Journal of Personal Injury Law

June 2016

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Editorial

Welcome to the June 2016 edition, my first and Muiris' last. Great thanks to Muiris for over a decade of sterling service as general editor of this journal. Muiris' generous and brilliant service to the profession is an example to us all.

Some things, however, don't change! Muiris introduced the December 2014 edition declaring a truism, "the myth … of a compensation culture is still the preferred weapon of choice of insurers' against injured people". This has reached deafening volume with the Autumn Statement announcement to abolish claims (arising from) whiplash and to increase the small claims limit for personal injury fivefold; which surprised almost all, including most insurers and even, it is reported, the Ministry of Justice!

The modern world in which we all live gives rise to various developments challenging the law. The articles in this edition all reference these challenges.

The extension of *Fairchild* to lung cancer cases by the Court of Appeal is so welcome. David Allan QC examines the February judgment of the Court of Appeal in *Heneghan* and traces principles arising from earlier judgments, their limitations and inconsistencies, and those of s.3 of the Compensation Act 2006. His call for the extension of s.3 to lung disease cases is indeed compelling.

In his article J.P.I.L. Board member Julian Fulbrook demonstrates perhaps the inadequacy of existing national laws to deal with the challenges of cases involving services provided by on demand apps in the digital space, using the example of Airbnb.

Douglas Maxwell writes about the importance of apologies to injured people, and the Scottish legislative response in seeking to eradicate some of the obstacles to making that all important simple apology,

Nigel MacKay shows us that the "gig" economy presents challenges to the law of vicarious liability to which there may be no obvious answers even after applying control factors, which are rightly becoming less determinative. Employment status and vicarious liability has to adapt to the modern world.

The family, specifically parenthood, too presents inconsistency. Chris Thorne highlights that a celebrity text message has 10 times the value that is apparently placed on a human life. His article explores this and other inconsistencies.

We end where we began. Damage Based Agreements will surely play a more prominent role as the Government pursues its Chancellor announced PI litigation policy. Stuart Kightley served on the Civil Justice Council Working Party and gives us the benefit of his inside knowledge.

Nigel Tompkins, Digest Editor, the entire J.P.I.L. Editorial Board and the Sweet and Maxwell team are owed an enormous debt of gratitude too for this, and indeed all, editions.

John Spencer
General Editor

The Extension of *Fairchild* to Lung Cancer

David Allan QC*

Apportionment; Asbestos; Cancer; Employers' liability; Lung

David Allan QC considers the recent Court of Appeal judgment in Heneghan v Manchester Dry Docks Ltd *on the application of the* Fairchild *causation rule to lung cancer cases.*

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The modified rule of causation which emerged from the House of Lords' decision in *Fairchild*,[1] has been largely confined to mesothelioma claims. That rule, as developed in the subsequent judgments in *Barker*[2] and *Sienkiewicz*,[3] provides that causation in a mesothelioma claim is established if it is proved on a balance of probabilities that asbestos exposure in breach of duty has materially contributed to the risk of the disease. The effect of s.3 of the Compensation Act 2006 is that any tortfeasor responsible for a material contribution to the risk is jointly and severally liable for the whole of the loss. In *Sienkiewicz* the Supreme Court, whilst confirming the *Fairchild* rule, did not give any encouragement to an extension of the rule to other diseases or types of injury.[4]

On 15 February 2016, the Court of Appeal handed down judgment in the case of *Heneghan*.[5] The claimant had claimed damages for losses arising out of Mr James Heneghan's contraction of lung cancer and premature death. The lung cancer was caused by occupational exposure to asbestos dust during many years of employment with many different employers. Six former employers could still be sued and these six were responsible for 35.2 per cent of the deceased's total occupational exposure to asbestos. The issue between the parties was whether each defendant was jointly and severally liable for the whole of the damages or for only a proportionate share determined by each defendant's contribution to the total exposure. The claimant contended that each tortfeasor had materially contributed to the lung cancer. Given that lung cancer is an indivisible injury each tortfeasor was liable in full. The defendant argued that the claimant could only succeed against an individual defendant by relying on the modified rule of causation in *Fairchild*. The House of Lords' decision in *Barker* on proportionate recovery remained the governing rule given that s.3 of the 2006 Act only applied to mesothelioma claims.

At the trial Jay J held that lung cancer and mesothelioma were legally indistinguishable. In a multi-defendant case, a claimant could only prove causation by reliance on *Fairchild*. It followed in these circumstances that *Barker* applied. The damages were divisible and a defendant was only liable for his proportionate share. In *Heneghan* this meant that the claimant recovered 35.2 per cent of the total loss. The Court of Appeal held that the trial judge's conclusions were correct. The effect of the Court of Appeal's judgment is that the *Fairchild* rule of causation is extended to lung cancer cases. It is now clear that the *Fairchild* rule is not restricted to mesothelioma and there is no reason why it should not apply to other diseases or injuries if similar factors which gave rise to *Fairchild* should apply. The most important of those factors was the uncertainty surrounding the physiological mechanisms which resulted in the disease.

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

[2] *Barker v Corus UK Ltd* [2006] UKHL 20; [2006] 2 A.C. 572.

[3] *Sienkiewicz v Grief (UK) Ltd* [2011] UKSC 10; [2011] 2 A.C. 229.

[4] *Sienkiewicz v Grief (UK) Ltd* [2011] UKSC 10; [2011] 2 A.C. 229 at [187] per Lord Brown. The same logic which requires that the claims of these respondents succeed to my mind requires also that the courts should in future be wary indeed before adding yet further anomalies in an area of law which benefits perhaps above all from consistency and certainty in its application.

[5] *Heneghan v Manchester Dry Docks Ltd* [2016] EWCA Civ 86.

Previous lung cancer claims had considered what the causal requirements were but this was in the context of a single tortfeasor being responsible for all the relevant exposure. *Shortell*,[6] concerned a lung cancer claim where the defendant's employer had exposed the deceased to asbestos in breach of duty. The parties agreed that if the claimant could prove that the asbestos exposure had more than doubled the risk of lung cancer then causation was established. The expert evidence indicated that if the asbestos exposure was to predominantly amphibole fibres then exposure greater than 25 fibre/ml years would more than double the risk of lung cancer. If the exposure was to a mixture of amphibole and chrysotile fibres then exposure in the region of 40–50 fibre/ml years was required to more than double the risk. The main issue in the case was therefore the level of exposure and in the event the trial judge, Mackay J preferred the estimate of the claimant's expert.

In the litigation commonly known as *Phurnacite*,[7] employees at a smokeless fuel plant were exposed to carcinogenic substances in the course of the manufacturing process. It was not in dispute between the parties that proof of causation was satisfied if tortious exposure to carcinogenic fumes had more than doubled the risk of lung cancer. The claimants argued that even where the exposure to carcinogens was not sufficient to double the risk the court could conclude that such exposure had materially contributed to the lung cancer and that applying *Bonnington Castings*,[8] causation was established. The trial judge, Swift J, rejected this approach. In the event in two of three claims for lung cancer the doubling of risk test was satisfied and the claims succeeded. In the third case, the risk was not doubled and the claim failed on causation.

Shortell and the *Phurnacite* cases were claims against a single tortfeasor. *Heneghan* raised a different causation problem because there was more than one tortfeasor responsible for exposure. The medical experts in *Heneghan*, Dr Rudd and Dr Moore-Gillon, agreed in their joint statement that in the absence of asbestos exposure Mr Heneghan probably would not have developed lung cancer. The engineering evidence indicated that Mr Heneghan's total asbestos exposure was of the order of 133.1 fibre/ml years and this exposure included 114 fibre/ml years of amphibole. The medical experts agreed that this exposure increased Mr Heneghan's risk of contracting lung cancer about five fold. If he had been a non-smoker without asbestos exposure his lifetime risk of lung cancer was about 0.5 per cent. His smoking history increased this risk to about 2 per cent. The asbestos exposure increased the risk to about 10 per cent.

In claims for lung cancer it can often be problematic whether the occupational exposure has caused the disease rather than smoking or some unknown cause. This is sometimes referred to as the "what" question. In *Heneghan*, on the medical evidence, this was not an issue. The second causation question is sometimes referred to as the "who" question. In *Heneghan* the dispute centred on the "who" question. Of the six defendants the range of contributions to total exposure was from 10.1 per cent (the third defendant) down to 2.5 per cent (the fourth defendant). The dispute between the medical experts was whether one could infer that each defendant had made a material contribution to the carcinogenic process which eventually resulted in the lung cancer. Dr Rudd accepted that one could never identify, on a deterministic basis, which fibres had played what role in leading to the development of the cancer. However, given what was known about the processes at the cellular level, the numbers of fibres involved in these processes (many millions) and the likely distribution of fibres in the lungs it was highly probable that fibres from all sources had played some part. Dr Moore-Gillon disputed that such an inference could be drawn. Whilst not disputing the cellular processes described by Dr Rudd and the numbers and distribution of fibres one could only conclude that each source of fibre had contributed to the risk of lung cancer. One can never know which fibres actually contributed.

[6] *Shortell v BICAL Construction Ltd*, unreported, 16 May 2008 QBD (Liverpool).
[7] *Jones v Secretary of State for Energy and Climate Change* [2012] EWHC 2936 (QB).
[8] *Bonnington Castings Ltd v Wardlaw* [1956] A.C. 613 HL.

On this issue, the trial judge preferred the evidence of Dr Moore-Gillon and in this finding he was upheld by the Court of Appeal. The main judgment was given by the Master of the Rolls, Lord Dyson. The central question posed in his judgment was whether, in a lung cancer claim, a claimant could rely on the material contribution principle. In *Bonnington Castings* the disease was silicosis, a condition the severity of which was affected by the extent of exposure. A court was able to conclude that all the exposure to silica dust had contributed to the disease. Lord Dyson contrasted *Bonnington Castings* with *McGhee*,[9] where the court was unable to conclude that the failure to provide showers had actually contributed to the claimant's dermatitis. This failure had increased the risk of dermatitis which was held to be sufficient to prove causation. *McGhee* was a decision of principle heavily relied upon in the judgment in *Fairchild*. At [45] Lord Dyson adopted Lord Hoffmann's observation in *Barker*[10] that *McGhee* was an application *avant la lettre* of the *Fairchild* exception.

In conclusion the Master of the Rolls held that the material contribution test applied in *Bonnington Castings* did not apply in the present case. *Heneghan* had all the salient features that were present in *Fairchild* and therefore the modified approach to causation should be applied in lung cancer claims. This meant in a lung cancer case a claimant established causation if he proved that occupational exposure more than doubled the risk of the cancer and that exposure with an individual defendant had materially increased the risk of lung cancer. However *Barker*, remained good law (*Zurich Insurance*)[11] and therefore there was only proportionate recovery against each defendant.

One issue not resolved by the appeal was an obiter observation of Jay J at [61] of his judgment concerning one of the unsued employers, W. Blackwell, who was responsible for 56 per cent of the total exposure. Jay J observed that he would have no difficulty concluding that a 56 per cent contribution should be regarded as sufficient to prove a claim on a balance of probabilities. He said it was not a conclusion based primarily on epidemiology but rather "it is basic arithmetic". The judge stated that the exposure with W. Blackwell was more likely than not to have been the cause of the cancer:

> "To the extent necessary, one may safely infer from the level of exposure that W. Blackwell's asbestos is directly inculpated in the disease process which the deceased sustained."

The implication of these observations is that if W. Blackwell had been the only former employer sued the claimant would have recovered 100 per cent of the loss. It is not spelled out whether this is because W. Blackwell was responsible for more than half the total exposure or because this exposure more than doubled the risk of contracting lung cancer. On the appeal both parties criticised this part of the judgment. Lord Dyson stated it was not necessary to decide whether the criticisms were well founded. Sales LJ stated that it was not immediately obvious to him that the judge was wrong in his observations but he would wish to reserve any concluded opinion on the question whether one of a number of employers could be held liable on ordinary principles on the basis that that employer was responsible for a doubling of the relevant risk. Other employers in the same action might be liable on application of the *Fairchild* approach and the court would have to consider what the effect might be in terms of recoverability of damages against each of them. Cases will no doubt arise where a defendant has been responsible for exposure which more than doubled the risk of lung cancer but was less than 50 per cent of the total exposure. Alternatively, a defendant's exposure may not be sufficient to double the risk but amounts to more than 50 per cent of the total exposure. In these different situations will liability be on a joint and several basis or for a proportionate share?

The answer to the question posed above may be provided by the judgment of Lord Phillips in *Sienkiewicz*. At [94], he posed what he described as a conundrum: why, if it was possible to equate increasing exposure

[9] *McGhee v National Coal Board* [1973] 1 W.L.R. 1 HL.
[10] *Barker v Corus UK Ltd* [2006] UKHL 20; [2006] 2 A.C. 572 at [13].
[11] *International Energy Group Ltd v Zurich Insurance Plc UK* [2015] UK SC 33; [2015] 2 W.L.R. 1471.

to increasing risk, could one not postulate that, on a balance of probabilities, where one defendant has caused over 50 per cent of a victim's exposure that defendant had caused the victim's mesothelioma?[12] In other words, why was there any need to apply *Fairchild* where epidemiological evidence enabled one to use statistics to determine causation? Lord Phillips considered that the answer to the conundrum related to uncertainty as to the adequacy of the data:

> "Thus the conundrum is answered by saying that there are several features about mesothelioma, and the gaps in our knowledge in relation to it, that render it inappropriate to decide causation on epidemiological data as to exposure."

Presumably a court would have to consider whether the data concerning lung cancer was as limited as that relating to mesothelioma or whether the epidemiological data was an adequate basis for making findings of fact as to what actually occurred.

Despite Lord Brown's strictures in *Sienkiewicz*[13] against extending the *Fairchild* principle beyond mesothelioma claims it will now apply to a significant new category of claim, namely lung cancer. A distinction remains in that in a mesothelioma claim where exposure to asbestos dust is established, it is very unusual for it to be disputed that the disease was caused by asbestos. Mesothelioma is a very rare condition in the absence of asbestos exposure. In contrast lung cancer is a common disease in the absence of asbestos exposure especially among smokers. A lung cancer victim will have to prove that the disease was caused by asbestos or some other occupational exposure and will normally do that by satisfying the doubling of risk test. *Heneghan* does raise the question: "To what other types of claim can the *Fairchild* rule be applied?" It is difficult to see that the modified principle could ever be confined to mesothelioma. *McGhee*, which played such a vital role in the judgments in *Fairchild*, was a claim for dermatitis.

On the highest authority, certain categories of case are excluded from the application of *Fairchild* despite difficulties for a claimant because of the limitations of medical science. By the narrowest of majorities, the House of Lords rejected the extension of *Fairchild* to the field of medical negligence (*Gregg*).[14] Where the tortious act or omission is merely one of several possible causes *Fairchild* cannot be relied on to overcome the causation hurdle (*Wilsher*).[15] Where a claimant fell out of a tree and suffered a fracture of the femoral epiphysis there was a delay in treatment on arrival at hospital and he suffered a vascular necrosis of the epiphysis. The question of whether he had any prospect of successful treatment was a question of past fact to be determined on the balance of probabilities (*Hotson*).[16] In these circumstances damages cannot be awarded for an increase in risk of injury or for a reduction in the chance of recovery. The correctness of these decisions has not been called into question by *Fairchild*. The position was summarised by Lord Hoffmann in *Gregg*:

> "Everything has a determinate cause even if we do not know what it is. The blood-starved hip joint in *Hotson*'s case, the blindness in *Wilsher*'s case, the mesothelioma in *Fairchild*'s case; each had its cause and it was for the plaintiff to prove that it was an act or omission for which the defendant was responsible. The narrow terms of the exception made to this principle in *Fairchild*'s case only serves to emphasise the strength of the rule. The fact that proof is rendered difficult or impossible because no examination was made at the time, as in *Hotson*'s case, or because medical science cannot provide the answer, as in *Wilsher*'s case, makes no difference. There is no inherent uncertainty about what caused something to happen in the past or about whether something which happened in the past will

[12] *Sienkiewicz v Grief (UK) Ltd* [2011] UKSC 10; [2011] 2 A.C. 229 at [94].
[13] *Sienkiewicz v Grief (UK) Ltd* [2011] UKSC 10; [2011] 2 A.C. 229 at [187].
[14] *Gregg v Scott* [2005] UKHL 2; [2005] 2 A.C. 176.
[15] *Wilsher v Essex AHA* [1988] A.C. 1074 HL.
[16] *Hotson v East Berkshire HA* [1987] A.C. 750 HL.

> cause something to happen in the future. Everything is determined by causality. What we lack is knowledge and the law deals with lack of knowledge by the concept of the burden of proof."[17]

The category of case where the *Fairchild* modified rule of causation is most likely to be applied are cases involving cancer. As was made clear in the medical evidence in *Heneghan* and before that in *Phurnacite* carcinogenesis is a stochastic process. It is never possible to identify the role, if any, of any particular exposure. It raises peculiar problems of proving, even on a balance of probabilities, what actually caused the development of a cancer. The logic which led to the adoption of the modified rule for mesothelioma and the extension to lung cancer may well lead to a further extension to other cancers caused by occupational or environmental exposure.

Following the House of Lords' judgment in *Barker* on proportionate recovery, Parliament rapidly intervened to reverse that part of the judgment and imposed joint and several liability.[18] It is difficult to see what basis there is for distinguishing between the mesothelioma victim and the lung cancer victim. As the law presently stands, the mesothelioma victim will recover in full provided there is at least one tortfeasor available to sue whereas the lung cancer victim may well achieve only a partial recovery at best. The lung cancer victim already faces the hurdle of proving on a conventional "but for" basis that asbestos or some other occupational exposure was the cause. The case for an extension of s.3 of the Compensation Act to lung cancer victims appears compelling.

[17] *Gregg v Scott* [2005] UKHL 2; [2005] 2 A.C. 176 at [79].
[18] Compensation Act 2006 s.3.

Airbnb: An Elusive Defendant in the Cyberworld

Julian Fulbrook*

E-commerce; Exclusion clauses; Hotels; Online services; Personal injury; Vicarious liability

A new frontier is developing in personal injuries litigation, which is how to respond to the challenges of cases involving services provided by on-demand apps in digital space. Focussing on Airbnb, the "online platform" which acts as an alternative hospitality broker offering a huge range of accommodation in locations across the world, Professor Fulbrook analyses the current state of the legal response, which has found it very difficult to keep up with this rapidly changing commercial model self-describing as a "community". Airbnb has, up to now, largely avoided the strict safety rules and taxes that apply to the mainstream tourist industry and to private landlords, and indeed has lobbied against the imposition of a regulatory framework when that has been proposed. While the Airbnb website gives advice to members on "responsible hosting" it is clear that a very considerable number ignore local laws; in New York State the analysis of data obtained from Airbnb after legal actions brought by the State Attorney General showed that three-quarters of Airbnb properties were "illegal". However, many of the laws around the world relating to this emerging economic sector are opaque, and may not fit easily with the challenges of this "sharing economy". Professor Fulbrook reviews some of the early cases from this "cyberworld" and notes how local and national governments are struggling to catch up. His conclusion is that "innkeeper liability" and standard principles of vicarious liability will permit actions in tort against Airbnb, which will in the long run assist in providing a better safety framework for guests. And despite the declaratory statements by Airbnb of overwhelming exemption clauses in their documentation it is very unlikely that these "releases" will be upheld in contractual cases, and most definitely not in tort cases where "gross negligence" can be shown. Given the continuing growth of Airbnb, with many attractive features for travellers, Professor Fulbrook suggests that now is the time for proactive legitimation by Airbnb, with an appropriate safety inspection regime based on taxation, and above all, for a significant rise in insurance cover as a response to the inevitable personal injury and property cases that will arise in such a huge global apparatus.

Introduction

The growth of Airbnb, the international online "marketplace" for holiday rentals, has been phenomenal. It is one of a burgeoning series of on-demand apps which provide a "platform" in areas such as accommodation, food delivery, and transportation. From a concept dreamed up in 2007 to assist in covering their rent by recent graduates of the Rhode Island School of Design ("RISD"), America's premier art school, Airbnb has blossomed as of December 2015 into a website with more than two million listings in over 190 countries. In its short history Airbnb has hosted over 60 million guests.[1] The demand seems insatiable. The original idea was to assist visitors to an Industrial Design Conference in San Francisco who could not find hotel accommodation, but were prepared to pay for three air mattresses in a loft, with the hosts providing good company and a home-made breakfast. Following the launch of a website in 2008 the company moved rapidly from complementing hotels and guesthouses with a cheap B&B when those were fully booked up, into a lifestyle alternative with a staggering variety of properties. In the UK there

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[1] Dave Lee, "Airbnb racism claim: African-Americans 'less likely to get rooms'" (12 December 2015), www.bbc.co.uk, *http://www.bbc.co.uk/news/technology-35077448* [Accessed 13 April 2016].

are currently places to stay in 42 castles, and worldwide an array of over 1,200 castles to consider.[2] Part of the appeal of Airbnb can be the option to stay in an igloo in Greenland, a lighthouse in New York, or in a tipi in Denmark.[3] The vast majority of Airbnb hosts and guests seem eminently satisfied with this "sharing economy", with its aim of "empowering individuals", and there are certainly attributes of flexibility, convenience and relatively lower costs than in the mainstream tourist and hospitality industry. In many Airbnb locations there are simply not the hotels or guest houses available, so this is forging an area of new demand. But perhaps inevitably several legal issues have arisen with this dramatic exponential growth, and not all are as yet happily resolved. Critics have pointed out that there are also some unsavoury aspects of such start-ups in their disregard of regulations on public safety and on the payment of taxes.

Circumvention of hotel and guesthouse regulations

It is difficult to generalise across so many jurisdictions, but health and safety regulation of standard forms of paid accommodation is usually inescapable, with the obvious aim of protecting consumers. So too is the unavoidable imposition of local and national taxes to pay for the registration and inspection services that provide some protection for users of hotels, motels and guesthouses. Airbnb initially had what can only be described as a blithe approach to any such issues, conveniently leaving the option of legitimation with local laws entirely to their hosts; the principal statement has been that "[w]hen deciding whether to become an Airbnb host, it's important for you to understand how the laws work in your city" adding, not unreasonably in many cases, that "[t]hese rules can be confusing".[4] However, the inescapable conclusion is that in many instances Airbnb wilfully or recklessly turned the proverbial Nelsonic blind eye to any such constraints. A related difficulty has been that municipalities and national governments have been slow and often unsure as to how to respond to a veritable tsunami of amateur unlicensed hoteliers. Mundane but vital safety factors for both landlords and hospitality providers, such as fire alarms and safe routes of exit, smoke and carbon monoxide detectors, regular gas and electrical checks, food hygiene rules, proactive repairs and maintenance, seem not always applicable to Airbnb hosts, and largely disregarded when they are germane. Meanwhile Airbnb, as merely a digital "platform" acting as broker or go-between in this new world of cyberspace, has, in the past, consciously attempted to hold itself aloof from intervening to support such rules, with all-encompassing exemption clauses. Their stance, highly convenient for commercial success, has been that Airbnb simply provide guidelines for "responsible hosting".

As well as public concerns on safety and the avoidance of taxation which would support an inspection regime to buttress safety, there has also been anxiety over what the proliferation of Airbnb has done to neighbourhood cohesiveness and in relation to local housing supply and demand. Even Airbnb have expressly worried about cases which led to their denunciation by the San Francisco City Attorney, where sitting tenants had been evicted to make way for more lucrative Airbnb rentals; in one case a landlord had "winkled out" a disabled tenant paying $1,000 a month, in favour of gaining $17,000 a month for rentals on Airbnb.[5] The company indicated that they "wholeheartedly support efforts to bring those landlords to justice" noting that "a small number of predatory landlords are abusing platforms like ours".[6]

In some popular city locations, particularly those attractive for weekend breaks, Airbnb has been accused of producing a revolving door of unknown guests, with neighbouring residents irritated by noise nuisance and the "destruction of local communities". For example, in central London, where there are many Airbnb

[2] *https://www.airbnb.co.uk/s/United-Kingdom?type=castle* [Accessed 13 April 2016].

[3] *http://www.digitaltrends.com/web/7-bizarre-airbnb-rentals-that-are-almost-too-weird-to-believe/* [Accessed 13 April 2016].

[4] Airbnb, "What legal and regulatory issues should I consider before hosting on Airbnb?", *https://www.airbnb.co.uk/help/article/376/what-legal-and-regulatory-issues-should-i-consider-before-hosting-on-airbnb* [Accessed 13 April 2016].

[5] Lydia O'Connor, "Landlords accused of kicking out tenants to list on Airbnb" (24 April 2014), The Huffington Post, *http://www.huffingtonpost.com/2014/04/24/airbnb-ellis-act-lawsuit_n_5202038.html* [Accessed 13 April 2016].

[6] Gerry Shih, "San Francisco sues landlords who evicted tenants for Airbnb" (23 April 2014), Reuters, *http://www.reuters.com/article/airbnb-lawsuit-idUSL2N0NF1UO20140423* [Accessed 13 April 2016].

properties, there have been a series of complaints of guests still living a lifestyle based on "Californian time", incessant holiday partying, and a loss of "cohesiveness" with so many short-lets clustered together. In response to a Parliamentary Question from Mark Pritchard MP in July 2015 requesting that the Secretary of State for Culture, Media and Sport hold discussions with Airbnb to comply with a longstanding requirement not to let properties for "more than 90 days each year", the somewhat lackadaisical ministerial response was to consider "setting up an Emerging Industry Action Group for the sharing economy" in due course.[7] Meanwhile several local authorities have been engaged in extensive reviews of Airbnb, usually under longstanding planning regulations prohibiting change of use from permanent residential to short-term holiday lets,[8] but also using enforcement powers about noise abatement. Council housing departments have also pointed out that acting as an Airbnb host in a council tenancy property generally infringes requirements not to give up possession of or sub-let any part of a home without the council's written permission. This theoretically attracts enforcement action currently under the Prevention of Social Housing Fraud Act 2013, with potential for the tenant to be fined or imprisoned.[9] Council leaseholders who have exercised the right to buy are also invariably in breach of covenant, with potential forfeiture of their lease, as too are most private leaseholders under the terms of their leases. One obvious difficulty in tracking some of the infringements is that British properties are advertised on the websites of many other countries, so hard-pressed local government officers have not been able to deal with translations, or indeed the transient nature of some of these listings, to prove breach of the "90 day rule". And when they have tracked down addresses and contacted Airbnb directly about potential infringements, further information has been refused without a court order. There is also an understandable reluctance to prosecute "innocents" stumbling in the somewhat arcane areas of planning and housing law, and Airbnb until recently having had very few checks or even giving advice on legal boundaries has not assisted in keeping people well clear of committing fraud. There can no doubt be legitimate reasons for taking in a lodger or sharing a flat, not least because of the infamous British "bedroom tax" applied to housing benefit claimants who are "under-occupying",[10] but the rampant churn of short-term and bogus "holiday lets" is now seen in the UK as a serious threat to settled communities, and is, of course, also driving up rents generally.[11] However, the boundaries are certainly opaque in the UK, and across the huge range of countries listed on Airbnb; illustrative of the rapid growth of Airbnb, the company opened up in Cuba in April 2015, and now a year later they have 3,700 listings there, predominantly in Havana, and no doubt after the visit recently by President Obama and the lifting of restrictions, many more American tourists will follow on.[12] As to the precise configuration of Cuban hospitality laws that might be applicable, there would seem to be little or no information, and it would also seem in the current euphoria no-one much cares.

Faced with an avalanche of breaches of the law by Airbnb, or as the company would term it, by Airbnb hosts, one possible response would be simply to capitulate. For example, in November 2015 Jersey City legalised Airbnb and added the company to their list of hotels paying a six per cent hospitality tax and being subject to regulation in zoning laws. The Mayor, Steven Falop, indicated that "You can either try and fight it and resist change, which I'm not sure is going to work, or you can try and figure it out and

[7] *http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-07-10/6546/* [Accessed 13 April 2016].

[8] Section 25 of the Greater London Council (General Powers) Act 1973 (as amended), provides the use as "temporary sleeping accommodation" of any residential premises in Greater London which involves a material change of use of the premises and of each part of them that is used for that purpose. This is defined as sleeping accommodation which is occupied by the same person for less than 90 consecutive nights and which is provided (with or without other services) either for payment or by reason of the employment of the occupant.

[9] See s.1 of the Prevention of Social Housing Fraud Act 2013.

[10] Welfare Reform Act 2012.

[11] See Anna Savva and Kathryn Hopkins, "Fraud team tackles tenants who sub-let homes on AirBnB" (9 February 2015), The Times, *http://www.thetimes.co.uk/tto/news/uk/article4348014.ece* [Accessed 13 April 2016].

[12] Frances Robles, "To beat the rush, Americans rush to Cuba, overloading services" (24 March 2016), The New York Times, *http://www.nytimes.com/2016/03/25/world/americas/americans-rush-to-cuba-overloading-services.html?_r=0* [Accessed 13 April 2016].

work together."[13] Across the River Hudson in New York City the law remains that a host has to be resident on the premises, but throughout the US a number of cities have now turned to a trajectory of establishing a tax and regulation regime. The other extreme of a complete ban was attempted for a while by the Province of Quebec in Canada, to eradicate what they termed a "black market" for holiday rentals, partly at the instigation of the official bed and breakfast and hospitality industry, whose numbers of establishments were in steep decline and who have to pay tax, insurance and registration fees.[14] Investigations were commenced against 2,000 homeowners renting out on Airbnb without a permit, and this campaign continued until October 2015.[15] However, recognising perhaps the "King Canute" nature of that approach, Quebec has recently become the first Canadian province to legalise Airbnb.[16] The Quebec Tourism Minister, Dominique Vien, in announcing the new policy said that from now on "Everyone is going to play on the same rink" with a tax and licensing regime applied to all "guests".[17]

Local and national governments are not always in agreement on the way forward. For example, in the UK a proposal by the Conservative Government under its Deregulation Act 2015 to relax the "90 day maximum rental rule" has been met by fierce opposition from local authorities, including staunchly conservative Westminster City Council, which called for that period to be cut to just one month's window each year for renting out. Westminster also called for all homeowners to be compulsorily registered when they are renting property.[18] In response, the Department of Communities and Local Government in February 2015 released guidance that they will maintain the 90-day limit on lettings; but stipulated that there would be a "one strike" approach to nuisance, in that following successful enforcement by an environmental health notice the owner would no longer be able to let property; that local authorities would be able to request exemption for specific blocks and localities; and that Council tax would be mandatory for any let property.[19] Further discussions on these policies are still underway.

New York exemplifies a twin track approach to Airbnb, which seems to be typical in many countries and localities. On the one hand it is a violation of the multiple dwelling law to rent out an entire apartment in a multi-family building for *less* than 30 days. This is an attempt to retain settled communities. On the other hand, residents are permitted to rent out a room in their home for *up to* 30 days, so long as the primary occupant is also present.[20] A cursory look at Airbnb in New York, and indeed elsewhere, shows that the vast majority of Airbnb lets are available for 365 days of the year. Eric Schneiderman, the New York State Attorney General indicated in a report in October 2014 that three-quarters of Airbnb rentals in New York City were illegal, finding that many of the listings were in reality large landlords operating chains of commercial lettings, and in defiance of the regulatory laws on health and safety applicable to landlords.[21] After a protracted legal skirmish Airbnb handed over to his office anonymised data on the company's hosts, in this way assisting further scrutiny. Airbnb also abruptly removed 2,000 or so listings in the state

[13] Martin Chaban, "Jersey City Proposes Legislation to Legalize Airbnb" (11 October 2015), The New York Times, *http://www.nytimes.com/2015/10/12/nyregion/jersey-city-proposes-legislation-to-legalize-airbnb.html* [Accessed 13 April 2016].

[14] Benjamin Shingler, "Quebec cracks down on AirBnB" (26 May 2013), The Globe and Mail, *http://www.theglobeandmail.com/life/travel/quebec-cracks-down-on-airbnb/article12162984/* [Accessed 13 April 2016].

[15] Geoffrey Vendeville, "Quebec to crack down on Airbnb-style home-rental services" (29 April 2015), Montreal Gazette, *http://montrealgazette.com/news/quebec/quebec-to-crack-down-on-airbnb-style-home-sharing-services* [Accessed 13 April 2016].

[16] Jin Lee, "Quebec Sides with Technology, First Province to Legalize Airbnb in Canada" (13 August 2015), The Main, *http://www.themainmtl.com/2015/08/quebec-legalizes-airbnb/* [Accessed 13 April 2016].

[17] Kevin Dougherty, "Quebec's proposed AirBnB regulations a Canadian first" (22 October 2015), 24news.ca, *http://www.24news.ca/the-news/canada-news/171891-quebecs-proposed-airbnb-regulations-a-canadian-first* [Accessed 13 April 2016].

[18] Nicholas Cecil, "Westminster Council rejects London 'Airbnb' rent plan" (10 February 2015), Evening Standard, *http://www.standard.co.uk/news/london/westminster-rejects-airbnb-rent-rules-for-londoners-10035418.html* [Accessed 13 April 2016].

[19] Department of Communities and Local Government, "Measures to boost sharing economy in London" (9 February 2015) Gov.uk, *https://www.gov.uk/government/news/measures-to-boost-sharing-economy-in-london* [Accessed 13 April 2016].

[20] Jonah Bromwich, "Airbnb Purged New York Listings to Create a Rosier Portrait, Report Says" (12 March 2016), The New York Times, *http://www.nytimes.com/2016/02/12/business/airbnb-purged-new-york-listings-to-create-a-rosier-portrait-report-says.html* [Accessed 13 April 2016].

[21] New York State Office of the Attorney General, "Airbnb In The City" (16 October 2014)*http://www.ag.ny.gov/press-release/ag-schneiderman-releases-report-documenting-widespread-illegality-across-airbnbs-nyc* [Accessed 13 April 2016].

posted by "bad actors", without further explanation.[22] Subsequent enforcement action also led to owners of apartments, which had been illegally rented out by their tenants, recouping city fines and legal fees from their tenants, so there has been a considerable aftermath.[23]

In the face of such legal and political challenges, Airbnb have not been quiescent, but have invariably tried to fight off any proposed changes. In the original home of Airbnb the City of San Francisco in 2015 proposed to limit rental time, along with other restrictions, and there was a very serious fight back against a "Proposition F" to introduce this, demonstrating a considerable lobbying ability by the company with its ready use of social media. The new law was rejected, although Airbnb spent nearly $9 million to defeat Proposition F, which would have capped the number of nights a host can rent out property at 75 per year and would have enabled the city to fine home-sharing sites up to $1,000 per night for non-compliance.[24] Critics suggested that "Airbnb and Uber have become multibillion-dollar companies by employing a kind of guerrilla growth strategy in which they set up a modest team of workers in a city and immediately start providing their services to the public, whether local laws allow them to or not."[25]

By contrast, and in an interesting use of language, Chris Lehane, Airbnb's Head of Global Policy and Public Affairs, stated that further restrictions on "home sharing" were not appropriate as: "This is now a movement." However, in response to this San Francisco vote and other challenges Airbnb subsequently unveiled an "Airbnb Community Compact", attempting to prevent illegal landlords operating on the platform and promising that hosts would pay a "fair share" of hotel and tourist taxes.[26]

Professor Derek van Bever of the Harvard Business School has suggested that this sudden change of approach by Airbnb was simply because "The regulatory risk warning light is flashing bright red on their management dashboards".[27]

In summary, it would appear that in many jurisdictions there are serious legal perils in operating Airbnb, and particularly in the UK with both housing and planning law implications for all tenants and leaseholders. Currently Airbnb gives a very feeble warning about the potential for prosecution and fines in respect of most of the countries and municipalities it operates in, as exemplified by its cavalier disregard of the cliff edge of eviction and leasehold foreclosure under the short lettings rule in London. This is replicated in many other countries, revised occasionally when local officials attempt to enforce the law. And when, as in North America, there are political moves to increase regulation or to enforce laws, or levy taxes, there has been, until recently, a very determined fightback, both in the courts and in lobbying.

Safety and wellbeing

The critical problem with the current organisation of Airbnb is the almost complete absence of safety considerations which have long been mandatory for landlords and in the hospitality industry. Basic protection in hotels and guesthouses for visitors has long been a feature in mainstream tourism, with regulation from national and local governments. Known often as "innkeeper liability" the fall-back position in common law jurisdictions has been precedent built up over time on the duty of care in the tort of negligence. A very unhappy light was cast on Airbnb in 2015 by research from Harvard, showing that in

[22] Mike Isaac, "Airbnb releases trove of New York City home-sharing data" (1 December 2015), The New York Times, *http://www.nytimes.com /2015/12/02/technology/airbnb-releases-trove-of-new-york-city-home-sharing-data.html* [Accessed 13 April 2016].

[23] Lawyer Herald, "Tenant slapped with $420,000 lawsuit after renting out flat to Airbnb" (7 January 2016), Lawyer Herald, *http://www.lawyerherald .com/articles/25625/20160107/tenant-slapped-420-000-lawsuit-renting-out-flat-airbnb.htm* [Accessed 13 April 2016].

[24] Zlata Rodionova, "Airbnb law: 'Proposition F' to limit rental time rejected in San Francisco" (4 November 2015), Independent, *http://www .independent.co.uk/news/business/news/airbnb-law-proposition-f-to-limit-rental-time-rejected-in-san-francisco-a6720656.html* [Accessed 13 April 2016].

[25] Conor Dougherty and Mike Isaac, "Airbnb and Uber mobilize vast user base to sway policy" (4 November 2015), The New York Times, *http:/ /www.nytimes.com/2015/11/05/technology/airbnb-and-uber-mobilize-vast-user-base-to-sway-policy.html* [Accessed 13 April 2016].

[26] Mike Isaac, "Airbnb pledges to work with cities and pay 'fair share' of taxes" (11 November 2015), The New York Times, *http://www.nytimes .com/2015/11/12/technology/airbnb-pledges-to-work-with-cities-and-pay-fair-share-of-taxes.html* [Accessed 13 April 2016].

[27] Mike Isaac, "Conciliation with cities is new tack at Airbnb" (11 November 2015), The New York Times, *http://www.nytimes.com/2015/11/12 /technology/airbnb-pledges-to-work-with-cities-and-pay-fair-share-of-taxes.html* [Accessed 13 April 2016].

a survey of more than 6,000 Airbnb hosts in major American cities people with names suggesting they were black were discriminated against.[28] In this connection it is perhaps illuminating to reflect on the leading British case in 1944 of *Constantine*, when the renowned West Indian cricketer Learie Constantine and his family were ejected after one night because of complaints from white US military service personnel in wartime London.[29] Birkett J held, many decades before race discrimination legislation was passed in the UK, that this colour bar was a clear breach of the historic innkeeper's duty to provide safe and reasonable accommodation. The principle, long established, was that a guest must not be refused without just cause. Although the Constantine family had been found alternative accommodation nearby, and there was no pecuniary damage, they were awarded nominal damages of five guineas plus their costs for this outrage.

The Harvard researchers noted that, in contrast to Airbnb, racial discrepancy no longer appears to exist in the US hotel industry, principally because bookings are often made automatically and without the host seeing a guest's name in advance. That is the proposed solution that has been suggested to Airbnb, along the lines of the "instant book" option which allows guests to book Airbnb rooms without the need for prior approval from a host. In a statement, Airbnb has admitted a serious problem, but has invited collaboration with "anyone that can help us reduce potential discrimination in the Airbnb community".[30] However, Brian Chesky, co-founder and Chief Executive of Airbnb, is on record in 2013 as saying that "We believe anonymity has no place in the future of Airbnb or the sharing economy", so this issue of racial discrimination looks insoluble at present by reason of the "community" basis that Airbnb adheres to.[31] With respect, having been alerted to this invidious situation it is incumbent on any reputable organisation to adopt a mature attitude to resolve this discrimination, rather than fall back on mantras of "sharing" and "community".

Another classic case on innkeeper's liability is that of Connie Francis in 1976, then the world's leading female singer, who was raped in a motel in Long Island while being threatened with a knife. When she discovered that Howard Johnson's had still not repaired the ill-fitting locks on sliding glass doors many months later, which had allowed the assailant to enter her room, she bravely sued the motel chain. The case uses her married name in *Garzilli*.[32] Evidence on liability was said to be "ample" and the main discussion in the case is on the level of damages. At the time Connie Francis had sold 80 million records and had appeared in five films, being described in the judgment as a "superstar of extraordinary talent". As a result of the attack she testified that

> "she could no longer appear before an audience because of her feeling of shame and humiliation, and she could no longer stay in a hotel or motel room which would be necessary for her to do if she was to fulfil her engagements."[33]

The court upheld a jury award of $2.5 million, worth now well in excess of $10 million. Inevitably after such a judgment there was an entire upgrading of the security of hotel rooms, with deadbolts, chains and peepholes, both in the US and in many other countries.

The Airbnb website section on "Responsible Hosting", does now draw attention to local rules; for example, on fire prevention it notes different approaches in Scotland and Northern Ireland.[34] In fairness Airbnb has also been slowly upgrading advice, in the light of further information, often gleaned from

[28] Mike McPhate, "Discrimination by Airbnb Hosts is Widespread, Report Says" (11 December 2015), The New York Times, *http://www.nytimes.com/2015/12/12/business/discrimination-by-airbnb-hosts-is-widespread-report-says.html* [Accessed 13 April 2016]. Dave Lee, "*AirBnB racist claim: African-Americans 'less likely to get room*'" (12 December 2015), bbc.co.uk, *http://www.bbc.co.uk/news/technology-35077448* [Accessed 13 April 2016].

[29] *Constantine v Imperial Hotels* [1944] KB 693.

[30] Lee, "AirBnB racist claim: African-Americans 'less likely to get room'".

[31] Airbnb, "Airbnb Announces 'Verified Identification'" (30 April 2013), *https://www.airbnb.co.nz/press/news/airbnb-announces-verified-identification* [Accessed 13 April 2016].

[32] *Garzilli v Howard Johnson's Motor Lodge Inc* 419 F. Supp. 1210 (E.D.N.Y 1976).

[33] *Garzilli v Howard Johnson's Motor Lodge Inc* 419 F. Supp. 1210 (E.D.N.Y 1976) at 1212.

[34] *https://www.airbnb.co.uk/help/responsible-hosting* [Accessed 13 April 2016]

hosts and guests, but this is clearly not done systematically. In the UK as well as dealing now with emergency procedures and suggesting that a first aid kit is easily available, the safety section also gives sensible advice on privacy, trip hazards, child proofing, and interior ventilation and temperature control. But none of this is mandatory, and there is, of course, no inspection regime to enforce that guidance.

Given the huge numbers of Airbnb guests it would be unrealistic to think there would never be fatalities or injuries. As with hotels and guesthouses there is an inevitability that injurious situations may arise from time to time. However, the modest array of guidance for Airbnb hosts still seems rather flimsy, and there have certainly been problems. Perhaps one of the most disturbing issues in the history of Airbnb was their slovenly reaction in 2015 to the difficulties experienced by Jacob Lopez, a 19-year-old American, who in a panicked telephone call told his mother in the US that his Airbnb host in Madrid had locked him in his room, removed the key, and was now "rattling knives in the kitchen drawer and pressing him to submit to a sexual act". When his mother telephoned Airbnb they would not reveal the address in Madrid nor would they call the police there, but simply gave her a number for the Madrid police; this led to a recording in Spanish and when the mother repeatedly tried to telephone Airbnb the calls were put to voicemail, in contravention of the boast that "We're here to help, 24/7, connect with our world-class customer support team whenever you're travelling or hosting".[35] Eventually Mr Lopez managed to persuade his host, born male but who had "recently transitioned genders" and who was now living as a woman, to release him, on the pretext that he had friends who knew his address and would be coming to collect him if he had not reached their agreed rendezvous. The response of the Airbnb host to a formal complaint was to deny threatening Mr Lopez, stating that the sex act was consensual, and accusing him of being transphobic. However, the key question raised by Ron Lieber in an article in *The New York Times* is how much responsibility should be ascribed to Airbnb for "its security measures and hospitality". Airbnb commented that this situation was "unique".[36]

That was also their response when two women travelling to Budapest were pestered by a male host (while the Airbnb photo had shown a female host), clearly threatened with molestation, and one of them was subjected to a "spiked" tomato juice, only waking up a day and a half later.[37] Airbnb had improved their "Verified ID" function in 2013, probably as a result of such untoward cases, but the problems of Jacob Lopez in 2015 demonstrate that continued reliance on a hit-and-miss peer-review system and without a serious back up in emergencies can court disaster. In his role as Airbnb's "Trust and Safety Manager" Philip Cardenas has posited that "We believe trust is a pivotal aspect of Airbnb, foundational to the collaborative consumption economy" (sic).[38] Given the potential threats to the security of Airbnb guests that somewhat naive reliance just on "trust" sounds not just wholly inadequate but hollow.

With Airbnb inhabiting the intermediate limbo area between being a landlord and being a hotelier there is a serious danger that routine health and safety issues that need to be faced by hosts—such as aspects relating to fire hazards, food hygiene and insurance—may go by the board. Although Airbnb has increasingly upgraded its "Responsible Hosting" advice, and has always paid lip service in advising compliance with the safety guidelines for the locality, it is clear that there are many infringements. Maintaining a worldwide remit and without a serious inspection regime means that only when problems surface will Airbnb react to them. For example, it has been indicated by Airbnb in the UK that there will at some stage be "plans" to ensure the provision of smoke and carbon monoxide detectors, and instructions

[35] Airbnb, "Trust at AirBnB", *https://www.airbnb.co.uk/trust* [Accessed 13 April 2016]

[36] Ron Lieber, "Airbnb Horror Story Points to Need for Precautions" (14 August 2015), The New York Times, *http://www.nytimes.com/2015/08/15/your-money/airbnb-horror-story-points-to-need-for-precautions.html* [Accessed 13 April 2016] and Kashmira Gander, "Airbnb safety: sexual assault allegations against host in Madrid raises questions about website's responsibilities" (16 August 2016), Independent, *http://www.independent.co.uk/travel/news-and-advice/airbnb-safety-sexual-assault-allegations-against-host-in-madrid-raise-questions-about-websites-10457992.html* [Accessed 13 April 2016].

[37] Marie Lisa Jose, "First, listen to my story of being drugged on an Airbnb stay, then learn from it" (13 August 2013), matadornetwork.com, *http://matadornetwork.com/trips/drugged-and-terrified-an-airbnb-booking-gone-wrong/* [Accessed 13 April 2016].

[38] David Zax, "Meet the former military intelligence officer who keeps Airbnb safe" (28 January 2013), fastcompany.com, *http://www.fastcompany.com/3005074/meet-former-military-intelligence-officer-who-keeps-airbnb-safe* [Accessed 13 April 2016].

and signage such as emergency safety cards for fire exits, but these are not mandatory on hosts. It would be illegal not to have some of these basic safety provisions in the tourist industry, and indeed a matter too for potential prosecution of private landlords on several of these factors.[39]

One safety net provision in regulated hotels and guest houses is also their ability to summon assistance. Gwen Deely flying to a holiday in Venice thought she had food poisoning and spent a week "staring at the ceiling" in an Airbnb apartment before somehow returning to New York, where she went straight to hospital with what turned out to be a ruptured appendix. Riddled with infection she was very fortunate to stay alive. Her comment was that "Had I been in a hotel, I would have asked to see a doctor who spoke English".[40] No doubt some Airbnb hosts would have been solicitous in such circumstances, although they are not always going to be easy to contact, and going well beyond the line of duty, but they are not obligated to provide 24-hour emergency support, as would be the case with most sectors of the hotel industry worldwide. And as we have seen there have been serious questions raised about the response of Airbnb itself to emergencies, despite the boast of a "24/7 world-class customer service".

Problems for hosts

Airbnb likes often to refer to itself as less a company than a "community".[41] This certainly seems an interesting proposition for a commercial organisation valued at $24 billion. A reality-check probably came at a watershed moment in 2011 when a travel journalist "EJ" rented out her apartment in San Francisco and then returned home to find it ransacked, with a locked closet smashed open, and items missing, such as her passport, credit card, camera, back-up external hard drive filled with photographs, and the family jewellery.[42] Responses from Airbnb were sluggish to say the least, with no communication for 24 hours despite desperate efforts to contact them. Allegedly this "trashing" was said by Airbnb to be a "one off case", but in response to widespread criticisms they scaled up their insurance scheme. At first this "guarantee" had been confined to secondary insurance, so was merely a long stop after a host's own household insurance cover, if any, and it was limited to $50,000. On any claim there would therefore be negotiations between insurers. However, the reality is that, sadly, many hosts neglect to inform their own insurers of renting out, so often exclusionary clauses are applicable. Or indeed hosts "go bare" to maximise their profits and have no insurance cover at all. After the EJ case Airbnb upgraded their cover to primary insurance with a $1 million "host guarantee", suggesting that this was an "unmatched level of protection in the travel industry" because "You're part of the Airbnb family and we stand by our family."[43] Nevertheless, the EJ case was also a public relations disaster, given the internet commentary, and also a clumsy effort with a "veiled threat" to attempt to silence the complainant and then by suggesting she "update" her original blog with a "twist of good news to complete the story".[44]

While it is difficult to know precisely how many such cases there have been, Troy Dayton had his apartment misused in Oakland in the same year, 2011, by a meth addict. CNN reported that Airbnb apologised, with the admission that "We have really screwed things up".[45]

[39] Lizzie Porter, "Airbnb: do the bargains come at a price?" (8 August 2014), The Telegraph, *http://www.telegraph.co.uk/travel/news/Airbnb-do-the-bargains-come-at-a-price/* [Accessed 13 April 2016].

[40] Jane E. Brody, "A new view of appendicitis" (21 March 2016), The New York Times, *http://well.blogs.nytimes.com/2016/03/21/a-new-view-of-appendicitis/* [Accessed 13 April 2016].

[41] Mike McPhate, "Discrimination by Airbnb Hosts Is Widespread, Report Says" (11 December 2015), New York Times, *http://www.nytimes.com/2015/12/12/business/discrimination-by-airbnb-hosts-is-widespread-report-says.html* [Accessed 13 April 2016].

[42] Around the World and Back Again, "Violated: a traveler's lost faith, a difficult lesson learned" (29 June 2011), *http://ejroundtheworld.blogspot.co.nz/2011/06/violated-travelers-lost-faith-difficult.html* [Accessed 13 April 2016].

[43] *https://www.airbnb.com* [Accessed 13 April 2016]

[44] Around the World and Back Again, "Airbnb Nightmare: No End In Sight" (28 July 2011), *http://ejroundtheworld.blogspot.co.nz/2011/07/airbnb-nightmare-no-end-in-sight.html* [Accessed 13 April 2016].

[45] A. Pawlowski, "Airbnb apologizes: 'We have really screwed things up'" (1 August 2011), CNN, *http://edition.cnn.com/2011/TRAVEL/08/01/online.rental.horror.stories/* [Accessed 13 April 2016].

Further "ransacking" cases led in 2014 to a 24-hour hotline being set up by Airbnb, and although many of these property loss cases are quietly settled there are several newspaper reports on some of the more lurid examples. One of these, perhaps responsible for the hotline being introduced, was when a professional comedian met with his guest in Chelsea in New York City to hand over keys to his apartment, but perhaps wisely went to dinner before returning home to pick up his luggage for his trip out of town. Instead of finding a "family get together" he discovered police and building apartment personnel in attendance to stop the apartment being wrecked by a "rowdy sex party" advertised widely for "overweight" punters.[46] In Canada a renter requested a property in Calgary for a "family wedding", but neighbours then observed "a two day party which saw up to a hundred people swarm on the house", fuelled by drugs, and causing over $100,000 in damages.[47] In another Canadian case students from Toronto renting an apartment in Gatineau for a weekend party ended the night with one guest shot and severely wounded, and with another fleeing the scene at 3am; the host commented sagely she would be "a little more careful" in the future.[48] Use of premises for prostitution and the making of pornographic films also seem recurrent themes in newspaper reports on Airbnb, with one Californian home-owner, Kristina Knapic, currently suing for fraud, negligence, trespass and breach of contract after an Airbnb rental went awry.[49] This rental was described as the "The Airbnb nightmare to end all nightmares", while the company, as usual, issued a statement that they had "zero tolerance for this type of behavior in our community" and had "permanently banned these guests from Airbnb".[50]

Airbnb currently provides their "home guarantee" cover for up to $1 million (£707,500) but of course the payments need to be maintained. One unfortunate host, Poonam Sandhu in Santa Cruz, told ABC News that she had agreed with the suggestion by her guests that they go "offline" and she accepted cash payments from them, which automatically voided the cover. The guests then subsequently refused to pay anything, refused to leave, stole her property, and claimed squatter's rights after 30 days. Having hired an attorney Ms Sandhu managed to have them evicted by making a payment of $1,750. It was subsequently discovered that the perpetrators had previous convictions for this sort of scam.[51]

New Year's Eve seems a particularly troublesome flashpoint. The renting out of a home in Putney by Christina McQuillan at the start of 2016, with subsequent lurid newspaper reports of drug use and open copulation observed by the startled homeowners when they were alerted, seems to follow a pattern in other parts of the world, and was certainly replicated this year in Montreal and Oakland, with Airbnb "used once again as a means to book a cheap party venue".[52] Damage in Putney was estimated at £3,000.[53] In all three cases there was the usual statement by Airbnb that the offending guests had been banned from the site and that "We have zero tolerance for this kind of behaviour and when something goes wrong we work quickly to make it right … our Trust and Safety team has reached out to the hosts to work with them under our $1m Host Guarantee, which covers a host's property in the rare event of damages."

No doubt all such cases are "rare" and "unique" in some aspects. Of course it is important to acknowledge the scale of Airbnb and get some of this in perspective—over one million guests used Airbnb over New Year's Eve, and in 2015 with over 35 million guests there were reports of 540 cases of "significant property

[46] Frank Rosario, C.J. Sullivan and Joe Tacopino "Airbnb renter returns to 'overweight orgy'" (17 March 2014), New York Post, *http://nypost.com/2014/03/17/airbnb-renter-claims-he-returned-home-to-an-orgy/* [Accessed 13 April 2016].

[47] "Drug-induced orgy causes huge damage", *Edmonton Journal* (25 July 2015) [Accessed 13 April 2016].

[48] Jocelyn Filiatrault, quoted on the ENP Newswire (22 March 2016).

[49] Tyler Hayden, "Porn star Accused of Trashing Airbnb" (2 December 2015), Santa Barbara Independent, *http://www.independent.com/news/2015/dec/02/porn-star-accused-trashing-airbnb/* [Accessed 13 April 2016].

[50] Hayden, "Porn star Accused of Trashing Airbnb".

[51] New York Daily News, "California homeowner says Airbnb renters stopped paying rent, refused to leave" (19 May 2015), *http://www.nydailynews.com/news/national/calif-homeowner-airbnb-renters-refused-leave-article-1.2227967* [Accessed 13 April 2016].

[52] Will Coldwell, "Airbnb: New Year's Eve disaster stories around the world" (7 January 2016), The Guardian, *http://www.theguardian.com/travel/2016/jan/07/airbnb-new-years-eve-disaster-stories-around-the-world* [Accessed 13 April 2016].

[53] See for photographs of the crowds and wreckage: Mark Chandler, "Party-goers 'trashed' Putney flat rented for New Year's Eve on Airbnb" (4 January 2016), Evening Standard, *http://www.standard.co.uk/news/london/partygoers-held-orgy-at-flat-rented-on-airbnb-for-new-years-eve-a3147556.html* [Accessed 13 April 2016].

damage" where the costs amounted to more than $1,000 (£680).[54] However, given these cases, it is perhaps little wonder that noise nuisance and "destruction of community" complaints about Airbnb are on the increase. But the important question is whether the insurance cover is adequate, whether the vetting is at a reasonable standard, and whether the reaction from Airbnb is proportional, professional, and without a slide into standard apology lines.

Personal injuries

Scale is also important to remember on any fair assessment of personal injury cases in respect of Airbnb. With so many guests it is inevitable that deaths and untoward circumstances might occur, just as in the hotel and tourist industry. However, there is a distinction. The hospitality industry may fight off complaints and defend lawsuits, but long ago abandoned any idea of wholesale immunity. With Airbnb it is astonishing to observe the purported attempt at a "boilerplate" waiver defence of *any* legal liability for any activity, and as we have seen, the woefully inadequate insurance cover, certainly when considering any serious tort claims.

Airbnb bluntly state in their terms and conditions that: "Airbnb is not responsible for and disclaims any and all liability related to any and all listings and accommodation." They indicate this in capital letters. This bold statement then goes on to note that "Accordingly, any bookings will be made or accepted at the member's own risk". While this might be of some persuasive effect in certain jurisdictions, now largely historical and certainly diminishing over time, it would be a risible attempt to avoid liability in many legal systems. On insurance cover Airbnb are proud to proclaim that they are backed by Lloyds of London, but have a stated limit of just $10 million on the policy, which would be easily exhausted with any substantial tort claims, particularly in the US. Nick Papas, a spokesperson for Airbnb indicated in 2015 that "fewer than 50 hosts had filed claims", so these parameters have not been tested as yet. That statement was in respect of one of the few publicised fatality claims, when a family rented a cottage in Texas over the Thanksgiving weekend. A rope swing hanging from a tree seemed "the essence of leisure, of Southern hospitality, of escape", but when used by Louis Stone the trunk broke and landed on his head, causing brain damage and then death. Airbnb sent a "thoughtful" letter of condolence and according to the journalist son of the deceased provided responses that were "dutiful and respectful". But Airbnb were not actually involved in any claim on this case, as the homeowner was covered by insurance and the matter was settled on undisclosed terms. Mr Stone's son, writing about this tragedy, commented that the insurers "lucky for us, did not deny coverage for commercial activity" but that this would "seem to be the exception to the rule".[55] That is indubitably correct, as it is very unlikely that most Airbnb hosts have household insurance to cover what is inevitably a "commercial" activity, particularly as in so many circumstances what they are doing in short-term letting is also illegal.[56]

A second fatality case involving Airbnb was a death from carbon monoxide poisoning resulting from a faulty water heater in Taiwan. The victim, a Canadian woman, was there for a wedding with five friends, all of whom had to be hospitalised but fortunately recovered. Details are somewhat sketchy, as Airbnb settled the case rapidly, by paying $2 million, making a statement eventually to ABC News that they were "shocked and heartbroken". However, according to Zak Stone, the journalist son of the Texas tree case victim, "The apartment was being run as an illegal hostel", which lacked an official authorisation that was required locally, and did not conform to "structural or fire safety standards".[57] The San Francisco attorney

[54] Coldwell, "Airbnb: New Year's Eve disaster stories around the world".

[55] See Zak Stone, "Living and Dying on Airbnb" (8 November 2015), matter, *https://medium.com/matter/living-and-dying-on-airbnb-6bff8d600c04* [Accessed 13 April 2016]

[56] See generally Ron Lieber, "Death in Airbnb rental raises liability questions" (13 November 2015), The New York Times, *www.nytimes.com/... /death-in-airbnb-rental-raises-liability-questions.html* [Accessed 13 April 2016].

[57] Kashmir Hill, "After a woman was poisoned in an Airbnb, the company started giving out prevention devices" (9 November 2015), fusion.net, *http://fusion.net/story/229589/airbnb-death-safety-regulations/* [Accessed 13 April 2016].

William B Smith, in a powerful commentary on this case in an article entitled "Taming the Digital Wild West" notes the rise of companies such as Airbnb and Uber, characterising them as the "self-proclaimed 'cyber-libertarians' who profess to be above the law and have little or no interest in protecting consumers. They are money-making machines."[58]

Such companies have also proved very adept at robust defence tactics, and then when faced with overwhelming liability, pre-empt bad publicity by speedy settlements. In a notorious case in 2013 in San Francisco a driver cruising around looking for a fare on the Uber app ran over and killed Sofia Liu, aged six, on New Year's Eve. At first Uber claimed their driver, Syed Muzaffar, who had been driving for them full-time for a month, had not clinched the fare on his cellphone and so was technically not "employed" by Uber at the moment of impact, or in the alternative he was "self-employed" as an independent contractor for services. Probably because of the overwhelmingly bad publicity Uber then rapidly settled the wrongful death lawsuit for an undisclosed level of damages.[59] In another Uber case, from Delhi although partially heard in California, where a passenger was raped by Shiv Kumar Yadav, it was found that this Uber driver had previous convictions for molestation of women; the defence was similarly one of "self-employment" but also that any relationship was with the Dutch company Uber BV, prompting the victim's attorney Douglas H Wigdor to describe Uber use somewhat tellingly as "modern day electronic hitchhiking".[60] The case was voluntarily withdrawn in California on payment of an undisclosed settlement, and the criminal prosecution in India resulted in a life sentence for the Uber driver.[61] An ancillary development of these cases was that two district attorneys in California filed a civil suit for misrepresentation against Uber over its driver background checks; Uber had claimed these were "industry leading" but were forced to pay $28.5 million to settle the case, and subsequently agreed to rename their "safe rider fee" as just a "booking fee".[62] As the "rider hailing" company is currently valued at more than $60 billion worldwide this payment is unlikely to put much of a dent in Uber's finances.

Of the personal injury cases against Airbnb which have not been swiftly settled with minimal publicity, the matter of a dog bite in Argentina has surfaced, possibly because of the initial intransigence of Airbnb not to pay a modest amount for medical bills. With the intervention of *The New York Times* they subsequently agreed to make payment to Mike Silverman, who had had an encounter with the host's Rottweiler chewing on his arm. This could perhaps have been even worse than a two-day hospitalisation, as Mr Silverman had a metal plate inserted in his arm from an earlier motorcycle accident, and when the dog bit into this solidity it let go. Airbnb in its initial response to a request for payments relating to medical bills and alternative lodgings stated bluntly that "Unfortunately, per our terms of service, we are unable to consider any request for compensation in liability scenario such as this."[63] The journalist from *The Times*, Ron Lieber, has also explored further the insurance and liability hinterland of start-ups in a series of articles; one such "sharing economy" case involved Liz Fong-Jones, an employee at Google and a student at MIT who rented out her car on the app Relay Rides. Her renter in Boston crashed the vehicle head on when he was in the wrong lane; he died and the four occupants of the other vehicle were severely injured. Just as with Airbnb this company provides $1 million liability insurance, and although they sent a cheque to the owner for a replacement vehicle Ms Fong-Jones had been understandably anxious about her potential liability as the vehicle owner, and indeed she was sued, along with the app company. The

[58] Available at *http://www.aswllp.com/content/images/Taming-The-Digital-Wild-West.pdf* [Accessed 13 April 2016]

[59] Joe Fitzgerald Rodriguez, "Uber settles wrongful death lawsuit of Sofia Liu" (14 July 2015), San Francisco Examiner, *http://www.sfexaminer.com/uber-tentatively-settles-wrongful-death-lawsuit-of-sofia-liu/* [Accessed 13 April 2016].

[60] *The Times of India*, "Uber rape survivor files lawsuit in US court against company" (30 January 2015), *http://www.timesnow.tv/Uber-rape-survivor-files-lawsuit-in-US-court-against-company/articleshow/4473298.cms* [Accessed 13 April 2016].

[61] Kaunain Sheriff M, "Uber rape convict will spend rest of his life in jail" (4 November 2015), The Indian Express, *http://indianexpress.com/article/cities/delhi/uber-rape-case-convict-shiv-kumar-yadav-sentenced-to-life-imprisonment/* [Accessed 13 April 2016].

[62] Mike Isaac, "Uber agrees to settle class-action suit over safety claims" (11 February 2016), The New York Times, *http://www.nytimes.com/2016/02/12/technology/uber-settles-class-action-suit-over-safety-background-checks.html* [Accessed 13 April 2016].

[63] Ron Lieber, "Questions about Airbnb's responsibility after attack by dog" (10 April 2015), The New York Times, *http://www.nytimes.com/2015/04/11/your-money/questions-about-airbnbs-responsibility-after-vicious-attack-by-dog.html* [Accessed 13 April 2016].

comment to her from Relay Rides was that they "100% commit to making sure that everyone involved in this tragedy is taken care of as well as humanly possible".[64] The case on wrongful deaths was eventually settled by the company for an undisclosed amount.[65]

It is in this area of fatality and severe disabling injury cases that Airbnb's insurance limit of $10 million looks likely to be inadequate, particularly with multiple deaths in something like a fire. But perhaps a current privacy case may reach that insurance capped limit first. Yvonne Schumacher from Germany booked an Airbnb apartment in Irvine for a Californian Christmas break in 2015. Her partner discovered that they had been secretly filmed and also "bugged" with recording devices. Lawyers on their behalf have indicated how the couple were "deeply humiliated and angry", having never been told of the secret camera and how they had "often walked through the room without clothing".[66] Given that a recent jury decision in Tennessee for the Fox News sportscaster Erin Andrews resulted in a payment of $55 million for secret filming in a hotel, albeit the stalker in that case also posted the resultant nude video on the internet, the *Schumacher* case is likely to result in a sizeable award. Lawyers for the hotel in the *Andrews* case argued that only the stalker was to blame, and he indeed went to prison for two and a half years, but the hotel was also held to be 49 per cent liable. Airbnb will no doubt argue in the *Schumacher* litigation that they were not the active perpetrators, but their repeated refusal to vet hosts adequately looks an uncomfortable fact in determining the outcome.[67]

What is clear is that attempting to "pass the buck" to a host is unlikely to absolve Airbnb of legal responsibilities. While in the past the "loss shifting" principle of vicarious liability may have enabled a "master" to avoid liability for the torts of a "servant" when that tortfeasor is, in the classic phrase in 1834 of Parke B, "going on a frolic of his own", the law in most countries has moved on.[68] There is no doubt that the modern law of vicarious liability is now much more expansive and certainly attuned to the reality of changing circumstances in modern life. Dyson LJ noted in *The Heybridge Hotel* that "A broad approach has to be adopted".[69] The kicking and punching of a waiter there by the hotel manager, after a mild altercation about a Portuguese barbecue, and then the manager threatening the waiter with a knife, seemed wholly out of keeping with the normal routines of hotel management and were certainly not activities which would in any way be "authorised" by the hotel owners. And yet the Court of Appeal held that this untoward behaviour was within the bounds of vicarious liability. Similarly, it has not been a complete defence since 1862 in common law jurisdictions to suggest that the parameters "authorised" will necessarily bind the courts on an interpretation of vicarious liability. In the leading case of *Limpus* in that year, the driver of a horse-drawn carriage was disobeying an express order not to obstruct a competitor; Willes J commented that the law is "not so futile" as to refuse vicarious liability just because the employer had emphatically forbidden the very conduct that constituted the negligence.[70] Similarly, in *Century Insurance*, when prior training, an instruction manual, signage (and common sense) would suggest that a petrol tanker delivery driver should not light up a cigarette and casually throw down a match when making a delivery, the resultant explosion was held by the House of Lords to be an act done "in the course of employment".[71] Given that the Airbnb guidelines to hosts is merely advisory, and not a set of instructions, then *a fortiori* the courts would be likely to reach for the "longer pocket" when considering liability and quantum in

[64] Ron Lieber, "Fatal collision makes car-sharing worries no longer theoretical" (14 April 2012), The New York Times, *http://www.nytimes.com /2012/04/14/your-money/relayrides-accident-raises-questions-on-liabilities-of-car-sharing.html* [Accessed 13 April 2016].

[65] M.P. McQueen, "Beware The Liability Of Sharing Your Car With Strangers" (11 October 2013), investopedia.com, *http://www.investopedia.com /articles/personal-finance/101013/beware-liability-sharing-your-car-strangers.asp* [Accessed 13 April 2016].

[66] Hannah Fry, "Woman sues Airbnb and Irvine couple, saying she was recorded by hidden camera in apartment" (17 December 2015), Los Angeles Times, *http://www.latimes.com/socal/daily-pilot/news/tn-dpt-me-1218-airbnb-lawsuit-20151217-story.html* [Accessed 13 April 2016].

[67] Daniel Victor, "Erin Andrews awarded $55 million in lawsuit over nude video at hotel", The New York Times, *http://www.nytimes.com/2016/03 /08/business/media/erin-andrews-awarded-55-million-in-lawsuit-over-nude-video-at-hotel.html?* (7 March 2016) [Accessed 13 April 2016].

[68] *Joel v Morrison* 6 C. &P. 501 (1834) at 503.

[69] *Cercato-Gouveia v Kyprianou* [2001] EWCA Civ 1887 at [17] ("*The Heybridge Hotel*").

[70] *Limpus v London General Omnibus Co* (1862) 1 H & C 526 at 539. See also on "prohibition" matters, *Canadian Pacific Railway Co v Lockhart* [1942] A.C. 591 PC (Canada); *London CC v Cattermoles (Garages) Ltd* [1953] 1 WLR 97 CA.

[71] *Century Insurance v Northern Ireland Road Transport Board* [1942] A.C. 509 HL (Northern Ireland).

respect of a serious injury, even when caused by a breach of the Airbnb "responsible hosting" guidelines. In the UK the exemption clause contained in the Airbnb "release" would be void under the unfair contract terms regime, and that would be the position in many Commonwealth countries. But even in jurisdictions such as the US where a waiver might be of probative value in certain circumstances, William B Smith in the paper already referred to, "Taming the Digital Wild West", suggests some promising lines of attack: in tort establishing "gross negligence" as in *Santa Barbara v Superior Court* to override the contractual stipulation,[72] or in contract law analysing concepts of ambiguity, breadth and scope, conspicuous, unconscionability, illegality and misrepresentation.[73]

Conclusion

While legal systems vary hugely, and national governments are clearly struggling to catch up with the realities of the "sharing economy", there are certainly signs that the limbo world of unregulated accommodation websites such as Airbnb may be starting to be curtailed. Necessarily this article has concentrated on the Anglo-American framework, but there are signs too elsewhere that an appropriate regulatory framework is slowly forthcoming. For example, in Spain the Catalan regional government in 2014 fined Airbnb the equivalent of £24,000 for illegal lets in Barcelona, the first such case in Europe. Airbnb responded by expressing its disappointment, and suggested that "Barcelona should stay on the cutting edge of innovation".[74] And in Berlin a law passed in July 2014, with a two-year lead in period, aims to conserve the city's housing stock by banning short-term lets without prior authorisation. Single room lets in flats with the owner in residence are likely to gain acceptance, although the position is still uncertain.[75] Although the Airbnb website for Berlin warns against crossing the road on a red pedestrian light it suggests that the city is known for, among other things, "weekend-long parties, electronic music, artist's squats" which might come as an unwelcome surprise to neighbours who might not relish the advertised "partying for days".[76] Currently there are many listed rentals in Berlin, although a serious effort is underway to root out "illegal" hosts.[77]

In addition to the belated enforcement of local housing and planning laws, about which Airbnb has in the past displayed nonchalance, there is also the issue of taxation. Airbnb in July 2014 automatically added 11.5 per cent hotel tax to all reservations in Portland, Oregon, and have now followed on with this in San Francisco and elsewhere.[78] These local taxes invariably support a local inspection regime, so that the issues are intertwined. Such a trajectory may indeed presage Airbnb becoming "legitimate"—and safer—in many countries. Continued negotiations with national and local governments on such issues would certainly be a reasonable response from an organisation that has grown so incredibly fast that attention to the demands of health and wellbeing may have been somewhat overlooked. Given the scale of Airbnb's global operation what is straightforwardly possible to predict is that they will inevitably continue to face legal challenges. It would be wise not only to have the appropriate insurance cover in place, but also to seek out proactively to safeguard against the hazards that experience in the mainstream hospitality and accommodation rental industries suggest are a risk to consumers. To rely on the goodwill of a "community" aspiration and "responsible hosting" is not enough for a global operation of this magnitude.

[72] *City of Santa Barbara v Superior Court* (2007) 41 Cal. 4th 747.

[73] Available at *http://www.aswllp.com/content/images/Taming-The-Digital-Wild-West.pdf* [Accessed 13 April 2016]

[74] Ashifa Kassam, "Airbnb fined €30,000 for illegal tourist lets in Barcelona" (7 July 2014), The Guardian, *https://www.theguardian.com/technology/2014/jul/07/airbnb-fined-illegal-tourist-lets-barcelona-catalonia* [Accessed 13 April 2016].

[75] Jeevan Vasagar, "Berlin housing laws threaten sharing economy by restricting rents" (30 April 2014), Financial Times, *http://www.ft.com/intl/cms/s/0/1e8299a0-d065-11e3-af2b-00144feabdc0.html#axzz45f6qSUOq* [Accessed 13 April 2016].

[76] *https://www.airbnb.co.uk/locations/berlin* [Accessed 13 April 2016]

[77] Berliner Morgenpost, "Berliner Senat fordert von Airbnb Daten von Vermietern" (24 March 2014), *http://www.morgenpost.de/berlin/article207282469/Berliner-Senat-fordert-von-Airbnb-Daten-von-Vermietern.html* [Accessed 13 April 2016].

[78] Will Coldwell, "Airbnb's legal troubles: what are the issues?" (8 July 2014), The Guardian, *http://www.theguardian.com/travel/2014/jul/08/airbnb-legal-troubles-what-are-the-issues* [Accessed 13 April 2016].

The Apologies (Scotland) Act 2016: An Innovative Opportunity in the Twenty-First Century or an Unnecessary Development?

Douglas S.K. Maxwell*

Apologies; Dispute resolution; Personal injury; Scotland

In a rather rare turn of events, a Bill in the Scottish Parliament has received near unanimous cross-party support. The result was that on the 19 January 2016 Holyrood enthusiastically agreed to the passing of the Apologies (Scotland) Act 2016. The Act provides that an apology does not amount to an admission of liability and is inadmissible as evidence in certain legal proceedings. Legislating on apologies is not a new phenomenon as liberal legal systems throughout the English-speaking world have quietly and effectively enacted apologies legislation in an attempt to make the civil justice system more accessible, affordable and effective and to promote the early and effective resolution of disputes by removing the concerns about the legal impact of an apology. These developments had, until the proposal of the Apologies (Scotland) Bill some four years ago, gone largely unnoticed in the UK. This paper aims to ask whether this new Act represents a vital step towards a more understanding and equitable system for dispute resolution in Scotland or if it is, in fact, an unnecessary development that will ultimately harm deserving applicants. This paper will then conclude by asking whether similar legislation should be enacted in England and Wales.

Introduction

The Apologies (Scotland) Act 2016 ("the Act") aims to encourage the use of apologies by providing that an apology is inadmissible in certain civil proceedings as evidence of anything relevant to the determination of liability, and cannot otherwise be used to the prejudice of the person making the apology, or on whose behalf it is made. The Act is intended to encourage a change in social and cultural attitudes towards apologising.[1] The initial proponent of the Act, Margaret Mitchell MSP wrote that:

> "The experience of those who regularly deal with members of the public who have a grievance is that, in the vast majority of cases, what the complainer seeks above all else, is an apology where the bad outcome is acknowledged and an assurance given that the same thing will not happen to anyone else."[2]

The concern was that although Scots may wish to apologise in Scotland there remains a lingering fear that doing so might result in a perceived admission of fault within legal proceedings.[3] The Act is designed to save victims, professionals and all those associated with litigation from these hidden costs and hopefully

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[1] Scottish Parliament, *Apologies (Scotland) Bill Policy Memorandum*, SP Bill 60-PM (Session 2015/04), para.2; Margaret Mitchell, "Apologies (Scotland) Bill A Proposal for a Bill to Provide than an Expression of an Apology Does Not Amount to an Admission of Liability and Is Inadmissible as Evidence, for the Purposes of Certain Legal Proceedings Available" (2012). 1-36. Section 5 provides for the main provisions of the Bill to come into force six months after Royal Assent.

[2] Mitchell, "Apologies (Scotland) Bill A Proposal for a Bill to Provide than an Expression of an Apology Does Not Amount to an Admission of Liability and Is Inadmissible as Evidence, for the Purposes of Certain Legal Proceedings Available", p.2.

[3] Jonathan Cohen, "Advising Clients to Apologise" (1999) 72 S. Cal. Rev. 1009, 1009.

to perpetuate a more understanding and equitable system for resolving disputes. It is important, from the outside, when considering the utility of an apology to stress that is it not always going to be the whole redress and by itself will not necessarily achieve corrective justice. However, the bill may serve as a meaningful part and sometimes whole of the redress shifting the balance and enabling more amicable solutions.[4]

The Apologies (Scotland) Act 2016

The Apologies (Scotland) Act 2016 states that:

> "In any legal proceedings to which this Act applies, an apology made (outside the proceedings) in connection with any matter —
> (a) is not admissible as evidence of anything relevant to the determination of liability in connection with that matter, and
> (b) cannot be used in any other way to the prejudice of the person by or on behalf of whom the apology was made."[5]

The provisions of the Act are to apply to all forms of apology, whether written or oral, formal or informal, whether made by individuals or organisations, and whether made immediately and spontaneously or only after careful deliberation.[6]

The application of the Act is significantly restricted. The Act will apply to all civil proceedings except: inquiries, including joint inquiries, which the Scottish Minister cause to be held under s.1 of the Inquiries Act 2005; proceedings under the Children's Hearings (Scotland) Act 2011; inquiries under the Inquiries into the Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2006; and defamation proceedings.[7] The Act will also not apply to Pt 2 of the Health (Tobacco, Nicotine etc. and Care) (Scotland) Act 2006[8] and crucially all criminal proceedings.[9]

The Bill does not legislate apologies in the sense of commanding them, nor crucially does it transfer the making of an apology into a means of avoiding liability altogether. The statute's raison d'être is to enable apologies by making them inadmissible for the purposes of proving liability or confirming a cause of action but liability can still be proven, and the cause of action confirmed, by all the normal means.[10] The Act has no effect on an apology's relevance or admissibility for the purpose of assessing damages.[11]

From the outset it is important to remember that apologies are not magic potions that work in every case, however, there is considerable evidence that they can be remarkably effective in addressing the key needs of people who have experienced harm.[12] There will be some circumstances where an apology will serve no good purpose, but these will be the exception to the rule.[13] Professor Vines is undoubtedly correct in her assertion that, the best way to think about apology in the civil liability arena is as a form of corrective justice.[14] Professor Vines outlines that the importance of apologies lie in the fact that an "apology forces

[4] Prue Vines, "The Power of Apology: Mercy, Forgiveness or Corrective Justice in the Civil Liability Arena?" (2007) 5 B.C.J.L. & Soc. Jus. 1, 20–22.
[5] The Apologies (Scotland) Bill 2015 [As Passed] cl.1(a) and (b)
[6] Apologies (Scotland) Bill Policy Memorandum, SP Bill 60-PM, (Session 2015/04), para.7.
[7] The Apologies (Scotland) Bill 2015 [As Passed] cl.2(1)(za), (zb)(a) and (b)
[8] The Apologies (Scotland) Bill 2015 [As Passed] cl.2(1A)
[9] The Apologies (Scotland) Bill 2015 [As Passed] cl.2(2)
[10] Mitchell, "Apologies (Scotland) Bill A Proposal for a Bill to Provide than an Expression of an Apology Does Not Amount to an Admission of Liability and Is Inadmissible as Evidence, for the Purposes of Certain Legal Proceedings Available".
[11] See implementation of Apology Act in British Columbia and inter alia: C. Kleedeld, "Thinking like a Human: British Columbia's Apology Act" (2007) 40(2) U.B.C.L Rev. 769.
[12] New South Wales Ombudsman, *Apologies—a Practical Guide*, 2nd edn (2009), p.ii.
[13] New South Wales Ombudsman, *Apologies—a Practical Guide*, p.ii.
[14] Prue Vines, "Apologising to Avoid Liability: Cynical Civility or Practical Morality?" (2005) 27 Syd. Law Rev. 483.

the apologiser into a humbling position which rebalances the relationship by rebuilding the victim's self-esteem and social status".[15]

Background

The recent development of apology-protecting legislation suggests that legislators see an important role for apologies in the civil liability arena.[16] The first recognised apologies legislation was enacted in the US State of Massachusetts in 1986.[17] It emerged from a tragic series of events in 1974 when a young girl named Claire Saltonstall was hit and killed by a car while riding her bicycle near her family home. The driver who struck her never apologised. Her father, William Saltonstall, a State Senator, was angry that the driver had not expressed contrition. He was told that the driver dared not risk apologising because it could have constituted an admission in the litigation surrounding the girl's death. Upon his retirement, the Senator and his successor presented the legislature with a bill designed to create a "safe harbour" for would-be apologisers.[18] This was the first tentative step, which has since resulted in over 35 US states and many nations around the world including Australia, Canada and New Zealand quietly and successfully implementing innovative and effective apologies legislation. As legislators and the judiciary have come to believe that in many legal proceedings "an apology is frequently worth more to an applicant than money".[19]

Apologies

Apologising when one has injured another is a basic moral act, yet it is very much outside the traditional adversarial legal framework.[20] What the Act proposes to do is to make litigation the last and not the first step for claimants offering redress and avoiding claiming a judicial remedy when it is not necessary. For example, a Study of Medical Negligence Claims in 2012 found that the pursuers felt that the NHS would never admit what had really happened and that their complaint would not be listened to, and so making a legal claim was inevitable.[21]

While the Act proposes to protect apologies within certain legal proceedings this is not the same as encouraging them. Genuine apologies are never easy to make.[22] Recent empirical research has found that apologies can be a valuable tool in fostering dispute resolution.[23] The problem remains that an individual who wants to apologise but fears being sued may refrain from apologising and the absence of an apology is precisely what triggers the suit.'[24] The protection for apologies has three elements:

1) a declaratory element—it is not an admission of fault;
2) a relevance element—it can't be taken into account in determining fault; and
3) a procedural element—it is not admissible as evidence of fault.[25]

The Act aims to reduce litigation and the adverse consequences that flow from it. Litigation is a costly affair "the present system means there is too great a drain on public resources largely for the benefit of

[15] Vines, "Apologising to Avoid Liability: Cynical Civility or Practical Morality?" (2005) 27 Syd. Law Rev. 483, 14
[16] Vines, "Apologising to Avoid Liability: Cynical Civility or Practical Morality?" (2005) 27 Syd. Law Rev. 483, 7.
[17] See; Massachusetts General Law Tit.II Ch.233 s.23D: "Statements, writing or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering or death of a person involved in an accident and made to such person or to the family of such person shall be inadmissible as evidence of an admission of liability in a civil action."
[18] Lee Taft, "Apology Subverted: The Commodification of Apology" (2002) 100 Yale L.J. 1135, 1151.
[19] *Cooke v Plauen Holdings Pty Ltd* [2001] FMCA 91.
[20] Jonathan Cohen, "Legislating Apology: The Pros and Cons" (2002) 70 U. Cin. L. Rev. 872.
[21] Scottish Parliament, "A Study of Medical Negligence Claims in Scotland" (2012), para.3.46.
[22] Nancy Berlinger, *After Harm, Error and Ethics of Forgiveness* (Baltimore: John Hopkins University Press 2000), p.62.
[23] Vines, "Apologising to Avoid Liability: Cynical Civility or Practical Morality?" (2005) 27 Syd. Law Rev. 483.
[24] Cohen, "Advising Clients to Apologise" (1999) 72 S. Cal. Rev. 1009, 1011 .
[25] John Kleefeld, "Thinking Like a Human: British Columbia's Apology Act" (2007) 40 U.B.C.L. Rev. 798, 799.

claimant solicitors".[26] The rise is predominately blamed on the surge in cases brought by no-win, no-fee lawyers, and the actions of aggressive "claims farmers" who encourage patients to sue for negligence through advertisements on TV, via text message and even in hospitals.[27]

The cost of litigation can never be measured solely in financial terms. These "hidden" costs include the mental and physical strains long drawn-out disputes can cause the very person who seeks redress. For claimants, who are often at their most vulnerable, the stress of litigation itself can lead to the onset of psychiatric and physical symptoms unrelated to any underlying physical cause.[28] In a recent study conducted at Manchester University one midwife described the stressful experience of appearing in court as "the most traumatic event in my life to date, I would equate it, to worse than the death of my mum … I am wearing a wig today because my hair started falling out as a result".[29]

Settling disputes amicably is at the very heart of the Scottish psyche, which has traditionally seen compensation culture and vexatious litigation as imported from the US and fundamentally un-Scottish. As Professor Gill writes:

> "It is not only the victim who has an interest in whether or not an offender apologizes. The general public has an interest as well. A person who is incapable of … empathizing with the pain of others, is a danger to society. Being able to apologize, even if the apology is not especially heartfelt, at least, indicates that the offender has some of the basic moral capacities necessary for social life."[30]

The harmful effects of litigation on both patients and clinicians have prompted calls for reform[31] but to date suggestions for a no-fault scheme have been rejected and the Government has failed to implement a redress scheme, providing an alternative to litigation for low value claims.

Clarifying existing law

There is an extremely strong argument to be made that the Act is simply clarifying the existing position within Scots law,[32] as whether or not an extra-judicial admission of fault is binding is normally a matter of intent.[33] As Walker and Walker noted in *The Law of Evidence in Scotland*:

> "An extrajudicial admission, when proved, does not preclude the party making it from stating a case which contradicts it. Its probative effect depends upon its terms and its importance in relation to the facts in issue in the cause, and to some extent on whether the cause is civil or criminal. In a civil cause the party who made the admission is entitled to establish that it was made for some secondary reason and was not true, and the whole circumstances in which it was made are relevant to qualify or explain its terms … It is thought that an admission shown to have been made under a mistaken view of the facts may be of little importance if the true facts are established."[34]

This was cited with approval by Lord Kincraig in *Liquid Gas Tankers* when he asserted that

> "such an admission is merely part, albeit an important part, of the proof of negligence against the defenders in a case which is based on negligence, but cannot per se found a claim for damages".[35]

[26] BBC, "Damages claims 'hitting' NHS case" (30 June 2009), *http://news.bbc.co.uk/1/hi/health/8124172.stm* [Accessed 13 April 2016].
[27] Daily Telegraph, "NHS forced to boost NHS negligence fund" (12 January 2012), *http://www.telegraph.co.uk/health/9008873/NHS-forced-to-boost-NHS-negligence-fund.html* [Accessed 13 April 2016].
[28] Ryan Hall, "Compensation Neurosis: A Too Quickly Forgotten Concept?" (2012) 40 J. Am. Acad. Psychiatry Law 390, 392.
[29] Judith Robertson, "A Phenomenological Study of the Effect of Clinical Negligence Litigation on Midwives in England: The Personal Perspective" (2014) 30 Midwifery 121, 126.
[30] Kathleen Gill, *The Moral Functions of an Apology* (London: Blackwell Publishers, 2000), p.16.
[31] Ian Kennedy, *Learning from Bristol: The Report of the Public Inquiry into Children's Heart Surgery at the Bristol Royal Infirmary 1984–1995* (2001).
[32] Prue Vines, "Apologies and Civil Liability in the UK: A View from Elsewhere" (2008) 12 Edin. L.R. 200.
[33] *Van Klaveren v Servisair (UK) Ltd* [2009] CSIH 37; 2009 S.L.T. 576.
[34] Alan Walker and Norman Walker, *The Law of Evidence in Scotland* (Edinburgh: William Hodge, 1964), pp.28–29.
[35] *Liquid Gas Tankers Ltd v Forth Ports Authority* 1974 S.L.T. (Notes) 35

In *Muir*[36] an admission that the defender should have acted differently was not held admissible in determining negligence. It remains the truism within Scots law that "negligence" is always a determination for the court to make. In *Muir*, the defender's employee, when in the witness box, had expressed regret at what had happened. Lord Thankerton said:[37]

> "The Court must be careful to place itself in the position of the person charged with the duty and to consider what he or she should have reasonably anticipated as a natural and probable consequence of neglect, and not give undue weight to the fact that a distressing accident has happened or that witnesses in the witness box are prone to express regret, ex post facto, that they did not take some step, which it is now realized would definitely have prevented the accident. In my opinion, the learned judges of the majority have made far too much of that which Lord Moncrieff regarded as an admission by Mrs. Alexander. It is not an admission in the sense that it can bind the appellants though it may be of some evidential value as to what the ordinary person would regard as a reasonable standard of care."

Lord Macmillan agreed that the expression of regret could not be a binding admission. He distinguished between an apology, which was an expression of regret, and an admission that could be binding on the appellant. The Act, therefore, has the potential to clarify the law and dispel the concerns of those who would not otherwise apologise.

In clarifying this position, the Act may remove the unfounded fear of litigation that has previously prevented apologies.[38] The evidence appears to show that medical practitioners tend to overemphasise their risk of being sued and that there is a strong level of concern about disclosing error.[39] For example, s.2 of the Compensation Act 2006 states that "an apology, an offer of treatment or another redress, shall not of itself amount to an admission of negligence or breach of statutory duty".[40] While this particular section only applies to England and Wales[41] the accompanying explanatory notes assert that s.2 was simply a reflection of existing law. On further reading Scots law clearly followed that of England and Wales. Under existing Scots law an apology in itself will not amount to an admission of liability, particularly in relation to negligence, as liability is a legal conclusion which courts will always have to draw themselves.[42]

What constitutes an apology

When initially proposed an inclusive definition that would constitute a "full apology." including elements of the five "R"s: recognition, responsibility, reason, regret and redress.[43] In considering the "five Rs" the Act aimed to define an apology on broadly similar grounds to that currently used in s.68 of the New South Wales Civil Liability Act 2002, which defines an apology as an expression of sympathy or regret, or of benevolence or compassion, in connection with any matter whether or not the apology admits or implies an admission of fault in connection with the matter.[44]

[36] *Glasgow Corp v Muir* [1943] A.C. 448 HL boiling water was spilled and scalded several children, on whose behalf an action was brought against the owners of the premises—"It is not an admission in the sense that it can bind the appellants, though it may be of some evidential value to what the ordinary person would regard as a reasonable standard of care".

[37] *Glasgow Corp v Muir* [1943] A.C. 448.

[38] Dorothy Armstrong, "The Power of Apology: How Saying Sorry Can Leave Both Patients and Nurses Feeling Better" (2009) 105 Nursing Times 16, 17 states: "There is a strong sense in the nursing community that apologising is, in itself, admitting liability and therefore should not be done. However, there is strong evidence that apology is not linked to higher rates of legal action."

[39] Christine Foster, "Defensive Medicine in General Practice: Recent Trends and the Impact of the Civil Liability Act 2002" (2009) 17 Am. J.L & Med. 235, 247

[40] Compensation Act 2006 s.2

[41] Compensation Act 2006 s.17.

[42] Vines, "Apologies and Civil Liability in the UK: A View from Elsewhere" (2008) 12 Edin L.R. 200.

[43] Mitchell, "Apologies (Scotland) Bill A Proposal for a Bill to Provide than an Expression of an Apology Does Not Amount to an Admission of Liability and Is Inadmissible as Evidence, for the Purposes of Certain Legal Proceedings Available".

[44] New South Wales Civil Liability Act 2002 s.68

The definition aims to draw upon the considerable existing guidance given by NHS Scotland[45] (who assert that an apology must include regret, reason and remedy),[47] the General Medical Council,[46] the Scottish Public Services Ombudsman[47] and many more public and private organisations. The bill also builds on the principles laid down in the seminal work of Nicholas Tavuchis *Mea Culpa*, which remains the most detailed sociological work on apologies. Tavuchis viewed apologies as part of a sequence: "event, call, apology, forgiveness, reconciliation".[48]

The New South Wales Ombudsman in 2009 stated that "an apology is the supreme glue in life. It can repair just about anything".[49] They are indeed a fundamental aspect of social interaction, which is instilled into us from a young age.[50] The hallmarks of an apology are the words, "I'm sorry".[51] Saying sorry sounds easy enough, but what actually constitutes an apology is slightly more complex,[52] as the way in which an apology is given can enact a multitude of different responses. Put succinctly, *not all apologies are created equal*, therefore, it must be asked why some apologies succeed in reconciling differences and some are ignored or rejected.

There is a dearth of academic literature dedicated to defining an apology and analysing its psychological and social utility. While this work may be notably abstract to those without a background in human psychology or sociology this should not dissuade us from its utility in defining an apology. The critical point is that the psychological theory demonstrates the views of the victim giving us an important insight into how apologies are received.[53]

Apologies can be divided into two rough categories. "Partial apologies", for example "I am sorry you were hurt" and "full apologies", for example "I am sorry you were hurt as a result of me not paying attention to the road while driving". As you can see a full apology is more than expressions of regret or sorrow but involved an acknowledgement of wrongdoing and acceptance of blame whereas a partial apology simply expresses general regret. The vast majority of academic literature highlights the importance of giving full apologies.[54] Professor Vines warns that an apology, which merely offers an expression of regret, may possibly have the opposite effect to that intended.[55] The psychological evidence suggests that the effect of a partial apology is a situation in particular relation to serious injury can aggravate rather than ameliorate the propensity to sue.[56] Similarly, Lee Taft argues that "for an apology to be authentic … there must be an unequivocal expression of wrongdoing".[57]

Claimants are sensitive to the difference in content conveyed by apologies that accept responsibility for having caused harm and statements that only express sympathy for injuries.[58] Cohen suggests that an apology has three elements: admitting fault, expressing regret for the action and expressing sympathy. He also emphasises the importance of sincerity and voluntariness:[59]

[45] The Scottish Government, "No fault compensation", *http://www.scotland.gov.uk/Topics/Health/Policy/No-Fault-Compensation* [Accessed 13 April 2016].

[46] The General Medical Council, "Good Medical Practice Guidance", *http://www.gmc-uk.org/guidance/good_medical_practice.asp* [Accessed 13 April 2016].

[47] Scottish Public Services Ombudsman, "Local Authorities Model Complaints", *http://www.spso.org.uk/sites/spso/files/communications_material/annual_report/Complaints-reports/SPSO%20local%20government%20complaints%20report%202012-13.pdf* [Accessed 13 April 2016].

[48] Nicholas Tavuchis, *Mea Culpa: A Sociology of Apology and Reconciliation* (Redwood City: Stanford University Press 1991), p.39.

[49] New South Wales Ombudsman "Apologies a Practical Guide", 2nd edn (2009).

[50] Prue Vines, "The Apology in Civil Liability: Underused and Undervalued?" (2013) 34 U.N.S.W. Law Research Paper 2013-34, 1.4.

[51] Cohen, "Advising Clients to Apologise" (1999) 72 S. Cal. Rev. 1009, 1014.

[52] See, Tavuchis, *Mea Culpa: A Sociology of Apology and Reconciliation* (1991).

[53] Vines, "The Apology in Civil Liability: Underused and Undervalued?" (2013) 34 U.N.S.W. Law Research Paper 2013-34, 4.

[54] Gerald Hickson, "Patients Complaints and Malpractice Risk" (2002) 287 J.A.M.A. 2951.

[55] Vines, "The Apology in Civil Liability: Underused and Undervalued?" (2013) 34 U.N.S.W. Law Research Paper 2013-34, 4.

[56] Jennifer Robbenolt, "Attorneys, Apologies, and Settlement Negotiation" (2008) 13 Harv. Negot. L. Rev. 349.

[57] Taft, "Apology Subverted: The Commodification of Apology" (2002) 100 Yale L.J. 1135, 1154.

[58] Robbenolt, "Attorneys, Apologies, and Settlement Negotiation", Jennifer Robbenolt, "Apologies and Legal Settlement: An Empirical Examination" (2003) 102 Mich. L. Rev. 460.

[59] Cohen, "Advising Clients to Apologise" (1999) 72 S. Cal. Rev. 1009, 1014–1015.

> "An effective apology must usually include an express acceptance of responsibility or fault for the actions or inactions that caused the harm — that is, a full apology. Even if a full apology may not be justified or warranted, a sincere expression of sympathy, sorrow or regret for the suffering of others may still be the right thing to do."[60]

The Act cannot legislate on how apologies are given or indeed even claim to predict how individuals will react to apologies. However, the considerable evidence noted above does perhaps show how the Act should be understood and its potential ability to help resolve certain disputes outside of the adversarial system.

The Potential Benefits of the Apologies (Scotland) Act Reduction in Litigation

The reality of litigation is that it is time-consuming, expensive, and stressful and has inherent risks associated with it. When outlining the advantages of a significant reduction in litigation, it is vital to remember that the Act does not transfer the making of an apology into a means of avoiding liability. Liability can still be proven and the cause of action confirmed by all the normal means justifiable; claimants will not be inhibited in any form by the Act nor will their access to justice.[61] Detailed studies have shown that compensation is not reduced, nor are the clear judgments of those proceeding over cases influenced due to apologies being given.[62]

The cost of litigation has reached preposterous levels. Pemberton reported in 2012 that the NHS throughout the UK had set aside £15.7 billion to cover compensation, representing an incredible seventh of the annual NHS budget.[63] He wrote that:

> "It's a painfully difficult situation. I'd never begrudge a patient compensation when they have received poor care that has led to problems with their health. Why should they face financial ruin because of someone else's incompetence or mistakes? My concern, however, is that because of the proliferation of legal firms that actively encourage people to seek compensation, cases are brought that otherwise would never have been pursued. This, combined with a culture of entitlement and a fragile sensibility whereby any inconvenience or perceived injustice warrants financial compensation, has led to increasing numbers seeking legal redress."

The increase in compensation payments made by NHS Scotland through the Clinical Negligence and Other Risks Indemnity Scheme is staggering. Payments have risen from £1.6 million in 2000/2001 to £58.24 million in 2010/2011. This represents an increase of 3,640 per cent in just 10 years. However, these figures only represent the tip of the iceberg as the cost of out of court settlements, lawyers' fees, negotiations, lost time, insurance and all the other ancillary costs will tower over these figures and undoubtedly represent a major hidden drain on NHS funding.

The real beneficiaries of this rise have been the legal profession. Over the past five years, 5,500 claims have had legal bills bigger than the victim's pay-out. On average lawyers received £36,000 per case last

[60] New South Wales Ombudsman, "Apologies: A Practical Guide" (16 March 2009), *https://www.ombo.nsw.gov.au/news-and-publications/publications/guidelines/state-and-local-government/apologies-2nd-ed* [Accessed 14 April 2016], p.ii.

[61] Hazel Genn, "Who claims compensation?" in Harris, *Compensation and Support for Illness and Injury* (Oxford: Oxford University Press, 1984) noted then that 75 per cent of injured people "never considered the question of damages at all, and of the quarter who did, only about half actually sought legal advice about claiming, Only 45 percent of those who considered the question of claiming damages ultimately obtained any damages, and of those who did seek legal advice".

[62] Hazel Genn, "who claims compensation?" in Harris, *Compensation and Support for Illness and Injury* (Oxford: Oxford University Press, 1984).

[63] Max Pemberton, "Could the HHS save itself millions just by saying sorry?" (7 May 2012), The Telegraph, *http://www.telegraph.co.uk/health/9246406/Could-the-NHS-save-itself-millions-just-by-saying-sorry.html* [Accessed 14 April 2016].

year whereas victims received £15,000.[64] In one case, a law firm received 58 times as much as the victim.[65] In a case the following year, the victim received £5,000 and the law firm representing them was paid £101,082. The cost has risen exponentially to the level that the Scottish Governments' Social Research unit has concluded that the cost of settling claims with an award below £20,000 now, on average, exceeds the value of the award.[66]

Litigation does not, however, simply have monetary costs. As stated above the "hidden costs" of litigation are often in themselves far greater than anything quantifiable in financial terms. While often controversial, a theory of "compensation neurosis" has emerged from the many studies undertaken on the consequences of litigation to plaintiffs.[67] Just as it is true that not everyone who is exposed to a death or trauma will have these conditions, not everyone involved in a compensation claim will have compensation neurosis.[68]

Compensation neurosis purports that the prolonged adversarial process and frequent medical and legal evaluations inhibit recovery, exacerbate problems and can bring on mental illnesses such as depression and post-traumatic stress disorder.[69] The study underlines how the multiple recounting of one's medical story, with conscious or subconscious cues constantly being delivered by the people around him such as lawyers, family, co-workers, and experts exacerbates and prolongs injuries.[70]

Litigation is not simply mentally and socially exacting for plaintiffs. Medical professionals find the experience of being sued to be very stressful. They experience a sense of betrayal and anger and do not understand why a patient that they have tried to help has turned against them. To be accused of making a serious mistake leads to a sense of humiliation and medical professionals are fearful of recrimination.

For example, a landmark study by Symon reported doctors involvement in litigation resulted in extreme stress, depression, anger, insomnia and infrequently alcohol abuse, physical illness such as gastro-intestinal symptoms and suicidal inclinations with some citing litigation as their most stressful life experience.[71] When interfering with the adversarial and contentious paradigm of delict law, midwives can abreact and suffer emotional, physical and psychological harm.[72] Comments made on the survey revealed these midwives felt demoralised, stressed, isolated with a general lack of support, particularly from midwifery managers "quick to point the finger of blame".[73]

Participants attributed health problems to experiencing litigation. Health problems included clinical depression, increased alcohol consumption, suspected heart attack and hair loss and stomach ulcers. Many participants experienced insomnia.[74] It has been estimated that 38 per cent of doctors suffer clinical depression as a result of allegations of negligence.[75]

The increasing cost of litigation combined with its high social cost means that it should only be used as a last resort and not the first port of call.

[64] Juliet Rix, "Price of suing the NHS too high" (29 March 2011), The Guardian, *http://www.theguardian.com/society/2011/mar/29/cost-suing-nhs-too-high* [Accessed 14 April 2016]; J. Laurance, "Scandal of Lawyers NHS payout bills" (18 December 2009), Independent, *http://www.independent.co.uk/life-style/health-and-families/health-news/scandal-of-lawyers-nhs-payout-bills-1844258.html* [Accessed 14 April 2016].

[65] J. Ungoed-Thomas, "Firm charge NHS £80,000 legal fees for £1,000 payout" (6 April 2014), *http://www.thesundaytimes.co.uk/sto/news/uk_news/Health/article1396891.ece*, [Accessed 14 April 2016].

[66] Scottish Government Social Research, *A Study of Medical Negligence Claims in Scotland* (2012), para.1.12.

[67] See inter alia: Ray Bellamy, "Compensation Neurosis: Financial Reward for Illness as Nocebo" (1997) 339 Clin. Orthop. Relat. Res. 94; Ryan Hall, "Definition, Diagnosis, and Forensic Implications of Postconcussional Syndrome" (2005) 46 *Psychosomatics* 195; Herbert Modlin, "Compensation Neurosis" (1986) 14 Bull. Am. Acad. Psychiatry Law 263; Hall, "Compensation Neurosis: A Too Quickly Forgotten Concept?" (2012) 40 J. Am. Acad. Psychiatry Law 390.

[68] Hall, "Compensation Neurosis: A Too Quickly Forgotten Concept?" (2012) 40 J. Am. Acad. Psychiatry Law 390, 398

[69] Robert Cohen and Jeremy Pfeffer, "The Pitfalls of Making a Categorical Diagnosis of Post Traumatic Stress Disorder in Personal Injury Litigation" (1994) 34 Med. Sci. Law 117.

[70] Amihay Levy, "Compensation Neurosis Rides Again" (1992) 6 Brain Inj. 401, 401–410.

[71] Andrew Symon, *Litigation: The Views of Midwives and Obstetricians* (Altrincham: Hochland & Hochland Ltd, 1998).

[72] Robertson, "A Phenomenological Study of the Effect of Clinical Negligence Litigation on Midwives in England: The Personal Perspective" (2014) 30 Midwifery 121.

[73] Symon, *Litigation: The Views of Midwives and Obstetricians* (1998), p.22.

[74] Robertson, "A Phenomenological Study of the Effect of Clinical Negligence Litigation on Midwives in England: The Personal Perspective" (2014) 30 Midwifery 121, 126.

[75] Sir Liam Donaldson, Chief Medical Officer, *Making Amends: A Consultation Paper Setting Out Proposals for Reforming the Approach to Clinical Negligence in the NHS* (Department of Health, 2003), Cm.6502.

The Act aims to clarify existing Scots law introducing a system that has shown to significantly reduce litigation and the terrible costs it can enact where it has been effectively implemented throughout the developed world.

Significant empirical research and real life case studies have explored the influence of apologies on litigant decision-making.[76] Participants who received apologies judged an offer as being more adequate, felt less need to punish the other party and were more willing to forgive than were participants who did not receive apologies. Full responsibility accepting apologies increased the tendency of recipients to accept a particular settlement offer.[77] Studies, which gave subjects hypothetical situations, reported that apologies clearly reduced the subjects' likelihood to litigate.[78] In Charles Vincent's study of "Why Patients Sue Doctors." Finding suggested that 37 per cent of British families would not have pursued litigation if offered a prompt apology combined with full disclosure.[79] Furthermore, the apology was given more weight in the decision over whether or not to litigate for monetary compensation.[80]

The impact of apologies has resulted in multiple studies designed to analyse its ultimate utility.[81] The two most cited studies: The University of Michigan Health System and Veterans Affairs Medical Centre in Kentucky[82] as well as other studies within John's Hopkins, Children's Healthcare of Atlanta and Sturdy Memorial Hospital in Boston, give us clear evidence of the benefits of apologies. These studies found that programs that encourage effective apologies and disclosure of mistakes can dramatically reduce malpractice payments. Most notably, a study performed at the University of Michigan Health Service reported that per case payments decreased by 47 per cent and the settlement time dropped from 20 months to six months since the introduction of their 2001 apology and disclosure program.[83] Cornell University and the University of Houston analysed healthcare facilities in those states that have adopted apology laws and found that statements of regret facilitated faster settlement times and a decrease in malpractice claims.[84]

Jesson and Knapp, both advocates of apology and disclosure, argue that the legislation goes further than an economic argument. They see apologies "not simply as a risk management tool, but as a way to improve the physicians-patient relationship and in doing so achieve better patient outcomes."[85]

Criticisms of the Apologies (Scotland) Act

Despite this, many, most notably personal injury lawyers will still look upon the Act with cynicism. Moving away from a culture that measures loss in a purely monetary form is not going to happen overnight. However, there are a number of concerns relating to the Act that must be stressed.

First, as was highlighted by the Faculty of Advocates, it remains that "there was little evidence of apologies currently having an impact on the outcome of Scots civil litigation". Within all the relevant literature to Scotland, there appears to be very little evidence to suggest that the apology had played any significant part in that decision.[86] The evidence that has been cited emanates from legal systems vastly

[76] Robbenolt, "Attorneys, Apologies, and Settlement Negotiation" (2008) 13 *Harvard Negotiation Law Review* 349.
[77] Robbenolt, "Apologies and Legal Settlement: An Empirical Examination" (2003) 102 Mich. L. Rev. 460.
[78] Robbenolt, "Apologies and Legal Settlement: An Empirical Examination" (2003) 102 Mich. L. Rev. 460.
[79] Charles Vincent, "Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action" (1994) 343 Lancet 1609.
[80] Cohen, "Legislating Apology: The Pros and Cons" (2002) 70 U. Cin. L. Rev. 872: "It is impossible to know with perfect certainty that fraction of patients would not have sued if they have received an apology. Some scepticism is warranted. When a patient says that he would not have sued if he had received an apology, you can never know for sure what he would have done if he had. But surely some patients can be taken by their word… I can't say for sure whether the percentage of patients who would have forgone suit if they had received an apology 5%, 15%, 25% or perhaps even 35%. But if the percentage is even half of what these studies suggest, it is a sizable percentage."
[81] Carol Liebman and Chris Hyman, "A Mediation Skills Model to Manage Disclosure of Errors and Adverse Events to Patients" (2004) 23 Health Aff. (Millwood) 22.
[82] Jonathan Cohen, "Apology and Organizations: Exploring an Example from Medical Malpractice" (2007) 27 Fordham Urb. L.J. 447, 447.
[83] Richard Boothman and others, "A Better Approach to Medical Malpractice Claims?" (2009) 2 J. Health Life Sci. Law 125.
[84] Benjamin Ho and Elaine Liu, "Does Sorry Work? The Impact of Apology Laws on Medical Malpractice" (2001) 43 J. Risk Uncertainty 141.
[85] Peter Knapp, "My Lawyer Told Me to Say I'm Sorry: Lawyers, Doctors, and Medical Apologies" (2009) 35 Wm. Mitchell L. Rev. 1410.
[86] Faculty of Advocates, *Response by Faculty of Advocates to Scottish Parliament's Justice Committee on Apologies (Scotland) Bill*, para.2.

different to Scotland and tends to focus on a handful of examples, notably the Michigan example, which perhaps should not be taken as conclusive evidence.

The related documents and the drafting process appear to have been focused primarily on personal injury and medical negligence claims. This was highlighted by the Faculty of Advocates who raised concerns that there was no evidence on the potential impact of the Bill on other areas, e.g. family law, the law of contract, debt actions, commercial litigation, administrative law, etc.[87]

Concerns have been raised as many insurance contracts contain a clause, which makes policies void if an admission is made.[88] While it has been noted above that an apology does not necessarily constitute an admission under Scots law this does not remove the uncertainty. Vines purports that this makes it vital to make clear that an apology is not an admission in order to avoid the unnecessary voiding of insurance contracts.[89] Vines outlines that clarity can only be achieved when an apology is defined to include an acknowledgement of fault.[90]

Insurance is not a devolved power because of this concerns were raised during the consultation period in regard to the Apologies (Scotland) Bill's effect on existing insurance contract as well as the legislative competence of the Scottish Government. The Scotland Act 1998 sets outs the legislative competence of the Scottish Government with insurance being outlined as reserved under s.A3 of Sch.5. It is, therefore, true that under s.29(4)(a) of the 1998 Act that a provision protecting an apology including a statement of fault from being admitted as evidence of liability or being taken to a conclusion of legal fault "would not otherwise relate to reserved matters". The Act there simply modifies Scots private law, which would then be taken into account by insurance companies when drafting insurance contracts. It does therefore not apply to reserved matters directly as a matter of law as it does not "relate" to insurance matters. The Bill will not invalidate insurance contracts, therefore having no effect on the insurance industry or its contracts of insurance.

It is accepted that a number of the international legislation cited does contain specific insurance provisions.[91] However despite such concerns research has failed to reveal a single case in either Canada or the US that involves the voiding of an insurance contract stemming from the insured being offered an apology. In Scotland court may be unwilling to void contracts in part because of the affect such decision would have on public policy. The purpose of insurance is to repay damages when adverse events occur, not to be the subject of moral judgment.[92]

Conclusion

It is quite clear that apologies are no panacea; ultimately it has to be conceded that "while legislation can address the legal consequences of apologies it cannot compel their mirror image, forgiveness".[93] Indeed as Goldberg, Green, and Sander write:

> "at times, an apology alone is insufficient to resolve a dispute, but will so reduce tension and ease the relationship between the parties that the issues separating them are resolved with dispatch."[94]

[87] Faculty of Advocates, *Response by Faculty of Advocates to Scottish Parliament's Justice Committee on Apologies (Scotland) Bill*, para.16.
[88] Vines, "The Apology in Civil Liability: Underused and Undervalued?" (2013) 34 U.N.S.W. Law Research Paper 2013-34.
[89] Vines, "The Apology in Civil Liability: Underused and Undervalued?" (2013) 34 U.N.S.W. Law Research Paper 2013-34, 6
[90] Vines, "The Apology in Civil Liability: Underused and Undervalued?" (2013) 34 U.N.S.W. Law Research Paper 2013-34, 6
[91] See inter alia the Canadian and Australian examples: Apology Act 2009 (S.O. 2009), c.3 - Bill 108 cl.2(1)(a),"does not despite any wording to the contrary in any contract of insurance or indemnity and despite any other Act or law, void, impair or otherwise affect any insurance or indemnity coverage for any person in connection with that matter"; Saskatchewan Evidence Act 2006 s.23.1(2)(c),"not withstanding any wording to the contrary in any contract of insurance and not withstanding any other act or low, does not void, impair or otherwise affect any insurance coverage that is available to the person or would be available to the person in connection with that event or occurrence but for the apology"; Australian Insurance Contracts Act 1984 s.54(3), "Where the inured proves that no part of the loss that gave rise to the claim was caused by the act, the insurer may not refuse to pay the claim by reason only of the act."
[92] Cohen, "Advising Clients to Apologise" (1999) 72 S. Cal. Rev. 1009, 1125
[93] Charlie Irvine, 'The Proposed Apologies Act for Scotland: Good Intentions With Unforeseeable Consequences' (2013) 17 Edin. L.R. 84, 85
[94] Stephen Goldberg, "Saying You're Sorry" (1987) 3 Negotiation J. 221, 221

The Act will require practical guidance notes to allow for its effective implementation. Issues such as the final definition of an apology, timing,[95] publicity and training will be a key part of the Apologies Bill's effective implementation. As Vines notes that after 10 years the legislation is still relatively unknown and relatively unused in Australia,[96] a position that Scotland will hope to avoid.

The intention of the Act should be commended but serious concerns remain about its ability to make any difference to claimants and whether it will have any real effect on the number of cases brought in Scotland. The Act suffers from its inherently abstract nature and the limited number of detailed studies undertaken in Scotland and internationally on whether apologies can actually be an effective vehicle for resolving disputes. Taken as a whole, it remains unlikely that the Act will bring any real benefit to Scotland.

This leaves one final question. On the passing of the Bill in January 2016 Margaret Mitchell stated that Scotland is now "leading the way in the United Kingdom on this issue".[97] However, caution must be exercised. Perhaps it would be wise for England and Wales to wait and see the actual results in Scotland before rushing into their own Apologies Act.

[95] In Margaret Mitchell, *Scottish Parliament Official Report* (Justice Committee, 19 January 2016), c.12, Margaret Mitchell stated that, "I very much hope that the Scottish Government will take on board the need for guidance on implementation of the legislation and the importance of training for front-line staff in public and private organisations in particular, and that that can be taken forward as part of its preparation for commencement of the legislation." Ameeta Patel, "Companies Can Apolgize: Corporate Apologies and Legal Liability" (2003) 66 Bus. Comm. Q. 9, 22, states that the timing of an apology is also crucial to its success and acceptance; the nearer the apology is to the event in question, the more likely that the apology will be regarded as sincere and result in positive consequences.

[96] Vines, "The Apology in Civil Liability: Underused and Undervalued?" (2013) 34 U.N.S.W. Law Research Paper 2013-34, 1.

[97] Mitchell, *Scottish Parliament Official Report* (19 January 2016).

Vicarious Liability: There's an App for That

Nigel MacKay*

Employment status; Online services; Self-employed workers; Vicarious liability; Workers

Nigel McKay looks at vicarious liability in the context of modern flexible work practices such as crowd-workers and the "gig" economy. He analyses the case law on control and other factors in terms of the employee/independent contractor relationship and applies this to the developing new economy.

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Crowd-working. Disruptive innovation. The on-demand, gig or sharing economy. New terms enter our lexicon as fast as Silicon Valley entrepreneurs come up with new technologies.

Whatever you want to call these new platforms, there is a high chance they will already have impacted on your life. Uber, for instance, is a global phenomenon. It completed its billionth journey on Christmas Eve 2015 (a £5 ride from London Fields to Hoxton). If you live in a city, you may well have contributed to that billion journey tally. You might also have had food delivered by a Deliveroo driver. If you needed a cleaner, you might have asked Hassle or Mopp to provide one. Handy might have sent someone to put up your shelves.

Those drivers, cleaners and handypeople form part of the new army of crowd-workers, typically working as and when requested by anyone with a smartphone.

These new forms of working have brought into focus an old problem, namely, employment status and how that impacts on the legal rights and responsibilities of the workers and the companies who hire them.

A group of Uber drivers are currently bringing Employment Tribunal proceedings claiming that they are "workers" for the purposes of various pieces of employment legislation. They argue that this means that they should be entitled to be paid at least the national minimum wage, they should receive paid holiday and they should be protected from discrimination and detrimental treatment for whistleblowing.

However, it is not only the rights of the drivers themselves that are impacted by their employment status. Whether an individual is an employee or an independent contractor (or something else) remains the principal question when it comes to vicarious liability. The issue of vicarious liability for the acts of the workers of the gig economy will be of great importance to both injured members of the public looking for recourse and to San Franciscan tech-entrepreneurs seeking to avoid liability whilst they become the next Mark Zuckerberg.

This is not necessarily a new problem. Traditional "employment" has long been in decline. Indeed, as Ward LJ pointed out in *English Province*,[1] Ewan McKendrick considered the change in working practices and how that might impact on vicarious liability as far back as 1990. He said:

> "The labour market in Britain is presently undergoing significant structural change. The principal change is a rapid increase in new, flexible forms and patterns of work which depart radically from the standard employment relationship whereby an employee works regularly (that is, full-time) and consistently for his employer under a contract of employment."

He went on to say:

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

> "The primary significance for tort lawyers lies in the fact that, owing to the flexibility, lack of continuity and irregularity of their work, many atypical workers are either unable or have great difficulty in establishing that they are employees employed under a contract of employment. If they are not employees then, presumably, they are outside the scope of the doctrine of vicarious liability."

He posed the question:

> "Can the doctrine of vicarious liability be adapted in order to encompass this new workforce or will the courts have to create new forms of primary liability?"[2]

McKendrick foresaw the problem but may not have envisaged quite how acute it could become. The casualisation of the workforce will surely increase exponentially with the onward march of the disruptive innovators. To take the example of Uber, it is aiming to have 42,000 drivers this year in London alone.

Vicarious liability

The modern test for vicarious liability was, of course, set out by the Supreme Court in *Christian Brothers*.[3] Lord Phillips referred to the synthesis of a two-stage test to determine vicarious liability. First, whether the relationship between the two parties is "one that is capable of giving rise to vicarious liability" and secondly whether the alleged acts were connected to that relationship in such a way as to give rise to vicarious liability.[4]

Lord Phillips' two-stage approach was most recently confirmed in the Supreme Court decisions of *Cox*[5] and *Mohamud*,[6] both handed down in March 2016.

It is the first stage of the test that employment status will be principally relevant to; whether the relationship between the two parties is "one that is capable of giving rise to vicarious liability".

In determining this question, the following principles can be distilled from *Christian Brothers*:

- an employer-employee relationship will generally be considered to be capable of giving rise to vicarious liability;
- a relationship akin to employment is also capable of giving rise to vicarious liability; and
- an independent contractor relationship will ordinarily not be capable of giving rise to vicarious liability.

Employee or self-employed contractor?

In applying the first stage of Lord Phillips' test, then, the first question to ask is whether an individual is an employee or a self-employed contractor.

Traditionally, that question was answered by focussing on control[7] (a factor that remains very relevant in the employment law sphere).

This appears logical, given that if an employer exerts control over an employee, it would seem appropriate that the employer should be responsible for any harm that follows. This was, of course, a rather simplistic approach. In particular, it does not deal well with highly skilled professionals, who require and are subject to little control, but instead have significant autonomy over how they carry out their work. The classic example is the brain surgeon who receives little direction as to how to perform her duties but who may be very much regarded as an employee.

[2] Ewan McKendrick, "Vicarious Liability and Independent Contractors—A Re-examination" (1990) 53 M.L.R. 770.
[3] *Various Claimants v Institute of the Brothers of the Christian Schools* [2012] UKSC 56; [2013] 2 A.C. 1 ("*Christian Brothers*").
[4] *Various Claimants v Institute of the Brothers of the Christian Schools* [2012] UKSC 56; [2013] 2 A.C. 1 at [21].
[5] *Cox v Ministry of Justice* [2016] UKSC 10; [2016] 2 W.L.R. 806.
[6] *Mohamud v WM Morrison Supermarkets Plc* [2016] UKSC 11; [2016] 2 W.L.R. 821.
[7] *Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Ltd* [1947] A.C. 1 HL.

As Lord Reed pointed out in *Cox*,[8] however, it was perhaps never appropriate "if one thinks for example of the degree of control which the owner of a ship could have exercised over the master while the ship was at sea".

The control test was thus adapted. May LJ stated in *Viasystems*:

> "The inquiry should concentrate on the relevant negligent act and then ask whose responsibility it was to prevent it. Who was entitled, and perhaps theoretically obliged, to give orders as to how the work should or should not be done? In my view, 'entire and absolute control' is not, at least since the *Mersey Docks* case, a necessary precondition of vicarious liability."[9]

Lord Phillips in *Christian Brothers*[10] simplified matters further, saying "the significance of control today is that the employer can direct what the employee does, not how he does it".

A principal argument in the Uber Employment Tribunal litigation is that Uber does exert significant control over its drivers (including both what is done and how it is done). Uber determines which passengers are allocated to which drivers, it places some control over the route followed, it takes payment from the customers, it decides the prices charged and it uses an appraisal system through its user rating function, "de-activating" drivers if they fall below a certain average rating.

Control is, however, no longer the sole or perhaps even dominant factor in determining an employer-employee relationship for the purposes of vicarious liability. Over the years, the authorities have drawn together a number of other principles to be considered.

First, the parties' expressed intention as to their relationship, whilst relevant, is of course not conclusive. The courts will look at all of the terms of the relationship between the parties, including implied terms, to determine the reality of the relationship between the parties.[11]

Uber classifies its drivers as self-employed "partners" or "customers" and no doubt other similar platforms seek to position themselves in this way. That stated classification alone will not determine whether Uber is vicariously liable for the drivers' acts (or indeed whether the drivers are entitled to employment rights).

The other factors used to determine employment status were usefully summarised by Ward LJ in *English Province*.[12] The appropriate approach, he said, is to marshal the various tests which have been applied and which should cumulatively point either towards an employer-employee relationship or away from one. He considered the factors as follows.

- Control, as already mentioned, is important but not crucial.
- It is necessary instead to consider the "economic reality" of the situation.
- Integration as a test had fallen out of favour (and perhaps that is understandable given how much technology has increased the possibilities for remote working) but it is still relevant, having been considered most recently in *Viasystems*.[13] One should ask, is the work an integral part of the business, or only accessory to it?
- Provision of an individual's own equipment is indicative that someone is an independent contractor.
- The ability to hire helpers or substitutes again is not suggestive of employment.
- The courts will look at the degree of financial risk taken and the degree of responsibility for investment and management. The more these factors are present, the more likely that an individual is an independent contractor.

[8] *Cox v Ministry of Justice* [2016] UKSC 10; [2016] 2 W.L.R. 806 at [21].
[9] *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2005] EWCA Civ 1151; [2006] Q.B. 510 at [16].
[10] *Various Claimants v Institute of the Brothers of the Christian Schools* [2012] UKSC 56; [2013] 2 A.C. 1 at [36].
[11] *Ferguson v Dawson & Partners (Contractors) Ltd* [1976] 1 W.L.R. 1213 CA (Civ Div) at 1222 and 1230.
[12] *English Province* [2011] EWHC 287.
[13] *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2005] EWCA Civ 1151; [2006] Q.B. 510.

Ward LJ summarises it himself as follows:

> "To distil it to a single sentence I would say that an employee is one who is paid a wage or salary to work under some, if only slight, control of his employer in his employer's business for his employer's business. The independent contractor works in and for his own business at his risk of profit or loss."[14]

There does seem to be something of a "sniff test" to Ward LJ's approach. Taking into account all of the circumstances, if it smells like employment, it probably is employment.

In the gig economy, however, there may well be no obvious answer even after all of the factors have been applied. A tech company may well argue that their crowd-workers are clearly not employees. Depending on the platform in question, the worker may log on and log off as they please, deciding what hours they wish to work and where. They may provide their own tools and have little integration in the business.

On the other hand, it is very difficult to say that they are in business for themselves, with responsibility for investment and management. Many of these workers will have little involvement in pricing, allocation of work, management or anything else meaningful in the way the operation is run. Their role may well involve financial risk, in the sense that they are vulnerable to not being given work and therefore not earning any money but there is little opportunity to profit from any investment if things are going well. In reality, they are paid a flat rate, which they do not set, for carrying out work.

Importantly, whilst they may not be integrated into the running of the business or the hierarchy of the management structure, they are an essential part of it. What would Uber be without its drivers?

Something akin to employment

For an employment lawyer, employee versus self-employed contractor can be a false dichotomy. There is a third, middle-ground status of "worker".

A worker is a statutory construct; a creature of employment legislation aimed at providing some of the more basic employment rights (many of which emanate from Europe) to a wider group of people than just employees.

What counts as a worker depends to some extent on the particular statute being considered but there are general guiding principles, which overlap with but are wider in scope than the tests used to determine whether someone is an employee. The European Court of Justice described a worker as someone who works for and under the direction of another person (i.e. subordinately) in return for which he receives remuneration.[15]

Lady Hale, however, stated in *Bates van Winkelhof*[16] that while subordination may sometimes be an aid to distinguishing workers from other self-employed people, it is not a freestanding and universal characteristic of being a worker.

The starting point is that, if there is a contract, by which an individual carries out work personally, and the status of the other party is not that of a professional client, then the individual will be a worker.

This could include some self-employed people, if they provide their services as part of a business undertaking carried on by someone else, as opposed to a business undertaking on their own account.

Using the example of Uber, even if it argues that its drivers are self-employed, it seems clear that the services they are providing are part of a business undertaking carried on by someone else, i.e. Uber.

To what extent can this line of argument be applied to vicarious liability to widen its scope to workers who are not employees? Is the relationship of employer-worker at least something akin to employment for the purposes of Lord Phillips' two-stage test?

[14] *English Province* [2011] EWHC 287 at [70].
[15] *Allonby v Accrington and Rossendale College* (C-256/01) [2004] E.C.R. I-873; [2004] 1 C.M.L.R. 35.
[16] *Bates van Winkelhof v Clyde & Co LLP* [2014] UKSC 32; [2014] 1 W.L.R. 2047.

Ward LJ expressly warns of the importance of considering context in *English Province*. "The fluid concept of vicarious liability should not" he states "be confined by the concrete demands of statutory construction arising in a wholly different context".[17] It is right that the test for worker status for the purposes of various statutory rights is unlikely to cover exactly the same group of people as the something akin to employment test. Nevertheless, it may be that worker status is certainly suggestive of a relationship akin to employment giving rise to vicarious liability.

In *Cox*, Lord Reed set out the principles for determining if a relationship was akin to employment. He said the following factors should be present:

- the individual carries on activities as an integral part of the business activities carried on by the defendant;
- the activities are carried out for the defendant's benefit (rather than for a recognisably independent business of the individual's own or of a third party); and
- the commission of the wrongful act is a risk created by the defendant by assigning those activities to the individual in question.[18]

There is therefore a significant overlap between the test for worker status and for something akin to employment, albeit with the additional factor of responsibility for creation of the risk (although this would in any case normally be present in a worker relationship).

This does not appear to be accidental. Lord Reed himself states in *Cox* that one of the benefits of the akin to employment approach is to direct "attention to the issues which are likely to be relevant in the context of modern workplaces, where workers may in reality be part of the workforce of an organisation without having a contract of employment with it".[19]

He goes on to say that an important consequence of the extension of vicarious liability to relationships akin to employment:

> "is to enable the law to maintain previous levels of protection for the victims of torts, notwithstanding changes in the legal relationships between enterprises and members of their workforces which may be motivated by factors which have nothing to do with the nature of the enterprises' activities or the attendant risks."[20]

It remains the case that each situation will turn on its own facts. However, whether or not crowd-workers are employees, if they are at least workers, that relationship will often be sufficiently akin to employment to be capable of giving rise to vicarious liability.

As a matter of policy, this would seem right. As Lord Steyn noted in *Lister*,[21] vicarious liability is a compromise between two conflicting policies: on the one end, the social interest in furnishing an innocent tort victim with recourse against a financially responsible defendant; on the other, a hesitation to foist any undue burden on business enterprise.

The average crowd-worker, possibly earning less than the minimum wage, will not be an attractive defendant for a negligently injured party. The billion-dollar tech company will.

[17] *English Province* [2011] EWHC 287 at [59].
[18] *Cox v Ministry of Justice* [2016] UKSC 10; [2016] 2 W.L.R. 806 at [24].
[19] *Cox v Ministry of Justice* [2016] UKSC 10; [2016] 2 W.L.R. 806 at [29].
[20] *Cox v Ministry of Justice* [2016] UKSC 10; [2016] 2 W.L.R. 806 at [29].
[21] *Lister v Hesley Hall Ltd* [2001] UKHL 22; [2002] 1 A.C. 215.

What Price Parenthood? The Value We Place on a Family

Chris Thorne*

A personal injury?—quantum—heads of damage—infertility absent injury—loss of autonomy or loss of amenity?—wrongful birth—wrongful sterilisation—a new head of damage?

Clinical negligence; Measure of damages; Parents; Reproduction; Sterilisation; Wrongful birth; Wrongful conception

In a jurisdiction where the value placed upon the distress caused by unauthorised access to celebrity text messages is approximately 10 times the value placed upon a life, it should come as no surprise that there is, as yet, no clear guidance on the assessment of damages in cases involving the ability to become a parent. A range of awards in cases involving wrongful birth, wrongful sterilisation, deception as to parenthood and the loss of the ability to father a child expose an inconsistency of approach which, in the absence of clear judicial analysis, is only likely to be exacerbated as medical science outpaces jurisprudence. As we enter the world of three-parent babies and as yet unthought-of developments in relation to the creation of life, it will be a bold practitioner who takes on the client with a novel claim, proffering any degree of assurance as to outcome by way of advice. Indeed, any certainty as to the ability to be remunerated for venturing into new territory, bearing in mind the Jackson reforms and the imperative of proportionality, is a thing of the past. Identifying a meaningful judicial approach to the value placed on parenthood, let alone a thread of cases from which to draw firm conclusions, is an unenviable and ultimately fruitless task. This article is intended as an overview of the disparate provision made by the law where the issue of autonomy and the family is concerned and a plea, probably in vain, for a more considered response to what is a significant issue to those affected. No attempt is made in this article to interpolate art.8 of the ECHR (rights to a private and family life) with the issue of damages arising out a tortious claim.

Compare and contrast

Reference to cases in which a claimant has an unwanted child may seem a perverse starting point in the quest for valuing the inability to have a family. Nonetheless, the development of principles of autonomy, which some regard as central to the point under consideration, can be seen in the decisions relating to negligent failure of sterilisation and wrongful birth.

In the leading failed sterilisation case, *McFarlane*[1] the court declined to award damages for the cost of bringing up a healthy but unplanned child but did award £7,500 for the pain and suffering of pregnancy and delivery. The implication was that pain and suffering was the proper subject of compensation, the loss of the ability to choose whether to have a child was not. It was further recognised in *McFarlane* that there might be a claim in respect of psychological injury suffered by the mother in pregnancy but not an award per se in respect of the child unwanted, with all of the implications that might have for the child in later life. Contrast the decision in *Parkinson*[2] when the court permitted the claimant to recover, in addition to general damages for the pain and suffering of pregnancy, the cost of bringing up a disabled child, in so

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[1] *McFarlane v Tayside Health Board* [2000] 2 A.C. 59 HL.

[2] *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530; [2002] Q.B. 266.

far as it exceeded the cost of bringing up a healthy child. Striking a balance between the assertion that a child is always a benefit and a blessing, irrespective of the circumstances and the practical realities for parents who neither expected nor wanted a child and now face the immense difficulties of bringing up a disabled child was not a comfortable task and the result appears to be an even more uncomfortable melding of conflicting principles.

Both cases, whilst not of direct assistance in guiding us to identifying the value of the loss of the ability to become a parent, did raise issues relevant to the point under consideration. The court in *Parkinson* explored issues of autonomy—as mentioned above, a concept some might see as central to the debate—and whether that autonomy is infringed by the presence or absence of a child. *Rees*[3] may take us a step closer to resolving the conundrum, in that although the court followed *McFarlane* and made no award in respect of the cost of bringing up a healthy child, the fact that the impact of so doing was significantly exacerbated by the mother's own disability led to an award of £15,000 for loss of autonomy, that is to say the loss of the right to choose to limit the size of one's family. Thus, once autonomy forms part of the equation when assessing damages, in the form of the right to choose the size of one's family, by extension surely the right to choose to have a family at all and where and when to do so, are rights, which if violated, give rise to a cause of action which sounds in damages.

In general, wrongful birth cases arising out of the tragic failure to identify fetal abnormality which, if identified, would have led to termination, follow the same principles as those arising from failed sterilisation and give no greater guidance in this exercise, reflecting issues of autonomy in similar fashion, yet subject to a far greater degree of complexity surrounding issues of causation. The 2009 case of *FP*,[4] which was a wrongful birth case, saw a figure of £20,000 awarded for pain, suffering and loss of amenity ("PSLA"), but the figure was agreed rather than contested, thus there is no exposition as to how the parties arrived at that amount. It would appear to be more than an indexation increase on the *MacFarlane* award and perhaps the beginnings of a move to reflect the true impact of the outcome.

If the arrival of a child at a time when not wanted is worth £15,000, what price the discovery that a wanted child is not yours? In 2015 there was wide press interest in what was designated "X v Y", where a man and wife had travelled to Spain to undergo IVF in 2004. Unbeknown to the husband, his wife returned shortly afterwards with her boyfriend and used the boyfriend's sperm in her IVF treatment rather than that of her husband. The child, born in 2005, was passed off as the husband's by the wife and he maintained the child, even after the couple divorced, only discovering that he was not the father of the child in 2011.

By the nature of the case, details are limited but the husband was awarded £39,000 in damages for the "deliberate fraudulent misrepresentation" by the wife. However, the figure was inclusive of distress, loss of earnings and overpayment of maintenance, with no clear distinction between the amounts, such that it is not known what element of the award is attributable to the distress of discovering one is not a parent. Even were that element defined, would it be an indication of the level of damages for distress as a result of the failure to have a child or more, the distress experienced by being misled as to paternity for so many years? What little has been reported tends to suggest that the latter, rather than the former was the significant factor in this case. Damages awarded for misrepresentation are not damages for loss of autonomy, even where that misrepresentation has effectively resulted in loss of autonomy.

It is a personal injury: What is the fuss?

Some might well question if there is any need to take a tour around a miscellany of case law broadly related to birth or paternity. Is not the level of damages applicable to such cases identifiable by direct

[3] *Rees v Darlington Memorial NHS Trust* [2003] UKHL 52; [2004] 1 A.C. 309.
[4] *FP v Taunton & Somerset NHS Foundation Trust* [2011] EWHC 3380 (QB); [2012] Med. L.R. 195.

reference, or at least analogy, to the cases where the primary issue is a personal injury giving rise to sterility, rather than the pure loss of the ability to have a child and become a parent? Surely this must bring us as close as possible to the answers we seek?

On the face of it, this simplistic approach is all that is required. Is not the loss of the ability to have a family all one and the same as the deprivation of fertility through negligent causes? As a pragmatist rather than an academic, such an approach has attractions but not all such claims fall within the personal injury remit and even where they do, the guidance is not entirely clear. Claims for damages for personal injury have long taken into account the impact of the inability to have a child, usually as the product of traumatic or clinical damage to the reproductive organs, rather than regarding such loss as a primary claim in itself. The *Judicial College Guidelines*[5] suggest total loss of the male reproductive organs attracts an award "in excess of £117,000", whilst female infertility, with severe depression, anxiety, pain and scarring is up "to £128,750". The gender differential remains throughout the range of injuries and awards. Interestingly, where traumatic loss of the ability to reproduce is not present, such that uncomplicated sterility without impotence nor any other aggravating factors has occurred, for a young man without children the bracket is £42,600–£54,250, whereas there is no comparable bracket for female infertility. Such "uncomplicated sterility", if sterility can in any way be characterised as "uncomplicated" in any circumstances, would appear to approach the nature of the loss we seek to value.

Where the claimant already has children "uncomplicated sterility" in men falls to a figure of £18,000–£23,000, whereas a similar category of injury for women is bracketed more widely at £13,650-£27,925, although curiously the higher figure includes "significant psychological damage". The question arises as to what is meant by "significant psychological damage", as the *Guidelines* themselves suggest that moderately severe psychological damage as a stand-alone injury would be worth in excess of the figure identified for sterility with psychological damage. It seems somewhat anomalous that sterility could reduce the level of PSLA for significant psychological damage, rather than increase it. This again clouds the issue of the value we place on the inability to have a child, although in reality, any attempt to distinguish the clinical fact from the psychological effect is artificial in nature.

The somewhat invidious distinction in the *Guidelines* between the lack of "ability to have children" and the lack of "ability to have more children" would seem on the face of it, to be valued at somewhere between £20,000 and £30,000, if one adopts the simplistic approach of deducting the figure for sterility once a family has been started, from the figure for sterility in those yet to start a family. Whilst the rationale for the distinction may seem immediately apparent (the inability to have any children is more damaging than the inability to have more children) the argument does not stand up to analysis and may vary considerably from individual to individual. Might not the parents desperate to have a family feel more acutely the inability to have a second child, knowing the joy of having the first, knowing that the first child will never have the companionship, love and support of siblings, knowing that their family is incomplete?

The issue becomes even more obscure when any concept of underlying injury, traumatic or not, is taken out of the equation. In *Yearworth*,[6] a group of claimants had been diagnosed with various strains of cancer. Each of the young men in the group was advised that chemotherapy was the most appropriate treatment but that it carried with it a risk of infertility. In each case, the patients were advised to bank sperm samples to preserve the ability to father children in the event that infertility ensued. Sadly, the defendant Trust failed to take adequate care of the samples and they were subject to thawing, damaging them beyond use, or such was the claimant's case. Breach of duty was not in issue but the existence of a claim in law in any form was disputed by the defendant. For the purposes of this analysis, a detailed review of the novel arguments in *Yearworth* is not necessary. It is known that the cases settled by negotiation once the Court

[5] Judicial College, *Guidelines for the Assessment of General Damages in Personal Injury Cases*, 12th edn (Oxford: Oxford University Press, 2013).
[6] *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37; [2010] Q.B. 1.

of Appeal recognised the existence of a cause of action, although significantly, not a personal injury claim, their Lordships not having been asked to comment on quantum. At first instance HH Judge Griggs considered the then *JSB Guidelines* bracket of £32,000–£41,250 for uncomplicated sterility but after taking into account what he deemed to be mitigating factors, came up with the somewhat parsimonious bracket of £8,000–£14,000 to reflect the level of loss suffered by the claimants. The assessment of general damages was merely an indication of what he might have awarded had he been inclined to find in the claimant's favour with regard to the existence of claim, which he was not. Fortunately, when it came to settlement, neither party drew great guidance from the first instance obiter remarks and a wider range of awards at a higher level was achieved. In general, the bracket achieved for the loss of ability to father a child was, in the view of the claimant's legal team, in the £20,000–£30,000 range. In coming to that conclusion, credit was given against the gross figure achieved for PSLA in respect of each client for that element which was deemed to constitute psychological injury. In other words, £20,000–£30,000 is net of PSLA for psychological injury and represents only the sum for the loss of ability to father children, or more accurately in these cases, the loss of ability to participate in IVF. As above, how far such a distinction between psychological damage and the loss of ability to have a family can realistically be maintained is open to question. The outcome was reached recognising that infertility was the product of the chemotherapy, not the negligent failure to preserve the samples but taking into account that the effect was indistinguishable to the claimant in most respects. Special damages were recoverable in addition.

Can we then refine the *Yearworth* approach and take any guidance as to the value to place on family life from those cases at what might be termed the opposite end of the spectrum, where parents who did not want a child have ended up with a child? Is there any correlation between the distress experienced by parents who experience failed sterilisation and those unable to conceive?

The most recent exposition of the issues, including that of autonomy, is to be found in the opinion of Lord Stewart, sitting in the Outer House, Court of Session in a debate on the defender's preliminary plea that "the pursuer's pleadings demonstrably fail to disclose a cause of action relevant in law, or which could be relevant, for recovery of damages for distress, depression and *loss of autonomy*".[7] For those not conversant with terms in the jurisdiction north of the border, this was in effect the equivalent of the hearing of an application by a defendant to strike out a claim for want of a cause of action, dealt with as a preliminary trial of legal issues only. The case of *Holdich* was, in many respects, a rehearing of the Yearworth in the Scottish jurisdiction. The facts were almost identical, the issues the same, the failure of the storage freezer at the Western General Hospital in Edinburgh in 2001 having, so the pursuers (claimants) averred, denied the men in the group the prospect of fathering children and caused distress and psychological injury. NHS Scotland declined to accept the persuasive authority of the English Court of Appeal in *Yearworth*, identified distinguishing features in law rather than fact and sought to defend the claims in full.

Difficult though it is to resist full consideration here of Lord Stewart's interesting in-depth analysis in his 77-page judgment, covering wide-ranging issues relating to claims in property, delict (tort), contract and devolution in the context of the Scottish NHS, posing such engaging questions as "Can you put a kilt on *Yearworth*?", sadly this article is not the place for a comprehensive review. Here, we are limited solely to the issue of the value of parenthood, or at least of autonomy, left to the final few paragraphs of His Lordship's judgment.

Yet again we see the difficulty of blurred lines, Lord Stewart himself commenting on the uncertainty as to whether there was or indeed, need be, a distinction between an award for solatium (broadly equivalent to general damages) and an award for loss of autonomy. He took into account *McEwan*[8] which saw an award of £65,000 for negligent surgery, which rendered the pursuer "practically sterile", that sum to

[7] *Holdich v Lothian Health Board* [2013] CSOH 197; 2014 S.L.T. 495 at [3].
[8] *McEwan v Ayrshire & Arran Acute Hospitals NHS Trust* [2009] CSOH 22; 2009 G.W.D. 13-208.

incorporate an element for the inability of the pursuer to add to his family, without making a separate award for loss of autonomy, taking us back to the somewhat confused approach apparent in the *JSB Guidelines*.

He acknowledged the defender's argument that *Rees* was the only true authority for the proposition that an award can be made for "loss of autonomy", noted their arguments that it should only be applied in very narrow factual circumstances and indicated that the absence of a clear authority supporting a loss of autonomy claim in "wrongful sterility" cases was perhaps "the better argument". He drew particular attention to the fact that Hale LJ, as she then was, having championed autonomy as a right in *Parkinson*, referred only to a loss of amenity in *Briody*,[9] a sad case of wrongful sterilisation. Her words in *Briody* perhaps bear further consideration:

> "Where someone has suffered personal injuries of a lasting nature, they cannot be put back in the position in which they would have been had the injury not happened. They are compensated by an award for the pain and suffering they have endured and for the continuing loss of amenity in their lives. In the case of a woman who has always wanted children, to be deprived forever of the chance of having and bringing up those children is a very serious loss of amenity quite separate from the pain and suffering caused by the injury. The level of awards for young childless women should reflect an understanding of how grave a detriment this is."[10]

Leaving aside the singular focus of the impact upon women rather than men in these cases and acknowledging that there is no doubt that members of the Court of Appeal are more than careful in their choice of words, it does appear that drawing a distinction between loss of amenity and loss of autonomy, in this context at least, is artificial. In *Parkinson* Hale LJ did not merely identify a loss of amenity as being mutually exclusive with a loss of autonomy, she specifically considered at some length the references to both autonomy and amenity by their Lordships in *MacFarlane* and the fact that both influenced their Lordships' decision. Furthermore, in this failed sterilisation case, she extended the principle, pointing out that the loss of autonomy was not merely an issue of pregnancy but the life-changing impact of having and caring for a child for the rest of one's days.

Despite his reservation in *Holdich*, Lord Stewart was prepared for the arguments to go forward to full proof. Sadly, the outcome of those arguments will never be known, the opportunity for judicial pronouncement on the issue having been lost, the cases settling on what might be termed a "*Yearworth*" basis before coming to proof (trial).

The quest for an answer to the question "What price parenthood?" remains unresolved. It should perhaps not be side tracked into a question of semantics or what may well be a meaningful legal debate in any other context. Whether the loss of the ability to have a family, howsoever caused, is a loss of amenity, a loss of autonomy or a thing in it's own right is of no concern to those who suffer such loss. Given the unique meaning and purpose of parenthood, perhaps the loss should stand as a head of damage above all others.

[9] *Briody v St Helens and Knowsley AHA* [2001] EWCA Civ 1010; [2002] Q.B. 856.
[10] *Briody v St Helens and Knowsley AHA* [2001] EWCA Civ 1010; [2002] Q.B. 856 at [18].

What Relevance do Damages Based Agreements have to Personal Injury cases?

Stuart Kightley*

Criminal Justice Council; Damages-based agreements; Drafting; Indemnity principle; Personal injury

Stuart Kightley, who was APIL's representative on the CJC's working group dealing with damage based agreements ("DBAs"), looks at the current position regarding DBAs. He notes the practical difficulties that arise in using them, primarily as a consequence of poorly drafted regulations and the proposals for reform of those regulations. He looks at the likely future use of DBAs in the context of lower-value fixed-cost personal injury cases.

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PROCEDURE

The Damages Based Agreements Regulations 2013 are gathering dust. For personal injury ("PI") and mainstream commercial litigation, DBAs are simply not used. Indeed, why use a funding mechanism that is so novel and arcane that no one understands it, so fraught with technical problems that no one dares to draft it, and so paltry in its rewards that no one wants to use it.

To recap, a DBA operates in the same environment as a conditional fee agreement ("CFA"), in that it is permissible (i.e. not unenforceable) if it complies with the requirements of the regulations, but those requirements are onerous; under a DBA the costs payable to the claimant's lawyer are capped at a percentage of the recovered damages (25 per cent of non-future losses in PI and 50 per cent in other—non-employment—litigation), and that percentage includes VAT and counsel's fees but not disbursements, which are payable by the client on top. Inter partes costs are credited against the costs within the cap, so that if the inter partes costs are less than the amount of the cap the client pays his lawyer the difference, but if the inter partes costs exceed the cap then the difference is not payable.

This is where the real problem lies with DBAs, where the Ontario model meets the indemnity principle, which is not as exotic a place as it sounds. It is where a losing defendant gets a costs windfall at the expense of the winning claimant's lawyer, because the winning claimant's lawyer can never recover more than 25 per cent (in PI), including VAT and counsel, of the recovered damages. In lower-value claims, which represent the overwhelming number by volume of PI cases, that 25 per cent gives the client great protection, but that protection is illusory when it means no lawyer is prepared to take his case on.

The minister Lord Foulkes did acknowledge that DBAs would rarely be a more attractive funding mechanism than CFA in personal injury litigation, when he tasked the CJC with advising on reform of the DBA regime in 2014. That much is obvious so long as CFAs allow a success fee on top of recoverable party and party costs whilst DBAs cap all costs as a proportion of damages.

So, at that time the focus of reform did not principally concern PI but was focussed on improving the drafting of the regulations to make DBAs generally more user friendly. But the CJCs working group (of which I was a representative member for APIL) did not just consider drafting issues. As part of the CJCs remit to keep the civil justice system under review it considered policy issues surrounding DBAs, and that included how the DBA regime worked in the PI sphere.

This article looks at the drafting issues in brief and then the policy issues, so far as they may impact the work of PI lawyers, and particularly in relation to other reforms that are on the horizon.

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The working group addressed the many drafting issues put by the Ministry of Justice and made 45 recommendations on them. The reader is spared the finer details of the arguments that raged over such issues as hybrid-concurrent versus hybrid-sequential DBAs and third-party funder DBAs, but there were some drafting points of interest to PI practitioners worth reporting.

- The wording of the regulations currently makes the claimant lawyer rather than the client liable for disbursements ("expenses") if the claim is lost and the working group recommended amendment. A related point not covered by the working group is whether after-the-event insurers may develop products to cover disbursements and other risks for use with DBAs.
- Reference to "expenses" in the regulations is confusing and should be replaced by the better-understood term "disbursements".
- Counter-claims are not dealt with and the regulations should set out how they are treated, e.g. by a second separate DBA or otherwise.
- Defendant DBAs are not currently allowed, but the Ministry proposes that they are, and they could well be if the regulations are amended to broaden the definition of the representative's payment from "sums recovered" to "financial benefit obtained". The working group saw difficulties in defining that financial benefit, and advised that the regulations may need to allow a methodology rather than prescribe a definition. There would be no client protection reason for capping a defendant DBA at the claimant level of 25 per cent.
- Hybrid CFAs are only worth mentioning in passing, from a PI perspective: there may be very good reasons in commercial litigation to have concurrent funding mechanisms, which might allow a DBA (and therefore costs up to 50 per cent of the claim value) in the event of a win and a discounted hourly rate retainer in the event of a loss, but there would surely be little or no appetite amongst PI claimants for a hybrid which makes them liable for costs if the case is lost. It should be noted that if the Government continues to resist the idea of such a hybrid it should remain permissible for a party to have an hourly rate retainer for one part of the case and a DBA for another, so conceivably a clinical negligence client may agree to fund investigative costs under a standard retainer, with the solicitor offering a DBA after deciding to take the case on.
- There were some concerns about the role of claims management companies ("CMCs") were DBAs to become more widespread. Of course "claims management services" are included in the statutory definition of the work covered by a DBA (Courts and Legal Services Act 1990), and in the definitions of "representative" and "client" in the 2013 Regulations, so it is well established that CMCs can represent clients under a DBA, but one possible consequence of the exclusion of non-contentious business from the ambit of the regulations concerns whether a CMCDBA would be properly regulated, because if not the client would not have the protection of the statutory cap.

  Of course CMCs cannot conduct litigation or advocacy for their clients and so how would one of their cases be funded to litigation? If a solicitor took the case on would they have to pay a 25 per cent DBA contribution to the CMC as well as taking another 25 per cent from the client under their own DBA?

  The working group recommended that the Government consider these issues carefully, possibly with the benefit of a specialist working group to prevent unintended consequences and/or uncertainties for clients.
- In terms of minimum content of a DBA, the working group was aware of the need for effective client protection but also of the importance of keeping the compliance requirements no more onerous than is necessary to achieve that end, and recommended deleting some of the clauses.

- In PI, the DBA fee only applies to heads of damage excluding future pecuniary loss. That would remain the case so long as the Government's policy position is that such future loss had to be protected. The question of how a global settlement is broken down as between heads of loss, for the purposes of calculating the DBA fee, was considered, but the working group took the view that a breakdown of heads of loss on settlement should not be mandated by the regulations and that instead the claimant's solicitor's professional obligation to act in his client's best interests and/or any professional body guidance would be sufficient client protection.

The Ministry had already signalled its intention to deal with these drafting points by producing to the committee a draft of new regulations. It was then a matter for them to decide which, if any, of the working group's recommendations to adopt and whether/how to amend their draft regulations accordingly.

The Ministry did not signal a wish to make fundamental reform to the DBA mechanism and so the working group's views on policy issues are only that—views—but if the Ministry wished to ensure greater take up of DBAs then they would surely take note of them. The policy issues of particular relevance to PI are set out below.

1) **Ontario model versus success fee model**

Whereas the Ontario model gives superficially impressive client protection, at least in the PI field, it does create the "windfall problem" (above) whereby reasonably incurred claimant costs are disallowed because they exceed the cap. The success fee model allows the claimant's solicitor to recover inter partes costs and the DBA becomes a success fee charged to the client, so it resembles in practice a CFA, save that the success fee is calculated directly by reference to the damages rather than to the costs.

The group considered the merits of both models and noted in particular the advantage of the success fee model in lower value litigation, its greater simplicity and also the recommendation of the Taylor review in Scotland in favour of that type of model, and preferred on balance the success fee model rather than the Ontario model.

2) **Indemnity principle**

Abrogation of the indemnity principle is really another way of doing away with the "windfall problem". If it were disapplied, then the claimant solicitor would, in a PI case, be guaranteed a *minimum* 25 per cent costs payment (including counsel's fee and VAT) because if the inter partes costs were less than the cap then the balance to 25 per cent would be made up from the client's damages, and if those costs exceeded the cap then they would just be recovered from the defendant in full and the client's contribution to those costs would be zero.

The working group recommended on balance that the indemnity principle be disapplied, either by general abolition or by specific abrogation.

However, the Government has repeatedly ignored such recommendations, perhaps most notably LJ Jackson in his final report, *Review of Civil Litigation Costs*.[1]

3) **PI and DBAs**

The working group noted the unfeasibility of the Ontario model DBA for PI, especially at the lower damages end, and considered the alternative options of raising the cap beyond 25 per cent, removing the restriction on heads of loss to which the DBA could apply, moving

[1] LJ Jackson, *Review of Civil Litigation Costs: Final Report* (The Stationery Office, December 2009), *https://www.judiciary.gov.uk/wp-content /uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf* [Accessed 14 April 2016].

to a success fee model, abolishing the indemnity principle or excluding PI claims from the DBA regulations altogether.

Before the enactment of the 2013 Regulations, APIL (and others) argued for a higher percentage cap and for the cap to relate to *all* damages, on the grounds that it was not realistic to expect lawyers to act on a DBA on the terms proposed.

The working group was divided on which of these options would best make DBAs work in PI claims, and was agreed only that it would not be wise to exclude PI from the regulations altogether "as all funding options should be preserved, at this stage".

The working group's 145-page report (*The Damages Based Agreements Reform Project: Drafting and Policy Issues*)[2] included 58 recommendations and was published in July 2015.

The elephant in the room of any discussion about DBAs and personal injury is the possibility of an increased small claims limit. This is the "sword of Damocles" that has hung over the profession for the last 10 or more years, as the least good alternative to numerous other government efforts to reduce costs and claim numbers.

In the 2015 *Spending Review and Autumn Statement*, updated 2016[3] the Chancellor announced the government's intention to increase the small claims limit for PI, after consultations in the Spring of 2016, with implementation planned for April—failing which October—2017.

Under the small claims jurisdiction there is essentially a no costs-shifting rule, which means that in low-value claims the funding options are necessarily limited.

The client can pay private hourly rate costs, but the prospect of paying in the event of failure and of costs extinguishing any damages in the event of success makes that option a non-starter.

CFAs are still available, and they prevent the claimant having to pay costs in a losing cause, but in the event of success the claimant would have to pay hourly rate base costs and a success fee, and so a CFA would invariably extinguish their damages.

That leaves the DBA, which in a no costs-shifting environment is the only funding mechanism that could offer access to lawyers. It would guarantee "no win, no fee" to protect a losing claimant from paying costs, and to the winning claimant it would ensure he lost no more than 25 per cent of his damages (plus disbursements).

The Government indicated the last time it considered increasing the small claims limit that it might revisit the subject if and when suitable safeguards are in place. It has not yet commented on the working group's July 2015 report, but is it intending to make and implement changes to the 2013 Regulations as part of the small claims court consultation process to make them more fit for purpose and to offer them up as the safeguard, to provide access to justice in the small claims court?

No claimant lawyer would commercially choose to act under a DBA over a CFA, but in the small claims court a CFA is not feasible, so is a DBA better than nothing?

By way of example, assuming a small claims limit of £5,000, an average PI claim of £2,500 value (with no future loss) would produce costs of £520 (25 per cent of £2,500 less VAT), and if the case went to trial or other hearing, such as an infant approval hearing, then any counsel's fee would have to come out of that figure. The client would also have to pay his own disbursements (e.g. medical records, medical report, court fee, police report in an RTA and any ATE insurance, of which the court fee and report fee should be recoverable from the opponent), leaving perhaps £250, so paying £875 in total (including VAT), leaving him with £1,625. If the claim value is say £1,500, the lawyer's costs are only £312 + VAT, and if the

[2] Civil Justice Council, *The Damages Based Agreements Reform Project: Drafting and Policy Issues* (August 2015), *https://www.judiciary.gov.uk/announcements/damages-based-agreements-dbas-publication-of-cjc-recommendations* [Accessed 14 April 2016].

[3] HM Treasury, *Spending Review and Autumn Statement 2015: key announcements* (25 November 2015), *https://www.gov.uk/government/news/spending-review-and-autumn-statement-2015-key-announcements* [Accessed 14 April 2016].

disbursements are as much as in the previous scenario, the claimant pays out £625 (including VAT) and so is left with £875.

Recoverable monies may be reduced by contributory negligence, squeezing client monies further under a DBA.

Once the cost of acquiring and running the claim and the risk of losing are factored in, then these cases will be run at a loss and will not be taken on by most firms. They (at least the straightforward ones) may however be attractive to CMCs with their lower running costs and lighter regulation on the basis that they are settled early without recourse to the courts.

At these damages levels there is no point in amending the regulations to allow the DBA to apply to all damages: the difference will be inconsequential. Of course the options of moving to a success fee model or disapplying the indemnity principle do not apply in the small claims regime because there are no inter partes costs, which leaves only the option of increasing the cap.

There remain very real client protection concerns if the cap were to approach 50 per cent, for whilst at that level these claims may arguably become cost effective to run for the lawyer, in turn allowing access to legal representation, many would see it is too high a price for claimants to pay.

DBAs were never suited to lower-value claims where the costs are high in proportion to the value of the claim. That is where fixed costs may be more suitable, so it is ironic that DBAs may come back into fashion at the low end of personal injury litigation at a time when the Ministry is considering whether to implement new style Jackson fixed costs at the high end (cases up to £250,000 value). But then the process of PI costs and funding reform has rarely been more than a succession of botched jobs.

Case and Comment: Liability

Kennedy v Cordia (Services) LLP

(UKSC, Lady Hale, Lord Wilson DPSC, Lord Reed, Lord Toulson, Lord Hodge, 10 February 2016, [2016] UKSC 6)

Personal injury—employer's liability—negligence—personal protective equipment—Management of Health and Safety at Work Regulations 1999 (SI 1999/3242)—Personal Protective Equipment at Work Regulations 1992 (SI 1992/2966)

Admissibility; Employers' liability; Expert evidence; Experts' duties; Personal injury; Personal protective equipment; Risk assessment; Scotland

At the end of 2010 Scotland was afflicted by a very severe winter which lasted many weeks. Snow fell. It lay, then froze. More snow fell in larger amounts and intermittently. Tracey Kennedy (then aged 41) worked for the defenders as a home carer. At about 20.00 on 18 December 2010 Miss Kennedy was required to visit an elderly lady, Mrs Craig, who was terminally ill and incontinent, at her home in order to provide her with palliative and personal care. The visit was one of a series of visits carried out by Miss Kennedy during her shift. She travelled to Mrs Craig's house after visiting another client.

Miss Kennedy was driven to the house by a colleague, who parked her car close to a public footpath leading to the house. The footpath was on a slope, and was covered in fresh snow overlying ice. It had not been gritted or salted. Miss Kennedy was wearing flat boots with ridged soles. After taking a few steps along the footpath, she slipped and fell to the ground, injuring her wrist.

Tracey Kennedy sued her employers alleging fault at common law and breaches of the Management of Health and Safety at Work Regulations 1999 (SI 1999/3242) and the Personal Protective Equipment at Work Regulations 1992 (SI 1992/2966). Her case was that staff fell every year on snow and ice while carrying out their duties and she alleged:

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

Her employers had carried out a risk assessment which assessed the risk of slipping and falling in inclement weather when travelling to and from clients' homes as "tolerable". The assessment did not consider the possible provision of personal protective equipment ("PPE"), such as non-slip attachments for footwear. Cordia gave its employees a hazard awareness booklet and advised them to wear safe, adequate footwear in inclement weather.

Miss Kennedy led evidence from an engineering consultant Lenford Greasly, who had qualifications and experience in the field of health and safety. The Lord Ordinary accepted Mr Greasly's evidence and found that Cordia had breached reg.3(1) of the 1999 Regulations by failing to carry out a suitable and sufficient risk assessment, and had breached reg.4(1) of the 1992 Regulations by failing to provide Miss Kennedy with PPE.

The Extra Division reversed that decision, finding that the Lord Ordinary had erred in accepting much of Mr Greasly's evidence. It also found that reg.4(1) of the 1992 Regulations did not apply, because the regulations were concerned with risks caused by the nature of the task performed by the employee, and the carrying out of Miss Kennedy's duties as a home carer did not create the risk of her slipping somewhere en route to carrying out those duties because of ice or snow. In relation to the common law case, it concluded that the Lord Ordinary had failed to address the necessary basic questions identified in *Morton*.[1]

The case proceeded to the Supreme Court.

Counsel for Cordia conceded at the outset of the appeal that health and safety practice could properly be the subject of expert evidence. The Supreme Court thought that that concession was correctly made. They held that the Extra Division erred in treating much of the factual material in Mr Greasly's report as inadmissible on the basis that it was not skilled evidence[2] that assisted the court. They also erred in excluding his evidence on how he would have carried out the risk assessment.

The Supreme Court confirmed that it may on occasion be expedient to instruct a witness with general health and safety experience to give skilled evidence on a specific question of health and safety practice which he or she may not have encountered in the past. Such a witness may have to conduct research into how the particular risk might have been reduced or avoided. Whether or not the witness has sufficient experience and knowledge to give skilled evidence is a matter which can be explored either through case management or in cross-examination.

The court confirmed that the employer's duty is no longer confined to taking such precautions as are commonly taken or, as Lord Dunedin put it in *Morton*, such other precautions as are so obviously wanted that it would be folly in anyone to neglect to provide them. A negligent omission can result from a failure to seek out knowledge of risks which are not in themselves obvious.[3]

In the present case, Cordia were aware of a history of accidents each year due to their home carers slipping on snow and ice, and they were aware that the consequences of such accidents were potentially serious. Quite apart from the duty to carry out a risk assessment, those circumstances were themselves sufficient to lead an employer taking reasonable care for the safety of its employees to inquire into possible means of reducing that risk.

Had such inquiries been made, or a proper risk assessment carried out, the implication of the evidence accepted by the Lord Ordinary was that Cordia would have learned that attachments were available, at a modest cost, which had been found to be effective in reducing the risk, and had been provided by a number of other employers to employees in a similar position. In those circumstances, the Lord Ordinary was entitled to conclude that Cordia were negligent in failing to provide Miss Kennedy with such attachments.

The court then considered the Extra Division's conclusion that the Lord Ordinary was not entitled to find Cordia liable in the absence of any explicit finding that Miss Kennedy's injury had been caused by any breach of duty on their part. They held that the question was not, of course, whether Miss Kennedy's injury would necessarily have been prevented: as in other civil contexts, the matter had to be decided on a balance of probabilities.

The Lord Ordinary made no express findings in relation to causation, other than that he accepted Miss Kennedy's evidence that she would have used anti-slip attachments if they had been provided to her. The question therefore was whether, in the light of the other findings which were made, the only reasonable inference which could be drawn was that Cordia's breach of their duties caused or made a material contribution to Miss Kennedy's accident.

[1] *Morton v William Dixon Ltd* 1909 S.C. 807 CSIH.

[2] Expert witnesses in Scottish practice have traditionally been described as skilled witnesses.

[3] A less outdated formulation of the employer's common law duty of care can be found in *Baker v Quantum Clothing Group Ltd* [2011] UKSC 17; [2011] 1 W.L.R. 1003 at [9].

So far as the 1999 Regulations were concerned, the breach of reg.3(1) resulted in a failure to provide protective equipment, in breach of the 1992 Regulations. The issue of causation therefore turned on the consequences of the latter breach.

So far as the 1992 Regulations were concerned, the finding that there was a breach of reg.4(1) implied that there was a failure to ensure that "suitable" equipment was provided. Equipment is "suitable" only if "so far as is practicable, it is effective to prevent or adequately control the risk or risks involved".[4] It followed from that definition that the equipment need not necessarily prevent the risk, but it must, as a minimum, adequately control the risk so far as is practicable.

The concept of suitability thus contains a causal component. The regulations do not define "adequately", but it can be inferred from the EU legislation (including the requirement under art.5(1) of the Framework Directive[5] that the employer shall have a duty to ensure the safety and health of workers) that a risk will not be adequately controlled unless injury is highly unlikely. Bearing in mind that the 1992 Regulations should not be construed in such a way as to reduce pre-existing levels of protection, that conclusion is also supported by case law on the previous domestic law. For example, in the case of *Rogers*,[6] which concerned the duty to provide "suitable" goggles under s.65 of the Factories Act 1965, Salmon LJ stated at 395:

> "The protection, to be suitable, need not make it impossible for the accident to happen, but it must make it highly unlikely."

It followed that where an employee had been injured as a result of being exposed to a risk against which she should have been protected by the provision of PPE, and it was established that she would have used PPE if it had been provided, it will normally be reasonable to infer that the failure to provide the PPE made a material contribution to the causation of the injury. The court held that such an inference is reasonable because the PPE which the employer failed to provide would, by definition, have prevented the risk or rendered injury highly unlikely, so far as practicable. Such an inference would not, of course, be appropriate if the cause of the accident was unconnected with the risk against which the employee should have been protected.

In this case, there was no suggestion that it would not have been practicable to provide equipment which was effective to prevent or adequately control the risk or risks involved, and the evidence of Mr Greasly was to the contrary effect. In the circumstances, the only inference which could reasonably have been drawn was that the breach of reg.4(1) had caused or materially contributed to the accident, and that Cordia were therefore liable to Miss Kennedy under the PPE Regulations.

The appeal was unanimously allowed.

Comment

This very important case on employer's liability arises out of a commonplace scenario, but signifies a serious shift in judicial thinking on the use of expert witnesses and risk assessments at work. Trip, slip and stumble cases form about half of hospital accident and emergency admissions, and treacherous winter conditions annually exacerbate this situation. Tracey Kennedy, the appellant, on call for palliative care to an elderly and terminally ill person confined to her home, had to negotiate a slippery public path. The combined judgment of Lord Reed and Lord Hodge, with unanimous concurrence from Lady Hale, Lord Wilson and Lord Toulson, is an emphatic declaratory statement in updating employer's liability on personal protective equipment, risk assessments, the use of expert evidence, and on the common law generally.

[4] Regulation 4(3)(d) of the Personal Protective Equipment at Work Regulations 1992 (SI 1992/2966).
[5] Directive 89/391 on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ L183/1
[6] *Rodgers v George Blair & Co* 11 K.I.R. 391.

At first instance evidence was led on behalf of Tracey Kennedy from a consulting engineer, Lenford Greasly. This was under objection from the respondents, although Mr Greasly's qualifications include engineering and law degrees, as well as a diploma in safety and hygiene. As a former member of the Health and Safety Executive and a former Inspector of Factories he is one of the foremost specialists in the field. While his views were significant at first instance for the Lord Ordinary, Lord McEwan, the Extra Division of the Inner House of the Court of Session, on appeal, were abruptly dismissive; Lady Smith remarking that the "Lord Ordinary certainly ought to have found that it was not admissible as expert evidence in the case".[7]

Reading those appeal judgments, and particularly the reliance on the 1909 statement of the law by Lord Dunedin in *Morton* is a trip down memory lane and as if the intervening century of advance on health and safety considerations never occurred. It is worth noting the "Dunedin formula" in full, as something of a vanished age before the "Wright formula" of a non-delegable duty of care in employer's liability and then the increasing legislative vigilance to protect the health and safety of workers. Lord Dunedin said:

> "Where the negligence of the employer consists of what I may call a fault of omission, I think it is absolutely necessary that the proof of that fault of omission should be one of two kinds, either—to show that the thing which he did not do was a thing which was commonly done by other persons in like circumstances, or—to shew that it was a thing which was so obviously wanted that it would be folly in anyone to neglect to provide it."[8]

Fortunately, the view of the Supreme Court in *Kennedy* is that the law is not static, but necessarily dynamic with developing knowledge. Mr Greasly's mention of lightweight grips to place on shoes seems to have been particularly incendiary for the Extra Division. These simple devices are a development of trail crampons and running spikes, the latter having been developed in the 1860s for cross-country running and for use on cinder tracks, so hardly new. Increasingly used in "snow belt" countries for ordinary winter walking, and particularly helpful for the elderly and the frail who would otherwise be confined to their homes, they have become widely used.

A study in the US in 2005 showed that the use of one particular brand, Yaktrax, made a serious impact in reducing falls in winter, and led to widespread discussion, although this seems to have passed by the notice of the Scottish appeal judges.[9] Mr Greasly's mention of six academic articles on these various devices, his personal use of them, his noting that the Royal Mail and at least one Scottish local authority routinely issued them to their employees in wintry weather, and his obvious point that if Tracey Kennedy had been advised to wear them on slippery pathways her injuries most probably would have been avoided altogether is treated with near derision in the Extra Division. Lord Brodie is particularly scathing, running over a list of such devices as if they were wholly beyond judicial knowledge, and then noting that the "Lord Ordinary treated Mr Greasly as an expert witness in 'the areas of health and safety at work which would not be in the knowledge of the court'", and seeming to find it incredulous that the judge "accepted Mr Greasly's evidence 'in the entirety'".[10]

Ms Kennedy's injury, falling and fracturing her left wrist, was clearly in the "course of employment". As the Supreme Court noted, it was her "duty to visit individuals in their homes".[11] Their judgment follows that not only the common law but the various legislative and regulatory rules under the Health and Safety at Work Act 1974 should seek to protect her. With the Health and Safety Executive reporting approximately 10,000 falls per annum at workplaces this is a critical area of protection.[12] Cordia, the subsidiary of Glasgow

[7] *Kennedy v Cordia (Services) LLP* [2016] UKSC 6; [2016] 1 W.L.R. 597 at [4].
[8] *Morton v William Dixon Ltd* 1909 S.C. 807; (1909) 1 S.L.T. 346 at 809.
[9] See Fergus Eoin McKiernan, "A simple gait-stabilizing device reduces outdoor falls and numerous injurious falls in fall-prone older people during the winter" (2005) 53 J. Am. Geriatr. Soc. 943.
[10] *Kennedy v Cordia (Services) LLP* [2014] CSIH 76; 2015 S.C. 154 at [8].
[11] *Kennedy v Cordia (Services) LLP* [2016] UKSC 6; [2016] 1 W.L.R. 597 at [2].
[12] *http://www.hse.gov.uk/* [Accessed 11 April 2016].

City Council set up to provide domiciliary care, were well aware of such incidents in snow and ice, having had on average four such injuries a year, and 16 during 2010. Their risk assessments were minimalistic and certainly did not consider the possible provision, or advice, of non-slip attachments for footwear.[13]

The Supreme Court reconnoitre the terrain of expert witness testimony, as to admissibility, knowledge and expertise, and impartiality. Much of this is necessarily on the esoteric dimensions of Scottish procedures, but the essential principle is that, while in recent years there has been a focus on economy in litigation, there is still an appropriate role for expert evidence. Cordia had argued in their written case against what they termed "the largely uncontrolled proliferation of experts", but the Supreme Court state emphatically that "the Lord Ordinary did not err in admitting all of this factual evidence" from Mr Greasly in respect of the industry background on risk assessments and on the use of "anti-slip devices".[14] This is an emphatic vindication of the use of expert engineering evidence in a case of this sort.

The Supreme Court then go on to comment extensively on the substantive law, particularly in the light of criticisms by the Extra Division of the Lord Ordinary's "remarks about the direction of the law being to level safety upwards".[15] Again their judgment is a detailed analysis of European legal requirements, "daughter directives", management regulations, the extending nature of the PPE regulations and risk assessment procedures. Following this review the Supreme Court then focus on the precise circumstances of Ms Kennedy's case and forcefully reinforce the view that "travelling from one client's home to another's was an integral part of her work", and that the health and safety legislative and regulatory provisions were there to protect her.[16]

Turning to the common law the Supreme Court note "the Extra Division's concern that the law should not be excessively paternalistic".[17] But in juxtaposition they point out that her role was not that of an "ordinary member of the public going about her own affairs". She was a home carer whose duty it was to travel to care for elderly and ill people in their homes and "on a freezing winter's evening despite the hazardous conditions underfoot".[18]

They then indicate the many further cases in the century since *Morton* and particularly the speech by Lord Walker of Gestingthorpe in *Fytche* on the more modern approach to risk assessments and what "precautions a reasonable employer would have taken in order to fulfil his common law duty of care".[19] If that approach had been taken, then Cordia would have learned of the footwear attachments which "at modest cost" would have been effective in reducing the risk of falls, and which had been provided by a number of other employers with employees in a similar position.

While the facts of this case are an everyday situation of a fall in slippery conditions this is a fundamentally important decision on employer's liability, with sweeping views on risk assessment, personal protection equipment, and the common law. The Supreme Court underline the essential requirement of considering dynamically and proactively the need to safeguard employees by a realistic and searching appraisal of current preventative methods to buttress safety.

In particular, they note the appropriate remit in procedural terms of taking expert advice, something which in the "economies of litigation" hysteria of the post-Jackson era could endanger the effective external analysis of risk assessments. Truly that slide away from appropriate expert testimony was close to "throwing out the baby with the bathwater". *Kennedy* is an unequivocal restatement of the law on both substantive and procedural issues, and its unanimous judgment is clearly a landmark decision in the field of employer's liability.

[13] *Kennedy v Cordia (Services) LLP* [2016] UKSC 6; [2016] 1 W.L.R. 597 at [6].
[14] *Kennedy v Cordia (Services) LLP* [2016] UKSC 6; [2016] 1 W.L.R. 597 at [63].
[15] *Kennedy v Cordia (Services) LLP* [2016] UKSC 6; [2016] 1 W.L.R. 597 at [74m].
[16] *Kennedy v Cordia (Services) LLP* [2016] UKSC 6; [2016] 1 W.L.R. 597 at [100].
[17] *Kennedy v Cordia (Services) LLP* [2016] UKSC 6; [2016] 1 W.L.R. 597 at [107].
[18] *Kennedy v Cordia (Services) LLP* [2016] UKSC 6; [2016] 1 W.L.R. 597 at [108].
[19] *Kennedy v Cordia (Services) LLP* [2016] UKSC 6; [2016] 1 W.L.R. 597 at [110]; *Fytche v Wincanton Logistics* [2004] UKHL 31, [2004] I.C.R. 975 at [49].

Practice points

- It is not the employee's task to design the solution to a potentially unsafe aspect of their work/workplace. It is for their employer to do so.
- An employer owes a personal, non-delegable duty to all of their employees to take reasonable care for their safety.
- An employer must not subject their employees to unnecessary risk.
- The employer's duty does not just relate to the premises occupied by them. It extends to places where the employee is sent to work including getting there.
- Both statute and the common law require that an employer must conduct suitable and sufficient risk assessments and act upon them.
- If a claimant is performing a risk-bearing task similar to that of members of the public, employers must assess whether the risk to which he/she is exposed is created by being "at work" rather than simply being in the public arena.
- Seeking to introduce "expert evidence", in cases like this should no longer be a problem. The essential principle is that, while in recent years there has been a focus on economy in litigation, there is still an appropriate role for expert evidence. Without expert evidence this case may well have failed.

Julian Fulbrook

Cox v Ministry of Justice

(SC, Lord Neuberger PSC, Lady Hale DPSC, Lord Dyson JSC, Lord Reed JSC, Lord Toulson JSC, 2 March 2016, [2016] UKSC 10)

Personal injury—liability—negligence—prisoners—Ministry of Justice—Prison Service—vicarious liability

Employers' liability; Employment status; Ministry of Justice; Personal injury; Prisoners; Vicarious liability

On 10 September 2007, while working as the catering manager at HM Prison Swansea, the claimant Susan Cox was injured in an accident caused by the negligence of a prisoner carrying out paid work under her supervision. She was 40 years old at the time. She was in the service of the Crown in her post, but was not strictly speaking an employee.

She had day-to-day charge of catering in the prison, in all its aspects, including supervision of the operation of the kitchen, ordering supplies, dealing with deliveries and matters relating to budget, staffing and training. Her immediate superior was the head of custodial care, who in turn was responsible to the deputy governor.

The claimant had four members of staff under her in the staff hierarchy, three civilians and one prison officer. Two of these subordinates would be on duty at any one time. Approximately, 20 prisoners would be assigned each day to kitchen work. Such prisoners would sometimes be regularly engaged in this work. Others would assist over short periods.

Food produced in the kitchen, for which the claimant had responsibility, was for prisoners only. They numbered some 400 at the time. The kitchen did not cater for staff members.

On the day in question, at about 09.15, a delivery of supplies for the kitchen arrived on the ground floor. The claimant went to attend to the delivery, taking with her six prisoners who were to bring the delivered food supplies from the ground floor to the first floor.

The customary manner of carrying out this task was for the goods to be loaded onto trolleys and taken to the first floor by lift. However, prisoners were not permitted to travel in the lifts for security reasons. A prisoner tasked with the operation would nonetheless have to enter the lift for the purpose of loading the goods. On this morning a number of lift journeys were successfully accomplished. However, with one trolley still waiting to be moved, the lift door suddenly slammed closed trapping one of the working prisoners.

Such a malfunction was not uncommon, frequently because of vandalism of the sensors by prisoners. While the judge found that it was probable that abuse by prisoners was the cause of malfunction on this occasion, he did not find that it was caused by any act of the prisoners working on kitchen duty.

The lift was shut down for a time and the trapped prisoner was eventually freed. During this incident a second delivery vehicle arrived. Two of the six prisoners, detailed to unloading duties, were instructed to make a start on unloading the new consignment. The four others were instructed by Susan Cox to carry the remaining goods from the first delivery manually up the stairs. These foodstuffs were contained in large sacks, made from reinforced paper and tied at the openings with cord. Each sack weighed about 25kg.

In such circumstances, in which sacks had to be carried manually, it was usual for the working prisoners to carry one or two sacks at a time. One prisoner, however, a man called Webster, began to transport three bags at one go. He was instructed by Susan Cox and by another member of staff to stop as the load was too great. Webster dropped one of the sacks which burst open, spilling rice onto the floor.

The claimant instructed all the prisoners to stop work until the spillage was cleared. She despatched one prisoner to fetch the necessary cleaning equipment. She bent down on one knee to prop up the damaged sack, in order to prevent further spillage. She saw that all the prisoners, save Webster, had stopped moving before she bent down. Webster had continued to carry his two remaining bags, ahead of Susan Cox and up the stairs. As she straightened to stand she felt a heavy thud on her upper back.

What had happened was that another prisoner (called Inder) had ignored her instruction to stop work and had attempted to carry two sacks past her as she was kneeling. He lost his balance and hit his head on an adjacent wall; one of the sacks which he was carrying fell off his shoulder and onto the claimant's back.

The trial judge found that the accident occurred because of Mr Inder's negligence. However, he dismissed the claim on the basis that the ministry was not vicariously liable for Inder's negligence; nor was the ministry in breach of its personal duty to her as her employer to take reasonable care for her safety by providing a safe system of work, a safe place of work, and safe staff and equipment.

The Court of Appeal held, adopting a principled, coherent and incremental approach, it was necessary to apply the features of the traditional relationship giving rise to vicarious liability, and to ask whether the features of this case fell within them so that it was fair and just to impose vicarious liability on the ministry.

That involved asking whether the relationship between Mr Inder and the ministry was one akin to employment. When one carried out that task and applied the relevant features identified in *Christian Brothers*,[1] it was clear that those features distinctly applied in this case.

In particular, the features which applied were the ability to compensate Mr Inder for his work, the fact that Mr Inder's employment by the ministry had created the risk of the injury being caused to Susan Cox, and the fact that Mr Inder would have been under the ministry's control.

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

The work carried out by Mr Inder and the other kitchen workers was essential to the functioning of the prison and was different in nature to the activities of those prisoners engaged in education, training, or on offending behaviour programmes. The work carried out by Mr Inder relieved the ministry from engaging employees at market rates and with all the concomitants of an employment relationship, and it was clearly done on the ministry's behalf and for its benefit. There was no reason that the ministry should not take on the burden of his work as well as the benefit.

As in *Christian Brothers*, the differences between Mr Inder's relationship with the ministry and the normal employment relationship, including the fact that Mr Inder was bound to the ministry by an imprisonment sentence and not a contract, and the fact that his wages were nominal, rendered the relationship between Mr Inder and the ministry, if anything, closer to that of an employer and its employees: far from there being mutuality or consent, there was an element of compulsion in engaging in the activity directed by the ministry as the quasi-employer. The ministry was accordingly vicariously liable for the claimant's injury.

The court went on to say that judge's findings as to the likely content of any training and as to the consequences if such training had been provided were unassailable on both duty and causation. The judge was not obliged to draw any inferences against the ministry. He was entitled to conclude that the provision of training would not have caused Mr Inder not to ignore both the obvious risk of injury and the claimant's express instructions.

Beatson LJ said[2] that it was understandable that considering whether a relationship was akin to employment could lead to a focus on whether the relationship was voluntary, but that focus could mislead if it was taken as a bar to vicarious liability rather than simply a factor to be taken into account. He thought the concept of a non-delegable duty might be a more attractive, direct and principled solution than vicarious liability. The facts and findings led him to conclude that the focus on the anterior duty of a defendant to provide a safe place to work, safe systems and safe staff rather than the negligent act which had in fact caused the claimant's loss might in some cases be to direct the bright light of analysis at the wrong point. This was because it relegated the organisational or "business" relationship between the person who in fact committed the tort and the person on whose behalf the activity is undertaken to a secondary role.

Beatson LJ accepted that while the existence of control was important, vicarious liability did not depend solely on it: what one was looking for was whether the person who had committed the negligent act was so much part of the work, business or organisation of the person or entity who it was said should be vicariously liable that it was just to make the latter answer for the negligence of the former.

The appeal was allowed.

The case proceeded to the Supreme Court who held that the approach in *Christian Brothers* extended the scope of vicarious liability beyond an employer's responsibility for the acts of its employees. However, it did not impose liability where a tortfeasor's activities were entirely attributable to an independent business.

Here the defendant did not have to carry on commercial activities, nor did it need to derive a profit from the tortfeasor's activities. It was sufficient that there was a defendant carrying on activities in furtherance of its own interests. Defendants could not avoid liability by technical arguments about the employment status of the tortfeasor.[3] The *Christian Brothers* requirements were met and the ministry was vicariously liable, *Christian Brothers* applied.

The Prison Service carried on activities in furtherance of its aims. The fact that the aims were not commercially motivated, but served the public interest, was no bar to imposing vicarious liability. Prisoners

[2] Considering: *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 A.C. 1; *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48; [2003] 2 A.C. 366; *Lister v Hesley Hall Ltd* [2001] UKHL 22; [2002] 1 A.C. 215; *E v English Province of Our Lady of Charity* [2012] EWCA Civ 938; [2013] QB 722.

[3] *Various Claimants v Institute of the Brothers of the Christian Schools* [2012] UKSC 56; [2013] 2 A.C. 1 explained, *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2005] EWCA Civ 1151; [2006] Q.B. 510 and *English Province* [2013] Q.B. 722 applied.

working in the kitchens were integrated into the operation of the prison, so that the activities assigned to them by the Prison Service formed an integral part of the activities it carried on, in particular the activity of providing meals for prisoners.

The prisoners were placed in a position where there was a risk that they could commit a variety of negligent acts within the field of activities assigned to them. Further, they worked under the direction of prison staff. The claimant had been injured as a result of negligence by the prisoner in carrying on the activities assigned to him. The fact that setting prisoners to work was one means by which the Prison Service sought to rehabilitate prisoners did not alter that conclusion.

Rehabilitation was not the only objective: the Prison Service also intended that prisoners should contribute to the cost of their upkeep by providing services. The prisoners' activities formed part of the operation of the prison and were of benefit to the Prison Service itself. It was not essential to the imposition of vicarious liability that the defendant should seek to make a profit. Nor did it depend on alignment of the objectives of the defendant and the tortfeasor.

The fact that prisoners were required to serve part of their sentence in prison and to undertake work there for nominal wages, bound them into a closer relationship with the Prison Service than would be the case for an employee. The fact that payments were below commercial level reflected the context in which prisoners worked, but did not mean that vicarious liability should not be imposed. Payment of a wage was not essential.[4]

The fact that prison operators were under a statutory duty to provide prisoners with useful work was not incompatible with vicarious liability. The *Christian Brothers* criteria were designed to ensure that vicarious liability was imposed where it was fair, just and reasonable to do so; where the criteria were satisfied, it would not generally be necessary to reassess the fairness of the result. However, where a case concerned circumstances which had not previously been the subject of authoritative judicial decision, it could be valuable to consider fairness. This appeal was such a case; however, for the Prison Service to be liable to compensate for negligence by the prison catering team appeared just and reasonable whether the tortfeasor was a civilian or a prisoner. The court also rejected arguments based on the risk of further claims being brought.

Comment

Whilst the law of vicarious liability can be traced back through cases over several centuries, it would be wrong to think of it as a rigid legal principle that is set in stone. Cases over recent decades have suggested that vicarious liability is actually a most elastic concept. It seems that its scope may just have been stretched a little further.

There are two key questions that have to be considered to determine whether vicarious liability can be established.

1) What sort of relationship has to exist between an individual and a defendant before the defendant can be made vicariously liable in tort for the actions of that individual?
2) In what manner does the conduct of that individual have to be related to that relationship with the defendant for vicarious liability to be imposed on that defendant?

In the majority of vicarious liability cases the court has been considering difficulties arising out of the second question. For the most part these have been cases where the relationship between the defendant and the wrongdoer has been that of employer and employee. This relationship, which historically has been viewed by the courts as that of a master and servant, is a long established relationship that can potentially

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

give rise to vicarious liability. However, here in *Cox* the Supreme Court had to consider the first question and look at the extent to which other relationships might also give rise to vicarious liability.

Cox follows on from of the Supreme Court's earlier decision in *Christian Brothers*, where the correct approach to be adopted in deciding whether various liability could be established in a non-employment relationship was considered. In that case Lord Phillips approached this question by first identifying five policy reasons that make it fair, just and reasonable to impose vicarious liability on an employer.

1) The employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability.
2) The tort will have been committed as a result of activity being taken by the employee on behalf of the employer.
3) The employee's activity is likely to be part of the business activity of the employer.
4) The employer, by employing the employee to carry out the activity will have created the risk of the tort committed by the employee.
5) The employee will, to a greater or lesser degree, have been under the control of the employer.

Lord Phillips explained that where these criteria are also met by a relationship between a defendant and a tortfeasor who are not bound by a contract of employment, that relationship can give rise to vicarious liability on the basis that it is "akin to that of an employer and an employee".

In *Cox* Lord Reed's single judgment takes the principles set out in the *Christian Brothers* case and expands upon them, giving additional guidance on what he describes as a modern theory of vicarious liability.

It is made clear that the five factors set out in the *Christian Brothers* case should not be given equal weight. He was rather dismissive of the first factor (means), observing that employers insure themselves to protect themselves against potential liability and they should not be held liable simply because they are insured. Regarding the fifth factor—control—it seems that this no longer has the significance that it was considered to have in the past. Such an approach was considered to be out of kilter with the reality of employment in modern life. The absence of any significant degree of control would not necessarily exclude the imposition of vicarious liability.

The remaining three factors were considered to be interrelated. What the court needs to consider here is whether the wrongdoer's torts might fairly be regarded as a risk of the defendant's business activities, whether they were committed for the purpose of furthering those activities or not. The wrongdoer needs to be acting in a role that is integral to the defendant's operation and for its benefit. Essentially, if the defendant can take the benefit of the tortfeasor's actions then the law dictates that they must also take the burden.

What is also made clear in this judgment is that it is not simply concerned with commercial activities where someone is involved in some form of "business". The benefit the defendant derives from the tortfeasor's activities does not need to take the form of a profit. It is sufficient that the defendant is merely carrying on activities in the furtherance of their own interests. This potentially covers a wide range of activities including the public, private and charitable sectors.

Ultimately it is now clear that vicarious liability can extend to a broad and diverse range of relationships. In the modern world of work many workers do not have the benefit of a contact of employment. Vicarious liability can extend to agency staff, temporary workers and potentially even to volunteers. There are multiple relationships which are not those of employment but would amount to the type of quasi-employment that could permit vicarious liability. It matters not that the organisation for whom the tortfeasor was acting was seeking to make a profit. What matters is that organisation was carrying on activities which were in the furtherance of their own interests and that the wrongdoer had been given a role that was integral to those activities.

Practice points

- Vicarious liability can be established beyond the confines of an employer-employee relationship and can also be established in certain quasi-employment relationships.
- In assessing whether a non-employment relationship can give rise to vicarious liability it is necessary to consider if: (1) the defendant is carrying on activities which are to further their own interests; and (2) the wrongdoer was assigned an integral part of those activities.

Richard Geraghty

Mohamud v WM Morrison Supermarkets Plc

(SC, Lord Neuberger PSC, Lady Hale DPSC, Lord Dyson JSC, Lord Reed JSC, Lord Toulson JSC, 2 March 2016, [2016] UKSC 11)

Personal injury—torts—employment assault—employees' duties—shops—vicarious liability

LT Assault; Employees' duties; Employers' liability; Torts; Vicarious liability

On 15 March 2008 Ahmed Mohamud visited Morrison's supermarket and petrol station in Small Heath, Birmingham. There is a kiosk which serves the petrol station which performs the function of a small convenience store. After checking the tyre pressures on his car, Ahmed Mohamud, who is of Somali descent, entered the kiosk and politely asked the Morrison's employee, Amjid Khan if there was a printing facility and if it was possible to print off some documents which were stored on a USB stick which he was carrying.

Mr Khan responded in abusive fashion, including racist language. In addition to Khan, there were two other employees present who appear to have joined in the abuse of the claimant, but who, on the judge's finding, were not involved in the subsequent violence. After being abused Ahmed Mohamud left the kiosk and walked to his vehicle.

He was immediately followed by Khan, who opened the front passenger door and partly entered the vehicle. He shouted violent abuse at Ahmed Mohamud, who told him to get out of his car. At this point Ahmed Mohamud was punched to the head by Khan. Then when he got out of his car to close the passenger door, he was again attacked by Khan, who punched him twice to the head. Khan then leapt on Ahmed Mohamud and subjected him to a serious attack involving punches and kicks while he was curled up on the petrol station forecourt.

At trial the judge found that the claimant was in no way at fault and had not behaved offensively or aggressively at any stage. He described the attack as "brutal and unprovoked". The judge found that the assault took place at a time when Khan was being encouraged to go back inside the kiosk by his supervisor, who had earlier told him not to follow the claimant out of the premises. Khan had made a positive decision to leave his kiosk and to follow Ahmed Mohamud.

The judge found that for "no good or apparent reason" Mr Khan had decided to follow the claimant from the kiosk and carry out his attack. He said that Mr Khan's actions appear to have taken place purely for reasons of his own. He dismisses the claim that the supermarket operator was vicariously liable for the assault perpetrated its employee Kahn. The claimant appealed.

The Court of Appeal held that the judge had correctly focused his attention on the test set out in *Lister*.[1] The question was whether the connection between the assault and the employment was sufficiently close to make it fair and just to hold Morrisons vicariously liable. They noted that each case turned on its own facts, and the authorities from *Lister* onwards made it clear that careful attention had to be given to the closeness of the connection between the tort and the employee's duties, viewed in the round. As analysed by Lord Millet in *Lister*, the decision in *Warren*[2] remained good law.[3]

The court also considered *Bazley*[4] in which McLachlin J in the Supreme Court of Canada, also referred to the question of risk, stating:

> "The fundamental question is whether the wrongful act is *sufficiently related* to conduct authorised by the employer to justify the imposition of vicarious liability. Vicarious liability is generally appropriate where there is a significant connection between the *creation or enhancement of a risk* and the wrong that accrues there from, even if unrelated to the employer's desires."[5]

She went on (at [41(3)]) to pose some non-inclusive factors which may be relevant in considering intentional torts. They are:

1) the opportunity that the enterprise afforded the employee to abuse his or her power;
2) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee);
3) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;
4) the extent of power conferred on the employee in relation to the victim; and
5) the vulnerability of potential victims to wrongful exercise of the employee's power.

Applying these principals, the Court of Appeal held that the fact that the assault had taken place while Khan was on duty at his place of work was relevant, but not conclusive. This was because the mere fact that the employment provided the opportunity, setting, time and place for the assault was not necessarily sufficient to fix Morrisons with liability. Moreover, the fact that Khan's job included interaction with the public did not, by itself, provide the necessary connection. Some factor or feature going beyond interaction between the employee and the victim was required.

The decided cases examined the question of close connection by reference to factors such as the granting of authority, the furtherance of an employer's aims, the inherent possibility of friction or confrontation in the employment, and the additional risk of the kind of wrong occurring. Those approaches represented different ways of answering the question, and they were illustrative of the necessary focus. It was important to recognise that, on the judge's findings, Khan had no responsibility for keeping order and he had committed the assault purely for reasons of his own.

He had not been given duties which involved the clear possibility of confrontation and the use of force, nor had he been placed in a situation where an outbreak of violence was likely. Rather, his duties were circumscribed and he had been instructed not to engage in any confrontation with a customer.[6]

They held that there was nothing to bring the case within the close connection test so as to enable a finding of vicarious liability. They concluded that the law is not yet at a stage where the mere fact of

[1] *Lister v Hesley Hall Ltd* [2001] UKHL 22; [2002] 1 A.C. 215.
[2] *Warren v Henlys Ltd* [1948] 2 All E.R. 935 KBD.
[3] *Lister v Hesley Hall Ltd* [2001] UKHL 22; [2002] 1 A.C. 215 followed, *Warren* [1948] 2 All E.R. 935 considered.
[4] *Bazley v Curry* [1999] 174 DLR (4th Ed) 45.
[5] *Bazley v Curry* [1999] 174 DLR (4th Ed) 45 at [41(2)].
[6] *Fennelly v Connex South Eastern Ltd* [2001] I.R.L.R. 390 CA (Civ Div), *Vasey v Surrey Free Inns Plc* [1996] P.I.Q.R. P373 CA (Civ Div), *Mattis v Pollock (t/a Flamingos Nightclub)* [2003] EWCA Civ 887; [2003] 1 W.L.R. 2158, *Keppel Bus Co v Sa'ad bin Ahmad* [1974] 1 W.L.R. 1082 PC (Singapore) and *Weddall v Barchester Healthcare Ltd* [2012] EWCA Civ 25; [2012] I.R.L.R. 307 considered.

contact between a sales assistant and a customer, which was plainly authorised by an employer, was of itself sufficient to fix the employer with vicarious liability.

They decided that if Morrisons were to be held liable for Khan's assault on Ahmed Mohamud, it would mean that in practically every case where an employee was required to engage with the public, his employer would be liable for any assault which followed on from such an engagement. That was a step too far and the appeal was dismissed. The case proceeded to the Supreme Court.

After reviewing the development of the doctrine of vicarious liability, the court indicated that the "close connection" test adumbrated in *Lister* and *Dubai Aluminium*[7] had been followed in a line of cases, including several at the highest level. There was a risk in attempting to lay down criteria for determining what precisely amounted to a sufficiently close connection to make it just for an employer to be held vicariously liable. A simplification of the essence was more desirable.

In its simplest terms, two matters had to be considered:

1) what functions had been entrusted by the employer to the employee (which had to be addressed broadly); and
2) whether there was sufficient connection between the employee's wrongful conduct and the position in which he was employed to make it right for the employer to be fixed with vicarious liability.

The cases in which the necessary connection had been found to exist were those in which the employee had used or misused his position in a way which injured the third party.[8] There was nothing wrong with the close connection test as such and the law would not be improved by a change of vocabulary.[9] The test should only be abrogated or refined if a demonstrably better test could be devised. However, the proposed "representative capacity" test was hopelessly vague. Moreover, while the Supreme Court had suggested in *Christian Brothers*[10] that the law of vicarious liability was on the move, such change was a response to changes in the legal relationships between enterprises and members of their workforces.[11] There had been no changes in societal conditions requiring a change in the law governing the circumstances in which an employer should be held vicariously liable for the torts of an employee.

The court pointed out that it was Khan's job to attend to customers and respond to their inquiries. His conduct in answering the claimant's request in a foul-mouthed way and ordering him to leave was inexcusable but was within the field of activities assigned to him. What happened thereafter was an unbroken sequence of events. It was not right to regard Khan as having metaphorically taken off his uniform when he followed the customer onto the forecourt.

Furthermore, once on the forecourt Khan had repeated his order to leave. That was not something personal between him and the customer. Khan was ordering him to keep away from his employer's premises, and he reinforced that order by violence. In doing so he was purporting to act in the furtherance of his employer's business.

While it was a gross abuse of his position, it was in connection with the business in which he was employed. Since the supermarket had entrusted him with the position of serving customers it was just that it should be held responsible for his abuse of that position. Finally, it was irrelevant that it looked as if Khan was motivated by personal racism rather than a desire to benefit his employer's business.

[7] *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48; [2003] 2 A.C. 366.
[8] *Lloyd v Grace Smith & Co* [1912] A.C. 716 HL, *Pettersson v Royal Oak Hotel* [1948] N.Z.L.R. 136 and *Warren* [1948] 2 All E.R. 935 considered.
[9] *Lister v Hesley Hall Ltd* [2001] UKHL 22; [2002] 1 A.C. 215 and *Dubai Aluminium* [2003] 2 A.C. 366 followed.
[10] *Various Claimants v Institute of the Brothers of the Christian Schools* [2012] UKSC 56; [2013] 2 A.C. 1 ("*Christian Brothers*").
[11] *Various Claimants v Institute of the Brothers of the Christian Schools* [2012] UKSC 56; [2013] 2 A.C. 1 referred to.

Although the claims and issues in this case were separate from those in *Cox*,[12] the judgment in *Cox* and this judgment were intended to be complementary in their legal analysis. This court conformed that it agreed with the reasoning and conclusion of Lord Reed in the *Cox* case.

The appeal was allowed.

Comment

Vicarious liability cases are perhaps the most "fact sensitive" of all determinations in tort. Repeatedly the courts have grappled with an application of legal principles to some extraordinarily vexed issues. Lord Dyson in this latest case of serious note states that the test for vicarious liability has "troubled the courts for many years".[13] Some of the most difficult cases have been, as with *Mohamud*, a senseless assault with no discernible motive other than unreasoning anger. Here, as in the 2012 Scottish case of *Vaickuviene*,[14] there was the aggravating factor of racism. Judgments have scattered in these cases.

At first instance in *Vaickuviene* Lady Clark of Calton held that the circumstances justified a finding that the supermarket chain Sainsbury's might be vicariously liable for the intentional misconduct. Her decision was overturned on appeal. In *Mohamud* the decisions at first instance and by a unanimous Court of Appeal that the supermarket chain Morrison's were not vicariously liable have now been overturned by the Supreme Court. Lord Dyson in his short judgment cites twice in quick succession the observation by Lord Nicholls in *Dubai Aluminium* that the standard "close connection" test is "imprecise" but also his comment that this is "inevitable given the infinite range of circumstances where the issue of vicarious liability arises".[15] In this "forensic lottery" of appeals on racist attacks in supermarkets it would certainly seem there has been vindication of Lady Clark's perspective in *Vaickuviene*.

However, what is especially clear is that, despite a sustained assault on the "close connection test" in this case, derived from the House of Lords decision in *Lister*,[16] Lord Dyson indicated that it "has now been repeatedly applied by our courts for some 13 years" and "should only be abrogated or refined if a demonstrably better test can be devised".[17] The claimant's lawyers had argued for a new test of "representative capacity", but the Supreme Court was not persuaded there was anything wrong with the existing test.

Lord Toulson gives the major judgment on behalf of a unanimous Supreme Court in *Mohamud*, and it is a masterly analysis of the history of vicarious liability, particularly of the famous cases of Holt CJ. He succinctly describes the "foul, racist and threatening language" used by Amjid Khan, the petrol shop attendant, responding to the polite and innocuous enquiry from his Somali customer, Ahmed Mohamud, and then the unreasoning and unprovoked assault that followed on the forecourt. Sadly, Mr Mohamud died subsequently from unrelated illness, but the clear factual basis of this case is that the claimant was blameless.

A first point is that the loss shifting principle of vicarious liability in the common law has always contained elements of strict liability. While that remains philosophically contentious for some commentators, the clear objective is to give an appropriate remedy for an innocent victim. As Lord Dyson indicates in his judgment, an overriding objective is a quest for justice, and "the attraction of the close connection test is that it is firmly rooted in justice. It asks whether the employee's tort is so closely connected with his employment as to make it just to hold the employer liable".[18]

[12] *Cox v Ministry of Justice* [2016] UKSC 10; [2016] 2 W.L.R. 806.
[13] *Mohamud v WM Morrison Supermarkets Plc* [2016] UKSC 11; [2016] 2 W.L.R. 821 at [50].
[14] *Vaickuviene v J Sainsbury Plc* [2012] CSOH 69; 2012 S.L.T. 849.
[15] Quoting Lord Nicholls from *Dubai Aluminium* [2003] 2 A.C. 366 in *Mohamud v WM Morrison Supermarkets Plc* [2016] UKSC 11; [2016] 2 W.L.R. 821 at [50].
[16] *Lister v Hesley Hall Ltd* [2001] UKHL 22; [2002] 1 A.C. 215.
[17] *Mohamud v WM Morrison Supermarkets Plc* [2016] UKSC 11; [2016] 2 W.L.R. 821 at [53].
[18] *Mohamud v WM Morrison Supermarkets Plc* [2016] UKSC 11; [2016] 2 W.L.R. 821 at [53].

No doubt there are other considerations, and indeed in the Court of Appeal Arden LJ advanced the view that the "underlying policy" is to provide an incentive to employers to improve the standards of safety for members of the public, and she doubted whether "the imposition of liability for personal acts of vengeance over which employers have no control" would assist in achieving that aim.[19]

With respect to the learned judge, that seems not to square with the view put forward in the homophobic harassment case of *Majrowski*, where Lord Nicholls of Birkenhead in the House of Lords noted that "importantly, imposing strict liability on employers encourages them to maintain standards of 'good practice' by their employees".[20] Sending out a very clear signal to companies and employees that racism will not be tolerated, and certainly not in the context of rage and violence may well serve a very useful social purpose. And certainly a quest for justice in such circumstances should be a priority, although as noted by her colleague, Treacy LJ, "each case must turn on its own particular facts, and the decision will inevitably involve an element of value judgment".[21]

Lord Phillips famously indicated in *Catholic Welfare Society* that "the law of vicarious liability is on the move".[22] It is certainly clear that we have moved a long way from the situation of exculpating an employer when, in the language of Parke B in the early nineteenth century, they would not be liable for the torts of a "servant" when that tortfeasor was "going on a frolic of his own".[23] The modern law, underpinned by the reality of compulsory insurance, has meant that "unauthorised" behaviour by employees may no longer of itself absolve an employer from tortious liability. As Dyson LJ, as he then was, observed in *The Heybridge Hotel*[24] in a case where an employee lost his temper and went berserk: "A broad approach has to be adopted in considering the scope of the employment".[25] In that case there was kicking and punching on a trivial issue, followed by the threat of a knifing. Indeed, in another knifing case, *Mattis*, a nightclub bouncer ran to his home to fetch a weapon, and then returned to stab a customer in the street. In both cases the employer was held to be vicariously liable.[26]

For some time in the development of the law on vicarious liability the key test was that attributed to Salmond, and that is discussed in detail in *Mohamud*. This analysis indicated that vicarious liability was only available where the tortious act, committed in the "course of employment", had to be "either (a) a wrongful act authorised by the master or (b) a wrongful and unauthorised mode of doing some act authorised by the master".[27]

An emphatic statement of this historic law of *respondeat superior* in the 1698 case of *Middleton*[28] observes that no master is chargeable with his servant's acts save when they are "authorised".[29] But the focus on express authority was gradually whittled down when its consequences were so dire for the blameless victim.[30] In particular, the historic tests seemed utterly inappropriate in sexual exploitation and

[19] *Mohamud v WM Morrison Supermarkets Plc* [2014] EWCA Civ 116; [2014] 2 All E.R. 990 at [62].
[20] *Majrowski v Guy's & St Thomas's NHS Trust* [2006] UKHL 34; [2007] 1 A.C. 224 at [9].
[21] *Majrowski v Guy's & St Thomas's NHS Trust* [2006] UKHL 34; [2007] 1 A.C. 224 at [25].
[22] *Christian Brothers* [2013] 2 A.C. 1 at [9].
[23] *Joel v Morrison* (1834) 6 C. & P. 501 at 503.
[24] *Cercato-Gouveia v Kyprianou* [2001] EWCA Civ 1887 CA (Civ Div).
[25] *Cercato-Gouveia v Kyprianou* [2001] EWCA Civ 1887 CA (Civ Div) at 17.
[26] *Mattis v Pollock (t/a Flamingos Nightclub)* [2003] EWCA Civ 887; [2003] 1 W.L.R. 2158. See also *Vasey v Surrey Free Inns Plc* [1996] P.I.Q.R. P373 CA (Civ Div), but contra *Everett v Comojo (UK) Ltd (t/a Metropolitan)* [2011] EWCA Civ 13; [2012] 1 W.L.R. 150, where a club was not liable for a stabbing inflicted by the driver of a club member on another club member; although there was a duty of care owed by the club this had not been breached in the circumstances.
[27] See R.F.V. Heuston, R.A. Buckley (eds), *Salmond and Heuston on the Law of Torts* (London: Sweet & Maxwell, 1996) p.443. That statement of the law, in the ninth edition of Salmond, *Law of Torts* (London: Sweet & Maxwell, 1936) p.95 was expressly approved by the Privy Council in *Canadian Pacific Railway Co v Lockhart* [1942] A.C. 591 PC (Canada) at 599 per Lord Thankerton. See generally now Paula Giliker, *Vicarious Liability in Tort: A comparative perspective* (Cambridge: Cambridge University Press, 2010).
[28] *Middleton v Fowler* (1698) 1 Salk. 282.
[29] *Middleton v Fowler* (1698) 1 Salk. 282. See also *McManus v Crickett* (1800) 1 East 105, which was followed for many years, and the historical survey in "Liability of Master for willful and wanton acts of servant" (1903) 3 *Columbia Law Review* 206.
[30] See further *Clerk & Lindsell on Torts*, edited by Professor Michael Jones, 20th edn (London: Sweet & Maxwell, 2010); *Limpus v London General Omnibus Co* (1862) 1 Hurl. & C. 526 at 539 per Willes J, the law is "not so futile" as to refuse vicarious liability just because the employer had emphatically forbidden the very conduct that constituted the negligence; *Century Insurance Co Ltd v Northern Ireland Road Transport Board* [1942] A.C. 509 HL (Northern Ireland).

child abuse cases; for example, in *Trotman*,[31] the Court of Appeal held that a deputy head teacher's sexual abuse of a pupil on a field trip to Spain was not within vicarious liability, as this conduct was clearly not "authorised" within the scope of employment.[32]

That traditional approach then changed dramatically with the "close connection" test, derived from the two Canadian Supreme Court cases on child abuse of *Bazley* and *Jacobi*.[33] No longer would it be a defence for employers to indicate that they would never have authorised abhorrent intentional assaults, but a wider view would be taken of the circumstances where acts might be incidental to employment. Liability was established in *Bazley* where the abuse took place in a children's home, whereas in *Jacobi* there was a 4:3 decision against liability, on the basis that the abuse took place off site in the perpetrator's home.

These "landmark" cases, as they were termed in the House of Lords in the subsequent case of *Lister*, which overturned *Trotman*, changed the law in a new trajectory.[34] *Lister*, similar to the facts in *Bazley*, involved sexual abuse in a boarding school, and led Lord Steyn to the view that "it is necessary to face up to the way in which the law of vicarious liability sometimes may embrace intentional wrongdoing by an employee".[35] The test would now be whether the intentional conduct of the perpetrator was "so closely connected with his employment that it would be fair and just to hold the employers vicariously liable".[36]

Now in *Mohamud* we have a further elucidation of this "close connection" test. Lord Toulson posits two questions that need to be determined. The first is what "functions" or "field of activities" have been entrusted to the employee, "or, in everyday language, what was the nature of his job". This question needs to be dealt with "broadly".[37] Then the second question is "whether there was sufficient connection between the position in which he was employed and the wrongful conduct to make it right for the employer to be held liable under the principle of social justice which goes back to Holt".[38]

Lord Toulson helpfully analyses a number of cases where assaults took place.[39] Most of them applied the Salmond test in a previous era. Particularly apposite is *Warren*[40] where a customer at a petrol station had an angry confrontation with the attendant, who wrongly suspected him of leaving without payment. After paying, the customer then drove after and flagged down a passing police officer, who returned with him to the garage. But after listening to both sides the officer said this was not a matter for him. At that point the attendant angrily punched the customer in the face. Hilbery J used the Salmond formula to determine that the assault had not been committed in the course of employment. Lord Toulson makes the distinction that "any misbehaviour by the petrol pump attendant, *qua* petrol pump attendant, was past history by the time that he assaulted the claimant" in *Warren*,[41] whereas in *Mohamud* there was an "unbroken sequence of events" and what occurred was a "seamless episode".[42]

Nevertheless it is clear in these vicarious liability cases that, as indicated by Lady Clark in considering the *Lister* test in *Vaickuviene*, there has been an increasing acknowledgement that the principles which have been developed are not entirely consistent, that the cases are very fact dependent, and that policy considerations have been and remain a major influence.[43] Lord Toulson in *Mohamud* also notes the issue

[31] *T v North Yorkshire CC* [1999] I.R.L.R. 98 CA (Civ Div)
[32] *T v North Yorkshire CC* [1999] I.R.L.R. 98 at [18].
[33] *Bazley v Curry* (1999) 174 DLR (4th) 45 and *Jacobi v Griffiths* (1999) 174 DLR (4th) 71.
[34] *Lister v Hesley Hall Ltd* [2001] UKHL 22; [2002] 1 A.C. 215.
[35] *Lister v Hesley Hall Ltd* [2001] UKHL 22; [2002] 1 A.C. 215 at [16]. See generally Peter Cane, "Vicarious Liability for Sexual Abuse" [2000] 116 L.Q.R. 21, and Justin Levinson, "Liability for Intentional Torts" [2005] J.P.I.L. 304.
[36] *Lister v Hesley Hall Ltd* [2001] UKHL 22; [2002] 1 A.C. 215 at [27]–[28].
[37] *Mohamud v WM Morrison Supermarkets Plc* [2016] UKSC 11; [2016] 2 W.L.R. 821 at [44].
[38] *Mohamud v WM Morrison Supermarkets Plc* [2016] UKSC 11; [2016] 2 W.L.R. 821 at [45].
[39] See in particular *Keppel Bus Co* [1974] 1 W.L.R. 1082 and *Gravil v Carroll* [2008] EWCA Civ 689; [2008] I.C.R. 1222, described by the learned editors of *Clerk & Lindsell* (2010) as an "especially tricky case" in relation to prohibitions on certain forms of conduct, possibly because of the suggestion that in rugby the throwing of punches is "just the kind of thing that both clubs would have expected to occur".
[40] *Warren v Henlys Ltd* [1948] 2 All E.R. 935 KBD.
[41] *Mohamud v WM Morrison Supermarkets Plc* [2016] UKSC 11; [2016] 2 W.L.R. 821 at [45].
[42] *Mohamud v WM Morrison Supermarkets Plc* [2016] UKSC 11; [2016] 2 W.L.R. 821 at [47].
[43] *Mohamud v WM Morrison Supermarkets Plc* [2016] UKSC 11; [2016] 2 W.L.R. 821 at [22].

of public policy, quoting Scarman LJ in *Rose*,[44] where a milkman was expressly forbidden to employ a youngster to assist with his round, but disregarded that rule and a 13-year-old boy was injured. Scarman LJ invoked *Salmond on Torts* to state that vicarious liability is based on public policy principles that are "socially convenient and rough justice", based on dicta harking back to Lord Brougham and Sir John Holt.[45]

Practice points

- Despite the efforts of the claimant's legal team in *Mohamud* to formulate a new test for vicarious liability, based on "representative capacity", the unanimous decision of the Supreme Court firmly re-establishes the *Lister* analysis of "close connection".
- Lord Toulson notes the two questions that must be asked as to whether an employee is still acting within the course of employment, particularly when engaged in an intentional act:
  - what is the "nature of [the] job"; and
  - whether there was "sufficient connection" between that position and the wrongful conduct, so as to "make it right for the employer to be held liable under the principle of social justice".
- The Supreme Court were not persuaded that there was anything wrong with the *Lister* approach, noting it has been affirmed many times, and nothing would be gained by a "change of vocabulary".

Julian Fulbrook

Williams v Bermuda Hospitals Board

(PC (Ber), Lady Hale, Lord Clarke, Lord Hughes, Lord Toulson, Lord Hodge, 25 January 2016, [2016] UKPC 4)

Personal injury—clinical negligence—liability—causation—material contribution—successive causes

LT Bermuda; Causation; Clinical negligence; Material consideration; Successive causes

The patient had been suffering from acute appendicitis and had attended a hospital emergency department, complaining of abdominal pain. A decision was taken to order a CT scan of the abdomen. There was a delay of over four hours between the doctor ordering the scan and the scan being performed. Surgery was eventually performed and it emerged that the patient had a ruptured appendix and widespread pus throughout the pelvic region from the ruptured appendix. The surgeon was of the view that the pus had been there for some time. The accumulation of pus led to myocardial ischaemia. During surgery, the patient suffered some form of myocardial ischaemic event and lung complications. He required intensive care.

The trial judge found that sepsis from the ruptured appendix caused injury to the patient's heart and lungs. He also found that the scan should have been obtained on an urgent ("STAT") basis and that the failure to do so led to the operation being delayed between two hours and twenty minutes and four hours and fifteen minutes. However, he concluded that the patient had failed to prove that the complications which he developed were probably caused by the failure to diagnose and treat him expeditiously.

[44] *Rose v Plenty* [1976] 1 W.L.R. 141 CA (Civ Div).
[45] *Rose v Plenty* [1976] 1 W.L.R. 141 at 147–148.

The Court of Appeal reversed that decision, holding that that proper test of causation was not whether the hospital's breaches of duty caused the injury to the patient, but whether they contributed materially to the injury. The defendant board appealed to the Privy Council.

The hospital board submitted that material contribution was not sufficient for the purposes of causation. It argued that *Bonnington Castings*[1] was distinguishable because in that case the inhalation from two sources was simultaneous, whereas in this case the sepsis attributable to the hospital's negligence developed after sepsis had already begun to develop.

The Privy Council held that the submission that the "material contribution" approach was confined to cases in which the timing of origin of the contributory causes was simultaneous was inconsistent with the decision in *Hotson*.[2] It was also inconsistent with the opinion, expressed in *McGhee*,[3] that where on the balance of probabilities an injury was caused by two or more factors operating cumulatively, it was immaterial whether the cumulative factors operated concurrently or successively. The sequence of events might be highly relevant in considering whether a later event had made a material contribution to the outcome or whether an earlier event had been so overtaken by later events as not to have made a material contribution to the outcome. However, those were evidential considerations.

As a matter of principle, successive events were capable of each making a material contribution to the outcome.[4] A claim would fail if the most that could be said was that the claimant's injury was likely to have been caused by one or more of a number of disparate factors, one of which was attributable to a wrongful act or omission of the defendant.[5]

In this case, the judge found that injury to the heart and lungs was caused by a single known agent, sepsis from the ruptured appendix. The sepsis developed incrementally over a period of approximately six hours, progressively causing myocardial ischaemia. The sepsis was not divided into separate components causing separate damage to the heart and lungs. Its development and effect on the heart and lungs was a single continuous process.

On the trial judge's findings, that process continued for a minimum period of two hours and twenty minutes longer than it should have done. It was right to infer, on the balance of probabilities, that the hospital's negligence materially contributed to the process and therefore materially contributed to the injury to the heart and lungs. The appeal was dismissed.

In obiter comments they referred to the Court of Appeal's decision in *Bailey*[6] saying that they had been wrong to hold that the trial judge in that case had departed from the "but for" test. In that case, the claimant had received negligent hospital treatment which led to her having to undergo further major procedures. As a result, she was left in a weakened state. In addition, she developed pancreatitis as an unfortunate but non-negligent complication. The judge at first instance had been right to find that the totality of her weakened condition caused the harm and that "but for" causation was established.

In further obiter comment they said that the "doubling of risk" test should be used with caution. It might sometimes be helpful, but inferring causation from proof of heightened risk was never an exercise to apply mechanistically. A doubled tiny risk would still be very small.

Comment

This is a curious case. It starts with a burst appendix in a hospital in a corner of a British dependent island territory in the North Atlantic Ocean. The claimant effectively loses at first instance although he is awarded $2,000 for some modest additional pain and suffering. He succeeds fully on appeal and is awarded $60,000.

[1] *Bonnington Castings Ltd v Wardlaw* [1956] A.C. 613 HL.
[2] *Hotson v East Berkshire HA* [1987] A.C. 750 HL.
[3] *McGhee v National Coal Board* [1973] 1 W.L.R. 1 HL.
[4] *Bonnington Castings Ltd v Wardlaw* [1956] A.C. 613 HL, *Hotson* [1987] A.C. 750 and *McGhee* [1973] 1 W.L.R. 1 applied.
[5] *Wilsher v Essex AHA* [1988] A.C. 1074 HL applied.
[6] *Bailey v Ministry of Defence* [2008] EWCA Civ 883; [2009] 1 W.L.R. 1052.

He donates the additional damages to charity. The Hospital Board don't challenge the additional award ("It's not about the money…") but appeal on a matter of legal principle (i.e. "It's about a lot more money…").

It ends up in the Privy Council with the NHS Litigation Authority intervening in an effort to persuade the court to row back from recent developments in the law of causation in clinical negligence cases. Bevan Brittan appear twice, acting for the Hospital Board defendant and, separately, for the NHS Litigation Authority. There appears to be no suggestion of any patient or claimant-focussed organisations being given the same opportunity to intervene.

Fortunately for claimants and their representatives, the Privy Council declined the invitation to turn back a decade of progress for patients' rights and safety and robustly dispatched Bevan Brittan's dual onslaught on the law, affirming that material contribution very much remains a tool for claimants to use to establish causation of injury in clinical negligence claims. That much is clear from the judgment. However, this is a complex area of law and trying to distil where we are post this Privy Council judgment still takes some doing.

The judge at first instance, Hellman J, decided the case on the standard "but for" causation test. He found that there had been a negligent delay in operating on the claimant's appendix of between around two and four hours. The complications that arose might have been avoided but for the delay but he was not satisfied that they probably would have been avoided. This was a straightforward application of the well-known test which requires the claimant to show that, but for the defendant's breach of duty, he would probably not have suffered the injury sustained.

The Court of Appeal (Ward JA) disagreed. The Court of Appeal re-examined some of the findings of fact and identified culpable delays between arrival, admission, examination, the ordering, taking and reading of the CT scan and the surgery. The trial judge was in error "by raising the bar unattainably high". The proper test of causation was "whether the breaches of duty … contributed materially to the injury". They did and the claimant succeeded.

At the heart of the Privy Council judgment is an analysis of the decision in *Bonnington Castings*. This was the first case in which the "but for" causation test was modified. The claimant developed silicosis as a result of inhaling dust. Some of the dust inhaled was "guilty" dust (i.e. attributable to a breach of duty by the defendant) and some of the dust was "non-guilty". The defendant argued the claimant would have developed silicosis as a result of exposure to the non-guilty dust in any event so should not succeed.

The House of Lords held that the claimant could recover, and recover in full. They found that the guilty dust (or negligent exposure) had made a material contribution (i.e. more than minimal) to the development of his silicosis. The injury (silicosis) was treated as an indivisible one. It was not possible to identify or apportion the extent to which the negligent exposure contributed to the disease.[7]

In *Bonnington Castings*, Lord Reid said:

> "the employee must in all cases prove his case by the ordinary standard of proof in civil actions: he must make it appear at least that on a balance of probabilities the breach of duty caused or materially contributed to his injury."[8]

Lord Reid summarised the medical evidence as establishing that the disease was caused by a gradual accumulation of silica in the lungs and said:

> "That means, I think, that the disease is caused by the whole of the noxious material inhaled and, if that material comes from two sources, it cannot be wholly attributed to one source or the other … it appears to me that the source of his disease was the dust from both sources and the real question is

[7] Arguably today silicosis would be treated as a divisible industrial disease that was capable of apportionment on the basis of cumulative exposure.
[8] *Bonnington Castings Ltd v Wardlaw* [1956] A.C. 613 HL at 620.

> whether the dust from the swing grinders [the 'guilty' dust] materially contributed to the disease. What is a material contribution must be a question of degree."[9]

The defendant in *Williams* sought to distinguish *Bonnington Castings* by suggesting that in *Bonnington Castings* the inhalation of dust from the two sources was simultaneous (concurrent) whereas the development of the sepsis in the claimant in *Williams* was not. The way it was submitted was that sepsis had begun already as a consequence of the claimant's underlying condition and that the subsequent delay only caused additional later (more) sepsis to develop.

The Privy Council gave this short shrift, relying on Lord Bridge's judgment in *Hotson* and also that of Lord Simon of Glaisdale in *McGhee* to the effect that where on the balance of probabilities an injury is caused by two (or more) factors operating cumulatively, one or more of which is a breach of duty, it is immaterial that the cumulative factors operate concurrently or successively.

So the Privy Council were clear that any attempts to roll back the application of the material contribution modification of the "but for" test in cases of successive or non-concurrent causes should not succeed. They said: "As a matter of principle, successive events are capable of each making a material contribution to the subsequent outcome."[10]

The Privy Council then distinguished *Wilsher* which remains authority for the proposition that a claim will fail if the most that can be said is that the claimant's injury is likely to have been caused by one or more of a number of disparate factors, one of which is attributable to a wrongful act or omission of the defendant. This is because the claimant will not have shown as a matter of probability that the factor attributable to the defendant caused the injury or was one of two or more factors which operated cumulatively to cause it. This was different to *Bonnington Castings* where there was a single cause (dust). And different to *Williams* where there was also a single agent—sepsis caused by the ruptured appendix.

The development and effect of the sepsis was a single continuous process which continued for a minimum of two hours twenty minutes more than it should have done. It was therefore right to infer on the balance of probabilities that the hospital's negligence materially contributed to the process and therefore materially contributed to the injury.

Bonnington Castings was applied in *Bailey* and the Privy Council went on to consider the *Bailey* decision in some detail, although their comments are arguably obiter as they noted:

> "Although not strictly necessary, it may be helpful to comment by way of postscript on two matters which were raised in argument. First, Ms Harrison was critical of the decision, and more particularly the reasoning, of the Court of Appeal in *Bailey*."[11]

In *Bailey*, Waller LJ 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."[12]

[9] *Bonnington Castings Ltd v Wardlaw* [1956] A.C. 613 HL at 621.
[10] *Williams v Bermuda Hospitals Board* [2016] UKPC 4; [2016] 2 W.L.R. 774 at [39].
[11] *Williams v Bermuda Hospitals Board* [2016] UKPC 4; [2016] 2 W.L.R. 774 at [44]
[12] *Bailey v Ministry of Defence* [2008] EWCA Civ 883; [2009] 1 W.L.R. 1052.

The Privy Council stated that it did not share the view of the Court of Appeal that *Bailey* involved a departure from the "but for" test. They preferred Foskett J's approach at first instance which was that the medical evidence established that the claimant's generally weakened and debilitated condition caused her not to be able to respond naturally and effectively to vomiting with the consequence that she inhaled her vomit leading to a cardiac arrest and hypoxic brain damage. The defendant's breach of duty following an endoscopic procedure known as ERCP required her to undergo further major procedures which should not have been necessary and which lead to her being in a weakened state. They preferred to see this not as a departure from the "but for" test but as an application of it.

"But for" the negligence following the ERCP the claimant would not have required the further major procedures. She would not then have been in such a weakened state and therefore on the balance of probabilities she would not have been so weak as to choke on her own vomit. The extent to which the claimant's separate (and non-negligent) pancreatic condition contributed to her weakness was not a cumulative cause but was an example of the well-known principle that a tortfeasor takes his victim as he finds her. They said:

> "The Board does not share the view of the Court of Appeal that the case involved a departure from the 'but for' test. The judge concluded that the totality of the claimant's weakened condition caused the harm. If so, 'but for' causation was established. The fact that her vulnerability was heightened by her pancreatic no more assisted the hospital's case than if she had an egg shell skull."[13]

So where does that leave us?

In 2009 this journal published an article entitled "Causation—The Search for Principle"[14] by Dame Janet Smith, then a Court of Appeal judge[15] in which she analysed the (then recent) decision in *Bailey*. Her opening paragraph remains as relevant today as it was then:

> "Until quite recently, the law of causation in personal injury cases was quite simple. So far as I am aware, very few cases on the topic went to the Court of Appeal. Today a significant proportion of appeals in that field involve problems of causation. They are not easy. They reveal that many judges at first instance find them difficult. This is an attempt to sort out the issues and find the principles."[16]

Having analysed the thread of cases starting with *Bonnington Castings* and leading up to the decision in *Bailey*, she concluded:

> "I called this paper "Causation--The Search for Principle" and I have tried to find the principles. It is not easy. Even when the principles are identified, it can be unclear which principle should be applied to which facts. I fear that barristers and advocates will continue to have difficulty with questions of causation and that the issue will continue to occupy the time of the Court of Appeal as often as it presently does."[17]

The case of *Williams* gave the Privy Council the opportunity to provide the clarity Dame Janet was searching for. They have certainly helped and the result was undoubtedly disappointing for those defending such claims. However, perhaps their judgment simply lays the ground for more arguments in cases than before. My attempt to distil some clarity is set out below.

[13] *Williams v Bermuda Hospitals Board* [2016] UKPC 4; [2016] 2 W.L.R. 774 at [47].
[14] Janet Smith, "Causation—The Search for Principle" [2009] J.P.I.L. 101.
[15] Dame Janet retired from the Court of Appeal in 2011. In 2012 she was appointed by the BBC to lead an inquiry into the Jimmy Saville abuse allegations and her report was published on 25 February 2016.
[16] Smith, "Causation—The Search for Principle" [2009] J.P.I.L. 101, 101.
[17] Smith, "Causation—The Search for Principle" [2009] J.P.I.L. 101, 113.

Practice points

- The "but for" test remains the standard causation test to be applied.
- The test is "but for" the defendant's breach of duty, would the injury on a balance of probabilities have been avoided.
- Where there are cumulative causes and the injury is a divisible one it is correct to seek to apportion the extent to which the injury is caused by the breach, essentially an application of the "but for" test in order to make that apportionment.
- Where the injury is indivisible and there are cumulative causes of which at least one is attributable to the defendant's breach of duty the "but for" test can be applied more broadly[18] and provided the defendant's breach of duty contributed materially to the injury causation will be established.
- For these purposes, material means more than minimal.
- Where there are cumulative causes it does not matter whether they are concurrent or successive.
- If, however, there is "an either/or" cause of an indivisible injury the court will need to decide, on a balance of probabilities, whether the claimant can prove causation, in other words apply the "but for" test.
- The same approach will be applied where there are a number of disparate factors, on the basis it will not suffice for the claimant just to show the defendant's breach of duty was capable of causing the damage or increased the risk of that damage (though material increase in risk may be established if the case falls within the principle outlined in *Fairchild*).[19]
- The claimant must, ultimately, prove causation by the most appropriate means. The court may not infer, just because there has been a breach of duty capable of causing the damage, causation is proved.
- Where there are separate but cumulative causes it may be possible to categorise the non-negligent cause as effectively being an application of the egg shell skull rule and of no causative effect.

Muiris Lyons[*]

GB v Stoke City Football Club Ltd

(QBD (Preston), Judge Butler QC, 30 November 2015, [2015] EWHC 2862 (QB))

Personal injury—sport—torts—vicarious liability—assault—battery—burden of proof—credibility—football clubs—psychiatric harm

LT Assault; Battery; Burden of proof; Credibility; Football clubs; Sports persons; Vicarious liability

The claimant, George Blackstock, claimed damages for personal injuries arising from two assaults alleged to have taken place while he was apprenticed to Stoke City Football Club. The events in issue were alleged

[18] It's arguable as to whether this is a modification or an extension or just the application of the "but for" test in a broader way. The semantics is perhaps unhelpful.

[19] *Fairchild v Glenhaven Funeral Services* [2003] 1 A.C. 32.

[*] I am indebted to fellow Board member John McQuater for his helpful contributions to this case comment.

to have taken place in 1986 and 1987, when Mr Blackstock was aged 16 and 17 and the second defendant Peter Fox was a professional player with Stoke City. Mr Blackstock spent just over two years at the club before returning home to Belfast after former England captain and Stoke manager Mick Mills released him because at 5ft 4in he was too small.

According to Mr Blackstock, he was subjected to a practice known as "gloving", whereby a gloved finger was covered in Deep Heat rubbing ointment and inserted into his rectum by the second defendant Peter Fox. That practice was said to have been commonly used against apprentices as a form of punishment by the professional players for failing to perform menial tasks for them, such as cleaning their kit. According to the claimant, the system of apprenticeship in the club created an enhanced risk that the professionals would punish the apprentices if displeased with them, whether or not contractually authorised to do so.

The claimant said that he had begun to abuse alcohol immediately after the first incident and had continued to do so for 20 years, and had also suffered from depression and relationship difficulties as a result of the alleged assaults. Peter Fox denied that the incidents had taken place.

The issues were whether the assaults had taken place; if so, whether the club was vicariously liable for them; and whether the claimant had suffered any physical or psychiatric injury.

When applying for a mortgage in 1996, the claimant had signed a statement that his alcohol consumption was very low. He had given contradictory evidence about his alcohol consumption at earlier limitations hearings.

The judge said that this case was not one of historic sexual abuse, but a case of what was in effect an accepted practice in the context of the football club. Although current terminology might describe the acts in question as sexual offences, at the time of their alleged commission it would not have been conventional to use criminal terminology for the purpose of civil proceedings. The claim was not presented as a claim for sexual assault and there was no suggestion of a sexual motivation on the part of the second defendant.

There was no need at common law for the claimant to prove that the second defendant intended to cause him injury; merely that he intended the conduct, coupled with an understanding that the contact exceeded what was acceptable.[1]

The claimant's inconsistent evidence about his alcohol consumption undermined his credibility and precluded the making of any findings of fact based on his unsupported evidence. There was no contemporaneous evidence of his having failed to perform as a footballer due to excessive alcohol consumption. The evidence concerning his personal relationships was also at variance with his accounts given to the psychiatric experts.

Judge Butler held that Mr Blackstock had failed to discharge the burden of proof saying:

> "I do not find the claimant's allegations are consciously dishonest or that nothing untoward ever occurred between players and apprentices at the club all those years ago, but I am unable to find as a fact that the specific events alleged by and allegedly involving the claimant did occur.
>
> Unsatisfactory as it may seem after such a long trial, but having regard to my duty to apply the burden and standard of proof appropriately, I am driven to the conclusion that the claimant has failed to discharge the burden of proof in his claim against the second defendant and it should be dismissed. His claim fails not because I find on the balance of probabilities that there was never any 'gloving' at the club or that he was not 'gloved' but because he has not proved those allegations and I cannot find on the balance of probabilities that he was 'gloved'."[2]

The judge decided that on the balance of probabilities, Blackstock had avoided revealing evidence which would not assist his case holding that the mere fact of a diagnosis of depression after the claimant made his allegations did not of itself prove that they were true. Nor was there any support for his assertion

[1] *Wilson v Pringle* [1987] Q.B. 237 CA (Civ Div) followed.
[2] *GB v Stoke City Football Club Ltd* [2015] EWHC 2862 (QB) at [137] and [138].

that his performance as a footballer deteriorated following the alleged assaults; on the contrary, it appeared to have improved. The claimant had therefore failed to discharge the burden of proof in his claim against the second defendant and it followed that his claim against the club also failed.

In obiter comments the judge said that even if the claimant had made out his case, Peter Fox had no express or implied power or duty conferred upon him by the club to discipline or chastise the apprentices. His comments on vicarious liability became irrelevant following the Supreme Court's decision in *Mohamud*.[3]

The claim was dismissed.

Comment

The distress of the claimant's legal team is palpable from this judgment. One can just imagine the solicitor sitting behind counsel in court, head in hands, as one by one the witnesses for the claimant are demolished under cross examination. Judge Butler found that there was "a tendency on the claimant's part to try to conceal facts that he might not think helpful to his claim"[4] and he further stated that:

> "the evidence of [three of the claimant's witnesses] was to a greater or lesser extent inconsistent, contradictory, unreliable and incredible and the evidence of [a fourth witness] was at least in part dishonest. Their evidence, individually and collectively, provides no credible support for the claimant's claim."[5]

Having characterised the claim as one of intimate physical assault as opposed to one of historic sexual abuse of a 16-year-old football apprentice (due to the absence of a sexual motivation on the part of the second defendant), the case was initially subject to a hearing on limitation as a preliminary issue.[6] As a result whilst the claimant was allowed to proceed on a case framed upon the tort of trespass to the person (assault, battery and false imprisonment), and vicarious liability for that tort, a wider claim in negligence against the club could not be brought and was out of time.[7]

Of course, the criminal law is not subject to the Limitation Act 1980 and it would have been open to the authorities to prosecute the second defendant, notwithstanding that the assaults could be characterised as "historic". It was accepted at trial that the two alleged assaults under consideration here, if proved, would have constituted offences of indecent assault pursuant to s.15(1) of the Sexual Offences Act 1956. However, here the second defendant had not been convicted of such crimes.

A proper risk assessment would dictate that the absence of any successful prosecution would ring alarm bells in the claimant camp. The judge correctly directed himself that he was not being asked to consider whether a criminal offence had been committed in this case, and that the correct standard of proof was one of the balance of probabilities. He noted that *Re H*[8] had been disavowed in *Re B*[9] in that the deliberate infliction of harm does not require a higher standard of proof in civil proceedings.

The judge here clearly felt he was not quite getting to the bottom of the issues. He said that his judgment against the claimant was not a positive finding that no such assaults ever took place, rather that the claimant had failed to discharge the burden of proof for the incidents pleaded:

> "A civil trial is not a search for absolute truth, even when findings of fact are possible, but I am very conscious that the full truth has not been revealed by this trial."[10]

[3] *Mohamud v WM Morrison Supermarkets Plc* [2016] UKSC 11; [2016] 2 W.L.R. 821.
[4] *GB v Stoke City Football Club Ltd* [2015] EWHC 2862 (QB) at [41] per HH Judge Butler.
[5] *GB v Stoke City Football Club Ltd* [2015] EWHC 2862 (QB) at [94].
[6] Guidance from case law indicates this is not appropriate in historic claims for sexual assault: see *B v Nugent Care Society* [2009] EWCA Civ 827; [2010] 1 W.L.R. 516; *T v Archbishop of Liverpool* [2008] EWHC 3531 (QB).
[7] The negligence claim had been pleaded on the basis that the club was in direct breach of its duty to take reasonable care of its apprentices and in particular to prevent assaults being committed against them by professional players.
[8] *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] A.C. 563 HL
[9] *Re B (Children) (Sexual Abuse: Standard of Proof)* [2009] 1 A.C. 11 HL.
[10] *GB v Stoke City Football Club Ltd* [2015] EWHC 2862 (QB) at [141] per HH Judge Butler.

Interesting words!

Despite the judge finding that the assaults had not been proved to have been committed, he commented on the pleaded claim for vicarious liability against the club, even though that too fell away. The club conceded that it employed the second defendant. The question would have been whether the tortious acts complained of were "so closely connected with his employment that it would be fair and just to hold the employer vicarious liable".[11]

We have seen a sea change in how vicarious liability for deliberate assault is being interpreted by the courts in recent years. Here, the judge was not convinced that there would have been vicarious liability even if the claimant had proved the facts alleged. Those comments are now irrelevant in view of the Supreme Court's decision in *Mohamud*[12] covered elsewhere in this edition of JPIL.

Practice points

- Claimants should risk assess such cases carefully. The assaults complained of in GB occurred almost 30 years ago, and would have constituted criminal assaults. The absence of a successful criminal prosecution and/or supportive internal investigation (it is evident from the judgment that such an investigation was carried out by the Football Association) should raise alarm bells. Claimant's solicitors must be fairly confident that they can still prove their client's case, even if it is only on the balance of probabilities.
- Proof witnesses carefully and critically evaluate their evidence before embarking on litigation. Here, the fact that many of the claimant's witnesses had sold their story to a tabloid newspaper very much counted against them.
- Avoid trials of a preliminary issue on limitation where possible in historic assault cases. For s.33 discretion to be granted, it is desirable for the court to consider the case as a whole. Claimants have a better chance of overcoming the hurdles of s.33 at the hearing of the substantive trial.

Jonathan Wheeler

Heneghan[1] v Manchester Dry Docks Ltd

(CA (Civ Div), Lord Dyson MR, Tomlinson LJ, Sales LJ, 15 February 2016, [2016] EWCA Civ 86)

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

LT Apportionment; Asbestos; Cancer; Causation; Employers' liability; Lung

James Heneghan was born on 8 March 1938. During the course of his working life, he was exposed to respirable asbestos fibres and dust. In November 2011 Mr Heneghan began to develop symptoms of

[11] *Lister v Hesley Hall* [2002] 1 A.C. 215 and *Various Claimants v Institute of the Brothers of the Christian Schools* [2012] UKSC 56; [2013] 2 A.C. 1.

[12] *Mohamud v WM Morrison Supermarkets Plc* [2016] UKSC 11; [2016] 2 W.L.R. 821.

[1] Carl Heneghan suing as Son & Administrator of the Estate of James Leo Heneghan, Deceased.

adenocarcinoma of the lung, and a diagnosis to that effect was made in early 2012. He died from the disease on 3 January 2013.

He had been employed by the six defendants on a sequential basis between 1961 and 1974. There were earlier employers who had not been sued. He had also been exposed to asbestos by earlier employers who had not been sued. The experts agreed that, on the balance of probabilities, he would not have developed lung cancer if he had not been exposed to asbestos. It was agreed that his exposure to asbestos over the course of his working life could be quantified and that the respondents were responsible for 35.2 per cent of the whole exposure. It was also agreed that biological evidence could not establish which, if any, of the exposures had triggered the cell changes in his body which led to him contracting the disease.

The judge awarded damages against each respondent in proportion to the increase in risk for which it was responsible, applying the principle established in *Fairchild*.[2] On that basis, the appellant was awarded damages of £61,600, rather than full damages of £175,000. The claimant appealed.

The court held that the broader view of causation in *McGhee*[3] had been adopted as a matter of policy in order to find a just solution to the problem which arose where the conventional rules of causation would result in a claimant failing to prove his case and recovering no damages for a defendant's breach of duty, even though the defendant had materially increased the risk that the claimant would suffer injury. To apply the test set out in *Bonnington Castings*[4] in this case would be to ignore the fact that there was a fundamental difference between making a material contribution to an injury and materially increasing the risk of an injury.

The decision in *Fairchild* had not been based on the fiction that a defendant who had created a material risk of mesothelioma was deemed to have caused or materially contributed to the contraction of the disease. *Bonnington Castings* applied in cases where the court was satisfied on scientific evidence that the exposure for which the defendant was responsible had, in fact, contributed to the injury. That was readily demonstrated in the case of divisible injuries, the severity of which was proportionate to the amount of exposure to the causative agent.

The response of the law to the problem posed in a case where the scientific evidence did not permit a finding that the exposure attributable to a particular defendant contributed to the injury was to apply the *Fairchild* exception. The factors identified in *Fairchild* for the application of the exception existed in this case:

1) all the respondents conceded their breach of duty;
2) all the respondents had increased the risk that the father would contract lung cancer;
3) all had exposed the father to the same agency that was implicated in causation, namely asbestos fibres; and
4) medical science was unable to determine to which respondent there should be attributed the exposure which actually caused the cell changes which initiated the genetic changes culminating in the cancer.

Therefore the judge had been right to apply the *Fairchild* exception. It would be wrong to draw an inference of causation from the epidemiological evidence. The evidence permitted the contribution to the risk of cancer attributable to an individual respondent to be quantified, but it went no further than that. It was not possible to infer that all or any of the defendants had made a material contribution to the father

[2] *Fairchild v Glenhaven Funeral Services Ltd (t/a GH Dovener & Son)* [2002] UKHL 22; [2003] 1 A.C. 32.
[3] *McGhee v National Coal Board* [1973] 1 W.L.R. 1 HL.
[4] *Bonnington Castings Ltd v Wardlaw* [1956] A.C. 613 HL.

contracting lung cancer. However, all of them had materially contributed to the risk that he would contract lung cancer.[5]

The appeal was dismissed.

Comment

On the face of it, the issue of causation in a personal injury claim is a straightforward matter. It is simply the question of how much harm or loss has been caused by the defendant's breach of duty. In practice the application of this question has often proven to be a most vexed issue. This has particularly been the case in the field of asbestos litigation. *Heneghan* is the latest instalment in a series of cases in this area which have exposed some of the difficulties with the conventional approach adopted by the courts to deal with the issue of causation.

Generally when considering issues of causation the appeal courts have had to balance two aims. On the one hand they must adopt a coherent set of principles. At the same time, they must do justice to an individual and ensure that they do actually obtain redress when it is fair and reasonable for them to do so. By seeking to achieve both aims the law in this area can often end up like a tangled knot that is difficult to unravel.

The general rule of causation is the "but for" test. The claimant must prove that *but for* the defendant's breach of duty, they would not have suffered the harm or loss in question. The onus is on the claimant to prove this causal link on a balance of probabilities. This approach ensures that the claimant is compensated for the harm the defendant's wrongdoing caused to them, but also that a defendant does not have to compensate another party for harm or loss that they probably did not cause or which would have arisen in any event.

The field of industrial disease litigation has on several occasions tested the limits of the "but for" test as a means to deliver justice. This has prompted the courts to seek a different approach to causation in certain circumstances. Historically the first significant divergence from the traditional "but for" test was confirmed in *Bonnington Castings*.

In *Bonnington Castings* the claimant's employment exposed him to silica dust which gradually over time collected in his lungs resulting in pneumoconiosis. Part of the exposure was caused by his employer's negligence but a larger contribution came from non-negligent exposure to the dust. In short, the cause of the condition was two separate sources and the defendant was only responsible for one of these. It could not be established that on a balance of probabilities the condition would have arisen but for the defendant's negligent exposure. However, it was held that the dust arising from the employer's negligent exposure had *materially contributed* to the claimant developing the disease. The defendant's negligent exposure, whilst not being the only source or agent resulting in the harm, was nevertheless considered to be sufficient to establish the causal link for the employer to be held liable to compensate their employee for the condition.

Bonnington Castings now stands as the authority for a broadly applicable principle in the law of causation. In a situation where a defendant's breach is one of a number of agents which bring about a specific harm or loss, so long as the defendant's breach is not de minimis, and that it materially contributed to the outcome, they can be held liable for that outcome.

The ability of this approach to do justice to the parties was challenged by the circumstances considered by the House of Lords in *Fairchild*. Here each of the claimants had worked for several employers, all of whom had negligently exposed them to asbestos. Each claimant had developed mesothelioma, a form of cancer which is almost always fatal. The medical evidence that was given in the proceedings established that it might have been just one single asbestos fibre inhaled at some unknown point during each claimant's working lives that triggered the process that lead to the development of the cancer. This left the claimants

[5] *Amaca Pty Ltd v Ellis* [2010] H.C.A. 5; *Jones v Secretary of State for Energy and Climate Change* [2012] EWHC 2936 (QB) and *McGhee* [1973] 1 W.L.R. 1 applied, *Bonnington Castings* [1956] A.C. 613 distinguished, *International Energy Group Ltd v Zurich Insurance Plc UK* [2015] UKSC 33; [2015] 2 W.L.R. 1471 followed.

with a difficulty when it came to establishing causation. How could they prove which of their employers had exposed them to the specific fibre that caused the mesothelioma? It could not be said that every fibre they had inhaled during their various employments had cumulatively added to the development of the condition (unlike the silica dust that gradually built up in the Mr Bonnington's lungs).

On the conventional approach to causation the claimants could not discharge the burden of proof that any of the identified employers had caused or materially contributed to the condition. If followed this approach would have meant that the claims would have failed. Their Lordships in *Fairchild* recognised the injustice this would have given rise to and they sought to avoid this by departing from the conventional test of causation. They found that each employer, through their negligent exposure to asbestos, had materially increased the risk of the claimants developing mesothelioma. The claimant need only establish that the defendant's exposure materially increased the risk that they would develop mesothelioma. This enabled the claimants to recover damages from an employer even though it was possible that fibres from their negligent exposure never actually caused the condition.

The sting in the tail of the "*Fairchild* exception" came a few years later with the decision of the House of Lords in *Barker*.[6] Mr Barker had died of mesothelioma after he had been exposed to asbestos during three periods of his working life. The first period was working for a company that was insolvent and against whom there was no means to recover damages. The second was during his employment with the defendant. The third was whilst he was working on a self-employed basis. Applying the *Fairchild* exception, the claimant was able to establish that the defendant's exposure had materially increased the risk of his developing mesothelioma. The question the court had to consider was whether that defendant, who only accounted for a modest proportion of the lifetime exposure to asbestos, should be liable to compensate the claimant in full. Their Lordships held that the defendant employers were only liable in proportion to their own contribution to the exposure.

This approach meant that claimants in mesothelioma cases would be left unable to recover full compensation if the case involved multiple employers where some were no longer in existence or had no insurance. Parliament recognised this injustice and s.3 of the Compensation Act 2006 was enacted promptly to remedy this.

Now in *Heneghan* the Court of Appeal has revisited the issues of *Fairchild* and *Barker*, but in the context of asbestos-related lung cancer rather than mesothelioma. Mr Heneghan had died of lung cancer after being exposed to large amounts of asbestos dust during his working life with multiple employers. He was only able to bring his action against six of those employers who between them had contributed 35 per cent of his lifetime exposure to asbestos. Epidemiological evidence confirms that the more asbestos someone is exposed to the greater the risk of developing lung cancer. It was generally accepted in this litigation that if the amount of exposure to asbestos more than doubled the risk of developing lung cancer then it could be said that it has, on a balance of probabilities, caused the condition. Here Mr Heneghan's lifetime exposure to asbestos gave a more than fivefold increase in the risk so it was not in doubt that his cancer was caused by asbestos.

Following the *Fairchild* exception, each defendant had materially increased the risk of Mr Heneghan developing lung cancer and could be held liable for this. But also following the approach in *Barker*, each defendant could only be held liable for damages in proportion to the increase in the risk for which they were responsible. This meant that the claim against the six defendants was restricted to 35 per cent of its full value, that being the percentage of the total lifetime exposure for which the defendants were responsible. Section 3 of the Compensation Act only applies to mesothelioma cases and therefore the claimant was stuck with this limited recovery.

The claimants argued that the *Fairchild* approach to causation should not apply in lung cancer cases as the aetiology is different to mesothelioma and the single fibre theory does not apply to lung cancer. It was

[6] *Barker v Corus UK Ltd* [2006] UKHL 20; [2006] 2 A.C. 572.

argued that a large dose of asbestos is required to be able to demonstrate that the cancer had been caused by asbestos rather than some other source. If there are multiple sources of those fibres then it is reasonable to conclude that each of those sources had actually contributed to the development of the cancer. Consequently, any defendant who materially contributed to the exposure should be held jointly and severally liable for the condition.

The Court of Appeal rejected this approach, finding that mesothelioma and lung cancer are "legally indistinguishable". They found that the precise mechanism by which one or more asbestos fibres triggered a chain of events which ultimately resulted in lung cancer was not clear and involved multiple stages and processes. It was not possible to prove anything more than that each of the defendants increased the risk of lung cancer. The *Fairchild* exception applied but so did the apportionment required by *Barker*.

Specific to cancers caused by asbestos, this decision leaves the law in a sorry state of affairs. If multiple employers negligently exposed an employee to asbestos, that employee is entitled to full compensation from any of those employers should they develop mesothelioma. But if the asbestos has caused lung cancer, the victim's right to redress is potentially limited. One would hope that the Government might see fit to extend s.3 of the Compensation Act 2006 to asbestos-related lung cancer cases to correct this anomaly.

The *Fairchild* exception was introduced to deal with the specific dilemma arising out of mesothelioma litigation. However, in *Fairchild* Lord Hoffman commented that this principle was capable of development and application in new situations. Here we see the extension of the principle to asbestos-related lung cancer cases. A similar approach to causation based on material increasing risk was previously adopted by the House of Lords in *McGhee*[7] in a dermatitis case. It would appear that the approach is generally applicable in all work-related cancer cases.[8]

Whether the material increase in risk approach to causation could be developed beyond the confines of industrial disease cases remains a moot point. Lord Nichols in *Fairchild* cautioned that the court must show considerable restraint in finding circumstances where such an approach might be adopted. Certainly in the context of clinical negligence litigation, attempts to establish that negligent treatment materially increased risk of an outcome have so far been rejected, specifically in *Wiltshire*.[9] Nevertheless, in situations where the precise mechanism by which a defendant's negligence causes a condition is unknown but where epidemiological evidence shows that the breach has materially increased the risk of such an outcome, the *Fairchild* exception might potentially provide a means by which causation could be established.

Practice points

- In asbestos-related lung cancer cases it is the correct approach to causation to consider if a defendant's exposure materially increased the risk of developing lung cancer, although a defendant is only liable in proportion to their own contribution to the exposure.
- Causation can potentially be established by adopting a test of material increase in risk in other disease cases other than asbestos-related cancers.

Richard Geraghty

[7] *McGhee v National Coal Board* [1973] 1 W.L.R. 1 HL.
[8] See *Jones* [2012] EWHC 2936 (QB).
[9] *Wiltshire v Essex AHA* [1988] A.C. 1074 HL.

UK Insurance Ltd v Farrow[1]

(QBD (Comm), Judge Waksman QC, 19 January 2016, Unreported)

Personal injury—indemnity—insurance—animals—agricultural insurance—farms—guard dogs—escapes—public liability insurance

Agricultural insurance; Farms; Guard dogs; Personal injury; Public liability insurance

Mother and son Maureen Farrow and John Farrow, had about 80 acres of land, including a large yard with a bungalow, where the mother lived, in addition to other buildings. They had been beef farmers until 2012, but no longer had any cattle. The vast majority of their business was a long-established business dealing in scrap metal, agricultural vehicles and parts. They had their own agricultural machinery, largely for making hay, which in part was used to feed their many horses.

They had kept a large Rottweiler dog attached by a long chain and a choker to a telegraph pole near the road. In October 2012 it broke free and ran into the road, causing an accident in which a motorcycle passenger was badly injured. She brought a personal injury action against the Farrows, and they intimated a claim on their farm combined insurance policy. UK Insurance Ltd sought a declaration that the indemnity wanted by their insureds was outside the terms of the insurance policy.

The policy had been arranged through a specialist broker. It covered the farm, the home, other buildings and contents. The business in the policy was described as "beef farmer". It covered livestock/animals which pertained to the insureds' business, and any claim due to the use of the dog in connection with the business.

Section 16c of the policy, in the section covering the bungalow and its contents, indemnified the insureds in respect of any bodily injury caused by any incident. However, that indemnity excluded any liability arising from animals except when being used for private purposes. There was expressly no cover in the farm policy for the non-agricultural activities. The broker had obtained confirmation from the insureds that they did not want cover for the scrap and parts business. The horses were insured as private not business assets.

It was common ground that the dog had guarded the scrapyard, but the insureds contended that he also guarded buildings housing livestock, hay and diesel, and against livestock escaping, and that he was a pet. The Farrows submitted that either:

1) the dog had caused the accident when it was guarding the premises, which included the horses and the buildings where they and the hay were housed, and therefore it was an occurrence in connection with the business under s.5 of the policy and was therefore covered; or
2) it was an occurrence under s.16c and covered by the bungalow buildings policy, and no exclusion applied because the dog was being used for a private use.

UK Insurance argued that there was no evidence of horses being in the yard at the time; there was no beef farming taking place; the dog's role was to defend the scrapyard, which was specifically excluded from the insurance policy; and the dog was not in private use so the exclusion in s.16c applied.

The judge held that the dog's essential role was as a guard. It was not a family pet. Its principal job was to guard the scrap business, which was the majority of the insureds' business. Its protection of the bungalow

[1] (1) Maureen Farrow (2) John Farrow (T/A R. Farrow & Sons).

was ancillary, otherwise it would have been placed closer to it. There were no cattle or pigs on the farm at the time of the accident. The sale of hay and horses was all that remained of the farming business, and that was very minor. There were no livestock sales in 2012. There was no evidence of horses being in the yard.

As the insureds and the insurer had agreed that the horses were only for private use, even if the dog's job was guarding farming equipment pertaining to the keeping of horses, the horses were not part of the farming business so there was no cover. Section 16c of the policy was engaged, but the exclusion applied: the dog was not being used for private purposes. Therefore there was no cover under s.16c.

The declaration was granted.

Comment

Insurers like certainty and when faced with a claim such as this, seeking a declaration as to whether or not a policy of insurance responds is a useful approach and one that provides certainty. I once considered seeking a declaration that the liability section of a policy did not respond on an occupiers' liability claim. In my case counsel advised against it as the facts were not as stark as they are here, and there is more to this case than is suggested by the bare facts in the summary above.

Sometimes issues can arise where there is alleged non-disclosure of a material fact. In such instances there can be disputes as to what the insurance broker knew and what was disclosed to the insurer. Similarly, the wording used in sales literature and proposal forms can be open to interpretation and arguments can arise as to when, for example, a general builder ceases to be a general builder and becomes a roofing contractor or a specialist of some sort. Such nuances do not apply here. As much as HH Judge Waksman may have wished to declare for the Farrows, based on the facts he was presented with, I don't think he had any choice but to declare in favour of UK Insurance.

Mr Farrow senior had died in 2010. For many years he and his family had farmed beef cattle and traded in agricultural machinery, second-hand parts and scrapped what could not be sold. For a number of years the business had been insured with NIG, a trading name of UK Insurance. A broker, Mr Woolgar, placed the business. The policy provided an indemnity in respect of the Farrow's legal liability for occurrences causing bodily injury and damage to property arising in connection with the business. In other words, fairly conventional public liability wording, but what was the business?

The policy defined the business as "shown in the schedule" including "directly connected ancillary activities" which included among other things the ownership, use, repair and maintenance of vehicles owned and used by the insured and livestock "belonging to or in the care, custody or control of … the business". Finally, the farm house, or rather farm bungalow, occupied by Mrs Farrow was also insured as was her liability as a private individual and occupier of the bungalow.

But what was the business? There was a clear correspondence trial dating back to 2005 that showed that the Farrow's did not want business insurance with NIG/UK Insurance in respect of the agricultural machinery/scrap business. Indeed, by endorsement an exclusion was added to the policy excluding the Farrow's activities as "agricultural and scrap dealer".

In August 2012 the policy was renewed on the basis that the business, as described, was that of beef farmer. The sum insured included £50,000 in respect of horses as well as various separate sums insured for farm buildings and the bungalow and its contents. The underwriters sought clarification in respect of the sum insured for the horses and did specifically challenge whether they were part of the business activities. The broker, on the Farrow's behalf, advised that amount related to the insured's own private horses.

That brings us to the role of the dog that was the cause of the accident. The Farrow's argued that the dog, Jake, caused the accident while guarding the premises which included the buildings housing horses, vehicles or farm machinery used to make hay that was fed to the horses that were insured under the policy.

In other words, the Farrows argued that Jake was essentially a farm dog. As an alternative proposition they argued that Jake was mainly a pet and was guarding the bungalow. UK Insurance argued that the policy only covered horses owned in a private capacity and that the Farrows had about 50 horses which they bred and sold—clearly a business activity that was not covered under the policy, and that Jake's role was that of a guard dog primarily for the scrap business and was clearly not a pet, despite being socialised and house trained.

After considering all the evidence in respect of the Farrow's activities and in respect of the policy of insurance the judge concluded that Jake was essentially a guard dog for, though not exclusively so, the farm machinery and scrap business. HH Judge Waksman concluded that if Jake's role was primarily to guard the bungalow he would have been chained closer to it. The judge also concluded that there was no beef or pig farming activity going on and that the only business activities were those of selling horses from time to time and the agricultural and scrap business, turnover in respect of which had been just under £2 million for the financial year in which the accident occurred. It was clear that the agricultural machinery and scrap business was excluded from the policy and that the sum insured in respect of horses was for private horses. Indeed, underwriters had specifically said that if there was buying and selling of horses they would need full details so that they could consider the risk further.

HH Judge Waksman had little alternative, on the facts, to find as he did. Jake got loose when a link of his choke chain broke and he strayed on to a road, where he was hit and killed by a motorbike travelling at 55mph. Tragically, the pillion passenger on the bike sustained catastrophic head injuries. One assumes that the pillion passenger will pursue a claim against the bike rider and their insurers. The alternative will be to pursue against the Farrow's in person, who in turn may have some redress against the shop from where the chain was purchased.

While the facts of this case were pretty unequivocal, there is a cautionary tale here; public liability insurance is not compulsory. Even where public liability insurance is in place, there may be issues as to whether an indemnity will be granted or the limit of indemnity may be restricted to say £2 million. Although the All Party Parliamentary Group on Insurance is looking at whether public liability covers should be compulsory, that is only half the story as sometimes there will be issues as to whether the policy responds, as was the case here.

Practice points

- Ultimately, your claim may only be as good as the insurance cover in force.
- Third Parties (Rights Against Insurers) Act 2010 may not help either as the claimant only assumes the rights that the insured would have under the terms of the policy. So, if there are relevant policy exclusions or if the policy has been avoided because on material non-disclosure, the Act will not assist.
- Don't assume that an indemnity will be granted. Ask if there are any issues and cut your cloth accordingly.
- Similarly, when dealing with a large claim ask what the limit of indemnity is and whether it is costs inclusive or exclusive. But even if the limit is costs exclusive, don't relax as insurers can and will pay over their limit as soon as they are satisfied that it will be breached. You may then have to have difficult conversations with your client in respect of your costs.
- If there are indemnity issues, insurers should be open with the claimant's solicitors at the earliest opportunity.

David Fisher

McLellan v Mitie Group Plc

(OHCS, Lady Scott, 6 November 2015, [2015] CSOH 151)

Liability—negligence—personal injury—employers' liability—health and safety at work—breach of duty of care—burns: safe systems of work—Provision and Use of Work Equipment Regulations 1998 (SI 1998/2306) reg.20—Work at Height Regulations 2005 (SI 2005/735) reg.10(2)

LT Breach of duty of care; Burns; Contributory negligence; Damages; Employers' liability; Falling objects; Personal injury; Scotland

Susan McLellan worked as a cleaner. She was employed by the defenders to clean at the Bank of Scotland at Garrowhill in Baillieston, Glasgow. On 11 December 2012 she was injured at work when a bucket of extremely hot water fell and splashed her, on the back of both her legs. She suffered skin loss and burns. Solatium as was agreed at the sum of £12,000. The issue at proof was causation.

While cleaning, Susan McLellan had to fill a bucket with hot water from a sink in an equipment cupboard. Her evidence was that she obtained the water from a boiler located next to the sink as the sink taps had never worked. The boiler had to be refilled, which took approximately four minutes. While she was waiting for the refill, she wedged the bucket underneath the boiler on a flat surface adjacent to the sink to allow her to continue with her cleaning duties. The bucket had subsequently fallen and had splashed her legs with boiling water.

Susan McLellan's supervisor gave evidence that she had not been aware of any fault with the taps, and that she had not told the staff to use the boiler, nor had she told them not to use it.

McLellan submitted that there had been no proper system in place to maintain the sink taps in working order and ensure a safe supply of hot water required to carry out the cleaning job, and her employer had been in breach of reg.10(2) of the Work at Height Regulations 2005 (SI 2005/735)[1] and reg.20 of the Provision and Use of Work Equipment Regulations 1998 (SI 1998/2306).[2] The employer submitted that the accident had been caused by Susan McLellan's actions in placing the bucket underneath the boiler and leaving it there, and she ought to have placed the bucket in the sink.

Lady Scott held that whilst the bucket had not fallen while being filled, that process had required a period where the boiler was refilled and the bucket, partially full of boiling water, had to be placed somewhere. While it might have been safer to place it in the sink, that too was inherently risky. The sink taps had not worked and but for that failure, McLellan would not have used the boiler and would not have been placed in the position where she required to place or secure the bucket during the refill process.

The Lord Ordinary further held that a system of maintenance of equipment which relied entirely upon reporting by the worker using the equipment was not adequate or proper. Where the hot water supply from the taps was inadequate, the use of the boiler had been expected by the employer and was in any event the obvious step to take. The risks inherent to the use of the boiler were clearly foreseeable and extended to consideration of the careless cleaner under pressure to complete her tasks.

[1] "10(1) Every employer shall, where necessary to prevent injury to any person, take suitable and sufficient steps to prevent, so far as is reasonably practicable, the fall of any material or object. 10(2) Where it is not reasonably practicable to comply with the requirements of paragraph (1), every employer shall take suitable and sufficient steps to prevent any person being struck by any falling material or object which is liable to cause personal injury."

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

Had the employer not wanted the boiler to be used, it ought to have given instructions or put up a sign to that effect. Had it intended the use of the boiler, it ought to have taken steps to guard against the risk of the bucket containing hot water from falling or splashing. Their liability was established, both at common law and in relation to the statutory case in respect of the 1998 and 2005 Regulations.

Having regard to the employer's breach of statutory duties, that the use of the boiler was an obvious step to take, was probably intended by the employer, and Susan McLellan's placing of the bucket had not been surprising in the circumstances. Her contributory negligence was assessed at 20 per cent.

Comment

The Enterprise and Regulatory Reform Act 2013 by s.69 amended s.47 of the Health and Safety at Work etc. Act 1974 in so far as it relates to civil liability. The section now provides the breach of a duty imposed by a statutory instrument containing health and safety regulations shall not be actionable except so far as regulations made under the 2013 Act so provide. Although the accident here was before 1 October 2013 when the change came into effect it is a useful case to see how negligence and breach of health and safety regulations will still continue to interact.

There can be no doubt that employers remain under a statutory duty to comply with health and safety regulations. The duties set out in statutory instruments made prior to the 2013 Act inform and define the scope of duties at common law. Accepting you can no longer specifically run claims based directly on breach of the regulations it is important to remember Viscount Younger statement on behalf of the Government in the House of Lords:

> "The codified framework of requirements, responsibilities and duties placed on employers to protect their employees from harm are unchanged, and will remain relevant as evidence of the standards expected of employers in future civil claims for negligence."[3]

In the same debate, another Conservative peer, Lord Faulks, stated:

> "A breach of regulation will be regarded as strong prima facie evidence of negligence. Judges will need some persuasion that the departure from a specific and well-targeted regulation does not give rise to a claim in negligence."[4]

As Lord Reid said in *Boyle*: "Employers are bound to know their statutory duty."[5]

All these regulations impose a statutory duty. Compliance is required by the criminal law. An employer who breaches a regulation, injuring an employee, is committing an offence. That being so, he can hardly argue that he was acting reasonably.

Susan McLellan's use of the boiler entailed working at height in a confined space with boiling water. This involved unnecessary risk of injury of the kind she suffered. Nothing had been put in place to effectively secure the bucket when the boiler was being used. Those failures were in breach of her employer's common law duty of care to maintain and enforce a safe system of working and in breach of reg.10(2) of the 2005 Regulations and reg.20 of the 1998 Regulations.

Had there not been any breach of the regulations, there would have been no accident and no negligence. In other words, the breaches of regulations were directly causative of the negligence resulting in her injuries.

[3] Viscount Younger, Lords debate, Hansard, col.1324 (24 April 2013).
[4] Lord Faulks, Lords debate, Hansard, col.1328 (24 April 2013).
[5] *Boyle v Kodak* [1969] 1 W.L.R. 661 HL.

Practice points

- An employer owes a personal, non-delegable duty to all of their employees to take reasonable care for their safety.
- Part of that duty, in both statute and common law, requires that an employer must conduct suitable and sufficient risk assessments and act upon them.
- This is for the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by, or under, the relevant statutory provisions.
- Breach of health and safety regulations is a criminal offence.
- An employer who breaches a regulation, injuring an employee, can hardly argue that he was acting reasonably.
- The Enterprise and Regulatory Reform Act 2013 neither alters nor reduces these duties of employers.

Nigel Tomkins

Case and Comment: Quantum Damages

Knauer v Ministry of Justice

(SC, Lord Neuberger PSC, Lady Hale DPSC, Lord Mance JSC, Lord Clarke JSC, Lord Reed JSC, Lord Toulson JSC, Lord Hodge JSC, 24 February 2016, [2016] UKSC 9)

Personal injury—damages—fatal accidents—future loss—loss of services—multiplicands—multipliers—Ogden Tables—Fatal Accidents Act 1976 ss.3(3) and 4

Dates; Fatal accident claims; Future loss; Measure of damages; Multipliers

Mrs Knauer was employed by the Ministry of Justice as an administrative assistant at Her Majesty's Prison, Guy's Marsh. In the course of her employment, she contracted mesothelioma, from which she died in August 2009. Her husband made a claim for future loss of dependency under the Fatal Accidents Act 1976.

The Ministry of Justice admitted liability for Mrs Knauer's death in December 2013. In a hearing before Bean J in July 2014, the parties agreed the annual figure for the value of the income and services lost as a result of Mrs Knauer's death, the "multiplicand". A dispute arose between the parties as to whether the number of years by which that figure was to be multiplied, the "multiplier", should be calculated from the date of death or from the date of trial.

Bean J held that he was bound to follow the approach adopted by the House of Lords in the cases of *Cookson*[1] and *Graham*[2] and to calculate the multiplier from the date of death. The judge made it clear that, absent that authority, he would have preferred to calculate the multiplier from the date of trial in line with the approach recommended by the Law Commission in their report *Claims for Wrongful Death*.[3] Mr Justice Bean granted a certificate under s.12 of the Administration of Justice Act 1969 to enable Mr Knauer to appeal direct to the Supreme Court.

The Supreme Court held that calculating damages for loss of dependency from the date of death, rather than the date of trial, meant that the claimant suffered a discount for early receipt of the money when in fact that money would not be received until after trial. That discount results in under-compensation in most cases.

A ruling that damages should be assessed from the date of trial involved departing from the established law as laid down by the House of Lords in *Cookson* and *Graham*. The question was whether this was a case in which the court should apply the 1966 Practice Statement and depart from precedent. The court had no hesitation in concluding that it should do so in this case.

They concluded that in the current legal climate, the application of the reasoning in the *Cookson* and *Graham* decisions was illogical and its application also resulted in unfair outcomes. The most important reason for coming to that view was that there had been a material change in the relevant legal landscape. *Cookson* and *Graham* were decided in a different era, when the calculation of damages for personal injury and death was nothing like as sophisticated as it is now and the use of actuarial evidence or tables was discouraged.

[1] *Cookson v Knowles* [1979] A.C. 556 HL.
[2] *Graham v Dodds* [1983] 1 W.L.R. 808 HL (NI).
[3] Law Commission, *Claims for Wrongful Death* (HMSO 1999), Law Com No.263.

Lord Bridge, in *Dodds*, outlined two concerns which were said to justify the rule. First, adopting the date of death reduced the need to deal with uncertainties around what would have happened to the deceased between the death and the date of trial. Secondly, were the date of trial to be adopted, this would lead to the anomaly that, the longer the trial were delayed, the more a claimant would be able to recover.

The Ogden Tables were produced in 1984 and endorsed by the House of Lords in the landmark case of *Wells*.[4] As the Ogden Tables include fatal accident calculations based on the recommendations of the Law Commission, there is now a perfectly sensible way of addressing the first of Lord Bridge's concerns. As to the second of Lord Bridge's concerns, this is less of an issue due to the respect in which the litigation landscape has been transformed since 1984. Under the Civil Procedure Rules 1998, the court is now in a position to set timetables and insist that the parties keep to them. In any event, the proper use of the Ogden Tables makes the concern irrelevant.

They also held that another reason why the court should depart from *Cookson* and *Dodds* was that the unfair effect of the rule as set out in those cases had led courts to distinguish them on inadequate grounds, which meant that certainty and consistency were being undermined.

The Supreme Court unanimously allowed Mr Knauer's appeal. Lord Neuberger and Lady Hale give a joint judgment, with which the other justices agreed.

Comment

The decision is straight forward and welcomed. No longer is an inappropriate distinction drawn between fatal and other personal injury cases when calculating the multiplier. In both scenarios the date of trial should be used in calculating the multiplier to apply to future losses. The impact is that a discount for a lump sum paid is avoided as clearly it should be since payment is always made after trial. In this case the discount was significant, over £50,000.

In practical terms the distinction by using the date of death in fatal cases had become unjustified ever since the introduction of the use of Ogden Tables as a reliable actuarially based starting point in 1984. Moreover, it has become inexcusable since tables were updated to include fatal accident claims following the recommendations of the Law Commission in 1999. Even Gerard McDermott QC for the respondent properly conceded that the appellant's case on the issue of principle was a good one.[5]

The Law Commission recommended that for pre-trial losses the only difference from non-fatal cases would be that there would have to be a small deduction to take account of the possibility that the deceased might in any event have died or given up work.[6] They recommended that the Ogden Working Party should explain more fully, how the existing tables should be used to produce accurate assessments of damages in fatal cases based on their recommended approach. Consequently, the Ogden Tables were updated, although until this judgement the decisions in *Cookson* and *Graham* prevented their use improving awards for claimants.

The Supreme Court assessed that the date of the trial is the correct approach. The court went on to consider whether it was proper for the court to depart from its decisions in *Cookson* and *Graham*.

It rejected submission by Frank Burton QC for the appellant that the issue was one of non-binding guidance which therefore did not require consideration of the 1966 Practice Direction. On the contrary their lordships decided this was a matter of legal principle, and therefore they turned their attention to the application of the 1966 Practice Direction.

The Supreme Court rejected the argument on behalf of the respondent that the system should be seen as a whole citing in support of his argument examples where current legislation requires that claimants

[4] *Wells v Wells* [1999] 1 A.C. 345 HL.
[5] *Knauer v Ministry of Justice* [2016] UKSC 9; [2016] 2 W.L.R. 672 at [6].
[6] Law Commission, *Claims for Wrongful Death* (November 1999), Law Com 263, para.4.17

be over compensated.[7] These examples were accepted but distinguished on the basis they represented legislative choices, rather than principles arising from judicial decisions. Their lordships also rejected the suggestion that changing the law should be left to the legislature as happened in Scotland.[8]

Here they said the issue arose from judges and should be corrected by judges as envisaged by the 1966 Practice Direction. Indeed, if it was not to be so used what purpose did it serve? Further, there were not other potential injustices or wider implications for the court to consider. Finally, the Law Commission itself stated "legislation is probably neither necessary nor appropriate"; there was "room for judicial manoeuvre without legislation". The Supreme Court implicitly rejected the logic of the House of Lords that using the trial date in fatal cases would have incentivised claimants to delay, since following *Cookson* and *Graham* would have had the (no less savoury) prospect of incentivising defendants to delay trial.[9]

The judgment leaves the residual question of why it has taken so long for the law to change when the need was correctly identified by the Law Commission in 1999!

Practice points

- The application of this decision is not complicated. Use the Ogden Tables for fatal accident cases and use the date of the trial to calculate the multiplier.
- Practitioners should look out for other opportunities to rectify routinely unfair consequences in cases they conduct, particularly where these emanate from judicial decision and where the circumstances on which precedent is based have developed.
- It should be said there is some doubt whether the logic applied in *Cookson* and *Graham* was in fact correct even at the time it was decided. Emphasis in both cases was perhaps over placed even then on the "vicissitudes of life" rather than the consequential anomaly of deducting an illusory discount for early payment.

John Spencer

Mosson v Spousal (London) Ltd

(QBD, Garnham J, 25 January 2016, [2015] EWHC 53 (QB))

Personal injury—damages—mesothelioma—fatal accident claims—general damages—bereavement damages—mistake—intangible services—special damages—contributory negligence

LT Contributory negligence; Fatal accident claims; General damages; Mesothelioma; Special damages

On 19 January 2014, Mr Thomas Mosson died, after a prolonged illness, of malignant mesothelioma. This claim was brought by his widow, Joan, on behalf of his estate and as his dependent under the Law Reform (Miscellaneous Provisions) Act 1934 and Fatal Accidents Act 1976.

Mr Mosson contracted mesothelioma as a result of being exposed to asbestos whilst working for a company then known as Matthew Keenan & Co at its factory in Bow between 1963 and 1964. After that period, he was self-employed. That company, now Spousal (London) Ltd, was the defendant to these proceedings. Primary liability was admitted and the claimant obtained judgment for damages to be assessed.

[7] *Knauer v Ministry of Justice* [2016] UKSC 9; [2016] 2 W.L.R. 672 at [24].
[8] Section 7(1)(d) of the Damages (Scotland) Act 2011.
[9] *Knauer v Ministry of Justice* [2016] UKSC 9; [2016] 2 W.L.R. 672 at [18].

The defendant alleged that any damages should be reduced on account of the deceased's contributory negligence during his period of self-employment. The defendant disputed certain heads of damage.

The judge accepted that the defendant had established that the deceased was self-employed at the material time, but was unable to establish that he had breached the duty he owed himself to take reasonable care to avoid the risk associated with asbestos exposure. The allegation that the deceased was contributory negligent was rejected.

The *Judicial College Guidelines*[1] gave a bracket of £53,200–£95,700 for mesothelioma cases. This case lay within the upper half of the most severe category for asbestos-related disease. The deceased had suffered severe pain and gross impairment of function and quality of life. His pain and suffering lasted for longer than was typical in these cases. He underwent repeated pleural drainage, repeated investigations, six cycles of chemotherapy, radiotherapy and surgical removal of parts of the pleura. His disease did not involve the peritoneum, which caused the most severe pain.

The deceased had also continued working until April 2013, had tolerated the chemotherapy reasonably well, had been able to take a holiday in October 2013, and had given evidence in November 2013. His last witness statement was provided eight days before his death. The case fell in the upper half of the appropriate category, but it was not at the very top. The appropriate amount for general damages was held to be £85,000.

The judge held that it was not reasonable to claim for the cost of a memorial bench or for clothing to be worn at the funeral.[2] In addition unlike funeral expenses, as there was no reference to probate costs in the 1934 Act and no basis on which such a claim could be read into the Act there was no other basis for allowing probate costs.

The widow claimed £15,915 in respect of sick pay paid to the deceased during his lifetime by his former employers. The defendant was ordered to pay the sums claimed and the claimant was to hold those sums on trust for the former employers.[3]

The claimant's schedule of loss claimed bereavement damages of £11,800. In the counter schedule the defendant agreed that figure. In fact, the appropriate award had been increased in April 2013 to £12,980. The claimant sought the corrected sum; the defendant said she should be held to the agreement of the lesser sum. As statute now provided that the appropriate figure is £12,980 the judge accepted that the earlier claim by the claimant was plainly a mistake. He saw no possible basis for holding her to that mistake and disregarding what the statute provided. The claimant was allowed £12,980.

The judge accepted that the deceased provided valuable services to his family, including gardening and general home maintenance. Considering the likely cost of having those services provided commercially, an amount of £1,500 per annum with a multiplier of five was granted.

The final disputed item of damages concerned "loss of intangible services". Such an award was said to reflect "additional value and convenience in having someone who is willing and able to provide these services out of love and affection rather than bringing in outside help and contractors". In other words, a claim for the inconvenience of paying for the services under the loss of services claim and using the damages to purchase them. The defendant alleged that it was not a valid head of claim. The making of such an award has become increasingly commonplace. However, there was held to be no proper jurisprudential foundation for it.

The judge recognised that damages for personal injury are intended to put the claimant in the position they would have been had the tort not occurred. He held that there could be no precise equivalence in money terms of every loss that flowed from an injury or a death. In the case of claims for services, the

[1] Judicial College, *Guidelines for the Assessment of General Damages in Personal Injury Cases*, 12th edn (Oxford: Oxford University Press, 2013).
[2] *Gammell v Wilson* [1982] A.C. 27 HL followed.
[3] *Dennis v London Passenger Transport Board* [1948] 1 All E.R. 779 KBD applied.

award was the best estimate of the value, rather than the cost, of services lost. The court had already made an award in respect of loss of services.

That was done by estimating the cost of providing commercially what would otherwise have been provided by the deceased. The award recognised the advantages and disadvantages of having services provided commercially rather than by the deceased. There was no room for an additional award for the loss of intangible benefits over and above the claim for lost services.

The claimant was held to be seeking further compensation for the inconvenience of paying someone to do what her husband would have done voluntarily. That was a claim of the sort which bereavement damages were intended to cover, as described in William Latimer-Sayer, *Personal Injury Schedules: Calculating Damages*.[4]

Where the consequence of bereavement could be valued in financial terms it could be a separate head of claim. Where they could not be financially valued, they fell to be regarded as part of bereavement damages. In those circumstances, the claim for intangible services was not a proper claim in law. Even if it were recognised in law, there was no unusual circumstance to justify an additional award.[5]

Comment

It is not often that mesothelioma cases come before the High Court for assessment on quantum. The award of damages of £85,000 is noted but it is worthwhile considering what Garnham J considered material in coming to the view that such an award was warranted. The High Court had before it the deceased's witness statement and his deposition and evidence was also given by Mrs Mosson, the claimant. Mr Mosson first became ill in November 2011. Fluid was drained from his chest and the biopsy was reported as "clear", the biopsy chest wound became infected and required repeated dressing. A further biopsy led to a diagnosis of mesothelioma. Mr Mosson was informed in January 2013 and he described his shock at receiving that news and how the progression of the disease affected him. Mrs Mosson gave "particularly graphic" evidence of the effect of this dreadful disease on her husband until his death in January 2014.

The deceased underwent surgery to remove thickened pleural. He developed recurrent pleural effusions and needed repeated drainage procedures. He also had chemotherapy which was particularly unpleasant causing nausea, vomiting, fatigue, peripheral neuropathy and tinnitus. His condition steadily declined until his death. Garnham J commented on the illness as follows:

> "I have no doubt that the Deceased suffered severe pain and gross impairment of function and quality of life. His pain and suffering lasted for longer than is typical in these cases. The Deceased underwent repeated pleural drainage, repeated investigation, six cycles of chemotherapy, radiotherapy and the surgical removal of parts of the pleura.
>
> However, the disease affected the pleura and not the peritoneum and it is well recognised that the involvement of the peritoneum causes the most severe pain. Furthermore, it is right to say that the Deceased was able to continue working until April 2013, that it appears he was able to tolerate the chemotherapy reasonably well (something that not all patients are able to do), that he was able to take a holiday in October 2013 and was able to give evidence on commission in November 2013 (although it is plain by then he was extremely unwell). The Deceased provided his last witness statement some 8 days before his death."[6]

It was on the basis of these comments that £85,000 was awarded.

[4] William Latimer-Sayer, *Personal Injury Schedules: Calculating Damages*, 3rd edn (London: Bloomsbury Professional, 2010).
[5] *Beesley v New Century Group Ltd* [2008] EWHC 3033 (QB) considered.
[6] *Mosson v Spousal (London) Ltd* [2015] EWHC 53 (QB); [2016] 4 W.L.R. 28 at [44] and [45].

Funeral expenses

As has been noted, a number of the aspects of the claim were refused. It was found to be unreasonable to claim for the cost of a memorial bench or the clothing to be worn at the funeral. It was noted that the cost of a headstone which marks the grave will be given, but not a memorial.

Past dependency

At issue in this case was the retirement age. The court found that the deceased would have worked until age 70. It is interesting to note what evidence was advanced in order to support this contention. First, it was noted that Dr Rudd (the Physician who provided expert reports for the claimant) noted that there were no other conditions that would have prevented the claimant from working until 70.

Secondly, Garnham J noted the deceased's determination to get back to work if he could.

Thirdly, the deceased had the ability to work onto age 70, was willing to do so and intended to do so had the opportunity presented itself. This case demonstrates the type of evidence that is needed to show a retirement age beyond the normal retirement age.

Loss of services

The claimant claimed £5,000 per annum. In support of this they relied on the evidence of Charlotte Wells a care expert. Ms Wells is a nurse and "professes no expertise either in the amount of time the services would have taken up or the likely cost if purchased commercially". Garnham J found that 10 hours per week was unsustainable on the basis of the evidence particularly if no allowance was made for the fact that as the deceased would have older, he would have done less. Garnham J, doing the best he could, allowed £1,500 per annum. It should be noted in this case that this claim covered the gardening, hoovering, DIY, decorating, and shopping.

The case was not put forward that he was particularly expert in home maintenance. It is suggested that in these circumstances, it would be more appropriate to use the services of a surveyor who would be able to assess on the basis of the factual evidence, how much time an individual had put into the maintenance of the home, the types of jobs that they would have done and how much it would have cost for this to have been done commercially. This will produce more credible evidence than by a nurse, as in this case.

Loss of intangible benefits

The judge considered the case law on this subject and whether or not this head of loss had actually been established. He referred to all of the case law, all first instances. He referred particularly to the decisions of *Beesley*[7] and *Fleet*.[8] In *Beesley* Hamblen J considered that an amount to be awarded under this head should be given in effect, routinely. By contrast MacKay J in *Fleet* was of the view that an award should not be made automatically but would depend on whether, as in the *Fleet* case, the deceased would have gone on to have given more than usual care.

However, Garnham J did not consider that this head of damages has been established. He was of the view that the award for loss of services had already covered this claim for loss of intangible benefits. He was also of the view that the claimant was seeking "further financial compensation for the inconvenience of having to pay someone to do what her husband would have done voluntarily. In other words, she seeks financial compensation for what is a non-financial loss consequent upon her husband's death. That, seems to me, is a claim for the sort which Bereavement damages were intended to cover".[9]

[7] *Beesley v New Century Group Ltd* [2008] EWHC 3033 (QB).
[8] *Fleet v Fleet* (2009) EWHC 3166 (QB).
[9] *Mosson v Spousal (London) Ltd* [2015] EWHC 53 (QB); [2016] 4 W.L.R. 28 at [75].

Garnham J went on to say:

> "Bereavement takes many forms and has many consequences. Where the consequence can be valued in financial terms, they can be a separate head of claim. But where they cannot, in my judgement, they fall to be regarded as part of bereavement damages."[10]

The writer finds this approach disappointing. There are many awards of damages given where the loss cannot be valued in financial terms. In a case of this nature, the loss of a loved one, with the care and affection, as in this case, the widow goes uncompensated. A bereavement award is effectively to compensate for the inevitable grieving process that an individual would have. That is indeed what the definition of bereavement reflects. In reality, loss of intangible services perhaps covers a claim for solatium that would be awarded in Scotland. In the circumstances of this case if brought in Scotland, the widow would recover an award in the region of £75,000, whereas in this particular case they were awarded nothing. An opportunity has been missed to strengthen the law in this area.

Practice points

- If there is a substantial claim for loss of services to include painting, decorating, DIY, and even building work around the house, consideration should be given to obtaining a report from a surveyor who is best placed to quantify the amount of work that would have been done by the deceased.
- Whilst this case is authority that there is no head of damages for "loss of intangible benefits", this is contrary to other authority of equal weight. In spite of this decision, the writer considers that the preferred view is that this is a legitimate head of damages. It covers aspects of claims for compensation in fatal accident cases that other heads do not. Accordingly, claims in respect of this, should continue to be made.

Colin Ettinger

Murphy v Ministry of Defence

(QBD, Judge Coe QC, 11 January 2016, [2016] EWHC 3 (QB))

Damages—personal injury—armed forces—breach of duty of care—causation—loss of congenial employment—measure of damages—pain—psychiatric harm—Equality Act 2010—Blamire awards— Smith v Manchester *awards—Ogden Tables*

LT Armed forces; Causation; Loss of congenial employment; Measure of damages; Pain; Personal injury

Kieran Murphy joined the Army on 24 April 2006. At the end of October 2010, when he was aged 21, he was serving in Afghanistan. Whilst in the course of unloading goods vehicles with colleagues he was involved in moving large heavy rolls of fabric used to create temporary roads. During the course of this he was struck on the head by one of the rolls of fabric thrown by two of his colleagues from one of the vehicles.

[10] *Mosson v Spousal (London) Ltd* [2015] EWHC 53 (QB); [2016] 4 W.L.R. 28 at [77].

As a result of the accident, Kieran was knocked unconscious. He developed chronic widespread pain ("CWP"), which was long-term and possibly permanent. He took a great deal of medication to cope with the pain. He had blurred vision for about three months after the accident and suffered occasional loss of bladder control. He was very keen to return to active duty and undertook a lot of physical exercise.

To cope with the pain, he began mixing his medication with alcohol and became aggressive as a result. His marriage suffered. He made two suicide attempts, in early 2011 and late 2012, as a result of depression. In October 2011 he had facet joint injections which improved his pain. However, he was medically discharged from the army in September 2013.

Kieran was from a military family and had joined the Army at 17. He claimed that he would have served a full career in the Army had it not been for the accident and would have attained the rank of staff sergeant. At the date of the hearing, he was working as a manager in the NHS.

The defendant admitted a breach of its duty of care to the claimant and accepted that his CWP condition was genuine, but disputed that it was triggered by the accident. The claimant relied on a psychiatric report which indicated that he had begun to suffer depression in December 2010 and had developed an adjustment disorder in late 2012 when he knew that he would lose his Army career. Kieran had suffered knee pain in 2009 which had resolved before the accident.

The judge held that the claimant had made strenuous attempts to regain fitness while in the Army in order to become deployable and had been keen to establish that he was medically fit in order to return to full duties. When giving evidence, his low mood and frustration were evident. He had been suffering from symptoms of mixed anxiety and depression since early 2011.

There was no evidence that he had already suffered from a pain syndrome based on the experience of knee pain in 2009. The fact that he had had pain which persisted for several months did not put him in a category of suffering from a chronic pain syndrome. There was evidence that CWP was capable of being triggered by trauma. The judge accepted that there was a clear temporal association between the accident and the onset of the claimant's symptoms, and between his initial physical injuries and the main sites of his complaints of long-term pain. Although there had been periods of improvement, there was no significant period of time in which he was symptom-free before the onset of CWP. Accordingly, causation was established.

Relying upon the *Judicial College Guidelines*,[1] the judge placed the case towards the upper end of the lower bracket of "Other pain disorders" with minor injuries which would have resolved within three months. The appropriate award for general damages, taking into account both the initial physical symptoms, the CWP and the overlapping psychiatric difficulties, was £30,000.

The judge accepted that the claimant had had at least a 54 per cent prospect of remaining in the Army for 24 years. He had suffered a loss of his chosen lifestyle, and the impact of the loss of status and personal identity was significant. The sum of £10,000 was therefore awarded for loss of congenial employment.[2]

In view of the claimant's employment, a *Blamire*-type award based on the current shortfall in take-home pay and the time he would have served in the Army was not appropriate. Most of the physical limitations he suffered affected his personal life but there was some impact on his work. Although he was disabled within the meaning of the Equality Act 2010, his disability was considered to be modest.

His employment was secure and his handicap on the labour market was limited. Given the claimant's particular circumstances, the judge decided that the case of *Billett*[3] provided more useful guidance than the Ogden Tables.[4] An award of £50,000 was made on the basis of *Smith v Manchester* in addition to an award for loss of earnings based on what he would have earned in the Army compared with what he would earn up to the time when he would have left.

[1] Judicial College, *Guidelines for the Assessment of General Damages in Personal Injury Cases*, 12th edn (Oxford: Oxford University Press, 2013).
[2] *Hanks v Ministry of Defence* [2007] EWHC 966 (QB) considered.
[3] *Billett v Ministry of Defence* [2015] EWCA Civ 773; [2016] P.I.Q.R. Q1.
[4] *Billett v Ministry of Defence* [2015] EWCA Civ 773; [2016] P.I.Q.R. Q1 followed.

Judgment was entered for the claimant and the parties were invited to agree the final award.

Comment

There are several interesting features in this case. One of them relates to the approach that the court would take in relation to chronic widespread pain. This was the primary complaint that the claimant had been and was seeking damages for. Evidence was given by Dr Munglani, chronic pain specialist, and Dr Spencer, psychiatrist for the claimant. Both experts are frequently asked to provide evidence in relation to these types of conditions for claimants.

The defendant had obtained expert evidence from Dr Dolin the chronic pain specialist and psychiatrist Professor Maden, who is often involved in giving evidence in personal injury cases and is known in particular for providing reports in abuse cases. HH Judge Coe QC said the following about the condition:

> "I accept that the mechanism of the causation of CWP has not yet been identified by medical science. However, it is undoubtedly recognised both by Dr Munglani and by Dr Dolin that there are different factors and events that can 'trigger' CWP. It seems that they both agree that CWP can occur spontaneously. Dr Munglani expresses the clear view that trauma is one of the factors. He cites a specific link between the experience of physical symptoms, particularly in respect of road traffic accidents and whiplash type injuries where someone involved in such an accident goes on to develop CWP. Recognising that there are triggers, Dr Munglani sets out that there is clear evidence to say that trauma is such a trigger and, in his experience, trigger can be a specific cause of the development of CWP. [5]"

The judge had cited statistical evidence relating to CWP which helped her with her decision. She also referred to several reported cases in which the courts have found that CWP (or fibromyalgia) can be caused by trauma, in particular traffic accidents where there has been a whiplash type injury. She also makes reference to a section on chronic pain in the *Judicial College Guidelines*. Whilst she accepts that there are different types of pain syndromes, she also accepts that courts frequently make awards of damages on the development of different types of pain syndromes following physical trauma.

In this case, the judge accepted the approach of Dr Munglani and Dr Spencer in preference to those of Dr Dolin and Professor Maden both of whom put forward the view that the ongoing symptoms suffered by the claimant were not accident related. Indeed, Professor Maden contended that the claimant was consciously exaggerating his symptoms. The judge commented:

> "It seems to me that both Dr Dolin and Professor Maden have been excessively selective in considering the entries in the medical records in the context of considering the development of a chronic pain disorder and a mental illness."[6]

The second interesting feature relates to the damages for loss of congenial employment. The judge considered a number of awards, according to her decision, and noted the claimant was seeking £15,000. He also noted that the claimant wanted to have a full career in the Army. He was from a military family and accepted the evidence of the claimant and his witnesses that it was in the Army where he wanted to remain. The judge went on to say that she accepted that the figures should be greater than they would be for some that would be appropriate for some jobs:

> "The claimant has suffered a loss of his chosen lifestyle and the impact of the loss of status and personal identity is significant."[7]

[5] *Murphy v Ministry of Defence* [2016] EWHC 3 (QB) at [164].
[6] *Murphy v Ministry of Defence* [2016] EWHC 3 (QB) at [173].
[7] *Murphy v Ministry of Defence* [2016] EWHC 3 (QB) at [187].

However, in making reference to *Hanks*[8] the judge thought that £10,000 was the award that should be made for loss of congenial employment.

The third point worthy of mention concerns how the court should approach the claimant's disability in relation to his position on the open labour market. The judge found that the claimant was disabled in accordance with the definition of the Equality Act and that defined in *Billett*.[9] The judge also considered how the use of the Ogden Tables in relation to this disability should be applied. She said that the use of tables without significant adjustment produces an unrealistic figure for the claimant and went on to say:

> "He is in work and has been since he left the Army. His employment is secure. He is handicapped on the labour market, but that handicap is limited. He will be more limited in his choice of employment, but has already found an employment and an employer where he can and does earn well. The judge at first instance in *Billett* adjusted the reduction factor to 0.73. The Court of Appeal considered that was too low. I consider that Mr Murphy's case is nearly on all fours with *Billett*. As the Court of Appeal said in *Billett* determining an appropriate adjustment is a matter of broad judgment and that exercise is no more scientific than the broad brush judgment which the court makes when carrying out a *Smith v Manchester*[10] assessment."[11]

On this basis, the judge approached the matter on the basis as in *Billet* and awarded £50,000.

The definition of handicap in the *Billett* case has been the subject of criticism by Victoria Wass in her article on the case.[12] Dr Wass considers that the definition adopted by the Court of Appeal is different, and not as far reaching, as that that was used in order to consider the statistical evidence to be relied on to prepare the relevant tables in Ogden 7. Indeed, it is as a result of this different definition that the Court of Appeal in *Billett* decided to use the *Smith v Manchester* approach rather than the more scientific approach that is encouraged by the use of the data in Ogden.

The Court of Appeal in *Billett* has introduced quite significant confusion in terms of using these tables. In the cases where there is a relatively insignificant disability that doesn't really satisfy the disability test for the purposes of the Ogden Tables (reference again is referred to Dr Wass' article) it may well be inappropriate to use the data in those Ogden Tables. In this type of case we have to revert to plucking the figure out of the air adopted in *Billet* and followed now in this case of *Murphy*. Dr Wass says:

> "There are real benefits in applying the Ogden methodology as opposed to a *Smith v Manchester* award: it provides an evidenced based starting point, it builds confidence in the existing framework, it is replicable in other cases and it provides an element of predictability in future awards."[13]

For the *Billett*/*Murphy* type case, Dr Wass suggests some adjustment to the non-disabled reduction factors may provide a sensible, flexible and evidence-based guide to the valuation of their claims.

Practice point

- In any case where there is an issue concerning the extent of the disability and how this should be assessed in respect of loss of earning capacity, consideration should always be given to using the Ogden Tables. They offer a more scientific approach to resolving this problem as

[8] *Hanks v Ministry of Defence* [2007] EWHC 966 (QB).
[9] *Billett v Ministry of Defence* [2015] EWCA Civ 773; [2016] P.I.Q.R. Q1.
[10] *Smith v Manchester* [1974] EWCA Civ 6.
[11] *Murphy v Ministry of Defence* [2016] EWHC 3 (QB) at [211].
[12] V. Wass, "*Billett v Ministry of Defence*: a second bite" [2015] J.P.I.L. 243.
[13] V. Wass, "*Billett v Ministry of Defence*: a second bite" [2015] J.P.I.L. 243.

it is desirable to move away from simply taking a guess which does not serve either party well.

Colin Ettinger

Case and Comment: Procedure

Crooks v Hendricks Lovell Ltd

(CA (Civ Div), Moore-Bick LJ, Arden LJ, Lindblom LJ, 15 January 2016, [2016] EWCA Civ 8)

Civil procedure—personal injury claims—certificates of recoverable benefit—costs orders—interpretation—Pt 36 offers

LT Certificates of recoverable benefit; Costs orders; Interpretation; Part 36 offers; Personal injury

The defendant had accepted liability for an accident at work. After the accident, the claimant claimed state benefits. The defendant made a Pt 36 offer for "£18,500 net of CRU [a certificate of recoverable benefits issued by the Compensation Recovery Unit] and inclusive of interim payments in the sum of £18,500". The defendant ticked the box which stated that the offer was made "without regard to any liability for recoverable benefits". At the time of the offer, the amount of CRU was £16,262.

At trial a few months later, the claimant obtained judgment for £29,550, comprising £4,000 general damages and the balance for lost earnings. A decision on costs was postponed pending the claimant's appeal against the CRU certificate. A revised CRU certificate showed deductible benefits of only £6,760. A dispute arose as to the amount of the defendant's Pt 36 offer. The defendant's case, with which the recorder agreed, was that its offer had comprised the interim payment of £18,500 plus the CRU sum outstanding at that time of £16,262, and that the claimant had failed to beat that offer at trial.

The claimant appealed. The issues were whether:

1) the recorder had misdirected himself as to the meaning of "net of CRU";
2) CPR r.36.14(1) required him to consider the effect of the offer on the day on which he gave judgment, rather than waiting for the revised CRU; and
3) the claimant had beaten the defendant's Pt 36 offer.

On the first point the Court of Appeal held that the defendant's offer was valid under CPR r.36.15(3)(a). There was no contradiction between the concept of the offer being made "net of CRU" and its being made "without regard to any liability for recoverable benefits" under r.36.15(3)(a). The natural meaning of an amount stated to be "net of" something else was the amount that remained after a deduction of tax or other contributions.

The gross compensation contemplated by the defendant when making the offer was not the crucial point. What mattered was the meaning of "net of CRU", which was how the offer had been expressed. The natural meaning of that phrase was "remaining after all necessary deductions of benefits [under the statutory scheme administered by CRU]".

It followed that when an offer made in such terms was compared to damages awarded by the court to determine whether it was more advantageous, it was necessary to consider the amount of damages *after* any corresponding adjustments for recoverable benefits had been made. The words "without regard to any liability for recoverable amounts" did not mean that the court was to have no regard to the amount of recoverable benefit when deciding whether the claimant had obtained a judgment more advantageous than the offer.

If the recorder was interpreting the offer as meaning "£18,500 net of CRU plus a payment to CRU for £16,262 and inclusive of interim payments in the sum of £18,500", then he was mistaken. The offer had been for £18,500, leaving aside any liability in respect of recoverable benefits once such liability had crystallised.

Considering the second point they held that the regime in r.36.14 applied to the circumstances as they were once judgment had been given, but not necessarily only at the moment of delivery. The phrase "upon judgment being entered" was not to be narrowly interpreted and meant "once judgment has been given and not before then". There would be cases in which a judge was entitled not make his decision on costs straightaway.

The facts of this case demonstrated why that had to be so. The judge knew that the correct amount of recoverable benefits remained to be determined. He was not constrained by r.36.14(1) to make his decision on costs in ignorance of the outcome of the CRU review.[1]

Finally, they held that considering whether a defendant had beaten a Pt 36 offer, it was necessary to compare the offer with the judgment on the same basis, allowing for any necessary subtraction for recoverable benefit from the total figure for damages in the judgment award if that was the nature of the offer, as it was in the instant case, or including the figure for recoverable benefit if the offer was made in those terms. One had to look at the net sum paid to the claimant, not the gross sum including monies payable to CRU.[2]

The real measure of whether the claimant had bettered the offer after issue of the revised CRU certificate was whether the total payment he actually received was more or less than the amount of the offer. The focus of r.36.14(1), (1A) and (2) was on the comparative advantage to the claimant as between offer and judgment, not disadvantage to the defendant.

The judgment award of £29,550 was subject to a deductible CRU amount of £6,760, leaving £22,789 as the amount that was net of recoverable benefit. That was the figure that ought to have been compared to the figure of £18,500 net of CRU in the offer, because that was the value of the judgment "net of CRU".

The claimant had beaten the Pt 36 offer. The basis on which the costs order was made was flawed. The costs order was set aside and the defendant was ordered to pay the claimant's costs of the proceedings.

Comment

Introduction

Although CPR Pt 36 has changed since the version of the rule considered in this judgment that is immaterial because, for all practical purposes, r.36.17 now reads as r.36.14 read at the time, whilst r.36.22 now reads as r.36.15 did.

The judgment reflects some concepts which underpin Pt 36 and that are worth identifying at the outset.

- The fundamental obligation to repay recoverable benefits, when a compensation payment is made, lies on the compensator.
- Accordingly, a defendant making a Pt 36 offer (though not a claimant making such an offer) must, if the payment on acceptance would be a "compensation payment" for the purposes of The Social Security (Recovery of Benefits) Act 1997, either:
  - — state that the offer is made without regard to any liability for recoverable amounts; or
  - — that is intended to include any deductible amounts.

[1] *Crooks* [2016] EWCA Civ 8 at [32]–[33].
[2] *Fox v Foundation Piling Ltd* [2011] EWCA Civ 790; [2011] C.P. Rep. 41 applied.

- When comparing the offer with any judgment to establish if that is "more advantageous" to the claimant it is the net figures which matter.

"Net of CRU"?

The first issue for the court was the basis on which the defendant's offer was made and specifically whether benefits were included.

The relevant offer was expressed to be "net of CRU" and, perhaps importantly, the defendant also confirmed in form N242 the offer was made "without regard to any liability for recoverable benefits".

The Court of Appeal accepted the phrase "net of CRU" was synonymous with an offer made "without regard to any liability for recoverable benefits".

It is not uncommon, however, to see defendant Pt 36 offers expressed to be "gross of CRU". Such offers are unlikely to comply with the rules on form and content now set out in r.36.22 and, as such, may be ineffective so far as the costs consequences provided for under the rule are concerned.

"More advantageous"?

The Court of Appeal held that the trial judge had been wrong to conclude, essentially on the basis of gross figures, the claimant had failed to obtain a judgment which was "more advantageous" than the defendant's offer, following the CRU review.

That was because, in deciding whether the judgment was more advantageous, it was necessary to compare the net sum the claimant received under the judgment with the net sum the claimant would have received if the offer had been accepted. Although that was a case in which the offer was made inclusive of deductible benefits the Court of Appeal held it was clear from the decision in *Fox*[3] this was a general principle.

Accordingly, the Court of Appeal confirmed that exactly the same approach to CRU is applicable whether a defendant's Pt 36 offer is made inclusive of deductible amounts or without regard to any liability for recoverable amounts.

The Court of Appeal also confirmed that the same approach would be applicable if the offer had not been made under Pt 36 and the court was considering the discretion on costs under Pt 44, in particular the relevance of any "admissible offer to settle" for the purposes of r.44.3(4)(c).

Timing

The judgment in this case gives important guidance about the timing of the comparison between offer and judgment, to determine whether the latter is "more advantageous" for the claimant than the former.

The Court of Appeal confirmed, given the analysis of what "net of CRU" meant, that the judge had been right to conclude the appropriate time for comparing offer and judgment was after any review of CRU. Lindblom LJ explained:

> "The correct amount of recoverable benefits remained to be determined in the CRU's decision on the review. That decision was not made, and could not have been made until after judgment had been given, because it was a decision that had to be made in the light of the judgment itself. The judge was not constrained by CPR 36.14(1) to make his decision on costs in ignorance of the outcome of the CRU's review, either leaving that process entirely to one side or speculating on what its result might be."[4]

[3] *Fox v Foundation Piling Ltd* [2011] EWCA Civ 790; [2011] C.P. Rep. 41.
[4] *Crooks* [2016] EWCA Civ 8 at [33].

Consequently, the Court of Appeal agreed that adjourning consideration of costs, pending final determination by the CRU, was for perfectly sensible reasons.

Practice points

Some key practice points can be drawn from this judgment.

- A defendant should make any Pt 36 offer in a way that complies precisely with the formal requirements of r.36.22 so far as CRU is concerned, or be at risk of the offer not carrying the intended costs consequences under that rule. A defendant may choose to deal with any non-Pt 36 offer—which, if accepted, would amount to a compensation payment for the purposes of the 1997 Act—in the same way, given that the court is likely to make precisely the same comparison and without the relevant information may be unable to do so.
- A claimant who receives a Pt 36 offer—or even any other offer—which does not comply with the requirements (or, if a non-Pt 36 offer, the spirit) of r.36.22, should seek clarification and/or challenge the efficacy of the offer.
- At trial it is important to remember the need to compare net figures.
- If there is any prospect of a CRU appeal or review, the court may be invited to adjourn costs pending such appeal or review.
- Claimants require careful advice on the implications, or potential implications, of CRU whenever offers, particularly Pt 36 offers, are made.

John McQuater

Atkins v Co-operative Group Ltd

(QBD, Supperstone J, 26 January 2016, [2016] EWHC 80 (QB))

Civil evidence—negligence—personal injury—asbestosis—breach of duty of care—causation—change of circumstances—consent judgments—fresh evidence

LT Asbestosis; Breach of duty of care; Causation; Change of circumstances; Fresh evidence

The claimant had sought damages for diffuse pleural thickening and asbestosis caused by his exposure to asbestos dust during his employment by the defendant between 1958 and 1962. Both parties were granted permission to rely on expert evidence. On the basis of that evidence, and in particular the evidence that the claimant had asbestosis, the defendant conceded breach of duty and judgment was entered with damages to be assessed.

On 25 March 2015 Master Gidden ordered that:

1) judgment be entered for the claimant with damages to be assessed; and
2) the defendant to make an interim payment in the sum of £25,000 in respect of damages and £8,000 in respect of costs by 15 April 2015.

The defendant was granted an extension of time and permission to appeal seeking this order:

1) there should be judgment for the claimant on breach of duty, with the issues of causation and quantum to be assessed; and

2) the issue of whether the interim payment made pursuant to the order dated 25 March 2015 should be repaid in part or in whole should be reserved and addressed at the conclusion of the trial on causation and quantum.

The defendant submitted that there had been a material change of circumstances since judgment was entered in that the radiological evidence had since been interpreted by an expert in cardiothoracic radiology, who concluded that the claimant had not in fact developed asbestosis. It therefore argued that it would be wholly artificial for the claimant to be compensated on the basis that he had developed an asbestosis-related condition.

The claimant submitted that there was no new or unforeseen evidence, and that the defendant had had ample opportunity to obtain any medical evidence on which he wished to rely prior to judgment.

Supperstone J held that the evidence which the defendant sought to adduce could not have been obtained with reasonable diligence by the time of the master's order. Practical difficulties would arise if the evidence was not admitted. It could not be appropriate for the defendant's expert to be required to express her opinion on quantum on the false assumption that the claimant did in fact have asbestosis, nor could it be appropriate for the court to proceed in circumstances where the claimant's medical expert, who was not a radiologist, had not had the benefit of considering the evidence as a whole. The claimant's prognosis and the issue of his life expectancy would depend on whether he had developed diffuse pleural thickening and/or asbestosis.

The judge ruled that in those circumstances, it was appropriate to order that judgment should be entered for the claimant on breach of duty only, with issues of causation and quantum to be assessed. The issue of whether the interim payment made pursuant to the order should be repaid in whole or in part was reserved to be addressed at the conclusion of the trial on causation and quantum.

The appeal was allowed.

Comment

The defendant would appear to have been rather fortunate in having its appeal granted in this case given that the judgment being appealed had been made with the defendant's consent. That consent was given in the context of both parties' chest physicians concluding that the claimant had asbestosis (though the defendant's expert did not accept a diagnosis of diffuse pleural thickening). What changed following the original consent judgment of Master Gidden was that: (a) the defendant had the radiological imaging interpreted by its own cardiothoracic radiologist who concluded that there was no evidence of interstitial fibrosis to suggest asbestosis; and (b) the claimant underwent new pulmonary function tests which revealed no worsening of pulmonary function since previous tests some years before. The defendant argued that this new information was a material change of circumstances justifying the appeal, and which also satisfied the test in *Ladd*[1] such as to justify the admission of new evidence on the appeal.

The "special grounds" set out in *Ladd* are:

1) the evidence could not have been obtained with reasonable diligence for use at the trial;
2) the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; and
3) the evidence must be such as is presumably to be believed; it must be apparently credible, though it need not be incontrovertible.

It was accepted by both parties that (2) and (3) in the *Ladd* test were satisfied, and it was as to (1) where the parties were in dispute on the appeal. Supperstone J duly decided that the evidence which the defendant sought to adduce could not have been obtained with reasonable diligence and therefore allowed reliance

[1] *Ladd v Marshall* [1954] 1 W.L.R. 1489 CA.

upon the new information. He then went on to allow the appeal on the basis that it would not have been right for the defendant's medical expert to express her opinion on the basis of false assumption regarding interpretation of the radiology.

The defendant was somewhat fortunate because the judge hearing the appeal could, it would seem, have readily come the conclusion that if it wanted to reserve its position on liability pending determination of the imaging by a cardiothoracic radiologist the defendant could have done so at the hearing before Master Gidden (as the defendant's solicitor had intended, but counsel at the hearing did not do), or it could have sought adjournment of that hearing pending the further investigations. It could also have been concluded (as the claimant argued) that this was not a change in material circumstances but a new opinion on the same circumstances.

Once the defendant—through counsel who had ostensible authority to make admissions—consented to judgment without first waiting for more evidence, it was somewhat harsh on the claimant to allow the defendant to, in effect, resile from their admission (thereby impeaching a consent judgment) once further evidence was obtained. Should the claimant be required to repay the interim payment, an issue which has yet to be determined, the consequence of permitting the appeal will have been immensely prejudicial to him. By contrast, although with the benefit of new evidence the judgment may have proved prejudicial to the defendant, it had been willingly entered into.

It is true that had the judgment stood there would have been some artificiality in the defendant's chest physician having to produce an opinion on a claimant who may not in fact have had a compensable condition. However, such "artificial" situations do arise in practice as for example with default judgments, and they do not result in insuperable difficulty.

Practice points

- Finality in litigation is important. By allowing the defendant in this case to resile from its own consent judgment this principle was undermined.
- Never be afraid to seek to adduce new evidence in an appeal if the test in *Ladd* can be argued. Such evidence is often persuasive, particularly if new facts arise post-judgment.
- Judgment should not be entered if an important ingredient of the cause of action is not established. *Judgment on breach of duty with the issues of causation and quantum to be assessed* appears to be an elusive judgment as it gives rise to few of the usual consequences of judgment (interest will not start to run and there will be no entitlement to costs save potentially for those relating to breach). The better course may be to record in a recital that breach of duty is admitted or no longer in issue rather than entering judgment. It is, of course, important to be very clear in court orders as to the limits of any admissions.

Nathan Tavares

Broadhurst v Tan[1]

(CA (Civ Div), Lord Dyson MR, McCombe LJ, David Richards LJ, 23 February 2016, [2016] EWCA Civ 94)

Personal injury—civil procedure: costs—low value personal injury claims—fixed costs—Pt 36 offers—indemnity basis costs—Civil Procedure Rules 1998 r.36.14(3), Pt 45, r.45.29B, r.36.14A, r.36.14, r.45.29C, and r.45.29I—Civil Procedure (Amendment No.6) Rules 2013

Fixed costs; Indemnity basis; Low value personal injury claims; Part 36 offers

The details of the facts in these two appeals are not material. It is sufficient to say that in both cases, the claimant:

1) started a claim for damages for personal injuries arising from a road traffic accident under the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ("the RTA Protocol");
2) made a Pt 36 offer to try to obtain settlement and the offer was rejected by the defendant; and
3) obtained judgment which was more advantageous than the offer she had made.

In the case of Ms Broadhurst, HH Judge Robinson (sitting in the County Court at Sheffield) held that r.36.14(3) applies in a s.IIIA case where a claimant makes a successful Pt 36 offer. But, he said, in such a case there is no difference between profit costs assessed on the indemnity basis and the fixed costs prescribed by Table 6 of r.45.29C, subject to the possibility of awarding a greater sum than fixed costs in exceptional circumstances pursuant to r.45.29J. Ms Broadhurst's case is that the judge was wrong to equate indemnity costs with fixed costs in this way.

In the case of Ms Smith, HH Judge Freedman (sitting in the County Court at Newcastle upon Tyne) held, like Judge Robinson, that r.36.14(3) applies in a s.IIIA case where a claimant makes a successful Pt 36 offer. But, unlike Judge Robinson, he did not equate indemnity costs with fixed costs.

The Court of Appeal confirmed that it was HH Judge Freedman who was right. In fixed costs personal injury claims governed by s.IIIA of CPR Pt 45,[2] costs were payable on the indemnity basis under CPR r.36.14[3] where a claimant made a Pt 36 offer and then obtained judgment which was more advantageous than the offer. Since r.36.14(3) had not been modified by r.36.14A, it continued to have full force and effect. Fixed costs were not to be equated with indemnity costs and any tension between r.45.29. Band r.36.14A therefore had to be resolved in favour of r.36.14A.

The first appeal was allowed and the second appeal dismissed.

Comment

Introduction

On 9 November 2013 the claimant and defendant were involved in a minor road traffic accident at a roundabout in Sheffield. On 23 February 2016 the court proceedings arising out of that accident concluded

[1] Heard with *Taylor v Smith*.
[2] Fixed recoverable costs and claims which no longer continue under the RTA or EL/PL pre-action protocols.
[3] Costs consequences following judgment.

with a landmark judgment by the Court of Appeal. This judgment deals with a key facet of the reforms introduced as a result of the Jackson Report, namely the significance of Pt 36 offers. That is in the specific context of the potential costs implications of such offers when made by the claimant in a claim subject to fixed costs under s.IIIA of Pt 45.

Background

In April 2013 fixed costs were introduced for personal injury claims which, even if subsequently litigated, originated in either the RTA Protocol or EL/PL Protocol. Part 36 was, at the same time, amended to confirm that fixed costs would remain applicable in a number of situations when Pt 36 offers had been made, for example when an offer to settle the whole claim is accepted within the relevant period. However, the terms of the amended rule appeared to exclude fixed costs in cases where a claimant obtained judgment which was at least as advantageous as that claimant's own Pt 36 offer.

Subsequently a number of county court decisions revealed the lack of a consistent approach to the consequences for a successful claimant of effective Pt 36 offers, specifically whether such an offer allowed the claimant to escape fixed costs. In this appeal the judge in *Broadhurst* took one view whilst the judge in the related appeal of *Taylor* took the opposite approach.

Hence, in the Court of Appeal, the Master of the Rolls observed:

> "The issue concerns the interplay between the fixed costs prescribed by section IIIA of Part 45 (to which I shall refer as 'section IIIA') and the provision in Part 36 for a claimant to recover assessed costs on the indemnity basis where she obtains a judgment against the defendant which is at least as advantageous to her as the proposals contained in her Part 36 offer. I shall refer to a claimant's Part 36 offer made in such circumstances as 'a successful Part 36 offer'."

[4]

The ruling given by the Court of Appeal deals with a number of issues, arising out of that interplay, which is worth considering in turn before assessing some key practice points that can be derived from the judgment.

Had the claimant made an effective Part 36 offer?

A point resolved in the first appeal in *Broadhurst*, and so not featuring significantly in the second appeal to the Court of Appeal, was whether the claimant had made an effective Pt 36 offer, the focus of that first appeal being the costs and other consequences of an offer the claimant made to settle liability at 50 per cent.

The district judge, who had tried the case, had, perhaps somewhat surprisingly, concluded:

> "The court declines to apply CPR 36.14(3)(a) and (b) … or (b) and (c) on the basis that … the Part 36 offers relate solely as to liability and not as to quantum."

At the hearing of the first appeal the court concluded the claimant had made a valid Pt 36 offer, applying *Huck*.[5] Consequently, the claimant succeeded, on the first appeal in *Broadhurst*, in establishing that there had been a successful Pt 36 offer. The issue on that appeal then turned to the consequences of such an offer in a case subject to s.IIIA of Pt 45 and the potential tension between that rule and Pt 36.

[4] *Broadhurst* [2016] EWCA Civ 94 at [2].
[5] *Huck v Robson* [2002] EWCA Civ 398; [2003] 1 W.L.R. 1340.

The Apparent Tension Between Part 36 and Part 45

Section IIIA of Pt 45 makes no express provision as to what should happen where a claimant makes a successful Pt 36 offer.

In these circumstances the Master of the Rolls held:

> "The effect of rules 36.14 and 36.14A when read together is that, where a claimant makes a successful Part 36 offer, he is entitled to costs assessed on the indemnity basis. Thus, rule 36.14 is modified only to the extent stated by 36.14A. Since rule 36.14(3) has not been modified by rule 36.14A, it continues to have full force and effect. The tension between rule 45.29B and rule 36.14A must, therefore, be resolved in favour of rule 36.14A. I reach this conclusion as a straightforward matter of interpretation and without recourse to the canon of construction that, where there is a conflict between a specific provision and a general provision, the former takes precedence."

[6]

Accordingly, the Court of Appeal concluded there was no doubt as to the true meaning of the rule, the apparent tension being clearly resolved in favour of r.36.14A.

If that were not so, then it would have been legitimate to use the explanatory memorandum as an aid to construction (as the condition specified by Lord Browne-Wilkinson in *Pepper*[7] would be satisfied). That explanatory memorandum stated:

> "New rules 36.10A and 36.14A make provision in respect of the fixed costs a claimant may recover where the claimant either accepts or fails to beat a defendant's offer to settle made under part 36 of the CPR. Provision is also made with regard to defendants' costs in those circumstances. If a defendant refuses a claimant's offer to settle and the court subsequently awards the claimant damages which are greater than or equal to the sum they were prepared to accept in the settlement, the claimant will not be limited to receiving his fixed costs, but will be entitled to costs assessed on the indemnity basis in accordance with rule 36.14."

That led on to an analysis of what the consequences provided for under r.36.14A would mean for the claimant in a fixed costs case.

Indemnity costs and fixed costs

In *Broadhurst* the judge hearing the first appeal, though overturning the ruling by the district judge that there was no effective Pt 36 offer, concluded that the claim remained subject to fixed costs as, in these circumstances, there was no difference between indemnity costs and standard costs.

In the related appeal of *Taylor* the judge had, conversely, concluded that the claimant was entitled to assessed costs, rather than fixed costs, and for that assessment to take place on the indemnity basis.

On this point the Master of the Rolls observed:

> "The starting point is that fixed costs and assessed costs are conceptually different. Fixed costs are awarded whether or not they were incurred, and whether or not they represent reasonable or proportionate compensation for the effort actually expended. On the other hand, assessed costs reflect the work actually done. The court examines whether the costs were incurred, and then asks whether they were incurred reasonably and (on the standard basis) proportionately."[8]

The Master of the Rolls went on to deal with a practical issue when he held:

[6] *Broadhurst* [2016] EWCA Civ 94 at [25].
[7] *Pepper (Inspector of Taxes) v Hart* [1993] A.C. 593 HL.
[8] *Broadhurst* [2016] EWCA Civ 94 at [30].

> "Where a claimant makes a successful Part 36 offer in a section IIIA case, he will be awarded fixed costs to the last staging point provided by rule 45.29C and Table 6B. He will then be awarded costs to be assessed on the indemnity basis in addition from the date that the offer became effective. This does not require any apportionment. It will, however, lead to a generous outcome for the claimant. I do not regard this outcome as so surprising or so unfair to the defendant that it requires the court to equate fixed costs with costs assessed on the indemnity basis. As Mr Williams says, a generous outcome in such circumstances is consistent with rule 36.14(3) as a whole and its policy of providing claimants with generous incentives to make offers, and defendants with countervailing incentives to accept them."[9]

Practice points

A number of practice points emerge from this judgment, some relating directly to the claimant making what was described in this case as "a successful Part 36 offer" and others, potentially of no less importance, of a much broader scope.

- Claimants should make full use of Pt 36 when making offers to settle, ensuring such offers comply with the rules as to form and content which are set out in Pt 36 itself.
- Defendants need to take very seriously such offers given the potential effect on recovery of costs and also the impact of other benefits provided for the claimant under Pt 36.
- To be "a successful Part 36 offer" that offer may relate, as in this case, only to the issue of liability and does not have to be an offer to settle the whole claim.
- Furthermore, "a successful Part 36 offer" does not have to involve a trial, only that there be judgment for the claimant.
- If the claimant makes "a successful Part 36 offer" that will, unless this would be "unjust", trigger an entitlement to indemnity costs from the end of the relevant period. On a practical level, in a case otherwise subject to s.IIIA of Pt 45, that will mean:
  - The claimant receiving the appropriate fixed costs applicable at the "staging point" when the relevant period in the offer expires.
  - The claimant thereafter being entitled to assessed costs. That will mean costs, applying the appropriate hourly rate, being assessed to reflect time spent. Furthermore, those costs will be assessed on the indemnity basis, so such costs cannot be cut back on the grounds of proportionality alone.
- Because any costs to be assessed on the indemnity basis will need to be approached in the same way the claimant will escape fixed costs in the event the court orders assessment of any costs on the indemnity basis under the general discretion conferred by Pt 44. That might be appropriate if, for example, an unsuccessful defendant fails to engage in ADR,[10] whether or not the claimant has made a successful Pt 36 offer.
- Because the Court of Appeal recognised assessed costs are conceptually different to standard costs that will mean the claimant escapes fixed costs if the court just orders, or the parties agree, assessment of costs even if that is on the standard basis.
- Those acting for claimants need to ensure that retainers do provide for costs on an hourly basis, rather than just the fixed costs according to the type of claim, or, despite the decision in this case, the indemnity principle is likely to limit costs recoverable to the fixed costs provided for in the retainer.

[9] *Broadhurst* [2016] EWCA Civ 94 at [31].
[10] See *Reid v Buckinghamshire Healthcare NHS Trust* [2015] EWHC B21 (Costs) SCCO.

- A claimant who anticipates the prospect of escaping fixed costs may, in a fast track case not subject to costs budgeting, wish to give, and receive in return, a costs estimate.
  - That will ensure the defendant is aware of the potential costs in the event of assessment, whether on the standard or indemnity basis.
  - Estimates from defendants remain important wherever those defendants are not subject to fixed costs. Such an estimate may reveal the costs being claimed by the claimant, should proportionality be a consideration, are not disproportionate but correspond to the costs incurred by the defendant given the nature of the issues and other relevant circumstances.
- Part 36 offers are not just about indemnity costs, as well as enhanced interest the claimant will, again unless this would be "unjust" benefit from the "additional amount" uplift.

John McQuater

Jockey Club Racecourse Ltd v Willmott Dixon Construction Ltd

(QBD (TCC), Edwards-Stuart J, 4 February 2016, [2016] EWHC 167 (TCC))

Civil procedure—Pt 36 offers—genuine offers—modest discounts—unjust—indemnity costs

LT Contractual liability; Costs; Indemnity basis; Part 36 offers; Validity

The Jockey Club had engaged Willmott Dixon to design and construct a new grandstand at Epsom Racecourse. Its roof system was damaged by high winds twice. The Jockey Club brought proceedings against Willmott Dixon, claiming damages for its costs of repair and consequential losses. After the second incident, the Jockey Club invited the company to send experts to inspect the damage, sent photographs and suggested a site visit. It told the company of its investigations involving experts in engineering and materials science.

The Jockey Club made a Pt 36 offer to settle liability on the basis that the company would pay 95 per cent of the damages to be assessed, but the company did not respond. After the acceptance period had passed, the club served amended particulars of claim setting out for the first time the total cost of total replacement of the roof and an estimate of its consequential losses, which amounted to over £5 million. A split trial was directed.

Willmott Dixon named its experts only two days before expert evidence was due and asked for an extension. Two months later they conceded liability and preliminary liability issues were settled by consent in the Jockey Club's favour. The club claimed costs on the indemnity basis as it had beaten its offer of 95 per cent.

There were two issues:

1) whether the club's offer fell within the meaning of Pt 36 and was a genuine attempt to settle liability reflecting an available outcome of the litigation; and
2) if so, whether it was unjust to make an order reflecting some or all of the incentives under Pt 36.

Edwards-Stuart J held that there was no possibility of contributory negligence, so a decision that the company would pay 95 per cent of the damages was not open to the court. The defence had offered no

positive case, merely a series of non-admissions. An offer had to contain some genuine element of concession on the part of the club to which a significant value could be attached.[1]

On the question of whether a Pt 36 offer had to reflect an available outcome of the litigation, even an unlikely one, the judge noted that cases were frequently settled on the basis of an assessment of risk that combined both the risk of failure and the uncertainty of the true value of the claim. An offer made in that light would not usually reflect a result that was a likely outcome of the litigation if fought to judgment as in *Huck*.[2] Although *Huck* was not a case in which the offer reflected an outcome that was not available, theoretically it was one where the offer did not reflect an outcome that was likely to result in practice, and the approach taken by the majority could be applied in this type of case.[3] That conclusion was reinforced by the decision on costs taken in *Wharton*.[4] Considering those authorities, the club's offer was valid within the meaning of Pt 36 and a genuine attempt to settle. While the five per cent discount was very modest, it was not derisory.

Consequently, the offer had to be given effect unless it would be unjust. All the circumstances of the case, including the factors in r.36.17(5) had to be taken into account. When the club served its draft amended particulars of claim, the ultimate costs of the works and consequential losses remained to be pleaded. Once the company realised the scale of the claim it did not take prompt steps to investigate, or to equip itself via expert evidence to assess properly its position on liability. Considering r.36.17(5)(c), the judge held that it would be unjust to order indemnity costs from 21 days after the offer, given that the company had just learnt of a major increase in the claim. However, the Jockey Club was entitled to indemnity costs from the earliest date after which the company should have been equipped to assess the claim on liability, namely four months after the offer.

Judgment was entered for claimant in part.

Comment

Introduction

The judgment in this commercial litigation deals with some important points for practitioners handling personal injury and clinical negligence claims.

What is an offer?

To be a Pt 36 offer, with all the potential that carries for costs and other consequences, the proposal must be capable of being properly regarded as an "offer".

To deal with this preliminary point the judge reviewed the authorities that seek to distinguish what might properly be characterised as an "offer" from a mere invitation to agree what might be termed a "total capitulation" The latter will not be an offer and hence cannot be a Pt 36 offer, even if that rule is expressly invoked when the proposal is made.

Edwards-Stuart J considered the most relevant authorities, on this topic, to be *Huck* and *AB*.[5]

Adopting the approach in *AB* Edwards-Stuart J concluded that, although hardly generous, the claimant had made an offer, as that proposal could not be described as "all take and no give".

[1] *AB v CD* [2011] EWHC 602 (Ch) applied.
[2] *Huck v Robson* [2002] EWCA Civ 398; [2003] 1 W.L.R. 1340 followed.
[3] *Huck v Robson* [2002] EWCA Civ 398; [2003] 1 W.L.R. 1340 followed.
[4] *Wharton v Bancroft* [2012] EWHC 91 (Ch) applied.
[5] *AB* [2011] EWHC 602 (Ch).

Does an offer have to reflect an available outcome of the litigation?

The next question was whether, to carry costs and other consequences under Pt 36, the offer had to reflect an available outcome of the litigation, in the sense of an order the court might make on the relevant issue or claim as a whole.

Recognising that an offer may reflect risks on liability as well as uncertainty about the true value of the claim Edwards-Stuart J accepted that a Pt 36 offer, to be effective, did not have to reflect an available outcome of the litigation.

Comparing the offer and judgment

On the basis that the claimant had made a valid Pt 36 offer the court had, next, to compare the offer and judgment, in order to decide whether that judgment was "at least as advantageous" to the claimant as the offer.

The defendant argued the claimant would only have beaten the offer if at least 95 per cent of the roof required replacement.

Edwards-Stuart J disposed of this argument shortly by holding that:

> "this is ingenious but misconceived. The offer was to pay 95% of the Claimant's damages '*to be assessed*': whether the damages to which the Claimant was entitled represented the costs of repairing only half the roof or the whole of it is a matter of quantum, not liability."[6]

Was the offer "a genuine attempt to settle the proceedings"?

The defendant argued that *Huck* could now be distinguished because it was decided under the earlier version of Pt 36 which did not include the provision now found in r.36.17(5)(e) namely "whether the offer was a genuine attempt to settle the proceedings".[7] Edwards-Stuart J rejected this argument, after holding that the offer was valid, by going on to observe:

> "that it was a genuine attempt to settle the claim. Whilst the discount was very modest, even in the context of a claim of some £400,000 it amounted to £20,000, which in my view cannot be described as derisory."[8]

Was the "information" available to the parties at the time of the offer significant?

Part 36 identifies the "information" available to the parties at the time as a relevant factor in determining whether the usual costs and other consequences of a Pt 36 offer might be "unjust".

Whilst it was correct the particulars of claim as served in March 2015 gave, for the first time, details of a major part of the claim that added very little to the case on liability, though it did tell the defendant about the size of the claim being faced.

Once the defendant realised the size of the claim being faced the judge considered the defendant might have been expected to take prompt steps to investigate the claim, and in particular make an informed assessment of the position on liability.

Edwards-Stuart J was, accordingly, prepared to accept that it would be unjust to award indemnity costs immediately after 21 days from the date of the offer, but only deferred assessment on the indemnity basis to those costs incurred from 29 May 2015.

[6] *Jockey Club Racecourse* [2016] 1 Costs L.R. 123 at [19].
[7] *Jockey Club Racecourse* [2016] 1 Costs L.R. 123 at [36].
[8] *Jockey Club Racecourse* [2016] 1 Costs L.R. 123 at [37].

Observations

The defendant's argument, described by the judge as "ingenious but misconceived", the claimant would only "beat the claimant's own offer if at least 95% of the roof required replacement" confirms that arguments about the problem with offers on liability where causation is an issue, often relevant in clinical negligence claims, should not hold sway. That is because the offer was to accept a percentage of the damages "to be assessed" and hence, in the context of this case, those damages would be reduced by the appropriate percentage whether ultimately awarded to reflect the costs of repairing half the roof or the whole of the roof. The extent of the damage to the roof, in this particular case, might be regarded as the equivalent, in the context of a personal injury or clinical negligence claim, as the injuries, losses and expenses caused by the defendant's breach of duty.

The judgment suggests the introduction of the "genuine attempt to settle the proceedings" test in r.36.17(5) has not changed the law as set out in *Huck*.

The judgment is also a clear endorsement of the approach in *Huck* that to be an effective offer on liability that offer does not have to reflect an actual outcome, even where the case is what might be described as being "all or nothing".

Practice points

On this analysis a number of useful practice points can be drawn from the judgment.

- Offers on liability by claimants, even when these do not reflect any possible outcome of the litigation can be very effective.
- Even a modest discount on liability should be regarded not just as an "offer" but a "genuine attempt to settle the proceedings".
- Such offers are, at the very least, likely to carry indemnity costs either from the end of the relevant period, or the point at which the offeree had sufficient information for indemnity costs not to be "unjust". Following the judgment in Broadhurst,[9] confirming fixed costs and assessed are conceptually different and that indemnity costs will carry the right to assessment, this is an important point.

John McQuater

PM Law Ltd v Motorplus Ltd

(QBD, Picken J, 5 February 2016, [2016] EWHC 193 (QB))

Civil procedure—costs—disbursements—legal expenses insurance—non-parties—particulars of claim—referrals—restitution—striking out—summary judgments

LT Costs; Disbursements; Law firms; Legal expenses insurance; Loss of profits; Non-parties; Referrals; Striking out

Motorplus is an insurance intermediary which markets and administers legal expenses insurance policies of both before-the-event ("BTE") and after-the-event ("ATE") types. Motorplus does this as agent for

[9] *Broadhurst v Tan* [2016] EWCA Civ 94.

various insurers. Pursuant to an agreement with the solicitors PM Law Ltd, the agent Motorplus referred potential civil claimants to the solicitors in return for referral payments. BTE and ATE policies provided by Motorplus were underwritten by three different insurers at different times.

The terms of the solicitors' client care letter stated that their disbursements and the party costs would be covered by the client's insurance policy, provided that the client had not breached its terms and conditions. Concerns arose as to late payment of referral fees and premiums. The agent Motorplus refused to make any further referrals. The solicitors issued a claim for lost profits.

The first part of the claim was based on the minimum number of monthly referrals which, according to the solicitors, Motorplus was committed to making under the agreement. The second part of the claim was for the recovery from Motorplus, whether contractually or by way of restitution, of monies allegedly due to the solicitors under the policies issued in favour of their clients. Those sums consisted of legal costs and disbursements incurred in handling the referred claims. Motorplus challenged the solicitors' title to sue as a non-party to the policies and disputed its own liability, as distinct from the liability of the insurers, since it was itself a non-party.

The solicitors submitted that they had title to sue because they were appointed by their clients under a contract of appointment to recover sums payable under the policies.

Picken J held that the solicitors had no liability of their own because it was their clients, as insured parties, who were liable to pay the relevant costs and disbursements and who were entitled to be indemnified by the insurers. The policies were therefore contracts between the solicitors' clients and the insurers. The terms of the client care letter recognised that arrangement and gave no indication that the solicitors claimed any entitlement in their own right. Since it was their clients who were liable, the solicitors could not claim to have suffered loss. Accordingly, their case had no realistic prospect of success.

The judge further held that although some of the policies described the insured's solicitors as the legal representative appointed by the insurers, it did not follow that there was any tripartite contract of appointment between the solicitors, the agent and the insurers. That would be fundamentally at odds with the fact that the policies named the clients, not the solicitors, as insureds. Even if there were such a contract, the solicitors would still need to establish the existence of an implied term that the insurers, or the agent on their behalf, would pay the solicitors' disbursements and costs. There was no basis on which to imply such a term.[1]

In addition, the agent was not an insurance company and was not itself a party to the policies. There was nothing to suggest that it had assumed liability. Its role of administering policies and paying claims on behalf of the insurers did not make it personally and directly liable to make payments under policies.[2] Accordingly, it was appropriate to strike out the relevant paragraphs of the claim and give summary judgment in the agent's favour in respect of the claims set out in those paragraphs.

The judge concluded by saying that even if there was a claim in restitution, the only recoverable sums would be the amounts paid by the solicitors by way of disbursements. The solicitors could not argue that they were liable to pay their own fees; nor could they be liable for adverse costs, since that liability rested with their clients as parties to the proceedings in which the costs orders were made. However, since it was the clients who were liable for the disbursements, the solicitors could not point to any obligation which might found a claim in restitution.[3]

The application was granted.

[1] *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72; [2015] 3 W.L.R. 1843 followed.
[2] *Temple Legal Protection Ltd v QBE Insurance (Europe) Ltd* [2009] EWCA Civ 453; [2010] 1 All E.R. (Comm) 703 followed.
[3] *Greene Wood McLean LLP (In Administration) v Templeton Insurance Ltd* [2010] EWHC 2679 (Comm); [2011] 2 Costs L.R. 205 considered.

Comment

The lost profits claimed by the Sheffield-based solicitors in what may seem an unusual arrangement, were in excess of £4 million so it is perhaps therefore not surprising that this litigation followed, let alone the £3 million claim said to be sums owed under the policies for costs and disbursements. They had enjoyed this lucrative arrangement with the defendant legal expenses insurance intermediary on behalf of three underwriting insurers at different times between 2006 and 2011. The BTE policies were underwritten by Equity Red Star until late 2008 or early 2009, when Ageas (previously known as Groupama Insurance Company Ltd) took over those policies. The ATE policies were underwritten by Equity Red Star until early 2009, when Alpha took them over.

Originally an agreement evidenced by emails, this was replaced by a contract in 2007. In return for the referral fees, PM Law would receive cases from the intermediary on behalf of the underwriting insurers. Having been given details of the prospective clients, the firm would contact them to confirm whether or not they had BTE insurance. If they did not, then PM Law would enter into a conditional fee agreement ("CFA") and issue an ATE insurance policy. The referral payments for those cases that were then accepted would be invoiced on a monthly basis. The scheme lasted until January 2011 following which Motorplus stopped the arrangement. It was unhappy at the proportion of cases being accepted and there was a delay and in some case default of payment of the referral fees. PM Law claimed damages representing lost profits as a result of the referrals being below the levels that had previously been agreed and supplied. That claim amounted to £4.4 million although this was not the subject of this application. This application revolved around a second claim:

> "for in essence, claims to recover from Motorplus, whether contractually or by way of restitutionary/contributory claim, moneys due to PML for disbursements and similar costs incurred in the course of handling the referred claims."[4]

Curiously it was acknowledged in court that in fact restitution was not actually pleaded although the parties asked the judge to treat this as though it had been so they would have guidance on the outcome of any later application to amend and bring in such a claim. The defendant intermediary sought to strike out the relevant parts of the claim or in the alternative the whole claim against it. Although not having issued an application, the insurers Aegeas and Alpha separately made clear they supported the strike out application. Equity Red Star had been released from the proceedings following repeated failures by the claimants to serve their claim on them.

The CFAs were drafted on very similar terms to the then Law Society Model CFA and the claimant remained liable for disbursements as the case progressed and win or lose. If lost, the ATE would indemnify them.

The eventual downfall for PM Law's unsuccessful resistance of the applications was that the policies were actually between the intermediary on behalf of the insurers and the client claimants and not directly with the law firm. The judge found that the solicitors could not rely on the Contracts (Rights of Third Parties) Act 1999 and indeed the defendant's counsel had conceded that because the policies themselves expressly excluded the operation of that act in the first instance. However, it still did not provide any way for the solicitors to enforce the terms or actually benefit on them. The sole purpose and benefit of the policies was for the client. It was acknowledged from previous authority that:

> "A contract does not purport to confer a benefit on a third party simply because the position of that third party will be improved if the contract is performed. The reference in [section 1] to the term purporting to 'confer' a benefit seems to me to connote that the language used by the parties shows

[4] *PM Law Ltd v Motorplus Ltd* [2016] EWHC 193 (QB); [2016] 1 Costs L.R. 143 at [22].

> that one of the purposes of their bargain (rather than one of its incidental effects if performed) was to benefit the third party."[5]

Secondly, the judge decided that the solicitors did not have title to sue in their own name really for the same reason that it was not them who were insured under the policies. In fact, this position has been spelled out in PM Law's client care information pack which was sent to their clients. They had used the words "we will claim disbursements on your insurance".[6] But the judge took the view that this simply meant that a claim will be presented on the client's behalf. The reality was that although a solicitor would often pay disbursements for the clients, it did not mean that they actually had a legal liability to do so and therefore still the indemnity was for the client.

PM Law then sought to argue an implied term in the policy that would allow them to sue in their own name but there they fell foul of a previous interpretation on this basis by the High Court in *Greene Wood McLean*.[7] There Cooke J had found that solicitors were able to bring a claim against ATE insurers because they had given a guarantee to their clients that the solicitors themselves would pay if the insurers did not. However, no such guarantee had been given in this case and there was no evidence of any other contractual commitment that the solicitors would pay disbursements.

The final nail in the coffin was that the defendant was only the intermediary to its underwriting insurers and was therefore a disclosed agent. Consequently, again it could not be held liable.

The judge was fairly dismissive of the claim in parts describing it as "unwinnable"[8] and saying that none of the documents that he had actually reviewed supported the claimant's case.

The judgment is silent on why PM Law did not sue on their client's behalf or seek an assignment of the cause of action. Perhaps the claims will return under a different guise? It would appear that the loss of profit claim remains.

Practice points

- Contractual claims require careful consideration of the contracting parties.
- Absent assignments of the cause of action, not being a contracting party will defeat a claim unless there is the clearest evidence that the contracting parties intended a benefit to be conferred on a third party and that cause of action has not been expressly excluded from the contract.

Mark Harvey

[5] Christopher Clarke J in *Dolphin Maritime & Aviation Services Ltd v Sveriges Angfartygs Assurans Forening* [2009] EWHC 716 (Comm); [2010] 1 All E.R. (Comm) 473.
[6] *PM Law Ltd* [2016] 1 Costs L.R. 143 at [15] and [16].
[7] *Greene Wood McLean* [2011] 2 Costs L.R. 205.
[8] *PM Law Ltd* [2016] 1 Costs L.R. 143 at [38].

Cumulative Index

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