barber & Co. Initially, Mrs Cooper's insurer, Esure, had no suspicions or concerns. What made them suspicious was that when the ultimate invoice appeared for the repairs, the repairs had cost precisely £3,598, the same amount as the estimate. In addition by then there was a claim for credit hire exceeding £40,000, the whole benefit of which, as the judge put it, financially went to the relevant credit hire company, "which in this case was plainly one and the same as the claims consultancy firm". This raised the suspicions either of Esure or of its solicitors, Keoghs.

However, by that time, Esure had already agreed to pay, in order to allow Mrs Hassan to mitigate, a sum equivalent to the estimated cost of repairs. They did that on August 30, 2012. On August 30, 2012,

[10] "229. The experts also did not consider it helpful to seek to distinguish between physiological changes in the brain associated with the event which had caused these changes, and the chronicity of that illness."

a cheque was drawn in favour of Mrs Hassan, not in favour of her solicitors or the supposed repair company or the accident claims company.

Receipt of that cheque was acknowledged by Barber & Co on September 14, 2012. An invoice to prove the repairs was requested. Eventually, one was provided on February 20, 2013, purportedly prepared by a company called "Duchy Car Body", or "Duchy Car Body Repairs". That invoice raised suspicions when the insurers for Mrs Cooper checked with the company in question, based in Bamber Bridge, Preston. They were informed by its proprietor, Mr Johnson, that the invoice was not an invoice prepared by that company. It was in the wrong form for one thing and there was no record of the firm having repaired Mrs Hassan's Mercedes motor car.

Proceedings were commenced by Barber & Co. When the revelation about the invoice came to pass it was decided by the insurers for Mrs Cooper to amend their defence to seek to plead that there was a fraud or conspiracy and also to seek to add the claims management company since, as the judge put it, "as ever in these cases, it was the claims management company ACC that had been plainly doing the running in terms of provision of documents to Barber & Co". Before the case came to court, ACC went into liquidation. Summary judgments were entered for Mrs Cooper in her capacity as Pt 20 claimant against the company and Mrs Hassan as Pt 20 defendants for damages to be assessed. Mrs Cooper then sought to recover exemplary damages.

The judge held that an exemplary damages award should be made against the claims management company. It was a very serious falsely exaggerated claim. The company had made a deliberate and unconscionable attempt to defraud the insurers and to mislead the court, and a deliberate attempt to intimidate a witness. It was right to make a punitive order and the damages had to be calculated by reference to the amount that the company had sought to obtain by fraud, to include the claim for costs.

Mrs Hasson had actively supported the fraud, even though she was an innocent party initially, and may have had a modest claim. If properly and honestly presented that might have produced a small sum of money for her in addition to the repairs to her car. In her evidence she hinted that she had signed various statements even though she knew them to be false, or feared they were false, or had no real belief in their truth. In the circumstances, the judge concluded that there should be an exemplary damages award against her.

The fact that there was what the judge called "an epidemic of false road traffic accident claims" had to be borne in mind when considering exemplary damages.[1] Mrs Hasson was ordered to pay exemplary damages assessed in the sum of £7,250. The company was to pay exemplary damages assessed in the sum of £60,000. The two awards were cumulative, but the Pt 20 defendants were only liable for the awards against them severally. Mrs Hasson had a perfect 9-9-9 credit score. She was allowed to discharge the judgment fully within a month or by making 29 instalments of £250 per calendar month.

Comment

I can't help it, but cases like this make me cross; and claimant solicitors who deny that fraud is a real issue make me angry. I remember a time when motor claims were relatively straightforward. This case highlights just how dirty and rife with fraud the motor claims process can be.

It beggars belief that a simple collision at a junction on January 15, 2012 could result, as stated in the pleadings issued in December 2012, in:

- repairs of £3,598;
- hire of £42,045.12; and
- recovery and storage of £5,808.

[1] *McIntyre v Home Office* , unreported, January 30, 2014 CC (Liverpool) considered.

A total of £51,451! The sad fact is that £42,000 hire bill is not the largest credit hire claim I have seen or commented on in this journal. In addition, damages for injury were also claimed.

The larger the claim the more likely it is to be subject to scrutiny and in this case Pt 18 questions were used to address the issue of repair. In reply the claimant stated that repairs started on September 3, 2012 and were completed eight days later. A repair invoice, for precisely the same amount as the estimate, was submitted in support. So far so good. However, enquiries with the owner of the garage that was alleged to have undertaken the repairs confirmed that the garage had not completed the repairs and that the invoice submitted was a fabrication and looked nothing like the invoices the garage used. Helpfully, the garage owner provided a statement to this effect which was then disclosed.

Following service of the statement, "representatives" of the credit hire company, Accident Claims Consultants Ltd, called on the garage owner and asked him to sign a statement of retraction. He refused and made a further statement to the defendant solicitors outlining what had happened. Remember that I said at the start of this piece that motor claims can be a dirty world? To illustrate the point, the garage owner was then subjected to harassment and intimidation in an attempt to have him retract the statements.

In the meantime, although the matter was listed for trial, the trial date was vacated following an application allowing the defendant to join Accident Claims Consultants Ltd in the proceedings and for a Pt 20 claim in the tort of deceit to be made against both Accident Claims Consultants Ltd and the Claimant. Exemplary damages against both parties were sought. In defence to the Pt 20 claim, it was admitted that the repair invoice had been prepared by the credit hire company. This undermined that claimant's own credibility as throughout she had insisted that the car had been repaired as per the estimate and invoice submitted as evidence.

Summary judgement was obtained against the claimant in respect of the claims for hire, repairs, and recovery and storage charges. The claimant was ordered to repay interim payments already made in respect of the car repairs. Accident Claims Consultants Ltd did not file documents in defence of the Pt 20 claim and their defence was struck out. Subsequently, at an uncontested hearing, judgment in respect of the tort of deceit was obtained with exemplary damages to be assessed.

By the time of the assessment hearing, the claimant's solicitor had come off record and she appeared unrepresented. Further revelations as to the extent of the deceit and fraud were made by the claimant at the hearing. When it came to assessing damages, HH Judge Butler said:

> "exemplary damages … are not principally compensatory. They involve an element of punishment. They are intended to make a party who has been guilty of unconscionable conduct suffer, to teach that person a lesson that tort does not pay, but also to deter others who might be similarly minded, tempted, or weak-willed enough to go along with such claims in a future situation."

I think the last point about "going along with such claims" sums up many of the ills in the motor claims process—a kind of "everyone else does it so why not me". That does not mean that the genuinely injured and genuine claimants should not be compensated but that the whole process is about money and has reached epidemic proportions. This is clearly something that HH Judge Butler recognised and was in his contemplation when he assessed damages.

Assessing damages for exemplary damages is perhaps more of an art than a science. In *AXA v Jensen*[2] the court decided that the caution given by the police following a fraudulent insurance claim in respect of theft of a caravan was insufficient and awarded 50 per cent of the £8,100 paid in respect of the alleged theft. *Tasneem v Morley*[3] involved nine "crash for cash" claims. The court was invited to make awards for exemplary damages and an additional £1,000 each in respect of investigation costs. The court held

[2] *AXA Insurance UK PLC v Jensen* , unreported, November 10, 2008 CC (Birmingham).
[3] *Tasneem v Morley* , unreporte,d September 30, 2013 CC (Central London).

that deliberately causing a crash was outrageous and dangerous act done purely for profit. A tariff approach of £2,000 in respect of the drivers and £1,000 in respect of each of the passengers was awarded.

In this case it was decided that it was appropriate to award exemplary damages against both Hassan and Accident Claims Consultants Ltd. As per HH Judge Butler:

> "in my judgement, this was a very serious false exaggerated claim. In terms of the second Part 20 defendant, ACC, it seems to me that there was not only a deliberate and unconscionable attempt to defraud the insurers of Mrs Cooper, and Mrs Cooper herself, and to mislead the court, but a deliberate attempt, even when caught out, to try and intimidate a witness … even after ACC had been joined, they saw fit to put in an utterly incredible, and I find dishonest, defence…it is hard to imagine a more serious case."

Against this backdrop, exemplary damages of £7,250 were awarded against Mrs Hassan and £60,000 against Accident Claims Consultants Ltd.

Although examples of defendants and their insurers seeking exemplary damages predate the introduction of qualified one-way costs shifting ("QOCS") it is quite likely that there will be an increasing number of such actions. Fraud is an increasing problem and, as officers of the court, it is something that all claimant solicitors should be fully alive to.

Practice points

- Be alive to the risk of your firm being the vehicle for a fraudulent claim. This is something that should be high on your "risk register".
- Carry out what due diligence you can in respect of your own clients. The reputational risks of getting caught up in fraud claims can be very damaging to say nothing of the lost value of work in progress.
- Question things that don't look right. How often do estimates and repair invoices match to the penny?
- The cost of insurance fraud is said to be in excess of £1 billion annually; the annual credit hire bill is estimated at £800,000,000. Do not think that all insurers are stupid all of the time. We are not and we are getting increasingly sophisticated and increasingly successful in respect of tackling cases like this.

David Fisher

Liverpool Women's Hospital NHS Foundation Trust v Ronayne

(CA (Civ), Sullivan LJ, Tomlinson LJ, Beatson LJ, June 17, 2015, [2015] EWCA Civ 588)

Personal injury—damages—hospitals—post-traumatic stress disorder—psychiatric harm—secondary victims—causation—clinical negligence

LT Causation; Clinical negligence; Psychiatric harm; Secondary victims

On July 8, 2008 Julie Ronayne was admitted to the Liverpool Women's Hospital where she underwent a hysterectomy. A few days after discharge Mrs Ronayne became very unwell and in the early morning of July 18 she was admitted to the Royal Liverpool University Hospital by way of its Accident and Emergency

department. During the course of a period of about 24 hours her husband Edward Ronayne (the claimant) observed a rapid deterioration in the condition of his wife, manifested most vividly in two distinct episodes.

1) At about 17.00 on July 18, shortly before she underwent emergency exploratory surgery, he observed her connected to various machines, including drips, monitors etc.
2) Sometime on the following day he observed her in her post-operative condition. She was unconscious, connected to a ventilator and was being administered four types of antibiotic intravenously. Her arms, legs and face were very swollen. Pressure pads were in place to keep the blood in her legs flowing. Three years later Mr Ronayne described his wife's then appearance to a consultant psychologist, Dr Eileen Bradbury, who gave evidence at trial, as resembling the "Michelin Man".

Mrs Ronayne's condition on July 18 and 19 was a consequence of the negligence of the defendant Trust in the performance of the hysterectomy. A suture was misplaced in her colon, in consequence of which she developed septicaemia and peritonitis. Although Mrs Ronayne remained in intensive care for a further nine weeks, developed an MRSA infection and had to deal with other extremely unpleasant complications she eventually made a complete recovery.

Edward Ronayne claimed that he suffered post-traumatic stress disorder ("PTSD") as a consequence of seeing his wife's sudden deterioration, particularly on the two occasions referred to. He described losing control of his stammer, feeling overwhelmed, powerless, out of control, detached, intensely angry, shocked, tense, tearful, agitated, irritable, sleep-disturbed, negative, pessimistic and low in mood. He also experienced intrusive memories. One expert concluded that he had suffered from PTSD but another concluded that he had suffered a mild adjustment disorder.

HH Judge Gore QC found that Edward had not suffered from PTSD, as he had not experienced the recurrent flashbacks and nightmares which commonly characterised that condition. However, he concluded that he had suffered from a psychiatric illness, triggered by his wife's sudden shocking state and condition during the period of one or two days after her admission to hospital. The Trust appealed.

On appeal there were two main issues. Whether the events concerned were "horrifying" in the sense necessary to found a secondary victim case and was it the sudden appreciation of those events caused the claimant's psychiatric illness.

The Court of Appeal held that the circumstances fell far short of those which had been recognised as founding secondary victim liability. The judge had been wrong to treat as one event the period of about 36 hours beginning with the sight of his wife before surgery, through to the moment when he saw her in her post-operative swollen state. Unlike the situation in *Walters v North Glamorgan NHS Trust*,[1] there was no "seamless tale with an obvious beginning and an equally obvious end". Instead, there was a series of events over a period of time.

The claimant's perception of what he saw on the two specific occasions was in each case informed by information which he had received in advance. Before the operation, he already knew that abnormalities had been found and he knew before seeing his wife that she was about to go to theatre for surgery. They held that it was artificial to regard the sight of her in her pre-operative condition as the beginning of an event distinct from what had gone before.

They also held that it was equally artificial to describe the sight of Julie in her post-operative condition as the end of a distinct event. It had been explained to him, before he saw her, that her life was in danger and he knew that the 24 hours following the operation would be critical. It was all part of a continuum. The necessary element of suddenness did not exist.

[1] *North Glamorgan NHS Trust v Ceri Ann Walters* [2002] EWCA Civ 1792; [2003] P.I.Q.R. P16.

In addition they held that what Edward saw on those two occasions was not horrifying by objective standards.[2] *Walters* was the only known reported case in which a claimant had succeeded as a secondary victim after observing the consequences of clinical negligence in a hospital setting. That was said to be unsurprising. In hospital, one had to expect to see patients attached to machines and drips and to see things that one might not like to see. Julie's appearance was as would ordinarily be expected of a person in hospital in such circumstances. It was not exceptional or "horrifying" in the sense in which that word was used in the authorities. It did not lead to a sudden violent agitation of the mind because Edward had been prepared to witness a person in a desperate condition and was, moreover, already extremely angry.[3]

They decided that the claim failed because the events had not been" horrifying" in the necessary sense. It was therefore unnecessary to determine whether the judge had been justified in finding that Edward's adjustment disorder had been caused by Julie's appearance on the two distinct occasions concerned, as opposed to being caused by her ill health. However, it seemed to them that the judge had given insufficient weight to the circumstance that Edwards was already extremely angry before he saw Julie after her operation.

In addition having found none of the persistent recurrent flashbacks or nightmares which characterise PTSD, they felt that the judge should have been far less ready to attribute causative potency to the two visual images rather than to the whole set of circumstances. The appeal was allowed.

Comment

There were two major issues in this appeal. First, was the correct test for secondary victims satisfied, and secondly, what was the actual psychiatric harm caused and did that in itself allow for the recovery of damages under the test?

The test

The Hillsborough disaster over 26 years ago spawned the jurisprudence on which much of the law rests. In my view it is outdated and needs to be changed. However, the Court of Appeal in this case was not prepared to be quite so radical.

The test that must be satisfied when claiming for psychiatric harm for a secondary victim is set out in *Alcock v Chief Constable of South Yorkshire Police*:[4]

1) The claimant must have a close tie of love and affection with the person killed, maimed or imperilled—*well Mr Ronayne certainly did here*.
2) The claimant must have been close to the incident in time and space—*yes*.
3) The claimant must have directly perceived the incident rather than, for example, hearing about it from a third person—*yes*.
4) The claimant's illness must have been induced by a sudden shocking event—*ultimately "no" here—but the bigger question is why?*

Lord Ackner in Alcock defined "shock" as:

> "the sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind. It has yet to include psychiatric illness caused by the accumulation over a period of time of more gradual assaults on the nervous system."[5]

[2] *Shorter v Surrey and Sussex Healthcare NHS Trust* [2015] EWHC 614 (QB) applied.
[3] *North Glamorgan NHS Trust v Ceri Ann Walters* [2002] EWCA Civ 1792; [2003] P.I.Q.R. P16 distinguished, *White v Chief Constable of South Yorkshire* [1999] 2 A.C. 455 HL and *Alcock v Chief Constable of South Yorkshire* [1992] 1 A.C. 310 HL followed.
[4] *Alcock v Chief Constable of South Yorkshire* [1992] 1 A.C. 310 HL.
[5] *Alcock v Chief Constable of South Yorkshire* [1992] 1 A.C. 310 HL at 401F.

The four limbs of the test are clearly "control mechanisms" designed to limit the reach of the remedy, although this was subject to the scrutiny of the House of Lords in *McLoughlin v O'Brian* in 1983.[6] In that case Mrs McLoughlin succeeded in her claim as a secondary victim when she came upon the *immediate aftermath* of a serious road traffic accident, having rushed to hospital to find her husband and some of her children seriously injured, and one of them dead.

Apparently, only one case has ever succeeded where the secondary victim has witnessed the immediate aftermath of *medical negligence*. That case is *Walters v North Glamorgan NHS Trust*,[7] where a mother witnessed her 10-month-old son in convulsions during a fit caused by the hospital's negligence. She is then reassured of the child's wellbeing, only to be told at another hospital that in fact her child had sustained major brain damage which would leave him with no quality of life; she is asked whether it is in her son's interest to continue with life support. The baby is taken off life support a day later and dies in his mother's arms. The court in that case was content to hold that this whole tragic set of circumstances was a shocking event or series of events, to allow the mother's claim.

However other cases have rowed back from Walters. Swift J in the very recent case of *Shorter v Surrey HC NHS Trust*[8] held that the shocking event should be objectively horrifying—it is not a subjective test, taking account of the claimant's medical knowledge or lack of it, and this is supported by Tomlinson LJ in *Ronayne*.[9]

Wild & Wild v Southend University Hospital NHS Trust[10] is also recent and instructive: a father's child dies in utero as a result of a hospital's negligence, and of which he is unaware until sometime later, in fact the day before his wife has to deliver the dead child. He argued that the shocking event was when he became aware of the death of his baby, but he was unable to recover as this was a late consequence of the negligence before the distressing scenes he had to witness—and for which he was somewhat prepared—of his wife giving birth to his dead child.

The court in *Wild* failed to find these circumstances were one shocking event or a series of shocking events. Mr Wild is likened to the Hillsborough victims—at least those shut out of compensation by *Alcock*—who became aware of the tragedy unfolding on television, but not the injury or death of the primary victims until much later; the subsequent visit to the mortuary was held in *Alcock* to be beyond the immediate aftermath of the tragedy. The court's judgment in *Wild* may be seen as particularly harsh when the Trust accepted on the evidence that the husband had developed a recognised psychiatric illness as a result of their admitted negligence.

Likewise therefore in *Ronayne*, the Court of Appeal felt that the events identified by the judge below could not be seen as separate shocking events but a continuum. Tomlinson LJ points to "a gradual realisation by the claimant that his wife's life was in danger in consequence of a mistake in carrying out the initial operation".

There was not one shocking event that would cause "an unexpected assault on the mind".[11] The two incidents identified as shocking by the judge below would not have been objectively horrifying. Much was made of the claimant's shock at his wife's appearance, but the appellate court felt that Mrs Ronayne had the appearance of someone who was ill in hospital, and therefore as expected in the circumstances.

All this seems grossly unfair to me. If a defendant seriously harms someone like Mrs Ronayne or kills them, like baby Wild, is it not foreseeable that a loved one will be affected, possibly to the point that they develop a psychiatric condition recognised by experts, which they would probably not otherwise have

[6] *McLoughlin v O'Brian* [1983] 1 A.C. 410 HL.
[7] *North Glamorgan NHS Trust v Ceri Ann Walters* [2002] EWCA Civ 1792; [2003] P.I.Q.R. P16.
[8] *Shorter v Surrey HC NHS Trust* [2015] EWHC 614 QB.
[9] *Liverpool Women's Hospital NHS Foundation Trust v Ronayne* [2015] EWCA Civ 588; [2015] P.I.Q.R. P20 at [13] per Tomlinson LJ.
[10] *Wild v Southend University Hospital NHS Trust* [2014] EWHC 4053 (QB).
[11] *Liverpool Women's Hospital NHS Foundation Trust v Ronayne* [2015] EWCA Civ 588; [2015] P.I.Q.R. P20 at [40] per Tomlinson LJ.

done in the normal course of friends, relations and loved ones hurting themselves or dying? Why should those secondary victims not be compensated for their evident illness?

This is one strand of APIL's campaign to reform the law of damages to secondary victims in its entirety. We say that the control mechanisms are 20-plus years out of date. The requirement for someone to be closely proximate to the event in time and space and for them to have directly perceived the event (or its immediate aftermath) ignores modern technology, 24 hour news, social media, mobile phones, and the internet. And we say there should be no need for the event to be objectively shocking, and those categories of people with whom one is expected to have a close tie of love and affection must be extended to reflect modern life, and modern relationships.

The judge at first instance was former APIL president HH Judge Gore QC. He was bold in his approach to the case. It is a shame that the Court of Appeal did not support him.

The harm

Lord Steyn in *White v Chief Constable of South Yorkshire Police*[12] emphasised that "only recognisable psychiatric illness ranks for consideration"[13] in terms of awarding compensation. Contrast that with the judge below in *Ronayne* "expressing an aversion to the attribution of what he called labels."[14] Whilst the judge below did accept that the claimant had suffered a "frank psychiatric injury" he rejected the claimant's expert's evidence that it was PTSD and adopted a concession from the defendant's expert that—if certain conditions were satisfied—she could characterise the claimant's illness as an adjustment disorder.

In particular the harm done must not only be recognised by the medical profession (and labelled) but must also be distinct from a 'normal' reaction to a loved one's serious injury, or death. As Lord Oliver puts it in *Alcock*:

> "Grief, sorrow, deprivation and the necessity for caring for loved ones who have suffered injury or misfortune must, I think, be considered as ordinary and inevitable incidents of life which, regardless of individual susceptibilities, must be sustained without compensation."[15]

However the distinction to be made is clearly a difficult one. In *Walters*, the mother's grief reaction at the death of her baby was pathological, and different from a "normal" grief reaction. In *Ronayne*, HH Judge Gore QC made it clear that—having heard the evidence—the claimant had given "accounts to others and to me that in my judgment go well beyond the incidents of life that must be suffered without compensation".[16] The Court of Appeal doubted this, but ultimately declined to be drawn on the issue of causation, finding as they had that the defendant's appeal would succeed on other grounds.

Practice points

- To succeed in a secondary victim case, the claimant must be able to point to having witnessed a sudden shocking or horrifying event—or its immediate aftermath—which has caused a recognised psychiatric injury such as PTSD.
- Be very wary of any such case arising out of medical negligence, as most of these cases fail—mainly due to the fact that the courts are reluctant to categorise the negligence as a horrifying or shocking event.[17]

[12] *White v Chief Constable of South Yorkshire Police* [1999] 2 A.C. 455.
[13] *White v Chief Constable of South Yorkshire Police* [1999] 2 A.C. 455 at 491H.
[14] *Liverpool Women's Hospital NHS Foundation Trust v Ronayne* [2015] EWCA Civ 588; [2015] P.I.Q.R. P20 at [7] per Tomlinson LJ.
[15] *Alcock v Chief Constable of South Yorkshire* [1992] 1 A.C. 310 HL at 410E.
[16] *Liverpool Women's Hospital NHS Foundation Trust v Ronayne* [2015] EWCA Civ 588; [2015] P.I.Q.R. P20 at [31].
[17] *Liverpool Women's Hospital NHS Foundation Trust v Ronayne* [2015] EWCA Civ 588; [2015] P.I.Q.R. P20 has even more recently been followed by Stewart J in *Owers v Medway NHS Foundation Trust* [2015] EWHC 2363 (QB) where again a husband who witnessed the serious harm caused to his wife as a result of a hospital's negligence (resulting in her death) was not allowed to recover for secondary trauma for these very same reasons.

- It is also an objective test that is applied to decide whether an event is truly "shocking" and "horrifying".
- Look out for developments in this area, as APIL is campaigning to change the law on this issue.

Jonathan Wheeler

Case and Comment: Procedure

Hoteles Pinero Canarias Sl v Keefe[1]

(CA (Civ), Moore-Bick LJ, Black LJ, Gloster LJ, June 17, 2015, [2015] EWCA Civ 598)

Civil procedure—torts—conflict of laws—EU—insurance claims—discretion—disputing the court's jurisdiction—hotels—insured persons—insurers—joinder—jurisdiction—Regulation 44/2001 art.11

Allocation of jurisdiction; EU law; Insurance claims; Insured persons; Joinder; Personal injury claims

[2]On October 26, 2006 at about 16.00 Godfrey Keefe[3] was sitting by a swimming pool at the Bahia Principe Costa Adeje Hotel in Tenerife where he and his family were staying at the time. The hotel is owned by the second defendant (the hotel). *Keefe*'s case was that an unsecured parasol was lifted by a gust of wind and blown into contact with his face. The spike of the parasol penetrated his right eye socket and into his brain, causing him very serious injuries, loss and damage.[4]

The hotel is a company domiciled in, and incorporated under, the laws of the Kingdom of Spain. The claimant alleged that the accident was caused by the fault, negligence and breach of duty of the second defendant, its management, servants and agents contrary to Spanish law and that it was liable under Spanish law for the injuries, loss and damage which he suffered.

The claim was initially pursued in Spain. However, following a ruling in December 2007 by the Court of Justice of the European Union ("the CJEU") in *FBTO Schadeverzekeringen NV v Odenbreit*,[5] the decision was taken to bring the claimant's claim in England directly against the hotel's liability insurers. The proceedings were issued in England under art.11(2) of Regulation 44/2001, which provided an exception for matters relating to insurance to the general rule that a defendant should be sued in the Member State where it was domiciled. The principal reason for doing so was because of the claimant's advisers' understanding that the value of his claim, if determined in England, under English law principles as to the quantification of loss, would exceed by a significant amount the value of his claim assessed under Spanish law principles.[6]

The insurer accepted the English court's jurisdiction, but indicated a potential cap on its liability to compensate the claimant. In order to recover any insured excess, the claimant therefore joined the hotel as a second defendant under art.11(3), alleging that its negligence had caused his accident. The hotel sought an order that the English court had no jurisdiction to try the claim, asserting that the claim concerned tort rather than a matter relating to insurance. On May 17, 2013 Master Cook dismissed the hotel's application challenging the jurisdiction of the English court. Their appeal was dismissed by HH Judge Higgins (sitting as a Judge of the High Court) dated October 9, 2013. They appealed to the Court of Appeal.

The Court of Appeal held that the Regulation had to be construed purposively with due regard to its aim to guarantee more favourable protection to the weaker party than that provided by the general rules

[1] Also known as *Mapfre Mutualidad Compania de Seguros y Reaseguros SA v Keefe*.
[2] Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1.
[3] Suing by his litigation friend Nik Eyton.
[4] As at the date of the appeal damages were said to be valued in an amount in excess of £5 million.
[5] *FBTO Schadeverzekeringen NV v Odenbreit* (C-463/06) [2007] E.C.R. I-11321.
[6] "Rome II" did not apply as the accident happened before January 11, 2009.

of jurisdiction.[7] Given that aim, there was no possible linguistic or purposive justification for construing art.11 as subject to some sort of implied restriction that the insurer might only be joined under art.11(1) or art.11(2), or likewise the insured/alleged tortfeasor might only be joined under art.11(3), where there was a policy dispute. The court pointed out that in many cases a direct action against an insurer would not involve a policy dispute, but merely raise questions about liability and quantum. Such a restriction in respect of art.11(2) had been expressly rejected by the CJEU, and there would be no logical reason for imposing it only in respect of art.11(3).[8]

In addition if the requirement for a policy dispute was determinative, it could produce the illogical result of there being no jurisdiction if the injured party attempted to join the insured/alleged tortfeasor as a defendant to the original proceedings (because no policy dispute was evident at the time of issue), but there being jurisdiction if the insured/alleged tortfeasor was joined subsequently once the dispute became apparent. That would be likely to result in an increased risk of separate proceedings in separate Member States and irreconcilable judgments. The whole point of art.11 was to enable direct actions against liability insurers to be brought in the courts of the injured party's domicile, irrespective of whether there was any dispute in relation to the policy.

Once that was accepted, there was no logical reason for restricting joinder of the insured/alleged tortfeasor under art.11(3) to situations where there was a policy dispute, even taking into account the well-recognised principle that art.11(3) was an exception to the general rule on jurisdiction and therefore should be narrowly construed. Moreover, there would clearly be a risk of irreconcilable judgments in England and Spain if the hotel was not joined as a party to the English action, and proceedings were started or continued against it in Spain. Accordingly, art.11(3) applied to the claim which the respondent wished to pursue against the hotel.

The court went on to hold that if a claimant sought to invoke a court's jurisdiction under art.11(3) to join an alleged tortfeasor/insured as a party to a direct claim against an insurer, then, irrespective of whether the national state's procedural rule was discretionary, the national court was bound to accept that jurisdiction. Even if the English court had a discretion to decline jurisdiction, then it should be exercised in the claimant's favour to permit the hotel's joinder to the existing action against the insurer.

Moore-Bick LJ accepted that *Maher v Groupama Grand Est*[9] might have suggested that the system of law by reference to which the existence of a direct right of action against a liability insurer was to be determined was the proper law of the contract. On further reflection he said that might not be correct. The existence of a direct right of action against the insurer would generally fall to be determined by reference to the law of the place where the wrongful act of the insured occurred.[10]

The appeal was dismissed.

Comment

Nine years since this claimant suffered this most horrendous life-changing injury, it would appear his claim is still only at the position of determining which defendants should face the claim irrespective of whether the claim should even succeed. There has been much criticism made of the Court of Appeal by those involved in commercial litigation that the delays are far too long and this is yet another case involving serious injury in which the claimant would have benefited from a fast track system that acknowledged the seriousness of the injury and the impact upon a litigant's life to enable much earlier appeal decisions to be made.

[7] *Odenbreit* [2007] E.C.R. I-11321 applied.
[8] *Odenbreit* [2007] E.C.R. I-11321 applied.
[9] *Maher v Groupama Grand Est* [2009] EWCA Civ 1191; [2010] 1 W.L.R. 1564.
[10] *Maher* [2010] 1 W.L.R. 1564 considered.

It was clearly an alert and sensible claimant legal team that moved from the Spanish jurisdiction into the courts of England and Wales following *Odenbreit*.[11] Although this case was outside of the scope of Rome II, it is illustrative of the post Rome II problems of being given compensation based on the territory of where the accident took place. The Spanish insurer alleged that the limit on their indemnity, inclusive of costs, was €601,000. In a catastrophic injury case such as this, this would have been a hopeless under settlement of the necessary damages and therefore bringing in the hotel itself was clearly essential. Not surprisingly the defendant hotel realising it would be responsible for the lion's share of any quantum the claimant was ultimately adjudged to recover and sought to take every means they could to avoid facing the claim. Unfortunately, but not surprisingly, permission to appeal to the Supreme Court has been pursued by that defendant. From the claimant's perspective, having watched this defendant lose at three separate High Court stages, it is to be hoped that permission is refused or if not that a determination is made very quickly.

What started as a European Court decision that directive action against an insurer is permitted, is then qualified by whether an individual's own jurisdiction rules actually permitted it. It was the court's view that the rules of English private international law did indeed allow it. However, perhaps unusually the judge who had given the leading opinion in a similar preceding case *Maher*[12] decided that actually his obiter comments were wrong. In fact his comments may be somewhat superfluous or certainly limited in an application as now more and more cases will fall within Rome II where art.18 provides that the applicable law may be the place of the accident or that provided by the contract of insurance.

Gloster LJ here accepted that where both Spanish and English law allowed the hotel to be joined in, the law that actually allowed the direct right of action was then ruled. It has been recognised for a long time that where it is thought that the court could not properly determine a dispute between the claimant and the first defendant without considering the second defendant involvement that second defendant would be joined to the proceedings even if ordinarily they would not or could not have been joined as the sole defendant. The hotel had argued that art.11(3) of the former judgment regulations meant you couldn't bring in a foreign tortfeasor where the existing defendant was the foreign insurer. The court however took the view that if you were to apply the regulations purposively then in fact you had to be able to do just that. It is not simply something to be used because there was an insurance coverage dispute it was more than that.

The claimant's case was that because the insurer had already been sued then it was art.11[13] that gave jurisdiction over the hotel. The defendant's discreet argument was that it wasn't a dispute about insurance but the lack of insurance! Therefore that removed art.11 and so that took the defendant back to its own jurisdiction. The hotel was saying that the claim against the hotel was over and above the insurance issue so in real terms it wasn't an insurance dispute. However, the purposiveness of the regulations is set out at recital 15:

> "In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two member states."

It meant that there was quite a burden on the hotel to try and show to a court that if their argument succeeded there was no risk of irreconcilable judgments when to most observers that risk must be real.

[11] *Maher* [2010] 1 W.L.R. 1564 considered.
[12] *Maher* [2010] 1 W.L.R. 1564 considered.
[13] Article 11(1)–(3):
"(1) In respect of liability insurance the insurer may also, if the law of the court permits it, be joined in proceedings which the injured party has brought against the insured.
…
(3) If the law governing such direct actions provides that the policyholder or the insured may be joined as a party to the action, the same court shall have jurisdiction over them."

To this argument the Court of Appeal said that there didn't need to be a policy dispute to trigger art.11 anyway.

It is reported that the German courts in February 2015,[14] considered a similar case and are now seeking a reference to the European Court. Time will tell whether that will impact upon this particular case.

Practice points

- There is every likelihood that indemnities in jurisdictions other than the UK are likely to be less generous.
- Consideration therefore needs to be given to the extent that there is any forum choice as to the likely ability for full recovery of damages and costs.
- The task of determining the appropriate defendant or defendants is one that requires careful forensic consideration.

Mark Harvey

Davies[1] v Forrett[2]

(QBD (Liverpool), Edis J, June 23, 2015, [2015] EWHC 1761 (QB))

Personal injury—road traffic accidents—civil procedure—costs orders—insurers' liabilities—non-party costs—overriding objective—Pt 20 claims

LT Conduct; Costs orders; Insurers' liabilities; Non-party costs; Overriding objective; Road traffic accidents

The claimant Daniel Davies was a passenger in a car which collided with a tree. The collision occurred after the driver and second defendant Ryan Partington attempted to overtake three cars. One of the cars pulled out, causing Partington to veer off the road and into the tree. Davies and Partington were both injured.

The first defendant Thomas Forrett was the driver who had pulled out. He did not stop, but drove on to his place of work. Forrett denied that he had been involved, but was convicted of driving without due care and attention at the magistrates' court. The claimant brought a claim against Forrett, but he continued to deny that he was responsible and alleged that Partington had caused the collision.

The claimant's solicitors therefore decided to join Ryan Partington and his insurer (Southern Rock) to the action. Partington's insurance policy did not cover commuting to work. As a result, Southern Rock denied that it was contractually liable to indemnify him in respect of the collision.

Southern Rock issued Pt 20 proceedings against Partington and the claimant, seeking a declaration that it had no liability. Partington's defence to those proceedings was drafted by Thomas Forrett's solicitors. Three years after his conviction in the magistrates' court, Forrett consented to summary judgment being entered against him in the main proceedings. The court was required to determine costs.

[14] Article 11(1)–(3):
"(1) In respect of liability insurance the insurer may also, if the law of the court permits it, be joined in proceedings which the injured party has brought against the insured.
(3) If the law governing such direct actions provides that the policyholder or the insured may be joined as a party to the action, the same court shall have jurisdiction over them."

[1] Daniel Davies (by his father & litigation friend Robert Davies) (claimant/Pt 20 defendant).
[2] Thomas Forrett (defendant) & Ryan Partington (defendant/Pt 20 defendant) and Southern Rock Insurance Co Ltd (defendant/Pt 20 claimant).

PROCEDURE

The judge held that the conduct of first defendant Thomas Forrett and his insurers, Admiral, between the date of his conviction and the date when he admitted liability, was designed to secure an advantage to which they were not entitled. It did so at the risk of causing substantially more work and cost to themselves and all other parties. The correspondence from the claimant and Southern Rock had been appropriate throughout. Almost every letter referred to the mounting costs caused by Admiral's refusal to accept Thomas Forrett's obvious fault.

The same approach had governed the conduct of Forrett's case, despite CPR r.1.3,[3] which imposed a duty on the parties to help the court to further the overriding objective. That was a duty and not an exhortation. Breach of that duty was a significant matter which was directly relevant to costs.

The claimant was entitled to an order against Forrett for the payment of his costs of suing Ryan Partington and Southern Rock. It had been reasonable for the claimant to add Partington and Southern Rock to the proceedings in response to the service of Forrett's defence. That defence was false in that it failed to admit liability to the claimant.

No order was made in respect of Ryan Partington's costs of the claim. His position on liability had not been vindicated, and it was likely that he would be found to have contributed to the accident by his own negligence. He was not a "successful defendant".[4]

Southern Rock's costs of defending the proceedings brought by the claimant were to be paid by Forrett. They were only brought in as a party because of uncertainty about their liability to meet the judgment if Ryan Partington were found liable to any extent. That uncertainty was manufactured by or on behalf of Ryan Partington, and was connived at by Forrett. Admiral's interest was to secure payment from Southern Rock towards the claimant's claim. That bid had failed comprehensively, and Southern Rock was to be regarded as a successful defendant. An order was made in the Sanderson form that Southern Rock's costs were to be paid by Forrett/Admiral.

Forrett was also ordered to pay Southern Rock's costs of the Pt 20 claim. Although he had not been a party to those proceedings, he had inspired them, contributed to them by instructing his solicitors to provide pleadings to Partington, and did so for his own financial benefit. An order for costs was therefore made against Forrett as a non-party under the s.51 of the Senior Courts Act 1981.[5] Southern Rock was the successful party in those proceedings. However, the cost of joining the claimant was not included, as that had been unnecessary. No order was made against Ryan Partington in respect of the costs of the Pt 20 action. The costs orders above were made on the standard basis.

Comment

Has any defendant succeeded with the hackneyed pleading:

> "The defendant admits the conviction referred to in the Particulars of Claim but denies its relevance to the civil proceedings."[6]

There was a factual dispute in which Mr Forrett denied throughout that he was responsible for the accident. That issue was heard and interpreted in the Magistrates Court. It was not a complicated set of facts and he was found guilty; beyond all reasonable doubt. Did his insurers Admiral ever really think it could re-run this dispute in the High Court and avoid the same finding on the balance of probabilities?

This was the key finding on which Forrett and Admiral sought to avoid liability or at least gain a contribution from the other insurers. In reality the judgment makes clear this was never really the tactic

[3] "The parties are required to help the court to further the overriding objective."
[4] *Bullock v London General Omnibus Co* [1907] 1 K.B. 264 CA considered.
[5] *Symphony Group Plc v Hodgson* [1994] Q.B. 179 CA (Civ Div) and *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (Costs)* [2004] UKPC 39; [2004] 1 W.L.R. 2807 considered.
[6] *Davies v Forrett* [2015] EWHC 1761 (QB) at [4].

employed by Admiral. They just assumed they would brow beat Southern Rock into making a contribution to the substantial damages it was facing; securing the commercial view that would lead to a settlement. Sadly in doing that they failed to consider their own commercial position and as ever whilst the lawyers and insurers played their game the seriously brain injured claimant was left without assistance. As Southern Rock's indemnity did not extend to commuting they sought a declaration that they were entitled to "stand in the shoes of the MIB". The implication of this would be that they would only end up compensating the claimant if there were no other insurance policies to pay.

Perhaps it was the fear that despite the redrafting of the summary judgment rules when the CPR came in so that courts should be more robust in their treatment of such applications, experience has shown the courts are still slow to grant them, that the claimant did not move straight to this. Instead and understandably they followed Admiral's lead and joined in Southern Rock and its driver; and so the litigation was doubled and even trebled and the costs equally so.

When Admiral and Mr Forrett finally conceded the claim the judge decided to hold them responsible for their actions and to meet the vastly increased costs from their actions:

> "20. I find that the conduct of Forrett and his insurers, Admiral, between 11th May 2012 (when Forrett was convicted) and 11th June 2015 when he admitted liability was designed to secure an advantage to which they were not entitled. It did so at risk of causing substantially more work and thus cost to themselves and all other parties. This is redolent of an era which had begun to fade into history even before 26th April 1999 when the Civil Procedure Rules 1998 came into force."

It is noteworthy that Southern Rock eschewed the opportunity to seek the costs of defending itself from the two injured claimants whose damages the judge noted could have been used to discharge the order. Instead it went against Admiral for a non-party costs order. They had been put on notice of this earlier in the proceedings. The use by the judge of words such as, "false", "manufactured", "connived" gives a clear feeling for the judge's view. There was even the fact that Admiral's lawyers, when not a party to the declaration proceedings between Mr Partington and his insurers, they sought to help him in defending them even drafting pleadings for him.

> "In my judgment, the closeness of Forrett to the Part 20 claim is relevant to the exercise of this discretion. Although not a party to it technically, he inspired it, contributed to it by instructing his solicitors to provide pleadings to Partington so as to assist him, and did this for his own financial benefit. It was all nonsense … In reality, the cover dispute was sustained for the benefit of Forrett/Admiral and failed. It is just that an order should be made against Forrett as a non-party."[7]

Section 51 gives the court a wide discretion as to whom it orders to pay the costs of litigation. The Supreme Court in *Aiden Shipping Co Ltd v Interbulk Ltd (The Vimeira) (No.2)*[8] determined that the section did not contain an implied limitation to parties to litigation. The Court of Appeal in *Symphony v Hodgson*[9] laid down the categories of non-parties. This included the managers and funders of litigation, solicitors and those involved in litigation close to the subject litigation. Its guidance also extended to the fact that such an order would be exceptional and early notice to the non-party should be given.

The court is increasingly concerned with the use of (and waste) of its resources. The High Court unusually ordered a party to disclose its available insurance indemnity in a personal injury group action where it was concerned not whether it could meet any final judgment on damages or adverse costs (the claimants' concern) but whether its failure to defend itself would impact upon the case management; there the hearing

[7] *Davies* [2015] EWHC 1761 (QB) at [26(iv)(d)].
[8] *Aiden Shipping Co Ltd v Interbulk Ltd (The Vimeira) (No.2)* [1986] A.C. 965 HL.
[9] *Symphony Group Plc v Hodgson* [1994] Q.B. 179 CA (Civ Div).

of a preliminary issue trial.[10]Section 51 enables the court to consider the full picture in litigation where, as here, significant court time and resources had been taking up with litigation found to be for the sole benefit of a non-party and where a conventional costs order would not do adequate justice.

In this case given the judge's evident dismay with the actions of Admiral, Mr Forrett and the instructed solicitors:

> "Forrett/Admiral have been described as the 'puppet master' pulling the strings and setting the cover dispute running."[11]

The non-party order was an expected one.

Practice points

- Pleadings should be carefully thought through for any implications as to the costs of the litigation.
- A party anticipating unreasonable conduct from another should warn clearly and concisely of the costs consequences of that conduct.
- Early notice should be given of an s.51 of the Senior Court Act 1981 application.

Mark Harvey

Webb v Liverpool Women's NHS Foundation Trust

(QBD (Leeds), Judge Saffman, April 1, 2015, [2015] EWHC 449 (QB))

Civil procedure—personal injury—clinical negligence—clinical negligence—issue-based costs orders—Pt 36 offers—proportionality

Clinical negligence; Issue-based costs orders; Part 36 offers; Proportionality

The claimant was a minor who had suffered injuries at birth. She alleged that the defendant NHS trust was negligent in first, failing to perform a caesarean section and secondly, managing the vaginal delivery inappropriately. The court concluded[1] that the Trust had been negligent in deciding not to proceed to a caesarean section, but had not mismanaged the vaginal delivery. The claimant recovered 100 per cent of her damages, despite the failure of the second limb of her claim.

Prior to trial, the claimant made a Pt 36 offer to settle for 65 per cent of her damages. The defendant rejected that offer, but failed to better it at trial. The claimant was therefore entitled to a 10 per cent on her damages pursuant to CPR r.36.14(3)(d). In an earlier part-heard costs hearing, the court had determined that it was not unjust for the consequences of Pt 36 to apply in principle to the costs to which the claimant was entitled.

The defendant submitted that an issue-based or proportionate costs order should be made, despite the Pt 36 offer, because of the failure of the second limb of the claim. The claimant argued that Pt 36 was a self-contained regime, and the existence of a successful Pt 36 offer meant that an issue-based or proportionate costs order could not be made.

[10] *XYZ v Various Companies* [2013] EWHC 3643 (QB); [2014] 2 Costs L.O. 197.
[11] *Davies* [2015] EWHC 1761 (QB) at [26(iv)(b)].
[1] *Webb v Liverpool Womens NHS Foundation Trust* [2015] EWHC 449 (QB); [2015] 3 Costs L.O. 367.

The judge held that the general rule was that the unsuccessful party should pay the costs of the successful party. The successful party was emphatically the claimant. A proportionate costs order would therefore be a departure from the general rule. However, an issue-based or proportionate costs order was not confined to exceptional cases. The reasonableness of taking failed points could be taken into account, but there was no automatic rule that an issue-based order should be made because the successful party had lost on one or more issues.[2]

The first limb of the claimant's claim was an attack upon the management of her mother's labour by the responsible obstetricians. The second limb was an attack on the midwives' management of the actual delivery. Neither allegation was dependent on the other; each was a discrete claim supported by separate expert evidence. At all times the second claim was weaker than the first claim.

In the absence of a Pt 36 offer, the court would have been disposed to exercise its discretion to make a costs order that required the defendant to pay only a proportion of the claimant's costs, to recognise the failure to establish the second limb of the claim. The question was how that decision was affected by the claimant's Pt 36 offer. The fact that there was a successful Pt 36 offer did not mean that the court was unable to make an issue-based or proportionate costs order.

The court accepted that Pt 36 was a self-contained regime and that the rule made no reference to such orders. However, insofar as such an order was necessary to avoid injustice, it was permissible for the court to make it. Part 36 specifically stated that it could be disapplied if its application led to injustice.[3] Accordingly, the court would make a costs order in the claimant's favour, limited to a percentage of her costs. The order would reflect the percentage of time spent on establishing the first limb of her claim, but not the second. Disbursements in respect of the second limb would not be awarded. The costs consequences in r.36.14(3)(d) would apply to the costs awarded to the claimant.

The amount of the percentage deduction was to be determined at a further hearing.

Comment

The claimant succeeded in establishing liability on the part of the defendant and obtained judgment accordingly, despite the defendant contesting this issue. Furthermore, that judgment was, to pick up the language of Pt 36, "at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer". In these circumstances it seems surprising the claimant, whilst obtaining a costs order against the defendant, was held to be entitled only to a percentage of the costs incurred in bringing the claim (the precise percentage to be determined at a further hearing).

On analysis of relevant principles this first impression, that the judgment on costs cannot be right, seems to be borne out. The reasoning behind this view is, however, far from straightforward and even involves a critique of the notes in the *White Book*. The complexity results primarily from the interface between the very specific, sometimes termed "automatic"[4], costs consequences provided for by Pt 36 and the more general discretion on costs found in Pt 44.

The crucial issue on this primary point is whether, when the claimant either fails to obtain judgment "more advantageous" than a defendant's Pt 36 offer or obtains judgment "at least as advantageous" as the claimant's own Pt 36 offer, the starting point so far as costs are concerned is Pt 36 or Pt 44. In other words is the correct approach to costs in such circumstances:

- that the relevant party is entitled to "costs" under the terms of Pt 36, unless that would be "unjust" (and only if those consequences would be "unjust" does the court turn to Pt 44 and

[2] *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd* [2008] EWHC 2280 (TCC), 122 Con. L.R. 88 applied.
[3] *Thinc Group Ltd v Kingdom* [2013] EWCA Civ 1306; [2014] C.P. Rep. 8 and *Davison v Leitch* [2013] EWHC 3092 (QB) considered.
[4] See, for example, the judgment of Briggs LJ in *PGF II SA v OMFS Company 1 Ltd* [2013] EWCA Civ 1288.

consider, on the basis of the general discretion in that rule, what costs order should be made); or

- should the court should start by exercising the discretion under Pt 44 to decide what "costs" the relevant party is entitled to under the terms of Pt 36 (although the Pt 36 offer will be a relevant factor in shaping the exercise of that general discretion conferred by Pt 44).

The notes in the *White Book* suggest the latter approach yet, as this case illustrates, that can produce a result which seems wrong and, furthermore, fails to reflect the degree of certainty, essential for proportionality and avoidance of satellite litigation, envisaged by the rules, particularly in the post-Jackson era. The former approach, it might be argued, more accurately reflects the relationship between Pt 36 and Pt 44 and has ample support from authorities decided since the case law referred to on this point in the *White Book*.

To explore all these issues it is necessary to start with a reminder of relevant aspects of the CPR before reviewing the case law and then turning to what appears to be, given the terms of the rules and guidance given by case law, the correct analytical approach to costs under Pt 36 and a potential conflict between the terms of that rule and Pt 44. The first consideration when analysing the judgment is, therefore, whether the claimant's Pt 36 offer should, of itself, have precluded a percentage costs order being made.

The analysis of the judgment in this case then requires consideration of a secondary issue. That is the proper approach to the general discretion on costs under Pt 44 and in particular the approach that should be taken to application of the general rule that the costs of the successful party will be paid by the unsuccessful party, irrespective of the terms of Pt 36 and effect of any offer made under that rule. The question is whether in this case, given the claimant's success, there was good reason to depart from the general rule in Pt 44.

It is worth noting, on the way, an interesting point about the distinction between Pt 36 offers on the issue of liability and offers to settle the whole claim.

The CPR: Part 36 and Part 44

Both Pt 36 and Pt 44 deal with the potential costs consequences of offers to settle. Part 44 also deals with the general discretion of the court on costs and the potential effect of an offer to settle on the exercise of that discretion.

The most relevant aspects, for present purposes, of r.36.17 (formerly r.36.14) are as follows:

"(1) … this rule applies where upon judgment being entered—

(a) a claimant fails to obtain a judgment more advantageous than a defendant's Part 36 offer; or

(b) judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer …

…

(3) … where paragraph (1)(a) applies, the court must, unless it considers it unjust to do so, order that the defendant is entitled to—

(a) costs (including any recoverable pre-action costs) from the date on which the relevant period expired; and

(b) interest on those costs.

(4) … where paragraph (1)(b) applies, the court must, unless it considers it unjust to do so, order that the claimant is entitled to—

(a) interest on the whole or part of any sum of money (excluding interest) awarded, at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;

(b) costs (including any recoverable pre-action costs) on the indemnity basis from the date on which the relevant period expired;
(c) interest on those costs at a rate not exceeding 10% above base rate; and
(d) provided that the case has been decided and there has not been a previous order under this sub-paragraph, an additional amount."

The most relevant terms, again for present purposes, of Part 44.2 are:

"(2) If the court decides to make an order about costs—
(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
(b) the court may make a different order …
…
(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including—
…
(c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply."

Conflict?

There are two points of particular importance in these rules when considering any conflict between them and, if so, which takes precedence. First, the terms of r.36.17 provide that the consequences of this rule will apply unless that would be "unjust". Secondly, the terms of r.44.2(4)(c) suggest that this provision is subordinate to Pt 36, by expressly excluding from consideration "an offer to which cost consequences under Part 36 apply".

A subsidiary point, relating to the second of these observations, is that Pt 44 has only read this way since 2007, when the rules were amended to make clear the divide between costs consequences under Pt 36 and under Pt 44. Consequently, case law prior to 2007 must now be considered with that amendment very much in mind.

The *White Book*, on the relationship between Pt 36 and Pt 44, cites *Kastor Navigation Co Ltd v AXA Global Risks (UK) Ltd*[5] where it was held that the term "costs" in r.36.14 meant costs by applying the principles in Pt 44. However, the significance of the change to the rules in 2007 has subsequently been recognised at Court of Appeal level in *Shovelar v Lane*[6] where Ward LJ said:

> "Part 36 is a separate, self-contained code. It must be applied as such. If the offer is one to which the costs consequences under Part 36 apply, then it cannot be taken into account under Part 44 because, although CPR 44.3(4)(c) requires the court to have regard to 'any payment into court or admissible offer to settle', those words are qualified by the words which follow namely 'which is not an offer to which costs consequences under Part 36 apply'. Part 36 trumps Part 44."

Very much the same point was made, again after the 2007 rule change, by Jackson LJ in *Fox v Foundation Piling Ltd*[7] when he said:

> "where one party makes a Part 36 offer and then achieves a more advantageous result than that proposed in his offer, the provisions of rule 36.14 modify the court's general discretion in respect of costs."

[5] *Kastor Navigation Co Ltd v AGF MAT (The Kastor Too)* [2004] EWCA Civ 277; [2005] 2 All E.R. (Comm) 720.
[6] *Shovelar v Lane* [2011] EWCA Civ 802; [2012] 1 W.L.R. 637.
[7] *Fox v Foundation Piling Ltd* [2011] EWCA Civ 790; [2011] C.P. Rep. 41.

Part 36

On this analysis the primary question for the court, when determining costs, should surely be whether there is an offer which engages the terms of r.36.17 (formerly r.36.14) and, if so, whether any of the consequences provided for in that rule would be "unjust". If and to the extent that, this rule engages, that should provide "automatic" costs consequences, at least from the end of the relevant period in the offer.

Only if that rule is not applicable, because it does not engage at all or the consequences will be "unjust", does the court then turn to the secondary question of how the general discretion on costs should be applied. That question will now involve reference to the matters identified in Pt 44, including any "admissible offer to settle" (which might include a Pt 36 offer provided that does not carry costs consequences under Pt 36 itself).

Whilst the focus, when considering the benefits conferred on a claimant under r.36.17, can often be on what might be thought of as the "extras" of enhanced interest, an additional amount and assessment of costs on the indemnity basis it is easy to overlook the logically anterior point, namely that the claimant is entitled to "costs" (those costs being assessed on the indemnity basis from the date on which the relevant period in the offer expired).

The term "costs", in the context of the claimant's entitlement, corresponds with the corresponding entitlement of the defendant where it is the claimant who fails to obtain a judgment more advantageous than a defendant's Pt 36 offer (though it is important to note Pt 36 makes no provision for the defendant's costs, in these circumstances, to be assessed on the indemnity basis).

Consequently, where r.36.17(4) engages a party is entitled, unless that would be "unjust", to "costs" (expressed in r.36.14(3) as "his costs"). That, in turn, raises the question of what, in this context, the word "costs" means. When considering that question, and the related topic of what will be "unjust" for the purposes of r.36.17 (formerly r.36.14), it is necessary to turn back to the relevant case law. Prior to the current version of the rules this point, as already noted, was considered in *Kastor Navigation Co Ltd v AXA Global Risks (UK) Ltd*.[8]

In *F & C Alternative Investments (Holdings) Ltd v Barthelemy*[9] the judge, at first instance, rejected the argument that the phrase "his costs", then found in r.36.14(3)(b), should be taken as referring to the entire costs of the claim, so as to exclude the possibility of disallowing part of the costs of the party who had the benefit of that provision. The judge relied, rather, on the interpretation of equivalent wording in the earlier version of Pt 36, which was held not to have such a meaning in *Kastor*.

On the *F & C* appeal the Court of Appeal held the relevant offer was not effective under Pt 36 so it was not necessary to determine whether the approach in *Kastor* still applied and, plainly, where the offer was only relevant under Pt 44 the general discretion about the terms of the order as to costs, under that rule, would apply. The court did not consider the comments of Ward LJ in *Shovelar* or Jackson LJ in *Fox* already referred to. Crucially both these judgments recognised that the first instance decision in *F & C*, at least at first instance, had ignored the important changes to both Pt 36 and Pt 44 in 2007.

The approach that seems more consistent with the present terms of both Pt 36 and Pt 44, applying Pt 36 unless that would be "unjust", was taken in *Smith v Trafford Housing Trust*[10] by Briggs J (as he then was) and in *Ted Baker Plc v AXA Insurance UK Plc*[11] by Eder J. On this basis a failure to consider whether it would be "unjust" for the usual terms of Pt 36 to apply, before exercising the general discretion under Pt 44, would appear to amount to an error of law.

[8] *Kastor* [2005] 2 All E.R. (Comm) 720.
[9] *F & C Alternative Investments (Holdings) Ltd v Barthelemy* [2012] EWCA Civ 843; [2013] 1 W.L.R. 548.
[10] *Smith v Trafford Housing Trust (Costs)* [2012] EWHC 3320 (Ch).
[11] *Ted Baker Plc v AXA Insurance UK Plc* [2014] EWHC 4178 (Comm); [2015] 1 Costs L.R. 71.

In this case these authorities were not cited by the judge, the only reference being to the judgment in *Thinc Group Ltd v Kingdom*.[12] Nothing in that judgment, however, contradicts the approach taken in *Ted Baker Plc* and *Smith*. Indeed the observations of Macur LJ could be said to support those views when she said:

> "Obviously a 'successful' Pt 36 offer in terms of CPR 36.14(1) should be accorded all due weight by the courts and in many cases will be decisive on the question of costs. That said, the court is obliged to consider whether the costs consequences provided by 36.14 (2) or (3)—as applicable—should follow or would be 'unjust'."

Whilst these cases all concern offers by claimants exactly the same point can, of course, arise when a successful defendant has made a Pt 36 offer as, for example, in *Altus Group (UK) Ltd v Baker Tilly Tax and Advisory Services LLP*.[13] In that case, despite a finding there had been a breach of duty, the claimant's claim was dismissed as causation could not be established. The defendant had made a Pt 36 offer to settle the claim. Whilst the defendant only recovered 50 per cent of those costs, applying Pt 44, prior to that offer, thereafter the defendant recovered costs without any apportionment, applying the terms of Pt 36.

In this case, rather than adopting the approach in these recent cases, the judge noted that the term "his costs" in r.36.14 must, according to the *White Book*, be those that would be awarded under Pt 44. Unfortunately the *White Book* does not reflect recent case law. The approach to costs, where Pt 36 applies, taken in *Smith*, *Ted Baker plc* and *Altus Group (UK) Ltd* does seem preferable to the line taken by the judge in this case which, despite according with the narrative in the *White Book*, seems inconsistent with the terms of Pt 36 and Pt 44 as those rules now stand.

Central to all this is the idea that, whether claimant or defendant, a party who makes what proves to be a reasonable offer under Pt 36 recovers "costs" from the end of the relevant period. A defendant will also recover interest. There is nothing unfair about, additionally, the claimant recovering enhanced interest and the "additional amount" as the claimant would have recovered costs, though potentially subject to the exercise of the general discretion under Pt 44, in any event if successful.

On this analysis where r.36.17 (formerly r.36.14) engages the general discretion, including the power to make partial costs orders, in Pt 44 is only reached when the threshold test of the Pt 36 consequences being "unjust" has been met, at least from the end of the relevant specified in the offer carrying those consequences under Pt 36. On this basis it could be said the approach, on the preliminary point about the significance of a claimant's Pt 36 offer, was wrong. However, even if the approach taken by the court was correct on this preliminary point the application of the general discretion found in Pt 44 appears questionable when the case law on how to approach that general discretion, found in r.44.2 (and formerly in r.44.3), is considered.

Part 44

Part 44 is relevant if either the word "costs" in r.36.17 must be determined by application of this rule, to decide what those "costs" are, or there is no offer carrying costs consequences under Pt 36. Whilst it is, of course, correct that Pt 44 gives the court a broad discretion on costs, including the range of costs orders which may be made, a key authority on the proper approach to the exercise of this discretion, not cited by the judge yet applied in numerous other cases since, is *Fox v Foundation Piling Ltd*.[14] Jackson LJ, giving a judgment with which Ward LJ and Moore-Bick LJ agreed, held that:

[12] *Thinc Group Ltd v Kingdom* [2013] EWCA Civ 1306; [2014] C.P. Rep. 8.
[13] *Altus Group (UK) Ltd v Baker Tilly Tax and Advisory Services LLP* [2015] EWHC 411 (Ch); [2015] 2 Costs L.R. 267.
[14] *Fox v Foundation Piling Ltd* [2011] EWCA Civ 790; [2011] C.P. Rep. 41.

> "There has been a growing and unwelcome tendency by first instance courts and, dare I say it, this court as well to depart from the starting point set out in rule 44.3 (2) (a) too far and too often. Such an approach may strive for perfect justice in the individual case, but at huge additional cost to the parties and at huge costs to other litigants because of the uncertainty which such an approach generates. This unwelcome trend now manifests itself in a (a) numerous first instance hearings in which the only issue is costs and (b) a swarm of appeals to the Court of Appeal about costs, of which this case is an example."

Jackson LJ went on to conclude:

> "In my view, there is no justification for departing from the usual starting point as set out in rule 44.3 (2) (a), namely that the unsuccessful party should pay the successful party's costs."

This approach has been applied in numerous cases since, including approval at Court of Appeal level once again in *Chief Constable of Hampshire v Taylor*[15] where Elias LJ said: "The normal order that the successful party is entitled to all his costs is not lightly displaced."

It is true there are cases where a party who might have been regarded as successful, in the sense of recovering something as a result of the proceedings, does not recover costs under the general rule in Pt 44, a notable example being *Medway Primary Care Trust v Marcus*.[16] However, this apparent anomaly is explained by focusing on the fundamental question of who has won as explained in *Magical Marking Ltd v Ware & Kay LLP*[17] by Briggs J (as he then was) when he said:

> "In *Procter & Gamble Co. v Svenska Cellulosa Aktiebolaget SCA* [2012] EWHC 2839 (Ch) Hildyard J said, at paragraphs 6–7 that in a money claim a simple mechanical test of identifying which of the parties is compelled at the end of the day to pay money to the other has much to commend it. Nonetheless, as he acknowledged, a more nuanced approach to the process of identifying the successful party has emerged from a series of Court of Appeal authorities, beginning with *Roache v Newsgroup Newspapers Limited* [1998] EMLR 161 in which, at page 168-9, Sir Thomas Bingham MR said:
>
> > 'The Judge must look closely at the facts of the particular case before him and ask: who, as a matter of substance and reality, has won? Has the plaintiff won anything of value which he could not have won without fighting the action through to a finish? Has the defendant substantially denied the plaintiff the prize which the plaintiff fought the action to win?'"

Briggs J went on to explain how *Marcus* could be distinguished from *Fox* when he said:

> "In my judgment the critical distinction between the *Medway* and *Fox* cases is that the former was, but the latter was not, about the question who ought to be regarded in the substance as the successful party. In deciding that question in the *Medway* case, the Court of Appeal followed the *Roache* case, as well as the closely analogous decision of the Court of Appeal in *Oksuzoglu v Kay* [1998] 2 All ER 63l, in which Brooke LJ said, on analogous facts to the present:
>
> > 'In this line of cases, where the plaintiff only recovers between 1% and 3% of his original claim (sometimes, but not always, after a late amendment) the Court is entitled to ask itself: "who was essentially the winning party?" It will not be distracted from making a just order as to costs by the absence of a payment into court which the plaintiff obviously would not have accepted.'"

In this case there could surely be no argument with the view that the claimant was undoubtedly the successful party and hence the approach in *Fox* should have been applied, irrespective of whether the

[15] *Chief Constable of Hampshire v Taylor* [2013] EWCA Civ 496; [2013] I.C.R. 1150.
[16] *Medway Primary Care Trust v Marcus* [2011] EWCA Civ 750; [2011] 5 Costs L.R. 808.
[17] *Magical Marking Ltd v Ware & Kay LLP* [2013] EWHC 636 (Ch); [2013] 4 Costs L.R. 535.

claimant's Pt 36 offer effectively excluded the general discretion on costs in any event, at least after the expiry of the relevant period in the offer.

Analysis

The judgment applied the general discretion on costs under Pt 44 when authority would suggest the proper starting point was the terms of Pt 36. That problem was then compounded by the approach taken to the general discretion under Pt 44 which appears to have ignored key authorities. Either way this does seem to be a case in which the claimant could have expected to recover costs in full, subject to assessment. The judgment does, however, contain a very interesting point concerning the nature of a Pt 36 offer which might be read as an offer on the issue of liability but may perhaps properly be treated as being an offer to settle the whole claim.

Offer on liability or the whole claim?

Offers on liability, which may be phrased as an offer to take a percentage of the damages that would be awarded on full liability in settlement of the whole claim, can often be usefully made. The relevant offer by the claimant was to accept 65 per cent of damages awarded on full liability. This was, although dealing in percentage terms which is often viewed as an offer on liability, expressed as an offer to settle the whole claim. Although the value of the whole claim might not have been known, so acceptance would not have finalised the case, the offer did still relate to the claim as a whole.

There is no doubt an offer on the issue of liability only can be an effective Pt 36 offer, as that is expressly provided for under the terms of the rule itself and such offers have carried costs consequences under Pt 36 in a number of cases.[18] Under the terms of Pt 36, as that rule has read since April 2015, the distinction between offers on the issue of liability and offers to settle the whole claim has become sharper, as only offers to settle the whole claim now carry the deemed costs order when the offer is accepted within the relevant period. That may make offers expressed to be in settlement of the whole claim, even if by offering to concede a percentage of the damages, more attractive to claimants.

Interestingly, despite the apportionment of costs, the judge, on the basis of the claimant's Pt 36 offer, did award the claimant enhanced interest and indemnity costs from the end of the relevant period. Even if the offer had been expressed to be on the issue of liability only those same consequences ought to have followed when the case was really about liability and so had the offer been accepted a trial would probably have been avoided. Such an offer, to pick up the language of the new r.36.17, was surely a genuine attempt to settle the proceedings in these circumstances.

Practice points

- For both claimant and defendant Pt 36 offers are crucial for giving what are sometimes termed "automatic" costs consequences, subject to the limited exception where these would be "unjust".
- If Pt 36 does take precedence over Pt 44 the significance, for both claimants and defendants, is that the effect of Pt 36 will generally provide protection, at least from the end of the relevant period in any offer carrying costs consequences under the rule, against a partial, percentage or issue based costs order.

[18] *Huck v Robson* [2002] EWCA Civ 398; [2003] 1 W.L.R. 1340; *Onay v Brown* [2009] EWCA Civ 775; [2010] 1 Costs L.R. 29; *Somnez v Kebabery Wholesale Ltd* [2009] EWCA Civ 1386; *Black v Doncaster and Bassetlaw Hospitals NHS Foundation Trust (Costs)* , unreported, April 20, 2009 CC (Sheffield).

- Thought is required, when formulating an offer that reflects apportionment on liability, whether that is an offer on the issue of liability and/or an offer to settle the whole claim. It may be advantageous for the claimant if that offer is expressed to be a way of resolving the claim as a whole.
- Defendants should be wary of relying on this authority and forming an optimistic view about arguments on costs in the event of failing to beat a claimant's Pt 36 offer.
- Claimants should go to court armed with all relevant authorities!

John McQuater

Sinclair v Joyner

(QBD, Cox J, June 23, 2015, [2015] EWHC 1800 (QB))

Personal injury—liability—negligence—road traffic accidents—breach of duty of care—causation—contributory—reconstruction—expert evidence

LT Bicycles; Contributory negligence; Drivers; Expert evidence; Reasonable care; Road traffic accidents

Just after 18.00 on Sunday July 3, 2011 the claimant Fenella Sinclair and defendant Rachel Joyner had been travelling along the same road in the opposite direction to one another. As both parties came around a bend they collided and the claimant fell from her bicycle, sustaining severe brain injury. The claimant submitted that the defendant failed to keep a proper lookout in that she failed properly to assess the hazard presented by the claimant, who was cycling in the middle of the road and standing up on her pedals. She contended that the defendant failed to appreciate that, in deciding to drive past her at the bend rather than braking and stopping to allow her to pass, she would not allow the claimant sufficient room.

The defendant denied all responsibility for the accident. She argued that as she approached and drove past the claimant, she was driving slowly, safely and appropriately, as far over to her nearside as possible. Her case was that she reasonably considered the claimant to present a hazard which required her to do no more than slow down to drive past her. She contended that the claimant then lost control of her bicycle and deviated unexpectedly into her side of the road as her car drove past. There was a hearing to determine liability only.

Due to the severity of her brain injuries the claimant could not give evidence. There were nevertheless a number of lay witnesses. There were also two reconstruction experts. The evidence from the defendant's expert was considered "unsatisfactory" by the judge for a number of reasons including the expressing of inadmissible views on the factual evidence.

Mrs Justice Cox held that the courts should not fall into the trap of imposing a counsel of perfection upon car drivers, thereby distorting their duty to take reasonable care.[1] It was relevant to bear in mind that the defendant was driving at a reasonable speed along a road she knew well, with her family in the car, on a warm summer's evening in a quiet, rural location. After she came around the bend, the events that occurred did so within a very short timeframe. Nevertheless, the claimant had established to the requisite standard that the defendant failed properly to assess the hazard the claimant presented as she drove around the bend and saw her. She failed to stop when it was necessary to do so to allow the claimant to pass by safely.

[1] *Ahanonu v South East London and Kent Bus Co Ltd* [2008] EWCA Civ 274 considered.

The defendant's carriageway was 2.5m wide, and the width of her car was 2.1m. Even if she were right over to her nearside, that left at best 0.4m between the car and the claimant who was, on the evidence, riding her bicycle only just on her own side of the road. The defendant noticed the claimant's proximity to the centre of the road as soon as she saw her. For the reasonable, prudent driver in those circumstances, the judge held that alarm bells would have sounded instantly.

In addition the fact that the claimant was riding up on her pedals and not sitting on the saddle normally meant that the defendant would have seen enough to form the view that she was not a "serious cyclist" and that she was in discomfort. The defendant's failure to see that the claimant was in discomfort, together with her estimate that the claimant was only two-three car lengths away when she first saw her, indicated that she was not in fact keeping a proper lookout as she came around the bend.

The judge also held that motorists had to anticipate hazards in the road, particularly from vulnerable road users such as cyclists, and be ready to react to them. The defendant could not be relieved of that duty by seeking to blame the claimant, who was obviously in difficulty, for deviating into her side of the road and colliding with the rear offside tyre after the front of the car had passed her. The fact that a collision occurred demonstrated that there was insufficient room for her to pass the claimant safely and that the defendant's assumption to the contrary was wrong.

The judge said that the defendant should have appreciated that her car was too close to the centre of the road for her to have passed safely. The reasonable, prudent driver would have braked immediately to allow the cyclist sufficient room to ride past. On the evidence there was ample time for the defendant to have done so. The causal effect of the collision was to deprive the clamant of the opportunity to regain control of her bicycle. There was no evidence that the claimant would have fallen over without any contact. On that basis, primary liability was established.

Turning to contributory negligence Cox J concluded that the claimant bore some responsibility for the accident. She should not have been riding her bicycle in a central position in the road, and her negligent conduct in doing so materially contributed to the damage caused. In all the circumstances, having regard to the parties' respective positions and conduct, the appropriate apportionment of fault for the claimant was held to be 25 per cent. Judgment was entered on that basis.

Comment

An interesting feature of this case relates to the quality, or lack of, the expert evidence that was given on behalf of the defendant by Mr Newton. As already mentioned, the claimant was unable to give evidence regarding the circumstance of the incident as she had no recollection. Cox J made comments about the about Mr Newton's evidence. The role of an expert in these cases has long been established by the Court of Appeal in *Liddell v Middleton*.[2] Further reference is made to the comments by Coulson J in *Stewart v Glaze*.[3]

These cases demonstrate the parameters in which reconstruction expert evidence should confine itself to. Essentially, the expert role is to provide the Court with the necessary scientific criteria and assistance based on their specific skills and experience. These skills will not be possessed by the Court, but they will enable the judge to interpret factual evidence. Mr Newton, however, had an incorrect view as to his role as an expert. He considered that he was there to discover the facts and to use his expertise and experience to give an opinion as to what happened. This is precisely what he is not supposed to do.

Mr Newton's evidence was further undermined in that he made various assumptions about the evidence which was not supported on the facts. For instance he made reference to the claimant having "struggled up the long slow hill in low gear" which did not actually occur.

[2] *Liddell v Middleton* [1996] P.I.Q.R. P36.
[3] *Stewart v Glaze* (2009) EWHC 704 (QB).

Not only was Mr Newton's approach to how his evidence should be given wrong, but there is also some significant doubt about his qualifications to give evidence. Mr Newton, it seems, had been involved for many years in considering many road traffic collisions. However, his experience was engaged with working as part of a multi-disciplinary team of academic experts and professionals at Loughborough University's Vehicle Safety Research Centre. This meant that he was able to seek other views on matters that were outside his range of expertise. Indeed, Mr Newton accepted that his own academic qualifications were very limited. In fact, he identified three individuals in his report who were consulted by him for the purposes of preparing his report. For instance he referred to a "two wheeler" consultant and that he had checked his report with him for its scientific validity. This is a wholly unsatisfactory approach to expert evidence. It is tantamount to an acceptance by Mr Newton of his own report but he did not have the expertise to advance any views that he had.

Another interesting feature of the case relating to Mr Newton is that he did not attend court on the first day. This was the day when the lay evidence was given and tested in cross examination. He said in evidence that he did not attend as he was not asked to do so by his instructing solicitors in order to save money.

Finally, another area in which his evidence was deficient related to the crucial issue of whether or not there had been contact between the claimant's bicycle and the defendant's motor vehicle. Mr Newton said there had not. Mr Newton's evidence was that the scuff marks to the bicycle and the car tyres were often caused by contact with a kerb or other road surfaces. He did not provide any evidence to support this. He conceded in cross examination that the evidence put forward by the claimant's expert that such marks could not have been caused by a kerbstone was correct.

Practice points

- When instructing an expert in any case, it is essential that they have the appropriate qualifications to be able to report on the matters that they have been instructed on.
- Any report prepared requires scrutiny to ensure that the expert does not stray into the judge's territory by setting out views on, as in this case, how the instant happened, and reaching judgements on the evidence presented.
- In other words, it is vital that experts appreciate their role in personal injury cases as defined by CPR 35.

Colin Ettinger

Griffiths v Secretary of State for Health

(QBD, Turner J, May 6, 2015, [2015] EWHC 1264 (QB))

Personal injury—negligence—causation—civil procedure—clinical negligence

LT Causation; Clinical negligence; Delay; Paramedics; Spinal cord

The claimant was a retired vet who had alcohol problems, every so often going on binges which could last for days. On July 21, 2010 the claimant was carrying out some DIY work at home. His wife, an alcohol specialist nurse, was out. The claimant filled the time waiting for some paint to dry by working on his computer, upstairs, whilst drinking vodka and orange.

About noon the claimant came downstairs, carrying an empty tumbler, lost his footing and fell. The claimant broke his neck in the fall, ending up sprawled at the foot of the stairs with his legs resting on the lower steps.

When the claimant's wife arrived home she, in the words of Turner J, "seriously underestimated the seriousness of her husband's condition".

The claimant's wife, being annoyed that he had been drinking, took a photograph of him where he was with the intention of confronting him with that photograph later and, as Turner J put it, "administer a dose of therapeutic discomfiture".

Twenty minutes later, with the claimant still lying at the foot of the stairs, his wife took another photograph of him. By about 13.45 the claimant's wife began to suspect her husband's condition was potentially serious. She feared he may have had a stroke. An ambulance was called and arrived about 14.25.

The ambulance crew, for whom the defendant was legally responsible, comprised a paramedic, an ambulance care assistant and a student nurse, who was just there to observe. The paramedic made a serious error from the outset, assuming, like the claimant's wife, that the claimant had suffered a stroke.

Consequently, no steps were taken to immobilise the claimant's neck. The claimant was lifted into a sitting position, carried into the lounge and sat on a sofa. Only at hospital was the correct diagnosis made about the severity of the claimant's injury. The defendant did not dispute that the error made by the paramedic, in concluding the claimant had suffered a stroke, was a breach of duty.

In these circumstances the issue for determination was whether the breach of duty in failing to immobilise the claimant's neck caused at least part of his residual disability. Turner J noted that: "The victim of a serious spinal cord injury remains vulnerable to further trauma in the immediate aftermath of his injury."

The claimant sustained, as a result of the fall, extensive ligamentous disruption and an unstable spinal cord injury. Applying the conventional test on causation Turner J held:

> "A combination of the literature and the expert opinion in this case thus leads me to the conclusion that where there is evidence of material deterioration after significant manhandling then the court would normally conclude that, on a balance of probabilities, the deterioration would not have occurred but for the manhandling."

On this basis the issue of causation depended upon two questions:

- Was there a level of negligent manhandling liable to cause further injury to the spinal cord?
- Did the claimant's condition deteriorate between the time he was found by the ambulance crew at the bottom of the stairs to the time he arrived at hospital?

On the question of manhandling it was agreed that as Mr Griffiths was lifted his neck was allowed to move freely. When subsequently interviewed the paramedic was very candid, accepting he should have immobilised the spine.

On the question of deterioration Turner J accepted the defendant's contention that the issue was whether there had been any deterioration in neurological function between the time of the fall and the time the claimant arrived at hospital, putting the matter this way:

> "I would not be prepared to conclude, without more, that the level of manhandling which I have found to have occurred was causative of a poorer outcome than would otherwise have been the case. However, if I were to find in addition that there was evidence to show that on a balance of probability Mr Griffiths was in a worse state when he arrived at hospital than he had been before he had been manhandled then this would establish that Mr Hamilton's negligence probably caused a poorer outcome for Mr Griffiths."

Although she would have been unaware of the forensic purpose to which these would be put, the photographs taken by the claimant's wife proved to be important. That was because a careful comparison appeared to show the claimant's left arm extending further from his body in the second photograph than it did in the first. This was enough for Turner J to conclude the claimant did have some level of residual function below the level of the spinal injury after the fall but before the manhandling.

Turner J concluded the manhandling which took place would not, without more, justify a conclusion on the balance of probability this breach of duty had caused injury. However, deterioration of spinal injury is relatively uncommon, the most common cause being mishandling. The combined evidence of manhandling and deterioration was compelling enough to support the conclusion manhandling had been responsible for the deterioration.

The remarkably good recovery by the claimant was not held to be inconsistent with there having been a spinal injury upon which further trauma was superimposed by manhandling. Consequently, the judge rejected the defendant's suggestion the assessment of the difference in outcome was so speculative the claim must fail in any event.

Comment

Introduction

The judgment in this case deals with a number of issues which will often arise in a clinical negligence claim that relates to the management of a spinal cord injury. It also gives helpful guidance on issues that may arise in a wider range of cases, when causation is an issue. The judgment also has the useful reminder about bundles of documents prepared for trial.

Causation: general principles

Where sub-standard medical treatment, of the kind that occurred in this case, follows initial injury that will, unless grossly negligent, be regarded as a consequent of the earlier event and so if that is tortious the original tortfeasor will remain liable and the difficulties on causation, considered in this case, will not have to be dealt with by the court.

Issues on causation of the kind which were determined will, however, have to be tackled if:

- the initial event was not tortious;
- there is a significant apportionment on liability; or
- the original tortfeasor is not able to meet any judgment.

Causation: This case

The issue on causation in this case raised related questions as to:

- whether there was a causal connection between the breach of duty and eventual outcome; and
- whether the outcome, assuming some causal effect, was sufficiently different to constitute injury or damage.

Causal connection?

The first issue, about causal connection, can be determined on a balance of probability, "but for" approach or, in certain circumstances, on the test of material contribution to injury.

The judge, in this case, felt it necessary to adopt the conventional "but for" test. That was perhaps on the basis that the claimant either had or had not suffered adverse outcome as a result of the breach of duty, leaving no way of finding that the breach of duty contributed, even if not decisively, to the outcome.

There were, however, cumulative factors involved in the sense of the trauma of the fall and the further trauma of the manhandling which would have the potential for applying the test of material contribution to injury identified in *Bailey v Ministry of Defence*.[1] However, the distinguishing feature is that here the defendant's argument was effective that all the damage had already been done, leaving no scope for an argument based on contribution (very different from *Bailey* and cases that followed approach where the damage had patently not occurred at the time of the breach or the uncertainty was over the issue of timing itself such as *Popple v Birmingham Women's NHS Foundation Trust*.[2] In this sense, although not articulated as such, the defendant's argument was very similar to that advanced in *Reaney v University Hospital of North Staffordshire NHS Trust*[3] applying authorities such as *Performance Cars v Abraham*.[4]

Injury?

The related question of whether, even if all the damage had not been done and hence the breach did have potential to cause an adverse outcome, there was insufficient quantifiable difference to amount to "damage" adopted, though again unarticulated, the issues arising in cases such as *Tahir v Haringey HA*.[5]

Another way of looking at that issue of whether there was "damage" is the defendant's suggestion that what the claimant really suffered as a result of any causative breach was a less good eventual recovery. That, of course, is a way of introducing the pitfall of the claimant of a case based on "loss of chance" when trying to establish damage to complete the constituent elements of liability as in *Gregg v Scott*.[6] For these purposes losing the opportunity of a better outcome, unless that was more than even, is not the same as deterioration, which provided it is quantifiable the law will count as the "damage" necessary to establish liability.

Burden of proof

Whilst the burden of proof is on the claimant to establish causation that is, of course, only to prove this on a balance of probabilities and, for these purposes, the evidence that is available may be enough for the court to infer probability.

The statistical information relied on by the claimant, of itself, did not suffice because that was insufficiently robust. However, coupled with the evidence to suggest deterioration usually occurred with manhandling, and the fact there was found to be manhandling, did suffice. Although in this case that combination of evidence was persuasive it is, in a sense, an example of the court being ready to infer causation when there has been a breach of duty likely to cause the injury that eventuated.

In *Drake v Harbour*[7] Toulson LJ observed:

> "In the absence of any positive evidence of breach of duty, merely to show that a claimant's loss was consistent with breach of duty by the defendant would not prove breach of duty if it would also be consistent with a credible non-negligent explanation. But where a claimant proves both that a defendant was negligent and that loss ensued which was of a kind likely to have resulted from such negligence, this will ordinarily be enough to enable a court to infer that it was probably so caused, even if the

[1] *Bailey v Ministry of Defence* [2008] EWCA Civ 883; [2009] 1 W.L.R. 1052.
[2] *Popple v Birmingham Women's NHS Foundation Trust* [2011] EWHC 2320 (QB).
[3] *Reaney v University Hospital of North Staffordshire NHS Trust* [2014] EWHC 3016 (QB); [2015] P.I.Q.R. P4.
[4] *Performance Cars v Abraham* [1962] 1 Q.B. 33 CA.
[5] *Tahir v Haringey HA* [1998] Lloyd's Rep Med 104 CA (Civ Div).
[6] *Gregg v Scott* [2005] UKHL 2; [2005] 2 A.C. 176.
[7] *Drake v Harbour* [2008] EWCA Civ 25; 121 Con. L.R. 18.

> claimant is unable to prove positively the precise mechanism. That is not a principle of law nor does it involve an alteration in the burden of proof; rather, it is a matter of applying common sense. The court must consider any alternative theories of causation advanced by the defendant before reaching its conclusion about where the probability lies. If it concludes that the only alternative suggestions put forward by the defendant are on balance improbable, that is likely to fortify the court's conclusion that it is legitimate to infer that the loss was caused by the proven negligence."

Evidence

The defendant tried to take the point that when a complaint was made on behalf of the claimant to the defendant this omitted some detail but as Turner J recognised:

> "This is true but I am not satisfied that the omission of this level of detail is a compelling reason for concluding that this is something that Mrs Griffiths and her husband imagined or invented after the event."

Photographs, video and other evidence of the kind can, as this case illustrates, sometimes be of the utmost value, even though that would never have been anticipated at the time those images were captured.

Bundles

Turner J had something to say of general application about trial bundles given that there were 17 lever arch files, containing over 5,000 pages of documentary material, out of which about a dozen remained unopened throughout the trial. Referring to para.3.2 PD 39A and Sedley's Laws of Documents (which the judge, for the avoidance of doubt, footnoted as a parody) Turner J held:

> "In this case, the trial bundles entirely fulfilled the expectations of parody but signally failed to comply with the Practice Direction. Of course, the court should not be too ready to criticise solicitors who may understandably err a little on the side of generosity when deciding which documents to include but this pragmatic indulgence does not excuse wholesale profligacy. CPR 1.3 imposes a duty upon the parties to help the court to further the overriding objective. This duty is not fulfilled by documentary carpet bombing. Those responsible for putting trial bundles together should bear in mind that if they are in breach of the Practice Direction then, in appropriate cases, adverse costs consequences may flow."

By way of interest Sedley's Laws of Documents are:

- **First Law:**

  Documents may be assembled in any order, provided it is not chronological, numerical or alphabetical.

- **Second Law:**

  Documents shall in no circumstances be paginated continuously.

- **Third Law:**

  No two copies of any bundle shall have the same pagination.

- **Fourth Law:**

  Every document shall carry at least three numbers in different places.

- **Fifth Law:**

  Any important documents shall be omitted.

- **Sixth Law:**

  At least 10 per cent of the documents shall appear more than once in the bundle.

- **Seventh Law:**

  As many photocopies as practicable shall be illegible, truncated or cropped.

- **Eighth Law:**

  At least 80 per cent of the documents shall be irrelevant. Counsel shall refer in court to no more than 10 per cent of the documents, but these may include as many irrelevant ones as counsel or solicitor deems appropriate.

- **Ninth Law:**

  Only one side of any double-sided document shall be reproduced.

- **Tenth Law:**

  Transcriptions of manuscript documents shall bear as little relation as reasonably practicable to the original.

- **Eleventh Law:**

  Documents shall be held together, in the absolute discretion of the solicitor assembling them, by: a steel pin sharp enough to injure the reader; a staple too short to penetrate the full thickness of the bundle; tape binding so stitched that the bundle cannot be fully opened; or a ring or arch-binder, so damaged that the two arches do not meet.

Practice points

A number of important practice points are illustrated by this judgment.

- Where there are successive tortfeasors it will not always be necessary to pursue a claim against each of those tortfeasors, unless a subsequent event is such that the chain of causation is broken or there may be difficulties in succeeding, in whole or in part, against an earlier tortfeasor.
- Whilst causation must be proved by the claimant, it is only necessary to do that on a balance of probability and inference is permissible.
- Any available evidence should be collected and carefully reviewed as sometimes what seems relatively innocuous may turn out to be crucial.
- Always remember that Sedley's Laws of Documents are a parody and not official guidance!

John McQuater

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