Journal of Personal Injury Law

March 2016

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ISSN: 1352-7533

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Editorial

Welcome to the March 2016 edition of JPIL.

In the December 2015 edition we featured an article from Heather Beckett looking at the approach Jay J took to evidential issues in the case of *Saunderson v Sonae Industria (UK) Ltd*. It is therefore a privilege to be able to publish in this edition an article from *Sir Robert Jay* on this topic. The article is based on the Richard Davies QC memorial lecture he gave at the PIBA Conference in 2015.

Michael Lees is a noted campaigner on the issue of asbestos in schools and we feature an article from him on this issue which is something that APIL have also been campaigning on for several years.

In our quantum section, JPIL board member *David Fisher* has written about the new Rehabilitation Code and the role of case managers.

On the international front, *Professor Bjarte Thorson* from Oslo University, Norway recently presented an excellent comparative analysis of the different approach to fatal accident claims taken across Europe at the PEOPIL conference and we are also delighted to publish an article based on that presentation.

We also have an interesting article looking at what happens where an ATE insurer refuses to indemnify from *Sarah Naylor*.

This will be my last edition of the journal having been General Editor since 2003. Twelve years is long enough at the helm (some may say too long!) but it has been a tremendous privilege to be the editor. One particular advantage has been the opportunity of keeping up to date with the latest developments across all aspects of personal injury law. I have been fortunate to publish articles from senior members of the judiciary, from eminent legal academics and from the very best practitioners in the field. I have chaired the JPIL Annual Conference and taken part in the JPIL case and comment sessions at a number of APIL conferences. I have had the pleasure of working with so many delightful and committed members of the JPIL Board over the years and will genuinely miss the camaraderie of the quarterly board meetings. I would like to particularly thank Nigel Tomkins who has been my Digest Editor throughout and also Denise Kitchener and Deborah Evans, the two CEO's of APIL who have been on the board respectively throughout my time. Their unstinting support for both me and the journal has ensured that as I step down the journal is better placed than it has ever been, at the forefront of analysis and learning in the personal injury world. I would also like to thank all those from Sweet & Maxwell who have made my life as editor as easy as possible and particularly the current team of Lindsay Emerson and Amelia Clarke.

Muiris Lyons
General Editor

The Richard Davies QC Memorial Lecture 2015: "Standards of Proof in Law and Science: Distinctions Without a Difference?"[1][2]

Sir Robert Jay[*]

LT Clinical negligencer; Expert evidence; Legal reasoning; Medical evidence; Personal injury; Science; Standard of proof

Introductory remarks

I accepted Andrew's skilfully flattering invitation to deliver this prestigious lecture with a mixture of conflicting emotions, a melange of pride, regret and fear. After all, I had been given the list of past lecturers and wondered how and why I could possibly be bracketed with them. Then, putting any evidential deficits to one side, I quickly threw my mind back to 25 years of friendship with and admiration for Richard Davies and decided to throw caution to the winds. Richard's untimely death some seven years ago now is of the deepest personal regret, and were he still alive it is probable, nay certain, that I would have run the first draft of this lecture past him for typically penetrating and no-holds-barred comment. The number of times I ambled into his room in Chambers for what we called "surgery" (in other words, obtaining his wise counsel in many domains of the law, and beyond) must have numbered in the hundreds.

Some general reflections on the topic

I am confining this lecture to civil law, being the main interest of those attending it. When litigating medical and scientific cases at the Bar, my working assumption was that science demanded a higher standard of proof than law. It is a purer, less expedient, discipline, and certainly one less apt to compromise. Science claims to deal in the currency of objective, irrefutable proof. Thus, taking my steer from Richard Davies who gave me so many forensic clues in those naïve, early days of practice, one standard cross-examination technique was to seek to undermine expert opinion by politely demanding that he or she put to one side rigorous scientific standards and indulge me and the court by embracing a weaker, more flexible, legal standard. Surely, I would ask hopefully, your answer would not be the same if you permitted yourself that indulgence? I never got much joy with that technique. Nowadays, most experts are fully alive to that ruse, and speak in their reports of "balance of probabilities" as if they were entirely familiar with the concept.

There are numerous reasons why, in many of its domains, science might aspire to be more rigorous than the law. Propositions of science mean little unless they are repeatable and generalisable. Thus, science looks for patterns and the ascertainment by inductive reasoning of general rules. The common law does that too, but in terms of its overall development as a corpus of man-made rules, and not in the context of finding facts. Very often, the court is seized of a singleton claimant and one past event. The finding of fact has no precedent value. Further, in the sort of scientific areas which might interest us, namely medicine,

[1] Delivered to the Personal Injuries Bar Association at Inner Temple on 20 October 2015.

[2] With thanks to Dr M.J. Quinn for this help in reviewing this paper in draft.

[*] Sir Robert Jay started practice at the Bar in 1983 after completion of pupillage. His practice was based mainly on public law, general common law, group litigation and public inquiries. He was appointed QC in 1998 and Recorder in 1999. He was subsequently appointed a Deputy High Court Judge in 2008, and was elected Head of Chambers at 39 Essex Chambers in 2011.

He was Leading Counsel to the Leveson Inquiry into the culture, practices and ethics of the press (2011–2012). In June 2013 he was appointed to the High Court Bench, and sits in the Queen's Bench Division.

engineering and other empirical disciplines, the standards must be high because what is at stake is often so serious.

Extremely experienced judges find themselves in disagreement on this issue. In *Loveday*,[3] Stuart-Smith LJ sitting at first instance said that in science there did not appear to be a generally accepted standard. However, Smith LJ in *Wood*[4] said that science imposed a higher standard than the law, and I believe that it would be fair to say that most judges have backed that view.

On this occasion, I am in the Stuart-Smith LJ camp. The quest for rigour, precision and certainty is not the same as saying that science imposes a higher standard of proof, or indeed any standard of proof. Outside the realm of mathematics where propositions prove themselves through their own internal logic, science does not have a standard of proof because there is no court of scientific opinion and no cadre of judges whose decisions are binding. In any event, I would suggest that nothing is regarded as *proven* in science in the sense in which that term is understood and deployed in the law. Proof in the law entails a fiction, a piece of intellectual *legerdemain* which is simultaneously necessary, sly, and apt to cause confusion. We all know that if a court concludes on the evidence that it is more probable than not that X has happened, then for the purpose of the law X is now a certain fact. If it is only possible that X occurred, then the law treats it as a non-event, as nugatory.

These are fictions which have no place in pure, or even impure, scientific discourse. First, as a matter of principle, all propositions of science must be capable, as Karl Popper explained, of being falsified. So it is that science never rests on its laurels; proof in science is elusive as the grapes of Tantalus. Secondly, and as a related point, *proof* (to the extent that this term has any validity in science) means something along the lines of a consensus having emerged in the scientific community that a particular hypothesis or proposition may now be regarded as solidly grounded. That proposition does not have to be *true*; it is simply the best available explanation, the best that science can do for the time being. Because there is sufficient common ground, the hypothesis becomes transmuted into something more robust: call it a statement of principle, or a theory of general application which has sufficient evidential ballast. Thirdly, science speaks in terms of degrees of confidence, not proof. Put another way, an expression of scientific opinion should be couched in terms of the amount of evidential support for it, rather than—as the law prefers—in any binary fashion.

In domains where law and science tend to intersect, the concept of degrees of confidence is capable of greater refinement. It might mean, a statistical assessment of the inherent probabilities (and in that statement probabilities really means possibilities). This might raise quite narrow questions: such as, exactly where a particular case may fall, or be taken to have fallen, on the normal curve. Elsewhere, it may reflect a more rounded and broader evaluation of all the available evidence and the allocation to that evidence of an expression of a degree of confidence in its robustness. It is in this second respect, I believe, that the most interesting questions arise, because it is in this respect that science and the law are covering the same sort of ground.

Thus far, I have reached the point where I can hear myself saying that proof in science is not proof on the balance of probabilities; indeed, it is not proof at all. I sense, though, that these are unsatisfactory and recherché conclusions. Simultaneously, they mean a lot and mean nothing. Perhaps I could and should be more helpful. I need to bring myself, if not back to earth then slightly closer to it.

Most legal problems touching on the world of science tend to arise in connection with medical and related issues, by which I mean issues which touch on the human body and mind. We lawyers are in the business not of proving the theory of evolution, even on the balance of probabilities, but in arguing about and deciding whether a claimant's personal injuries should be compensated in a court of law. It is in the

[3] *Loveday v Renton (No.1)* [1990] 1 Med. L.R. 117.
[4] *Wood v Ministry of Defence* [2011] EWCA Civ 792.

rough and tumble of this work that the law often has to rely heavily on scientific opinion, and in doing so needs to understand its methodology, the evidence it uses, and the standards it typically applies.

In one elementary sense science and the law have the same starting-point. The null hypothesis in science is that there is no association, still less a causal link, between two temporally sequential events. In this way science treats itself as an independent and impartial tribunal, because to predicate or presume an association would be to run the risk of befuddling or prejudging the inquiry. There is no scientific basis for making any such presumptions; the slate is clean. The law, as ever, has a simpler mode of expressing the point; the burden of proof is on the claimant. But the law's implicit reasoning is different: the burden of proof must lie somewhere, and in a civil case intuitively it seems right that the person who brings the case must prove it. It also feels right that in a civil dispute between two entities, if something is more likely than not, then it is proved. As ever in the common law, we have an axiom founded on gut-feeling and earthy pragmatism.

Practical problems naturally arise in the law where a fact in issue cannot be proved by direct evidence but by inference. The law may be based on a deterministic view of the natural world. Causes may in theory be observed as they occur, but they will not have been if the past event has come and gone. The drawing of an inference is the only available pathway to proof.

To the extent that the law has regard to scientific evidence in deciding whether or not to draw a probabilistic inference, it seems to me that in most respects the law is genuflecting towards a corpus of knowledge and opinion which is more rigorously established, in the sense of having a more methodologically rigorous evidence base, than may exist in much of the law's bread-and-butter work. For example, many straightforward accident claims are resolved solely on the basis of eye-witness evidence, which is almost always flawed because human memory is so unreliable. No one would claim this resolution to be scientific.

However, I am not saying that scientific methods are always so rigorous. Taking just one example, in so many cases a medical expert will be expressing an opinion in the individual case on the basis of clinical judgment. That, no doubt, may be a compelling amalgam of observation and experience, but it certainly does not entail the recruitment of the claimant to any randomised controlled trial. In the same way perhaps as the good judge, the good doctor is applying intuition honed by experience to a particular evidential matrix and conjuring a common-sense conclusion out of the mix. Outside the court room, that good doctor will be expressing himself or herself in terms of degrees of confidence (or lack of it); inside the court room, those possibilities are ironed out and become transformed from an expert expression of probability into a judicial expression, once the judgment is delivered, of synthetic certainty.

I would like now, if I may, to develop some of these points and identify where the law and science are, respectively, in harmony and disharmony.

Evidential hierarchies

A concept of the standard of proof is inextricably intertwined with the nature and quality of the evidence brought to bear to discharge it. In recent years, medical science, and in particular those responsible for deciding whether, and if so how, therapeutic interventions should be deployed, have seen fit to devise rules, levels or hierarchies of evidence, with the aim of promoting rigour and consistency in decision-making. The gold standard is the randomised controlled trial, but just as one swallow does not make a summer, the regulators prefer to see a raft of high-quality meta-analyses and systematic reviews. At the bottom of the scale is expert opinion *simpliciter*—I qualify it in that way because expert opinion evidence in the courts may be supported by top-quality, level I evidence. In this evidential hierarchy, observational evidence, i.e. the sort of evidence we judges accept (or reject) day in day out, is regarded as low-grade but not quite rock-bottom.

Just as it would be wrong to say that science has a standard of proof in the strict sense, it would also be simplistic to say that science has rules of admissibility of evidence. However, in the realm of peer-review and stringent regulation of pharmaceutical products, papers will not tend to get published and new drugs will not obtain approval unless the evidence is at or close to the gold standard.

The underlying reasons of policy and principle for this stringency are clear. Medical science in particular is bedevilled with examples of false dawns, of apparently strong associations between two events turning out to be mere coincidence, and with the twin scourges of confounding and bias. So, there are not rules of admissibility as such, but there are conventions which serve to constrain reliance on observation and mere opinion.

There is not a unitary approach to this issue across common law jurisdictions. In our jurisdiction, although the Practice Direction to CPR Pt 35 compels an expert to cite any literature relied on and to mention any reasonable countervailing opinion (how often is this paragraph of the PD obeyed?), the issue is treated as one which goes to weight, not to admissibility. In practice, however, if the issue is a purely scientific one, I imagine that most experienced judges would accord greater weight to gold-plated evidence. This means that in product liability cases and group litigation involving scientific issues, observational, anecdotal evidence adduced by claimants may struggle to trump any reasonably consistent and robust scientific picture. I will be returning to this point at the end of my talk.

In the US, the position on my understanding differs. Following the 1975 enactment of new Federal Rules of evidence, and particularly r.702 dealing with scientific evidence, in 1993 the US Supreme Court in *Daubert*[5] for the first time obliged federal judges to be proactive and screen the medical scientific evidence of individual experts in toxic tort litigation to ensure it is relevant and reliable. *Daubert* makes judges the "gatekeepers" of medical/scientific expert testimony measured against the benchmarks of existing knowledge and practice. A judge must now ascertain whether scientific evidence is grounded in the methods and procedures of science. The Supreme Court emphasised that the inquiry envisioned by r.702 is a flexible one. It then identified four factors to consider when assessing whether a theory or technique is derived scientifically. These include its methodology, testability, subjection to peer review, and general acceptance by the scientific community.

In the absence of an evidential code with an analogue to r.702, our courts will not, I believe, be moving towards *Daubert*. This fills me with no regret, because there is an obvious danger that disputes which intuitively should be seen as going to weight, and therefore can only be properly evaluated once the court has heard all the evidence, tend to get decided prematurely under the curtain of admissibility. Arguably, this works to the disadvantage of claimants.

In any event, there has been a reaction in some prestigious scientific quarters to the fetishising of evidential hierarchies. I commend to your attention a lecture available online given in 2008 by Professor Sir Michael Rawlins, former chair of what is now the National Institute for Health and Care Excellence (the annual Harvian Oration entitled "On the Evidence for Decisions about the Use of Therapeutic Excellence"). On that occasion, Sir Michael said this:

> "The notion that evidence can be reliably placed in hierarchies is illusory. Hierarchies place RCTs on an undeserved pedestal for … although the technique has advantages it also has significant disadvantages. Observational studies too have defects but they also have merit. Decision makers need to assess and appraise all the available evidence irrespective as to whether it has been derived from RCT's or observational studies, and the strengths and weaknesses of each need to be understood if reasonable and reliable conclusions are to be drawn. Nor, in reaching these conclusions, is there any shame in accepting that judgments are required about the 'fitness for purpose' of the components

[5] *Daubert v Dow Merrill Pharmaceuticals Inc* [1993] 509 U.S. 579.

> of the evidence base. On the contrary, judgments are an essential ingredient of most aspects of the decision-making process."

A well-designed randomised controlled trial ("RCT") may well be independent and impartial, but there are poorly designed studies which can tilt the scales of scientific justice. Observational studies may be subjective and prone to human error, but they may also be thoroughly decent and robust, subject to all the human factors bearing on the quality of the observations in question. Sir Michael reminded his lecture audience that Francis Bacon, Rene Descartes and Thomas Hobbes all considered on philosophical grounds that the observational approach was to be preferred to the experimental.

The bottom line is that Sir Michael's point about judgment being an essential ingredient of most aspects of the decision-making process applies as much to the relevant domains of science as it does to the law. This is not of course to equate the standards of proof, but it certainly suggests that the decision-making process cannot ignore a human element.

The Bradford Hill criteria

The Bradford Hill criteria are extremely familiar to this Association, but one needs to be clear as to their proper sphere of operation. Both medical scientists and lawyers will have regard to Sir Austin Bradford Hill's nine criteria where the issue is what we lawyers like to call, "generic causation". Outside the confines of any individual case, is agent X capable of causing disease or condition Y? For example, can the MMR vaccine cause autism? Proof of generic causation is necessary but not sufficient in product liability and personal injury litigation where this sort of issue arises, because even if the claimant falls within the class of individuals who might or could have sustained the relevant injury as a result of the postulated cause, it remains to be established whether this particular claimant in fact did so.

The Bradford Hill criteria constitute scientific orthodoxy, no doubt with some fine tuning over the years, notwithstanding that they are now 50 years old. Further, the common law has not been slow to have regard to them, where appropriate.

In science, particularly in epidemiology, the Bradford Hill criteria provide a solid framework for focusing decision-making where causation cannot be established by observation and can only be inferred. One of Sir Austin's primary purposes was to distinguish between the concepts of association and causation. Evidence of a statistically significant association is neither necessary nor sufficient to establish causation. Thus, if the evidence relevant to the remaining eight criteria is sufficiently strong, the scientific community might regard the null hypothesis as having been disproved even if the statistical evidence of association is not robust. Conversely, even if the evidence supporting the posited association is powerful, it will be insufficient to disprove the null hypothesis without adequate evidence elsewhere.

According to the null hypothesis, the relative risk is deemed to be 1: there is no evidence of association. Where the relative risk is between 1 and 2, there is some evidence of association, but in less than 50 per cent of cases. Where the relative risk is greater than 2, there is evidence of association in more than 50 per cent of cases.

I said earlier that science works on the basis of degrees of confidence, and this is particularly so with epidemiological evidence. For a scientist, in the absence of other evidence, the null hypothesis cannot begin to be disproved if the result of the given study fails to attain statistical significance. Conventionally in epidemiology, the results of studies are expressed with a confidence interval of 95 per cent. Thus, if the range of findings of relative risk is expressed within a confidence interval of, say, 0.5–3, that means that 95 per cent of the results fell within that bracket. It also means that the findings have failed to achieve statistical significance because the lower end of the bracket is lower than 1. Put more formally, the "p" value (a complement of the confidence interval) is greater than 0.05. It has not been established to the

conventional degree of confidence that the posited relationship is caused by something other than mere random chance.

It is important to correct two misconceptions which sometimes underpin legal thinking in this area.

First, a confidence interval of 95 per cent does not somehow equate to the discharge of a standard of proof to a 95 per cent degree of probability. In formal terms, given that the "p" value is calculated on the assumption that the null hypothesis is true, it cannot be a direct measure of the probability that it is false. There is, in fact and in principle, no ready, mathematical means of ascertaining that probability.

Thus, the "p" value is only a measure of statistical significance; it does not express a standard of proof. This is so even if one were to have 100 studies which give the same result. One might well be very confident in the outcome, but that is an expression of judgment; it is not an expression of the discharge of particular standard.

Secondly, one must not confuse confidence intervals with relative risks. For example, a series of studies may all show with confidence that the relative risk in a given case is, say, 1.5. The result is therefore statistically significant—because it has been established with appropriate confidence—but it may be of little practical use, depending on the context. Further, for a lawyer seeking to prove causation on the balance of probabilities by this sort of evidence alone, a relative risk of 1.5 would be no use at all, because the risk will not have been doubled.

Confidence intervals are the conventional means of expressing the finding of an individual study. If a number of studies require interpretation, a lot of fancy epidemiological work may be needed before an assessment of an overall relative risk may be made.

On the other hand, once that work has been performed, and it has been established to the appropriate degree of confidence that the relative risk is greater than 2, the legal inference—that association has been proved on the balance of probabilities—involves no fancy epidemiological work at all; it is simple arithmetic.

Viewed in these terms, the scientist and the lawyer may be seen as two ships passing in the night. The lawyer really has no interest in statistics and degrees of confidence, probably understands very little about them, and may well wrongly believe that the epidemiologist is solemnly applying some high standard of proof. The scientist, on the other hand, is only interested in statistical significance, and sees absolutely no magic in a relative risk greater than 2.

Maybe I should concede this much. Imagine 100 studies all giving the same, statistically significant result: would an epidemiologist with experience of giving expert evidence in court say, if pressed, that the civil standard of proof has been satisfied? This epidemiologist would not be able to specify what standard has been met, but he or she would, I confidently believe, be able to say that a certain threshold has been surpassed. In so doing, this epidemiologist would not be applying any scientific standard of proof. He or she would, under duress, be reaching an overall judgment with reference to a yardstick others have brought to the party.

Earlier, I said that if the relative risk is greater than 2, then a claimant will have proved association on the balance of probabilities. I should make clear that this claimant will not, without more, have proved causation. I should also make clear that, if she or he is indeed fortunate enough to prove causation by other evidence, then what will have been proved is generic, not individual causation. Unfortunately for claimants, there are quite a few hurdles to surmount.

The law's approach to epidemiological evidence has developed over the past 25 years. The decision of Stuart-Smith LJ, in *Loveday*, is familiar, but that of the Court of Appeal in *Vadera*[6] may be less so. In *Vadera*, Henry LJ said this:

[6] *Vadera v Shaw* (1999) 45 B.M.L.R. 162.

> "The judge concluded, and in our respectful view was right on the evidence to conclude, that the studies carried out and referred to by Dr L did not establish a statistically significant connection between Logynon and strokes. Such evidence cannot be ignored by a judge. It is as common-sense a conclusion as one could wish to say that if the connection between A and B cannot be shown with confidence to be other than a coincidence, then it cannot be held on a balance of probabilities that A caused B."

The decision was right on its facts but I am not sure about all of the reasoning. Henry LJ appears to be referring to the epidemiological evidence touching on the issue of association. He was not referring directly to the issue of relative risk. On my interpretation of his judgment, the evidence under consideration was not statistically significant. If that is right, it follows that there was no statistically significant evidence of any relative risk, and the claim would have to fail for want of proof. So far, so good, but I do not agree that this is because "it cannot be shown with confidence to be other than coincidence". At that stage of the exercise, the ascertainment of statistical significance, no standard of proof is entailed at all, still less a standard which happens to be the same as the civil standard.

Possibly a more illuminating analysis is to be found in the seminal judgment of Mackay J in *XYZ*[7] ("the Oral C contraceptive litigation"). I am not just saying that because Colin hails from the same chambers. I use the epithet "seminal" but Lord Phillips prefers "remarkable"—no doubt in the judicial sense of that term.

In that case, the issue was generic causation and the claimants conceded that if they could not prove that the excess risk was greater than two (when comparing the second generation of contraceptives with the first) then their claims could not succeed. Accordingly, although not formally a preliminary issue, Mackay J dealt with it first. The defendants were contending that proof of an excess risk of greater than two would only have taken the claimants to first base, and that other important issues remained, not least the issue of individual causation in the lead cases.

In this context of generic causation, it seems to me (noting Lord Phillips' contrary view) that the analysis of the issue would have been the same had there been no first generation of the drug and the comparison was being made with women who were not taking it at all. For ease of analysis, I will simplify my approach to *XYZ* in that way.

Mackay J at [41]–[43] of his judgment observed that epidemiology was the starting-point for his assessment of what he called the "true" relative risk but not the end-point. There came a time, Mackay J observed, when he would be constrained, or permitted, to part company with the epidemiology and come to an overall, broader assessment of the issue applying traditional common-law standards. Thus, the judge, like Prometheus, is unbound—decoupled from the rules and conventions of epidemiology.

With the assistance of formidable expert opinion, Mackay J surveyed all the available epidemiological evidence and concluded that the true relative risk was in the region of 1.7. This meant that the claims could not succeed, and as the judge pointed out, it was unnecessary for him to make a finding of whether this translated into a true relationship of cause and effect, or was merely, as he put it, a statistical appearance. In the course of his judgment, Mackay J considered the other eight Bradford Hill criteria, and on my understanding he did so as part and parcel of his necessarily broad and wide-ranging inquiry into the issue of association. An epidemiologist would probably say that these remaining eight criteria are relevant to causation more generally and from a scientific perspective can have no bearing on the issue of association.

For present purposes, it is important to seek to ascertain at what point in his analysis Mackay J sought to break free from the rules and conventions of epidemiology. On my understanding, he did not do so in the context of interpreting the conclusions of individual studies. He did not say, for example that these could in some way be looked at more benevolently from the claimants' perspective because they must

[7] *XYZ v Schering Health Care Ltd* [2002] EWHC 1420 (QB); (2003) 70 B.M.L.R. 88.

have applied some higher standard of proof than the law requires. In other words, he did not labour under the first of the misconceptions I have previously identified. Further, there was no proper, evidence-based approach for somehow reworking an individual study to reflect the standard of proof the law requires. One could not say, for example, that by taking a confidence interval of less than 95 per cent one attains a level of confidence or standard of proof closer to 51 per cent. There are so many reasons why this is so, not least because, as I have said, the confidence interval is only a measure of the null hypothesis being false; it is not a measure of the association being made out.

For the purposes of this article, I suppose I need to ask whether a scientist would have reached a different conclusion about the "true" relative risk than did Mackay J. In order for this piece of speculation to work, one would need a large panel of scientists and to average out their conclusions. The panel would say that there are a large number of studies, of different quality, coming to somewhat different conclusions. If forced to come to a scientific conclusion, that would no doubt be expressed within a range with some sort of notional confidence interval. However, the mid-point within that range, averaged out as I have said, would probably be the same of Mackay J's figure. What would be lacking, though, would be a several hundred paragraph long judgment.

Had the relative risk in *XYZ* been found to be greater than 2, individual causation would have had to have been considered. A positive finding of generic causation would have meant that more than 50 per cent of claimants within the overall cohort would have proved their cases, but how does the law decide who succeeds and who does not? In statistical terms, all claimants would find themselves distributed along a normal or Gaussian curve, but what additional evidence, if any, is required?

This issue has clearly given rise to some difficulty, even in the Supreme Court, and I would like to return to it in that context.

Another decision of Mackay J has caused some controversy at the highest level. Again, however, I find myself wholly agreeing with it. In *Shortell*[8] he was trying a lung cancer case where the claimant was exposed to the risk of disease both through smoking and asbestos exposure. The evidence established that the causation of lung cancer is dependent on an aggregate dose either of asbestos fibre or smoke. He concluded on the available epidemiological evidence that the relative risk of contracting lung cancer through the ascertained asbestos exposure was between 3 and 3.5, well sufficient therefore to meet the "doubling of the risk" test. Put in these terms, it is difficult to see what is controversial about this reasoning, but I will soon be coming to that. I should add that in *Jones*[9] Swift J followed a similar legal approach although the claims before her failed on their facts.

Shortell was different from *Hotson*[10] and *Gregg*.[11] Given that the relative risk in both those cases was less than 2, the fiction of the law translated the possibilities into 0 and the claims failed. Recovery of damages for loss of a chance only works if the law wishes to give up on its fiction and succumb to the scientific approach of applying degrees of confidence.

Sienkiewicz v Greif (UK) Ltd[12]

For present purposes I am not so much concerned with the special rules which apply to mesothelioma cases but the approach of the Supreme Court to epidemiology in general. However, I will take a short stroll into the enclave, in order to see where the stakes in the ground are properly laid.

The special rules apply because science is silent and the law, if it wishes to achieve pragmatic justice, must soften its usual standards. In that sense, both science and the law are marching hand in hand.

[8] *Shortell v BICAL Construction Ltd* Unreported 16 May 2008 QBD.
[9] *Jones v Secretary of State for Energy and Climate Change* [2012] EWHC 2936 (QB).
[10] *Hotson v East Berkshire HA* [1987] A.C. 750 HL.
[11] *Gregg v Scott* [2005] UKHL 2; [2005] 2 A.C. 176.
[12] *Sienkiewicz v Greif (UK) Ltd* [2011] UKSC 10; [2011] 2 A.C. 229.

In *Fairchild* and *Barker* science was mute because in mesothelioma, on the present state of scientific knowledge, it was unknown whether an individual developed mesothelioma as a result of inhaling any particular fibre or fibres; and, therefore, whether a particular defendant was responsible for exposing him to the fibre or fibres that caused his illness.

In *Fairchild*, both Lords Bingham and Rodger pointed out that mesothelioma was dose-related: the greater the quantity of dust and fibre inhaled, the greater the risk. However, there were at least two reasons why this evidence could not tilt the scales of probability.

First, there was no evidence as to whether the condition was more likely caused by a single fibre, a few fibres, or many fibres. The court was not prepared to infer, in the absence of such evidence, that each of these possibilities was as likely as to the others. It followed that enhancing the risk by increasing the dose did not help. In practical terms, Mackay J was right in *Shortell* to say that the risk factors in mesothelioma are randomly distributed over a succession of tortfeasors.

Secondly, given the number of employers involved, in none of the cases before the House of Lords could the risk be said to be doubled by any one period of employment. So, without prejudice to my first point, no attempt could therefore be made to prove legal causation on that basis.

It followed that the claims could not be proved on scientific evidence, including I would add any epidemiological evidence.

In *Fairchild* their Lordships were therefore dealing with an absence of evidence of this nature. One could not put a figure on the level of enhancement of risk, but even if inferences *could* be drawn, there was no basis for saying that it was doubled. That said, their Lordships did say that mesothelioma claims failed for want of proof because what was required was evidence bearing on the operation of the disease process in the individual case.

In *Sienkiewicz*, the position was different to the extent that a figure was put on the risk of contracting the disease through an environmental cause. However, that risk was only 18 per cent, and could not add to the claimant's case on any doubling of the risk approach. Nor, on the Supreme Court's express findings, could it subtract from it. There was a rock of uncertainty whether the risk was unquantified (*Fairchild*) or quantified; that made no difference in principle.

The ratio of *Sienkiewicz* is that epidemiological or statistical evidence has no value in mesothelioma cases, either in support of a claimant (because the application of special rules means that such support is unnecessary) or against him (because, if the evidence is insufficient to discharge the legal burden of proof, there remains the rock of uncertainty).

Lord Phillips touched on Mackay J's judgment in *Shortell* and found it puzzling. It was unclear, in his view, why Mackay J did not decide the case on the simple basis that the asbestos and the cigarette smoke had combined synergistically to cause lung cancer, thereby satisfying the *Bonnington*[13] test on causation. I dealt with this point in a lung cancer case which will be heard by the Court of Appeal next term. As counsel for the claimant correctly conceded in my case, asbestos smoke does not materially contribute to the damage, in contrast to dust and pneumoconiosis.

I have finished my brief stroll into the enclave and I am back into the wider plains of epidemiology. What the Supreme Court had to say about that was, of course, obiter, but remains of considerable interest.

In *Sienkiewicz*, the most interesting analysis of statistical evidence came from Lord Rodger. He advanced a principled objection to its use—not in combination with other evidence, but in its absence. Imagine a case where it is agreed that there is, say, a 70 per cent chance of a relevant personal injury being caused by a tortious event. In such an instance, the legal burden is not discharged because there is a distinction between proving the chances of something happening and, as Lord Rodger put it, the actual cause. More precisely:

[13] *Bonnington Castings Ltd v Wardlaw* [1956] A.C. 613 HL.

> "So, by leading the epidemiological evidence, the only 'fact' that the claimant can prove and offers to prove, on the balance of probability, is that in most cases the dermatitis would have been related to the lack of showers. So, if the judge accepts the evidence, it may legitimately satisfy him, on the balance of probability, not that the claimant's dermatitis was caused by the lack of showers, but, in the absence of any evidence that the claimant was atypical, it is more probable than not that his dermatitis was caused by the lack of showers. In short, the chances are that it was. Whether, in any particular case, the claimant's dermatitis was actually caused by the lack of showers is a matter of fact—and one that remains unknown, if the only available evidence is statistical."

I do not agree.

The distinction between actual and probable causes is one without a difference; or, put another way, the insistence on proof of so-called actual cases serves impermissibly to intensify the standard of proof. The law does not insist on proof by observation or experimentation; it is entirely comfortable with proof by inference—which depends, of course, on the arithmetic being on the claimant's side (it was not on the facts of *McGhee*)[14] and there being nothing atypical about his case. If proof of what actually happened in the instant case were required, in the sense explained by Lord Rodger, both *Hotson* and *Gregg* should have been decided on a much simpler basis.

Further, there have been so many clinical negligence cases where Lord Rodger's distinction is routinely ignored. Take a cancer case where it is alleged that the treating doctor failed to diagnose the disease in time, and the claimant's mother died whereas she should have survived. There usually will be no direct evidence of the deceased's condition at the time the negligent omission took place, and so this has to be deduced, or inferred, by expert evidence of what probably was the position. Further, how this particular deceased might have responded to earlier treatment is in Lord Rodger's sense *unknown*, but this too can be inferred from the epidemiology. The expert can say only what the probabilities are, referring no doubt to relevant literature and personal experience. In such cases, the claimant can and does succeed without showing, in Lord Rodger's words, what actually was the position.

I suspect that what is happening here is that there is an intuitive hostility to the notion that facts in issue can be proved solely by evidence which bears on the quantum of risk as opposed to what occurred in the instant case. For a lawyer, the quantum of risk involves an evaluation of the hypothetical possibilities over a cadre of notional, similar claimants rather than the nitty-gritty of the individual case. However, provided that both generic and individual causation are properly considered, this instinctive antipathy is surmountable.

Other members of the Supreme Court addressed the issue of epidemiological evidence and they all (save possibly for Lord Phillips) advanced slightly different reasons for saying that they did not much like it on a standalone basis.

It was pointed out that such evidence is often flawed (it is), it requires very careful interpretation (it does), that a distinction must be drawn between proof of association and proof of causation (indeed it must), and that a relative risk of say 2.1 would be proof, if at all, by the skin of its teeth (correct).

All these objections are well-founded, although all that the Supreme Court was doing here is adopting exactly the same approach as would an appropriately cautious epidemiologist to the results of a number of studies. Once again we see an example of the law and science tending to converge.

However, to say that this sort of evidence needs to be assessed very carefully indeed, mindful that the burden of proof is on the claimant and needs to be discharged to a certain standard, is different from saying that it is wrong in principle to have regard to it.

Further, it is necessary in my view to return to the distinction between generic and individual causation. This is nicely illustrated by the Supreme Court's analysis of the conundrum of the red and the blue taxis.

[14] *McGhee v National Coal Board* [1973] 1 W.L.R. 1 HL.

Assume that there are more red taxis than blue taxis, and no other available evidence to adjust the probabilities either away for or against one taxi company.

In this given example, the number of red and blue taxis is taken as a fact, but in the real world one could well need epidemiological evidence to establish the figures. That evidence would bear on the issue of generic causation, which is analogous to the likelihood of these taxis being red rather than blue. In the real world, there may be all sorts of problems with the epidemiological evidence, but Mackay J has taught us how to deal with these.

So, the example with the taxis proceeds on the basis that the epidemiological evidence is reliable, and that we can be satisfied to the relevant standard how many taxis fall into which category.

The next stage is individual causation: was the claimant hit by a red taxi or a blue taxi? If the only available evidence is the numerical evidence (for example, as Lord Phillips pointed out, no evidence of driver competence across the fleets etc.), does the claimant succeed by suing the employer of the red taxis? The present case is not, of course, within the *Fairchild* enclave because medical science knows the number of taxis in each category.

Lord Rodger did not engage with this, possibly because he thought that the example was too flippant, but it must follow from the passage I have read out that the claim should in his view fail. The claimant has only proved a probability, not what happened in the instant case. Some other evidence is required, and none exists.

One has to put to one side the implausibility of there being no other available evidence. In a case where there is eye-witness evidence, recourse to the number of taxis will not assist. Further, the court will often be in a position to draw inferences from one party's failure to call relevant evidence.

But, if there really is no other evidence, logic and principle should say that the claim succeeds. What happened in the individual case is not *actually* known, to use Lord Rodger's formulation, but it may be inferred arithmetically from the inherent probabilities.

I recognise that if the point ever arose, the Supreme Court would probably find a way of dismissing the claim, and perhaps I would too. Somehow all of this runs contrary to one's basic instincts of what justice is about, namely treating people as individuals rather than as hypothetical occupiers of places on a normal curve.

The following additional thoughts about individual causation may tentatively be proffered.

First of all, as already pointed out, there usually will be salient, case-specific evidence which enables the court to adjust the notional location the individual claimant may be deemed to occupy on the normal curve. The availability of such evidence serves to avoid the charge that individuals are being treated as mere laboratory specimens. In standard medical practice, this is exactly the sort of exercise doctors perform in applying clinical judgment to individual cases. The objectives of the law are, of course, different, but the methodology shares certain similarities.

Secondly, it seems to me that there may be an important distinction between different types of generic issue. If the issue is (per *McGhee*) susceptibility to dermatitis through exposure to brick dust, no one would say any issues of individual responsibility arise. Some people are more susceptible than others: this is morally neutral or, put another way, just bad luck. In such circumstances, there ought to be no instinctive reason not to apply generic evidence to the individual case, even if no case-specific evidence is available, and—as previously explained—every reason why such evidence should be. On the other hand, the position may be somewhat different where questions of culpability and responsibility appear to be engaged, as they clearly are with the red and the blue taxis.

However, if the law is not prepared to allow recovery in this latter sort of case, one wonders on what principled basis it is doing so. Perhaps, as Lord Dyson observed in *Sienkiewicz*, this is all about policy.

Of course, a statistician would be finding all of this somewhat hard to stomach. The true analysis is that the chance of having been hit by a red taxi can be worked out by simple arithmetic, but is only a chance. At no stage does it become something else.

Where science and the law may conflict

There have been examples of group litigation where the available scientific evidence appears to point in one direction and the claimants' lay evidence points in another. However should the law resolve this conflict?

I have been involved in two cases where this problem has arisen, one at the Bar and another on the Bench. I am precluded by formal undertaking from talking about the former, and the case I tried is about to be considered by the Court of Appeal. The issue, in a nutshell, was whether the claimants sustained personal injury as a result of inhalation of the toxic products of burning wood-chip. The scientific evidence said that they were highly unlikely to have done, but the lay evidence was rather different.

In such cases, if some sort of reconciliation of all the evidence is not possible, the science will have to yield to the eye-witness evidence, or vice-versa. Lightman J, sitting in the Court of Appeal, made that very point in *Coopers Payen*.[15]

Of course, each case must turn on its own facts. Sometimes, it may be possible to say that the lay evidence is particularly compelling whereas the scientific evidence is not robust. Or, it may of course be the other way round. I cannot imagine a case of the lay evidence prevailing where the science is rock-solid. But what about the tougher cases in the middle?

An interesting example of such a case is the decision of the Court of Appeal in *Armstrong*.[16] In that case, the claimants alleged that they suffered soft-tissue injuries to their spines in consequence of a relatively low-impact road traffic accident. The parties relied on jointly-instructed, accident reconstruction evidence based on second-hand information about the damage the vehicles had sustained. This evidence directly contradicted the claimants' evidence and stated that they could not have sustained injuries as they alleged. The trial judge found the expert evidence to be convincing and the claimants to be blameless and honest witnesses. The judge preferred their account. The issue which arose on appeal was whether the trial judge could have rejected the expert evidence without finding any flaw in it. The Court of Appeal held that he could: he had weighed up all the evidence in the case, and was entitled to conclude that the claimants were not lying and that there had to be some inaccuracy in the expert's evidence.

This was an extremely difficult case where the issue was fraud. No claimant may be heard to rewrite Newton's Laws, but the expert evidence may not have been that good. Even so, no one could say what was wrong with it.

It is possible to analyse this case in a number of ways. First, to say that it is a pragmatic decision turning on its own particular facts, in particular an unspecified lack of certainty in the expert evidence and that fraud was being alleged by the defendant. Secondly, to say that if, as the trial judge clearly thought, the expert evidence was compelling, then it is somewhat unsatisfactory to say that there must be something wrong with it even if the error, or flaw, cannot be identified. Thirdly, to say that the discharge of the legal burden of proof is, in fact, a rather mysterious process which cannot be wholly dependent on the sharp elbows of science and must ultimately yield to imponderable, human factors.

Maybe there *are* cases where the common law reserves to itself the right not to be held in the thrall of the scientist.

As I have said, there will of course be cases where claimants cannot, as it were, get round the science, and where the court should and will say so. However, in cases where the science is uncertain, either

[15] *Coopers Payen Ltd v Southampton Container Terminal Ltd* [2003] EWCA Civ 1223; [2004] 1 Lloyd's Rep. 331.
[16] *Armstrong v First York Ltd* [2005] EWCA Civ 277; [2005] 1 W.L.R. 2751.

because it is inherently so or because of gaps in human knowledge and understanding, there is no reason why compelling lay evidence should not tip the scales. The law will always, I believe, permit that degree of latitude, notwithstanding that the lay evidence may amount to nothing in the court of scientific opinion.

Concluding observations

I am probably right in saying that virtually all of us did not take science at A-level because we weren't clever enough; or, put another way, we were better at other things. Having gone down a certain path, we lawyers have, I think, acquired different ways of thinking. The training, methodologies and instincts of a scientist are somewhat different.

When Sir Michael Rawlings refers to scientific judgment based on all the available evidence, he is naturally recognising all the factors which turn someone into a good scientist with sound judgment. Despite the quest for objectivity and irrefutability, science—because it so often depends on judgment—makes do with something less water-tight. The law has always been less ambitious.

In *Sienkiewicz* Lord Dyson (yet another alumnus of 39 Essex Chambers) said that there is valuable distinction to be drawn between "fact probability" and "belief probability". The former is a more than 50 per cent statistical chance of the event having occurred; the latter is more than a 50 per cent belief that a knowable fact has been established. A scientist, quite rightly, would find this perplexing, and might point out that only theologians should be using the language of belief. Furthermore, an epistemologist would need to explain what is a knowable fact. I share this sense of puzzlement. Although I have little judicial experience, I am not sure that I am in the business of believing knowable facts. I am doing something more mundane, deciding whether the burden of proof has been discharged on the available evidence.

I accept, and the litigants before me no doubt hope and trust, that in carrying out that task I am exercising judgment, which in the law, as in science, is multi-faceted. I also accept that in the law there is probably more scope for instinct, intuition and common-sense. Albert Einstein said that intuition is nothing more than the acquisition of prejudices before the age of 18. But we lawyers do not believe that, do we?

Asbestos in Schools

Michael Lees*

LT Asbestos; Mesothelioma; Pupils; Schools; Teachers

This article examines the problem of asbestos in schools, its extent, the risks and the legal implications. It provides examples of the level of knowledge about the risks to asbestos. It examines and gives examples of how asbestos is disturbed and the levels of fibres released. It highlights how the extensive use of asbestos insulating board in places accessible to children has, and continues, to pose the greatest risk. It provides statistics of the number of teachers and support staff who have died of mesothelioma and estimates of the number of children who will subsequently die. The article examines the problems of obtaining evidence and how asbestos records have often been destroyed. It cites cases where unjustified assurances have been given about the level of exposure and the risks. It demonstrates how parents, staff and children are often unaware they have been exposed to asbestos. It shows how public liability insurance has not been available for pupils. It examines the implications of court judgments for future claims for damages.

Most schools contain asbestos

More than 85 per cent of schools contain asbestos[1] and much of the most dangerous material is vulnerable to damage from children.

All those schools contain chrysotile, many contain amosite and some contain crocidolite. All types of asbestos can cause cancer but the "amphiboles", amosite and crocidolite, are more dangerous. Amosite is estimated to be up to 100 times more likely to cause mesothelioma than chrysotile and crocidolite up to 500 times more likely to.[2] The more friable materials, such as sprayed asbestos, lagging and asbestos insulating board ("AIB"), have the potential to release the greatest number of fibres. It is also relevant that in similar materials crocidolite and amosite fibres are released 10 times more readily than chrysotile.[3]

All types of asbestos were used for spraying but crocidolite was the most common type until 1962, its use ceased in 1971 and all spraying ceased in 1974.[4] Sprayed asbestos was used for instance on the ceilings of swimming pools, corridors and halls, and on structural beams and columns. In one example, pupils threw their biros to be impaled in the sprayed corridor ceiling.[5] Heating boilers and pipes have been insulated with asbestos lagging since the late 19th century, and crocidolite, amosite and chrysotile were used.[6] Some of this lagging is in places accessible to staff and pupils but most runs through wall, ceiling or under floor voids. It is now old and there is evidence that in some schools it has deteriorated and contaminated the surrounding area and adjacent rooms.[7]

Asbestos insulating board ("AIB") contains amosite and was extensively used in schools in places that are accessible to children. It therefore poses the greatest risk. A 2009 Health and Safety Executive ("HSE")

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[1] See: "List of UK local authorities. Percentage of schools that contain asbestos" (Mar 3, 2015), Asbestos in Schools, *http://www.asbestosexposureschools.co.uk/pdfnewslinks/LAs%20schools%20containing%20asbestos.pdf* [Accessed 3 February 2016].

[2] J.T. Hodgson and A. Darnton, "The Quantitative Risks of Mesothelioma and Lung Cancer in Relation to Asbestos Exposure Is there a threshold?" (2000) 44(8) Ann. Occup. Hyg. 565.

[3] Control of Asbestos at Work (Amendment) Regulations 1998 and Approved Code of Practice (ACOP) to the Control of Substances Hazardous to Health Regulations 2002, para.A67, p.34.

[4] Health and Safety Executive, *Asbestos: The survey guide* (HSE, 2010), HSG 264, p.53.

[5] Personal correspondence and photograph (Lees/Shutler 29 May 2012).

[6] Health and Safety Executive, *Asbestos: The survey guide*, pp.53–57.

[7] For example: Nightingale Junior School. Personal correspondence Lees/NASUWT. "Parents told of "low risk" after school asbestos find" *Derby Evening Telegraph*, 5 December 2006.

case control study highlighted that "[t]he British mesothelioma death-rate is now the highest in the world." The study concluded the likely reason is because:

> "Britain was the largest importer of amosite, and there is strong although indirect evidence that this was a major cause of the uniquely high mesothelioma rate."[8]

Up to 80 per cent of amosite was used in the manufacture of AIB,[9] and since its introduction in 1951 large amounts were used in the construction and refurbishment of schools until 1980 when manufacture ceased. After the Second World War there was an urgent need to replace and build new schools, consequently there was a building boom with more than 14,000 schools being built between 1945 and 1975 and many other schools were refurbished incorporating large amounts of asbestos materials.[10] In the peak of 1968 alone more than 600 schools were constructed.[11] To meet the demand industrialised "system" built principles were introduced, where dimensions were standardised and components prefabricated in factories then erected on site. Because of the open wall and ceiling voids the potential for the rapid spread of fire is high, so large quantities of asbestos materials were used.

About half the school buildings in Britain are constructed using building systems[12] and most were constructed in the 1960s and 1970s when the use of asbestos was at its height. This was highlighted in a 1997 report by the Medical Research Council ("MRC") and the Building Research Establishment which stated:

> "In general extensive use was made of sprayed coatings (amphiboles), Asbestolux ceiling panels (AIB), and asbestos board and asbestos-cement partitioning in system-built buildings constructed in the 1960s. These particular buildings might thus be considered to pose a relatively 'higher risk' of exposure."[13]

Large quantities of AIB are in places where it can be disturbed and damaged by children, in walls, window surrounds, and ceiling tiles with more than 20 per cent of the ceilings of new public buildings between 1967 and 1973 being AIB.[14] All the ceilings in some schools are AIB, as are the walls in classrooms, corridors, halls, gyms, stairwells, and toilets. In steel-frame system-built schools either sprayed asbestos or more normally AIB has been used as a cladding for the columns. AIB was also used as a general building material during the refurbishment of schools, but it was used to a lesser extent in traditionally built schools. AIB-lined warm air heating cabinets in schools and storage heaters contained AIB or Caposil blocks, which contains amosite and is a similar composition to AIB.

Most of the asbestos that was used in the construction of school buildings remains in situ today because of government policy.

Most asbestos remains because of government policy

The government policy for schools is:

> "Asbestos which is in good condition and unlikely to be disturbed or damaged is better left in place and managed until the end of the life of the building as this presents less risk of exposure to the occupants than the process of removing it."[15]

[8] Health and Safety Executive, *Occupational, domestic and environmental mesothelioma risks in Britain* (HSE, 2009), IMIG Congress Abstract, 25–27 Sep 2008.
[9] Health and Safety Executive, *Occupational, domestic and environmental mesothelioma risks in Britain*, p.46 para.4.7.
[10] Linda Shuker et al., *Fibrous Materials in the Environment* (Medical Research Council Institute for Environment and Health, 1997).
[11] University of Newcastle upon Tyne, *School building programmes: Motivations, consequences and implications* (2005).
[12] Scape School building overview, *www.scapebuild.co.uk* [Accessed 3 February 2016].
[13] Linda Shuker et al., *Fibrous Materials in the Environment*, pp.72 and 75.
[14] Linda Shuker et al., *Fibrous Materials in the Environment*, p.23.
[15] John Mann MP and Secretary of State for Schools Nick Gibb MP, *Schools: Asbestos*, HC Vol.523, col.199W (8 February 2011), *http://services.parliament.uk/hansard/Commons/bydate/20110208/writtenanswers/part015.html* [Accessed 3 February 2016].

Schools are unique places amongst workplaces because they contain large numbers of children. They are boisterous, lively places where children jostle down corridors, slam doors, scuff walls, and lift ceiling tiles and, in so doing, disturb and damage the asbestos. Consequently, a policy that might work in an office has been shown to fail in a school.

In March 2015, following a public consultation,[16] the Department for Education published their review of asbestos policy for schools.[17] The dangers inherent in even the best system of asbestos management were encapsulated by the business manager of a secondary school who responded to the consultation. He said that there are over a thousand teenagers in his school who sometimes struggle to contain their emotions, so it is inevitable asbestos is disturbed. A system of asbestos management that might work in a building used by adults will not be suitable for young people.

A 2010 Asbestos Consultants' Association ("ATAC") report stated:

> "The evidence is that the system of asbestos management in many schools is not of an adequate standard, in some it is ineffective, in others it is almost non-existent, and in some it is at times dangerous … These are not minor problems that have crept in over recent years; rather they are fundamental problems that are endemic in schools in the UK."[18]

ATAC's conclusions have been confirmed by HSE inspections that have resulted in enforcement action being taken for a failure to safely manage asbestos. A quarter of local authorities in one study had enforcement action taken, [19] and a fifth of schools outside local authority control had action taken.[20]

There is considerable evidence that the policy of management has failed in the past,[21] so there needs to be a fundamental change in policy if future asbestos exposures are to be prevented. The Asbestos in Schools Group recommended to the Department for Education policy review that all AIB should be removed from schools where it is accessible to children. So far the department has not agreed. However, following a serious incident in one of its schools, Caerphilly County Borough Council adopted the policy and is now removing all accessible AIB from its schools.[22]

Almost 50 years ago the Department for Education were warned of the particular risks to children. They informed local authorities and school authorities about the dangers of asbestos and advised them to implement measures to reduce exposures to a minimum.

No threshold of exposure—children are more at risk—reduce exposures to a minimum

For at least 50 years, expert opinion has been that very low levels of exposure to asbestos can cause mesothelioma. The 1965 report of the Chief Inspector of Factories stressed:

> "Mesothelioma has been shown to be associated in some cases with exposure to asbestos dating back 20 or more years previously and sometimes at an astonishingly slight degree."[23]

[16] See Asbestos in Schools Group, "Response from The Asbestos in Schools Group to Policy Review: Asbestos Management in Schools" (30 March 2014), Asbestos in Schools, *http://www.asbestosexposureschools.co.uk/pdfnewslinks/AiS%20RESPONSE%20TO%20THE%20DFE%20POLICY%20REVIEW.%20Asbestos%20management%20in%20schools%2030%20Mar%2014%20(Final).pdf* [Accessed 3 February 2016].

[17] Department for Education, *Asbestos management in schools: a review of Department for Education policy* (March 2015): see *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/412466/The_management_of_asbestos_in_schools_a_review_of_Department_for_Education_policy.pdf* [Accessed 3 February 2016].

[18] *Asbestos Testing and Consultancy Association*, Assessment of asbestos management in schools (24 Jan 2010).

[19] Health and Safety Executive, *Inspection Findings: Asbestos management in Local Authority school system buildings* (2009/10).

[20] See Michael Lees, "HSE Enforcement Schools: For Infringements of the Asbestos Regulations" (30 March 2014), Asbestos in Schools, *http://www.asbestosexposureschools.co.uk/pdfnewslinks/HSE%20ENFORCEMENT%20SCHOOLS%2030%20Mar%2014.pdf* [Accessed 3 February 2016].

[21] See Michael Lees, "Asbestos Incidents and failures of asbestos management in schools" (28 March 2014), Asbestos in Schools, *http://www.asbestosexposureschools.co.uk/pdfnewslinks/Asbestos%20Incident%20&%20Management%20Failings%20in%20Schools.pdf* [Accessed 7 February 2016].

[22] Caerphilly County Borough Council, *Asbestos removal programme* (Cabinet meeting minutes, 2 July 2014).

[23] HM Inspector of Factories on Industrial Health, *Annual Report* (1965), p.82.

The 1966 Chief Inspector of Factories report highlighted that, although crocidolite was known to cause mesothelioma, there was growing evidence that other types of asbestos could also cause the disease. The report stated:

> "Of necessity, preventive action must precede absolute proof of the relative hazard of different sorts of asbestos. At present, crocidolite seems to be especially associated with the occurrence of mesothelioma, but no one can say that other forms of asbestos may not be implicated. Only epidemiological studies extending over many years can provide the answers. While such studies are proceeding the only safe course is to eliminate the escape of asbestos dust into the air."[24]

Dr Lloyd Davies was the Senior Medical Inspector of the Factories Inspectorate and was also the chairman of the "Advisory Panel on Problems Arising from the Use of Asbestos".[25] In 1967 the Department for Education Chief Inspector of Schools contacted him following publicity about the dangers of asbestos as he was concerned about its use in schools. Dr Lloyd Davies responded and expressed his concern about the particular risks to children. He stated:

> "The important point to me is that you are dealing with children … My advisory panel on the hazards of asbestos have suggested that wherever practicable, the exposure to asbestos should be restricted to persons of 40 years or over. I must admit that you have a difficult problem, because of the youth of the persons exposed. The more I see of asbestos, the more I dislike it".[26]

He stressed that the level of exposure needed to cause mesothelioma was not known, although he acknowledged that the required exposure may be very small:

> "No-one can deny, in the light of recent evidence, that there is an association between mesothelioma and asbestos, but numerically speaking, for any one person the risk is likely to be small. Having said this, we have to admit that we do not know the degree of risk. Further no-one knows the 'dose' of asbestos required to produce mesothelioma in later years, but it may be very small. Unlike cigarette smoking and cancer of the lung, the risk does not seem to diminish after exposure ceases".

In 1967, following Dr Lloyd Davies' warning, the Department for Education issued an administrative memorandum to all educational establishments warning about the dangers of inhaling asbestos fibres and stating:

> "inhalation of any form of asbestos dust by pupils and teachers should be reduced to a minimum. The occurrence of mesothelioma is associated especially with products made from one of the naturally occurring forms of asbestos, crocidoIite (blue asbestos). Exposure to even low concentrations of dust may be hazardous."[27]

In 1976 The Department for Education updated their guidance on asbestos and stressed that "all necessary steps should be taken to prevent the inhalation of asbestos dust by pupils, students or staff".[28]

In 1979 the Government's Advisory Committee on Asbestos again stressed that children are more likely to be at risk from asbestos. It stated:

> "The risk to children. … susceptibility to cancer is known to vary with age, the very young being especially at risk in relation to certain stimuli. The second is that as children can be expected to live

[24] HM Chief Inspector of Factories on Industrial Health, *Annual Report 1966* (Ministry of Labour, August 1967), p.60.

[25] Advisory Panel on Problems Arising from the Use of Asbestos, *Problems arising from the use of asbestos: memorandum of the Senior Medical Inspector's Advisory Panel* (HMSO, 1967). Ministry of Labour HM Factory Inspectorate 1967. Minute Department for Education, Rossetti/ Howlett, 6 Feb 1967.

[26] Letter from Dr Lloyd Davies, Head Medical Officer Factories Inspectorate, Ministry of Labour to Department for Education (6 Mar 1967).

[27] Department for Education and Science, *Inhalation of Asbestos Dust* (19 July 1967), AM20/67.

[28] Department for Education and Science, *The use of Asbestos in Educational Establishments* (2 Jul 1976), AM7/76.

> longer than adults they have more chance of being affected by carcinogens with long latency periods … we have found no convincing evidence for the existence of a threshold below which no increment of risk takes place for lung cancer or mesothelioma".[29]

In 2013 the Government's advisory committee on cancer, the Committee on Carcinogenicity, ("CoC") again confirmed children are more vulnerable to asbestos exposure than adults as they will live longer for the disease to develop, the younger the child the greater the risk. The lifetime risk of developing mesothelioma for a five-year-old child is 5.3 times greater than an adult aged 30. Insufficient scientific research has been carried out to determine whether or not a child's physical immaturity makes them more vulnerable, so the committee were unable to come to a conclusion over this aspect. However, a leading paediatrician stressed that as children are involved, and the science is incomplete, then the precautionary principle should be followed. He warned that it is known the juvenile lung is particularly susceptible to injury and that lung damage below the age of five would remain for life.[30] Dianne Willmore was exposed to asbestos while a pupil at school and subsequently died of mesothelioma. In March 2011 seven Justices of the Supreme Court unanimously upheld the judgment that she had been negligently exposed to asbestos while a pupil at school, and that the exposure she had suffered materially increased the risk of her mesothelioma developing.[31]

The courts accepted the expert medical opinion given by Dr Rudd, an internationally recognised expert in mesothelioma, that: "Mesothelioma can occur after low level asbestos exposure and there is no threshold dose of asbestos below which there is no risk."[32] This evidence reflects acknowledged expert opinion of the World Health Organization and the HSE, which was confirmed in 2011 by the Government's advisory committee on science, WATCH.[33]

In *Edgson* Dr Rudd, Dr Hugh-Jones and Dr Britton explained how all exposures to asbestos have a cumulative effect that can lead to the development of mesothelioma. Jeffrey Burke QC summarised the line agreed by the three expert medical witnesses:

> "Mesothelioma can in theory be caused by a single fibre acting to create a mutation of a cell from which a malignant tumour may develop. … all exposures up to 10 years before the appearance of symptoms is relevant, for two reasons; first, any inhalation may cause mutation …; secondly, the inhalation of asbestos is now known to have an adverse effect on the body's natural ability … to deal with potentially mutating or mutated cells before a malignant tumour develops … Later exposure adds to earlier exposure. All exposure, other than in the last ten years before the emergence of symptoms, is cumulative and contributes to the risk of and the development of a tumour."[34]

(Subsequently in 2010 in the Appeal Court hearing on the *Employers' Liability Insurance "Trigger" Litigation*, the opinion was expressed that all asbestos exposures contribute to the risk of a tumour developing up to about five years before the onset of symptoms.)[35]

Medical opinion is that there is no minimum threshold exposure for the development of mesothelioma, however in legal terms it has been accepted that an exposure is "significant" when it is above the background level as it materially increases the risk of mesothelioma developing. In *Willmore* Dr Rudd referred to the

[29] Advisory Committee on Asbestos, *Asbestos Vol 1: final report of the advisory committee 1979* (HMSO, 1979), p.60, para.112; p.57, para.103(3).

[30] Committee on Carcinogenicity, *Statement on the relative vulnerability of children to asbestos compared with adults* (7 June 2013). Lees contemporaneous notes, evidence from Professor A. Bush. CoC meeting 12 June 2012.

[31] Supreme Court judgment *Sienkiewicz v Greif (UK) Ltd* [2011] UKSC 10; [2011] 2 A.C. 229.

[32] *Willmore v Knowsley MBC* [2009] EWHC 1831 (QB) at [4].

[33] World Health Organization, *Elimination of asbestos related diseases* (September 2006). World Health Organization, *Environmental Health criteria 203: Chrysotile Asbestos* (1998). Hodgson and Darnton, "The Quantitative Risks of Mesothelioma and Lung Cancer in Relation to Asbestos Exposure Is there a threshold?" (2000) 44(8) Ann. Occup. Hyg. 565, 583. Working Group on Action to Control Chemicals (WATCH), *Final WATCH Position on asbestos risk assessment* (HSE, February 2011).

[34] Jeffrey Burke QC, *Edgson v Vickers* [1994] I.C.R. 510 at 524.

[35] *Durham v BAI (Run Off) Ltd* [2010] EWCA Civ 1096; [2011] 1 All E.R. 605 at [313]; *Sienkiewicz v Greif* [2011] 2 A.C. 229; *Knowsley v Willmore* [2009] EWHC 1831 (QB) at [19(v)].

Industrial Injuries Advisory Council definition of a significant exposure. He stated that "Significant" is defined in accordance with the definition adopted in relation to mesothelioma causation by the Industrial Injuries Advisory Council in their 1996 report (CM3467):

> "A level above that commonly found in the air in buildings and the general outdoor environment. It would be appropriate for the Court to conclude that each such exposure materially increased the risk that she would develop mesothelioma."[36]

The MRC report examined authoritative studies and concluded outside background airborne asbestos fibre levels are between 0.000001f/ml and 0.0001f/ml (1 and 100f/m^3),[37] but in schools, commercial buildings and system-built housing with asbestos in good condition the level is on average 0.0005f/ml (500f/m^3). This means that the background level in schools with asbestos in good condition is 5–500 times greater than outside air. A study in the USA determined that on average schools have higher asbestos fibre levels than other building types.[38]

There is no known threshold exposure to asbestos below which there is no risk, and all exposures are cumulative increasing the likelihood of mesothelioma developing. Children are more at risk. There are large quantities of friable asbestos materials in schools that are vulnerable to disturbance and damage from children and staff so that frequent exposures have occurred and continue to do so. The levels are often significantly above background levels and often occur over prolonged periods of time.

Hazardous asbestos materials vulnerable to disturbance and damage

Asbestos fibres are released when asbestos materials are disturbed and damaged. The level of fibre release depends on the type of asbestos material, the type of asbestos it contains, the condition it is in, the type of disturbance and the length of time the disturbance takes place.

The MRC report concluded: "It is not unreasonable to assume, therefore, that the entire school population has been exposed to asbestos in school buildings." It highlighted the particular risks in system-built schools, assessed lifetime asbestos exposures and estimated that

> "Children attending schools built prior to 1975 are likely to inhale around 3,000,000 respirable asbestos fibres … Exposure to asbestos in school may therefore constitute a significant part of total exposure."[39]

The estimates were based on a background level of 0.0005f/ml (fibres per millilitre of air)—which is 500f/m^3 (fibres per cubic metre of air)[40]—under normal occupation with the asbestos being in good condition, but it was stressed that levels are a lot higher when asbestos is disturbed or damaged. Consequently, the numbers of fibres released and inhaled can be significantly greater than background levels and significantly greater than the cumulative exposure in this estimate.

It should be noted that the MRC estimate was based on approximately 0.5m^3 of air an hour being inhaled. This is a conservative estimate and studies show a child at school inhales between 0.4m^3–2.23m^3 an hour depending on their age and activity. To graphically illustrate the numbers of fibres inhaled the fibre levels in this article are expressed in the number of fibres in a cubic metre of air.

[36] *Knowsley v Willmore* [2009] EWHC 1831 (QB) at [8] and [57(b)].
[37] Linda Shuker et al., *Fibrous Materials in the Environment*, p.71.
[38] R.J. Lee and D.R. Van Orden "Airborne asbestos in buildings" (2008) 50 Regul. Toxicol. Pharmacol. 218, 221.
[39] Linda Shuker et al., *Fibrous Materials in the Environment*, pp.72 and 75.
[40] Note: in the UK airborne asbestos fibre levels are conventionally quoted in fibres per millilitre of air (f/ml). Because of the manner in which the results are presented it can appear that the levels are very low and that little harm can be done. A better picture of the fibre levels is given if they are quoted in fibres per cubic metre of air (f/m^3). "Children's behaviour and physiology and how it affects exposure to environmental contaminants" (2004) 113(2) *Pediatrics* 996.

The Department for Education have been aware for almost 50 years that asbestos materials in schools can release asbestos fibres. In 1967 the department sought the advice of the Senior Medical Inspector of the Factories Inspectorate on the use of asbestos in schools. Dr Lloyd Davies advised that:

> "From the practical point of view, I should have thought that the conditions required in the manipulation (i.e. sawing and drilling) of asbestos, including exhaust ventilation and filtration, are such that they could not be provided. Even if they were provided, no-one could be certain that some dust would not escape … I do not like the idea of keeping asbestos wool wet, because it does not wet easily, and somebody will sooner or later let it dry. I may be misinformed, but my concept of asbestos wool is that it is friable, and liable to give off dust … We do know that frayed insulation around hot water pipes can give rise to airborne asbestos—but how significant this is, I do not know."[41]

Therefore, the Department for Education were fully aware from 1967 that without stringent controls in place asbestos fibres would be released, and yet schools continued to be built and maintained with very few, or no, controls in place so that since then asbestos materials have been sawn, drilled, filed, handled, disturbed and damaged.

In a civil claim if evidence can be found of building or maintenance work taking place that disturbed asbestos materials in the presence of the claimant then it provides evidence of exposure. It also provides evidence of negligence as the level of knowledge since the mid-1960s has been that such practices are contrary to guidance and they produce high levels of fibres. Tests have shown for instance that, during the time the operation takes place, power sawing of an AIB panel can produce 5,000,000f/m^3–20,000,000f/m^3 (5f/ml-20f/ml), drilling AIB 5,000,000f/m^3–10,000,000f/m^3 (5f/ml-10f/ml), breaking and ripping out AIB 5,000,000f/m^3–20,000,000f/m^3 (5f/ml-20f/ml), 15 minutes dry brushing and bagging of dust and debris after breaking single AIB panel 73,000,000f/m^3 (73f/ml) and the careful removal of whole AIB panels up to 5,000,000f/m^3 (5f/ml).[42]

One such case occurred in a primary school over the course of three weeks when 30 windows were replaced with no precautions taken. The window surrounds, window heads and panels beneath the windows were AIB. The windows and panels were ripped out using a power jigsaw and crowbars, the debris was then thrown in the playground while staff and pupils looked on. There was extensive damage to the AIB, widespread contamination of the school, and asbestos dust and debris remained in the classrooms which the teachers swept up with dustpans and brushes.[43] The school was closed for two months while an environmental clean took place. The cost was £750,000 but the disruption to the school and the stress and anxiety to children, parents, and staff is unquantifiable.

The more difficult cases to prove are the ones where there has been low level exposure over a prolonged period of time. Such exposures are typical in schools and the fibres released from normal classroom activities can be significantly greater than background levels. Because the releases can be frequent and take place over prolonged periods the cumulative burden can be considerable, and at times significantly greater than a one-off exposure from building and maintenance work.

For example, in 1974 a school caretaker had to clean dust from the children's desks. Tests were carried out which determined the dust contained asbestos fibres. The cause was the cabinet heaters lined with AIB of which there were 20 in the school. The local authority had the cabinets cleaned and the AIB sprayed

[41] Letter from Dr Lloyd Davies, Head Medical Officer, Factories Inspectorate, Ministry of Labour to Department for Education (6 Mar 1967).

[42] Health and Safety Executive, *A comprehensive guide to managing asbestos in premises* (February 2004), HSG 227, Table 15, p.95; Health and Safety Executive, *Probable asbestos concentrations at construction processes* (December 1989), EH35; Health and Safety Executive, *Working with asbestos cement and asbestos insulating board* (November 1996), EH71. Howie ACADemy, "Risks with asbestos insulating board" (Autumn 2001), pp.11–12.

[43] Dr John W. Cherrie and Hilary Cowie, *A Report on the Likely Risks from Asbestos Exposure at Silverhill School, Derby* (IOM Institute of Occupational Medicine, 2004) Report No:628-00009.

with PVA sealant. However, the sealant did not solve the problem as fibres were released and dust was once again found on the surfaces. After about a year the council had all the AIB panels removed.[44]

In 1981 further tests in other schools showed once again that amosite fibres can be emitted from cabinet heaters into classrooms. Fans suck in air, pass it over heating elements and emit the hot air through grills into the room. This form of heating was developed in the 1950s and became one of the most popular means of heating schools.[45] The cabinets were typically lined with unsealed AIB and the baffles to deflect the air were also typically AIB. The levels were up to 60,000f/m^3 (0.06f/ml).[46] Heating cabinets remain in use in schools with tests in 2012 in a school in Wales again confirming that amosite fibres can be emitted, particularly when the cabinets are disturbed—as typically happens in a school. Analysis by an electronic microscope showed levels up to 4,300f/m^3 (0.0043f/ml) of amosite fibres were released.[47] Each occupant of the room would inhale about 7,000 fibres during two hours in a classroom. The cumulative exposure of the occupants of the rooms over a day, a week or a term would be considerable. It is reasonable to assume that generations of children and staff had been exposed over more than 50 years since the heaters were installed. I am aware of three civil claims in various schools from people suffering from mesothelioma where this type of heater is implicated. Another example is that just slamming a door can release significant levels of amosite fibres. Tests carried out in 1987 in a system-built secondary school[48] measured levels up to 330,000f/m^3 (0.33f/ml) from slamming the door five times. Again the majority of fibres were amosite. The levels are up to 660 times greater than the normal background level. They were the average level measured over 60–90 minutes and electronic analysis confirmed the majority of fibres were amosite. Therefore, if after each lesson the door was slammed five times these levels of amosite fibres would have been maintained throughout the day.

The report concluded that the results "suggest that even when supposedly sealed in by painting, asbestos panels are still hazardous." The reason is that although the front of the AIB panel is painted, the reverse face is not, and therefore every time a door is slammed or the wall hit amosite fibres are released from the reverse face of the panel into the wall void to be ejected through any crack or gap into the room.

Kicking the walls produced levels from 170,0000f/m^3–870,000f/m^3 (0.17f/ml–0.87f/ml). These levels are between 340 and 1,740 times higher than the normal background levels in schools with asbestos in good condition. Such practice is not uncommon in many schools and there is evidence of holes being smashed in walls and IT desks being positioned abutting AIB walls so that pupils' feet knock and scuff the panels.

Following these 1987 tests there is no evidence that any measures were taken to warn the thousands of other schools that potentially had very similar problems, therefore the release of asbestos fibres continued unabated. Twenty years passed until the problem was identified once again. In 2006 air sampling was carried out in a system-built school in Wales which found that when the doors were slammed, walls and interior columns were hit, when windows were banged shut and when people sat on window sills high levels of asbestos fibres could be ejected out of cracks and gaps into the classrooms and also into the ceiling void. The airborne asbestos fibres were again predominately amosite.

The average level from these normal everyday activities in classrooms and corridors was 90,400f/m^3 (0.094f/ml), which is almost 200 times greater than the background level with asbestos in good condition. The highest level in a school was 440,000f/m^3 (0.44f/ml), although tests in a similar building gave a level of 2,370,000f/m^3 (2.37f/ml).[49] Although the majority of the slides were analysed by optical microscopes,

[44] Telephone conversation between Mr S. Maffin, cabinet maker and Lees (27 Aug 2013).

[45] *Andrew Saint, Towards a Social Architecture: The Role of School Building in Post-War England* (New Haven: Yale University Press, 1987), p.86.

[46] Letter HM Principal Inspector of Factories to Principal architect CLASP ADP/SNC/03 (23 Oct 1981). Health and Safety Executive, *Asbestos in warm air heating systems (Revised)* (Health and Safety Commission, August 1982), LAAIC/C 3/5.

[47] Health and Safety Executive, *HSL Airborne asbestos concentrations at Cwmcarn High School* (2014), As/2012/14.

[48] ILEA report, *Investigation into fibre release from low level asbestos panels—Ernest Bevin school* (May 1987), LSS/AP/52.

[49] Health and Safety Executive, freedom of information request (15 Jan 2007), Lees 2007010226.

six slides were analysed electronically and gave asbestos fibre levels up to 240,000f/m^3 (0.24f/ml), 480 times greater than the background level.

The remedial action advised by HSE was not to remove the asbestos debris, damaged and deteriorating AIB but instead to leave it in place and "manage" it by sealing every crack in the walls, columns and ceilings. This is a temporary expedient that has been proved to fail, but nonetheless it remains the official advice.

A further example of significant asbestos fibre release from common classroom activities is the release of amosite fibres from removing books from a classroom stationery cupboard. Tests were carried out in a school where the backs of cupboards in 11 classrooms were unpainted AIB panels. Tests showed amosite levels, analysed by an electronic microscope ("SEM"), from 17,000f/m3–40,000f/m^3 (0.017f/ml–0.04f/ml) with an average of 27,000f/m^3 (0.027f/ml) (50 times greater than normal background.)

The shelves and the contents were visibly covered in dust. Tests then simulated cleaning the cupboard. The levels of amosite fibres measured by SEM were from 120,000f/m3–840,000f/m3 (0.12f/ml–0.84f/ml) with an average of 360,000f/m^3 (0.36 fibres/ml)[50] (700 times greater than normal background.)

The cupboards were accessed daily, in some cases six times a day. 15 members of staff had worked in the classrooms for more than 8 years, and 7 of those for more than 16 years. The pupils had five years of lessons in the classrooms. It was assessed that the cumulative exposures of the pupils to amosite fibres was between 4.75f/ml.hours and the worse case of 47.5f/ml.hours over their five years at the school. The teachers' likely annual exposure was between 1f/ml.hours and 7f/ml.hours with a worst case between 5f/ml.hours and 31f/ml.hours every year. Assuming a minimum breathing rate of 0.5m^3/hr, cumulatively the pupils would inhale between 2,400,000 and 24,000,000 amosite fibres over their five years at the school and each year the teachers would inhale between 500,000 and 15,500,000 amosite fibres.

This exposure was from a single source, but there were many other potential sources of asbestos fibre release in the school as the buildings were system-built CLASP and Hills. Both of which contain large amounts of asbestos materials in places vulnerable to damage.[51] Any investigation should therefore consider all the likely sources of asbestos fibre releases, as all exposures add to the cumulative burden. I am aware of two civil claims from teachers suffering from mesothelioma who taught in classrooms in other schools where the cupboard shelves were asbestos.

Another example is the significant amosite fibre release from pinning notices and the children's work to AIB panels. My wife was a nursery school teacher and every day she changed the displays. The children would draw and paint pictures and then cut them out. At the end of the day my wife would tie cotton to the clowns and aeroplanes and pin them to the ceiling as mobiles. I sometimes helped. I could reach the ceiling but my wife had to stand on a chair to insert the drawing pins so that her face was within inches of the ceiling. On one occasion I saw her brush the debris and dust from her hair and clothes as she inserted a drawing pin into the ceiling where previous displays had been pinned. All the ceilings throughout the school were AIB. She had displayed work in this manner throughout her 30-year teaching career, and it was a common practice amongst other teachers and teaching assistants.

After her death from mesothelioma I commissioned tests to assess the numbers of amosite fibres released. Mr Robin Howie carried out two series of tests which determined that more than 6,000 mainly amosite fibres were released from each insertion and removal of a drawing pin. Following receipt of the results HSE and the Health and Safety Laboratory ("HSL") undertook a test that counted just 30–40 fibres per pin. We questioned the veracity and methodology of the test. HSL then carried out a further test that

[50] Alan Jones, Andy Stelling, I. Levers, Hilary Cowie, *An assessment of the past exposure and estimation of consequent risks to health of staff that may have arisen from asbestos-containing material in cupboards at Lees Brook Community Sports College, Derby* (IOM Strategic Consulting Report, April 2009), 629-00224; Derby Alan Jones, Andy Stelling, I. Levers, Hilary Cowie, *An assessment of the past exposure and estimation of consequent risks to health of pupils that may have arisen from asbestos-containing material in cupboards at Lees Brook Community Sports College* (Strategic Consulting Report: May 2009), 629-00270.

[51] Derby City Council Education Services, *Types of school buildings* (September 2004).

assessed the exposure level in the breathing zone of the teacher. This assessed the level over 25 minutes as ~0.05f/ml (50,000f/m^3). There were again certain anomalies in the methodology of the HSL test so the government's advisory committee on science, WATCH, assessed the methodology and results of all the tests.

WATCH were highly critical of the methodology and conclusions of the first HSE/HSL test and dismissed the results. They accepted the results of both Mr Howie's tests and those of the second HSL test. They agreed that 6,000 fibres were released from each insertion and withdrawal of a drawing pin and concluded that

> "A 'realistic worst-case' prediction for exposure of an operative under conceivable real-life conditions is 0.05f/ml (50,000f/m^3) in a 25 minute period of drawing pin activity."[52]

In the extreme event of all the fibres being inhaled then the exposure would be 1f/ml (1,000,000f/m^3) during the period of pinning. It should be noted that the estimates did not consider the contamination of the classroom, the fibres becoming airborne once again from classroom activity, the contamination of the hair and clothing of the teachers nor the exposure of the pupils.

If the practice takes place over weeks or years the cumulative exposures are considerable. Mr Howie assessed the risk to the teachers and pupils from five years of the practice and concluded that the risk of developing mesothelioma from a cumulative exposure to the teachers from age 25 is about 1:10,000. He assumed that the pupils' exposure was significantly less than the teachers, however because of their age their risk of developing mesothelioma was increased and therefore the risk would be about 1:20,000. [53]

There have been a number of civil claims from teachers suffering from mesothelioma who displayed work in a similar manner. It must be emphasised that the definitive reference is the WATCH committee conclusion and should be used in any estimate of exposure. But regrettably expert witnesses have incorrectly referred to the report of the flawed first HSE/HSL test. Following WATCH's criticism Mr Howie and I asked HSE to withdraw this report, but they refused and it remains to this day on their website to be misused.

A final example is the asbestos exposure of science, carpentry, metal work and ceramics teachers, their assistants and their pupils. Asbestos materials were commonly used in lessons. Asbestos wool was used for school chemistry experiments, as were AIB, Millboard or asbestos cement Bunsen burner mats, asbestos paper and AIB and asbestos cement fume cupboard linings. Asbestos wool was known to be still in use in the 1980s, and Bunsen burner mats and fume cupboards are still found in some schools. A recent asbestos survey in a school identified an ironing board with an asbestos iron stand still in use. Crocidolite and chrysotile were used in asbestos cloth for fire blankets, oven mitts and welding aprons for science, domestic science, ceramics and metal work classes. Asbestos mitts were known to be still in use in a ceramics class in 2014. Blackboards could be made of asbestos cement and some notice boards were AIB.

In 1967 the Chief Medical Officer of the Factories Inspectorate had advised the Department for Education against the use of asbestos materials in schools and in particular against the use of asbestos wool and the manipulation of asbestos board.[54] The department issued a warning to all schools about the inhalation of asbestos dust.[55] Their asbestos files for 1967–1968[56] show that they watered down the advice they had been given and in some cases they ignored it. Thousands of schools continued to be built incorporating large amounts of asbestos and asbestos materials continued to be used in classrooms. A Department official raised his concerns that they were not following the advice that they had sought and had been given by

[52] Working Group on Action to Control Chemicals (WATCH), *Asbestos exposure from use of drawing pins in asbestos insulating board* (WATCH committee minutes, 1 Feb 2006), conclusions, p.15, para.3.63. See: *http://www.hse.gov.uk/aboutus/meetings/iacs/acts/watch/010206/minutes.pdf* [Accessed 3 February 2016].

[53] Robin Howie Associates, *Calculation of teachers' and school children's mesothelioma risk—from H&D* (2000) (20 February 2006), RMH/03/324.

[54] Letter from Dr Lloyd Davies, Head Medical Officer, Factories Inspectorate, Ministry of Labour to Department for Education (6 March 1967).

[55] Department for Education and Science, *Inhalation of asbestos dust* (18 July 1967), AM20/67.

[56] Department for Education and Science, *Asbestos files 1966–1968*, National Archives ED50/842.

the principle expert in the country.[57] It took another 10 years for the Department for Education to advise against the use of asbestos wool.[58]

The presence and manipulation of asbestos materials in lessons was routine until the 1980s and although it has been almost eliminated it still occurs, with the continued use of asbestos rope seals on kilns, oven mitts, fume cupboards, Bunsen burner mats and ironing boards. I am aware of carpentry, metal work, domestic science and science teachers who have developed mesothelioma and have taken civil action.

An investigation into what caused a mesothelioma should look at the obvious causes such as building and maintenance work, but it should also probe a lot further. In my opinion solicitors investigating claims should always obtain all the school's asbestos surveys, registers management plans, and records of asbestos removal, obtain evidence of the condition of the buildings, the behaviour of the pupils and whether any damage to the fabric of the building occurred. They should determine what subject a teacher taught and to what age group. Evidence should be obtained of any maintenance or refurbishment that took place and what form of heating was present.

The exposures suffered by children and staff in a school can be significant from a single one-off exposure, but low level exposures over a prolonged period of time can cause as great and at times a greater exposure. The inevitable result is that people are dying.

Mesothelioma deaths amongst former pupils, teachers and support staff

Three hundred and eight school teachers have died of mesothelioma since 1980, of which 155 died between 2003 and 2013. [59] The occupational statistics do not include mesothelioma deaths above the age of 74, although almost as many people die of mesothelioma above that age as below. Studies have shown that lower exposures on average have longer latencies,[60] and therefore in a profession such as teaching it is reasonable to assume that as many, or perhaps more, teachers have died over the age of 74. If so, the occupational statistics significantly understate the actual numbers of teachers who have died.

In addition, 17 educational assistants, eight school secretaries and eight nursery nurses and assistants died between 2003 and 2013. School caretakers, cleaners and cooks have also died of the cancer,[61] but their occupational statistics are generic and do not record their deaths under schools.

But they are the tip of the iceberg as for every teacher there are 20–30 children and they are more at risk. But the children's subsequent deaths are not reflected in the mesothelioma occupational statistics because the long latency means that they occur long after they have left school and are recorded under the occupation they had at the time. Amongst all workplaces schools are unique places as the statistics only reflect the mesothelioma deaths of a small percentage of the occupants who have been exposed to asbestos, as the vast majority are children.

In 1980 the US Environmental Protection Agency estimated that nine children would subsequently die from mesothelioma to each teacher and support staff death from asbestos exposure at school in the US.

[57] Rossetti and Howlett, *Minute DES 6 Feb 1967*, National Archives ED50/842 210728.

[58] Department for Education and Science, *The Use of asbestos in educational establishments* (July 1976), 7.76. 2.

[59] Male and female mesothelioma deaths and PMRs aged 16–74 for selected occupations in the health and education sectors in Great Britain in 2013 and PMRs for 2003–2013 Freedom of Information Request Reference No: 201509015. 2003–2012 FOI No: 201420002. 7 Jan 2015. 2012. FOI No: 2014100437 27 Nov 2014. Health and Safety Executive, *Mesothelioma Occupation Statistics Male and female deaths aged 16–74 in Great Britain 2002–2010* (March 2013): see *http://www.hse.gov.uk/statistics/causdis/mesothelioma/mortality-by-occupation-2002-2010.pdf* [Accessed 3 February 2016]. Health and Safety Executive, *Mesothelioma occupational statistics: Male and female deaths aged 16–74 1980–2000*, Table 3, 4 Southampton Occupation Group. Five-year time period 1980–2000 excluding 1981. Email from Health and Safety Executive Statistics Unit to Lees (15 Jul 2008). Mesothelioma deaths in the education sector for males and females 2001–2005.

[60] C. Bianchi et al., "Asbestos exposures in malignant mesothelioma of pleura; a survey of 557 cases" (2001) 39 Ind. health 161. Malignant mesothelioma due to environmental exposure to asbestos: follow up of a Turkish cohort living in a rural area. Chest, p.2228. M. Metintas et al., "Mesothelioma: cases associated with non-occupational and low dose exposures" (1999) 56 Hillerdal Occup. Environ. Med. 505.

[61] Health and Safety Executive, *Male and Female mesothelioma mortality aged 16–74 in health and education sectors in the UK 2003–2013* (29 September 2015), FOI 201509015. Asbestos in Schools Group, "Asbestos in Schools. The scale of the problem and the implications" (30 October 2011), pp.34–42: see *http://www.asbestosexposureschools.co.uk/pdfnewslinks/AiSreportonASBESTOSINSCHOOLS.pdf* [Accessed 3 February 2016].

(The estimate did not take into consideration the increased vulnerability of children.)[62] Because of the particular risks to children stringent laws were passed so that schools could manage their asbestos.[63] In Britain, schools are treated as any other workplace, no such laws have been passed and no official estimate has been made.

However, in 2013 Professor Julian Peto, a leading epidemiologist and member of the CoC, estimated that between 200 and 300 people will die each year due to their asbestos exposure experienced as children at school in Britain during the 1960s and 1970s.[64] In the 20-year period that would equate to 4,000–6,000 mesothelioma deaths of people exposed to asbestos at school as a child.

In evidence to the Education Select Committee Professor Peto stated:

> "There are now 400 deaths a year in women from mesothelioma; most of those are from asbestos in buildings—a good two-thirds of them are caused by asbestos in buildings. It is reasonable to assume that a fair fraction of that is due to asbestos in schools, because what happens to you when you are young is worse than what happens when you are old, in terms of causing cancer … There is very good evidence that living twenty years longer after exposure vastly increases your risk. That is the fundamental point."[65]

Britain has the worst incidence of mesothelioma in the world and it is increasing, at 39.9 per million of the population per annum, [66] compared to the US which has stabilised since 1999 at 12.8 per million per annum.[67] An increasing proportion of the deaths are amongst people who have never worked in the high risk occupations. It is reasonable to assume that a significant contributory factor is that generations of children in Britain have been exposed to asbestos at school. This starts the process of the development of mesothelioma from a very young age in a large number of people, later exposures then add to earlier exposures.

Although the level of exposure through uncontrolled building work and maintenance will be less now than it was in the 1960s and 1970s all the asbestos is old and much of the schools' estate has not been properly maintained so that the everyday exposures continue. Inevitably the deaths will continue.

HSE's estimates of the peak in mesothelioma deaths are based on the import and use of asbestos and the latency of mesothelioma of 30–40 years. Their estimates of the year the peak will occur have gradually slipped as the incidence of mesothelioma deaths continues to rise. They now acknowledge that the peak will probably be later than their model predicts as it was based on the heavy past occupational exposure and does not take sufficient account of "environmental" exposures,[68] which includes those that occur at school.

As a significant number of mesothelioma deaths are because of asbestos exposure at school one must question why there have been so few claims for damages from former pupils.

Very few claims from former pupils

I am aware of just four claims for damages from former school pupils suffering from mesothelioma and a fifth from a former university undergraduate. Amongst the pupils the claim for Dianne Willmore was

[62] Unites States Environmental Protection Agency, *Support document for the proposed rule on friable asbestos-containing materials in school buildings*, EPA report 560/12-80-003, p.92. American Academy of *Pediatrics*, "Asbestos Exposure in schools" (1987) 79(2) Pediatrics 301, reaffirmed May 1994.

[63] AHERA 15 U.S.C. II, §2643. US Environmental Protection Agency Office of Air and Radiation Regulations, Ch.53. EPA Fact sheet AHERA 1986 Statement EPA Administrator (23 Oct 1986).

[64] Professor J. Peto, *Education Select Committee hearing on Asbestos in Schools* (13 March 2013). Personal correspondence Professor Peto to Lees (3 May 2013).

[65] Professor J. Peto, *Asbestos in Schools* (Education Select Committee hearing, 13 March 2013).

[66] MESO04 *www.hse.gov.uk/statistics/tables/meso04.xlsx* [Accessed 7 February 2016] shows the number of mesothelioma deaths and death rates by age, sex and three-year time period from 1969–2013.

[67] United States Centers for Disease Control and Prevention (CDC), *Mesothelioma Death Rate by Gender, United States, 1999–2010*.

[68] Health and Safety Executive, *Mesothelioma in Great Britain 2014* (October 2015).

settled in her favour in 2011 following a Supreme Court judgment.[69] Sarah Bowman's claim was settled out of court in her favour in 2012.[70] Chris Wallace's was also settled out of court in his favour in 2013[71] and a fourth case is in progress. However, the 2011 Appeal Court judgment in *Williams*[72] found against the former undergraduate Michael Williams.

Following the March 2011 Supreme Court judgment in *Willmore* the insurance industry and defence lawyers feared that "[t]his decision could generate claims from claimants who have minimal exposure",[73] and argued that "the Supreme Court, in failing to add an additional burden of proof for such claimants, has left defendants potentially vulnerable to speculative claims".[74]

But there have been very few claims since then and in part the reason is because of the precedence set by the October 2011 judgment in Michael Williams' case. However, there are also other reasons.

Evidence difficult to obtain—staff and pupils are often unaware of asbestos exposure

When my wife died in September 2000 the coroner asked me to investigate where she was exposed to asbestos. My wife had taught for 30 years in some 25 schools, some as permanent posts and others as a supply teacher. During my investigation I was confronted with prevarication, obscuration and delays from school authorities, local authorities, their insurance companies and also from the Health and Safety Executive. Evidence had been destroyed or withheld until inevitably the statute of limitation expired. I had been warned it was a mountain I had to climb if I was to obtain justice for my wife, and indeed it has been.

There was evidence that my wife had been exposed to asbestos in a number of schools she taught in and the coroner gave a verdict of "Death from industrial disease" and spoke at length of the dangers of asbestos at school. Very early in my investigation it became apparent that the problem was far wider than the asbestos exposure of my wife, because as she had been exposed to asbestos in her classroom then so had her pupils. In the 15 years since then my investigation has expanded to look at the whole issue of asbestos in schools in Britain. In the course of this I have been asked for my opinion and advice by solicitors, teachers, school support staff and former pupils suffering from mesothelioma. I have therefore studied in some depth a significant number of cases. The problems of obtaining evidence are more often than not the same.

A common theme is that when they are first diagnosed with mesothelioma people cannot initially recall when they were exposed to asbestos and it is only as the investigation progresses it transpires that they have worked, or been taught, in schools that contain the more dangerous types of asbestos materials. It is also invariably found that the systems of asbestos management have been poor or non-existent so that asbestos has been disturbed or damaged.

A case control study commissioned by the HSE found that 62 per cent of females in the study suffering from mesothelioma did not know where their exposure had taken place. It concluded that in Britain there are four times more people who develop mesothelioma and are unaware of where they were exposed, than the remainder of the world.[75] Their lack of knowledge about their exposure to asbestos is precisely what occurs in a school.

Over the course of some 50 years, for instance, the staff and pupils in the thousands of system-built schools had no idea that they were being regularly exposed every time someone slammed a door or a child bumped into a wall. The staff and children who were exposed from the practice of inserting drawing pins

[69] *Sienkiewicz v Greif* [2011] 2 A.C. 229; *Knowsley v Willmore* [2009] EWHC 1831 (QB).
[70] Lees personal correspondence with Irwin Mitchell, Sarah Bowman (December 2012).
[71] Personal correspondence Lees to Boyes Turner, Chris Wallace (3 June 2013).
[72] *Williams v University of Birmingham* [2011] EWCA Civ 1242; [2012] E.L.R. 47.
[73] Kieron West, Philippa Craven, "Defending mesothelioma claims—'a lost cause'" (Kennedy, 10 March 2011).
[74] West, Craven, "Defending mesothelioma claims—'a lost cause'".
[75] Health and Safety Executive, *Occupational, domestic and environmental mesothelioma risks in Britain, a case control study* (2009).

were unaware that they were being exposed and neither were the staff and pupils in schools with cabinet heaters or AIB backed cupboards.

When asbestos incidents occur in a school unjustified assurances are frequently given about the seriousness of the incident, and it is not uncommon for the very fact that an incident has occurred to be kept from parents in particular. Evidence showed that infants and staff had been regularly exposed to asbestos over many years in a school my wife taught in. I asked that the parents should be informed. In 2004 the HSE held a meeting to discuss the general issue of whether parents should be informed after an asbestos incident in a school. They took the decision, against their own expert medical advice,[76] that parents need not be informed of their children's asbestos exposure unless it exceeded the Action level.[77] This has meant that asbestos incidents have occurred in schools where children have been exposed but neither they nor their parents have been informed.

The HSE decision and subsequent guidance for schools was fundamentally wrong but it is known that at least one local authority has followed the guidance "to the letter",[78] in another incident staff were informed but parents were not and neither was it entered against the children's names in the school incident book.[79] The parents in my wife's school were never informed. In the case of the school where tests were carried out to determine the release of amosite fibres from stationery cupboards the school authorities were advised by the firm of "experts" undertaking the risk assessment. They estimated that the exposure for both the staff and pupils did not exceed the Action level. Because of this they stated:

> "The interviewees' potential for exposure was so low that we recommend that they do not need to ask their GPs to enter a note on their medical record."[80]

This statement is contrary to expert medical advice and epidemiological opinion. In addition, they had estimated that the worst case exposure for some teachers was 31f/ml.hours each year, which would exceed 48f/ml.hours in 18 months and for the pupils their worst case estimate was 47.5f/ml.hours, which in terms of estimating exposure is the same as 48f/ml.hours.

The Action level is 48f/ml.hours (48,000,000f/m^3) and was designed for asbestos contractors wearing masks and protective overalls. It is a dangerous level for adults and significantly more so for children. The Asbestos in Schools Group argued successfully for this flawed guidance to be withdrawn[81] and it finally was in February 2012.[82]

Similar flawed advice and unjustified assurances were given following the incident in the primary school when AIB panels and 30 windows were ripped out causing extensive contamination of the classrooms. The exposure of the teachers and the cleaners who cleaned up would have been high and, although the exposures of the pupils would probably have been less, it would have been significant. The same commercial firm of "experts" were employed by the council to carry out a risk assessment. Contrary to the evidence, they assessed the risks for the workmen, teachers, cleaners and pupils to be minimal and negligible. They also recommended that:

[76] HSE Comments on Lees family and Robert Hermanns, "OC265/48—Inadvertent exposure" (HSE, March 2004).

[77] HSE, "Chairman's office CO case CO/62/04" (13 Aug 2004). HSE meeting 'The Lees family" (19 Mar 2004). HSE Education Sector briefing HSE Head of Asbestos Policy. Lees contemporaneous notes (13 Dec 2006).

[78] AiS meeting local authority official (24 Jun 2011).

[79] Personal correspondence Lees/JR (January 2011).

[80] Jones, Stelling, Levers, Cowie, *An assessment of the past exposure and estimation of consequent risks to health of staff that may have arisen from asbestos-containing material in cupboards at Lees Brook Community Sports College, Derby*, p.viii; Derby Alan Jones, Andy Stelling, I. Levers, Hilary Cowie, *An assessment of the past exposure and estimation of consequent risks to health of pupils that may have arisen from asbestos-containing material in cupboards at Lees Brook Community Sports College*, p.35, para.7.6.

[81] See "Informing staff and parents following an asbestos incident in a school. The case for withdrawing HSE guidance" (15 July 2011), Asbestos in Schools, *http://www.asbestosexposureschools.co.uk/pdfnewslinks/INFORMING%20following%20an%20asbestos%20incident%20in%20a%20schoo%2015%20Jul%2011.pdf* [Accessed 7 February 2016].

[82] LAC 5/19 was withdrawn in December 2011 and OC 265/48 in February 2012.

> "In particular, we do not recommend that any record be kept of this incident on people's health or personnel records of children or school staff."[83]

Their risk assessment was criticised by the HSE and a senior occupational hygienist as significantly underestimating the risk.[84] However, the flawed advice and unjustified reassurances remain.

If eventually any of the former pupils or staff develops mesothelioma there will be no entry in their medical records. It is possible that after the passage of time the children in particular will have forgotten the incident and in some cases they will be unaware that exposure had even occurred. It will need considerable in-depth research to discover that the person had been significantly exposed as a child at school.

Destruction of documents

It is essential that all the asbestos surveys, asbestos registers, management plans and documents related to asbestos removal for the school are obtained at an early stage of any investigation. In my experience it is common that the school or local authority are only able to provide very few, and at times none, of the documents as they have destroyed them. This is a particular problem if the building has been demolished. In one case the local authority had destroyed all the documents related to a school to the extent they had no record the school had existed. The investigation however determined that the school had been a type of system building called "MACE". The whole concept of system buildings is that they have standard specification, dimensions and materials and therefore comprehensive data was obtained about another MACE school that had been built at the same time. Evidence was obtained that large amounts of AIB had been used in places that are accessible to the pupils and the case was successfully concluded in favour of the claimant.

In two of the schools that my wife taught in the local authorities apologised that they should have kept the asbestos surveys and registers for a period of five years, but in both cases they had destroyed them earlier than their guidance specified. In one of the cases the local authority provided me with the asbestos register which showed that the temporary classrooms contained significant quantities of AIB, some of which was in a "high" priority and others in a damaged, "emergency" condition. But the temporary classroom my wife had taught in had been demolished and all documents pertaining to the building had "accidentally" been destroyed years earlier than they should have been. As far as this school was concerned it was not possible to provide the necessary evidence that asbestos had been present and disturbed other than surmising that it was probable it had been.

Clearly the absence of documents that show the extent, type and position of asbestos materials works in favour of the defendant as it makes it very hard, if not impossible, for the claimant to pursue their case. Once a school building has been demolished most local authorities only retain the documents for a limited period of five or six years, which means that, even if they have complied with their rules, the documents have often been destroyed by the time a claim is made in long latency diseases such as mesothelioma.

The Asbestos in Schools Group proposed to the Department for Education that the time period for the retention of asbestos documents for schools should be greater than 40 years, which is the present retention period for asbestos medical records for asbestos contractors.[85] The DfE policy review did not take the

[83] Dr John W Cherrie and Hilary Cowie, "A Report on the Likely Risks from Asbestos Exposure at Silverhill School, Derby" (IOM Institute of Occupational Medicine, 2004), 628-00009, pp.12 and 13

[84] R. Howie, "Assessment of likely asbestos exposures and consequent risk levels at Silverhill School" (BOHS presentation, 13–15 May 2008). HSE Senior Scientific Advisor Nigel Black, Statement of witness (2 February 2005)

[85] Asbestos in Schools Group and the Joint Union Asbestos Committee, "AiS and JUAC Recommendations DfE review of asbestos policy in schools", Asbestos in Schools, *http://www.asbestosexposureschools.co.uk/pdfnewslinks/RECOMMENDATIONS%20%20AiS%20and%20JUAC%20%20%20DfE%20Policy%20Review%20%20%20Updated%207%20May%2014.pdf* [Accessed 7 February 2016].

Asbestos in Schools Group, "Response from The Asbestos in Schools Group to Policy Review: Asbestos Management in Schools" (30 March 2014), Asbestos in Schools, *http://www.asbestosexposureschools.co.uk/pdfnewslinks/AiS%20RESPONSE%20TO%20THE%20DFE%20POLICY%20REVIEW.%20Asbestos%20management%20in%20schools%2030%20Mar%2014%20(Final).pdf* [Accessed 7 February 2016].

proposal forward and therefore if it is to succeed it would be most helpful if APIL members could lend their support to the proposal.

Williams v Birmingham University

In 1965 a paper by Dr Newhouse and Dr Thompson highlighted that non-industrial, low-level exposures could cause mesothelioma.[86] The conclusions of the paper were brought to the public's attention when the *Sunday Times* published an article in October 1965.[87]

Until 2011 it was widely accepted by the courts that the 1965 publication of the Newhouse paper was the date from which a defendant should have reasonably foreseen that low levels of asbestos exposure could cause mesothelioma. However, in 2011 an Appeal Court judgment in *Williams v University of Birmingham*[88] upset that general acceptance.

Leeds County Court was given evidence that in 1974 Michael Williams was an undergraduate when he carried out experiments in a tunnel beneath Birmingham University. He worked in the tunnel for between 52 and 78 hours over the course of 8 weeks. The tunnel contained asbestos-lagged heating pipes in poor condition and there was a lot of asbestos dust on the floor which he disturbed. The asbestos was crocidolite, amosite and chrysotile. Mr Williams died aged 54 of mesothelioma in 2006. His family took legal action against the university and HH Judge Penelope Belcher found in the family's favour.[89] The university appealed.

The Appeal Court ruled that the university were not in a breach of duty as they considered that an organisation such as theirs would not have reasonably foreseen that their student was being exposed to an unacceptable risk. Instead of using 1965 and Newhouse as the state of knowledge of the university in 1974, Aitken LJ ruled that their state of knowledge would have been that an "acceptable" level of exposure was the workplace "hygiene" asbestos fibre level stated in Technical Data Note TDN13 of 1970.[90]

Aiken LJ's judgment concluded:

> "In my view the best guide to what, in 1974, was an acceptable and what was an unacceptable level of exposure to asbestos generally is that given in the Factory Inspectorate's 'Technical Data Note 13' of March 1970, in particular the guidance given about crocidolite. The University was entitled to rely on recognised and established guidelines such as those in Note 13."[91]

I consider that the Appeal Court judgment was incorrect. Workplace asbestos hygiene and control levels are for workers working on asbestos materials and that is made clear in TDN13. The levels were never meant to be applied to the occupants of buildings. Neither were they a threshold for a "safe" level of exposure, rather they were a threshold level for enforcement action by the Inspectorate. Official guidance has intentionally never defined an acceptable level of exposure, or "environmental" level, for the occupants of buildings. The introduction of an environmental level has been considered but then rejected mainly on practical grounds, so that historically the guidance preferred by the Department for Education was that measures should be taken to reduce exposures to a minimum.[92]

The "recognised and established guidelines" for the University was not TDN13 but was the 1967 guidance AM20/67 issued to them by the Department for Education which clearly stated that:

[86] M Newhouse and H Thompson, "Mesothelioma of Pleura and Peritoneum following exposure to Asbestos in the London Area" (1965) 22(4) Brit. J. Ind. Med. 261; M Newhouse and H Thompson, "Epidemiology of Mesothelial Tumors in the London Area" (1965) 135(1) Annals NY Acad. Sci. 579.

[87] "Scientists track down killer dust disease" *Sunday Times*, October 1965.

[88] *Williams* [2012] E.L.R. 47.

[89] *Williams v University of Birmingham* , unreported, 16-18 September 2009 CC (Leeds).

[90] Standards for Asbestos Dust Concentration for use with the Asbestos Regulations 1969, Technical Data Note 13.

[91] *Williams* [2012] E.L.R. 47 at [61].

[92] Internal memorandum OM Stepan to Griffin "AM on asbestos" (2 June 1983).

> "inhalation of any form of asbestos dust by pupils and teachers should be reduced to a minimum. The occurrence of mesothelioma is associated especially with products made from one of the naturally occurring forms of asbestos, crocidolite (blue asbestos). Exposure to even low concentrations of dust may be hazardous."[93]

The university were not complying with the Department for Education guidance. The guidance was very clear that exposure to even low concentrations of dust may be hazardous, and yet they allowed their student to conduct his experiment in the tunnel with damaged lagging and that was contaminated with crocidolite, amosite and chrysotile fibres. By doing so they failed to comply with the guidance that advised them to take measures to reduce inhalation of any form of asbestos dust by pupils and teachers to a minimum.

TDN13 provided guidance for HM Inspectors of Factories. It gave "hygiene levels" for employed persons in workplaces governed by the 1969 Asbestos Regulations. It gave guidance on how the levels should be measured and what protective equipment should be worn. TDN13 did not apply in this case whereas the Department for Education administrative memorandum did. The university would have received a copy, it was relevant to this specific situation and yet they failed to heed the warning or comply with its advice. It is pertinent that this key document was not referred to in the Appeal Court hearing and neither was it cited in the appendix of the judgment summarising the documents relevant to the history of the development of knowledge of dangers of exposure to asbestos fibres.[94]

The Supreme Court judgment in the *Sienkiewicz* and *Willmore* cases gave hope for people who had experienced low level exposure but one that had nonetheless materially increased the risk of their mesothelioma developing. The judgment in *Williams* case has put another obstacle in the path of the claimants. There are good grounds to challenge the judgment but four years later that has not been achieved.

If all those hurdles are crossed in investigating a claim with the result that the claimant is awarded damages, then there is a possibility that there will be no funds to pay the damages. That is because, in the case of pupils, the defendant school might have been uninsured for asbestos risks for non-employees.

Lack of insurance for pupils—trigger litigation does not apply

In March 2012 the Minister of State for Schools confirmed in a parliamentary written answer that "there is a general asbestos exclusion for public liability insurance".[95] This brought the risk to children from asbestos in schools into stark relief when insurance companies consider that the risks are so great that they are uninsurable. But it also confirmed that in general school pupils were not insured against asbestos risks, and this was particularly the case in academies and free schools.

However, in the absence of commercial insurance, future claims can still be met in local authority schools as they self-insure. But most academies and free schools do not have the resources to do so. The Asbestos in Schools Group raised the issue with the Department for Education. In 2014 the department introduced the "Risk Protection Agreement" for academy trusts. This provides general insurance including cover that was previously unavailable so that asbestos-related claims from former pupils will be met. It is funded by central government.

This is a good scheme, but as at June 2015 just 1,182 academies had joined out a total of 5,028. It is understood that some academies are locked into their present commercial agreement. It is likely that some academies remain unaware that their present cover does not provide public liability asbestos risk insurance. In addition, it is known that some academies had been assured by their brokers that they have full asbestos

[93] Department for Education and Science, "Administrative Memorandum 20/67 Inhalation of Asbestos Dust" (19 July 1967).

[94] *Williams* [2012] E.L.R. 47 at [68].

[95] Ian Lavery MP and Minister of State Nick Gibb MP, "Parliamentary written answer Schools asbestos" (21 March 2012), see Annex 1. "In general asbestos risk insurance is not available to school children" (4 December 2013) http://www.asbestosexposureschools.co.uk/pdfnewslinks/INSURANCE%20schools%20lack%20of%20asbestos%20risk%20public%20liability%20insurance%204%20Dec%2013.pdf.

exposure risk public liability insurance cover. However, it would appear that in certain cases they have not as they do not realise that there are critical exclusion clauses.

The two clauses that will exclude most claims are "[y]ou have complied with any legal obligations to manage asbestos" and "any discovery of asbestos by you is unintentional and accidental". If a claim was successful it is likely that the school had been found negligent in causing the asbestos exposure, in which case the exclusion clause would apply as the academy had not complied with legal obligations to manage their asbestos. The second clause does not exclude claims that are "sudden and accidental", but it does exclude claims where the exposure has occurred over a period of time. Which is more often than not what happens in a school.

There is an additional problem with the wording of some policies that will inevitably exclude a number of future claims. In March 2012 the Supreme Court passed judgment on the "Trigger" issue.[96] However the ruling only applied to employers' liability insurance, whereas public liability policies are still governed by the Court of Appeal ruling on *Bolton*.[97]

Consequently, schools that have, or had, public liability insurance for asbestos risks then the *Bolton* ruling still applies. Therefore if a former pupil or non-employee (which might for instance include a teacher or teaching assistant supplied by an agency) makes a claim it depends on the wording of the policy whether for insurance purposes the injury occurred at the time of exposure or at the onset of malignancy.

This serious anomaly was settled in the "Trigger" issue judgment for employers' liability insurance, but it remains unresolved in the case of public liability insurance. This means that there is yet another hurdle that a former pupil will have to cross before they can successfully make a claim. For their sakes it is important that the law on public liability asbestos risk insurance is brought in line with the law for employers' liability insurance.

Conclusion

The legacy of the widespread use of asbestos in schools is that former pupils, teachers and support staff are now dying of mesothelioma. Their exposures were avoidable as some 50 years ago warnings were issued and advice given to prevent exposures. But the warnings were often not heeded. Asbestos materials have frequently been disturbed and fibres released so that generations of children and staff have been exposed. The challenge for personal injury lawyers is to obtain evidence. At times that challenge can seem insurmountable as the claimant might be unaware of their exposures or the evidence has been destroyed. But a diligent and determined search can often prove that the school contained asbestos and activities can be identified that disturbed the asbestos. By allowing exposure to take place the school or local authority had failed to follow the advice from 50 years ago that, if heeded, would have prevented the person being exposed to asbestos in the course of their work or as a child at the school.

[96] *Durham v BAI (Run Off) Ltd* [2012] UKSC 14; [2012] 1 W.L.R. 867; on appeal from *Durham* [2011] 1 All E.R. 605.
[97] *Bolton MBC v Municipal Mutual Insurance Ltd* [2006] EWCA Civ 50; [2006] 1 W.L.R. 1492.

Rehabilitation and Use of the Case Managers: Rehabilitation Code 2015 and Supporting Guide to Case Managers and Those Who Commission Them

David Fisher

Appointments; Codes of practice; Guidelines; Managers; Personal injury; Rehabilitation

David Fisher, who is a member of the Rehabilitation Working Party looks at the new code and in particular the supporting "Guide to Case Managers" which were published on 1 December 2015. The guide is intended to help all practitioners get the best out of the rehabilitation process and to avoid some of the issues that can arise.

Reproduced[1] below is the "Guide for Case Managers and those who Commission them" that supplements the revised Rehabilitation Code, both of which were formerly released on 1 December 2015 and will be hosted on the Civil Justice Council website.

The Rehabilitation Code was first introduced in 1999 and was last reviewed in 2007. With the advent of the Portal it was recognised that the 2007 code no longer fitted current personal injury practice, especially so as earlier versions of the code were focussed on the initial needs assessment ("INA") process. The code has been endorsed by major claimant and defendant stakeholders including APIL, MASS, ABI and FOIL and provides a voluntary framework within which claimant representatives and compensators can work together.

As we all know, the pre-action protocol places on the parties an ongoing obligation to consider, as early as possible, whether the claimant has any reasonable needs that could be met by medical treatment or other rehabilitation measures. If so, they should discuss how these needs might be addressed. The code then provides a framework as to how any needs might be addressed by the parties. Although the principles are the same throughout, the code recognises the significant differences between the handling of lower value injuries, e.g. those with a value under £25,000 and medium value or catastrophic injuries. In respect of lower value injuries, the code seeks to ensure that the process is cost effective and proportionate. It also seeks to reflect, in so far as is possible, the motor and liability Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents (portal process).

With regards to medium and higher value claims, the intention is that all parties adopt the same principles and collaborative approach throughout the life of the claim and not merely at the INA stage. It is in this context that all practitioners, whether case managers, insurers or solicitors—either claimant or defendant, may find the accompanying "Guide for Case Managers and those who Commission them" helpful. Stating the obvious, despite best intentions, rehabilitation operates in a contentious environment and as a consequence at times the actions of practitioners (claimant, defendant or case manager) may inhibit the effectiveness of rehabilitation outcomes for the claimant who is ultimately supposed to be at the centre of the process.

[1] Reproduced with the permission of the authors and the IUA Rehabilitation Working Party. The Guide was co-authored by David Fisher, Jan Harrison and Neil Sugarman.

It is hoped that the guide will assist all practitioners deliver the best rehabilitation outcomes for injured claimants. In addition to the guide, I would also encourage practitioners to read the IUA/ABI publication "Psychology, Personal Injury and Rehabilitation" which is available as a free download on the internet.[2]

A Guide for Case Managers and those who Commission them

1. Introduction

This Guide is designed to supplement, but not replace, the Rehabilitation Code in relation to claims for personal injury. It is intended primarily for the use of Case Managers but will also be of value to rehabilitation providers in addition to those who refer clients to them, such as lawyers and insurance claims handlers.

In the context of the medico legal claims process, rehabilitation and Case Management can be a highly complex and contentious issue, but also extremely productive. There are many factors that will determine whether rehabilitation, in the broad sense of the term, is successful. Included among these are the motivation of the injured person and the extent to which they wish or are able to engage with the process, as well as trust — trust between the injured person and Case Manager, and trust between the insurance claims handler and the lawyer acting for the injured person. Where that trust is lacking, rehabilitation outcomes may be affected.

Good communication between the parties and speedy decision-making are essential to good rehabilitation outcomes.

At all times, Case Managers who are registered with a professional body, e.g. nursing or occupational therapy, must abide by the standards and guidance set by those bodies. Case Managers and others will also find it useful to refer to the Code of Ethics set by BABICM and CMSUK, and also to BABICM's "Competencies and standards for case management practice" and CMSUK's "Standards and Best Practice Guidelines".

Where the term rehabilitation is used in this Guide, it is intended to include all aspects of rehabilitation including case management unless stated otherwise.

2. Purpose of Rehabilitation

The intention of the Rehabilitation Code is to put the injured claimant at the heart of the process. Rehabilitation must look to put the claimant back, in so far as is possible, to the same physical, mental and financial condition that they enjoyed before the accident. Where the severity of their injuries means that this will not be possible, rehabilitation must be aimed to reasonably maximise the *independence* and quality of life of the injured person, and not create *dependence*. Rehabilitation should also be regarded as a comprehensive exercise for the benefit of the injured claimant, taking account of the impact of the accident on those also affected, such as the claimant's family, and in addition on the claimant's possible inability to work. As such, sometimes, particularly on larger claims, it will be necessary to work with the claimant's family so that they are better equipped to help the claimant; this can be especially so in cases involving brain injury to a family member, especially children. Similarly, counselling can help a family member come to terms with what has happened to a loved one and this in turn can help the rehabilitation process.

Cases where the effects of an injury overlap or exacerbate a pre-existing condition or work/domestic issue can be problematic. Although the purpose of rehabilitation is to put the claimant back to the same physical, mental and financial condition that they were in before the accident, sometimes this can only be

[2] The IUA/ABI Rehabilitation Working Party, "Psychology, Personal Injury and Rehabilitation" (2004) IUA of London, *http://www.iua.co.uk/IUA_Member/Publications/Rehabilitation_Code.aspx* [Accessed 5 February 2016].

achieved by addressing the pre-existing health condition or domestic/work issue. How far this is done will depend on the facts of the case and complexity of the injury. However, in such circumstances, the Case Manager should identify pre-existing barriers to successful rehabilitation and, if it is important that these are addressed, should spell out why that is the case and the possible consequences of not addressing them. Sometimes, the pre-existing medical condition or issue may be so intractable that the cost of endeavouring to address the problem far outweighs the financial and non-financial benefit that might accrue.

Rehabilitation outcomes and objectives need to reflect the reasonable pre-accident situation and aspirations of the claimant, and should not be used as a means to maximise damages in the claim prior to settlement.

3. Rehabilitation and the Law

The purpose of damages is to put the injured person in the same position they would have been in if they had not sustained their injury. These damages can be reduced if the injured person was partly at fault for their own injury. *Sowden v Lodge*[3] emphasises that an injured claimant is entitled to have not merely the cheapest rehabilitation they need, but rather the rehabilitation they *reasonably* need to enhance their lifestyle with a view to restoring it, as much as possible, to how it was prior to the accident.

Rehabilitation costs are treated as damages by the Court. In simple terms, this means that where there is a single referral by the claimant (*or their lawyer on their behalf*), with the costs of case management and rehabilitation funded by way of interim payments made by the insurer, unless liability is agreed in full, the costs of rehabilitation are capable of reduction by the extent of any contributory negligence on the part of the injured person. Rehabilitation funded under the Code sits outside of the litigation process and thus the costs of agreed rehabilitation are paid in full by the insurer and are not at risk of reduction for contributory negligence.

The provision and funding of rehabilitation has to be viewed against this backdrop.

The Pre Action Protocol, which forms part of the Court Civil Procedure Rules, places on the claimant's solicitor and defendant's insurer an ongoing duty to consider rehabilitation. If, subject to some liability attaching to the defendant, and thus their insurers, rehabilitation would help put the injured person back into the position they were in before the accident, it should not be refused. Nevertheless, rehabilitation should be proportionate to the injury and should not be refused unless what is being proposed is unreasonable.

4. Selecting a Rehabilitation Provider or Case Manager

A good Case Manager or rehabilitation provider is worth their weight in gold. Appointing a poor Case Manager or rehabilitation provider can be an impediment and end up costing more money and failing to deliver quality outcomes for the injured person and the parties to the claim. So, investing time and effort at the outset to choose an appropriate Case Manager or provider can pay dividends.

This applies equally to insurers who have preferred providers; the Case Manager who is to be commissioned MUST have the appropriate knowledge and skills to address the injury in question.

Things that those who commission Case Managers should look for, and that the Case Manager or rehabilitation provider should be prepared to provide, might include:[4]

- Does the Case Manager or therapist to be commissioned have the relevant professional qualifications? For example, some people who carry out telephone assessments may not be

[3] *Sowden v Lodge* [2004] EWCA Civ 370

[4] Taken from APIL's "2008 Think Rehab! Best practice guide on rehabilitation".

medically qualified, though Case Managers who come from a social-work background and are CQSW or similarly qualified can be highly effective.

- Do they have relevant knowledge and experience of working in the required field either as a Case Manager/therapist or in the NHS? Beware of superficial CVs; don't be afraid to ask questions!
- Do they have evidence of relevant CPD?
- What evidence is there of clinical governance or supervision? Who supervises the sole practitioner? They may have a peer group, but you need to ask.
- Do they have external accreditation with a recognised body such as CARF, or can they evidence compliance to PAS150?
- Do they have full and adequate professional indemnity insurance? This is particularly relevant after *Loughlin v Singh*.[5]
- Does the Case Manager live or work close enough to the client, depending on how regularly they may need to visit? Normally, one hour's travelling time is considered the maximum.
- Can you take up a reference from somebody whose opinion you value?

It is also necessary to consider the charging structure and fees. Do the fees charged reflect market rates? Is it a set fee or an hourly rate? What is the charging unit and how does that compare with competitors?

5. Duties of a Provider and Those Who Commission Them

To foster trust, the claimant's lawyer and insurer should declare any financial or ownership relationship, direct or indirect, that they have with any Case Manager or provider, but so too should the Case Manager and provider declare any relationship they have with the insurer or claimant lawyer.

Case Manager/provider

First and foremost, the duty of a Case Manager/provider is to the injured person. The nature of the relationship with the injured person is therapeutic and they are not part of the litigation team.

Irrespective of how the Case Manager/provider receives the referral, whether jointly from the claimant and insurer or solely from the claimant (*or their solicitor on their behalf*), they must preserve their independence and the nature of the therapeutic relationship at all costs.

They must adhere to their own professional standards and not be influenced by commercial considerations.

A Case Manager/provider should only accept a referral if it is within their field of expertise and they are able to help the injured person. Case Managers/providers should not be afraid to decline referrals if they don't have the expertise or capacity to do the job. To do so may earn the Case Manager/provider greater professional respect than accepting the job and failing to deliver. The Case Manager should also consider whether they are capable of providing a suitable service from a geographical perspective. Do they live or work close enough to the client, depending on how regularly they may need to visit?

Insurer

The insurer should not refuse rehabilitation unreasonably. If a recommendation is being made and the insurer does not understand why it is being made, they should ask for more information.

Insurers should deal with communication and funding requests, etc. in a timely fashion. Not doing so and delaying can have a negative impact on rehabilitation outcomes and build cost. Insurers should also

[5] *Loughlin v Singh* [2013] EWHC 1641 (QB)

be mindful that often rehabilitation recommendations are interlocking and that to pick and choose some recommendations and not others can prejudice outcomes. If this is a route the insurer wishes to go down, the Case Manager/provider will find it useful to be given an explanation *as to the rationale behind the decision*. Similarly, where the Case Manager/provider makes interlocking recommendations, they should make it clear that one recommendation cannot succeed without the other.

Solicitor

A solicitor has a duty to act in the best interests of their client. This does not always equate to maximising damages; maximising life chances for the injured person is more important.

It should be the aim of the solicitor to act in a holistic manner, balancing their duty to obtain full and fair compensation with their duty to do everything possible to facilitate their client's optimum recovery. This should include working with a Case Manager and other relevant professionals in a collaborative manner. The solicitor should agree service level standards or other terms and conditions with the Case Manager and should also agree a regularity of contact and exchange of information which are appropriate to the individual case.

6. The Rehabilitation Process

Referral

This can be a joint referral or sole referral by either party with the agreement of the other. It is for the injured person and their legal advisers to choose. The parties are encouraged to agree the selection of an appropriately qualified Case Manager best suited to the Claimant's needs.

Where the insurer and claimant solicitor are working collaboratively and there is trust, joint referral can work. However, the insurer cannot insist on joint referral and, indeed, the law makes it clear that it is the claimant (*or their solicitor on their behalf*) who should commission the Case Manager.[6] Where this occurs, the case of *Wright v Sullivan* does encourage joint selection of the Case Manager. Again, this is important as it can foster trust and productive collaboration.

An insurer should not commission a Case Manager or provider without any dialogue or contact with the claimant's solicitor and then expect the Case Manager to obtain the claimant's solicitor's agreement that they should be commissioned.

The referral should make it clear who will be paying the fees of the Case Manager/provider and any limits or constraints on funding.

The Case Manager/provider being commissioned may also find it useful to understand the position in respect of liability; the purpose of this is to assist them in managing the injured person's expectations.

The INA or Assessment

This is usually the starting point of the rehabilitation process. However, some injured people may be so badly injured or traumatised by the event giving rise to their injury that psychologically they are not ready or able to engage with the process fully. It does not necessarily mean that the injured person is looking to enhance their claim in an inappropriate way; it can simply be that they need help to understand and engage with the rehabilitation process, and that they are overwhelmed with everything that has happened to them. In such instances, counselling or other psychological input before the rehabilitation process itself starts can be helpful if the injured claimant is prepared to engage and it is medically recommended. The Immediate Needs Assessment or initial rehabilitation assessment should focus on the rehabilitation priorities and

[6] *Wright v Sullivan* [2005] EWCA Civ 656

what is required. Often the recommendations are interlocking; this means that there is a danger that agreeing to one recommendation but not to another could impact on the success of what is to be delivered; although in some circumstances, only some of the options may be appropriate or attract the willingness of the claimant to engage.

In the more serious cases where liability investigations might be ongoing or where liability might be in dispute, insurers may wish to consider funding some but not all of the recommendations. This can be a useful approach in those cases where there is unlikely to be a full defence and it can assist in building trust and goodwill. In such circumstances, the Case Manager/provider and the claimant's advisors must be made aware of the situation and, where they have not done so already, prioritise and fully cost the rehabilitation requirements.

Where liability attaches and where what has been recommended is proportionate to the benefit to be obtained by the claimant, it is unhelpful for an insurer to refuse funding.

If there is to be a delay in agreeing funding, it can be helpful to explain why to the claimant/claimant's solicitor and Case Manager.

From an insurer perspective, it is very important that, once received, INA reports are prioritised so that early decisions regarding the recommendations and agreement to fund can be made and communicated to both the Case Manager and claimant solicitor. Delay can lead to poor outcomes.

Case Management and Delivery of Ongoing Rehabilitation/Therapy

This is a potentially thorny issue and one where views of all involved in the process may be different.

Some will argue that to avoid conflicts of potential interest, there should be a clear dividing line between the assessment process and the provision of case management and other therapeutic relationships; different professionals should be involved in each aspect. However, continuity between assessment and delivery works, but the tensions and conflicts that can emerge are something that practitioners, whether Case Manager, insurer or claimant's solicitor, need to be mindful of. It is the therapeutic process that should be paramount. Continuity that builds on the therapeutic relationship established in the assessment process through to delivery of recommendations is regarded by many clinical practitioners as being best practice and, for instance, is emphasised in the CMSUK's *Best Practice Guidelines*.

Goal Setting

Goal setting is integral to the rehabilitation process. Goals should be those of the injured person or client. They should be agreed at the outset between the injured person and Case Manager/therapist, and there might be a need for a negotiation phase with the injured person so as to ensure "buy in".

This emphasises the importance of the INA assessment and continuity of the therapeutic relationship. Goals should be SMART:

> Specific/Subjective, e.g. to be able to walk the dog to the shop to get a paper, or return to work.
> Measurable, e.g. by date XX/YY/ZZ, or to lose 3kg in weight.
> Agreed/Achievable, e.g. they should be the client's goals and thus be agreed with them. What they MUST NOT be is a list of Case Manager actions.
> Realistic, e.g. at the most absurd, being able to walk to the shop will not be realistic for a paraplegic.
> Time-bound/Timely, e.g. to be achieved by a certain date.

Goals may be supported by Case Manager actions, but tasks or actions to be carried out by the Case Manager are not goals and should be challenged.

The injured person's goals might be very long-term or even aspirational; provided that there are shorter-term, measurable goals leading to the achievement of the longer-term aim, that is valid.

Claims handlers and fee earners should be alert to instances where there is no progress towards some or all goals from one period to the next, especially so when there may be several months between *updates*. This should prompt questions as to why there has been no progress as there may be legitimate reasons. It may also require dialogue with treating medical and associated professionals. In some circumstances, it might be appropriate for the Case Manager to attend multi-disciplinary meetings.

The Case Manager or therapist themselves should remember the therapeutic nature of their involvement, and if they are having no impact, they should question their own continued involvement, irrespective of the loss of possible fee income.

Records

Case Managers should keep comprehensive records. They should remember at all times that their relationship with the claimant is a clinical and therapeutic one. There is no specific, required format for keeping the records, but Case Managers should be aware that the records may be the subject of scrutiny by other medical professionals, lawyers, insurers and the Court. They should therefore be clear, legible and a comprehensive, true and accurate record of their involvement with the claimant.

At all times, records must comply with the relevant professional standards of the Case Manager/therapist.

Communication and Disclosure

Where there is unilateral referral by the claimant solicitor as opposed to joint referral, in accordance with the principles outlined in *Wright v Sullivan*, documentary records of the involvement of a Case Manager are subject to disclosure to third parties as outlined above and do not, apart from in extreme circumstances, attract legal professional privilege. It is not for the Case Manager to decide what is or is not subject to privilege. The claimant solicitor should decide what is privileged and redact as appropriate, and should then send the records to the defendant insurer/solicitor.

Involvement in the Legal Process

A Case Manager is not an expert witness but can be a witness as to fact (*Wright v Sullivan*). They can voluntarily provide witness statements but are not compelled to do so. However, they are not immune from being called to give evidence. They can also choose whether they wish to participate in providing information within the legal process, e.g. attending a conference with legal advisers. A Case Manager should remember that their overriding duty is to their client in all circumstances and to act in their best interests. Again, as emphasised in the CMSUK's *Best Practice Guidelines*, "The case manager is part of, if not leading, the rehabilitation process and is not a member of the litigation team". Their primary focus is the therapeutic needs of their client and they should use their professional judgement and *evidence base* to determine whether any suggested action is appropriate. It is recognised that a Case Manager, when attending a meeting with the client's legal team, may find it difficult to remove themselves from the meeting. However, they should not allow themselves to be open to undue influence.

Funding

It is sensible for a Case Manager to undertake full and regular accounting, and to ensure that they are working within agreed budgets. Case Managers should be alive to the fact that obtaining funding or decisions about funding is not always a speedy process, and they should try to anticipate this by planning ahead, wherever possible. However, insurers should also be aware of the need for consistency and to avoid disruption in the rehabilitation process, and should respond and react to requests from Case Managers promptly. Case Managers and insurers should work together to establish smooth pathways to payment,

so as to avoid lack of continuity. The insurer should be transparent if there are issues with regards to future funding and they should discuss these in a timely fashion with the claimant solicitor. The Case Manager should not be used as "piggy in the middle" with regards to any disputes and these should be resolved between claimant solicitor and insurer. If the decision is made to withdraw funding, a phased withdrawal, as opposed to a sudden cut-off, can assist all parties.

7. Vocational Rehab

Vocational rehabilitation will, for many injured claimants, be exceedingly important to their physical and mental wellbeing. Getting back to work in some form or other is a benefit to all; to the injured claimant, the paying insurer, and to the government and society in general. Case Managers should recognise that this is not an objective for all injured people, but it is for many in their attempts to resume some form of normality. Case Managers should consider the possibility of vocational rehabilitation at the earliest appropriate moment. This may involve them in dialogue with employers, and Case Managers should be aware of some of the mythical barriers to a return to work. However, vocational rehabilitation is a specialist area and if a Case Manager does not have the relevant experience or expertise, this should be recognised and a referral to somebody more suitable should be made.

8. Case Manager Dos and Do Nots

The case of *Loughlin v Singh*[7] reinforced the responsibilities of a Case Manager. It is imperative that Case Managers are therefore aware of the need to be alert to changing clinical and social needs and circumstances. Failure to do so can now lead not just to poorer outcomes for their clients, but also to financial penalties for the Case Manager or provider. If in doubt, Case Managers should liaise closely with treating professionals, family members and, subject to confidentiality, with third parties. It is imperative that Case Managers do not fall into a "comfort zone" once a regime has been established and that they have systems to carry out regular reviews which will enable them to be alert to medical and other recommendations, and new needs arising.

9. Problems and What To Do When They Arise

Case Managers should be aware that, in many cases, there will be emergencies or crises that are likely to arise, depending on the type and extent of the injury and the family dynamics. They should risk-assess this possibility so far as they are able and make contingency plans or have these available.

[7] *Loughlin v Singh* [2013] EWHC 1641 (QB)

Fatal Accidents in the European Union

Bjarte Thorson*

Allocation of jurisdiction; Choice of law; EU law; Fatal accident claims; Fundamental rights; Just satisfaction; Right to effective remedy; Right to life

The article was taken from a presentation delivered to the annual PEOPIL conference in Edinburgh 2015, and is an attempt to take a snapshot of Europe and its approach to fatal accidents at present. Having the aim of "an ever closer Union" and the increased mobility of the EU citizens in mind, it looks briefly at EU legislation and give some remarks on the current state of the EU rules on choice of law in FA cases. Taking account of how the right to life is also a fundamental right belonging to all EU citizens on equal levels, it then looks at how the "common European courts"—the EU courts and the European Court of Human Rights—deal with awards to compensate for infringements of this right as of today, with emphasis on the jurisprudence from the last 5–10 years.

Introduction

Fatal accidents ("FAs") in Europe are dominated by road fatalities. Although there has been a positive trend for a number of years now, Eurostat still counted over 25,000 deaths in 2013.[1] As to fatal accidents at work, according to Eurostat, Europe saw approximately 3,500 in 2012.[2] There are different ways to consider victims of crime; for homicides data shows around 5,200 for 2012.[3] In medical negligence, it is difficult to obtain reliable statistics in Europe.

Domestic legislation on FAs around Europe reflect massive differences. The bereaved may therefore find themselves in completely different situations, depending on which state's law is applied. In some jurisdictions, the bereaved will, alongside financial compensation for their actual losses, receive substantial awards for their pain and suffering. In other states, they may receive only standardised lump sums for economic losses, or zero for any non-pecuniary consequences. With the aim of "an ever closer Union" and the increased mobility of the EU citizens in mind, as well as taking account of how the right to life is, after all, the most fundamental right belonging to all European citizens on equal levels, regardless of nationality, domicile, etc.—it is an appropriate time to provide a snapshot of how the "common European Courts": the EU courts and the European Court of Human Rights, deal with FAs as of today. That is the main topic of this article (see "Claims at the European level" below). As a backdrop, this calls however for some further initial remarks on the differences between the national legal orders (see "National legal systems" below), on the cross-border issues (see "Choice of law" below) and on how the EU has acted as legislator (see "The EU as legislator" below). The article concludes with a few brief summarising comments (see "Some concluding remarks" below).

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[1] Cf. Directorate General for Mobility and Transport, "EU road fatalities" (European Commission, March 2015), europa.eu, europa.eu, *http://ec.europa.eu/transport/road_safety/pdf/observatory/trends_figures.pdf* [Accessed 4 February 2016].

[2] Eurostat, "Number of non-fatal and fatal accidents and work" (2012), europa.eu, *http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Number_of_non-fatal_and_fatal_accidents_at_work,_2012_(%C2%B9)_(persons)_YB15.pngt* [Accessed 4 February 2016].

[3] Eurostat, "Homicides recorded by the police" (2002) europa.eu, *http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Homicides_recorded_by_the_police,_2002%E2%80%9312_YB14.pngt* [Accessed 4 February 2016].

National legal systems

From a practitioner's perspective, fatal accidents are primarily a matter of claims for loss of maintenance (breadwinner/dependency claims), funeral expenses, and claims for non-economic damages (bereavement).[4] Important for personal injury lawyers is also the issue of the recovery of the deceased's own claims for damages.

Some comparative studies have been done.[5] None of these however deal with the calculations in much detail, and so it is perhaps not easy to spot how large the differences actually are.[6] On the basis of these studies, it nonetheless appears that recovery of the deceased's own claims is accepted throughout Europe.[7] There is the difference that claims for non-economic damages in some jurisdictions are considered as a personal satisfaction and that the deceased therefore must have started to take steps—such as to initiate court proceedings—in order to avail himself of his option to claim damages, before they died. The Study Group on a European Civil Code coins this as an "older school of thought", but it is a way of thinking reflected in quite a few jurisdictions.[8]

Looking at *bereavement* claims, one cannot speak of any common European principle. In some states this is the major head of damage in FA cases, in others it is not recognised at all. Yet other systems acknowledge this kind of damage as such, but make it for instance dependent on gross negligence by the tortfeasor.

Funeral costs appear to be uncontroversial; the study group found that the European legal systems "differ only on peripheral issues, which mostly relate to the claimants and the level of claim".[9] Also claims for loss of breadwinner may justifiably be said to form "common ground", as the study group noted,[10] although there are many different approaches with respect to who the beneficiaries may be, as well as to how the damages are calculated. One recurring difference is that while in some jurisdictions loss of maintenance is recoverable by any person whom the deceased would in fact have supported, in other jurisdictions only those who would have had a statutory claim for maintenance are compensated.[11]

It varies to which degree the existing comparative studies include all those details so important to the final sums; whether the courts are using tables or look at all circumstances of each case; how many hours they assume a person generally works in the home to support his family; how they separate the amount of a person's income with respect to how much he spends on himself and how much he spends on his family; etc. They nonetheless imply that it is above all the issue of non-economic losses which, at present, divides Europe in its approach to FA claims. Compensation for non-economic damages dominate for example in several of the Mediterranean countries, while major jurisdictions further north are far more restrictive. Within the countries where focus lies more or less solely on the financial losses, there is,

[4] FAs may also give rise to "pure economic" or "ricochet" losses, for example where the deceased was a key employee in a claimant's business or sporting team, but this will not be dealt with in the following.

[5] The most extensive by PEOPIL (the Pan-European Organisation of Personal Injury Lawyers; see *www.peopil.com*) and published in 2005 (Marco Bona, Philip Mead and Siewert Lindenbergh (eds), *Fatal Accidents and Secondary Victims* (St Albans: Xpl Law Publishing, 2005)). Somewhat newer is the work by the Study Group on a European Civil Code (see *www.sgecc.net*) and the Acquis Group (see *www.acquis-group.jura.uni-osnabrueck.de*) in their preparations of the Draft Common Frame of Reference (cf. Christian von Bar and Eric Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (München: Sellier European Law Publishers, 2009) and Christian von Bar, *Principles of European Law, Non-Contractual Liability Arising out of Damage Caused to Another* (München: Sellier European Law Publishers, 2009)). A thorough presentation of France, Germany and the UK, and including the ECHR and EU law, may be found in Cees van Dam, *European Tort Law*, 2nd ed. (Oxford: Oxford University Press, 2013).

[6] An interesting "internal" comparative study was performed by General Re, and published in their newsletter "Claims Focus" in January 2014 (see *http://media.genre.com/documents/cfpc1401-en.pdf* [Accessed 4 February 2016]).

[7] Bona, Mead and Lindenbergh, *Fatal Accidents and Secondary Victims* (2005) PEOPIL 2005, p.407 and von Bar, *Principles of European Law, Non-Contractual Liability Arising out of Damage Caused to Another* (2009), p.402.

[8] Bona, Mead and Lindenbergh, *Fatal Accidents and Secondary Victims* (2005), pp.407–408 and von Bar, *Principles of European Law, Non-Contractual Liability Arising out of Damage Caused to Another* (2009), p.403.

[9] von Bar, *Principles of European Law, Non-Contractual Liability Arising out of Damage Caused to Another* (2009), p.406.

[10] Bona, Mead and Lindenbergh, *Fatal Accidents and Secondary Victims* (2005), pp.416–417 and von Bar, *Principles of European Law, Non-Contractual Liability Arising out of Damage Caused to Another* (2009), p.409.

[11] Cf. von Bar, *Principles of European Law, Non-Contractual Liability Arising out of Damage Caused to Another* (2009), pp.409–415.

naturally, a great divide between those bereaved of their breadwinner and those bereaved of other family members.

Choice of law

The large differences across Europe makes the choice of law—and the choice of court—highly important where there is a cross-border element.

The main rule on jurisdiction is the option to sue at the defendant's home court. Delictual claims may under the recast Brussels regulation (2015)[12] also be brought before the courts of the place where the harmful event occurred or may occur (*forum locum delicti*).[13] This corresponds to how the main rule on choice of law for delictual claims is *lex loci delicti (damni)*, i.e. the law of the country in which the damage occurs irrespective of the country or countries in which the indirect consequences of that event occur, see. art.4(1) of the Rome II Regulation.[14] For FA claims, the latter appears to imply that the courts cannot, by way of art.4(1), resort to the law of the country in which the bereaved are domiciled. Advocate General Nils Wahl recently delivered an opinion to the European Court of Justice ("ECJ") reflecting this view.[15]

Apart from this, both choice of law and of jurisdiction fall outside the scope of this article. It should nonetheless be mentioned that *RTAs* are as a main rule subject to the same abovementioned rules, and these are in reality also presupposed in Art 3 of the Motor Vehicle Insurance (MVI) Directive.[16] The MVI Directive has however also some special rules, cf eg Art 10(4) and 25(1) as to non-insured or non-identifiable vehicles. Although the vehicle in the *Lazar* case appears to have been non-identified, the referring court did not ask about this rule. As to jurisdiction and RTAs, following the ECJ in *Odenbreit*, one also has the option of suing the insurer in one's home state, if the applicable law acknowledges direct action and provided that the insurer is domiciled in a Member State.[17] In RTAs, acknowledgement of direct action is imposed by EU law, cf Art 18 of the MVI Directive. Choice of law for *accidents at work*, on its side, is obscured by how benefits in respect of such are considered as matters of social security, cf Regulation 883/2003 on the co-ordination of social security systems, Art 3(1)(f). The general principle is *lex loci laboris*, cf Art 11, but with special rules for posted workers and those with employment in more than one state, cf Art's 12 and 13.

The EU as legislator

In general, it is debatable how far harmonisation of European PI law is necessary in order to achieve a common market. Moreover, the way national tort laws—or rather the laws on liability—are linked to tradition and intertwined with other legal disciplines; contracts, criminal law, (social) insurance law, etc., complicates harmonisation—equal rules may draw along with them very different consequences in different legal systems.

In line with this, much of the EU legislation related to the areas in which FAs typically occur, does not harmonise tort law, it merely coordinates it. One example is the Directive on compensation to crime victims.[18] This contains rules on issues such as the right to submit an application in the host State and (art.1), the right to information for potential applicants (art.4), but claims will be based on national schemes

[12] Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1.
[13] Article 7(2).
[14] Regulation 864/2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40.
[15] Opinion of A.G. Nils Wahl in *Lazar v Allianz SpA* (C-350/14) EU:C:2015:586.
[16] Directive 2009/103 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability (codified version) [2009] OJ L263/11.
[17] *FBTO Schadeverzekeringen NV v Odenbreit* (C-463/06) [2007] E.C.R. I-11321; [2008] I.L.Pr. 12.
[18] Directive 2004/80 relating to compensation to crime victims [2004] OJ L261/15 (and Directive 2012/29 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L315/57).

(art.12). Another example is accidents at work, cf. Regulation 883/2004.[19] The Motor Vehicle Insurance Directive imposes on the Member States an obligation to enact legislation according to which all civil liability must be insurance covered (art.3), but does not go far in creating standards as to what that civil liability may entail, although it inter alia requires coverage of some minimum sums (art.9).

Even where there are elements of harmonisation of the substantive tort law, the EU as legislator has been reluctant with respect to going much further than to harmonise the grounds of liability. Introducing or harmonising specific grounds of liability are not that controversial, given that most national tort law systems already consist of a mix of general liability rules, e.g. on negligence or *culpa*, and special rules for different sectors, such as rules on liability for motor vehicles. One example in this respect is the Product Liability Directive,[20] which harmonises the grounds of liability of a defective product—(art.6)—but as to FAs only sets out that death has to be covered (art.9(a)), and, moreover, that states can decide on the issue of non-economic losses (art.9(2)). As to the calculations, these are entirely governed by national rules, save for the ban against capping the liability below €70 million (art.16).

The picture is not much altered when turning to legislation that has at least one foot in contract law. Holiday cases have a contractual root, as the Package Travel Directive[21] harmonises the ground of liability in the form of "failure to perform or the improper performance of the contract" (art.5). Some details as to how Member States may regulate the accountability are also set out (art.5). Apart from the fact that limitations of personal injury claims are not allowed (art.5), there is still not much harmonisation on the PI law.

Insofar as one may at all meaningfully speak of harmonisation, it is the regulations on passenger liability in different transport sectors that reach the furthest at present, but not in all sectors. As to aviation, the Warsaw Convention of 1929 was for a long time the international regime.[22] The Montreal Convention of 1999 altered this.[23] The EU became party to that convention, and therefore made Regulation 889/2002[24] amending the previous regulation[25] on air carrier liability in the event of accidents. In line with the convention, the 2002 Regulation made it clear that there were to be no financial limits to compensation for death (art.10). It also set out that there should be strict liability up to SDR[26] 100,000 (approximately €130,000), thereafter liability could be based on fault (art.10). For FAs, the regulation moreover prescribed an obligation of advance payments within 15 days (SDR 16,000 (approximately €20,000)) (art.7). As follows, there was not much harmonisation with respect to FAs. The regime of damages in the maritime sector is comparable. Regulation 392/2009[27] makes clear that there is strict liability for "death of … a passenger caused by a shipping incident" (with, inter alia, a force majeure exception) up to SDR 250,000 (circa €320,000), thereafter the liability is fault-based (Annex I, art.3). The system of advance payments within 15 days—of minimum €21,000—is equally present in this regulation (art.6(1)). Turning to the railway, Regulation 1371/2007[28] opens for many national exceptions, which will not be dealt with here. This regime goes further however in harmonisation. On damages, the regulation builds on the Uniform Rules annexed to the International Carriage by Rail Convention,[29] cf. art.13 of the regulation. In the Annex, art.26, the ground of liability is described as "an accident arising out of the operation of the railway and

[19] Regulation 883/2004 on the coordination of social security systems [2004] OJ L166/1.

[20] Directive 85/374 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] OJ L210/29.

[21] Directive 90/314 on package travel, package holidays and package tours [1990] OJ L158/59. A new directive was recently backed by the Council.

[22] The Warsaw Convention for the Unification of certain rules relating to international carriage by air 1929.

[23] The Montreal Convention for the Unification of Certain Rules for International Carriage by Air 1999.

[24] Regulation 889/2002 amending Regulation 2027/97 on air carrier liability in the event of accidents [2002] OJ L140/2.

[25] Regulation 2027/97 on air carrier liability in the event of accidents [1997] OJ L285/1.

[26] Special Drawing Rights.

[27] Regulation 392/2009 on the liability of carriers of passengers by sea in the event of accidents [2009] OJ L131/24.

[28] Regulation 1371/2007 on rail passengers' rights and obligations [2007] OJ L315/14.

[29] Appendix A—Uniform rules concerning the Contract for International Carriage of Passengers and Luggage by Rail (CIV) to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as modified by the Protocol for the modification of the Convention concerning International Carriage by Rail of 3 June 1999 (1999 Protocol).

happening while the passenger is in, entering or alighting from railway vehicles". On the damages, also this regulation provides for a provision on advance payments (of minimum €21,000) in cases of death (art.13). The most interesting part is, however, the Annex, art.27:

> "In case of death of the passenger the damages shall comprise … any necessary costs following the death, in particular those of transport of the body and the funeral expenses; … If, through the death of the passenger, persons whom he had, or would have had, a legal duty to maintain are deprived of their support, such persons shall also be compensated for that loss. Rights of action for damages of persons whom the passenger was maintaining without being legally bound to do so, shall be governed by national law."

Noteworthy is not only that non-economic losses are not available, but also that maintenance claims are limited to persons with a legal right to maintenance. Liability may be capped, but not below SDR 175,000 (circa €220,000).

A very similar approach is to be found in the road sector. Regulation 181/2011,[30] covers "accidents arising out of the use of the bus or coach resulting in death", art.1(b). It states (art.7):

> "Passengers shall, in accordance with applicable national law, be entitled to compensation for death, including reasonable funeral expenses, … In case of death of a passenger, this right shall as a minimum apply to persons whom the passenger had, or would have had, a legal duty to maintain".

Also this liability may be capped, but not below €220,000 (art.7(2)(a)).

While there is only a limited degree of harmonisation directly imposed by the EU as legislator, it should be kept in mind that national courts dealing with EU law must always adhere to the general principles of effectiveness and equivalence, first established by the ECJ in the 1970s[31]: they must ensure that EU law is being given a genuine effect, and claims based on EU law cannot be treated less beneficial than claims based on national law. The ECJ has highlighted the importance of these principles inter alia in RTA cases, cf. as one example the ruling in *Haasová*.[32] Moreover, at least since the mid-1980s, the ECJ has made clear that when EU law individual rights are at issue, the national legal systems as well as the EU institutions themselves have to ensure the judicial protection of these rights.[33] This matter is now also codified in art.47 of the EU Charter on fundamental rights. The EU right to judicial protection largely encompasses similar requirements to those derived from art.6 and art.13 ECHR, that is a procedural requirement that alleged rights violations shall be triable ("judicial control") as well as a substantive requirement that infringements are subject to adequate reparation ("effective remedy"/"appropriate redress").

On this background, it is appropriate to turn to the possibilities of bringing FA claims on the basis of "European rights".

Claims at the European level

Infringements of the right to life

The right to life is set out in art.2 of the ECHR and art.2 of the EU Charter. Article 2 ECHR reads:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

[30] Regulation 181/2011 concerning the rights of passengers in bus and coach transport and amending Regulation 2006/2004 [2011] OJ L55/1.

[31] Cf. *Rewe Zentralfinanz eG v Landwirtschaftskammer für das Saarland* (33/76) [1976] E.C.R. 1989; [1977] 1 C.M.L.R. 533 ECJ and *Comet BV v Produktschap voor Siergewassen* (45/76) Comet [1976] E.C.R. 2043 ECJ.

[32] *Haasová v Petrik* (C-22/12) EU:C:2013:692; [2014] R.T.R. 15 at [42].

[33] Cf. inter alia *Johnston v Chief Constable of the Royal Ulster Constabulary* (222/84) [1986] E.C.R. 1651; [1986] 3 C.M.L.R. 240 ECJ.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
   - in defence of any person from unlawful violence;
   - in order to effect a lawful arrest or to prevent the escape of a person lawfully detained
   - in action lawfully taken for the purpose of quelling a riot or insurrection."

Article 2(1) of the EU Charter contains the more laconic: "Everyone has the right to life." In spite of the very different approaches, art.2(1) is meant to correspond to both art.2(1) and 2(2) of the ECHR.[34] This is also made clear in the Explanations to the Charter.[35]

Through its jurisprudence, the ECtHR has gradually developed a doctrine after which the right to life corresponds to three different types of obligations on the hands of the States: A negative substantive obligation—to refrain from unlawful killing,—a positive substantive obligation—to take active steps to prevent the loss of life—and a procedural obligation—to invest and otherwise make it possible to reveal the circumstances of suspicious deaths.

Breaches of the negative substantive obligation are often related to conflict areas and may be exemplified with the case of *Pitsayeva*,[36] that dealt with persons who disappeared in the Chechen Republic between 2000 and 2006 allegedly after being abducted from their homes by groups of unidentified men. There may however also be other types of cases, for instance deaths that have occurred during attempts of riot control.

The *positive* substantive obligation spans wider, and may generally seem to deserve more attention from PI lawyers than is the case today. Key to the positive obligation is that the State must have had information about the threats to a person's life, but this may be the case in a wide range of contexts. One is domestic violence, which was at issue in the case of *Tomašić*.[37] The offender had first been imprisoned for death threats. The municipal court had sentenced him to five months' imprisonment and had ordered security measures (compulsory psychiatric treatment) not only during his imprisonment but also afterwards as necessary. An appeal court later reduced the security measures so to only last during the imprisonment, as it found that there was no legal basis for extending them for any time after. Shortly after he was released, he shot and killed his (ex) partner, their common child and himself. The cases of domestic violence are characterised by how not only the possible offender, but also the possible victim, is identifiable beforehand. The positive obligation under art.2 ECHR spans further however. It covers also general threats to society, as illustrated by *Bljakaj*.[38] Briefly put, a man had shown several signs of being mentally unstable, and was inter alia interviewed by policemen, who appear to have considered him as depressed and possibly suicidal, but not dangerous to others. Later he not only attacked and severely injured his wife by shooting her in an open street, he also took himself to the offices of his wife's lawyer and shot and killed him. The authorities were found to not have offered the lawyer sufficient protection from the threat the killer posed to him, but not because there had been any indications that this lawyer in particular was at risk. It was instead due to the fact that the unstable person was a risk to society as a whole—to anyone. Article 2 may also prove relevant in cases of completely different natures, e.g. cases on occupational diseases. A recent ruling to exemplify is *Brincat*.[39] Mr Attard had, for a state-owned enterprise, been working on public buildings and otherwise been heavily exposed to asbestos in his work on Malta in the early 1970s. Upon finding that the State ought to have known about the risks connected to asbestos at the relevant time and that sufficient measures to inform and protect the worker against them had not been adopted, the court

[34] Article 2(2) of the EU Charter reads: "No one shall be condemned to the death penalty, or executed." This aims to correspond to Protocol 6 of the ECHR.
[35] *Explanations to the Charter* [2007] OJ C303/02, paras 17 and 33.
[36] *Pitsayeva v Russia* (53036/08), judgment of 9 January 2014.
[37] *Tomašić v Croatia* (46598/06) [2012] M.H.L.R. 167. See also *Opuz v Turkey* (33401/02) (2010) 50 E.H.R.R. 28 .
[38] *Bljakaj v Croatia* (74448/12) (2016) 62 E.H.R.R. 4.
[39] *Brincat v Malta* (60908/11), judgment of 24 July 2014.

ruled that there had been a breach of art.2. Other applicants in the *Brincat* case had survived, but with diseases. They were found to have had their rights under art.8 (the right to respect for family life) infringed. The obligations under art.2 and art.8 are thus comparable, implying that one may find support in jurisprudence on either one. Another relatively recent ruling on art.8 is *Vilnes*.[40] This case dealt with claims from individuals who had previously been engaged as deep-sea divers for petroleum operators in the North Sea, and who had consequently started to suffer long-term illnesses. One reason had been the operating companies' use of too rapid diving tables, leading to decompression sickness. Claims against the Norwegian State had failed in the national courts as the State was not considered as an appropriate addressee for claims that sprung out of the drilling operators' activities. The ECtHR however found the State liable on the ground that its supervisory authorities had not demanded the operators to present to them the decompression tables for review, in order to bring information about them to the divers, so that they could assess the risks related to diving. This ruling found a breach of art.8 on the right to respect for family life as the consequence of the lack of information was not immediately life-threatening. It would however have been ruled as a breach of art.2 had that been the case. For PI lawyers it is a notable example of how defective labour supervision may in fact render the authorities' liable for occupational diseases.

The procedural head of art.2 ECHR is a frequent topic before the ECtHR.[41] This should also be of interest to PI lawyers, for instance with respect to fatal accidents at work or resulting from medical malpractice. The applicant in *Öztürk*[42] was the husband of a woman who died after complications during surgery. Subsequent investigations were not effective and ultimately criminal proceedings versus the surgeon were time barred. The husband's own civil claim was dismissed, even though the surgeon had received disciplinary sanctions. In sum, the requirements set out by art.2 were not fulfilled. The case of *Lazăr*[43] should also be interesting to those working with FA claims. The applicant's son had died in hospital, and there was a lack of effective criminal investigations. When faced with the applicant's complaint, the Government argued that he had the possibility of a civil lawsuit for medical malpractice. The ECtHR noted however that while this was a theoretical option, such liability would be fault based. It considered that the applicant would depend on evidence produced in an appropriate criminal investigation in order to be able to prove fault. There was thus nonetheless a violation of the procedural head of art.2. A similar reasoning may be applied to accidents at work, should liability be fault based.

Possible roads to compensation

There are several different liability regimes that may come into play where there has been a violation of the right to life, in addition to the national laws.

If an EU Member State has breached the right to life, there is the option of EU Member State liability, based on the line of jurisprudence from the ECJ introduced by the famous *Francovich* judgement.[44] Should the EU institutions themselves violate the right to life, there may be the possibility of claims directly versus the EU on the basis of art.340 of the TFEU (EU liability). In addition to these two, there is the option of damages on the basis of art.13 of the ECHR. This article requires the State in breach to offer an "effective remedy". It appears to vary between the European legal systems to which degree they consider art.13 of the ECHR as a separate ground of liability or whether liability for breaches of convention rights are handled under specific statutory regimes (such as the English Human Rights Act 1998) or by way of national law

[40] *Vilnes v Norway* (52806/09) 36 B.H.R.C. 297.
[41] Cf, for example, from 2015, *Saydulkhanova v Russia* (25521/10) judgment of 25 June 2015, *B v Croatia* (71593/11) judgment of 18 June 2015, and *Dölek v Turkey* (34902/10), judgment of 28 April 2015.
[42] *Öztürk v Turkey* (25774/09), judgment of 21 July 2015 (this ruling is at present not final).
[43] *Lazăr v Romania* (32146/05), judgment of 16 February 2010.
[44] *Francovich v Italy* (C-6/90 and C-9/90) [1991] ECR I-5357; [1991] E.C.R. I-5357; [1993] 2 C.M.L.R. 66.

on non-contractual liability in general.[45] Either way the remedies offered must fulfil the requirements of art.13 of the ECHR. If an effective remedy has not been offered—if none or only partial reparation have been made—the claimant may ask the ECtHR to award "just satisfaction" under art.41 of the ECHR—and that would then be the fourth route to compensation.

As follows, different courts at different levels may come into play. Liability for the EU institutions may of course only be established by the EU courts. While claims under the EU Member State liability regime are filed before national courts, those courts may—and, if they are courts of last instance; must—ask the ECJ for a preliminary ruling (TFEU art.267). The ECtHR may, as mentioned, come into play if the claimant has exhausted his options to file damages claims before national courts, but still is not fully repaired, so that there is a breach of art.13 of the ECHR, cf. art.41 of the ECHR. It may also happen that the national courts deny that there has been a breach of art.2 of the ECHR, and that the complaint to the ECtHR only seeks to establish this breach, while the applicant aims to eventually file a subsequent claim for damages before national courts.

There is also an interplay between the different sets of rules. First, within the reign of EU law: while EU Member State liability and the liability for the EUs own institutions sprung out of different legal bases and initially operated with different conditions, the ECJ took the step of aligning the different liability regimes in its ruling in *Bergaderm*.[46] In order to understand Member State liability one should thus also study the ECJs—and the General Court's—rulings on EU liability. Secondly, there is a link between art.13 and art.41 of the ECHR, in the sense that the ECtHR has held that its own practice of awarding just satisfaction under art.41, gives guidance as to how the contracting states may fulfil art.13. There is, at present, an extensive jurisprudence on art.41, compared to that on art.13. In order to unravel the requirements of art.13 one should thus also—or in fact, first of all—study the ECtHRs rulings on just satisfaction.

EU law liability

Conditions

Claims against EU institutions have to be founded on art.340(2) of the TFEU, according to which the non-contractual liability of the EU is built upon "the general principles common to the laws of the Member States". The legal basis for claims against the EU Member States is unwritten, but may be derived from a long line of rulings by the ECJ, starting with *Francovich*, in which the court famously held that the principle of State liability was "inherent in the system of the Treaty".[47] With the ruling in *Bergaderm*, the ECJ clarified that the conditions for liability are the same in both regards: there must have been a breach of an individual right, that breach must be sufficiently serious, and there must be a causal link between the breach and the claimant's injury and loss.[48]

The question of EU law individual rights—the first condition—is still very unclear. It appears that the main issue is whether or not the provisions or principles from which the rights are eventually derived, has as one of their aims the protection of individuals.[49] One can thus rule out provisions which merely regulate the division of competences between EU institutions,[50] or even the EU and Member States;[51] provisions

[45] Cf. in general *Damages for Violations of Human Rights: A Comparative Study of Domestic Legal Systems*, edited by Ewa Baginska (Basel: Springer International Publishing, 2015).
[46] Cf. in general Pekka Aalto, *Public Liability in EU Law: Brasserie, Bergaderm and Beyond* (Oxford: Hart Publishing, 2011).
[47] *Francovich* [1993] 2 C.M.L.R. 66 at [35].
[48] Cf. *Laboratoires Pharmaceutiques Bergaderm SA v Commission of the European Communities* (C-352/98 P) [2000] E.C.R. I-5291 at [42] and *Brasserie du Pêcheur SA v Germany* (C-46/93 and C-48/93) [1996] ECRI-1029 at [42].
[49] Cf. e.g. *Sison v Council of the European Union* [2011] E.C.R. II-7915 at [47].
[50] Cf. *Industrie- en Handelsonderneming Vreugdenhil BV v Minister van Landbouw en Visserij* (22/88) [1989] E.C.R. 2049; [1991] 2 C.M.L.R. 461 ECJ.
[51] Cf. *Artegodan GmbH v European Commission* (T-429/05) [2010] E.C.R. II-491 at [75].

that merely aim to ensure the general confidence in a proper administration, etc. In practice, one has at times to draw the relatively difficult line between rules that are suitable for private enforcement and those which best belong to the public authorities to enforce.[52]

While it is self-explanatory that art.2 of the EU Charter deals with an individual right as such, another difficulty is met—making it still, at present, difficult to see how art.2 of the Charter may form a very practical basis for FA claims versus the Member States. The difficulty stems from art.51(1) of the Charter, according to which

> "The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States *only when they are implementing Union law*."

Most infringements of the right to life will not have this kind of link.[53] Should one indeed however be able to prove that the EU Charter right to life has been infringed in the context of EU law implementation, the condition of a sufficiently serious breach cannot be expected to pose problems to the claimants. As noted by Angela Ward, the right to life belong to those rights

> "that are so entrenched that it is difficult to imagine factual circumstances in which either Member States or Union institutions would have any discretion to breach them. These provisions are likely to attract an award of compensation upon proof of failure to comply with the Charter".[54]

The condition of a direct causal link may also possibly complicate matters for the claimants. One of the very few personal injury claims based on EU liability that the ECJ has been presented with, is the case of *Leussink*. Mr Leussink was an official at the Commission who was severely injured in a car accident. The car belonged to the EU (the then-Community) and liability was in reality established on the basis of negligence—poor car maintenance. Mr Leussink's claims for financial losses were compensated over the insurance scheme for the Community staff. The ECJ awarded him compensation also for non-economic damage. Of interest to the issue of fatal accidents is, however, that his wife and four children had also put forward claims for non-economic losses. These were all dismissed due to "indirect" causality. The court added that this was "borne out by the fact that the legal systems of most Member States make no provision for compensating such effects".[55] It is submitted that this passage cannot be taken as decisive for FA cases. First, causality is not per se more indirect where the bereaved claim compensation for non-economic losses, compared to where they claim compensation for loss of breadwinner. Unless the ECJ would reject claims also for non-economic losses, it appears that the justification by way of an "indirect" causality would merely be a cover for the policy consideration—namely that bereavement claims are controversial. Secondly, however, claims for bereavement are clearly less controversial than claims from family members in injury cases. Thirdly, if the EU institutions are liable for a loss of life, one may have a breach of art.2 of the EU Charter on fundamental rights, in turn bringing about art.47 of the Charter, which requires an effective remedy. According to ECtHR case law, which is clearly relevant here, this must include compensation for non-economic losses, cf. in further detail, the section headed "Liability on the basis of Article 13 ECHR" below. A coherent approach would then indicate that Member State liability should fulfil the same standards.

[52] Cf. e.g. *Paul v Germany* (C-222/02) [2004] E.C.R. I-9425; [2006] 2 C.M.L.R. 62.
[53] As to what "implementing Union law" implies, see in particular *Åklagaren v Åkerberg Fransson* (C-617/10) EU:C:2013:105; [2013] 2 C.M.L.R. 46.
[54] Angela Ward, "Damages under the EU Charter of Fundamental Rights" (2012) 12 E.R.A. Forum 589, 601.
[55] *Leussink v Commission of the European Communities* (169/83 and 136/84) [1986] E.C.R. 2801 ECJ at [22].

Calculation

Should all conditions for liability be considered as fulfilled, there is the issue of calculation.

For economic losses, it appears relatively clear that the case law of the ECJ, taken as a whole, reflects the genera idea of full compensation, even though the court has never boldly stated this as a matter of principle. Among the many cases to support this, *Mulder*[56] and *Manfredi*[57] may be mentioned. There are also many rulings in which the EU courts have granted compensation for non-economic damages, but mostly in cases of pure economic loss.[58] On personal injuries, there is as mentioned little practice from the ECJ. One notable case is, however, *Grifoni*. The court in this judgment dealt with claims from a carpenter who had been injured while working on a EURATOM-building, and held that:

> "The victim of an accident must be compensated, irrespective of any financial loss, for any personal damage which may cover physical or mental suffering … In view of the injuries suffered by the applicant and the ensuing consequences, the applicant's non-financial loss must be assessed at a lump sum of LIT 100 000 000, of which 50% must be imputed to the Commission, that is to say LIT 50 000 000."[59]

The quite generally framed opening statement indicates that the ECJ is apt to look at claims for compensation of non-economic losses with willingness also outside the realm of pure economic loss.

Liability on the basis of Article 13 of the ECHR

Article 13 ECHR as a legal basis

Violations of the ECHR should primarily be remedied at the national level. In line with this idea, art.13 of the ECHR states:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

In principle, any sort of remedy, or combination of remedies, may fulfil art.13. Nor does it have to be legal remedies, sometimes a mere apology/declaration of breaches, memorials, etc., can be effective. Nonetheless, it appears relatively clear that if a violation results in economic losses, an effective remedy is one that repairs those losses. For those leading to non-economic losses, the issue will to some degree depend on which sort of rights that have been infringed. For violations of the most fundamental rights, such as the right to life, compensation for non-economic damage is also necessary in order for a remedy to be effective. The ECtHR thus held in *Keenan* that

> "in the case of a breach of Articles 2 and 3 of the Convention, which rank as the most fundamental provisions of the Convention, compensation for the non-pecuniary damage flowing from the breach should in principle be available as part of the range of possible remedies".[60]

Although an infringement of the right to life will call for options of compensation of non-economic losses, this does not however, according to the ECtHR, mean that jurisdictions in which bereavement claims are

[56] *Mulder v Council of the European Communities (No.1)* (C-104/89 and C-37/90) [1992] E.C.R. I-3061 at [34].
[57] *Manfredi v Lloyd Adriatico Assicurazioni SpA* (C-295–298/04) [2006] E.C.R. I-6619; [2006] 5 C.M.L.R. 17.
[58] Cf. as some rather random examples the staff case in *Willame v Commission of the European Atomic Energy Community* (110/63) [1965] E.C.R. 649; [1966] C.M.L.R. 231 ECJ, or the case of pre-contractual liability in *Embassy Limousines & Services v European Parliament* (T-203/96) [1998] E.C.R. II-4239; [1999] 1 C.M.L.R. 667.
[59] *Grifoni v European Atomic Energy Community (Euratom)* (C-308/87) [1990] E.C.R. I-1203; [1992] 3 C.M.L.R. 463 at [37]–[38].
[60] *Keenan v UK* (27229/95) (2001) 33 E.H.R.R. 38 at [130]. Cf. also *Bubbins v UK* (50196/99) (2005) 41 E.H.R.R. 24 at [171].

not acknowledged, are in breach of art.13. This had been argued in *Zavoloka*.[61] The applicant's daughter had died in a traffic accident in Latvia, and under Latvian law at the time there was no compensation for non-pecuniary losses. The ECtHR found that this could not amount to an infringement of art.13 in conjunction with art.2. While this result is unsurprising from a political perspective, and in light of the aims of the ECtHR, the justification is less convincing from a legal—tort law—perspective. It seems, inter alia, from a tort law perspective odd to justify the result by reference to how the national legislation had been modified after the time of the facts in the disputed case, as the court did.[62]

When damages are necessary in order for the remedy to be effective, the ECtHR has repeatedly held that the standard is a *reasonable* amount of just satisfaction, cf., for example *Dubjakova*.[63] This requires an assessment "of all the circumstances of the case", in which key factors are the violation in itself, the time passed, and standard of living in the State concerned. Importantly, the ECtHR has held that guidelines may be derived from its own practice of awarding just satisfaction under art.41 of the ECHR, but that the contracting states' own awards in order to fulfil art.13 may be somewhat lower, inter alia as they may be awarded "more prompt".[64] There are incidents where the contracting states have awarded very low sums,[65] and the ECtHR has accepted this. This may make it appealing for the States to solve the damages issue nationally, hence relieving an already overloaded Strasbourg Court from even more complaints.[66]

Just satisfaction under Article 41 of the ECHR: Conditions

Article 41 of the ECHR states:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."[67]

The words "if necessary" and "just", indicate how the competence of the ECtHR is discretionary—the awards are equitable. It is also important to underscore that art.41 of the ECHR is not a traditional and complete regime of international law State responsibility; on the contrary one should rather understand art.41 of the ECHR as a sort of supplement to the general obligation of ensuring restitutio in integrum under international law, which lies behind the provision on execution of judgments in art.46 of the ECHR. Partly this explains why the art.41 awards are often moderate and at times dismissed. In line with this, the court for instance occasionally "dispenses" the State in breach from liability due to the complexities of the matter,[68] an approach that may make art.41 resemble negligence liability. Faced with breaches of the most fundamental provisions such as art.2, the ECtHR cannot however be expected to be open to refuse to award just satisfaction due to circumstances on the States' side.

For the ECtHR to award just satisfaction, it must find a clear causal connection between the damage claimed and the violation of the convention. Moreover the causal link must be direct.[69] The requirement of a causal link is important with respect to breaches of the procedural aspect of art.2, as the court by way of referral to this requirement generally dismisses claims for financial losses—maintenance claims and

[61] *Zavoloka v Latvia* (58447/00), judgment of 7 July 2009.
[62] *Zavoloka v Latvia* (58447/00), judgment of 7 July 2009 at [41].
[63] *Dubjakova v Slovakia* (67299/01), judgment of 10 October 2004.
[64] See on these points *Dubjakova v Slovakia* (67299/01).
[65] Cf, for example, *Dubjakova v Slovakia* (67299/01) (SKK50,000 accepted as "reasonable" (approximately €1,500)).
[66] Cf. e.g. the *Guide to good practice in respect of domestic remedies*, adopted by the Committee of Ministers 18 September 2013, five, where it is noted that the implementation of effective remedies should, inter alia, "permit a reduction in the Court's workload as a result" as well as "a decrease in the number of cases reaching" the ECtHR.
[67] See further the Rules of the Court, rr.60 (on applications for just satisfaction) and 75 (on judgments with awards).
[68] Cf. e.g. *Lindheim v Norway* (13221/08 and 2139/10) (2015) 61 E.H.R.R. 29 at [141].
[69] Cf. e.g. *Çakici v Turkey* (23657/94) (2001) 31 E.H.R.R. 5 at [127].

claims of recovery of funeral costs—where only the procedural head of art.2 has been infringed.[70] There appears however not to be any hindrances to compensation of financial losses due to violations of the procedural obligations as a matter of principle, i.e. if the claimant actually manages to prove a causal link.[71]

Should there, on the other hand, be circumstances at the victims' or claimants' sides, such as contributory conduct or lack of mitigation of the losses, this is relevant.[72] There are also examples of more open policy oriented refusals. One example is the controversial ruling in the case of *McCann* ("Operation Flavius"), in which the ECtHR found that art.2 had been breached as the UK authorities had not ensured that an anti-terrorist operation in which three suspects were killed, as a whole was controlled and organised in a manner which respected the requirements of the Article. The court found it nonetheless inappropriate to award damages given that the three killed were terrorist suspects who indeed intended to plant a bomb.[73] From a tort law perspective, the judgment also reflects a sort of identification between the deceased and the claimants, in the sense that the deceased's conduct (and intentions) had the consequence that the "indirect" victims were left without compensation.

Just satisfaction under Article 41 of the ECHR: Calculation

General principles Given that art.41 of the ECHR gives the ECtHR competence to award just satisfaction when the law of the defendant State "allows only partial reparation to be made", it seems already at the outset that one may at least link the provision to the principle of indemnity. Although the ECtHR has made clear that it assesses claims for just satisfaction "on an equitable basis",[74] and, moreover, that art.41 does not reflect an ordinary international law "State responsibility" regime,[75] when looking at financial losses, the current practice directions by the President of the Court appear to give an adequate description:

> "The principle with regard to pecuniary damage is that the applicant should be placed, as far as possible, in the position in which he or she would have been had the violation found not taken place, in other words, *restitutio in integrum*."[76]

When faced with the non-economic losses, it is more difficult to pinpoint a clear principle behind the ECtHR's awards. One has above all to study the judgments in order to establish an impression of which standards the court is apt to operate with. Well in line with this, the President's practice directions state that the court "will make an assessment on an equitable basis, having regard to the standards which emerge from its case-law".[77]

As mentioned, the ECtHR acknowledges a general duty to mitigate. There are also elements of a *compensatio lucri cum damno* principle, which may however blend somewhat into the general rule that just satisfaction may only be awarded where the national law of the defendant State does not already provide for full reparation. This is for instance visible in the Government's submissions in *Mezhiyeva*[78]

[70] Cf. e.g. *Saydulkhanova v Russia* (25521/10) at [79] (loss of maintenance) and *Melnichuk v Romania* (35279/10 and 34782/10) judgment of 5 May 2015 at [132] (funeral costs). See, however, also *Fanziyeva v Russia* (41675/08), judgment of 18 June 2015 at [87] and [89], where a claim for loss of maintenance due to a violation of the procedural head of art.2 of the ECHR was refused as "unsubstantiated".

[71] There is also the ruling in *Tanis v Turkey* (65899/01) (2008) 46 E.H.R.R. 14, where the ECtHR must have looked at the lack of willingness to investigate a disappearance as a matter which pointed towards a possible breach of the substantive head of art.2. It concluded that the State's responsibility was "engaged" under art.2 ECHR.

[72] Cf. e.g. *Rehbock v Slovenia* (29462/95) (1998) 26 E.H.R.R. CD120 (breach of art.3).

[73] *McCann v United Kingdom* (A/324) (1996) 21 E.H.R.R. 97 at [219].

[74] *Öneryıldız v Turkey* (48939/99) (2005) 41 E.H.R.R. 20 at [166].

[75] Cf. on this topic, inter alia, Michel de Salvia, "Can the Reparation Awarded to Victims of Violations under the ECHR be Considered a Real "Just" Satisfaction?" in Walter Berka and Attila Fenyves (eds), *Tort Law in the Jurisprudence of the European Court of Human Rights* (Berlin: De Gruyter, 2011), p.387.

[76] *Practice Direction issued by the President of the Court in accordance with Rule 32 of the Rules of Court* on 28 March 2007, 60.

[77] *Practice direction issued by the President of the Court in accordance with Rule 32 of the Rules of Court* on 28 March 2007, 60.

[78] *Mezhiyeva v Russia* (44297/06), judgment of 16 April 2015 at [79]: "there is a national mechanism of compensation for loss of a breadwinner in Russia therefore the question of compensation for the loss of a breadwinner can be resolved at the national level".

and *Khava Aziyeva*,[79] and the ECtHR's dicta in *Kukayev*.[80] The jurisprudence shows however that if damages have not already been awarded nationally, the ECtHR does not find it appealing to send the applicant back to yet another round in the national judiciary—a system he or she has already exhausted once. It is thus foremost where compensation has de facto been paid that the ECtHR takes regard of it. In the aforementioned case of *Vilnes*, the court did not find a sufficient causal link to financial losses proven, and also added that the evidence was anyhow "not such as would enable the court to make an equitable award under the Convention that exceeds the amounts that they have already received under the various national compensation schemes and which would have to be deducted from any such award".[81]

Loss of maintenance With respect to the possible beneficiaries of maintenance claims, the ECtHR does not find it decisive whether or not there would be a legal duty to support. Alongside awards to spouses[82] and children,[83] the jurisprudence offers examples of awards to unmarried partners[84] and parents.[85] There is nothing that indicates that siblings are ruled out as a matter of principle. What matters, appears to be the requirement of a clear causal link. For instance, the court has denied claims from parents when their deceased child was quite young at the time of death. This seems to be based on a consideration that it is too uncertain what sort of support that would eventually have taken place in a hypothetical future; in *Öneryıldız* the "prospect of future financial support by the seven minor children who died in the accident" appeared "too distant".[86] For elderly parents, awards have been made.[87]

With respect to the level of compensation, the starting point is an actuarial calculation. If the ECtHR receives actuarial calculations that appear to be reliable, it is inclined to award the calculated amount.[88] If the applicants ask for very low sums, the court also seems to be relatively apt to accept these without requiring any particular substantiation.[89] If the court however becomes uncertain as to the reliability of the proposed numbers, it seems liable to disregard them altogether, in favour of granting a lump sum.[90] If no itemised particulars are at all submitted, the ECtHR solves the issue of an award based on relatively "free" reasoning. In *Öneryıldız*, the court thus assumed that "each member of the household must, in one way or another, have provided a contribution, if only an accessory one, to the sustenance of all".[91]

On this ground, an aggregate award of €10,000 was made. In *Osmanoğlu*, the applicant, the father of the deceased, argued that their family shop had to close down after the death of his son. Although no itemised claim had been submitted, the court awarded €60,000.[92] To justify awards by reference to "comparable cases" is another technique used. In *Duran v Turkey*, the ECtHR compared the case to *Acar*,[93] *Çelikbilek*,[94] and *Aydın*[95]—all versus Turkey—, and taking equity into account, before it awarded €22,000 jointly to two parents.[96] In general, the court seems to emphasise information about the subsistence levels where the bereaved reside. For instance, in *Khava Aziyeva*, the deceased was born in 1979, and the two applicants were his two children, born in 2008 and 2010 respectively. The applicants had taken account

[79] *Khava Aziyeva v Russia* (30237/10), judgment of 23 April 2015 at [116]: "The Government … pointed out the existence of domestic statutory machinery for the compensation for the loss of the family breadwinner".
[80] *Kukayev v Russia* (29361/02), judgment of 15 November 2007 at [127].
[81] *Vilnes v Norway* 36 B.H.R.C. 297 at [270].
[82] Cf. e.g. *Çakici v Turkey* (2001) 31 E.H.R.R. 5.
[83] *Çakici v Turkey* (2001) 31 E.H.R.R. 5.
[84] *Velikova v Bulgaria* (41488/98), judgment of 18 May 2000.
[85] *Islamova v Russia* (5713/11), judgment of 30 April 2015.
[86] *Öneryıldız v Turkey* (2005) 41 E.H.R.R. 20 at [16].
[87] Cf. *Islamova v Russia* (5713/11).
[88] Cf. e.g. *Çakici v Turkey* (2001) 31 E.H.R.R. 5 at [127] (£11,534.29 awarded).
[89] Cf. e.g. *Baysayeva v Russia* (74237/01) (2009) 48 E.H.R.R. 33 (€968 claimed).
[90] Cf. e.g. *Kukayev v Russia* (29361/02) at [127].
[91] *Öneryıldız v Turkey* (2005) 41 E.H.R.R. 20 at [16].
[92] *Osmanoğlu v Turkey* (48804/99) (2011) 53 E.H.R.R. 17 at [119]-[124].
[93] *Acar v Turkey* (36088/97 and 38417/97) (2004) 38 E.H.R.R. 2.
[94] *Çelikbilek v Turkey* (27693/95), judgment of 31 May 2005.
[95] *Aydın v Turkey* (25660/94) (2006) 42 E.H.R.R. 44.
[96] *Duran v Turkey* (42942/02), judgment of 8 April 2008 at [79].

of the subsistence levels for children in the Chechen Republic were approximately €128, and only €6,000 was awarded to each of them by the court.[97]

Funeral costs As to funeral costs, the ECtHR appears to look at whether or not they seem reasonable, and if so it awards a satisfaction which implies that they are reimbursed in whole.[98] Generally speaking, it seems that the awards—as of 2015—are usually in the range up to approximately €3,500.

Non-economic losses (bereavement) Turning to the bereavement awards, the ECtHR looks at the issue of possible beneficiaries quite comparably to how it deals with this when faced with claims for loss of maintenance, i.e. from a factual point of view. In addition to those beneficiaries mentioned above, siblings are frequently awarded satisfaction to compensate for non-pecuniary losses, both when there have been breaches of the substantive head of art.2,[99] and when only the procedural aspect has been at stake.[100]

Even if there has only been a breach of the procedural head of art.2, awards appear to be nearly automatic as of today. Illustrative is *Saygı*. In that case, the applicant's son had disappeared after detainment, and there was no effective investigation. The court considered that "the applicant's suffering on account of the authorities' failure to carry out an effective investigation into her husband's disappearance does not require substantiation".[101] €20,000 was awarded. This amount seems to be approximately what the court generally thinks is justified, in spite of the great differences that may be as to the procedural errors which give rise to the award. The original circumstances surrounding the death may probably in principle not be entirely irrelevant, although the ECtHR seems, wisely, to focus on the procedural errors, as another approach could blur the distinct obligations under art.2 and create uncertainty as to the purposes of the awards, which could in turn cause problems in eventual subsequent domestic proceedings. From the latest years, one may here mention *Saydulkhanova* (€20,000 to a mother whose son disappeared in Chezhnya; the criminal investigation had been "plagued by a combination of defects" (at [69])),[102] *B* (€20,000 to three "close relatives"[103] of a man killed in relation to a police operation; there were a number of deficiencies in the investigations, which in sum sufficed to conclude that the State had failed to carry out an "adequate, independent and effective" investigation (at [74])),[104] *Dölek* (€20,000 jointly to mother and six siblings of man found dead in home with unclear signs of trauma; the ECtHR noted that "very few steps" appeared to have been taken (at [71]) and highlighted "numerous failures in the investigation" (at [82])),[105] *Mocanu* (€20,000 to wife with two children whose husband was killed during the suppression of the anti-totalitarian demonstrations in Romania 1989; there had inter alia been "lengthy periods of inactivity" in the investigation (at [339])),[106] *Fanziyeva* (€26,000 to a mother whose daughter died after jumping out of a window to escape police custody; a criminal investigation had never been instituted),[107] *Jaloud* (€25,000 to a father whose son was killed by shooting in Iraq; the ECtHR stated that it was prepared to make "reasonable allowances for the relatively difficult conditions [prevailing in Iraq at the relevant time] under which the Netherlands military and investigators had to work" (at [226]–[227]), yet found that the procedural obligations had still not been met)[108] and *Dimov* (€50,000 jointly to two sons and a wife after death in relation to police operation; while the investigations had started promptly and progressed at a good pace, it had been

[97] *Khava Aziyeva v Russia* (30237/10) at [114] and [120].
[98] Cf. e.g. *Öneryıldız v Turkey* (2005) 41 E.H.R.R. 20 at [167].
[99] Cf. e.g. *Kılıç v Turkey* (22492/93) (2001) 33 E.H.R.R. 58.
[100] Cf. e.g. *Buldan v Turkey* (28298/95), judgment of 20 April 2004; and *Dölek v Turkey* (34902/10). *Solomou v Turkey* (36832/97), judgment of 24 June 2008 may also be mentioned.
[101] *Saygı v Turkey* (37715/11), judgment of 15 January 2015 at [63].
[102] *Saydulkhanova v Russia* (25521/10) (the claim had been €100,000).
[103] This appears to have been the wife and two children, but this is not clear from the ruling.
[104] *B v Croatia* (71593/11) (the claim had been €30,000).
[105] *Dölek v Turkey* (34902/10) (the claim had been €90,000).
[106] *Mocanu v Romania* (10865/09, 45886/07 and 32431/08) (2015) 60 E.H.R.R. 19 (the claim had been €200,000).
[107] *Fanziyeva v Russia* (41675/08), judgment of 18 June 2015 (the claim had been €100,000).
[108] *Jaloud v Netherlands* (47708/08) (2015) 60 E.H.R.R. 29 (the claim had been €25,000).

"deficient in at least two crucial respects" (at [84]; in fact both of them were related to the authorities' (mis)understanding of their obligations under the ECHR).[109] In the aforementioned *Öztürk*, only €5,000 was awarded, but the applicant had not asked for more.[110]

Where the substantive head of art.2 of the ECHR has been violated, awards are perhaps somewhat less "standardised". Still the court does not justify the exact amounts with much detail. The natural starting point is the factual character of the violation. The applicant in *Albakova* was the mother of a person who had been killed in a counter-terrorism operation, and there was a breach of both the substantive and the procedural side of art.2. The court awarded €60,000.[111] The legal classification of the facts seems however not necessarily to be of great importance. In *Khava Aziyeva* three applicants were for instance awarded €60,000 jointly for violation of a number of rights.[112] The ECtHR also refers to equity in itself. In *Nehyet Günay* it awarded, on this ground, €30,000 as a lump sum for both economic and non-economic losses to the deceased's mother, and €30,000 jointly for the non-economic losses of five siblings.[113] Additionally the court emphasises "the family ties between the applicants and the victim of the killing" which is closely related to the "seriousness of the damage sustained", as underscored in *Solomou*,[114] in which the father of the person killed was awarded €30,000 and each of his seven siblings €15,000.

Some concluding remarks

Insofar as we can speak of a common ground in European law on fatal accidents claims, it appears that this is limited to the fact that persons whom the deceased had a legal obligation to support, are generally awarded compensation for their economic losses, and that funeral costs and related expenses are generally reimbursed.

Apart from this, the different legal systems differ substantially, and the EU as legislator has not been willing to regulate FA claims on those more controversial points. We have also seen that the little EU legislation of relevance to FA claims that actually exists, is relatively patchy and, in sum, leaves claimants in quite different positions depending on in which area of life the fatal accident happened.

The matter which truly divides Europe is that of non-economic losses. While this is the major head of damage in some jurisdictions, others are dismissive, or operate at least with very strict conditions. We have however seen that restrictive practices on non-economic losses cannot be upheld insofar as an individual's fundamental right to life has been breached, as this would run counter to art.13 of the ECHR. By way of an analysis of the European Court of Human Rights' latest jurisprudence on its competence to award "just satisfaction" under art.41 of the ECHR, we have, moreover, seen what this Court thinks about equitable compensation. It is evident that at least in a number of jurisdictions, bereaved will benefit strongly from invoking the ECHR if some connection to the State can be proven—for example insufficient labour supervision, insufficient information about possible health risks, etc. The ECtHR has not however been willing to boldly hold that the protection of our most fundamental human right—the right to life—requires the contracting states to establish domestic rules on compensation also for non-economic losses in general, i.e. where there is no link to the State as to a substantive breach of art.2. This is understandable from the point of view of the Strasbourg Court, of which the main aim is to contribute to the respect of human rights, and to which the issue of individual damages is thus in one sense secondary. Yet, from the perspective of tort law, in which one seeks above all a coherent, just and equal system of individual redress to victims, irregularities are created when fatalities that have some link to a responsible State are compensated, whereas fatalities that may from a tort law perspective be quite comparable, yet miss this link, are left

[109] *Dimov v Bulgaria* (30086/05), judgment of 6 November 2012 (the claim had been €100,000).
[110] *Öztürk v Turkey* (25774/09) (this ruling is at present not final).
[111] *Albakova v Russia* (69842/10), judgment of 15 January 2015 at [77].
[112] *Khava Aziyeva v Russia* (30237/10).
[113] *Günay v Turkey* (51210/99) (2010) 50 E.H.R.R. 19.
[114] *Solomou v Turkey* (36832/97) at [101].

uncompensated. Although it seems that harmonisation of FA damages lies far ahead, human rights may thus indirectly be one of the important factors pushing in that direction.

What to do when After-the-Event Insurers Refuse to Indemnify

Sarah Naylor*

After the event insurance; Avoidance; Knowledge; Limitation periods; Misrepresentation; Professional negligence

PROCEDURE

Introduction

Since the introduction of conditional fee agreements it has been common practice for claimants to take out after-the-event insurance ("ATE") policies.

These policies provide important protection for claimants but, unfortunately, there are occasions when claimants face a refusal to indemnify by after the event insurers.

So, what happens when a case proceeds to trial; is lost; a costs order is made against the claimant; and the ATE insurer then refuses to indemnify the claimant?

A recent decision of the Insurance Ombudsma,[1] following a complaint by Mr George Head, considered this very situation.

Background

A helpful starting point is the background to Mr Head's dispute with Enterprise Insurance Company PLC ("Enterprise").

Personal injury claim

Mr Head instructed Raleys solicitors to pursue an industrial disease claim on his behalf under the Coal Handling Agreement Vibration White Finger Scheme, which was compromised by settlement in 2002 resulting in receipt of compensation by Mr Head.

Professional negligence claim

Mr Head subsequently instructed Mellor Hargreaves solicitors to pursue proceedings against Raleys solicitors, for under-settling his industrial disease claim.

Mr Head's professional negligence claim was issued in 2011. Mr Head was not aware of technical legal matters such as limitation periods and what amounted to knowledge for the purposes of limitation.

Mr Head's claim against Raleys solicitors was funded by a conditional fee agreement and an ATE insurance policy with Enterprise to protect him against inter alia adverse costs orders in the claim.

Liability in the claim was denied and so the case proceeded to trial. Raleys solicitors raised a successful limitation defence to the claim which was dismissed at trial in January 2014. Mr Head was ordered to pay costs to Raleys solicitors in the sum of £26,012.89, following costs proceedings, in February 2015.

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[1] 19 June 2015—Complaint Reference 1550-8768/AMC/IF54

Claiming on the ATE policy

Accordingly, Mr Head made a claim on his ATE policy with Enterprise for payment of the defendant's costs. Enterprise refused to indemnify Mr Head for the defendant's costs, relying on their assertion that the court judgment showed that the evidence Mr Head had given to the court as to his knowledge and understanding of the issues was inconsistent and misleading.

Enterprise said that under the terms of the ATE policy Mr Head was obliged to truthfully disclose to them all material information affecting the risk and alleged that he had failed to do so.

Enterprise contended that Mr Head had misrepresented the facts in respect of his knowledge and had provided information that was materially wrong or incorrect. Enterprise stated that had they known the true position the ATE policy would never would have been issued.

Accordingly, Enterprise argued that the policy was voided from the outset and could not be enforced, therefore they considered they had no liability to indemnify Mr Head.

Mr Head disputed Enterprise's reasons for avoiding payment under the policy, on the basis that there was no evidence to show that any alleged misrepresentations by him were deliberate, reckless or fraudulent. The judge hearing the professional negligence claim made no finding of dishonesty against Mr Head though he did find him to be "a less than credible witness whose evidence shifted repeatedly and often in significant respects".

Date of knowledge

Date of knowledge, for limitation purposes, is a complex issue as it involves knowledge about a number of relevant factors.

Mr Head had contacted Mellor Hargreaves solicitors in 2008 regarding a professional negligence claim in response to an advertisement in the press which suggested that claimants who had previously pursued industrial disease claims may have had those claims under-settled. It is of note that there was no evidence to suggest that enquiries were made of Mr Head as to when he became aware of his right to pursue a professional negligence claim. Limitation had been based on the date of knowledge diarised as October 2014, being six years from the date Mr Head contacted Mellor Hargreaves.

The solicitors representing Mr Head in the claim were responsible for obtaining the ATE policy for Mr Head and no questions were apparently asked which would have alerted him to the fact that if there was any discrepancy with his date of knowledge, it would adversely affect the indemnity.

Mr Head, as a lay person, relied on legal professionals to advise whether or not he had grounds for pursuing a professional negligence claim and if so, whether that claim was statute barred.

Limitation and date of knowledge enquiries did not appear to have formed part of any investigation that the solicitors carried out before recommending that Mr Head take out an ATE policy with Enterprise. Mr Head therefore did not accept that there had been any misrepresentation on his part.

The solicitors representing Mr Head informed Enterprise at various stages of the claim as to the progress being made, and the issues which had been raised by the defendant including potential issues with limitation and date of knowledge. Enterprise was fully aware of the defendant's intention to raise limitation as a preliminary defence.

On one occasion Mr Head was presented with a document which detailed answers to a number of questions for his approval, he was told not to worry about the first four questions as they were in relation to legal matters which he need not have any concerns about. Significantly, those questions were about limitation.

Mr Head, at trial, was cross examined for almost a full day by an experienced barrister. The fact that the extensive cross examination resulted in the judge forming the view that Mr Head was a "less than credible witness" was not evidence of any misrepresentation, simply that he had been a poor witness,

which sadly is a fact and risk of litigation. It is clear that Mr Head had been co-operative throughout the claim, had answered all questions and queries and had been a reasonable client. There was no evidence to show that Mr Head deliberately or recklessly misled the solicitors or Enterprise with the information he provided.

Financial Ombudsman complaint

In these circumstances Mr Head considered Enterprise were wrong to conclude that just because he turned out to be a poor witness at court, that he had deliberately, recklessly or even carelessly misrepresented facts regarding his case either at the time the policy started or any time afterwards.

Meanwhile Mr Head was being actively pursued by Raleys Solicitors for payment of their costs, and had been served with a statutory demand. Mr Head was a retired gentleman with no savings with which to pay such a large sum of money.

The Financial Ombudsman issued a provisional decision finding against Mr Head, concluding that Enterprise acted fairly when it set aside Mr Head's policy and refused to provide indemnity for his costs. The adjudicator was satisfied that Mr Head should reasonably have told his solicitors at the time, at what point he became aware that he had cause to claim.

Mr Head's new solicitors disagreed with the adjudicator's conclusion and requested a review. Further submissions were made in support of Mr Head's complaint. Accordingly, the complaint then progressed to a consideration by the Financial Ombudsman.

In February 2015, the Financial Ombudsman issued a provisional decision finding in favour of Mr Head. In arriving at this decision, the Financial Ombudsman had considered all available evidence, including the terms of the ATE policy itself.

The provisional decision set out that:

> "taking everything into account, it is difficult to say that Mr Head made a deliberate or reckless misrepresentation of any material particular to Enterprise Insurance or was reckless in failing to give information if he was not asked about it by his legal representatives. The fact that the judge at trial formed a view about Mr Head based on his answers to vigorous cross examination, does not in my view, automatically lead to the conclusion that he made a misrepresentation which entitled Enterprise Insurance to avoid the policy."

Accordingly, the ombudsman made the provisional decision that Enterprise should meet Mr Head's claim for the defendant's costs in line with the terms and conditions of the ATE policy, in full and final settlement of the complaint.

During the entire ombudsman process Mr Head was constantly under threat of bankruptcy proceedings as Raleys Solicitors maintained their intention to pursue him for payment of their costs which were overdue for payment. It was of course right for Raleys to take such action, as in the absence of an indemnifying ATE insurer they were within their rights to take action against Mr Head personally.

After further representations the Financial Ombudsman issued a final decision on 19 June 2015. The ombudsman made a finding that Mr Head was not dishonest in the way that Enterprise alleged. The ombudsman agreed that Mr Head answered all questions put to him by his solicitors and would not have had an appreciation for issues relating to limitation. The ombudsman found that just because Mr Head turned out to be a poor witness at court did not necessarily mean that he deliberately lied. Taking all of this into account, the ombudsman upheld Mr Head's complaint and decided it would not be fair or reasonable for Mr Head to have to pay the costs awarded to Raleys Solicitors.

The Financial Ombudsman went on to say that it was entirely relevant that the ATE insurance policy with Enterprise was arranged by Mr Head's solicitors. He was therefore in their hands and acting upon their advice.

In conclusion the ombudsman decided that Enterprise should indemnify Mr Head under the terms and conditions of the ATE policy, and that they should also pay Mr Head £750 in compensation to reflect the stress, trouble and upset resulting from the situation.

The ombudsman declined to find that Enterprise should meet some or all of Mr Head's legal fees incurred in making the complaint to the ombudsman, despite submissions on his behalf that such legal fees were necessarily incurred in that Mr Head could not possibly have navigated such a complex complaint in person, given the legal issues at hand.

Mr Head formally accepted the ombudsman's decision which of course rendered it legally binding upon the parties under s.228(5) of the Financial Services and Markets Act 2000.

County court proceedings

The decision of the ombudsman might have been seen by Mr Head as light at the end of the tunnel. Unfortunately, matters did not conclude there as Enterprise failed to make payment of costs to Raleys on Mr Head's behalf and failed to pay the £750 in compensation to him as the ombudsman had prescribed.

This led to Mr Head having to take yet more legal advice as to the next appropriate steps to take.

Enterprise were chased for payment and unfortunately no response was received.

Under Sch.17 para.16(a) to the Financial Services and Markets Act 2000, a money award which had been registered in accordance with the scheme may, if the county court so orders, be recovered under s.85 of the County Courts Act 1984 as if it were payable under an order of that court.

Accordingly, county court proceedings were then issued on Mr Head's behalf for an order or declaration that, by the decision of the Financial Ombudsman Service, Enterprise must indemnify Mr Head for his liability to Raleys, for costs and interest, and that they pay the £750 all of which be enforceable as an order of the county court, along with interest on those sums.

The county court proceedings were issued on 21 August 2015. Once again, at this stage, it seemed things might be back on track for Mr Head.

Judicial review

Shortly after the county court proceedings were served upon Enterprise, Mr Head's solicitors received a copy of a judicial review application made by Enterprise seeking to challenge the decision of the Financial Ombudsman.

Enterprise had asked the court, in the judicial review application, to find that the decision made by the Financial Ombudsman was wrong in law; that there were no sufficient grounds upon which the ombudsman could have reached the decision; and that the decision was unreasonable and irrational.

Enterprise sought an order quashing the ombudsman's decision, a mandatory order requiring the ombudsman to dismiss Mr Head's complaint and costs.

Mr Head was named as an interested party in the judicial review proceedings, therefore grounds of resistance to the application.

Mr Head resists the judicial review application which is likely to be considered by the court early in the new year.

Conclusion

It is, of course, right that after the event insurers should only pay for matters that they are on risk to cover, but there is a need for good faith in all insurance contracts not just in terms of disclosure by the insured but by insurers in dealing with claims made.

This case illustrates the very real difficulties that can arise in practice, even when it is anticipated appropriate insurance cover has been put in place.

The outcome of the judicial review application is awaited with interest.

Case and Comment: Liability

AB v Main

(QBD, HH Judge Stephen Davies, 4 November 2015, [2015] EWHC 3183 (QB))

Liability—personal injury—road traffic accidents—negligence—breach of duty of care—causation—children—contributory negligence—brain damage

Breach of duty of care; Children; Contributory negligence; Road traffic accidents

The defendant had been driving her car down a single carriageway road when the claimant, then aged eight, had moved from the pavement out into the road and collided with the wheel arch of her car. His head struck the lower nearside of the windscreen near the side pillar, causing a serious brain injury.

The accident happened on Hale Road, Liverpool, which runs east to west from the village of Hale towards Speke, which is the direction in which the defendant was travelling. At the accident site it runs immediately north of the perimeter fence of Liverpool Airport and immediately south of a wide grassed area, beyond which lies a parallel road, Hale Drive, behind which there is residential housing where the claimant and his family live. Hale Road is a single carriageway with one lane in either direction, each approximately 3.5m wide. The speed limit at the point of the accident was 40mph.

According to the defendant, she had been travelling at between 25mph and 30mph at the time of impact. She said that she had seen two boys at the side of the road and that one of them had suddenly run into the road, while looking back towards the other boy, and collided with the side of her car. The claimant's friend, who was with him at the time of the accident, said that the claimant was going to get a bottle on the grassy area at the other side of the road when the accident occurred.

The claimant brought an action in negligence against the driver of a car involved in a road traffic accident which had resulted in his sustaining severe brain injuries.

The judge held that the relevant standard of care was that of the reasonably careful driver, armed with common sense and experience of the way pedestrians, particularly children, were likely to behave. If a real risk of a danger emerging would have been reasonably apparent to such a driver, then reasonable precautions should have been taken. If the danger was no more than a mere possibility, which would not have occurred to such a driver, then there was no obligation to take extraordinary precautions.[1] The defendant was not to be judged by the standards of an ideal driver, nor with the benefit of "20/20 hindsight".[2] A motorist driving close to children playing on the pavement owed a duty to ensure that those children were aware of his presence before proceeding past them.[3]

From the claimant's conduct in moving to the centre of the pavement, turning to look at oncoming traffic and looking at something on the other side of the road, the defendant ought to have appreciated that there was a real, significant, and increasing risk of his running across the road. She ought to have kept the boys under closer observation than in fact she did, and either to have taken her foot off the accelerator and covered her brakes, or to have sounded her horn. Although she was driving at a reasonable speed and

[1] *Foskett v Mistry* [1984] R.T.R. 1 followed.
[2] *Stewart v Glaze* [2009] EWHC 704 (QB); (2009) 153 (16) S.J.L.B. 28 applied.
[3] *O'Connor v Stuttard* [2011] EWCA Civ 829 followed.

genuinely believed that she was taking reasonable precautions, the defendant had made a series of errors of judgment which cumulatively amounted to negligence.

Based on the evidence of accident reconstruction experts, if the defendant had kept the claimant under proper observation and reacted appropriately by covering her brakes, the impact would have taken place at a speed of less than 20mph and the claimant would not have suffered the serious brain injury which he did. Even if the collision might still have occurred at a speed of just over 20mph, the point of impact would have been different and again the serious head injury would have been avoided. In any event, if the defendant had sounded her horn as she approached the claimant he would have become aware of her presence and would not have attempted to cross the road.

The judge was satisfied that an ordinary child of between eight and nine could reasonably be expected to have sufficient knowledge and experience of crossing roads such as Hale Road to know of the importance of looking right and left to check for oncoming traffic before crossing. The claimant's mother confirmed in cross-examination that the claimant had been aware since before he was allowed to play out by himself, from when he was around seven years old, of the importance of looking out for and giving way to cars when crossing roads, and that she felt sufficiently confident to let him play out by himself. She said that whilst he was not allowed to cross Hale Road by himself she would have expected that if he had done so he would have looked right and left before crossing. The judge found that was precisely what one would expect of someone of the claimant's age and experience.

The judge concluded that given the claimant's age and experience it would be quite wrong to reduce the damages to anything like the same extent that would have happened had he been an adult. His share in the responsibility for the damage had to reflect the fact that had he not been so young he would almost certainly not have done what he did. A 20 per cent reduction in damages for contributory negligence was held to be appropriate to reflect the strong likelihood that the claimant would have acted differently had he not been so young.

Comment

So, remind me, what is that old joke about "good news, bad news"? Clearly, the good news here is that this is the youngest ever claimant to have contributory negligence to be awarded against them. The bad news is: "is this a case that defendants should have won?" They think so, as at the time of writing they have applied for leave to appeal.

They will say I guess, that the defendant was driving cautiously, at least 25 per cent below the speed limit, and that she had no reason to anticipate that the claimant would run across the road (a fact supported by one of the independent witnesses whose evidence was accepted.) The defendant said that she was driving in the middle of her lane and that she was aware of two boys playing by railings to the side of the pavement. She did not know what they were doing, but they were not doing anything in particular that would cause her to pay particular attention. She saw one of the boys move to the centre of the pavement, where he stood still, and that the other remained by the railings, bending down. She says that the claimant was facing away from her and appeared to be talking to his friend. He was looking over his shoulder but that he was not moving. The next she was aware of was movement to her left as the boy ran into the side, not the front, of her car.

Remember, the defendant says that the claimant was standing still in the middle of the pavement looking over his shoulder and appeared to be talking to his friend.

What was said to the Police at the time by the defendant was:

> "I was driving along the road and two boys were at the side of the road. One boy suddenly ran into the road into the side of my car. He was running, but looking backwards".

In a later interview she said that the boys were not doing anything in particular when she first saw them. The claimant was facing away from her, looking over his shoulder talking to the other child.

There were three witnesses to the accident: the claimant's friend, Morris, who subsequent to the accident said that the claimant never saw the defendant's car because he was looking the other way at a bottle he (Morris) was holding. An independent witness saw that Morris was holding a bottle and was fearful that it would be thrown at traffic, and the defendant's daughter who had seen Morris pick something up and that the claimant had his back to the defendant's oncoming car.

It is acknowledged and accepted that a motor vehicle is a dangerous weapon and that pedestrians, particularly children, are owed a very high due of care and that the standards expected of drivers are exacting. Indeed, at the outset of the judgment, HH Judge Davies set out a number of legal principles, including:

1) That the standard of care to be expected of drivers is that of a reasonably careful driver who has common sense and experience of the way pedestrians, especially children behave. If there is a *real* risk of danger, and not just a mere possibility of danger, then reasonable precautions should be taken. Risk has to be real and not fanciful.
2) If there is real risk, then the Highway Code sets out the type of action a prudent driver should take such as sounding the horn, anticipate that pedestrians may step into the road etc. The code also states that at 20mph the risk of death is significantly reduced.
3) That the courts should be wary of making "findings of fact of unwarranted precision when not justified by the evidence".[4]
4) Caution should be exercised in relation to reconstruction experts.
5) Not to place undue weight on current recollections in respect of events that occurred many years ago. In this regard, Chris Kennedy QC for the defendant emphasised that greater weight should be given to contemporaneous evidence which would usually be that given to the Police. The judge agreed with this point.
6) That considering whether the standard of driving fell below the required standard should not be considered in a vacuum and that regard must be had to the actual circumstances of the accident.
7) Finally, with regard to the issue of contributory negligence, that it was necessary to consider what could reasonably be expected of a child of that age; an ordinary child of that age and not a paragon of virtue.

HH Judge Davies found as fact that the defendant:

- was travelling at 30mph or a little under but not as low as 25mph;
- saw the boys in good time and that she saw them by the side of the pavement, looking down at something;
- it should have been obvious to her that they were "engaged in some form of play";
- ought to have seen that the claimant was "holding something in his raised hand, and that his attention was on the oncoming traffic approaching her";[5]
- knew that the claimant had not looked towards her and therefore could not have been aware that her car was approaching; and
- "[s]he also, crucially, failed to see him turn back towards the road and to begin to move off across the pavement towards the road and into her path".[6]

[4] *AB v Main* [2015] EWHC 3183 (QB) at [11].
[5] *AB* [2015] EWHC 3183 (QB) at [65].
[6] *AB* [2015] EWHC 3183 (QB) at [65].

Remember, Mrs Main, in her evidence to the Police when interviewed at the scene said: "He was running, but looking backwards". Mrs Main's daughter also said that the claimant had his back to their car and Morris also confirmed that the claimant had not seen the oncoming vehicle. Further, neither of the witnesses mention that the claimant had a bottle in raised arm. Was the risk in this case real or fanciful? From a close reading of the judgment and without the benefit of hearing all the evidence, it does seem as if he made findings fact not touched on elsewhere in the judgment. Some might say that HH Judge Davies was bending over backwards to give something to the boy.

So, has HH Judge Davies, who is a Technology and Construction Court judge, misdirected himself as to the facts of evidence in the case? We will have to wait and see what the Appeal Court says, if the application is successful. This feels that an unrealistic bar has been set for drivers' reacting to pedestrians walking or standing on adjacent pavements.

As to contributory negligence, the claimant's parents acknowledge that he had been taught the essentials of road safety. So, subject to any appeal, with children aged eight-nine where that is the case are now open to allegations of contributory negligence.

Practice points

- If the decision stands the case will emphasise the very high standards of care expected of drivers in the presence of children.
- Conversely if the decision stands then it is "open season" for contributory negligence in respect of child pedestrian aged eight-nine years.
- It is now accepted that children of eight-nine years should be aware of the basics of road safety.
- Despite the judge's findings of fact, contemporaneous evidence remains a highly important feature in every case.
- If at all possible, seek to have your case heard by an experienced personal injury judge. Even though you remain a "hostage to fortune" the risks should reduce.

David Fisher

Royal Wolverhampton Hospitals NHS Trust v Evans

(CA (Civ Div), Lord Dyson MR, Underhill LJ, Dame Janet Smith, 23 October 2015, [2015] EWCA Civ 1059)

Personal injury—liability—clinical negligence—surgeons—surgical procedures—civil evidence—breach of duty of care—burden of proof—hip—perversity—procedural impropriety

LT Burden of proof; Clinical negligence; Hip; Procedural impropriety; Surgeons; Surgical procedures

Mrs June Evans underwent a left total hip replacement in January 2010. After the operation, it was found that her left leg was numb and she could not move her left foot. A post-operative x-ray showed the presence of a large piece or "blob" of the cement which had been used to secure the acetabular prosthesis in position. This cement was removed at a second operation where it was found to have been in contact with the left sciatic nerve. Despite prompt removal of the cement, the sciatic nerve had been permanently damaged.

Mrs Evans sued, alleging that the surgeon had been negligent in allowing the blob of cement to be retained and had suffered damage as a result. Eventually, causation was conceded and the only live issue for the judge at trial was breach of duty.

The judge reminded himself that the burden of proof rested on the patient and said that the primary facts did not, without more, give rise to any inference of negligence. He found that a substantial cement extrusion had probably occurred in the area of the transverse acetabular ligament, probably at a time when the surgeon could not see it happening because of the presence of the tool he was using. That such extrusion occurred was not indicative of sub-standard technique, but the surgeon knew or should have known that such extrusion could occur, and should have adopted a rigorous surgical technique which demanded vigilance and careful examination for extrusions at all times. He held that the surgeon's performance or technique fell below acceptable standards because he had not exercised the necessary minimum degree of vigilance. He therefore concluded that the patient had made out her claim because the surgeon had been negligent in failing to see and remove the cement during the hip replacement.

The Trust appealed contending that:

- despite the judge's direction to himself he had wrongly reversed the burden of proof, requiring proof that the surgery had been conducted with reasonable skill and care;
- the judge's findings and holding were not supported by the evidence; and
- the trial was unfair due to a serious procedural irregularity, in that the surgeon had not had the opportunity to deal with the allegation that he had negligently cut away the cement extrusion at a time when he did not have a complete view.

The Court of Appeal held that the judge's direction on the burden of proof was clearly correct. He had rightly stated that he could draw no inference of negligence from the fact that an extrusion had been retained, and correctly identified and answered the question whether, on the facts, the patient had proved that the surgeon's performance of the operation had fallen below the acceptable standard.

Perversity was always a difficult furrow for an appellant to plough, and the court held that it could not possibly be said that, on the basis of the evidence before him, the judge's decision was wrong. His findings of primary fact were, by the end of the hearing, virtually common ground. A substantial extrusion had occurred in the area of the transverse acetabular ligament, probably at a time when the surgeon could not see it because of the tool he was using. That finding was not sensibly open to challenge.

The judge's holdings as to the extent of the duty or the standard of care to be expected were almost entirely based on common ground. The experts had agreed that the risk of extrusion was well known and that it was important to remove any extrusion so far as possible. The judge had found that the surgeon had known or ought to have known of the risk that an extrusion might occur and that its extent could not be predicted, and that he should have adopted a technique which demanded vigilance and careful examination at all times: those findings were uncontroversial. The judge could not be faulted for concluding that the surgeon had failed to meet the expected standard. He had been entitled to reach the conclusion he had.

On serious procedural irregularity the court made clear that the surgeon's function was as a witness of fact, describing what he had seen and done. He was not an expert whose function was to give an opinion on breach of duty. It could not be a serious procedural irregularity not to put to a witness of fact that a particular action amounted to substandard practice. Their conclusion was that the case had been conducted thoroughly and fairly and there was no procedural irregularity at all, let alone one which could undermine the fairness of the process.

The appeal was dismissed.

Comment

The cost to the taxpayer of clinical negligence claims is never far from the headlines. Each year the NHSLA publish an annual report proclaiming how much these claims cost and implicitly blaming claimant lawyers both for bringing unmeritorious claims and for driving up the costs of meritorious claims unnecessarily. These claims have led directly to the consultation on fixing costs in clinical negligence claims which is currently underway. Yet the extent to which the conduct of these claims by the NHSLA and its panel firms contributes significantly to the overall costs is rarely publicly analysed.

As a claimant practitioner of over 20 years my experience is that despite the NHSLA often claiming to want to settle meritorious cases quickly and cheaply this in fact rarely happens. Instead what we consistently see is liability issues denied until late in the day and defendant tactics of delay and procedural wrangling driving costs unnecessarily upwards. In this case the claimant succeeded both at first instance and again on appeal. Two expensive defeats for the NHSLA and their solicitors Browne Jacobson. It will be interesting to see what (if any) post-mortem is carried out in relation to the costs to the tax-payer of the manner in which this piece of litigation was handled.

Two things stand out from this judgment however. First, there was a late concession on the issue of causation shortly before trial. The defendant had initially made a full denial but shortly before trial the issue of causation was conceded leaving only breach of duty in issue. It must be fair to assume that at least some additional (and as it turns out unnecessary) costs had been occasioned by both parties dealing with the issue of causation up to this late stage.

Secondly, the seeds of defeat for the defendant were sewn at an early stage in the preparation of their witness evidence. The orthopaedic surgeon who performed the operation was the only witness of fact called to give evidence. As usual in such cases, his witness statement stood as his evidence in chief. He was then cross-examined. After he had given evidence, to which the experts listened to establish the factual matrix, the experts were then called to express their expert opinion based on the factual evidence.

Giving the judgment of the Court of Appeal Dame Janet Smith noted:

> "In my view, the judge was entitled to form an unfavourable view of Mr Mughal's failure to deal with the issues surrounding the retention of extruded cement in his witness statement (saying only that he had 'removed any extruded cement') and claiming by way of explanation for this failure that he had not realised that he was expected to give a detailed account of what had happened. To my mind, it is most surprising that a consultant surgeon, in receipt of legal advice, would not realise that he was supposed to give a detailed account of the operation in his witness statement which was prepared at a time when the issues in the case were clear. The result was that Mr Mughal could not provide any detail about what he had done at the time. Indeed, he seemed never to have thought about the detail of what had happened until he was in the witness box. In my view, it is unfortunate that he did not write an addendum to his first operation note after he had performed the second operation and knew that a large (and damaging) piece of cement had been retained. But he did not and it is not surprising that the judge was unimpressed by his evidence."[1]

As the Court of Appeal identified this was a case in which there was a "good deal of common ground between the experts". At trial the defendant relied on a study showing that retention of cement was common.[2] The experts were agreed that not all of those cases could have entailed negligence on the part of the surgeon. Accordingly, the fact that this extruded cement had been missed was not in itself evidence of substandard care. However, the "paucity of detail" in the surgeon's evidence left it open to the judge to conclude that there had been a failure on the part of the surgeon. This was not a case of the judge

[1] *Royal Wolverhampton Hospitals NHS Trust v Evans* [2015] EWCA Civ 1059 at [47].
[2] In one 2002 study the proportion of cases where extruded cement had been seen on the post-operative X-rays was 45 per cent.

inferring negligence or reversing the burden of proof. It was one where the trial judge felt able to conclude that the surgeon had been:

> "unable satisfactorily to describe any steps he had taken to deal with the risk of extrusions. The extrusion was 'there to be seen'. The judge thought that it was not irrelevant that the operation note did not address this part of the operation at all. Further, the witness statement provided no detail of this part of the procedure. Having heard the oral evidence, the judge was not satisfied that the necessary minimum degree of vigilance had been exercised."[3]

The Court of Appeal gave fairly short shrift to the five grounds of appeal pursued on behalf of the defendant noting that:

> "The written argument in this appeal (I cannot call it a skeleton argument) is 27 pages long. I regret to say that it complicates what should be a fairly simple set of grounds of appeal."[4]

So a double win for the claimant in a relatively straight forward case involving negligent conduct of a total hip replacement, causing a sciatic nerve palsy.

The case now continues on the issue of quantum of damages. No doubt at some stage the claimant's lawyers will be accused of having incurred costs that are disproportionate both to the value of the claim and to the issues involved in the case, but given that it is defendant behaviour and choice of tactics that drives such costs such criticism appears unwarranted.

Practice points

- Where the defendant's surgeon is called as a witness of fact it is in the interests of the defendant that the surgeon's witness statement deals properly and fully with the issues in question.
- Where the statement does not deal fully with the issues then it leaves room for the judge to conclude that the surgeon did not perform the procedure with proper skill and care and it is unlikely that an appeal court will interfere with such findings lightly.
- The late concession of liability issues by the defendant inevitably causes unnecessary costs to be incurred by both parties.
- Clinical negligence trials are inherently risky for both parties and one would like to think the decision to proceed to trial using taxpayer's money is not taken lightly and that even greater scrutiny is given to the decision to appeal an adverse trial judgment.

Muiris Lyons

[3] *Evans* [2015] EWCA Civ 1059 at [25].
[4] *Evans* [2015] EWCA Civ 1059 at [29].

Horner v Norman

(CA (Civ Div), Moore-Bick LJ, Lewison LJ, Sir Timothy Lloyd, 21 October 2015, [2015] EWCA Civ 1055)

Liability—personal injury—negligence—road traffic accidents—brakes—ice—pedestrians—roads—speed—expert evidence

LT Breach of duty of care; Expert evidence; Ice; Road traffic accidents; Speed

On 12 January 2010, as he was crossing the west-bound carriageway of the A4 Colnbrook Bypass near Heathrow airport, Stephen Horner was knocked down by a car driven by Miss Emma Norman. As a result of the collision Mr Horner suffered significant injuries, which led him to bring proceedings against Miss Norman.

The A4 at that point is a dual-carriageway road, with two lanes in each direction separated by a central reservation covered with grass and shrubs. Mr. Horner had been staying at the Sheraton Heathrow Hotel, situated on the north side of the road adjacent to on the east-bound carriageway. At about 18.00 that evening he made his way on foot to a garage on the south side of the road adjacent to the west-bound carriageway apparently in order to buy some alcohol. Having bought two bottles of vodka, he set off to return to his hotel. He dashed across the west-bound carriageway and was struck by Miss Norman's car just before he reached the central reservation.

Mr Horner may have been making for a communication road which enabled vehicles to cross from one carriageway to the other and which would have enabled him to cross the central reservation without having to walk on the grass. At that time the grass was wet.

Mr Horner has no recollection of the accident or of the circumstances which preceded it, but there were two witnesses who were able to give first-hand evidence, Miss Norman herself and the driver of the following car, Mr Amit Patel. There was also evidence in the form of contemporaneous police reports. In addition, each side called an expert in accident reconstruction.

Horner's case was that the driver had been negligent in failing to apply her brakes as quickly, or with such force, as could reasonably have been expected. The claim depended to a significant extent on the condition of the road surface. Horner's expert in accident reconstruction gave evidence that the coefficient of friction of a damp road of the kind on which the accident occurred was 0.65, and that if the driver had braked as quickly and as hard as she should, the collision would not have occurred. The driver's expert agreed that the coefficient of friction was 0.65 for a normal damp road, but would be lower if there were icy patches on the road. He put forward a figure of between 0.2 and 0.35.

The police collision report, completed at the scene shortly after the accident, recorded that there was frost or ice on the road at the time. A subsequent police report stated that the road was icy. At first instance the judge found that there had been patchy ice on the road, so that the coefficient of friction would have been less than 0.65. He held that 0.35 "might have been nearer the mark". He concluded that the driver had braked as hard as she could, and that her actions accorded with those to be expected of a reasonably competent and careful driver faced with an unusual emergency. The case was dismissed and the claimant appealed.

On appeal the pedestrian argued that there was an insufficient basis for the judge's findings that the coefficient of friction was 0.35, and that there were patches of ice on the road. He argued that the fact that

the car had come to a halt within a few yards of the collision, having been travelling at 25mph at least, showed that the coefficient of friction had been of the order of 0.65.

The Court of Appeal concluded that the judge had been right to be sceptical about whether it was appropriate to use a purely mathematical analysis to determine liability in this case. The calculations put forward by the pedestrian's expert necessarily depended on certain assumptions. None of those assumptions could be regarded as sufficiently clear to compel acceptance of the analysis based on them. The judge had not found that the coefficient of friction was 0.35: he had just said that that figure "might have been nearer the mark". He concluded that it could not be said with any confidence that the state of the road was such as to permit maximum braking efficiency.

The question for the judge was whether the driver had failed to act in accordance with the standards to be expected of a reasonably competent and careful driver. Given the uncertainties in the case, that question could be approached in two ways: one was to say that, given a coefficient of friction of 0.65, in the absence of any other plausible explanation the driver's failure to avoid the accident showed that she was negligent. The other was to say that, since the driver did all that could reasonably be expected of her under the circumstances, the coefficient of friction could not have been as high as 0.65.

The judge had accepted the accounts given by the driver and an eyewitness, and had been satisfied that the driver had done all that she could to avoid hitting the pedestrian. He also found as a fact that there were icy patches on the road which, although they might not have reduced the coefficient of friction to 0.35, did make it impossible to be satisfied that it was as high as 0.65. The judge had considered the evidence in the round. The police reports indicated the presence of frost and ice on the road. The judge had been entitled to accept that evidence and to doubt whether calculations of speed and braking capacity could be approached with any confidence on the basis of a coefficient of friction as high as 0.65 or around that figure.

Accordingly, the judge had been entitled to hold that the driver was not liable to the pedestrian. He had rightly been sceptical about using a purely mathematical analysis to determine liability. The appeal was dismissed.

Comment

Reconstruction evidence is rarely solely determinative of liability in RTA liability cases, and this proved the case here. Moore-Bick LJ gave the leading judgment, which was agreed without amplification by the other two Lord Justices.

The fulcrum of the case was whether the coefficient of friction was 0.65, (consistent with a damp, but not icy road) in which case the claimant was on balance of probability negligent. If it was lower, maybe as low as 0.35 according to the first instance judge relying on Miss Norman's expert, she probably was not negligent. The key to answering this question was the prevailing weather conditions, specifically the presence of ice.

The two driver witnesses and the police reports, and not expert assumption were determinative.

Miss Norman gave evidence she was travelling at about 30mph (the speed limit was 50mph). On impact Mr Horner was thrown against the bonnet of Miss Norman's car. The windscreen smashed, indicating an impact speed of between 25mph and 35mph according to the expert evidence.

The first instance judge found that Mr Horner's dash across the road took two seconds from the kerb to the point of collision. Therefore, allowing 0.7 of a second reaction time (proposed as a reasonable average by Mr Horner's expert), and 0.3 of a second to break, with a friction coefficient of 0.65, Miss Norman ought to have stopped before the collision occurred. However, the friction coefficient number was critical to answering the question of whether Miss Norman was negligent in failing to stop before there was a collision. Moreover, evidence was not clear exactly where the collision occurred or how far

Miss Norman's vehicle travelled before coming to a halt, which cast further doubt on the actual speed and therefore the expert calculated reaction time of Miss Norman.

The two police reports suggested there was ice.

Miss Norman and Mr Patel, driving behind her vehicle were "careful and impressive" as witnesses, and gave evidence that Miss Norman had done all she could to avoid hitting Mr Horner. The appellant's leading counsel correctly made the point that post-accident there was no evidence of slipperiness by either driver witness when exiting their vehicles. He also reminded the court that there was nothing unusual noticed on breaking whether in terms of skidding or anti-locking; both Miss Norman's and Mr Patel's vehicles were fitted with such a device. All relevant, but none of it compelling

Mr Horner had no recollection of the pre-accident conditions.

However, Mr Horner's expert relied on a number of assertions: the road was damp, but there was no ice. However, on balance it was always likely to be held that some ice was present on the basis of the two police reports prepared shortly after the collision. Further, the appellant's expert assumed that Miss Norman's speed on impact was between 25mph and 35mph. He assumed a reaction time of more than 0.7 of a second was necessarily negligent. None of these assertions were reliable and consequentially cast doubt on the expert's conclusions.

The first instance judge, were it to become relevant, placed Mr Horner at 75 per cent responsible, and whilst not required to make a finding on this point the Court of Appeal did not disagree. Doubtless this contrast helped Miss Norman when compared to her own evidence and that of Mr Patel, both of whom were impressive.

In hindsight the appellant was always going to find it difficult if not impossible to disprove the presence of ice. The police reports asserted it was more than likely it was present. To succeed Mr Horner had to win on this point, which was always going to be difficult once his expert's assumptions were challenged most specifically by the police reports.

Practice points

- Reconstruction evidence can be helpful, but rarely will be sufficient in isolation. It is essential to look at the balance of any other evidence to see how that affects the expert evidence, and ultimately the issue of negligence.
- Practitioners need to be careful with all expert evidence adduced, particularly with regard to assumptions made. Here the overwhelmingly critical point was whether there was in fact ice on the road. The balance of evidence always suggested there was!
- On appeal the precise finding of the judge at first instance is important. Here, he did not find that the friction coefficient was 0.35, but that it "might have been nearer the mark", an important distinction.

John Spencer

Saunderson v Sonae Industria (UK) Ltd

(QBD (Manchester), Jay J, 30 July 2015, [2015] EWHC 2264 (QB))

Liability—personal injury claims—group litigation—public nuisance—smoke—negligence—breach of duty of care—injury severity—material contribution—solicitors

Causationr; Fire; Group litigation; Hazardous substances; Material contribution; Personal injury claims

This group litigation involved numerous similar claims for damages for personal injuries, in the torts of negligence and public nuisance, brought by 16,626 claimants. The litigation arose out of a major fire at the defendant's particle board manufacturing plant at Knowsley Industrial Park, Kirkby commencing on Thursday 9 June 2011, at approximately 17.30. The fire caused a very substantial plume of smoke, fumes, associated chemicals, and particulate matter to issue forth into the surrounding area. In due course, most of the flammable contents of the building were consumed in the fire.

The claimants, all of whom either lived or worked in the neighbouring area or near the plant, said that they were exposed to quantities of smoke sufficient to cause them personal injuries: in particular, a range of symptoms variously involving the respiratory tract, the eye, and the skin, and in some cases headache and more general debility. The claimants had completed questionnaires as part of the litigation process, which detailed the onset and progress of their symptoms. However, apart from in relation to one claimant, there was an absence of any contemporaneous medical note either recording a complaint about the fire or linking symptoms to the fire. No one alleged symptoms of any permanence, and it was accepted that these are low-value claims.

The defendant had admitted breach of duty in respect of those who might foreseeably suffer injury in consequence of exposure to the smoke. The existence and causation of actionable injury remained in dispute. The claimants argued that it was sufficient for their purposes that they were able to prove that the defendant's breach of duty materially contributed to the risk of injury. The court tried 20 test claims.

The issue was whether the package of chemicals and particles released as a result of the fire caused, or materially contributed to, the claimants' alleged personal injuries. Mr Justice Jay held that it was conceptually and legally incoherent in this case to speak in terms of the smoke plume making it more probable that claimants might have suffered personal injuries, or that their risk of suffering personal injuries was increased. The issue was a binary one: either, on the balance of probabilities, they sustained an injury in consequence of tortious exposure, or they did not.

The judge confirmed that the doctrine of "material contribution to the risk" in *Fairchild*[1] was designed to cover only two situations. The first was where there were two or more tortfeasors, and medical science could not say which caused the injury; the second was where there was one tortfeasor and two potential causative agents, one "guilty" and one "innocent", but it could not be proven which actually caused the claimant's injury. The fundamental reason why the "material contribution to the risk" principle could not avail these claimants was that it was incumbent on them to prove on the balance of probabilities that they were within the relevant envelope of material risk as that concept was properly understood. Any individual claimant was only at risk if they could prove exposure at a level which was capable of causing personal injury.[2]

[1] *Fairchild v Glenhaven Funeral Services Ltd (t/a GH Dovener & Son)* [2002] UKHL 22, [2003] 1 A.C. 32.

[2] *Fairchild* [2003] 1 A.C. 32 considered, *McGhee v National Coal Board* [1973] 1 W.L.R. 1 HL and *Heneghan v Manchester Dry Docks Ltd* [2014] EWHC 4190 (QB) applied.

It was common ground that the claimants could not recover damages unless they established on the balance of probabilities that they sustained "actionable injury". A transient, trifling, self-limiting, reversible reaction to an irritant was not "actionable injury" for the purposes of the law of tort. However, if the degree of irritation was severe enough, it might be possible to hold that the line had been crossed.[3]

The judge held that viewed in isolation, the scientific evidence did not even begin to support the claims. The court considered lowering the exposure thresholds to reflect scientific uncertainty, the difference between the scientific and legal standards of proof, and the quality of the test claimants' lay evidence. However, a liberal approach, which favoured the claimants when the evidence permitted it, had been applied throughout the judgment. The vast majority of the test claimants had fallen a long way short of demonstrating any significant exposures. There was no obvious reason why the claimants should be the greater victims of scientific uncertainty than the defendant. The lay evidence viewed as a whole was vague, often internally inconsistent, and inconsistent with the known behaviour of the smoke plume. It did not cast doubt on the scientific evidence in any way. The symptoms experienced by the claimants did not exceed the hurdle the law set for actionable personal injury.

The personal injury claims brought by the claimants under the group litigation order were dismissed, as the claimants' symptoms did not amount to actionable personal injury. Judgment was entered for the defendant.

Comment

This is a fascinating judgment, well worth reading for all those interested in the so-called "compensation culture". It is a very sorry tale indeed. Justice J concluded that there were serious weaknesses in the claimants' overall case. Some might say this is a lesson in how not to run complex disease litigation.

The case had been severely damaged by the delay in bringing the claims and the absence of any contemporaneous evidence. The judge expressed the reasonable view that had 16,000 people really suffered symptoms of the severity claimed, he would have expected to see evidence of complaints to newspapers and the local authority, increases in GP attendances and some contemporary local record of a problem. None were brought to the court's attention.

Standard form questionnaires asking a series of leading questions had been used. There had been pop-up shops and cold calling of potential claimants, which did not inspire any degree of confidence. Many of the questionnaires were inaccurate and exaggerated, calling into question the objectivity and integrity of the whole process. Concerns in this regard were heightened by the fact that two of the questionnaires were shown to bear forged signatures, and that whole families have been signed up, apparently willy-nilly, to the group.

The defendant drew to the judge's attention, through the evidence of a Ms Adele Wilson, the sort of behaviour that had been going on. According to para.6 of her witness statement:

> "In approximately January 2012, I was at work when I received a telephone call from my partner, Greg Taft. Greg told me that a lady had visited our home in Tower Hill who had told him that she was acting on behalf of GT Law solicitors who was dealing with claims against Sonae relating to smoke inhalation from the fire in June 2011. She said that Sonae had accepted liability and that compensation had already been paid out to claimants. The lady was attempting to encourage Greg to sign up in order to put forward a claim against Sonae for symptoms relating to smoke inhalation. Greg told her that he was not interested in making a claim and asked her to leave."[4]

[3] *Cartledge v E Jopling & Sons Ltd* [1963] A.C. 758 HL and *Grieves v FT Everard & Sons Ltd* [2007] UKHL 39; [2008] 1 A.C. 281 followed, *Greenway v Johnson Matthey Plc* [2014] EWHC 3957 (QB); [2015] P.I.Q.R. P10 applied.

[4] *Saunderson v Sonae Industria (UK) Ltd* [2015] EWHC 2264 at [457].

Ms Wilson was not cross-examined about this evidence, which was admittedly hearsay. However the judge concluded that there was no reason to doubt its accuracy. The information Mr Taft was given was inaccurate—there had been no admission of liability, and no money had been paid. The judge concluded that misleading information of this sort had the obvious tendency to encourage the bringing of claims, on the basis that the defendant was a soft target and this was easy money. That this information was understood in exactly this way was revealed by the terms of the Facebook posts. The judge said:

> "I strongly deprecate this sort of practice. Not merely does it sail close to the wind in terms of its professional propriety, it is severely counter-productive as and when the case comes to trial."[5]

The judge strongly deprecated the practices adopted by certain firms of solicitors in order to encourage the bringing of claims. He said that the legal process had "preyed on human susceptibility and vulnerability". Jay J ordered that a copy of the judgment was to be sent to the Solicitors Regulation Authority for investigation of the issues raised in relation to two of the test claimants. GT Law was referred to the Solicitors Regulation Authority regarding its representation of claimants in this case. It was reported in October 2015 that GT Law Solicitors, the trading name of First Stop Legal Services, had filed for administration.

Practice points

- Claimants cannot recover damages for personal injuries unless they establish on the balance of probabilities that they sustained what the law regards as "actionable injury". It is insufficient for them to prove inconvenience and distress.
- A transient, trifling, self-limiting, reversible reaction to an irritant is not "actionable injury" for the purposes of the law of tort.
- In cases such as this it is not sufficient for claimants to prove that the defendant's breach of duty materially contributed to the risk of injury.
- Claimants do not have to prove sole cause, but they do have to prove at least material cause.
- The "material contribution to the risk" principle cannot apply to cases like this.
- There is a difference between the legal and scientific standard of proof.[6]
- Claimants often only rely initially on medical evidence in respect of causation in disease cases. It is important that medical experts are asked to consider and take into account the scientific evidence where appropriate.
- Cases such as this are complex and difficult and should be left well alone by all but lawyers who have the right experience and expertise.

Nigel Tomkins

[5] *Saunderson* [2015] EWHC 2264 at [457].
[6] See, for example, the judgment of Smith LJ in *Wood v Ministry of Defence* [2011] EWCA Civ 792.

Case and Comment: Quantum Damages

Reaney v University Hospital of North Staffordshire NHS Trust

(CA (Civ), Lord Dyson MR, Tomlinson LJ, Lewison LJ, 2 November 2015, [2015] EWCA Civ 1119)

Personal injury—clinical negligence—care costs—causation—pre-existing condition—measure of damages

LT Care costs; Causation; Clinical negligence; Measure of damages; Pre-existing condition

The claimant, Christine Reaney was born on 14 May 1947. On or around 30 December 2008, when she was 61, she experienced a sudden onset of back pain with associated increasing weakness in her legs. She was admitted to the A&E Department of Stafford Hospital and on the following day underwent an MRI scan. She was transferred to the North Staffordshire Royal Infirmary that day and the initial impression from the MRI scans of a transverse myelitis was confirmed.

Transverse myelitis is a very rare inflammatory condition causing damage to the spinal cord. The condition left her paralysed below the mid-thoracic level and with no control over her bladder or bowels. During her hospitalisation, she developed a number of deep pressure sores with consequent osteomyelitis (infection of the bone marrow), flexion contractures (abnormal shortening of the muscle tissue) of her legs and a hip dislocation. The combined effect of those disabilities was that her lower limbs adopted a "windswept" configuration, causing her to fall from an upright sitting position to the left. At trial she was only able to sit out in her wheelchair for four hours at the most; otherwise she remained in bed.

The claimant brought a clinical negligence claim against the first defendant NHS trust and the second defendant NHS foundation trust. Because of the effect of the transverse myelitis, the claimant was always destined to be confined to a wheelchair for the rest of her life. The trusts admitted negligence in respect of the claimant's pressure sores and their consequences. The central issue related to the extent to which the pressure sores and their sequelae had made her essential condition worse than it would have been but for their development and what damages should be paid by the defendants in respect of the claimant's current condition.

At first instance Foskett J held[1] that it was apparent that the pressure sores and their consequences had made a significant and material difference to the claimant's physical well-being and her care needs. Without them, she would have had a much better quality of life, spending her waking hours out of bed in a standard wheelchair (with the ability to maintain a good spinal posture and balance) which she would have been able to self-propel. She could have undertaken a few basic household tasks and would have been able to get out and about much more than was possible in her present condition. While she was inevitably going to be doubly incontinent, her bowel management would have been better and she would not have required the urethral catheter which she used now. But for the development of the pressure sores in hospital and their consequences, she would have required no more than roughly seven hours of professional care each week until the age of 70; she now required two carers on a 24/7 basis, a requirement that would continue for the rest of her life.

The judge accepted that she and her husband would need to move to a larger property to accommodate the carers. They would also need a larger vehicle. While accepting the general thrust of the trusts'

[1] *Reaney v University Hospital of North Staffordshire NHS Trust* [2014] EWHC 3016 (QB); [2015] P.I.Q.R. P4.

submission that in law a defendant could only be liable to compensate a claimant for the damage it had caused him or to which it had materially contributed, the judge concluded that this case should be seen as a reflection of the principle that a tortfeasor had to take his victim as he found him. If that involved making the victim's current damaged condition worse, then the tortfeasor had to make full compensation for that worsened condition.[2] On the evidence, it was held that the trusts' negligence had made the claimant's position materially[3] and significantly worse than it would have been but for that negligence. She would not have required the significant care package (and the accommodation consequent upon it) that she now required but for the negligence. The judge ordered that compensation should be assessed, hopefully by agreement, on that basis.

The sum awarded for pain, suffering and loss of amenity £115,000. Agreement could not be reached on all of the other heads. On 31 October 2014 a supplementary judgment[4] was handed down by Mr Justice Foskett when judgment was entered for £2,894,814.69. The defendants contending that they were liable for the claimant's care needs less the needs that she would have had but for the negligence.

The Court of Appeal decided that the judge should have held the defendants liable to meet the cost of the claimant's needs but only to the extent that her needs were increased as a result of the negligence.[5] If the defendants' negligence caused her to have care and other needs which were substantially of the same kind as her pre-existing needs, then the damage caused by the negligence was only the additional needs. If the needs caused by the negligence were qualitatively different from her pre-existing needs, then those needs were caused in their entirety by the negligence.

They held that Foskett J's findings did not support a conclusion that the significant care package required as a result of the negligence was qualitatively different from what would have been required but for the negligence. His decision that all of her care and physiotherapy needs were caused by the defendants' negligence could not stand. The judge had erred to the extent that he had relied on the decision in *Sklair v Haycock*[6] in reaching his decision on causation.

In *Sklair*, Edwards-Stuart J had confused the question of the need for care, which was a question of causation, with the question of who would have to pay for it. However, they concluded that the decision in *Sklair* could be explained and supported on the basis that the care required as a result of the accident in that case was qualitatively different from that which would have been required but for the accident.[7] There was no doubt about the claimant's condition before the negligence or about the injuries she suffered as a result of the negligence. It was therefore not necessary to modify the "but for" test and consider whether the negligence had made a "material contribution" to the claimant's condition.[8]

The appeal was allowed. The case was remitted to Foskett J for him to assess damages in respect of the claimant's heads of loss in the light of the Court of Appeal's judgment.

Comment

Introduction

This is an important decision which helps to explain, and clarify, the proper approach to both causation and the assessment of damages where the claimant has a pre-existing need for care that would have

[2] *Livingstone v Rawyards Coal Co* (1880) 5 App. Cas. 25 HL considered.
[3] *Bailey v Ministry of Defence* [2008] EWCA Civ 883; [2009] 1 W.L.R. 1052 considered.
[4] *Reaney v University Hospital of North Staffordshire NHS Trust* , unreported, 31 October 2014, QBD.
[5] *Performance Cars v Abraham* [1962] 1 Q.B. 33 CA; *Baker v Willoughby* [1970] A.C. 467 HL; and *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576; [2004] 1 W.L.R. 3002 followed.
[6] *Sklair v Haycock* [2009] EWHC 3328 (QB).
[7] *Sklair* [2009] EWHC 3328 (QB) explained.
[8] *Bailey* [2009] 1 W.L.R. 1052 considered.

continued irrespective of the breach of duty by the defendant. The same issues can arise with other heads of damage such therapies, transportation and accommodation.

Although reversing the trial judge, the judgment of the Court of Appeal confirms the approach to claims for care, and some heads of damage, may not be as straightforward as suggested by a passage from Kemp & Kemp, quoted at [15] the judgment, which reads:

> "In principle one would have thought that the correct approach would be to compare the Claimant's needs after the injury for which the claim is being made with his needs before he was injured, and to make a valuation of the difference between the two."[9]

Consequently, a number of important practice points can be drawn from this judgment on the proper approach to heads of claim such as care, transportation, accommodation when the claimant had pre-existing need for any of these.

Concepts

The judgment of the Court of Appeal, like the judgment at first instance, pre-supposes familiarity with some underlying concepts. It is, accordingly, worth analysing the application of those principles to the facts of the case and then considering the significance of this analysis for other cases.

A number of concepts are relevant for these purposes.

- The distinction between causation of damage, in the sense of the claimant proving damage necessary to complete the tort of negligence, and the assessment of damages once liability has been established.
- The different ways which, depending on the evidence, the claimant may be able to prove causation and hence liability. Specifically: the "but for" or balance of probabilities test; and the test of material contribution to injury.[10]
- The related topic of distinguishing divisible and indivisible damage which is relevant to identifying the damage, for which damages will need to be assessed, caused by the breach of duty.
- The "full compensation" principle applicable, once liability has been established for some damage, to the assessment of damages.
- The proper approach to deductions from damages assessed on the "full compensation" principle, to reflect expenses saved as a result of the injuries suffered.

These concepts were deployed by the parties in arguments raised on the issues before the court both at trial and on appeal.

Arguments

The focus of the defendant's argument was on the preliminary issue of causation, arguing on the law that the claimant could not prove relevant heads of divisible damage were caused by the breach of duty for which the defendant was responsible and hence establish liability for such damage.

The claimant argued that there had been a causative breach of duty by the defendant and hence the issue for the court concerned only the assessment of damages, to be dealt with by applying the law dealing with that issue.

The argument preferred by the court inevitably had a crucial bearing on the outcome of, in particular, the claimant's care claim. That was because if the claimant could not establish the defendant's breach of

[9] *Kemp & Kemp: Quantum of Damages* (London: Sweet & Maxwell), Ch.3, para.13-003.
[10] See *Bailey* [2009] 1 W.L.R. 1052.

duty caused relevant damage the court would not even reach the stage of assessing damages and hence considering how the "full compensation" principle would need to be applied to the facts of the case.

This, equally, was of significance to the amount of any damages awarded. If the claimant's arguments had been accepted that would have meant the defendant paying damages in accordance with a schedule which the defendant contended "in almost its entirety could reasonably have been presented as a schedule for T7 paraplegia" despite, the defendant arguing, there was no material additional need arising from the extra disability caused by the defendant's breach of duty.

Causation

The first issue for the court to tackle at trial was the defendant's contention that the stage of assessing damages had not been reached. That was, the defendant argued, because the claimant could not establish liability, in the sense of the defendant's breach of duty having caused some, indivisible, damage for which damages would need to be assessed.

There is a stark distinction between the approach taken by the courts when deciding causation, in the sense of the claimant proving some damage which results from the defendant's breach of duty and thereby establishes liability, and when assessing damages. That is because the courts will apply quite different approaches to these distinct issues, as explained by Moore-Bick LJ in *Smithurst* when he said:

> "it is necessary to remind oneself of the important distinction in cases of this kind between proof of damage and assessment of damages. Damage is an essential element of the cause of action in negligence and therefore, as part of establishing liability on the part of the defendant, the claimant must prove on the balance of probabilities that the defendant's act or omission caused the harm in respect of which he claims. If he fails to do so, his claim will fail: see, for example, *Hotson East Berkshire Area Health Authority* [1987] A.C. 750. It is to be contrasted with the assessment of damages, which involves determining the extent of the loss suffered by the claimant, a distinction which Lord Hoffmann was at pains to emphasise in paragraphs 67–69 of his speech in *Gregg v Scott*. … It is usually, and I think preferably, treated as an aspect of the assessment of damages. It calls for a different approach because the nature of the enquiry is different."[11]

On this primary issue of causation, the defendant's argument was based on *Halsey*,[12] which followed the earlier Court of Appeal judgment in *Performance Cars*.[13] In *Steel* the claimant's claim concerned losses from two separate accidents each of which had some effect upon pre-existing spinal stenosis.

The first accident accelerated existing problems by 7–10 years whilst the second accident caused a three to six month aggravation of the claimant's problems. The second accident did not affect the long-term prognosis, although if the first accident had not occurred that second accident would have had the same effect on acceleration as the first accident. In these circumstances Dyson LJ held:

> "In the present case, the question is whether the second tortfeasor is responsible for the consequences of the first injury. To that question, the answer can only be: no. It is true that, but for the first accident, the second accident would have caused the same damage as the first accident. But that is irrelevant. Since the claimant had already suffered that damage, the second defendant did not cause it."[14]

Foskett J distinguished *Steel* on the basis this defendant had caused, as a result of a breach of duty, the claimant damage. The judge went on to explain that, unlike the claimant in *Steel*, this claimant had not already suffered the damage inflicted by the defendant's breach of duty because:

[11] *Smithhurst v Sealant Construction Services Ltd* [2011] EWCA Civ 1277; [2012] Med. L.R. 258 at [10].
[12] *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576; [2004] 1 W.L.R. 3002.
[13] *Performance Cars Ltd v Abraham* [1962] 1 Q.B. 33; [1961] 3 W.L.R. 749.
[14] *Halsey* [2004] 1 W.L.R. 3002 at [70].

> "the Defendants' negligence has made the Claimant's position materially and significantly worse than it would have been but for that negligence. She would not have required the significant care package (and the accommodation consequent upon it) that she now requires but for the negligence."[15]

This conclusion was based on the judge's findings, when resolving a conflict of expert opinion between Mr Gardner for the claimant and Mr Tromans for the defendant, that "but for" the defendant's breach of duty the claimant would not have needed:

- two carers on a 24/7 basis;
- new accommodation, because her current property was too small for those carers; and
- a vehicle to accommodate the claimant and her carers.

The ruling the claimant's position was "materially and significantly worse" might be said to reflect the approach taken to establishing causation in cases such as *Tahir*[16] and *Oliver*.[17] In those cases the courts concluded that to establish damage that needed to be "measurable damage" or "a measureable degree of loss", rather than speculation.

In the Court of Appeal, on this point, Lord Dyson MR observed:

> "It was (rightly) common ground that if the defendants' negligence caused Mrs Reaney to have care and other needs which were substantially of the same kind as her pre-existing needs, then the damage caused by the negligence was the *additional* needs. On the other hand, if the needs caused by the negligence were qualitatively different from her pre-existing needs, then those needs were caused *in their entirety* by the negligence."[18]

The central point decided by the Court of Appeal, which justified the appeal being allowed, was that the trial judge had not found the care package required as a result of the defendant's breach of duty was qualitatively different from the care which would have been required but for that breach. In other words the trial judge had found the care package was quantitatively, but not qualitatively, different. That, the Court of Appeal noted, was simply accepting the claimant had, as a result of the defendant's breach of duty, required "more of the same". Lord Dyson MR explained:

> "If the judge had made a reasoned finding that the care package required as a result of the negligence was different in kind from that which Mrs Reaney would have required but for the negligence, it might have been difficult for (the defendant) to challenge it. But in my view the judge did not do so. The undoubted fact that Mrs Reaney's quality of life is now markedly worse than it would have been but for the negligence says nothing about whether the care that she now needs is qualitatively or quantitatively different from what she would have needed but for the negligence."[19]

Consequently, on this primary causation point, the conclusion of the trial judge that the defendant should be treated as having caused all the claimant's care and physiotherapy needs along with accommodation, equipment, transport and holiday requirements, could not stand.

A subsidiary point on causation was that the trial judge felt able, on the evidence, to decide this on a balance of probabilities, or what is sometimes termed the "but for" approach. This was explained by Lord Phillips in *Sienkiewicz* when he said:

> "It is a basic principle of the law of tort that the claimant will only have a cause of action if he can prove, on balance of probabilities, that the defendant's tortious conduct caused the damage in respect

[15] *Reaney* [2015] P.I.Q.R. P4 at [70]
[16] *Tahir v Haringey HA* [1998] Lloyd's Rep. Med. 104 CA (Civ Div).
[17] *Oliver v Williams* [2013] EWHC 600 (QB); [2013] Med. L.R. 344.
[18] *Reaney* [2016] P.I.Q.R. Q3 at [19].
[19] *Reaney* [2016] P.I.Q.R. Q3 at [25].

> of which compensation is claimed. He must show that, *but for* the defendant's tortious conduct he would not have suffered the damage. This broad test of balance of probabilities means that in some cases a defendant will be held liable for damage which he did not, in fact, cause. Equally there will be cases where the defendant escapes liability, notwithstanding that he has caused the damage, because the claimant is unable to discharge the burden of proving causation."[20]

In *Sienkiewicz* Lord Phillips had noted there was an "important exception to the 'but for' test", namely where breach of duty has made a "material contribution" to damage. This "material contribution" test was explained by Waller LJ in *Bailey* when he said:

> "I would summarise the position in relation to cumulative cause cases as follows. If the evidence demonstrates on a balance of probabilities that the injury would have occurred as a result of the non-tortious cause or causes in any event, the claimant will have failed to establish that the tortious cause contributed. *Hotson* exemplifies such a situation. If the evidence demonstrates that 'but for' the contribution of the tortious cause the injury would probably not have occurred, the claimant will (obviously) have discharged the burden. In a case where medical science cannot establish the probability that 'but for' an act of negligence the injury would not have happened but can establish that the contribution of the negligent cause was more than negligible, the 'but for' test is modified, and the claimant will succeed."[21]

Foskett J had observed that, if necessary, he would have concluded that the claimant would have established causation on the basis of this alternative test, holding:

> "Had I had any doubts in this case about the issue of causation in the 'but for' sense, I would have been inclined to find that the Defendants had 'materially contributed' to the condition that has led to the need for the 24/7 care of the nature discussed earlier in this judgment and that the lack of any joint or concurrent tortfeasor as a potential direct compensator (and/or from whom a contribution might be sought by the Defendants) is no answer to a full claim against the Defendants: cf. *Bailey v Ministry of Defence* [2007] EWHC 2913 (QB) as upheld in the Court of Appeal: [2009] 1 WLR 1052. However, as I have indicated, I consider that causation is established by what might be termed the more conventional route."[22]

The Court of Appeal, however, did not accept the "material contribution" test was applicable to the facts of the case. Lord Dyson MR explained:

> "In the present case, there was no doubt about Mrs Reaney's medical condition before the defendants' negligence occurred or about the injuries that she suffered as a result of the negligence. There was, therefore, no need to invoke the principle applied in *Bailey*'s case. The issue was as to the cause of the needs to which these injuries gave rise. The concept of material contribution had no part to play in resolving that issue."[23]

Perhaps another way of analysing this point is to recognise that the concept of factual causation involves dealing with both those cases where the debate is really about the linkage between breach and damage and those cases where that causal mechanism is apparent and the debate is really about whether the result can be characterised as "damage" necessary to establish liability.

It is clear the focus of the Court of Appeal was on the latter point, what would amount to "damage", as the approach taken was that the claimant had to establish the need for care was now qualitatively different

[20] *Sienkiewicz v Greif (UK) Ltd* [2011] UKSC 10; [2011] 2 A.C. 229 at [16].
[21] *Bailey* [2009] 1 W.L.R. 1052 at [46].
[22] *Reaney* [2015] P.I.Q.R. P4 at [70].
[23] *Reaney* [2016] P.I.Q.R. Q3 at [36].

from that which the claimant would have needed but for the defendant's breach of duty. When analysed in this way it does seem that the approach in *Bailey* is inapplicable as whilst the evidence may not allow causation, in the sense of linkage between breach and damage, to be decided on a balance of probability but still allow a finding based on material contribution, the same problem does not occur when determining whether there is "damage", as that simply requires an evaluation by the court as to whether there has been, to pick up the language of this case, a "measureable degree of loss". For these purposes the approach explained in *Bailey* does not need to be relied upon, as the court can make findings based on legal analysis of the facts without having to have recourse to scientific knowledge.

This, however, presupposes that a claim for care, and other distinct heads of loss, are a form of divisible damage, such that the claimant needs to establish the defendant's breach of duty caused each element of such damage. That raises the concept of divisible and indivisible damage.

Divisible and indivisible damage

If the claimant establishes liability, by proving the defendant's breach of duty caused damage, the defendant will potentially be liable for all the damage thereby caused. Some damage is regarded as indivisible, so if the defendant is held to have caused that damage, damages will be assessed for the whole of that damage. If, however, the damage is treated as divisible then damages will only be assessed to reflect the divisible part of that damage which the defendant's breach of duty has caused.

It can, in practice, sometimes be difficult to distinguish what is divisible damage from indivisible damage. Indivisible damage is sometimes termed concurrent torts. As Laws LJ observed in *Rahman*:

> "the characteristic of such torts is the logical impossibility of apportioning the damage among the different tortfeasors."[24]

This concept also overlaps with that of "same damage", found in the Civil Liability (Contribution) Act 1978 with which the judgment in *Rahman* was concerned, and hence Laws LJ went on to explain:

> "The justice which lies behind the rule as to concurrent tortfeasors, that is the rule that each is liable for the whole of the damage constituted by the single indivisible injury suffered by the claimant, casts much light on what is meant by 'single indivisible injury' and thus 'same damage'."[25]

The approach of the trial judge suggested the claim for care was treated as an indivisible head of damage. The Court of Appeal would clearly have treated the claim for care as an indivisible head of damage, for which the defendant would have been liable in full, if, as a result of the defendant's breach of duty, the care required by the claimant had been "qualitatively different". Without that finding the issue of divisibility did not arise as the Court of Appeal concluded the defendant had simply not caused any of the care the claimant already required.

Assessment of damages

The trial judge observed, having reached the stage of assessment, that the "claimant is entitled to full compensation in the manner encapsulated in the words of Lord Blackburn". The words of Lord Blackburn, referred to by the judge, were those in *Livingstone* where he said that the court should award:

> "that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."[26]

[24] *Rahman v Arearose Ltd* [2001] Q.B. 351 CA (Civ Div) at [17].
[25] *Rahman* [2001] Q.B. 351 at [19].
[26] *Livingstone v Rawyards Coal Co* (1880) 5 App. Cas. 25 HL at 39.

This is the "full compensation" principle, meaning that once the claimant had established the defendant's breach of duty had caused an indivisible injury the claimant is entitled to be fully compensated for that injury. The Court of Appeal did not express any different view but, of course, were assessing damages on the basis the defendant had only caused the claimant's additional need for care.

Returning to the first instance decision the injury, for which damages had to be assessed in this context, was the need for care. The court having found that the defendant's breach of duty caused a need for care the damages for this then fell to be assessed by reference to the care the claimant now required, even though the claimant would have required some care in any event. That, at first sight, seems illogical, but is a reflection of the principled approach taken by the judge. Given the findings made by the judge on causation, if any allowance was to be given for care the claimant would have required in any event, this had therefore, not to be on the basis of arguments about causation but by applying the law concerning the extent to which the defendant is entitled to offset against damages any expenses saved by the claimant as a result of those injuries.

Deductions

The general approach of the courts, when assessing damages, towards allowance for expenses saved, was explained in *Hodgson* where Lord Bridge held:

> "My Lords, it cannot be emphasised too often when considering the assessment of damages for negligence that they are intended to be purely compensatory. Where the damages claimed are essentially financial in character, being the measure on the one hand of the injured plaintiff's consequential loss of earnings, profits or other gains which he would have made if not injured, or on the other hand, of consequential expenses to which he has been and will be put which, if not injured, he would not have needed to incur, the basic rule is that it is the net consequential loss and expense which the court must measure. If, in consequence of the injuries sustained, the plaintiff has enjoyed receipts to which he would not otherwise have been entitled, *prima facie*, those receipts are to be set against the aggregate of the plaintiff's loss and expenses in arriving at the measure of his damages."[27]

With some heads of loss, notably care, the provision which would have been made, irrespective of the damage caused by the defendant, would often not have involved the claimant in expense. This very point was considered in *Sklair* where Edwards-Stuart J held:

> "However, where the Claimant would have continued to enjoy care and attention given out of love and affection which he now cannot enjoy because of the accident, I see no reason in either logic or justice why he should be required to place a value on that care and attention and then be made to give credit for it against his claim. In this case the Claimant has not gained by the absence of his father's care and attention—indeed he would say that he is now worse off because he is without it—and I do not believe for one moment that his father would feel that he has achieved a saving as a result of the accident: far from it, I am sure that he would have much preferred to continue to care for the Claimant for as long as he is able to do so. I therefore reject the submission of the Defendant that I should place a value on these services and give the Defendant the benefit of it. To do that would be to add insult to injury."[28]

This approach was approved, and adopted, by Foskett J in his judgment. That is, once again, an entirely principled approach in line with authority. It is notable that since the first instance decision of Sir Rodger

[27] *Hodgson v Trapp* [1989] 1 A.C. 807 HL at 819.
[28] *Sklair* [2009] EWHC 3328 (QB) at [89].

Bell in *Iqbal*[29] it has been established that voluntary care does not prevent recovery of the cost of that care if the need has been caused by the defendant's breach of duty.

The approach taken to the claim for care was held by Foskett J to be equally applicable to other heads of loss caused by the defendant, in the sense of making the claimant's needs materially and significantly greater than they were, where pre-existing needs were being met without the claimant incurring expenditure. Specifically, in this case, the judge held that the same approach was applicable to the claims for accommodation and transportation. The same approach might well have been applied to other heads of claim such as therapies.

Because of the findings made on causation the Court of Appeal did not fully explore the approach to deductions when assessing damages. The Court of Appeal did, however, uphold the conclusion, though not the approach, of Edwards-Stuart J in *Sklair*, Lord Dyson MR explaining:

> "the decision can be justified as based on an issue of causation, although that is not how it was analysed by the judge. The care regime required after the accident could properly be described as qualitatively different from that which had been previously needed (and would have been needed in due course). But for the accident, the claimant would have required general supervisory care of an essentially independent life. This was to be contrasted with his need for personal support in a 24 hour care regime as a result of the accident."[30]

Implicit in this conclusion is the recognition that the approach to deductions adopted by Edwards-Stuart J in *Sklair*, and indeed Foskett J at first instance, is correct. It remains key to understanding why, provided causation can be established, a defendant may be liable for heads of loss such as care, transportation, accommodation and therapies even if the claimant did have pre-existing needs. That is provided those were not, and would not in the future have been, at financial cost to the claimant.

Conclusion

Whilst it could be said the judgment in this case does no more than apply well established legal principles it is, as well as acting as a reminder of those principles, a useful illustration of how significant these are in the formulation of claims for heads of loss such as care, transportation, accommodation and therapies where the claimant had pre-existing needs but these are qualitatively different as a result of the defendant's breach of duty.

Practice points

- The initial focus, for both parties, needs to be on the primary issue of whether the defendant's breach of duty has caused the damage claimed. Where there was a pre-existing need that question is likely to be approach by asking whether the defendant's breach of duty is qualitatively, as opposed to quantitatively, different from pre-existing needs.
- This issue, with the focus on the nature of the damage suffered, is a matter of legal analysis which the court will approach on the conventional "but for", balance of probability, basis. Consequently, it is not necessary to have recourse to the alternative "material contribution" test.
- Experts may have some important input, in establishing causation, by contrasting the claimant's post-injury situation with pre-injury needs in order to show the relevant breach of duty has caused a qualitatively, rather than only quantitatively, difference in what the

[29] *Iqbal v Whipps Cross University Hospital NHS Trust* [2007] EWCA Civ 1190; [2008] P.I.Q.R. P9.
[30] *Reaney* [2016] P.I.Q.R. Q3 at [32].

claimant requires whether this be care, transportation, accommodation, therapies or other similar heads of claim.

- If, on this basis, causation is established, experts will only need to identify the claimant's ongoing needs, without having to specifically identify what the claimant would have needed in any event as, with a qualitative difference, the Court of Appeal agreed the defendant would be liable for such needs "in their entirety".
- If, as a matter of causation, the claimant can establish only a quantitative, rather than qualitative, difference in needs as a result of the defendant's breach of duty the evidence may need to be more extensive. Expert evidence, in these circumstances will need to identify claimant's pre-existing needs as well as current needs, so the difference can be assessed.
- Where the claimant establishes a qualitative difference in needs, leaving the defendant responsible for the "entirety" of the relevant damage the issue of deductions is likely to be significant, as the defendant might still argue credit should be given for the notional cost. Factual evidence may be important in these circumstances to confirm whether or not pre-existing needs would have continued to have been met without monies being expended by, or on behalf of, the claimant. That might be, for example, by gratuitous care, provision of accommodation by local authorities or therapies given by the NHS without cost.
- Both claimants and defendants need to give careful thought, in cases of this kind, to:
  - — the key legal issues and evidence necessary to deal with those issues; and
  - — the content, accordingly, of the schedule and counter schedule.

John McQuater

Marshall v The Motor Insurers' Bureau

(QBD, Dingemans J, 27 November 2015, [2015] EWHC 3421 (QB))

Personal injury—road traffic accidents—EU—conflict of laws—fatal accident claims—France—uninsured drivers—Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003 (SI 37/2003)—Loi Badinter (Law 85-677 (France))—art.4 of Regulation 864/2007 ("Rome II")

LT Applicable law; EU law; Fatal accident claims; France; Insurers' liabilities; Road traffic accidents; Uninsured drivers

On 19 August 2012 British nationals Paul Marshall and Christopher Pickard were standing behind a Ford Fiesta motor car and its trailer, while it was being attended to by a breakdown recovery truck on the side of a motorway in Paris, France. As they were there an uninsured Peugeot motor car registered in France driven by a French national, Cindy Bivard, collided with the trailer shunting it into the Ford Fiesta and then into the vehicle recovery truck.

Mr Pickard was thrown forward and landed clear of the vehicles but suffered serious injuries. Mr Marshall's head hit the windscreen of the Peugeot and he ended up with his leg trapped underneath the trailer, and he died at the scene.

The Ford Fiesta motor car was registered in the UK and insured by Royal & Sun Alliance ("RSA"), and the recovery truck was registered in France and insured by Generali France Assurances ("Generali").

Two actions were commenced. The first claim was made by Mrs Marshall against the Motor Insurers' Bureau ("the MIB").[1] Mrs Marshall relied on reg.13 of the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003 (SI 37/2003), ("the 2003 Regulations"). The 2003 Regulations make the MIB liable in respect of liabilities of compensation bodies in other EEA states for losses caused by uninsured drivers. The relevant compensation body in France responsible for such losses is the Fonds de Garantie ("FdG").

The MIB denied liability, contending that the FdG would not be liable to Mrs Marshall because under the Loi Badinter[2] Mr Pickard and RSA, as driver and insurer of the Ford Fiesta, and Generali, as insurers of the recovery truck, were liable. By amendment Mr Pickard was added as second defendant, and Generali was added as third defendant.

The second action was brought by Mr Pickard against the MIB relying on the 2003 Regulations. The MIB denied liability and contended that Generali, as insurers of the recovery truck, were liable to Mr Pickard. There were also various CPR Pt 20 proceedings which had been stayed.

The court was required to determine three preliminary issues:

1) whether French or English law applied to the issue of liability;
2) if French law applied, whether the Fiesta and recovery truck were "involved" within the meaning of the applicable French statute, the Loi Badinter; and
3) whether the MIB was liable under the 2003 Regulations.

Mr Justice Dingemans determined that the applicable law was to be determined by reference to art. 4 of Regulation 864/2007.[3] The general rule under art.4(1) was that the applicable law was the law of the country in which the damage occurred. It was common ground that for all the claims, the damage occurred in France. Article 4(2) provided an exception to that general rule, that where the parties had their habitual residence in the same country at the time when the damage occurred, the law of that country would apply. Article 4(3) provided that where it was clear from all the circumstances that the tort was more closely connected with a country other than that indicated in (1) or (2), the law of that country applied. This meant that under art.4(3), a governing law mandated by art.4(1), but excluded by art.4(2), might be required by art.4(3). In this case it was clear to the judge that the tort was manifestly more closely connected with France rather than England and so French law applied to the issue of liability for the claims before the court.

The Loi Badinter imposes a liability to compensate persons injured in a road traffic accident on the insurer of any vehicle which was "involved". The judge determined that a vehicle was involved in an accident if it intervened in "any capacity whatsoever". That went beyond a causal link, but there were still limits; mere presence of a vehicle at the time of the accident was not enough.

In respect of Mr Marshall, the Fiesta was involved as Paul Marshall had ended up trapped underneath the trailer at a time when he was alive. The recovery truck was also involved as the trailer fell on Mr Marshall when it was prevented from travelling forward by the truck's presence. Thus, both RSA, as insurer of the Fiesta, and Generali, as insurer of the recovery truck, were liable to Mrs Marshall under French law.

In respect of Christopher Pickard, although there was no contact between him and the Fiesta or trailer, both were involved in his accident. However, the recovery truck was not involved as there was no collision or contact between it and Mr Pickard and, although it was present at the time of the collision, there was nothing out of the ordinary in what the recovery truck had done so far as Mr Pickard was concerned.

[1] The first defendant in the first action and the defendant in the second action.

[2] Loi 85-677 du 5 juillet 1985 tendant à l'amélioration de la situation des victimes d'accidents de la circulation et à l'accélération des procédures d'indemnisation (Law 85-677 of 5 July 1985 aimed at improving the situation of victims of accidents of traffic and the acceleration of compensation procedures (France)).

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

Neither RSA nor Generali was liable to Christopher Pickard. In those circumstances, the FdG was liable to Christopher Pickard and accordingly the MIB was liable to compensate him under the 2003 Regulations.

The question remained as to whether the MIB was liable to Mrs Marshall under reg.13. She contended that as it was common ground that the preconditions in reg.13(1) had been satisfied, the MIB was liable to compensate her under reg.13(2). The court did not accept that. The FdG was not liable to make payments to Mrs Marshall under French law as liability lay with both RSA and Generali under the Loi Badinter. In those circumstances, under the terms of reg.13(2), the MIB was not liable to compensate her.[4]

Comment

This is the latest in a line of nightmare cases where British victims are killed or severely injured abroad by uninsured or untraceable drivers. If such a tragedy occurs on British soil then, since 1946, the Motor Insurers' Bureau operates as a supportive safety net for claimants. While it has also certainly been the expectation since the UK joined the EU that a similar "long stop" arrangement would support the innocent victim and their dependants so far as personal injuries in Europe are concerned, *Marshall* illustrates some of the complexities.

Sadly the position elsewhere in the world is sometimes even more fraught. A reminder has come as recently as December 2015, when the Privy Council, in dealing with an insurance appeal from the Bahamas, pointed out the complete vacuum there of any compensation fund for the victims of uninsured drivers. Lord Mance on behalf of the Board endorsed the observation in the Bahamian Court of Appeal that the legislature there should urgently introduce a measure along the lines of the UK's Motor Insurers' Bureau.[5]

The conflict of laws in Europe is essentially a battle between two competing trajectories: on the one hand the view that the applicable law should be that of the country where the motor vehicle accident occurs; and on the other hand the attempt to have a pan-European approach to support the victim of an uninsured or untraceable driver. "Rome II" in 2007 espouses the former approach.[6]

The 2003 Regulations, a British statutory instrument consequent on various European policy formulations, and particularly the deeming provision reg.13(2)(b), suggests an attempt to resolve matters in accordance with the laws of the "home" country. As Moore-Bick LJ stated in the Court of Appeal in *Jacobs*[7] the law applying to the existence of tortious liability has, since Rome II, been the law of the country where the injury was caused. The principle seems to be that "when in Rome, do as the Romans do". However, when it comes to uninsured and untraceable drivers and a British victim then in his view reg.13 points to the law by which the court makes the assessment of compensation as remaining the law of the UK, specifically the law of England and Wales. In that case the claimant had been struck in a Spanish car park by a German driver, living in Spain or Germany, with a car ordinarily based in Spain, but without insurance, neatly illustrating some of the tangles thrown up in these cases.

Moore-Bick LJ's analysis was followed in another Court of Appeal case, *Bloy*,[8] where a four-month-old child suffered severe brain injuries requiring life-long care when involved in a road accident in Lithuania. The driver who caused the collision was subsequently convicted of driving under the influence of alcohol and without insurance. Sir Terence Etherton giving judgment in the Court of Appeal carefully analysed the successive waves of European motor insurance directives and dismissed the appeal by the MIB, holding that compensation payable by the MIB was to be determined entirely by reference to English law, and in particular without the monetary limit on compensation that would apply under Lithuanian law. The learned judge noted the opinion of the Advocate General in *Pelitto* that more than 1,500,000 individuals suffer

[4] *Jacobs v Motor Insurers' Bureau* [2010] EWCA Civ 1208; [2011] 1 W.L.R. 2609, and *Bloy v Motor Insurers' Bureau* [2013] EWCA Civ 1543; [2014] Lloyd's Rep. I.R. 75 considered.
[5] *Insurance Company of the Bahamas Ltd v Antonio* [2015] UKPC 47 at [4].
[6] Regulation 864/2007 ("Rome II").
[7] See generally *Jacobs v Motor Insurers' Bureau* [2011] 1 W.L.R. 2609.
[8] *Bloy v Motor Insurers' Bureau* [2013] EWCA Civ 1543; [2014] Lloyd's Rep. I.R. 75.

personal injuries each year as a result of car accidents in the EU and are affected by the EU rules on motor vehicle insurance.[9]

Such perspectives on the interaction between Rome II and reg.13 have been repeatedly challenged by the MIB, and this reasoning has now been doubted by Gilbart J in *Moreno*, where Tiffany Moreno, an English national holidaying on the Greek island of Zakynthos, was catastrophically injured at a roadside verge by an uninsured vehicle driven by a driver of Albanian extraction and perhaps nationality. Bound by the Court of Appeal in *Jacobs*, that "the law governing the assessment of damages where the MIB is liable shall be English law and that caps on those damages will be of no effect",[10] Gilbart J also notes the reality behind the battle for compensation in some of these MIB cases, which is the assumption that "the level of provision is more generous in England and Wales than in all other EU jurisdictions",[11] although the learned judge doubts that this is actually so in every case.

The dichotomy between Rome II and reg.13 may at some point be resolved by the Supreme Court, as Gilbart J acceded to an application by the MIB for a "leapfrog" appeal in *Moreno*.[12] A point of interest in that certification application is that Gilbart J noted that there have been 484 claims made under the 2003 Regulations against the MIB.[13] On 28 July 2015 the Supreme Court granted permission to appeal.

In this morass of legal uncertainty Dingermans J carefully picks his way through the factual circumstances of the cases involving Christopher Pickard and the widow of Paul Marshall. The cause of this shunting horror story in the southern suburbs of Paris was clearly the recklessness of the French driver, who was "asleep" and "uninsured", with a collision with stationary vehicles which "took place at considerable speed", despite their being marked out by a breakdown triangle, cones, and flashing lights on a recovery vehicle.[14]

Ms Bivard was subsequently charged with manslaughter and causing unintentional injuries with the use of a motor vehicle, as well as driving without insurance. She was sentenced to two years' imprisonment, a term which was suspended, and a one year driving ban, the latter a somewhat incongruous penalty given the carnage that resulted. Indeed, the aftermath of this catastrophe for Christopher Pickard, who was ultimately successful in his action against the MIB, is well illustrated by an interview in which he described how he was haunted by the image of his friend lying underneath the trailer and that he was suffering "regular flashbacks and nightmares about the crash … The accident has had a very traumatic impact on my life and it is something that will never leave me as long as I live".[15]

Flung clear when the Peugeot crashed into the back of the trailer, Mr Pickard was diagnosed with a fractured ankle and knee, bruising on his collarbone and ribs, severe whiplash and spinal damage, and was unable to work for over seven months. Three years of fighting the MIB for compensation no doubt added to the agony of losing his friend and workmate, and casts an unhappy spotlight on the MIB's contention that, in handling 20,000 claims against uninsured and untraced motorists every year, they endeavour to "settle them fairly and promptly".[16]

The critical point in Christopher Pickard's case was that he had been struck by the Peugeot driven by the uninsured driver. The two welders, on their way back from a job at a winery, had pulled over to the hard shoulder of the *autoroute* when their trailer was shedding a wheel. They had then been in the process of having a recovery truck driver assist with fixing the spare wheel to the trailer, the other vehicles had been part of the background but not "involved" in his injuries. Another important feature of this case was

[9] *Bloy* [2014] Lloyd's Rep. I.R. 75 at [69], noting *Petillo v Unipol Assicurazioni SpA* (C-371/12) EU:C:2014:26; [2014] 3 C.M.L.R. 1.
[10] *Moreno v Motor Insurers' Bureau* [2015] EWHC 1002 (QB); [2015] Lloyd's Rep. I.R. 535 at [65].
[11] *Moreno* [2015] Lloyd's Rep. I.R. 535 at [5].
[12] The claimant's representatives also supported the application under s.12 of the Administration of Justice Act 1969, as amended by s.63 of the Criminal Justice and Courts Act 2015.
[13] *Moreno* [2015] Lloyd's Rep. I.R. 535 at [5(d)].
[14] *Marshall v Motor Insurers' Bureau* [2015] EWHC 3421 (QB) at [32] and [34].
[15] "I'm haunted by image of Paul underneath trailer", *Sunday Mercury*, 13 December 2015.
[16] See *https://www.mib.org.uk/* [Accessed 6 February 2016].

that Mr Pickard was not entitled to make a claim under French law against the Royal and Sun Alliance "because they were his insurers". Nor was he entitled to make a claim against the insurance relating to the recovery vehicle for the simple reason that he was "propelled into the air by the Peugeot and he was wholly unaffected by the recovery truck".[17] Dingemans J, having therefore exhausted those other potential avenues, concluded that neither RSA nor Generali could be looked to for compensation, and therefore the FdG were liable to Mr Pickard, and that defaulted to the MIB under the 2003 regulations.

The case brought by Mrs Marshall for the death of her husband was not quite so straightforward. Here the applicable law on liability was clearly that of France under the provisions of Rome II. This meant in turn the Loi Badinter, somewhat unhappily depicted as a law enacted with the purpose of reducing delays in obtaining compensation for victims of road traffic accidents in France, but clearly not in reality in this case. Dingemans J examines the provisions of art.1 of the Loi Badinter, which applies where "an earth-bound motor vehicle and its trailers or semi-trailers is involved", with an exegesis of what is meant by being "involved", together with considering the French text "*est implique*".[18] His conclusion is that the Peugeot was clearly "involved" as the runaway vehicle causing the shunting, that the Ford Fiesta was "involved" in that the victim "ended up trapped underneath the trailer at a time when Mr Marshall was alive", and that the recovery vehicle was also "involved" as it was part of the "mechanism of the accident".[19] It followed that both RSA and Generali, the two insurance companies in respect of the Ford Fiesta and the recovery truck, were liable to Mrs Marshall under French law, and the claim under reg.13 against the MIB fell away.[20]

It may well be that yet another European directive or regulation, or perhaps even European case, clarifies this situation before further discussion in the *Moreno* case, if that does proceeds to the Supreme Court following its certification by Gilbart J as involving a matter of public importance. While Dingemans J in *Marshall* untangles the various strands in this Parisian pile-up it is unfortunate that a real or perceived dichotomy between Rome II and reg.13 can have prolonged the lengthy wait for an award of compensation for Mr Pickard and Mrs Marshall. The boundaries of this, as yet unsettled, legal conundrum are those of the European Economic Area, which is the whole of the EU plus Norway, Iceland, Liechtenstein and Switzerland, so a sizeable geographical area for potential uncertainty and dispute.

Practice points

- Despite several attempts at harmonisation of European laws in respect of uninsured and untraceable drivers who cause motor vehicle collisions with foreign national victims, who then suffer death or personal injuries, the position is not wholly clear.
- Rome II makes the applicable law on liability that of the country in which the accident occurred.
- However, the assessment of damages under reg.13 suggests that a British victim should be compensated with regard to UK law and principles.
- While this case was able to circumnavigate some of the complexities in apportioning responsibility between the MIB and insurance companies, applying French law, there are issues which will require clarification, possibly in the case of *Morino*, which has been certified under the "leapfrog" procedure and has now been accepted for a hearing on appeal by the Supreme Court.

Julian Fulbrook

[17] *Marshall* [2015] EWHC 3421 (QB) at [52] and [53].
[18] *Marshall* [2015] EWHC 3421 (QB) at [39].
[19] *Marshall* [2015] EWHC 3421 (QB) at [48], [49] and [50].
[20] *Marshall* [2015] EWHC 3421 (QB) at [51].

C v WH

(QBD, Sir Robert Nelson, 23 September 2015, [2015] EWHC 2687 (QB))

Personal injury—damages—sexual abuse—special educational needs—teachers—vulnerable adults—causation—indecent photographs of children—loss of amenity—loss of earnings—pain and suffering

LT Child sexual abuse; Consent; Measure of damages; Personal injury; Personality disorders; Schools; Sexual grooming; Teachers; Vicarious liability

The claimant was born in 1992. Between July 2006 and 2011 she was a pupil at the defendant's special educational needs school, for children with emotional and behavioural difficulties. The claimant had developed severe epilepsy at the age of 18 months. This was difficult to control and the claimant then developed behavioural problems. She had communication and memory problems. Her family was dysfunctional and she was placed on the child protection register because of emotional and physical abuse at home.

She claimed damages against the defendant for personal injuries which she alleged were caused by sexual abuse she received while she was a pupil at the school, from a member of staff, Mr Whillock. A staff member found indecent images of the claimant and inappropriate texts from Whillock on the claimant's mobile phone. Whillock pleaded guilty to possession of the images in a magistrates' court and was sentenced to a community order.

The claimant alleged that Whillock had groomed her when she was aged about 16 by listening sympathetically to her problems, spending time with her, talking to her on the telephone, encouraging her to send indecent images of herself to him, exchanging text messages of a sexual content and, eventually, sexually assaulting her by indecent touching, digital penetration, oral sex, and rape.

Whillock strongly denied the allegations, except those relating to the indecent images and the texts. After the images were disclosed the claimant took an overdose. She suffered from acute distress, panic attacks and anxiety and she threatened self-harm. She was diagnosed with adjustment disorder and personality disorder. The company accepted vicarious liability and sought 100 per cent contribution from Whillock for any damages payable.

The judge held that, on the basis of the texts, the indecent images and the evidence, in particular that of Whillock, it was clear that he had been actively encouraging the claimant to send indecent photographs to him. He had a sexual motive and he was grooming her for sexual activity.

Whillock was found to be a wholly untrustworthy witness but there were also aspects of the claimant's evidence which were not wholly reliable. The burden of proof was on the claimant and there was a substantial conflict of evidence. The judge decided that her claims had to be treated with considerable caution.[1] The court determined that sexual touching, fondling, and digital penetration of the claimant had taken place over a matter of months. However, the allegation of rape was very serious and the evidence was insufficient to establish that penetrative sexual intercourse or oral sex had taken place.

Family conflict had been another source of the claimant's mental health problems but it was clear that the abuse had caused her diagnosed psychiatric condition of an adjustment order which continued after 2010, and manifested as increased anxiety, increased self-harm, social difficulties with peers, and a decrease in self-confidence and self-esteem. It did not matter that it was the disclosure of the abuse, rather than the abuse itself, which had initiated her serious mental health problems. It was in the very nature of successful

[1] *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1985] 3 W.L.R. 640 CA (Civ Div) followed.

grooming that a victim might become infatuated, and accept the abuse in exchange for the continuation of the relationship. This was especially so where Whillock became a father figure, substituting himself for the father with whom the claimant could not get on.

The expert evidence was that the abuse had caused 30 per cent the claimant's symptoms and that they would diminish over the next few years with the help of therapy and more stable relationships.[2] The court was satisfied that each of the three elements of the tort of intentional infliction of harm were made out.[3]

Total damages of £51,370 were assessed as below: pain, suffering and loss of amenity £35,000[4]; handicap on the labour market £10,000; psychological treatment £6,370.

Comment

Mr Whillock (the abuser) was the Vice Principal of West Heath School and Head of Boarding. He had been the co-author of the child protection policy at the school which he had shamelessly flouted in abusing the claimant, a former pupil. Whilst the claimant's condition had been much improved following a left temporal lobotomy in 2008, she had organic brain damage and remained a vulnerable person even as a young adult.

The defendant school had accepted that it was vicariously liable for the actions of Whillock, but put the claimant to proof that she was indeed abused by him. The school had brought in Mr Whillock at a later stage of the proceedings as a third party and claimed a 100 per cent contribution from him for any sums for which they were found to be liable. However, shortly before the trial they applied to amend their defence to plead that the claimant had in fact consented to the assaults—an application refused by Master Fontaine and renewed before the trial judge. It was later withdrawn when the judge indicated that the trial would need to be adjourned and the costs thrown away borne by the defendant.

There is a worrying trend that consent is the new battleground between claimants and defendants in these cases. Unlike the criminal law, there is no "age of consent" in civil cases—the question of consent is a matter of fact. The courts have found that children as young as 12 are capable of consenting to having sexual acts performed upon them (including buggery)[5] and we are seeing more and more cases where this is being pleaded, the argument being that if the assaults were not accompanied by threats or acts of violence and intimidation, they must have been consensual. This of course ignores the psychological effects of grooming and manipulating ones victim, which was very much a part of this case.

The claimant had to prove that she had been sexually abused in order to succeed in her claim against the school for being vicariously liable for their employee's tort of trespass against the person.[6] However, even if she could not prove abuse, she could in any event recover for the sexually explicit texts and the indecent images that Whillock had procured from her under the principle of Whillock having intentionally committed a "wrongful act" designed to cause physical or psychological harm, as first recognised in the case of *Wilkinson*.

That issue first came up in the context of a child abuse case in *C v D*. In that case one of the allegations was that the defendant headmaster had filmed the claimant in the showers at a school. At the trial, counsel for the claimant conceded that these allegations fell short of assault, and that there was no breach of duty or negligence. However, they were nonetheless deliberate acts that were proven and which it was alleged had caused psychiatric injury.

Field J reviewed a series of cases in this area, in particular that of *Wilkinson* where a malicious practical joker had told his victim that her husband had suffered a serious accident, thus causing her psychiatric

[2] *C v D* [2006] EWHC 166 (QB) and *JL v Bowen* , unreported, 27 May 2015 CC (Manchester) considered.
[3] *Wilkinson v Downton* [1897] 2 Q.B. 57 QBD and *O v A* [2015] UKSC 32; [2015] 2 W.L.R. 1373 followed.
[4] Had it only been an *O v A* [2015] 2 W.L.R. 1373 case it would have been £25,000.
[5] *R. (on the application of A (A Child)) v Criminal Injuries Compensation Appeals Panel* [2001] Q.B. 774 CA (Civ Div).
[6] Assault, battery and false imprisonment.

injury. In *C v D*, there was an actionable wrong under the *Wilkinson* principle, but that remedy was only available if the filming of the claimant had caused him to suffer a recognised psychiatric injury, and in that case it was found to have been merely distressing.[7]

In the end, in *C v WH* the judge did find on the evidence that a claim under *Wilkinson v Downton* principles had been established, in what is now the first reported case of damages for "sexting" being awarded as a stand-alone element in a claim. As a result the case received much publicity after the judgment was handed down.[8] The *Wilkinson* principle has been reformulated very recently in a Supreme Court case, *Rhodes*.[9] Giving the leading judgment, Lady Hale and Lord Toulson describe the tort as a wilful infringement of the right to personal safety. They determined that it has three elements: a conduct element, a mental element and a consequence element,[10] and the burden of proof of all three is on the claimant.

Applying that test to the facts of the case in *C v WH*, the trial judge Sir Robert Nelson found that all the elements of the test had been met. The conduct element was met because Whillock had acted unjustifiably against the claimant by sending her sexually charged texts and encouraging her to send indecent images of herself to him.

The mental element was met because Whillock was sexually interested in the claimant and his design was to groom and manipulate her to satisfy that interest. The claimant had to prove that Whillock meant to cause severe mental or emotional distress to her. There are actions (as recognised in *Rhodes*) whose "consequences or potential consequences are so obvious the perpetrator cannot realistically say that those consequences were unintended".[11] Here, Whillock could not have failed to be cognizant of the fact that grooming a vulnerable ex-pupil for sex, who was some 39 years younger than him, was likely to cause her harm.

The consequence element was proved as the judge found that the claimant suffered from an adjustment disorder after the disclosure, and her mental health declined when the abuse became public.

The judge then awarded damages on the basis of the findings of fact that Whillock had indeed sexually assaulted her and, through the "sexting" messages, had been guilty of intentional conduct designed to harm her. Had the assault charges not been proved, the judge would have awarded £25,000 for pain, suffering and loss of amenity. As it was, with the actual assaults proved, PSLA was assessed at £35,000.

Practice points

- This is a ground breaking case on texts and procuring images even absent an actual assault having to be proved. I predict others will follow.
- The path to success starts with *Wilkinson* in 1897, first argued in the context of a child abuse case in *C v D* in 2006, and to fruition now with this case. Do read the *Rhodes* judgment if you are interested in the history of the tort of wilful infringement of the right to personal safety, which has been somewhat neglected in the recent past.

[7] Despite the ruling in *C v D* [2006] EWHC 166, the writer would argue that a claim in assault may still have been possible on similar facts. According to the case of *Collins v Wilcock* (1984) 1 W.L.R. 1172 (Admin) DC, an assault is an act that causes another person to apprehend the infliction of immediate, unlawful, force on his person. Other cases derived from the criminal common law indicate that words or gestures alone, or indeed silent telephone calls, can be sufficient to constitute an assault (see *R. v Ireland (Robert Matthew)* [1998] A.C. 147; [1997] 3 W.L.R. 534, and also *Turberville v Savage* (1669) 1 Mod 3. Further, the tort of trespass against the person, from which assault is derived, also includes the tort of false imprisonment. This is defined in C. Elliott and F. Quinn, *Tort Law*, 6th edn (Essex: Pearson Longman, 2007) as "depriving the claimant of freedom of movement without a lawful justification for doing so", which arguably could have been applied to the facts in *C v D*.

[8] See, for example, Noel Titheradge, "Damages awarded in 'sexting case' for the first time" BBC News, 5 August 1994.

[9] *O v A* [2015] UKSC 32; [2015] 2 W.L.R. 1373. In that case a mother unsuccessfully attempted to prevent the father of her son from publishing a book about his life containing certain passages, describing the father's sexual abuse as a young child, which the mother felt could cause their son to suffer psychological harm. The judgment contains a fascinating historical evaluation of *Wilkinson v Downton* and how this tort had come about and developed since 1897.

[10] *O v A* [2015] 2 W.L.R. 1373 at [73].

[11] *O v A* [2015] 2 W.L.R. 1373 at [112].

- Consent is becoming a real battleground in these cases. Detailed witness statements are the key here.
- I always ask my clients for a photograph of themselves as a child at around the time when they were abused which I disclose to the defendant and ensure is placed very prominently in the trial bundle if the case goes anywhere near the court. This is often a powerful way of illustrating that the adult claimant you see before you today, was indeed an innocent and vulnerable party at the time the crimes were (sometimes allegedly) committed against them.

Jonathan Wheeler

BDA v Quirino

(QBD, HH Judge Graham Wood QC, 23 October 2015, [2015] EWHC 2974 (QB))

Damages—personal injury—sexual abuse—measure of damages—general damages—aggravated damages—causation—injury to feelings—mental distress—psychiatric harm—loss of earnings

LT Aggravated damages; Child sexual abuse; Loss of earnings; Measure of damages; Medical treatment; Psychiatric harm

A claim has been brought by BDA to recover damages for the consequences of systematic sexual abuse to which she was subjected by the defendant, her then karate instructor, during her teenage years, that is from late 2001 until December 2005. At the hearing the claimant was 28 years of age. Judgment in default had been entered and the court was required to determine causation and quantum.

The claimant had been sexually abused by the defendant when she was aged between 14 and 18. The abuse started with grooming, moved on to kissing and touching, and progressed to full intercourse. The claimant felt unable to report it until 2011 when she was a PhD student. By that stage the abuse had led her to take a year out of education and caused her to have difficulty with intimate relationships.

The defendant maintained a defence of consent, and during the investigation and trial process the claimant became clinically depressed, took an overdose and was hospitalised. She stopped her studies and was unable to resume them until three years later when the defendant had been convicted and the appeal process exhausted.

A psychiatric report indicated that the abuse had resulted in a two-year depressive illness with a 20 per cent chance of recurrence, and continuing post-traumatic anxiety which was having a profound effect on the claimant's personal life, but which had a 60 per cent chance of easing with therapy. It also indicated that the claimant's particular resilience meant that her symptoms were milder than might otherwise have been expected.

The issues were:

- causation;
- quantification of damages for pain, suffering, loss of amenity and mental distress;
- whether there should be a separate award of aggravated damages;
- past and future loss of earnings; and
- quantification of the claim for handicap on the labour market.

The judge held that the claimant's psychological problems were entirely related to the abuse and had affected her education to such an extent that she would be entering the labour market four years behind

her contemporaries. For pain, suffering and loss of amenity there was an award of £30,000. The psychological injury fell into the "moderately severe" bracket in the *Judicial College Guidelines*.[1] Assessment of damages was approached on the basis of the identifiable features of that injury, rather than matters such as abuse of trust and the conduct of the perpetrator, which were properly to be dealt with by aggravated damages. The judge noted that the claimant's depressive illness, while leaving her vulnerable to further episodes, had been relatively short-lived.

For mental distress falling short of a tangible psychiatric disorder, the award was £16,000. The claimant's distress fell towards the upper end of the middle band of seriousness identified in *Vento*.[2] As a teenager, she had felt trapped and unable to confide in anyone, and she had been unable to enjoy relationships and develop in a normal way. Thereafter, the criminal process was an unpleasant ordeal which forced her to relive the experience. On the other hand, her intelligence and resilience had insulated her from more damaging mental effects.

There was also an aggravated damages award of £9,000. The judge noted that there was some degree of overlap between aggravated damages, which reflected heightened feelings, and damages for pain, suffering and mental distress. While there was no hard and fast rule, it was held appropriate to make a separate award where there was an identifiable heightening of feelings. Aggravated damages were not punitive but reflected an additional layer of damage referable to the conduct of the perpetrator, which had made the consequences worse but which was not otherwise compensable.

In this case, they were justified on the basis that the claimant was quiet and private and had experienced heightened humiliation on having to make the disclosure, and on the basis that the defendant had pursued his defence of consent throughout the trial and on appeal. It was also appropriate to take account of the fact that the claimant had suffered for years in silence, partly because of the grooming and partly because of her own nature.

An award of £75,000 was also made in respect of past and future loss of earnings. While it was possible to say that the claimant would now pursue a career in the biomedical or pharmaceutical industry and could expect an income of at least £28,000 per year as a graduate, what she would have done had her education not been interrupted was far less certain. A broad-brush approach was therefore adopted as appropriate, taking four years' worth of anticipated earnings as a starting point and reducing that figure to take account of uncertainties.[3]

In addition there was also be an award of £30,000 to reflect handicap on the labour market in the form of the risk of the claimant losing her employment as a result of further episodes of depression. Because the claimant did not have a specific disability it was held not unreasonable to take a more traditional approach than that indicated in Ogden 6. While the risk was significant, it was unlikely to lead to long periods of unemployment and was best represented by just over one year's worth of lost earnings.

Finally, £12,553 was awarded in respect of past and future medical treatment and associated costs.

Comment

This case illustrates that survivors of abuse will have the sympathy of the court, and by taking matters to a trial, the rewards in terms of damages are often surprising. Of course the ordeal for the claimant in giving evidence in such cases is not to be under-estimated. In this case she had previously given evidence against the defendant in criminal proceedings. The defendant here appeared in person. Special measures were in place at the assessment hearing so that the claimant gave evidence from behind a screen, and the cross

[1] Judicial College, *Guidelines for the Assessment of General Damages in Personal Injury Cases*, 13th edn (Oxford: Oxford University Press, 2015), Ch.4(A)(b).
[2] *Vento v Chief Constable of West Yorkshire* [2002] EWCA Civ 1871; [2003] I.C.R. 318, applied.
[3] *Blamire v South Cumbria HA* [1993] P.I.Q.R. Q1 CA (Civ Div) applied.

examination took place through the judge. The claimant's anonymity was also protected by continuing an order taken out when proceedings were issued.

School and other academic records were vital in establishing a connection between the psychological effects of the abuse and the claimant's educational performance, which then went on to sound in damages. A full set of medical records was also important and instructions were taken at the outset of the case to pinpoint all counsellors and therapists seen. GP records alone are often insufficient to give a full picture of the extent of clinical intervention.

For pain, suffering and loss of amenity ("PSLA"), the judge here compartmentalised his award in two. The first part was for moderately severe psychiatric damage as evidenced by the opinion of a consultant psychiatrist, and followed the JCB guidelines. The second was for "injury to feelings" or mental distress, and the judge accepted that cases where damages have been awarded for sexual harassment were relevant here to this exercise (and in particular the *Vento* case).

On top of these awards, the claimant succeeded in a claim for aggravated damages, which the judge distinguished from *Vento* damages so as to compensate the claimant for "heightened" distress. He pointed to the humiliation the claimant experienced as a result of the defendant's deliberate acts, which spanned years, and that the claimant had felt for a long time that she had to keep quiet about the abuse, because she was a private person. In addition, the way that the criminal proceedings impacted upon the claimant was an additional relevant issue. The fact that the defendant maintained a defence of consent, that he had attacked her credibility, and had later pursued an appeal. The judge correctly directed himself that whilst such damages should not be punitive, they were aggravating factors in this case, absent which the claimant would not be properly compensated just by his award for PSLA.

As for lost earnings, the claimant was a highly intelligent woman, and her postgraduate studies for a doctorate were significantly affected by the disclosure of the abuse and the criminal process, such that she had to "delay" her studies by four years. Because the claimant was not in settled employment, and there was therefore a higher degree of uncertainty, the judge opted for a "broad brush" approach to this loss, rather than a multiplier/multiplicand approach, as advocated in *Blamire*.[4] Evidence was accepted that the claimant would pursue a career in the bio-chemical or pharmaceutical industries and data for average graduate earnings in such industries shaped the award. This did not preclude a separate award under *Smith*[5] principles: The claimant risked suffering from recurrent depression which could cause periods of absence in her future employment. Additionally, because she was now someone who had been diagnosed with a psychiatric condition in the past, this could compromise her ability to compete on the open labour market in the future. Whilst the claimant was seen by the judge as a "highly resilient and resourceful young woman" he awarded her a sum equivalent to just over 12 months' lost earnings as a graduate.

Other heads of loss were not challenged and found to have been proved: treatment costs (on which the psychiatric expert had offered an opinion), prescriptions and travel costs. The total award inclusive of interest was £173,786.70.

Practice points

- Take your cases to trial! You are likely to do a lot better than you think! Seriously though, if you are in a trial situation remember to consider special measures and anonymity for abuse victims.
- Do evidence such cases with as much background material as you can; full educational and medical/therapy records if they still exist.

[4] *Blamire* [1993] P.I.Q.R. Q1 applied.
[5] *Smith v Manchester Corp* (1974) 17 K.I.R. 1 CA (Civ Div).

- Always argue for aggravated damages on top of general damages for PSLA when dealing with cases involving intentional, abusive acts.
- Remember that a *Blamire* claim does not preclude a *Smith* claim (and vice-versa) if the facts allow.

Jonathan Wheeler

Young v AIG Europe Ltd

(QBD, Stewart J, 24 July 2015, [2015] EWHC 2160 (QB))

Personal injury—damages—road traffic accidents—heart attack—spinal haematoma—paraplegia—causation—subsequent event—non-haemorrhagic stroke—expert evidence

LT Cardiovascular diseases; Causation; Personal injury; Road traffic accidents

Neil Young was born on 4 April 1938. On 13 May 2013 he was involved in an accident caused by the negligent driving of the defendant's insured. He suffered personal injury as a result of that accident. The question for the court to determine was one of causation only.

Mr Young suffered a myocardial infarction (heart attack) ("MI") on/about 15 May 2013. AIG accepted that the accident caused the MI. The claimant also sustained a spinal haematoma, the neurological symptoms of which first developed on/about 17 May 2013 and this rendered him paraplegic. The spinal haematoma and its consequences were also admitted as having been caused by the road traffic accident.

On 4 June 2013 Mr Young suffered a non-haemorrhagic stroke. This caused left-sided paralysis which apparently had the effect of substantially increasing the claimant's claim (and particularly his care needs) if he succeeded on the disputed issue of causation.

The defence alleged that there were four potential mechanisms for the development of the Mr Young's stroke which the experts were unable to differentiate between or to identify which was the actual cause of the stroke. Those four potential mechanisms were:

"(1) Embolism arising from (a carotid artery) atheromatous plaque unrelated to the spinal injury;
(2) Embolism from the heart relating to a non-ST elevation myocardial infarction;
(3) A local in situ thrombosis occurring within the right middle cerebral artery and related to a hyper-coaguable state which would be unrelated to the spinal injury;
(4) Paradoxical embolism arising from a venous thrombosis passing through a previously present atrial defect which would be unrelated to the spinal injury."[1]

In summary the insurers submitted that the medical evidence merely established a material increase in risk and that this was not the applicable test of causation in the circumstances of this case. They said that the claimant's case, at its highest, was that their insured's negligence merely added a new discrete risk factor (the MI) to the existing risk factors of age, male gender, ex-smoking habit, hypertension, hypercholesterolemia and overweight/obesity. Therefore, the insurer submitted that the court could not find that the road traffic accident probably caused the stroke.

It was conceded by the defendant that if the court was satisfied on the balance of probabilities that the accident caused the stroke, it was not incumbent upon the claimant to prove which one of the four possible

[1] *Young v AIG Europe Ltd* [2015] EWHC 2160 (QB) at [6].

pathways caused it. The defendant however submitted that the evidence could merely demonstrate that the accident increased the risk of the claimant's stroke.

This was an unusual case in that the claimant's cardiologist and both neurologists were firmly of the opinion that the accident caused the stroke. The sole dissident was the defendant's cardiologist Dr Saltissi. The judge examined the quality of the expert evidence in detail reminding himself that it was the court's function to decide causation, not the doctors.

Having reviewed the evidence in detail the judge concluded that the claimant had a background risk which was higher than a healthy 75-year-old. It was about 30 per cent risk over 10 years or, roughly speaking, 0.25 per cent each month. If pathway (4) was effectively discounted[2] then there were three possible pathways to the stroke. Any one of these pathways could have happened absent the accident and any one of them could have happened because of the accident.

He considered *Alphacell* where Lord Salmon said:

> "The nature of causation has been discussed by many eminent philosophers and also by a number of learned judges in the past. I consider, however, that what or who has caused a certain event to occur is essentially a practical question of fact which can best be answered by ordinary commonsense rather than abstract metaphysical theory."[3]

The judge accepted the evidence of the majority that the accident probably being the cause of the stroke was very strong. Absent the accident the claimant very probably would not have suffered the stroke he did. He had a 30 per cent risk of suffering a stroke over a 10-year period. Taking that approach in the circumstances of this case he concluded that the evidence in favour of the accident probably being the cause of the stroke was very strong.

The answer to the preliminary issue was that the road traffic accident that occurred on 13 May 2013 on the clear balance of probabilities caused the stroke suffered by the claimant on 4 June 2013.

Comment

In this case the defendant sought to set a trap for the claimant. This was by getting expert agreement that there were four potential mechanisms for the non-haemorrhagic stroke and then contending that because it was impossible for anyone to say which mechanism was more likely, the claimant could not prove his claim. The defendant was then wanting the opportunity to argue that a material increase in risk would not have enabled the claimant to succeed.

A lot of time was spent by the judge investigating the various mechanisms and the relevant epidemiological evidence. Bearing in mind that the issue of causation was to be decided by the judge and not the experts, however, the defendant was forced to concede that if the court was satisfied on the balance of probabilities that the accident caused the stroke, it was not in fact incumbent on the claimant to prove which one of the four mechanisms caused it. The judge found the overall evidence to strongly point to the accident being the cause of stroke, and hence causation was made out.

The case is a reminder that precise answers and explanations to difficult factual causation issues may not be required and a more general, common-sense approach might well be sufficient. The degree of certainty which doctors and scientists may demand in their own professions when considering causation is not required by the law. The balance of probabilities will suffice. Ironically in this case it was the majority of the doctors who were content to take a simple approach whilst it was the lawyers (at least on one side) who were potentially over complicating things. Practitioners should keep common sense and a pragmatic approach to the fore when addressing what may appear to be complex causation arguments.

[2] Though it could not be wholly discounted.
[3] *Alphacell Ltd v Woodward* [1972] UKHL 4; [1972] A.C. 824 at 847.

Perhaps the refreshing paragraph quoted from Lord Salmon's judgment in *Alphacell* should be wheeled out more often, but sadly the simple approach will not overcome the knotty causation issues in many cases when considering the "but for" scenario. *Young* is very fact specific and there was significant expert opinion supporting the proposition that the accident was the cause of the stroke. In many cases such issues are a matter of finely balanced opinions and for the judge to prefer one side's experts over those of the other side substantive reasons must be given and hence a time-consuming detailed analysis of the scientific evidence will be required. It must always be remembered, however, that there are limitations to the use of epidemiological evidence.

It was the impossibility of applying epidemiological studies to determine causation in individual cases which was cited as the principal reason the tobacco litigation failed.[4] As Lord Nimmo-Smith put it there is a "fallacy of applying statistical probability to individual causation".[5] However, there are cases in which epidemiological evidence can be sufficiently honed to provide conclusions in individual cases and that combined with clinical experience may well be determinative. If only everything could be reliably determined on "common sense"!

Practice points

- Keep common sense and a pragmatic approach to the fore when addressing what may appear to be complex causation arguments.
- Ensure experts have sufficient regard for a claimant's individual circumstances, and that they also bring their own clinical experience to bear.
- Caution should be exercised in the deployment of general population statistics in establishing causation.[6]

Nathan Tavares

[4] *McTear v Imperial Tobacco Ltd* 2005 2 S.C. 1 CSOH.
[5] *McTear* 2005 2 S.C. 1 at [6.184]. And see *Gregg v Scott* [2005] UKHL 2; [2005] 2 A.C. 176 at [26]–[33] per Lord Nicholls.
[6] See Mark Simpson, QC, Professor Michael Jones and Professor Anthony Dugdale, *Clerk & Lindsell on Torts*, 21st edn (London: Sweet & Maxwell, 2014) at [2–28].

Case and Comment: Procedure

Surrey v Barnet and Chase Farm Hospitals NHS Trust

(SCCO, Master Rowley, 10 August 2015, Unreported)

Clinical negligence—detailed assessment—legal advice and funding—legal aid—change of funding—conditional fee agreements—additional liabilities—sufficiency of the advice

LT After the event insurance; Conditional fee agreements; Costs; Legal aid; Personal injury claims; Reasonableness; Success fees

Kai Surrey was born on 1 December 2004. Unfortunately, he suffered serious brain damage at that time and the underlying proceedings related to his attempt to attribute the blame for his injuries to the defendant. Liability was disputed by the defendant but this was compromised on a 70:30 apportionment in the claimant's favour shortly before the liability trial.

It took a further 18 months for the parties to reach agreement as to quantum before the court's approval was sought and the case concluded. During the 18 months the legal aid certificate was discharged and the claimant entered into a conditional fee agreement ("CFA") with his solicitors. He also took out an after-the-event ("ATE") insurance policy. Within the total costs claimed by the claimant was a success fee of £57,119 and an insurance premium of £50,682.

In a detailed assessment of the claimant's bill of costs, the court was required to decide whether it had been reasonable for him to change the funding of his case from legal aid to a CFA. The defendant submitted that the claimant's change had unreasonably incurred those costs. The claimant contended that the change had been reasonable in light of his solicitor's fears that legal aid would not provide sufficient funding for any hearing that might be required concerning quantum after forthcoming changes were brought into effect by the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

The Master held that when choosing to change funding methods, the claimant, assisted by his solicitor, had to have acted in a reasonable manner.[1] In this case, the solicitor's advice to the claimant was insufficient to found a reasonable conclusion because she failed to advise him regarding the landscape after the 2012 Act came into force. In particular she failed to advise about his recovery of additional damages following the decision in *Simmons*.[2]

In the absence of being informed of those issues, the Master concluded that it was impossible to say that the claimant could have made a reasonable choice to change funding arrangements. Consequently, the additional liabilities flowing from the new arrangements were unreasonably incurred and as such were not recoverable from the defendant.

Comment

Costs Judge Rowley, is one of the more well-known costs judges. Originally a solicitor with a high profile reputation for advising insurance companies (former President of FOIL), his career then followed the interesting path of becoming a chief executive to a barristers' chambers and then a legal adviser to an

[1] *Sarwar v Alam* [2001] EWCA Civ 1401; [2002] 1 W.L.R. 125 applied.
[2] *Simmons v Castle* [2012] EWCA Civ 1288; [2013] 1 W.L.R. 1239 considered.

ATE insurance company. He was also a member of this editorial board before going to the bench. All that is missing is representation of personal injury claimants and he would have the complete set to enable him to have a 360 degree view of all aspects of litigation; consequently, he is an eminently suitable practitioner to be a costs judge.

With that background in mind, it is interesting that twice in the same year he was asked to consider the same question, namely whether it was reasonable for a claimant to switch from being publicly funded to enter into a CFA backed by an ATE policy. The fact that at first glance he reached a different answer in each case may seem strange until one examines the facts. The only surprising issue about these cases is that it has taken so long for them to appear in court.

When the LASPO rules were published, it was very clear that claimants who then had the benefit of public funding would need to be advised as to whether it was in their interests to continue with that funding or to switch to a CFA whilst recovery of both the success fee and ATE premium from their opponent was still possible. Practitioners involved with public funding of clinical negligence cases are well aware of the fickle attitude of the Legal Aid Agency ("LAA"), formerly the Legal Services Commission, as to whether it would allow a certificate to continue for the length of the case or be prepared to extend its costs limits to sufficiently enable the claimant to be advised.

The worst scenario for a claimant would be to continue with their public funding after April 2013 and to then find their certificate is not extended or is discharged and that they are then encouraged to enter into a CFA at that point. The claimant would then find that there is a risk that their solicitor would not be prepared to enter into a CFA at all if the case remains risky, or perhaps more likely would agree to enter into the CFA so that the claimant might face deduction from their damages of any success fee and ATE premium. This of course assumes that an ATE policy could be achieved at any cost let alone an affordable one. It would have been unclear in 2012 and up until April 2013 what sort of ATE market would remain and whether there was any appetite for the provision of ATE insurance policies where the claimant would not have the benefit of qualified one-way costs shifting ("QOCS") so that the premium would have to be borne from damages.

The earlier and similar case Master Rowley reviewed was *Hyde*.[3] This too was a clinical negligence claim. The claimant there had the benefit of a public funding certificate from July 2008. Liability had been conceded and a consent order had been filed with the court. The defendant had then made a Pt 36 offer of £150,000.00 whilst the claimant had made her own Pt 36 offer of £275,000.00. At this point the claimant's funding certificate permitted the solicitors to deal with quantum after judgment but it did contain a costs limitation which her solicitors considered was inadequate to cover all of the steps that would have been required to prosecute her quantum case. The solicitors had made a request for a further extension of the financial limit and that had been denied. Thus by March 2013 only one month before LASPO came into being, the claimant's solicitors believed that they were about to run into the extent of the costs limitation which they considered meant it would be difficult for them to adequately continue to represent and prosecute the claimant's claim. As a result they entered into a CFA with an ATE policy although they omitted to seek a discharge of the funding certificate.

The first question therefore that Master Rowley had to deal with was whether or not the claimant could recover any costs on a party and party basis under the CFA when the funding certificate remained in position. Master Rowley found that where a party had exhausted the costs that could be claimed under a public funding certificate then essentially the certificate was "spent". Effectively, therefore, one was looking at a discharge by conduct in the same manner as certificates in which all of the work up to the limitation of scope had been undertaken already.

Master Rowley ruled that the effect of that discharge was to end the services funded by the LAA and to then enable a private retainer to be put in place. He noted that the claimant had properly served notice

[3] *Hyde v Milton Keynes Hospital NHS Foundation Trust* [2015] EWHC B17 (Costs).

of the new funding with a Form N251 so that the defendant was on notice of the change in the claimant's funding. This was similar in effect to serving notice of change to a litigant in person. To support this Master Rowley considered that if the claimant had conversely sought to argue that she had the benefit of costs protection after 25 March 2013, she would have been successful in doing so. On this basis Master Rowley was satisfied that the claimant could in principle recover her costs under the CFA and recover the additional liabilities.

The issue then to consider was whether or not this decision to change funding was a reasonable one to have made. The defendant had said that the CFA was unnecessary and unreasonable given how close to settling the claim it was and they fixed upon what they considered to be a lack of risk at the point the decision was made. Master Rowley took the view that the claimant and her solicitor in particular were entitled now not to be required to continue to use the public funding certificate when it was clear that the available funding was going to be insufficient. Thus the decision to change to another means of funding must be a reasonable step to take.

It will be seen the facts of *Hyde* are quite different to the facts in *Surrey*. In the former the public funding limitations had been reached but not in the latter. Nevertheless, the fundamental question in both was whether or not the decision to change funding was a reasonable one. Inevitably, therefore, that decision could change depending on the individual circumstances of the case.

CPR r.44.5(1) is the starting point for considering whether or not additional liabilities should be incurred and recovered. This rule recites the fact that the court is to have regard to all of the circumstances when deciding if costs are being reasonably and proportionately incurred and are reasonable and proportionate in amount. Sections 11.7–11.8 of the old Costs Practice Direction (or which still applies to funding arrangements incurred prior to April 2013) provides that:

> "11.7 When the court is considering the factors to be taken into account in assessing an additional liability it will have regard to the facts and circumstances as they reasonably appear to the solicitor or counsel when the funding arrangement was entered into and at the time of any variation of the arrangement.
>
> 11.8 (1) In deciding whether a percentage increase is reasonable, relevant factors to be taken into account may include:
>
> (a) The risk that the circumstances in which the costs, fees or expenses will be payable might or might not occur.
>
> (b) The legal representatives liability for any disbursements.
>
> (c) What other methods of financing the costs were available to the receiving party."

In the first case to go to appeal on CFAs, the Court of Appeal set out the way in which a court would determine a litigant's choice between alternative funding methods,

> "The overriding principle is that the claimant, assisted by his/her solicitor, should act in a manner that is reasonable."[4]

The decision has been revisited on various occasions. *LXM* acknowledged that the advice given to the claimant does not necessarily mean that they have to take the best choice of funding but certainly a reasonable one. In *Surrey* the claimant's letter that they had addressed to the LAA was produced to the court:

[4] *Sarwar v Alam* [2001] EWCA Civ 1401; [2002] 1 W.L.R. 125 at [50].

> "Without sufficient Public Funding to cover the cost of our work, our client is exposed to make up the shortfall in any costs not recovered from the Defendant. This is clearly not in our client's best interests when there are alternative methods of funding available.
>
> In addition, as we enter into litigation, it must be borne in mind that LSC funding does not protect a client's damages from the effects of failing to beat a Defendant's Part 36 offer. In such circumstances the client may be liable to pay the opponent's costs as these would normally have been deducted from damages, together with our own costs incurred after the date which the opponent's offer should have been accepted.
>
> In our opinion, where there is insufficient public funding, it is in our client's best interests to have an alternative funding arrangement in place. In this case the most suitable would be a Conditional Fee Agreement with an After The Event insurance policy, which provides no risk of our client incurring costs or deductions from her compensation. We have advised our client's Litigation Friend of the same.
>
> Our difficulty comes with the changes in the rules governing the recoverability of ATE insurance premiums from Defendants in successful claims that come in to force on 1 April 2013. If our client enters into a CFA after 1 April 2013 and her case is successful, then the ATE premium would not be recoverable from the Defendants and would leave her exposed to paying for it from her compensation. It is therefore crucial to enter into a CFA prior to 1 April 2013 in order to protect our client's funding position and to prevent her paying for the ATE premium."[5]

The Master made specific reference to his earlier view in *Hyde* by saying that the solicitors here had taken a completely different approach to the relevant of the costs limitation. In this case, at the time that the decision was made to change the funding arrangement judgment on liability had been entered, quantum had been calculated, there was no Pt 36 offer putting the claimant (or his solicitor) at risk and therefore it was most likely that the defendant would be meeting the costs at the end of the case. This would mean that there was unlikely to be any need to turn to public funding to reimburse the claimant's solicitor. However, in *Hyde*, even though liability judgment had been obtained, there was a Pt 36 offer and there was therefore a significant risk present and the funding limitation reached.

In *Surrey* the solicitor with the conduct of the case had provided a witness statement in which she set out the reasoning for the advice to discharge the certificate. She focused upon the uncertainty of future funding after April 2013 and the risk if the agency had refused to increase the reserve for the assessment of damages hearing and a CFA had not been put in place, then either the claimant or her solicitors would have been exposed to unrecoverable disbursements and profit costs following the hearing. Although she referred to the Pt 36 risk and the fact that the statutory charge would apply there such that the claimant's damages would not be protected from the effects of failing to beat an offer unfortunately, her detailed statement did not make reference to any positive advice in relation to the *Simmons* damages uplift: the increased payment of damages by 10 per cent that the Court of Appeal had levied in support of LASPO that would impact on the claimant's position. The Master commented:

> "There is no evidence before me to indicate whether the Claimant or his Litigation Friend would have considered the abandoning of up to £20,000, which was more or less guaranteed, in return for peace of mind regarding future funding. They may have decided that the system that had apparently worked for seven years was unlikely to breakdown in the final stages and they would rather have the money and risk the funding issues. They may have taken the view that QOCS protected them sufficiently not to incur an ATE premium. The possibilities for speculation are endless. What is certain, however, is that the *Simmons* damages were of significance and so should have been explained

[5] *Surrey v Barnet and Chase Farm Hospitals NHS Trust* , unreported, 10 August 2015, SCCO at [14].

to the Claimant's Litigation Friend so that informed consent to a change in funding could be given. The absence of any evidence from the Litigation Friend on this point, to my mind, speaks volumes."[6]

The solicitors had done their best to give the claimant all the protection against the pitfalls that they were warning of by entering into a CFA lite; in other words, the only costs that could be charged to the client were those that were recovered from the defendant. It was accompanied by an ATE policy.

The Master dealt with each of the arguments put forward by the claimant's solicitor in justifying the choice. He discounted the suggestion of increasing bureaucracy with legal aid funding and anyway found this in any event not to be a matter for the client to consider, but a matter for their solicitor. Not surprisingly he was dismissive of the suggestion that continued public funding would have an effect on the quality of the evidence that would be put forward by the claimant.

Unfortunately, there appeared to have been some confusion as to the estimates of costs being put forward by the claimant's solicitors but the judge found as a matter of fact that the solicitors had not sought to actually increase the final level of the certificate before requesting the discharge. The judge identified that the only likely reduction in a full recovery of damages or costs by the claimant would be from not beating a Pt 36 offer (one had not yet been made); an adverse interlocutory costs order or costs which could not be recovered between the parties in any event. There was then a discussion as to whether in the event of a Pt 36 not being beaten whether it was the claimant's damages or her costs that would be adversely affected by the set off between the claimant and defendant's orders for costs. The court acknowledged that "In practice the court would have a decision to make as to who decided not to accept a Part 36 offer and so whether the damages or the costs should be affected".[7]

The parties agreed that the combination of the CFA lite and the ATE insurance meant that the claimant was now virtually immune to any payment of costs to their lawyer or otherwise.

The deciding factor for the Master and missing from the advice given by the solicitor was the Court of Appeal's pronouncement in *Simmons* to put into effect the recommendations of Sir Rupert Jackson's final report such that additional damages were intended to recompense a client who was no longer able to recover their success fee or ATE premium from the opponent.

> "20. Accordingly, we take the opportunity to declare that, with effect from 1 April 2013, the proper level of general damages in all civil claims for (i) pain and suffering, (ii) loss of amenity, (iii) physical inconvenience and discomfort, (iv) social discredit, or (v) mental distress, will be 10% higher than previously, unless the claimant falls within section 44(6) of LASPO. It therefore follows that, if the action now under appeal had been the subject of a judgment after 1 April 2013, then (unless the claimant had entered into a CFA before that date) the proper award of general damages would be 10% higher than that agreed in this case, namely £22,000 rather than £20,000".[8]

Thus the Master considered what the claimant did by following his solicitor's advice and entering into a CFA was that he had prevented himself from recovering up £20,790.00, being the assessment of the likely general damages quantum increased by 10 per cent. The claimant, or more accurately his solicitor had chosen not to put any evidence forward to suggest that this advice had been given and so instead relied on the case of *AMH*.[9] A case before another costs judge, Master Leonard and again relating to a transfer of funding method.

Here a claimant alleging sexual abuse had the benefit of public funding from March 2012 but the month before the LASPO regime he discharged the legal aid certificate and replace it with a CFA. There the

[6] *Surrey*, unreported, 10 August 2015, SCCO at [88].
[7] *Surrey*, unreported, 10 August 2015, SCCO at [41].
[8] *Simmons* [2013] 1 W.L.R. 1239 at [20], quoted in *Surrey*, unreported, 10 August 2015, SCCO at [59].
[9] *AMH v The Scout Association*, unreported, 28 January 2015, SCCO.

claimant's solicitor had concluded that the LAA (then the LSC) would not provide sufficient funding to take the case to trial and that there was a possibility the claimant would obtain employment, the result of which would be to render him ineligible for continued public funding. In that case the solicitor put evidence before Costs Judge Leonard that it was unlikely that the *Simmons* uplift would defray the cost of irrecoverable success fees.

Master Leonard decided that the solicitor was obliged to consider the risk of losing legal aid funding in the circumstances of the case, but found that the advice he gave the client was "incomplete" because it did not go into the more positive aspects of the new regime, such as qualified one-way costs shifting and capped success fees.

However, the Master following the *LXM* approach said:

> "I am unable to accept that a choice must be unreasonable if it is not made on the best available information. I think one has to consider … whether the choice was reasonable in all the circumstances. It is … possible to make the right choice for, here, not so much the wrong reasons as an incomplete set of reasons … The fact this was a CFA Lite arrangement was crucial."[10]

Master Leonard viewed the CFA Lite as meaning the claimant would not lose any damages to meet unpaid costs:

> "The solicitor gave it in the knowledge that if he did not give that advice, it was possible that the client might lose out financially at the end of the day."[11]

The defendant in *Surrey* noted that the general damages were modest in *AMH*, such that the *Simmons* uplift and therefore much less relevant. Here at £20,000.00 as an uplift it contended this was not something that could be easily ignored. Interestingly, Master Rowley considered that the difference between this case and *Hyde*, is that there is a different approach to the relevance of the costs limitation. Here, he considered that the limitation had actually been ignored and it was only apparently considered when the application to discharge was actually being prepared. There was very little risk to the claimant's solicitors at that point:

> "However, on the facts of this case, the failure to give advice regarding the post LASPO landscape and in particular the Simmons damages, in my view rendered the advice to be insufficient on which to have found any proper or reasonable conclusion."[12]

Perhaps slightly adventurously this Master referred also to the recent Supreme Court case of *Montgomery*[13] on the question of informed consent and drew the parallel:

> "it seems to me the test of materiality in this context is very similar … in the absence of being informed of these issues, it seems to me impossible to say that the claimant can have made a reasonable choice to change funding arrangements. Consequently, I find that the additional liabilities flowing into the new arrangements are unreasonably incurred and as such are not recoverable from the defendant."[14]

Of course, lawyers who have advised their clients to switch from public funding to recoverable CFAs did so a long time ago. It is too late to revisit that advice now. However, they will now have a good steer on how a costs judge from the Supreme Court Costs Office approaches these decisions. Thus any challenge they now face at detailed assessment to such a step having been taken, and the current climate of costs

[10] *AMH*, unreported, 28 January 2015, SCCO, quoted in *Surrey*, unreported, 10 August 2015, SCCO at [85].
[11] *AMH*, unreported, 28 January 2015, SCCO.
[12] *Surrey*, unreported, 10 August 2015, SCCO at [86].
[13] *Montgomery v Lanarkshire Health Board* [2015] UKSC 11; [2015] A.C. 1430.
[14] *Surrey*, unreported, 10 August 2015, SCCO at [88] and [89].

reduction engendered by the Department of Health would suggest there will be many, they will better know the test they have to satisfy a judge on assessment and the evidence they will need to present.

Practice points

- Advice to clients on any funding option must provide enough information as to the advantages and disadvantages of a particular option as to enable the client to make a properly informed decision.
- Faced with a challenge on detailed assessment the lawyer should carefully consider the evidence they wish the judge to consider and the manner in which it is presented.

Mark Harvey

Almond v Medgolf Properties Ltd

(QBD, Phillips J, 15 May 2015, [2015] EWHC 3280 (Comm))

Civil procedure—default judgment—acknowledgment of service—late filing—CPR r.12.3(1)—CPR r.10.3

LT Acknowledgement of service; Default judgments; Extensions of time; Late filing

The claimant applied for summary judgment in default of acknowledgement of service. After the application was made the defendant served acknowledgment of service on the claimant but did not file a copy at court. The defendant argued that it was entitled to serve the acknowledgment late.

The defendant submitted that the effect of CPR r.12.3(1)[1] was that claimants were not entitled to default judgment if, before it was entered, a defendant served an acknowledgement of service to defend the claim. They said that there was nothing to prevent a defendant from filing a late acknowledgement of service if default judgment had not been entered in the interim: CPR r.10.3.[2]

Phillips J held that contrary to the defendant's submissions, the position had to be judged as at the date that the application for default judgment had been made.[3] It would be highly unsatisfactory and make a nonsense of procedure if defendants could avoid default judgment being entered against them by way of an acknowledgment of service filed any time before judgment was pronounced. The question of whether the defendant had filed an acknowledgment of service could only be judged at the point at which the application was made.

The judge also held that a further and complete answer to defendant's submissions was that, as the defendant accepted, it had not filed an acknowledgment of service in fact on any basis where merely providing a copy to the other party did not suffice to avoid default judgment. Accordingly, they were unable to resist default judgment on the basis of the late provision of acknowledgment of service to the claimants.

[1] "12.3— Conditions to be satisfied: (1) The claimant may obtain judgment in default of an acknowledgment of service only if- (a) the defendant has not filed an acknowledgment of service or a defence to the claim (or any part of the claim); and (b) the relevant time for doing so has expired."

[2] "10.3— The period for filing an acknowledgment of service: (1) The general rule is that the period for filing an acknowledgment of service is- (a) where the defendant is served with a claim form which states that particulars of claim are to follow, 14 days after service of the particulars of claim; and (b) in any other case, 14 days after service of the claim form."

[3] *Taylor v Giovani Developers Ltd* [2015] EWHC 328 (Comm) applied.

Comment

Introduction

The judgment in this case is significant for both claimants and defendants.

Whilst this case concerns a claim in which it was necessary to make application for, and not just request, default judgment the same principles should be applicable whenever the defendant is late in filing the acknowledgment of service and either application or request for judgment has been properly made meanwhile.

Defendants

Practitioners acting for defendants not infrequently receive court papers at a late stage. This judgment confirms the procedural difficulties that may be caused if delay results in the acknowledgment of service being filed out of time, particularly if the claimant has made a prompt application for judgment meanwhile.

Where the acknowledgment of service is filed late the defendant ought to be seeking an extension of time from the court.[4] If no extension of time is applied for, or granted, then, despite the range of judicial opinion highlighted by the judgment in this case, judgment for the claimant ought to be entered, even where that request is made after the acknowledgment of service has been filed.

The defendant must file, not just serve, the acknowledgment of service, as it is the filing of that document which is required to prevent the entry of default judgment.

Claimants

A problem frequently experienced by claimant practitioners is that, having made a timely application for default judgment, backlogs of post result in the request not being actioned by the court until a time when the defendant has belatedly filed an acknowledgment of service and/or a defence. In these circumstances the claimant remains entitled to judgment.

Consequently, those acting on behalf of claimants should always make a prompt request for default judgment, in the absence of an acknowledgment of service or defence. That is because if the application, or request, for judgment arrives at court after the time limit for, but before receipt of, the acknowledgment of service (or defence) the claimant is entitled to judgment even if the acknowledgment of service (or defence) arrives belatedly.

If the claimant delays in requesting judgment and, meanwhile, the acknowledgement of service (or defence) arrives with the court, though out of time, there is a range of judicial view about the claimant's entitlement to judgment (though in the absence of an appropriate extension of time the claimant should, for the reasons already noted, be entitled to judgment).

It is good practice, when requesting judgment, to ask that this be dealt with by the court as promptly as possible. The court might also be appraised on the decision in this case to guard against the request being erroneously refused simply because, by the time the application is processed, an acknowledgment of service (or defence) has been filed.

A regular judgment, even if there might be a defence, will not automatically be set aside and the court is now likely to adopt, when dealing with an application to set judgment aside, three stage test identified in *Denton*.[5]

[4] *Coll v Tattum* (2002) 99(3) L.S.G. 26 Ch D.
[5] *Denton v TH White Ltd* [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926.

Practice points

There are some key practice points which can be drawn from this decision.

- Defendants must ensure an acknowledgment of service is filed in a timely way at court, failing which the defendant is at risk of default judgment even if the acknowledgment of service is filed prior to judgment being entered but after judgment has been requested.
- Claimants should always make prompt application for default judgment in the absence of an acknowledgment of service and/or defence being filed by the due date.
- Claimants practitioners may wish to remind the court, when seeking judgment, of the case law in this area to ensure that a timely, and proper, request for judgment is not pre-empted by a late acknowledgment of service and/or defence.

John McQuater

Cavell v Transport for London

(QBD, William Davis J, 30 July 2015, [2015] EWHC 2283 (QB))

Civil procedure—personal injury—pre-action admissions—withdrawal—road traffic accidents—highway maintenance—CPR r.14.1a(4)(b)—CPR PD 14 (Admissions) para.7.2—Civil Liability (Contribution) Act 1978

Highway authorities' powers and duties; Highway maintenance; Pre-action admissions; Road traffic accidents; Withdrawal

On the 10 October 2011 Philip Cavell was riding his bicycle on a cycle path running alongside the A4 in Hounslow. At a point where the cycle path joined a bus lane he came off his bicycle and suffered a back injury. At the time he told a paramedic that he fell "due to uneven ground". In September 2012, he emailed Transport for London ("TfL") alleging that a "pothole" had caused the accident. He included a clear digital image of the scene with the defect marked. His case was that he came off his bicycle because of a defect in the roadway. He contacted TfL which is the body responsible for the maintenance of that highway.

Gallagher Bassett, a claims handling firm instructed by TfL, reviewed the case and, in August 2013, issued a denial of liability on the basis that inspection records for the site indicated regular inspection with no defects identified. The cyclist sent images from July 2013 showing that the defect was still present, which he claimed undermined the inspection records. A second claims handler reviewed the case and, in December, concluded that the lack of contemporaneous evidence of the road's condition made it difficult to assess whether the inspections had been carried out reasonably. In November 2013, an employee of TfL repaired the relevant part of the road, describing the fault as a "pothole in bus lane". The cyclist was unaware of this development. In March 2014, the cyclist's solicitors contacted Gallagher Bassett, which issued an admission of liability within 24 hours on 13 March 2014.

Because Mr Cavell's injury was not straightforward, it became necessary to issue protective proceedings. The admission of liability was pleaded as part of his case. When eventually the defence was served in February 2015 notice was given that the admission would be withdrawn with the court's permission. Application for such permission was made on 14 April 2015 supported by a witness statement from a solicitor acting on behalf of the defendant. Mr Cavell responded via a witness statement from his solicitor.

The defence pleaded that the admission made was not an admission of liability. The precise terms of the admission were: "Please note liability will not be an issue, subject to causation." As Mr Justice William Davis said:[1]

> "The only sensible meaning of those words is that primary liability for the accident is admitted but no admission is made as to whether the injury suffered (or some part of it) was caused by the accident. It clearly was an admission of liability."

Indeed, in her statement Angela Hanmore, the solicitor acting on behalf of the defendant, proceeded on the basis that it was. And the judge confirmed she was quite right to do so.

The issues were whether:

- the admission should not have been made because there was no contemporaneous evidence to support it; and
- if the admission was not withdrawn, TfL would be able to claim any contribution or indemnity from the contractor responsible for inspection and repair of the highway.

The judge held that the cyclist's digital images were a contemporaneous record of the defect. The inspection records would have carried more weight if the defect apparent in September 2012 had not still been present in November 2013, when it was assessed by TfL as a pothole. While the cyclist had not informed medical professionals of the pothole, he had told the first person to treat him at the scene about it.

The court had to consider the factors listed in CPR PD 14 (Admissions) para.7.2,[2] including whether new evidence had come to light that was not available at the time the admission was made, the conduct of the parties, and whether withdrawal was in the interests of the administration of justice.

No explanation had been offered for the erroneous admission. The claims handling firm was experienced in the type of claim involved. The initial denial was followed by a lengthy review of that decision and, during that time, repairs were carried out to the road. All the external evidence suggested careful consideration of the available material and a reasoned decision based on that material. There was no new evidence to undermine that proposition.

The judge concluded that it would not be in the interest of the administration of justice to permit withdrawal of an admission made after mature reflection of a claim by highly competent professional advisors without evidence to suggest that it had not been properly made.[3] The application to withdraw was dismissed.

Under the Civil Liability (Contribution) Act 1978, TfL would have to prove the defect, which was something which the cyclist could assist with. TfL was therefore not prevented from obtaining a contribution or indemnity if the admission was not withdrawn.

PROCEDURE

[1] *Cavell v Transport for London* [2015] EWHC 2283 (QB) at [2].

[2] "7.2 In deciding whether to give permission for an admission to be withdrawn, the court will have regard to all the circumstances of the case, including—(a) the grounds upon which the applicant seeks to withdraw the admission including whether or not new evidence has come to light which was not available at the time the admission was made; (b) the conduct of the parties, including any conduct which led the party making the admission to do so; (c) the prejudice that may be caused to any person if the admission is withdrawn; (d) the prejudice that may be caused to any person if the application is refused; (e) the stage in the proceedings at which the application to withdraw is made, in particular in relation to the date or period fixed for trial; (f) the prospects of success (if the admission is withdrawn) of the claim or part of the claim in relation to which the offer was made; and (g) the interests of the administration of justice."

[3] *Woodland v Stopford* [2011] EWCA Civ 266; [2011] Med. L.R. 237 considered.

Comment

Introduction

CPR Pt 14.1A provides that a "pre-action admission" can only be withdrawn by consent or permission of the court as well as expressly providing that such an admission can found an application for judgment.

This rule reflects the need for admissions to help further the overriding objective by narrowing the issues and helping to keep costs proportionate.

It is, unfortunately, not uncommon for a party who has made an admission to try to resile from that admission. When that happens the court may need to consider whether there was an "admission" and, if so, whether it is appropriate for that admission to be withdrawn.

Admission?

It seems curious that the defendant conceded, and the judge agreed, there was an admission of "liability" when that was expressly stated to be "subject to causation". That is because, without causation, there is no liability even if breach of duty can be established. As Baroness Hale explained in *Greg*:[4]

> "It is now hornbook law that damage is the gist of the action in negligence."

That is now reflected by the definition of "admission of liability" in the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents, the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims and Pre-Action Protocol for Personal Injury Claims (as the latter was updated in 2015).

The approach taken to the admission in this case may be helpful in the sense that the claimant may wish to argue an admission of the kind given is an admission of "liability" (the implication being that causation simply means the nature and extent of the injuries).

That could, however, create problems in a case where the claimant chooses to treat such an "admission" as not an admission at all, and moves on to commence proceedings (as the defendant might then argue there had been an admission which generated the need for the claimant, under the terms of the protocol, to disclose details on quantum as a preliminary to issue).

This endorses the need, in any particular case, for the claimant to tell the defendant how an ambiguous admission is to be interpreted. In this case the claimant made the understanding of the admission clear by specifically pleading that it was treated as an admission of "liability".

In any event the decision might be explained by the approach the judge took to the evidence, in which he concluded that if there was a breach, causation was plainly established, when he said:

> "There is no doubt that Mr Cavell sustained some kind of injury when he came off his bicycle at the relevant point on the cycle path."

All of this highlights the real difficulties about what exactly an "admission" is and does seem to ignore contemporaneous case law suggesting that what will be required to found a judgment will be an unequivocal admission. In *Dorchester Group*[5] Coulson J held that:

> "it seems to me that, for judgment to be entered under r.14.1, the admission has to be clear and unequivocal: see for example, *Technistudy v Kelland* [1976] 1 WLR 1047. That is how r.14.1 is intended to work. Here, the alleged admission about the discount for early payment to Mitie is neither clear nor equivocal. We know that, because Dorchester's first reaction was to seek clarification of

[4] *Greg v Scott* [2005] UKHL 2; [2005] 2 A.C. 176 at [193].
[5] *Dorchester Group Ltd (t/a Dorchester Collection) v Kier Construction Ltd* [2015] EWHC 3051 (TCC); [2016] C.I.L.L. 3753 at [15].

> the offer on this point, and the explanation made it clear that there was no such admission. In those circumstances, it cannot possibly be said that there was a clear admission in the offer letter."

Perhaps a useful way of analysing whether or not there is an "admission of liability" is to ask whether what was given by the defendant is clear enough, and sufficiently broad in scope, to entitle the claimant to judgment, if requested, on liability.

Permission?

The case is helpful in suggesting a defendant will not get an application to withdrawn an admission through "on the nod" and will need to be justifying such a step by proper argument based on the factors in CPR PD 14.

That reflects what ought to be, from April 2013, a tougher approach to compliance with the CPR, including the need to further the overriding objective. In *Berg*[6] the court recognised this might well mean it would be more difficult for a defendant to get permission for an admission to be withdrawn.

In the new era of proportionate litigation it is worth noting the consequences of the permission which was given to withdraw an admission in one of the key authorities, namely *Woodland*. As a result of that ruling the case continued to be litigated all the way to the Supreme Court on a preliminary issue about non-delegable duties[7] following which the case went to trial on liability.[8] After all of that liability was established. Surely a more proportionate approach would have been to keep the defendant to the admission originally, in the event sensibly, made.

Medical records

An incidental point is that the case is a further example of the courts attaching relatively little weight to entries in medical records, so far as these substantiate, or otherwise, the alleged circumstances of an accident. As Jackson LJ observed in *Bell*:[9]

> "Anyone who has dealt with personal injury litigation over the years not infrequently encounters inaccuracies in records of what the patient said, not necessarily because the nurse or doctor got it wrong. The patient may be in a state of confusion or the doctor may be working, or nurse may be working, under pressure, and one has to view with some caution less significant inconsistencies."

Costs

Finally, it is interesting to note that the judge, having observed the claimant's costs for the application were "hugely disproportionate" concluded that:[10]

> "It may be that the better course would be for the costs of the application to be payable by the Defendant in any event but for the assessment to form part of the final assessment of costs whether after a trial on quantum or after an agreed disposal of the case."

Practice points

A number of practice points can be drawn from this judgment.

[6] *Berg v Blackburn Rovers Football Club & Athletic Plc* [2013] EWHC 1070 (Ch); [2013] I.R.L.R. 537.
[7] See *Woodland v Swimming Teachers Association* [2013] UKSC 66; [2014] A.C. 537.
[8] See *Woodland v Maxwell* [2015] EWHC 820 (QB).
[9] *Bell v Havering LBC* [2010] EWCA Civ 689 at [32].
[10] *Cavell* [2015] EWHC 2283 (QB) at [17].

- Defendants should be unambiguous when making pre-action admissions.
- Claimants who received equivocal admissions should seek clarification or simply state what the admission is understood to mean.
- Summary assessment of costs is not always appropriate, even where a hearing has lasted for less than a day.

John McQuater

Gavin Edmondson Solicitors Ltd v Haven Insurance Co Ltd

(CA (Civ Div), Laws LJ, Elias LJ, Lloyd Jones LJ, 2 December 2015, [2015] EWCA Civ 1230)

Personal injury—civil procedure—legal advice and funding—conditional fee agreements—fees—insurance companies—liens—personal injury claims—pre-action protocols—settlement—solicitors' remuneration—Cancellation of Contracts made in a Consumer's Home or Place of Work etc. Regulations 2008 (SI 2008/1816)

LTC Conditional fee agreements; Cooling-off period; Fees; Insurance companies; Liens; Personal injury claims; Pre-action protocols; Settlement; Solicitors remuneration; Success fees

Gavin Edmondson Solicitors Ltd ("Edmondson") had entered into conditional fee agreements ("CFAs") to represent six clients in personal injury claims against Haven Insurance Company Ltd ("Haven"). Haven had settled the claims directly with the clients on an inclusive basis, meaning that Edmondson had been deprived of their costs. Edmondson therefore brought a claim in order to recover their fees, disbursements and success fees from the insurer Haven.

Edmondson sought equitable intervention by the court, claiming that Haven had wrongfully prevented them from establishing a lien on the settlement sums for their costs. The CFAs incorporated a Law Society document which provided that a client who won the claim would pay Edmondson's charges, disbursements and a success fee, which it could claim from its opponent.

However, each client also received a client care letter which indicated that if the client won, Edmondson would be able to recover their fees, disbursements and success fee from the opponent and had the right to take recovery action in the client's name. Each CFA was subject to the Cancellation of Contracts made in a Consumer's Home or Place of Work etc. Regulations 2008 (SI 2008/1816), meaning that each client had the right to cancel his retainer within a seven-day period. In the case of two of the clients, the insurer Haven made the offer to compromise within that seven-day period.

There were three issues:

1) whether the principle of equitable intervention[1] could operate only where a defendant had express notice of a lien;
2) whether a lien could arise in circumstances where the clients were under no personal liability to pay Edmondson's fees; and
3) whether the insurer's liability was affected by the fact that an offer might have been made at a time when a retainer could still be cancelled.

[1] Set out in *Khans Solicitors v Chifuntwe* [2013] EWCA Civ 481; [2014] 1 W.L.R. 1185.

The Court of Appeal held that there was no reason in principle why implied, rather than express, notice of a lien should not be sufficient for the operation of the principle of equitable intervention. In any event, express notice had been given in this case. It was apparent from transcripts of telephone calls that the insurer Haven had intended to avoid paying Edmondson's costs by entering into a settlement directly with the clients. Haven's knowledge of and participation in the scheme established by the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents meant that it was well aware of Edmondson's interest in receiving its fixed costs and other sums due under the scheme.[2]

Each of the claimants had entered into a CFA with Edmondson on the same standard form produced by Edmondson. This stated that it must be read in conjunction with the Law Society document: "What you need to know about a CFA." This had the effect of incorporating the Law Society document which provided:

> "If you win your claim, you will pay our basic charges, our disbursements and a success fee. The amount of these is not based on or limited by the damages. You can claim from our opponent part or all of our basic charges, our disbursements, a success fee and insurance premium."

However, in each case the retainer also incorporated the client care letter which included the following paragraph:

> "For the avoidance of any doubt if you win your case I will be able to recover our disbursements, basic costs and the success fee from your opponent. You are responsible for our fees and expenses only to the extent that these are recovered from the losing side. This means that if you win, you pay nothing."

The court recognised that there was a tension between these two provisions but held that the provision in the client care letter had to prevail because it was expressed to be for the avoidance of doubt. That meant that Edmondson had no recourse against their clients for the fees and were limited to what they could recover from the losing side. In those circumstances, they would not have a lien over assets received in their clients' account because the clients had no underlying liability to them.

However, under the normal course of events, Edmondson would have an entitlement to recover the fixed costs and other sums payable under the protocol scheme. That was either an entitlement of the solicitors themselves or, alternatively, an entitlement to bring proceedings in the name of the clients to recover those sums. In either case, Edmondson had an interest which equity could protect and which was deserving of protection.

Haven was aware of that interest because of its knowledge of, and participation in, the protocol scheme. That might involve an extension of the principle in *Khans*, but the court held that there was no reason why that principle should not apply in the circumstances of the case.

The protocol scheme was not mandatory and it was therefore open to the insurer Haven to enter into compromise agreements with the claimants outside the protocol. However, that was not what had happened. In each case, the client had authorised Edmondson to commence the protocol process on his behalf and Haven had voluntarily entered into the protocol process. Neither the clients nor Haven had formally exited the process before entering into the compromise agreements. Haven had acted with the intention of defeating Edmondson's entitlement under the scheme.[3]

In addition, the court held that the fact that an offer might have been made at a time when a retainer could still be cancelled could not relieve Haven of liability. It would have been open to the insurer to make the offer conditional upon cancellation of Edmondson's retainer within the permitted period, but it did not do so. In each case, the insurer assumed the risk that its offer might be accepted after the expiry of the

[2] *Khans* [2014] 1 W.L.R. 1185 applied.
[3] *Khans* [2014] 1 W.L.R. 1185 applied.

cancellation period. In any event, in none of the underlying cases was the retainer cancelled or otherwise terminated.

The insurer entered into each compromise agreement with notice of Edmondson's entitlement and the principle of equitable intervention required it to pay to Edmondson the sums payable on settlement under the protocol scheme.

Comment

Thankfully the judgement clarifies the legal position. The principle in *Khans* applies in situations of implied as well as express notice rightly protecting a solicitor's claim on funds recovered; a base principle we are told, established for fully two centuries.[4] Specifically, once parties enter the Pre-action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents, which is not mandatory, the protocol governs in significant detail the behaviour expected of the participating parties. Specifically, it stipulates the various obligations to pay the claimant's representative's costs.

The insurer behaviour in this case is astounding. It was clearly calculated to deny the claimant solicitor their costs, whilst "using" the protocol to negotiate directly with the claimant's representative's client. The decision at first instance was therefore a surprise, and appropriately overturned by the Court of Appeal.

I was a member of the Working Party of the Civil Procedure Rules Committee which drafted the low value protocols including the relevant protocol in this case. Quite often members of the working group would state that this or that potential loophole would surely never be pursued! This case is an object lesson of the fact that if there is a potential loophole somebody, somewhere, sometime will seek to go through it!

The Claims Portal Ltd's Behaviour Committee considered the issue of direct contact with the claimant where he or she is represented. Its guidance, last updated according to its website on 6 February 2013, and well before the relevant conduct in this case made it clear that "once an Insurer or other Compensator is aware that a solicitor is acting there should be no contact with the claimant unless through that solicitor".[5]

The guidance note goes on to say:

> "There is no doubt that this behaviour breaches the principle of 'treating the customer fairly' under the Third party Assistance Code of Practice of the ABI."

Further, the guidance note encouraged the claimant representative in the case before it to consider raising individual cases with the Financial Conduct Authority ("FCA") and the Information Commissioner. Unfortunately the Behaviour Committee has no regulatory teeth, but does have huge persuasive impact. It comprises an equal balance of insurer and claimant representatives, and reports in to the Claims Portal Ltd Board, which similarly has balanced membership. The guidance note had no impact on the insurer in this case.

When one observes the facts of this case it is little wonder that insurer commitment not to use legal and other provisions as a "try on" rings rather hollow!

Practice points

- It is not clear what further actions if any were taken by the claimant's representative. However, practitioners with portal and protocol disputes should consider raising the issue with the Claims Portal Ltd Behaviour Committee, and indeed the FCA and/or the Information Commissioner. If it can be resolved in this way it could be quicker and cheaper than

[4] *Gavin Edmondson Solicitors Ltd v Haven Insurance Co Ltd* [2015] EWCA Civ 1230 at [24].

[5] Claims Portal Ltd Behaviour Committee, "Guidance Note BCG1 — Direct Contact with Represented Clients" (6 February 2013), claimsportal.org.uk, *http://www.claimsportal.org.uk/en/about/behaviour-committee/* [Accessed 6 February 2016].

proceeding to the Court of Appeal. Alternatively, such a reference may have persuasive use in litigation.

- Practitioners should ensure that their CFA or other client agreements agree with and do not contradict their client care letter. As "belt and braces", a provision might be appropriate to insert in both that if the client does reach agreement with the insurer or compensator direct that is a circumstance in which the client becomes personally liable for legal costs.
- Never presume your opponent in proceedings won't try anything, especially to avoid paying legal costs, and argue it all the way!

John Spencer

Radice v Worster

(QBD, Foskett J, 17 November 2015, [2015] EWHC 3732 (QB))

Personal injury—road traffic accidents—civil procedure—defences—automatism—EU law—preliminary issues

Automatism; Case management; Defences; EU law; Negligence; Preliminary issues; Road traffic accidents

The claimant had been seriously injured in a road traffic accident. It appeared on face value that the defendant had been driving negligently. The defendant, however, raised the defence of automatism. Her case was that she suffered a sudden and unexpected loss of consciousness, caused by an attack of atrial fibrillation, which had been fully outside of her control. The claimant's response was that the defence of automatism was incompatible with European directives. The master directed that there should be a hearing of that preliminary issue to determine whether automatism was incompatible with the directives. He found that it might save time and money if it was known first whether the defence could be used at trial.

The claimant appealed and submitted that the master's approach was wrong, as it might cause the claimant to be locked in an irrelevant dispute as to the interpretation of the directives, to determine points of law that might end up being appealed up to the Supreme Court or referred to the Court of Justice of the European Union. He further submitted that if it was shown that the defendant had not fallen unconscious but had been asleep at the wheel, there would be no need to discuss the complicated point of EU law.

The defendant submitted that the master had been entitled to come to the conclusion that he did. She argued that the court should not interfere where the judge had applied the correct principles and taken into account all relevant matters, unless it was satisfied that the decision was so plainly wrong that it was outside the generous ambit of his discretion. She further submitted that hearing the preliminary issue would not prolong the trial, as it was unlikely that the trial would be held until the end of 2016 anyway.

Foskett J held that the master did not have available the proposed cost budget for dealing with the preliminary point. In order to be sure that it would save costs, he had to be able to compare the two approaches. It was not clear that the master had considered all the material. One factor to consider was whether there was a risk of the preliminary issue increasing costs and/or delaying the trial, and to what extent the issue might become irrelevant. The preliminary point was not straightforward and there were conflicting authorities on the matter.

If a judge found against the defendant, she was very likely to appeal, which could take several very costly years. If the defendant won, the case would not be any further forward, and the defendant would

have the opportunity to run the defence on its merits. A hearing of a preliminary issue could cause delay, anxiety and expense.

Foskett J differed from the master's approach and considered that the proper and robust case management of the cost budget was better than separating the EU law point as a preliminary issue. There was also a risk that the issue would become irrelevant if the facts were found as the claimant contended. The master's mind had not been focused on those relevant factors: if it had been, his conclusion might well have been different.

The appeal was allowed.

Comment

Automatism is the term used to describe an act done by a person who is not able to control what they are doing due to the sudden onset of physical or mental afflictions. In *Bratty v Attorney General of Northern Ireland*, Lord Denning defined automatism by saying:

> "'automatism'—means an act which is done by the muscles without any control by the mind such as a spasm, a reflex action or a convulsion; or an act done by a person who is not conscious of what he is doing, such as an act done whilst suffering from concussion or whilst sleep-walking."[1]

Illnesses including epilepsy, diabetes, dementia and undiagnosed obstructive sleep apnoea[2] have all been cited as causes of automatism in previous cases. Blackouts, sleep walking/driving, choking fits, even being attacked by a swarm of bees have been used to rely upon a defence of automatism.

For the defence to succeed the burden of proof is on the defendant to prove automatism on the balance of probabilities. The defendant must not only prove that automatism lead to a total loss of control, they must also prove an absence of fault in the events leading up to the point at which control was lost.

It is not a common defence in civil negligence claims but it can be a complete defence as it absolves the defendant of any liability for the consequences of their total loss of control. Where an automatism defence is established the injured party is not entitled to any compensation through a personal injury claim even if they are entirely blameless.

A good example comes from an accident on 12 November 2012 on the A1 near Newcastle. Gordon Soutar was driving his white BMW when it crossed carriageways colliding with a small van. The van driver died and his passenger suffered injuries. Gordon Soutar was charged with causing death by dangerous driving. Independent witness evidence spoke of seeing a white BMW driving erratically. One witness said the BMW had overtaken five cars, pulled back into his carriageway and then drifted onto the opposing carriageway within one to two seconds.

Jurors were told that after the accident Soutar went for tests and was found to have obstructive sleep apnoea. He denied causing death by dangerous driving on the grounds he must have been unconscious during a "micro-sleep" associated with the disorder. After a week-long trial at Newcastle Crown Court jurors took only 90 minutes to acquit Soutar of any wrongdoing.

In this case the defendant's automatism defence was based on an alleged sudden and unexpected loss of consciousness, caused by an attack of atrial fibrillation, which had been fully outside of her control. The claimant's response was to turn to European law on the basis that the defence of automatism was incompatible with European motor directives.

The European Court of Justices' ruling in *Bernaldez*[3] is the effect that:

[1] *Bratty v Attorney General of Northern Ireland* [1963] A.C. 386 HL at 409.
[2] See *R. v Souter*, unreported, 1 May 2014, Crown Court (Newcastle).
[3] *Criminal Proceedings against Bernaldez* (C-129/94) [1996] E.C.R. I-1829; [1996] 2 C.M.L.R. 889.

- art.3(1) of the First Motor Vehicle Insurance Directive, as developed and supplemented by the Second Motor Insurance Directive and Third Motor Insurance Directive Directive,[4] must be interpreted as meaning that compulsory motor insurance must enable third-party victims of accidents caused by vehicles to be compensated for all the damage to property and personal injuries sustained by them; and
- this interpretation precludes an insurer from being able to rely on statutory provisions or contractual clauses to refuse to compensate third-party victims of an accident caused by the insured vehicle

The claimant may well have an arguable point. However the master directed that there should be a preliminary issue hearing to determine whether automatism was incompatible with the directives. The master's view was that it might save time and money if it was known first whether the defence could be used at trial.

On the claimant appeal Foskett J did not agree. He felt that the proper and robust case management of the cost budget was better than separating the EU law point as a preliminary issue. Clearly if it turns out that the defendant had not become unconscious but had been asleep at the wheel, there will be no need look at the EU law point. But if it does not happen in this case it is only a matter of time!

Practice points

- When a defence of automatism is raised claimants must examine all available evidence about the defendant's medical history and condition.
- In many cases this is likely to include obtaining their own expert medical evidence on the defendant.
- DVLA records are also essential and cross referencing those with medical records and evidence can be important.
- Look to Europe as directives may be the answer.

Nigel Tomkins

First Capital East Ltd v Plana

(QBD, Judge Hughes QC, 23 October 2015, [2015] EWHC 2982 (QB))

Personal injury claims—civil procedure—administration of justice—criminal procedure—acquittals—committal for contempt—contempt of court

LT Acquittals; Committal for contempt; Fraud; Personal injury claims

Ilmi Plana was employed as a bus driver by First Capital East Ltd. His case was that whilst moving some signs at the bus depot he was caused to slip in some way, sustaining a blow to the head. When he attended at a hospital casualty department there were no external signs of injury and a brain scan was normal. Ilmi Plana described suffering dizziness, daily blackouts, chest pains and headaches. He obtained medical evidence from a neurologist and a consultant psychiatrist, which indicated that his disability flowed from

[4] Directive 2009/103 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability [2009] OJ L263/11.

the accident. In 2010, judgment by consent was entered for Ilmi Plana, and an order was made for an interim payment.

In 2012, the employer carried out clandestine surveillance on Ilmi Plana. It obtained video footage showing him spending considerable time at a hand carwash, moving cars there and cleaning parts of cars, as well as appearing to communicate with employees in a supervisory role. The footage also showed him walking and sometimes hurrying to shops in the vicinity of the carwash. They did not disclose the evidence at the time.

In February 2013, Ilmi Plana served an updated schedule of loss claiming £637,308, arising from his need for constant supervision and his inability to work. There was a note of his inability to drive. He asserted that he was virtually housebound and was unable to stand or walk for long periods. He was supported by his son Arsim Plana. Both signed witness statements which presented the picture of a claimant who had been left seriously incapacitated and in need of constant care. Upon disclosure of its surveillance footage, the employers sought the comments of Ilmi Plana's doctors on that evidence.

A strike out application came before HH Judge Collender QC in the Central London County Court on the 15 August 2013. At the hearing, Ilmi Plana stated that he did not wish to put further medical evidence before the court. The claim for damages was struck out as the video footage of the claimant demonstrated that the claim was fraudulent. The judge ordered that the interim payments of £125,000 were to be repaid by Ilmi Plana. The matter was then transferred to the High Court for the employer's application for permission to bring contempt proceedings.

Seven days after the hearing Ilmi Plana left the country and went back to Kosovo where he was originally from. When he returned on 26 March 2014, the Metropolitan Police were waiting for him. He was arrested the following day for fraud in relation to the personal injury claim and remanded into custody. On 29 May 2014 the employer's insurers filed an application to bring committal proceedings for contempt of court against father and son pursuant to CPR r.81.18[1] in relation to statements made in support of the father's personal injury claim. In September 2014, the father was acquitted in the criminal proceedings. The view having been taken that there was insufficient evidence against him, the son was not prosecuted.

The insurer's application for permission to bring committal proceedings for contempt of court against the claimant and his son was heard on 15 October 2015. The issue was whether it was appropriate to bring committal proceedings when the alleged contemnor had already been tried and acquitted by a criminal court on the same facts.

The judge held that in the case of the father, two important and competing considerations had to be weighed in the balance. The first was that the court should itself punish those who sought to rely on false statements in civil proceedings with a view to financial gain. The second, based on the principle of finality in litigation, was that the same allegations should not be litigated twice over. Each case had to be considered on its merits. Acquittal by a jury was not an absolute bar to permission being granted for committal proceedings, but permission was unlikely to be granted except, for example, where there was material evidence that was not before the jury or important new evidence had since come to light. This was not such a case.

Were permission to be granted, the judge hearing the committal application would be invited to reach a different conclusion from the jury on the same evidence and applying the same standard of proof. That was not an attractive proposition. If it was inappropriate to grant permission to bring committal proceedings against the father, it had to follow that it would not be appropriate to grant permission in the case of the son, as the judge would be invited to reach a different conclusion from the jury in that the son's statement could not be found to be false without the same finding, by implication, being made in relation to the father. The application was refused.

[1] A committal application in relation to a false statement of truth or disclosure statement.

Comment

In the background to this application must have been the sense of deep concern, felt by those who insure defendants against personal injury claims, about dishonest, false and inflated claims. In recent times insurers have been accumulating successful convictions against alleged personal injury fraudsters. Although no reliable figures are available, insurers claim that there are increasing numbers of fraudsters. Unsurprisingly they argue that there is a need to make it clear that such dishonesty will not be tolerated by the courts and will be punished as contempt. However, in this case they suffered a setback when the judge refused to grant their application for permission to bring committal proceedings for contempt of court.

The judge had no hesitation in finding that the case against both father and son was a strong one. The statements that were alleged to have been false were highly significant in the context of a large personal injury claim made on the basis that the claimant was permanently incapacitated and in need of constant care.

The judge did not consider that delay in proceeding with the application itself was a sufficient reason to refuse permission. This was because the delay was initially attributable to the father's absence from the country, and thereafter to the criminal proceedings. The factor that prompted Judge Peter Hughes to pause for thought was the fact Ilmi Plana had been acquitted of fraud in relation to his accident injuries at Southwark Crown Court. The insurer accepted that there was unlikely to be any material difference between the evidence relied on then and in support of this application. Judge Hughes felt that meant that it would be unjust to allow a prosecution in a civil contempt hearing.

To make matters worse, before this application there had already been a second attempt to prosecute the father. It was a prosecution brought by the Department of Work and Pensions for fraudulently claiming benefits by not disclosing his true care and mobility needs. The case was based on the same evidence as the first failed trial. Predictably it was stayed as an abuse of the process.

In the US Supreme Court in *Green v US*[2] Black J reminded us that an idea

> "that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty."

In *R v J*,[3] the Court of Appeal, presided over by the Lord Chief Justice, reviewed the law on double jeopardy and emphasised the narrow basis of the principle of autrefois acquit. The Lord Chief Justice cited with approval the above passage from *Green v US*. The principle was clearly relevant to the exercise of discretion in the context of a case such as this. That being so can it ever be appropriate to bring committal proceedings when the alleged contemnor has already been tried and acquitted by a criminal court on the same facts?

Of course, acquittal by a jury on a charge of fraud arising from the giving of false evidence in a civil claim is not an absolute bar to permission being granted for the bringing of committal proceedings against the person concerned for contempt of court.[4] However, permission is very unlikely to be granted where there is no new evidence against the alleged contemnor as it appears was the position in this case.

One lesson to be learnt from this case is that applications for permission to bring contempt proceedings have to be made and progressed without delay. That applies particularly to cases before district and circuit judges, who heard the bulk of personal injury litigation. Surely it ought to be possible to streamline current

[2] *Green v US* 355 U.S. 184 (1957) at 187–188.
[3] *R v J* [2013] EWCA Crim 569; [2014] Q.B. 561.
[4] See for example *R. v Green (Bryan Gwyn)* (1993) Crim. L.R. 46 CA (Crim Div).

practice and procedure to ensure that applications arising out of county court proceedings are referred to the High Court immediately and fast-tracked so that a decision can be made with a minimum of delay. Is this a job for the Civil Procedure Rules Committee or Parliament?

Practice points

- Acquittal by a jury on a charge of fraud arising from the giving of false evidence in a civil claim is not an absolute bar to permission being granted for the bringing of committal proceedings against the person concerned for contempt of court.
- However, permission is unlikely to be granted where there is no new evidence against the alleged contemnor.
- Any application for permission to bring contempt proceedings should be made and progressed without delay.

Nigel Tomkins

Cumulative Index

This index has been prepared using Sweet & Maxwell's Legal Taxonomy.