Journal of Personal Injury Law

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Colin Ettinger: Solicitor and Partner with Irwin Mitchell, London. Past President and Senior Fellow of APIL. Member of the Personal Injury Panel. Specialities: catastrophic injuries and occupational health issues.

Case and Comment Editor

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Dr Julian Fulbrook: Dean of Graduate Studies and Senior Lecturer in Law at LSE. He holds law degrees from Exeter, Cambridge and Harvard. He was a Wright Rogers' Law Scholar at Cambridge; a Canon Samuel Barnett Memorial Fellow at Harvard Law School; Duke of Edinburgh Scholar at the Inner Temple.

David Fisher: Catastrophic Injury Claims Manager for AXA Commercial Insurances. Responsible for AXA Commercial's Neuro trauma team that won the PI Team of the Year (Defendant) at the 2010 PI Awards. Advocates developing a more consensual approach to the handling of injury claims. Member of Trust Mediation's Advisory Council.

Richard Geraghty: Solicitor and Partner with Slater & Gordon (UK) LLP, London where he is also the National Practice Development Leader for Personal Injury Training and Education. He is legal advisor to the Police Federation Health & Safety Committee and a member of APIL. Specialities: Serious injury cases including spinal and brain injuries, amputation and fatal claims.

Helen Blundell: Non-practising solicitor at APIL. Consulting editor of APIL's monthly publication, PI Focus. Specialities: Interventions and judicial reviews on behalf of the association, the discount rate; personal injury related HMRC issues, Mesothelioma Act and related scheme; infraction/complaints to European Commission.

James Goudkamp: Barrister, 7 King's Bench Walk London. Fellow of Keble College and an Associate Professor at Oxford University. James holds or has held positions at Harvard Law School, the Inner Temple, the National University of Singapore, the University of Western Australia, and the University of Wollongong. Speciality: Tort law.

Nathan Tavares: Barrister, Outer Temple Chambers, 222 Strand, London. Member of the Personal Injury Bar Association and Professional Negligence Bar. Association Judge of the First Tier Tribunal (Mental Health). Specialities: Catastrophic injury, clinical negligence.

Kim Harrison: Kim Harrison is a Principal Lawyer at Slater & Gordon in Manchester. She was previously a Partner at Pannone LLP prior to the merger with Slater & Gordon in 2014. She has published widely and appeared on TV and radio in relation to many of her cases. Specialities: Abuse claims, inquest work, and chest and asbestos disease cases

Brett Dixon Brett Dixon: Legal and Training Consultant with Brett Dixon Training Limited. Fellow and President of APIL, Member of the Civil Procedure Rule Committee. Specialities: Civil Litigation, Personal Injury Liability, Health & Safety Law, Civil Procedure and Costs.

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Editorial

This is my first edition as Editor of JPIL. Hopefully I will continue in the tradition of ensuring that current topical and in-depth articles are available to assist those studying and practising personal injury law.

We open this month's journal with articles on Brexit. The first called "Adieu" by Kathryn Beale is timely. The Government are introducing a package of measures to make legal changes necessary to facilitate Brexit. Kathryn identifies the issues involved in unravelling and redefining the laws made over the past 40 years or so and the difficulties this will inevitably present. Having set the scene regarding the position generally, she then deals with issues concerning cross-border litigation, non-package travel claims. Once again uncertainties emerge over this.

Brett Dixon continues in this vein with his analysis of the potential impact of Brexit on health and safety law. Again, we are likely to look forward to uncertainty as a result.

William Norris QC has prepared a very detailed and valuable article on the duty of care in sport. This review is undoubtedly an admirable analysis of what most would regard as good or best practice of sports bodies. Nevertheless, focus in this article is on what is meant by "a duty of care" in the context of obligations in sport.

We have four articles in this addition on procedural matters. Helen Blundell looks at the implications of the recent Court of Appeal decision in *Qader v Shaw*. This case had a particular significance for claimants whose legitimate claims for damages were disputed and who needed to defend allegations of fraud made in the proceedings. This case establishes that such claimants were not limited to recover anything other than fixed costs. It has been established that such claimants are entitled to recover costs on a multi-track basis which will no doubt place them in a much better position to defend serious allegations of fraud.

We continue on this issue relating to the impact of misrepresentation by injured people. Angela Sandhal is concerned with the High Court's rejection of a judicial review application by an ATE insurer of a decision made by the FSO who upheld a complaint made by George Head about the insurers refusing to indemnify him.

A third article on the theme of potential dishonesty in personal injury cases is written by Marcus Grant. This is concerned with committal proceedings and offers practical advice for practitioners on advising clients of the risk of committal proceedings where they may have behaved in a fraudulent manner.

Our final article on practice and procedure is by John McQuater. John is now up to Part 11 on the future of CPR Pt 36. We are treated to a very careful analysis of recent decisions on what has proved to be part of the rules which has generated much satellite litigation.

In our damages section, Daniel Friedland, Consultant Clinical Neuropsychologist, writes about rehabilitation for traumatic brain injury. This paper argues that rehabilitation in the community is a crucial part of the overall rehabilitation process. The effectiveness of community rehabilitation and vocational rehabilitation can prove to be that much more effective if carried out in the community.

Colin Ettinger

Adieu

Katherine Deal

Natasha Jackson*

Brexit; Cross-border disputes; EU law; Implementation; Package holidays; Personal injury

On 29 March, Theresa May fired the art.50 starting pistol, beginning a two-year sprint to negotiate the UK's withdrawal from the EU. As part of this process, negotiators and lawyers will have to navigate a constitutional minefield to facilitate this messy divorce.

While the outcome of the negotiations remains within the realms of speculation, what is crystal clear is that there will be widespread implications for personal injury lawyers working in and across domestic and European contexts, whatever the result.

Constitutional cliffhanger

The legal saga of Brexit has gripped lawyers and members of the public. We eagerly followed the judicial review challenges as to if, how and when art.50 could be initiated, with the Supreme Court in *R. (on the Application of Miller)*[1] confirming that the "constitutional measures" the UK has to invoke in order to trigger art.50 required Parliament first to vote before the Prime Minister could begin the withdrawal process.

A vote was duly passed after some minor skirmishing, the three-line European Union (Notification of Withdrawal) Act 2017 was passed and became law on 16 March 2017 (surely the shortest and furthest reaching Act for many a generation) and art.50 has now been triggered, with memes and gifs galore. It is now clear that this first instalment of the Brexit process was merely a trailer for the constitutional drama that is to unfold.

We are still in the opening scenes at the moment, with all eyes trained on the drama of the negotiations themselves. This process contains its own constitutional questions, ranging from the UK's legal status and obligations during the negotiation process, the finality of the process (could we realistically extend the deadline, or legally back-track from pulling the trigger?), and the scope of any withdrawal. This last point in particular is significant, as there remains an ongoing challenge working its way through the English courts asking whether a separate art.127 trigger must be pulled before Britain can leave the EEA. None of this is to mention the potential implications of "no deal" on the UK's position going forwards.

The timescale as things stand, now art.50 has been triggered, is that the UK leaves the EU on 29 March 2019. The deadline can be extended by unanimous agreement, but without an extension, the UK exits the EU with or without a deal as to the future arrangements between the former partners. Finalising the details of Greenland's departure took three years, with the merest fraction of negotiation to what the Brexit divorce will involve (and far fewer Member States to consult). Current estimates suggest that 6–10 years looks likely for the UK. Once (or indeed if …) a deal is struck between the remaining EU ("rEU") and the UK, the deal must be voted on by rEU through the European Council. No fewer than 20 Member States, or 65 per cent of the population of the EU, must approve the deal. If that is obtained, the European Parliament will ratify the deal. On the UK side, Parliament is expected (and expecting) to have a say. If either vetoes the deal, presumably both sides re-enter negotiations, neither knowing necessarily the basis for the original

* 3 Hare Court.

[1] *R. (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2017] 2 W.L.R. 583.

veto and what alternatives would obtain agreement, like a rather more convoluted version of the "Mastermind" board game.

The main focus of this article, however, is on what will happen in the run up to, and post-Brexit, as it affects personal injury litigation. Untangling the two enmeshed legal systems raises a host of complexities on a UK, EU and international level that those designing the new relationship will have to take into account.

Lacuna

From the UK's perspective, leaving the EU will require at its basis the repeal of the European Communities Act 1972 ("ECA 1972"). But, predictably, the situation is far from straightforward.

Section 2(1) of the ECA 1972 brings the supremacy and direct effect of EU law into domestic legislation. By virtue of this section, the Treaties and EU Regulations do not require implementation by Member States to take effect, meaning that a wealth of important community legislation—including the rules governing jurisdiction, conflict of laws and the enforcement of judgments—are not necessarily reflected in UK law other than under the ECA 1972. Part of leaving the EU means that (unless otherwise saved) this will have to go, with all of this dependent legislation dropping away with the section.

Section 2(2) enables the implementation of Directives (which are not directly effective, and must be put into domestic legislation by Member States) by statutory instrument ("SI"), saving the need to pass an Act of Parliament each time a Directive is transposed into UK law. Numerous workplace Regulations originate from Directives. Section 2(2) also cannot remain in force post-Brexit unless otherwise retained. However, in repealing this section, those SIs made under the power of s.2(2) will also fall away. As such, transitional measures will be necessary to ensure those SIs that have been enacted already remain operative in the aftermath of the separation.

Preservation

The Government's intended solution is the "Great Repeal Bill", details of which emerged in the White Paper on 30 March 2017. One of the most striking things about this Bill is the misleading audacity of its title: it preserves and adopts EU law whilst repealing a statute passed by Parliament, and is a practical necessity that some might feel falls short of being "great". The idea is that, with so much free time on their hands over the next decade or so, those in charge can go through 40 plus years of accumulated legislation piecemeal and decide which bits to keep and which bits to let go (and presumably what might replace the bits which are let go).

As Theresa May expressed to the Conservative Party Conference, the intention is to "convert the 'acquis'—that is the body of existing EU law—into British law".

While some EU law is already technically UK law by virtue of Act of Parliament or secondary legislation, the Bill will have to include provisions for bringing into domestic law those Regulations (and, debatably, Treaty provisions) that are only effective under s.2(1), and the multitude of SIs that would otherwise drop away with s.2(2) of the ECA 1972.

Part of this transition will require provisions enabling the tedious process of amending laws that rely on or refer to EU institutions or mechanisms, in order to clarify the relationships and maintain continuity and operability post-transition. There will also be vacuums that must be filled in areas previously within the EU's competence (particularly relevant to border control and competition). The additional constitutional complexities of implementing and reconciling this importation process with the devolved legislatures of the UK also cannot be forgotten, although this short overview is not the place to air these intricacies.

Relationship status: "It's complicated"

The manner in which all of this will and should be achieved is fraught with legal and political debate.

Pragmatically, the Bill will have to authorise ministers to "fast-track" secondary legislation, and will likely empower them under so-called "Henry VIII clauses" to amend primary legislation without the scrutiny of Parliament. This, naturally, is an inherently controversial approach, not least due to the pre-Brexit concerns of many that EU measures avoided proper parliamentary scrutiny precisely by slipping through this constitutional back-door.

On a political level, the adoption of the *acquis* will entail further debates as to how the UK should respond to legislative decisions, European Court of Justice ("CJEU") judgments and institutional developments coming from Europe. Connected to these debates is the issue that many internal EU agreements and some international treaties carry with them regulatory obligations and legislative requirements upon Member States, which often change over time. The UK may need to keep up with the EU and its institutions in some respects if it wishes to retain certain international arrangements, whilst no doubt needing to appease those who have been agitating for the hardest of hard Brexits at home.

The Bill will confirm that there will no longer be any role for the CJEU in the interpretation of the laws which have been saved, and the Bill will not require the domestic courts to consider the CJEU's jurisprudence. So even if an EU instrument is expressly retained as part of domestic law, any intended similarity with EU jurisprudence ends at the point of departure. The implications for some parts of personal injury law are explored below.

Further, it is important to note that EU law preserved in the UK and developed by our courts will not affect the EU. So, legislation relating to jurisdiction, judgment enforcement and trade (for example) will only take meaningful effect if, and to the extent that, an agreement between the EU and the UK is reached. In the context of personal injury litigation, the effect may be minimal. Anecdotally, very few courts of other Member States currently appear to pay heed to decisions of other Member States even now where the issues in dispute are near identical and the Regulation or Directive under consideration the same, but any respect other Member States might have paid to the interpretation of the UK courts will be a distant memory.

Depending upon the contents of Britain's post-Brexit package, the political rhetoric of national sovereignty that has driven the "Leave" campaign is likely to clash with the practical realities of our new obligations and relationships; it will fall to the lawyers to design a framework for implementing the political outcomes reached.

Conscious uncoupling

While the Great Plan is to hold tight to the *acquis* at the point of Brexit, the Government envisages the UK taking the power to "amend, repeal and improve any law it chooses". As such, legislation (within the Bill or otherwise) must be implemented to facilitate the daunting process of filtering and assessing the huge body of imported law and determine the fate of each component.

Much legal ink has been spilled over who should have the final say on the sift. The indignant tutting over the deployment of Henry VIII clauses to ensure post-Brexit preservation are nothing compared to the uproar should ministers be empowered to take these much more significant decisions under such authority. This would represent a handing of powers to the executive that many constitutional theorists consider undemocratic and an affront to the parliamentary sovereignty Brexit allegedly came into being to protect.

However, around 6.8 per cent of primary and 14.1 per cent of secondary legislation between 1997 and 2009 related to the EU;[2] the parliamentary timetable—already destined to be dominated by Brexit after

[2] House of Commons Library, "How much legislation comes from Europe?" (13 October 2010), Research Paper 10/62.

we leave—would be completely overwhelmed by the demands of scrutinising this gargantuan body of law. The White Paper suggests 800–1,000 statutory instruments will be required merely addressing the issues of the departure.

It seems likely, therefore, that "Uncoupling" measures will rely on enabling ministers to "fast-track" enactments and repeals through secondary legislation and Henry VIII clauses

The extent to which ministers will be authorised to act and the imposition of checks and balances imposed (such as review deadlines) remain up for political debate. The conflicting strains of parliamentary and civil service capacity and the need to keep the nation running as normal alongside this process, will be weighed along with the views of constitutional theorists and the democratic demands of scrutiny to establish the balance.

Position pre- and post-Brexit

Until 29 March 2019 (or such later time as all Member States agree to finalise the negotiations) the UK remains a full member of the EU, with all the commensurate rights and obligations. So, as explored below, it will continue to be under an obligation to transpose into UK law the amended Package Travel Directive.[3] It will continue to look to the CJEU as the ultimate arbiter of the meaning and purpose of numerous pieces of legislation which affect cross-border personal injury claims, such as the Motor Insurance Directives or Rome II or the Judgments Regulation.[4] The Supreme Court's decision is currently awaited in *Keefe v Hotel Piñero Canarias,*[5] for example, which may involve a reference to the CJEU to provide the answer as to whether a foreign-domiciled tortfeasor can be sued in an English court under the Judgments Regulation when coupled to a claim against a foreign-domiciled insurer. If a reference is made and not resolved before the departure date, would the reference continue? Would the UK have standing to maintain the reference? Could another Member State step in to pursue the reference to obtain clarity for rEU even if it would not benefit the referring State? And what for poor Mr Keefe—would he remain subject to the eventual ruling of the CJEU deciding whether the English court had jurisdiction back in 2012 when the hotel was originally joined?

Moreover, it is possible that the Brexiteers' negotiating strategy could include deliberate non-conformity with ongoing obligations, if only as a means of testing the waters. What appetite rEU may have for seeking to enforce compliance as the clock ticks down to March 2019 also remains to be seen.

The UK's legal fabric in the post-Brexit world will depend greatly upon what is woven into the exit package. Much of the law that comes from the EU concerns Britain's relationships as a member of that Union; how both parties agree to maintain, alter or dismantle those relationships, and the extent to which they manage to do so in just two years (or such longer period as may be negotiated), will be crucial to dictating the shape of post-Brexit Britain in an international world.

What is beyond doubt, however, is that whatever package is negotiated will entail a lengthy, complex and unenviable task of unpicking and replacing the imported pre-Brexit *acquis* to achieve whatever relationship the UK and rEU settle upon going forwards.

Cross-border litigation in package travel claims

Package travel claims generally involve a claim on a package holiday contract governed by English law brought against an English-domiciled defendant tour operator. Directive 90/314 was brought into effect by The Package Travel, Package Holidays and Package Tours Regulations 1992 (SI 1992/3288), which

[3] Directive 2015/2302 on package travel and linked travel arrangements, amending Regulation 2006/2004 and Directive 2011/83 and repealing Directive 90/314 [2015] OJ L326/1.

[4] Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12/1 (Brussels I).

[5] See *Hoteles Pinero Canarias SL v Keefe* [2015] EWCA Civ 598; [2016] 1 W.L.R. 905.

state in terms that they were made "in exercise of the powers conferred … by section 2(2) of [the 1972] Act". They will accordingly be retained in the first instance, unless otherwise repealed in the interim (which seems unlikely).

In 2015 a new Directive was adopted. This must be implemented into UK law by 1 January 2018 and brought into effect by 1 July 2018. Even on the most optimistic timetable, this is likely to be long before all issues of the divorce have been finalised, and so it will need to be brought into effect.

The Department for Business, Innovation and Skills has already indicated that the UK will transpose the Directive in due course. The mechanism for doing so is likely to be by way of Regulations made pursuant to the European Communities Act 1972; just as the Package Travel Regulations 1992 transposed the 1990 Directive—with of course the same question mark as to whether it will survive any post-Brexit cull.

The scope of the new Directive is significantly broader than the 1990 Directive. It covers not only traditional package holidays (as they are currently known) but also aims to extend consumer protection to 120 million consumers who book other forms of combined travel.

Enhanced consumer protection is achieved through a number of means. The definition of "package" is far wider. It includes the traditional package where a combination of travel services is combined by one trader. It also now includes the conclusion of separate contracts with individual providers where:

1) two or more travel services are combined and purchased from a single point of sale; or
2) they are purchased from separate traders through linked online booking processes where the traveller's name, payment details and email address are transmitted from one trader to another within 24 hours of the confirmation of the first booking.

This expanded definition therefore covers many existing "dynamic", "contract-splitting" or "click-through" arrangements designed to avoid falling within the definition of "package" within the meaning of the 1992 Regulations.

The new Directive also obliges traders to provide insolvency protection for "linked travel arrangements" which fall outside the scope of the regime applicable to packages. A linked travel arrangement occurs where at least two types of travel services, not constituting a package, are purchased where the trader facilitates or procures the selection of the services. The new Directive also provides for enhanced information provision obligations of the sort of travel products being purchased and the corresponding level of protection together with stronger cancellation rights. Agents who put together a flight and a hotel or car hire will have the same liabilities as a package organiser, including responsibility to pay a full refund if a holiday is significantly altered pre-departure, fix problems/make alternative arrangements if things go wrong, reimburse/compensate a consumer if a holiday falls short of that booked and pay for up to three nights' extra accommodation in "unavoidable and extra-ordinary circumstances", such as the 2010 ash cloud. Consumer protection is at the forefront.

The Directive was not universally welcomed by the travel industry. Once the new Directive is part of UK law, however, it is perhaps unlikely that there will be sustained lobbying from the travel industry to drop it. Trading models will have been amended in readiness, contractual terms will have been adopted—industry generally dislikes uncertainty and it may be thought that there will have been changes enough by then. There will be sustained pressure from consumer protection groups to keep it. Some of the bigger tour operators are part of EU-wide groups and there may be very little enthusiasm for different terms and conditions for different companies in the same organisation. And of course a free trade agreement reached with rEU (well beyond the scope of this article) may require some form of harmonisation of consumer protection in the field of tourism and other fields.

But that is not to say that the "UK model" of the new Directive will progress along the same lines as those adopted by rEU. The 1992 Regulations have, after all, been interpreted rather differently from their

continental counterparts—all of them implementing the same Directive. It is trite law that package contracts governed by English law contain, unless a more stringent obligation is set out in terms, an implied term of reasonableness. So, the tour operator is liable in circumstances where the overseas supplier has failed to adhere to reasonable standards of skill and care (the battle being generally what those standards are). But some Member States such as France have brought the original Directive into effect in national law as imposing a strict duty of results, and see for example the decision of Dingemans J on the strict liability provisions of the French Code of Tourism in *Committeri v Club Mediterranee SA*.[6] There have not, as far as the authors are aware, been any claims brought in the UK on the basis that the 1992 Regulations failed adequately to implement the Directive (and any such submission would fail given that the form and method of implementation of any Directive is for the individual Member States to decide under art.288 of the TFEU). Nor has the gospel that English package travel contract claims involve fault-based rather than strict liability been tested to the Supreme Court. But the concept of national law implementing EU law differently from other Member States is one that is already familiar to English personal injury lawyers.

Accordingly, there is no reason to suppose that Brexit will impact one way or the other on the issue of interpretation of the 2015 Directive. We will go one way and the individual Member States will go another, with occasional overarching guidance on their side from the CJEU on points of general application. Whether our courts continue to gain any assistance in interpreting the new UK Regulation from such guidance is a question which will be answered one case at a time. And whether the UK follows rEU in any subsequent Directives is, at this stage, a question only Mystic Meg could answer.

Cross-border litigation of non-package travel claims

Cross-border personal injury claims which involve a foreign defendant (or insurer) stand to be rather more acutely affected. At the moment, jurisdiction over EU-domiciled defendants is governed by the recast Judgments Regulation.[7] So claims issued up until the day of Brexit will, on their face, be covered by the Regulation. Of particular relevance is s.3,[8] which concerns matters relating to insurance. So, where a claimant is injured overseas and is able to establish, courtesy of art.18 of Rome II, a direct right of action against the tortfeasor's insurer by reference to the law of the insurance or the law of the tort, the claimant can bring the claim based on the direct action against the insurer in England as his home court.[9] Since all Member States have had to provide for a direct right of action for injured persons to sue a motor insurer since the Fourth Motor Insurance Directive[10] in 2000 (in England under the arguably only-partially-compliant The European Communities (Rights against Insurers) Regulations 2002 (SI 2002/3061)), and since many States provide for such a right generally, many hundreds if not thousands of claimants have taken advantage of the Judgments Regulation and its predecessor to launch claims in their home court in the last decade.

However, the Judgments Regulation is directly effective as an instrument of EU law and so has never been brought separately into UK law since there was no need to do so. So, if by the Great Repeal Bill we expressly incorporate it into UK law, life carries on as before? Possibly, but unlikely. The Judgments Regulation is a reciprocal arrangement, based on mutual recognition and respect across all of the Member States. If the UK agreed that the Judgments Regulation should be part of UK law, that may have very little bearing indeed on whether foreign defendants can be sued here. Few Spanish insurers will accept that the provisions of arts 11(1)(b) and 13(2) of the recast Regulation (if taken on wholesale by the UK) give the English court the sort of long-arm jurisdiction required—they are subject to being sued in the

[6] *Committeri v Club Mediterranee SA* [2016] EWHC 1510 (QB).
[7] Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1.
[8] Regulation 1215/2012 arts 10–16.
[9] *FBTO Schadeverzekeringen NV v Odenbreit* (C-463/06) EU:C:2007:792; [2008] 2 All E.R. (Comm) 733.
[10] Directive 2000/26 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles and amending Directives 73/239 and 88/357 (Fourth Motor Insurance Directive) [2000] OJ L181/65.

courts of another Member State, and the UK adopting the Regulation will not bring them within the wording of the Regulation.

Additionally, it is a central part of the Brussels regime that there is to be no consideration of the appropriate forum. If jurisdiction is established under the Regulation (or if another court considers that it is so established), that cannot be undermined by the court of another Member State. So, no application of forum non conveniens (since application of the Regulation means the forum is appropriate), no injunctions to prevent proceedings elsewhere[11] and no second-guessing the courts of another Member State. Mutual trust must be accorded to each other. If Italy does not have jurisdiction, Italy must say so. If, albeit to other eyes wrongly, Italy determines that it does have jurisdiction, that is not a reason for the English court to intervene and permit the claim to proceed in England. None of this rationale will apply merely because the Regulation is part and parcel of English law—throwing wide-open the possibility of jurisdiction challenges galore.

Nor would a stand-alone agreement on the part of the UK to carry on applying the Judgments Regulation offer parties much protection without the reciprocity inherent in the existing version. Assume that a Spanish insurer accepts that it is subject to the jurisdiction of the English court, and a sizeable award of damages and costs is made (or agreed). If the insurer refuses to pay, what then? The judgment could not be recognised in Spain as of right, nor could it then be enforced. Recognition and enforcement would depend on Spain's own internal rules for non-EU judgments. Many jurisdictions essentially require a claim to be re-litigated before a judgment will be enforced. Merely being able to establish jurisdiction may very well not offer a claimant any protection that a claim will be satisfied. No longer can (or should) claimant lawyers advise that claimants are likely to be better off suing in England—enforcement procedures will have to be scrutinised up front. And that goes double for costs, long the bane of foreign insurers' lives, constantly surprised as they seem to be by the level of costs that can be incurred in this jurisdiction if one puts one's mind to it. The readiness of a foreign court to enforce a high costs award from England in the future without the obligation imposed by the Regulation is very much open to question.

Nor can these difficulties automatically be alleviated if rEU were willing to enter into a bilateral agreement with the UK whereby each agrees the Regulation should govern their mutual dealings. An agreement is all very well, but what if one side or another fails to stick to it? At the moment there are various "teeth" for non-compliance. Another country or the Commission can take legal proceedings and even refer the matter to the CJEU. The options for a foreign court to refuse to recognise and enforce an English judgment are relatively few and there are consequences for refusing. But a bilateral agreement without a means of ensuring adherence to the agreement is toothless. If a Spanish court(s) took the view that a costs award of £150,000 (on top of a modest award of damages) should not be enforced, there would be very little that could be done to challenge it. That would introduce an unacceptable but perhaps inevitable layer of uncertainty and lack of confidence in cross-border litigation, and would almost certainly lead responsible lawyers to advise injured persons to choose litigation locally rather than in their own home court. The guarantee of recovering damages for the most seriously injured claimants may very well be a far more tempting prospect than holding out for the prospect of a bit more after far more of a struggle. Lawyers facing a reduction in work over the next few years as the borders close will have to be particularly astute to keep a client's interests always at the forefront of their minds.

The Regulation, and the jurisprudence interpreting it, may change, as indeed may the British domestic equivalent. How could the UK and rEU agree bilaterally to stick to the Judgments Regulation when what that means may change? So, the English court might determine that English proceedings should be injuncted even where the defendant is properly sued here because English jurisprudence has re-established the importance of forum conveniens. Or the CJEU may interpret the Regulation binding rEU one way and the Supreme Court interpreting the UK version rule differently. Numerous CJEU decisions have been the

[11] *Turner v Grovit* (C-159/02) EU:C:2004:228; [2005] 1 A.C. 101.

object of criticism in this country, it would be more surprising in future if there WERE perfect consistency between "their" judgments and "ours". Absent ongoing confirmation that the bilateral agreement will involve the following of CJEU guidance or even be subject to CJEU guidance (hard to square with all the "taking back sovereignty" rhetoric) it is difficult to see how the agreement could work in practice.

Then there is also the possibility of using the Lugano Convention,[12] to which the UK through the EU is already a signatory. Practically, though, this is likely to involve membership of EFTA, which Theresa May appears to have ruled out in favour of avoiding any need to adhere to the same four freedoms of the EC. In any event, membership of EFTA requires the agreement of all contracting parties, one of which is the EU. Is the EU likely to grant the UK a favour by way of membership like this? We shall see.

Once jurisdiction is established in post-Brexit days, if it is established, English courts are likely to have less difficulty with choice of law. Rome I[13] (on contracts) and Rome II[14] (non-contractual obligations) are directly effective EC Regulations and will be enshrined in UK law by the Great Repeal Bill. Neither of these requires reciprocity so there is no reason why English courts should not apply the existing rules to determine the applicable law. Courts are becoming more and more familiar with assessment of personal injury claims under foreign principles, and there is likely to be limited appetite to put change of choice of law rules at the top of the agenda.

In any event, when this issue was last considered by the Supreme Court in *Cox v Ergo Versicherung AG*,[15] the indications were that, if the old substance/procedure divide were re-introduced, current thinking would require procedure to defer to the substance, so it may well be that there would be no difference in practice anyway. Cause of action and extent of liability (now) go hand in hand, and "there is no basis on which an English procedural provision can expand a defendant's liability under the substantive principles of the relevant governing law".[16]

And pragmatically, an award assessment by reference to foreign principles rather than on the pre-Rome II foreign substance/English assessment rules may be just that bit easier to enforce overseas if it comes to it. Once again, however, divergence in the future is likely since the UK courts will not be subject to any overarching guidance from Luxembourg, or any subsequent amendments from Brussels.

Implications

So, what now? It is hopefully clear from this article that there are far more questions than answers, and it is certain that the next two years will be fraught with uncertainty. The potential windfall for claimants by the recent discount rate decision (where that can be prayed in aid) is balanced by the downsides in cross-border litigation of simply not knowing what is going to happen. It seems inevitable that foreign insurers will benefit from concerns about enforcement post-Brexit. It would take a bold claimant lawyer to reject an offer providing for payment in the hope or expectation that a bigger sum would be awarded and then paid post-Brexit—and a particularly bold one to reject a global offer which provides sufficient for the claimant and something for costs. It would take a foolish defendant lawyer not to advise insurer clients to exploit the uncertainty. Who will be advising claimants to press for an otherwise well-deserved periodical payments order against a foreign insurer? Who will be advising insurers to appeal an otherwise unappealable judgment in the hope that the Brexit door will clang shut before the appeal is heard? One cannot help but remember what is said to be the Chinese curse: "May you live in interesting times." For cross-border personal injury claims and the parties involved, few more "interesting" times can be envisaged.

[12] Convention on jurisdiction and the enforcement of judgments in civil and commercial matters 2007.
[13] Regulation 593/2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/109.
[14] Regulation 864/2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40.
[15] *Cox v Ergo Versicherung AG (formerly Victoria)* [2014] UKSC 22; [2014] A.C. 1379.
[16] *Cox v Ergo Versicherung AG (formerly Victoria)* [2014] UKSC 22; [2014] A.C. 1379 at [48] per Lord Mance.

The Starting Point

Brett Dixon

Brexit; Direct effect; EU law; Health and safety at work; Rules of interpretation

The article written by K Deal is an excellent breakdown of the practical and political implications of Brexit that I would commend to readers. The intention of this further article is to explore the impact of Brexit, whether it happens or in what form it might happen, on health and safety duties owed to employers by employees. There is a further class of person that is potentially impacted given that current UK health and safety regulations do also extend the scope of duties beyond the employer-employee relationship to situations where a person or entity has control over the work and to the extent that they have control.

As a consequence of membership of the EU, the UK has implemented into law a number of regulations aimed at promoting and protecting health and safety. There numerous industry or work area specific Regulations, but the most important given the breadth they cover are those often called the "six pack Regulations":

EU Directive	UK Regulation
The Workplace Directive[1]	The Workplace Health, Safety and Welfare Regulations 1992 (SI 1992/3004)
The Work Equipment Directive[2]	The Provision and Use of Work Equipment Regulations 1998 (SI 1998/2306)
The Personal Protective Equipment Directive[3]	The Personal Protective Equipment at Work Regulations 1992 (SI 1992/2966)
The Display Screen Equipment Directive[4]	The Health and Safety (Display Screen Equipment) Regulations 1992 (SI 1992/2792)
The Manual Handling Directive[5]	The Manual Handling Operations Regulations 1992 (SI 1992/2793)
The Framework Directive[6]	The Management of Health and Safety at Work Regulations 1999 (SI 1992/3242)

The fundamental point that lawyers must first accept in this context is simple: the decision to exit and the terms of the exit are political in nature. That means essentially that there must always be a degree of speculation as to the outcome.

Regardless of where precisely that speculation, or indeed hope, leads you it is a distinct possibility that exit will take place by 19 March 2019.[7] Following on from that the stated intention of the Government,

[1] Directive 89/654 concerning the minimum safety and health requirements for the workplace (first individual directive within the meaning of art.16 (1) of Directive 89/391) [1989] OJ L393/1.

[2] Directive 2009/104 concerning the minimum safety and health requirements for the use of work equipment by workers at work (second individual Directive within the meaning of art.16(1) of Directive 89/391) (Text with EEA relevance) [2009] OJ L260/5.

[3] Directive 89/656 on the minimum health and safety requirements for the use by workers of personal protective equipment at the workplace (third individual directive within the meaning of art.16 (1) of Directive 89/391) [1989] OJ L393/18.

[4] Directive 90/270 on the minimum safety and health requirements for work with display screen equipment (fifth individual Directive within the meaning of art.16 (1) of Directive 89/391) [1990] OJ L156/14.

[5] Directive 90/269 on the minimum health and safety requirements for the manual handling of loads where there is a risk particularly of back injury to workers (fourth individual Directive within the meaning of Article 16 (1) of Directive 89/391) [1990] OJ L156/9.

[6] Directive 89/391 on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ L183/1.

[7] Based upon the deadline of two years contained in art.50 of the TEU, which is only extendable by a unanimous decision of the European Council.

which seems intact but weakened, was to transpose EU law in to UK law and then unpick the provisions thereafter based on political decisions.[8]

So, this article, proceeds on the premise that:

- we exit on 19 March 2019;
- the effect of that will be to repeal the European Communities Act 1972;[9] and
- health and safety regulations will not be removed at that stage.[10]

The Regulations are legally very vulnerable to subsequent alteration and repeal as a consequence. The approach of the Government in Enterprise and Regulatory Reform Act 2013 s.69[11] had the effect of lowering the protection to the worker by removal of civil liability for breach of those Regulations and thereby requiring reliance on common law negligence for an injured person to enforce those rights. This shows how vulnerable those Regulations are to political decisions to reduce so-called red tape against a backdrop of the myth of a compensation culture.[12]

Losses

There are a number of significant and obvious losses if we Brexit:

- a change in how the courts interpret legislation via the loss of the Marleasing duty;[13]
- continual improvement of health and safety that is a requirement/aim via the Framework Directive; and[14]
- direct effect[15] of health and safety provisions which was important in light of the changes brought about by s.69 of the Enterprise and Regulatory Reform Act 2013.

If we pause at this point is worth saying that health and safety regulations are arguably a facet of control of the labour force. The argument being that reduced health and safety burdens could lead to efficiency savings. If the UK sought a deal with direct access to the single market then it is conceivable that the terms of such a deal would permit access on the basis that there were comparable provisions in relation to regulation of the labour force to prevent distortion of the market.

Interpretive loss/change

The starting point is the case of *Marleasing*.[16] The case places an obligation on domestic courts as far as possible to interpret domestic law so that it achieves, as far as possible, the intended effect of EU law. In certain cases this has permitted courts in the UK to add words to legislation to do so. This is a very broad and powerful approach, that far outstrips the approach for example where there is an international treaty

[8] White Paper "Legislating for the United Kingdom's withdrawal from the European Union" (HMSO, 30 March 2017) and the statement of David Davis Secretary of State for Brexit on the white paper.

[9] White Paper "Legislating for the United Kingdom's withdrawal from the European Union", para.2.2 provides: "As a first step, it is important to repeal the ECA to ensure there is maximum clarity as to the law that applies in the UK, and to reflect the fact that following the UK's exit from the EU it will be UK law, not EU law, that is supreme. The Bill will repeal the ECA on the day we leave the EU."

[10] White Paper "Legislating for the United Kingdom's withdrawal from the European Union", para.2.5 provides: "the Bill will also preserve the laws we have made in the UK to implement our EU obligations."

[11] This provided for an amendment to s.47 of the Health and Safety at Work Act that repealed civil liability for breach of health and safety regulations in England, Wales and Scotland.

[12] Lord Young, *Common Sense, Common Safety* (Cabinet Office, 15 October 2010) reached the conclusion broadly that the compensation culture was more myth than reality.

[13] *Marleasing SA v La Comercial Internacional de Alimentacion SA* (C-106/89) EU:C:1990:395; [1992] 1 C.M.L.R. 305.

[14] Directive 89/391 on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ L183/1.

[15] Some provisions of EU law can be relied upon directly by individuals in national courts, provided they meet certain criteria.

[16] *Marleasing SA v La Comercial Internacional de Alimentacion SA* (C-106/89) EU:C:1990:395; [1992] 1 C.M.L.R. 305.

that has to be considered. There are limits, but, practically, a court has a broad duty to ensure compliance, limited only by the requirement not to go against the goal or thrust of the legislation being interpreted.[17]

Once the effect of *Marleasing* is lost then the approach of the court in interpreting the health and safety legislation in light of the duties owed will change. This arguably will be something that is not immediately obvious. In the absence of the *Marleasing* duty, the approach taken by the court when interpreting a statute is the requirement to determine Parliament's intention, based upon the words used in the legislation. Only if there is some ambiguity does the court then go on to consider from other sources such as *Hansard* what Parliament intended.[18]

At first, the court may be persuaded that to understand the intention of Parliament it is must consider where the Regulation came from, namely the underlying EU Directive, but this would not be on the basis for example that the court could add words to the legislation in order to give effect to that intention. It is also likely that the court will be presented with the argument that the legislative intent of Parliament in revoking the European Communities Act 1972 and leaving the EU clearly outweighs any intent apparent from when the Regulations were first introduced. Over time that is an argument that is likely to become irresistible.

The loss of the facility to refer a matter to the European Court of Justice on an issue of interpretation under art.267 of the TEU will also inevitably lead to domestic interpretation methods taking centre stage. In short, EU law will become and be seen to become less of a relevant consideration in interpretation.

The practical effect of that is that cases which might have been successful will no longer be so. The recent Supreme Court decision in *Kennedy v Cordia (Services) LLP*[19] is a good working example of how the underlying Directive can radically alter the outcome.

In *Kennedy,* the injured person had been the claimant worked for her employer as a home carer. In the winter of 2010 Scotland had been subject to a very severe winter leading to very cold conditions with snow falling and then freezing. On 8 December 2010, she was required to carry out a home visit to an elderly patient. She slipped and fell in the prevailing conditions. When her claim against her employer was considered she alleged fault under the common law and breaches of the Management of Health and Safety at Work Regulations 1999 and the Personal Protective Equipment at Work Regulations 1992. She alleged that:

- 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;
- the employer provided no attachments for footwear which if provided she would have worn; and
- her training was inadequate.

Initially her case was successful, but was reversed on appeal with the court finding that the Regulations applied only where the risk was caused by the nature of the task given to the employee and not whilst they were travelling or en route to those duties. This was a very narrow interpretation of the Regulations. In the Supreme Court, the court paid particular regard to the underlying Directives and the requirements of those Directives in aiding interpretation of the duties under the Personal Protective Equipment at Work Regulations 1992 noting in particular that:[20]

> "The Regulations do not define 'adequately', but it can be inferred from the EU legislation (including the requirement under article 5(1) of the Framework Directive that the employer shall have a duty

[17] See for example *Vodafone 2 v Revenue and Customs Commissioners* [2009] EWCA Civ 446; [2010] Ch. 77.
[18] See *Pepper (Inspector of Taxes) v Hart* [1992] UKHL 3; [1993] A.C. 593 generally in relation to that approach.
[19] *Kennedy v Cordia (Services) LLP* [2016] UKSC 6; [2016] 1 W.L.R. 597.
[20] *Kennedy v Cordia (Services) LLP* [2016] UKSC 6; [2016] 1 W.L.R. 597 at [118].

> to ensure the safety and health of workers) that a risk will not be adequately controlled unless injury is highly unlikely."

That in turn led to the Supreme Court overturning the decision in the court below and the consequent success of the claim brought by the injured person.

Without the Directive and the duty under *Marleasing* then this case could well have been decided differently. The focus was on the Directive and thereby the Regulation being interpreted in light of the underlying purpose—the protection of the worker. The interpretation loss could well turn out to be the biggest loss of all.

The Framework Directive

This Directive is often referred to as the mother Directive and the detailed Directives that deal with each of the areas of health and safety as the daughter Directives.[21] In turn, these led to the introduction of the six pack Regulations that are at the core of our health and safety legislation.

Importantly the Framework Directive has a core commitment to the continual improvement of the health and safety of workers. This we have already seen can have a crucial effect on how a court interprets those Regulations when combined with the *Marleasing* duty.

It also is the basis for the continuing improvement in health and safety legislation. Whilst an EU member, the UK has an obligation to do so. Once outside? Improvements will be for the UK government and the devolved legislatures. The general direction of travel has regrettably been to look to reduce the protections.[22] The Health and Safety Executive would inherit this or a similar duty, against a backdrop of low funding.

Direct effect

It is well-known that some provisions of EU law can be relied upon directly subject to certain requirements.[23] With the advent of the changes to how personal injury cases were pleaded as a consequence of s.69 of the Enterprise and Regulatory Reform Act 2013 this became a crucial factor in personal injury cases. Where the case being brought was against an "emanation of the state"[24] then the underlying Directives could be relied upon directly. The net effect of this method of pleading was that the duty on the employer is higher and the removal of civil liability under the Regulations could be avoided as the Directive was relied upon as the breach.

Once we leave the EU, unless there is a transitional provision, this method will not be available. Consequently, cases against "emanations of the state" will be in the same position as all other employer's liability cases.

This is important as it is arguable that s.69 of the Enterprise and Regulatory Reform Act 2013 has had a chilling effect on the pursuit of employers' liability cases. The Compensation Recovery Unit figures show a 30.3 per cent reduction in the registration of employers' liability cases since 2013/2014.[25] Other areas have shown reductions, but significantly less. There may be other explanations, such as the effect of low value portals, but that does not explain the stark difference to other personal injury types that have seen much lower reductions.

[21] See the table above in relation to both mother and daughter Directives and the six pack Regulations.

[22] Lord Young, *Common Sense, Common Safety*; Professor Löfstedt, *Reclaiming health and safety for all: an independent review of health and safety regulation* (Department for Work and Pensions, 28 November 2011); and Enterprise and Regulatory Reform Act 2013 s.69.

[23] See *Francovich v Italy* (C-6/90) EU:C:1991:428; [1993] 2 C.M.L.R. 66 and K. Deal article in this issue.

[24] See most recently the opinion of the AG in *Farrell v Whitty* (C-413/15) EU:C:2007:229; [2007] 2 C.M.L.R. 46—examples include local authorities, NHS trusts, privatised utilities and similar organisations.

[25] Figures published by the CRU on *https://www.gov.uk/government/publications/compensation-recovery-unit-performance-data/compensation-recovery-unit-performance-data* [Accessed 24 June 2017) show a total of 105,291 Employer claims registered in 2013/2014 and 73,355 in 2016/2017—a 30.3 per cent drop.

Conclusion

Significant reductions in the enforcement of health and safety rights in the civil arena where injuries have been caused to employees already seems to be with us. The likelihood is that the effect of Brexit[26] will be to reduce the effectiveness of those rights even further, and whilst the Regulations themselves will be preserved by the process adopted in the Great Repeal Bill they are significantly vulnerable to future repeal/amendment without the underlying commitments required by membership of the EU.

[26] Within the assumptions this article makes.

A Duty of Care in Sport: What It Actually Means

William Norris QC*

Duty of care; Personal injury; Sport; Sporting organisations; Volenti non fit injuria

The "Duty of Care" in the legal and non-legal sense

In December 2015, as part of its "Sporting Future" strategy, the UK Government asked Baroness Tanni Grey-Thompson to conduct an independent review of the duty of care which sport has towards its participants.[1] That review—the "Duty of Care in Sport"—was published in April 2017 and follows seven themes:

1) education;
2) transition (within and when leaving a sport);
3) representation (of participants);
4) equality/diversity/inclusion;
5) safeguarding;
6) mental welfare; and
7) safety/injury/medical issues.

This review is undoubtedly an admirable analysis of what most would regard as good or best practice, particularly for larger (and certainly most professional) sports bodies. It contains many well-considered recommendations as to how they could be better structured and administered with greater consideration for the interests and welfare of participants whether joining, participating in or when retiring from sport. But what is actually meant meant by a "duty of care", words we have come to hear used to characterise whatever the speaker thinks should or should not have been done by authorities or individuals in a particular set of circumstances?

In many instances, the phrase "duty of care", like "fit for purpose", is nothing more than a portentous way of garnishing the speaker's views with a veneer of pseudo-legal authority because, if there is a duty at all, it is often a moral or social duty rather than a legal one. Baroness Grey-Thompson's report does not even try to offer a definition: she says in her introduction[2] that she has "adopted a deliberately broad definition of 'Duty of Care'—covering everything from personal safety and injury, to mental health issues, to the support given to people at the elite level. I looked across as broad a range of sports and levels … as possible".

Since it is in the law that the concept of a "duty of care" first arose and continues to be developed, the focus of this article is on explaining the circumstances in which a *legal* as opposed to moral or social duty is imposed by the law in a sporting context. As is evident to every lawyer, but may not be immediately apparent to an administrator who solemnly commends a particular policy as being as an expression of its "duty of care", the distinction is important because a breach of a legal duty renders the wrongdoer (and any sporting body legally responsible) liable in damages to the victim. So our notional administrator needs

* William Norris QC, 39 Essex Chambers, specialises in major personal injury and duty of care cases, especially in the context of sport. He was counsel in *Grimes v Hawkins* [2011] EWHC 2004 (QB), *Poppleton v Trustees of the Portsmouth Youth Activities Committee* [2008] EWCA Civ 646; [2009] P.I.Q.R. P1 and *Anderson v Lyotier (t/a Snowbizz)* [2008] EWHC 2790 (QB) and is a former chairman of the Personal Injury Bar Association and the General Editor of *Kemp and Kemp: Quantum of Damages*. He also sits as one of the chairmen of Sport Resolutions' arbitrators, the National Anti-Doping Panel and that of the Disciplinary and Licensing Panels of the British Horseracing Authority.

[1] In the context of the Cameron Government's expressed intention to introduce such a "duty": Department for Digital, Culture, Media & Sport, *Sporting Future: a New Strategy for an Active Nation* (17 December 2015).

[2] Department for Digital, Culture, Media & Sport, *Sporting Future: a New Strategy for an Active Nation*, p.4.

to be careful what he[3] wishes for: the consequences of widening the scope of legal responsibility beyond its current constraints are, self-evidently, very significant, particularly with substantially increased awards of damages for catastrophic injury following the change in the discount rate and at a time when many professional bodies, other organisations and private individuals have almost certainly got wholly inadequate levels of indemnity under their insurance policies.[4]

The difference between a moral and a legal duty

A simple example illustrates[5] the difference between a moral or social duty and a legal duty. Assume a friend and I are walking along a cliff top. My friend fails to notice that there is a sheer drop ahead. I realise that, if he walks on, he dies. It is beyond argument that I owe a moral—or social—duty to warn him. But I certainly owe him no legal duty because (adopting what is generally regarded as the favoured formulation for imposing a duty of care in relation to injury), first, I have *assumed* no responsibility for his safety, secondly, he is an adult and is not *relying* on me to look after him and, thirdly, the law has not (hitherto) regarded it as *reasonable* to impose a duty in such circumstances.

On the other hand, if one were to change the facts a little, a duty of care certainly does arise: for example, if my companion were a 10-year-old child or was visually impaired, or if the dangerous drop were not obvious and I had told him I knew the way and would look out for hazards. Then consider another variation on the original facts: what if I were to have seen that there was a family of five picnicking on the beach below the cliff on which anyone falling from the edge would be likely to land? I may owe my friend no legal duty to protect him from the consequences of his own foolhardiness: but surely I should do something to save the unfortunate family from terrible injury when he fell? This is a more difficult question, but the probable answer is still that I owe no such legal duty, whichever test is applied and however clear-cut my moral or social duty to say something to prevent the disaster.

The "duty of care" review's recommendations as good practice

In the context of sport, a similar distinction can and should be drawn between moral and legal duties. Baroness Grey-Thompson took "transition" as her second theme; in a nutshell, she makes recommendations as to how national governing bodies ("NGBs") should deal with those who come into and those who leave sport, particularly when they enter the outside world having spent many of their formative years in a highly competitive and closely regulated environment and, retiring for any reason, find themselves unprepared for life outside.

In those circumstances, it is surely good practice that a sport's governing body, or a club which has enjoyed the services of a player from a young age until retirement from the game, should help with that transitional process, at least if it has sufficient resources to do so. On the other hand, one should not lose sight of the fact that adults must also take responsibility for their own futures. In the case of horse racing, for example, the Injured Jockeys Fund (a charity of which I am a trustee) and the jockeys themselves (through a levy on their share of prize money) run the Jockeys Employment and Training Scheme ("JETS") to help with post-racing life and career development. This is an example of what may be thought good practice—an expression of a moral, but certainly not a legal, duty. And it is noteworthy that the responsibility has been undertaken not by racing's regulator and governing body (the British Horseracing

[3] For convenience only, I shall use the masculine throughout.

[4] A vivid example of how this might arise is *Harcourt v FEF Griffin* [2007] EWHC 1500 (QB); [2008] Lloyd's Rep. I.R. 386. The hearing (before Irwin J, as he then was) was concerned with whether the defendants could be ordered to disclose their level of insurance cover in a claim brought by a teenage tetraplegic arising out of a gymnasium accident. The judge ordered that the level should be disclosed since what was apparently the extent of the cover (£5 million) was likely to be insufficient to meet a claim valued by the claimant's advisers at £8 million–£10 million gross (£6 million–£7.5 million net allowing for some contributory negligence), regardless of whether one approached assessment as a lump sum claim or as a periodical payments order. With a discount rate of 0.75 per cent, the full value of the potential claim would now probably have been more than £25 million.

[5] An example discussed in the Privy Council decision in *Yuen Kun Yeu v Attorney General of Hong Kong* [1988] A.C. 175 PC (Hong Kong).

Authority ("BHA")) but by an independent charity and the jockeys on their own account. For reasons of principle to which I now turn, that arrangement cannot possibly be seen as a failure of any legal duty of care by the BHA nor would the law recognise any such legal duty as being imposed on the BHA even if JETS did not exist.

Principle and theory: The duty and standard of care[6]

Before reviewing the categories in which the law recognises and imposes a true legal duty, it is necessary to identify appropriate legal principles. In doing so, it is important to recognise that no separate principles apply to sport which do not also apply to other forms of human activities involving risk. What makes sport special from a legal point of view is that all parties realise that it involves risk and that, where there is a duty, the standard of care must allow for the particular and special circumstances in which harm may arise. As Longmore LJ observed in *Sutton v Syston Rugby Football Club*,[7] courts intervene in sport with considerable caution: he explained that it was "important that neither the game's professional organisation nor the law should lay down standards that are too difficult for ordinary coaches and match organisers to meet".

Of course, the issue is more profound than that. It is not merely a question of the law needing to take a sensible and broad approach to the standard of care.[8] The very imposition of a duty has serious implications for professional or amateur organisers and administrators who are placed at personal financial risk. Hence the importance of identifying the test for the imposition off a legal duty as well as the standard which will set its limits.

In some cases, the nature of the duty will derive from and depend on the particular relationship of the parties. Thus an employer owes contractual, common law and statutory duties to his employees particularly as regards matters affecting health and safety. The same will apply in the case of many clubs and sporting (including national) bodies to which players are contracted because employment, or something close to it, is actually or in effect the nature of the parties' relationship. Likewise, an occupier's duty to his visitors (which will clearly include players and spectators at grounds/events) and to trespassers is defined by statute.[9] Other duties are governed by statutory regulation, such as the Provision of Work Equipment Regulations 1998 (SI 1998/2306).[10]

It is in relation to other, less easily-defined, relationships where the search for a reliable test of general application which establishes when one party may be responsible to another for an act of negligence begins, at least for most law students, with the notorious snail in a ginger beer bottle.[11] There, Lord Atkin formulated the apparently simple "neighbour" test: a duty is imposed to take reasonable care in respect of acts or omissions which one might reasonably foresee could injure one's "neighbour" (someone one should have in mind as being reasonably likely to be affected by one's act or omission). However, that test alone has not proved sufficient as the two-men-on-the-cliff example demonstrates. So the modern law has sought to find other formulations.

First, it is important to recognise that the law draws a clear distinction between duties in relation to purely economic loss and those in relation to physical and psychiatric ("personal") injury. Aside from

[6] Both *Clerk & Lindsell on Torts* (London: Sweet & Maxwell) and *Charlesworth & Percy on Negligence*, 13th edn (London: Sweet & Maxwell) are very useful resources in any study.

[7] *Sutton v Syston Rugby Football Club* [2011] EWCA Civ 1182.

[8] In fairness to Longmore LJ, *Sutton v Syston Rugby Football Club* [2011] EWCA Civ 1182 was a straightforward case as regards duty given that the defendant was the occupier under the Occupiers' Liability Act 1957 as well as the organiser of the game. How far the "inspection" duty should extend to those who organise more informal events remains open to argument.

[9] Respectively the Occupiers' Liability Act 1957 and Occupiers' Liability Act 1984.

[10] See, for example, *Hide v Steeplechase Co (Cheltenham) Ltd* [2013] EWCA Civ 545; [2014] 1 All E.R. 405. However, the amendment to s.47 of the Health and Safety at Work Act 1974 introduced by s.69 of the Enterprise and Regulatory Reform Act 2013 reversed the previous presumption in favour of a breach of health and safety legislation as giving rise to civil liability.

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

obligations which may derive from contract, "economic torts" are very narrowly confined; they include defamation, procuring a breach of contract, conspiracy, intimidation, unlawful interference and the like. The law would not, therefore, recognise a tort-law duty on a club or a sport's governing body to provide a structured programme for transition into ordinary life. If such a legal duty were to arise, it would have to derive from contract—that is, be provided for in the terms of membership which the sport's participants adhere to when joining (and accepting the jurisdiction of) that sport. In short, one can say with confidence that not only does tort law recognise no duty to promote economic welfare but there is not even a tort-law duty to take steps to prevent economic loss.

Secondly, the classic tests for the imposition of a duty of care in relation to personal injury are expressed in two separate (but overlapping) lines of case law. One such is the *Caparo* test of foreseeability, proximity and reasonableness which derives from the House of Lords decision in *Caparo Industries v Dickman*.[12] But the other test, which probably has the greater utility and application in personal injury litigation, is the three-stage test referred to above: the third component of it, reasonableness (a concept which inevitably incorporates policy considerations), is the same in both tests but the other two, assumption of responsibility and reliance, are the key constituents which determine whether one party has a duty to the other in relation to personal injury: see *Mitchell v Glasgow CC*, *Poppleton v Trustees of the Portsmouth Youth Activities Committee,Ministry of Defence v Radclyffe*, *Jennings v Forestry Commission* and *Fowles v Bedfordshire CC*.[13]

A duty only in relation to personal injury

It follows that one can say with confidence that, outside of contract, a sporting body owes no general legal duty to promote or ensure the economic or spiritual well-being of its participants. Instead, such duties as are owed are concerned with physical and mental *harm*: that is, if there is a duty, it is in relation to "personal injury", a concept which includes both physical and psychiatric harm. One must also recognise that, generally, tort law tends to concern itself with acts of *commission* rather than *omission*.

The first issue in any case is whether a body such as a club or country owes any duty at all. In some examples, this is self-evident. A club will be responsible if one employee—or someone for whom it is legally responsible[14]—injures another negligently or if a piece of equipment provided proves to be faulty or unsuitable for the activity in question and causes an injury. It certainly also owes a duty as occupier as regards the state of the building or pitch which it provides. But what about other, less obvious, potential for harm?

To date, courts have tended to take a broad approach and recognise that it may be reasonable to impose a duty in general terms although the nature and extent of any such duty will vary greatly according to the particular circumstances. For example, a professional sporting body which closely regulates the conduct of a sport for reasons of safety certainly owes a duty in relation to physical injury: we can see that in practice in the case of boxing.[15] It is also as an expression of such a duty[16] that a sport such as rugby has

[12] *Caparo Industries plc v Dickman* [1990] UKHL 2; [1990] 2 A.C 605. A case about negligent preparation of accounts rather than personal injury. However, its application in the context of personal injury cases can be seen in cases such as *Everett v Comojo (UK) Ltd (t/a Metropolitan)* [2011] EWCA Civ 13; [2012] 1 W.L.R. 150.

[13] *Mitchell v Glasgow CC* [2009] UKHL 11; [2009] 1 A.C. 874, *Poppleton v Trustees of the Portsmouth Youth Activities Committee* [2008] EWCA Civ 646; [2009] P.I.Q.R. P1, *Ministry of Defence v Radclyffe* [2009] EWCA Civ 635, *Jennings v Forestry Commission* [2008] EWCA 581; [2008] I.C.R. 988, and *Fowles v Bedfordshire CC* [1996] E.L.R. 51 CA (Civ Div).

[14] The concept of vicarious liability is a complex one and has been developed in recent often in the context of sex abuse claims and others. Space will not permit an extensive discussion of the issue here but the main jurisprudence is to be found in *Various Claimants v Institute of the Brothers of the Christian Schools* [2012] UKSC 56; [2013] 2 A.C. 1; *Maga v Birmingham Roman Catholic Archdiocese Trustees* [2010] EWCA Civ 256; [2010] 1 W.L.R. 1441 (both sex abuse cases) and in *Cox v Ministry of Justice* [2016] UKSC 10; [2016] A.C. 660; *Mohamud v Wm Morrison Supermarkets Plc* [2016] UKSC 11; [2016] A.C. 677; and *Fletcher v Chancery Lane Supplies* [2016] EWCA Civ 1112. For consideration of how this applies as between club and player in personal injury claims, see the football cases discussed later.

[15] See *Watson v British Boxing Board of Control Ltd* [2001] Q.B. 1134 CA (Civ Div).

[16] Though the duty might attach to the body with immediate responsibility for running the particular event rather than the governing (here I mean the rule-making) body directly because of the lack of proximity in the relationship with the player and/or lack of assumption of responsibility/reliance.

guidelines about uncontested scrums and (particularly for younger players) about contests between players of disparate sizes and why sports such as rugby and racing both have strict concussion protocols.

Accordingly, in those kinds of cases, there can be no doubt that those who are immediately responsible for the organisation of such events will be held to owe such a duty and, if so, the standard of care required will be informed by and may include compliance with such standards.[17] Equally un-controversially, those who provide safety equipment should ensure that it is of an appropriate standard. On the other hand, how far this duty extends to less structured relationships between clubs/sporting bodies and competitors/participants will depend very much on a principled analysis of the relationship and on the facts of the particular case. That will include the extent to which the club/sporting body has assumed responsibility for safety and the competitor/participant has relied on it as opposed to exercising free will.[18]

In those examples, there are obvious risks of physical harm. But not all physical risks are so clear-cut and psychiatric damage is much less so. How does the law deal with those?

Applying the two tests for establishing a duty of care which are set out above, clubs and national bodies can certainly *foresee* that athletes over whom they exercise direct control and authority may suffer harm if "asked" or "required" to do something which places them at unacceptable but not necessarily obvious risk of physical or psychiatric injury. Where such direct authority is exercised—which will certainly cover the relationship in contract between club or country and the player—it may well be that their relationship is one of sufficient *proximity* to give rise to a duty of care and that the club/country has *assumed responsibility* for the player and the player is *reliant* on that body for the proper regulation of his role in the sport.

If those constituents are all present, then the argument against the imposition of a duty of care which extends to such potential injury will be that, as a matter of policy, it is not *reasonable to impose such a duty*. Here, I recognise, there may be policy considerations against imposing a wide-ranging duty and, as is evident from the judgment of Longmore LJ in *Syston*,[19] courts are instinctively reluctant to interfere in the management of sport and a club or national body cannot be expected to fulfil the role of parent or nanny. But the relationship between, say, club and player may be very close to—and can actually be—that of employer-employee where duties of care in relation to physical and psychiatric harm are well recognised. It follows that the necessary constituents for a duty of care are in place. But issues of what is reasonably foreseeable[20] still arise.

Hence the answer to the question of how far, if at all, the duty of care extends to less obvious or immediate risks arising out of the physical or psychological demands that a club or national body places upon its athletes is not entirely straightforward. The extent of the duty and/or the standard of care required will also be infinitely variable according to circumstances. What may be perfectly acceptable treatment of a seasoned professional may be wholly inadequate when dealing with a vulnerable teenager.

In short, it is not possible to identify a single test of when liability will or will not arise. In the case of physical injury, for example, it is commonplace that coaches or clubs may expect their players to "go through the pain barrier" or "run off" an injury or to continue to play having taken pain-killing injections or drugs but without much regard for the harmful long-term consequences.[21] Indeed, there are many coaches

Accordingly, any duty would be more likely to be imposed on those (clubs and referees) with more immediately control of and responsibility for the players.

[17] Whatever standards are set in the way of guidelines by the sport's professional body or an organisation such as ROSPA will not necessarily define the standard which is no more and no less than "reasonable care in the circumstances". Nevertheless, published guidelines will help to inform the assessment of such standards; see *Tomlinson v Congleton BC* [2003] UKHL 47; [2004] 1 A.C. 46 and *Poppleton v Trustees of the Portsmouth Youth Activities Committee* [2008] EWCA Civ 646; [2009] P.I.Q.R. P1.

[18] And, of course, on whether the court is persuaded that it is reasonable to impose a duty in the circumstances of the case.

[19] *Sutton v Syston Rugby Football Club* [2011] EWCA Civ 1182.

[20] Consider, for example, *Rochester Cathedral v Debell* [2016] EWCA Civ 1094.

[21] Most high level athletes will tell you that it is rare indeed for them ever to feel 100 per cent fit: they know that the price of success is subjecting the body and mind to a level of pressure they would rather not bear and may even have adverse consequences in the longer term. But the stark choice they must make is between competing and not competing, between success and failure.

who would tell us that it is only by pushing athletes to and, if necessary, beyond what they believe are their limits that gold medal performance in achieved. How can the law allow for that? Will the courts say in such a case that the necessary three ingredients of the duty of care?[22] Hitherto, the law has not really sought to address this issue in those terms.

It may not be an answer in tort law to say "well, they are adults; no-one forced them" when that misunderstands both the realities of high-level competitive sport and the legal principles concerning "acceptance of risk", which I deal with directly below. A court might well hold that true freedom of choice does not exist because the pressures to compete are so intense and, accordingly, the athlete's ability to make an informed decision will not negate the duty he is owed. Instead, any element of real choice will be relevant to the flexible application of the required standard of care which must also allow for the intense pressure which goes with high-level competition.

In those examples, the focus was one of physical health. The same issue arises in a more subtle way in relation to psychological health where stresses may be equally harmful but society in general and sportsmen in particular may be less sensitive to their management and/or the symptoms of mental illness may be less apparent. Again, this does not mean there is no duty; rather, the standard of care recognises that psychological pressure is an inevitable feature of high-level competition. But a club or coach which places a player under pressure which is unacceptable in the circumstances as a matter of good practice may find he is in breach of duty. What should be done in such a case, when the club or coach has reason to suspect that a player is not mentally robust enough to cope, is to take and follow advice from a medical professional. In that way the club or coach may be able to show that it has discharged the duty of reasonable care in the circumstances.

Accepting risk

As the discussion above recognises, the law allows for the reality that contact sports, at least those involving adults, are played by people who participate in full awareness of the risks of physical injury and that all sport brings psychological pressures with which some will cope better than others.[23]

When those risks materialise and someone is injured or has a breakdown, it is probably more accurate to say that they fail because the participant's acceptance of risk means that the other party's duty does not extend to the circumstances in which such injury was sustained or is relevant to the standard of care than that the claim is defeated by the application of the maxim volenti non fit iniuria. So, even where clubs or governing bodies put pressure on an athlete to compete when there is an issue as to whether he is physically or mentally unfit, they are likely to have satisfied the required standard if an athlete decides that he is fit to play and that assertion is not apparently untrue.

Simply because a competitor realises that he may get injured does not mean he cannot possibly claim if he is. It is unlikely that his acceptance of risk is unqualified. For example, if you play football or rugby you take the risk that a tackle may cause you injury but, whilst you may have accepted that risk, you certainly will not have accepted the risk of gross carelessness or malicious attack by your opponent. If that is what happens, that opponent is likely to be held liable to you.

Similarly, your acceptance of risk is likely to be on the basis that it is not just your fellow competitors who must conduct themselves fairly and properly but also that those responsible for running the game do so according to the rules. So in *Smoldon v Whitworth*[24] a colts rugby player succeeded in his claim against the referee who had failed properly to apply the rules of scrummaging: as the Court of Appeal made clear,

[22] Whichever of the two tests is used.
[23] Indeed, those who cope best will probably do best.
[24] *Smoldon v Whitworth* [1997] P.I.Q.R. P133.

whatever players consent to as regards risk certainly does not include consenting to another player or the referee failing to do his duty as prescribed by the rules.[25]

Likewise, an occupier will not be liable to someone in respect of a risk willingly accepted by him.[26] As Lord Hoffmann emphasised in *Tomlinson v Congleton BC*[27] and as is repeated by May LJ in *Poppleton*,[28] occupiers and organisers who are not purporting to provide supervision or instruction have no responsibility for the activities of adults who choose to take what they should have realised were obvious risks. On the other hand, the nature of the relationship between the parties may be such that the court does not entirely exonerate the defendant even if the claimant chooses to take a risk. That is likely to be the case where the relationship is that of employer and employee and it may also be so where the relationship is close to that and/or where the claimant's freedom of choice is not genuine; see *Reynolds v Strutt & Parker;Ministry of Defence v Radclyffe*, discussed further below.[29]

We see how this works in practice in *Blake v Galloway*[30] where a plea of volenti failed at first instance in a case where teenagers had been engaging in horseplay and one got hurt and sought damages for negligence and battery.[31] The Court of Appeal allowed the defendant's appeal without deciding whether the claim was defeated by volenti on the basis that the claimant had tacitly consented to run the risk of injury by participating in the horseplay and that was very relevant to the issue of standard of care (which the defendant had not breached) and was also an answer to the claim in battery. We see exactly the same principle applied in claims between fellow competitors in other the racing and football cases.[32]

A similar issue also arises in relation to attendance at sporting events. Take horse or motor racing, or cricket, for example. In the case of cars and horses, there is inevitably a remote risk that they will leave the track and injure someone in the crowd.[33] If you stand on the apex of an unprotected corner at a motor-rally, you must realise there is a risk (remote though it may be) of a car coming off the track: ditto with a racehorse. Similarly, it is commonplace for a cricket ball to sail into the crowd, particularly at a 20/20 game. Were someone to be injured in such circumstances, could they claim? The answer is surely in the negative: almost everyone attending a game knows that this might happen and the overwhelming likelihood, as borne out by experience, is that no-one will be badly hurt. But the claim will probably fail because the court finds that the degree of risk and general acceptance of some risk is relevant to the standard of care rather than because of the application of a free-standing defence of "consent".[34] This was certainly the rationale behind the decision of the Court of Appeal in *Murray v Harringay Arena*[35] where a spectator at an ice-rink was hit in the eye by a puck which flew into the crowd.[36]

[25] Even so, the standard of care must be decided in light of the circumstances which include the fast moving nature of the game. What might otherwise be "mere" negligence would not be enough: what Lord Bingham called the "high threshold of liability" would have to be crossed to establish a breach of duty which, he said, would not be done easily.

[26] Occupiers Liability Act 1957 s.2(5) and the Occupiers Liability Act 1984 s.1(6).

[27] *Tomlinson v Congleton BC* [2003] UKHL 47; [2004] 1 A.C. 46 at [44]–[45].

[28] *Poppleton v Trustees of the Portsmouth Youth Activities Committee* [2008] EWCA Civ 646; [2009] P.I.Q.R. P1. Followed in another bouldering/rock-climbing case, *Maylin v Dacorum Sports Trust (t/a XC Sportspace)* [2017] EWHC 378 (QB).

[29] *Reynolds v Strutt & Parker LLP* [2011] EWHC 2263 (QB), *Ministry of Defence v Radclyffe* [2009] EWCA Civ 635.

[30] *Blake v Galloway* [2004] EWCA Civ 814; [2004] 1 W.L.R. 2844.

[31] This case also raised questions about consent as a defence to a claim framed in "trespass to the person", i.e assault/battery; see *Dann v Hamilton* [1939] 1 K.B 509; [1939] 1 All E.R. 59. The Court of Appeal in *Blake v Galloway* [2004] EWCA Civ 814; [2004] 1 W.L.R. 2844 favoured the approach which took consent as a relevant consideration in determining the duty and standard of care rather than as a free-standing defence, so favouring the approach of Kitto J (rather than that of Barwick CJ) in the decision of the High Court of Australia in *Rootes v Sheldon* [1983] A.L.R 33 HC (Australia).

[32] Relatively few in horseracing (*Caldwell v Maguire* [2001] EWCA Civ 1054; [2002] P.I.Q.R. P6 being perhaps the best-known example): rather more in football including *Condon v Basi* [1985] 1 W.L.R. 866 CA (Civ Div) and several others discussed further below.

[33] Which is exactly what happened in the seminal case of *Wooldridge v Sumner* [1963] 2 Q.B. 43 CA. See also *Murray v Harringay Arena* [1951] 2 K.B. 529; [1951] 2 All E.R. 320n, both cases in which spectators were struck by pucks at ice hockey matches.

[34] See *White v Blackmore* [1972] 2 Q.B. 651 CA (Civ Div).

[35] *Murray v Harringay Arena* [1951] 2 K.B. 529; [1951] 2 All E.R. 320n.

[36] See also *Browning v Odyssey Trust Co Ltd* [2014] NIQB 39 QBD (Northern Ireland) and Diplock LJ in *Wooldridge v Sumner* [1963] 2 Q.B. 43 CA.

In practice

So much for the theory. Let us now consider how and in what circumstances a duty of care has so far been recognised as arising in sport. In each case, as we have seen, the legal analysis has two stages. First, it must be established that there is a duty of care which extends to the circumstances in which the injury was sustained. Secondly, if so, the question is whether the defendant has discharged the required standard of reasonable care in the circumstances[37] which, for reasons explained above, will involve consideration of the extent to which the injured party has exercised free will in accepting the risk of injury. At the risk of repetition and for convenience, we can break down into separate (though, admittedly, overlapping) categories what has been and may in the future be the approach of courts to the question of the duty of care in sport.

Regulators, governing bodies, medical staff

- Those who regulate a sport, especially in relation to safety, are likely to be held to owe a duty if they have assumed direct responsibility for safety for the particular event: *Watson v British Boxing Board of Control Ltd*[38] (provision of appropriate medical facilities at ringside) is probably the simplest and clearest example. However, the way in which the duty is framed depends entirely on the circumstances. In boxing, where the infliction of physical injury is the direct or indirect point of the sport, the duty was framed as being one to provide proper medical facilities so that any injury sustained would be timeously and competently treated. Accordingly, it may not be easy to establish a duty (or breach of duty) if the regulator's responsibility is more general/less specific.
- Medical officials with direct responsibility for safety at sporting events—boxing is one example, but other sports such as racing and rugby are in almost identical positions—will owe a duty. A breach of that duty would render them liable as well as the stadium or club for whom they were working when an error was made. An obvious example would be a rugby case where a player showed obvious signs of concussion which were missed by the medical and support staff so that the player returned to the pitch and suffered another significant head injury with serious consequences.
- How far such a duty extends to players who are put under unreasonable pressure by, say, clubs or coaches to compete in circumstances where they are at particular risk of physical or psychiatric injury has yet to be identified and will very much be a fact-sensitive question.

Clubs and other sporting bodies; vicarious liability

- Sporting bodies exercising control over players at any level (at a national level, cricket and rugby are obvious example) will be liable if they have conducted themselves negligently. This necessary degree of control will be readily established if the relationship of the parties is governed by, or akin to, contract. Where there is such a duty, it will extend to taking reasonable care to prevent physical and psychiatric injury. As we have seen, the nature and extent of that duty can never be precisely defined. It might include putting strong pressure on a vulnerable player to play when unfit, whether physically or mentally, if the effect of doing so is to exacerbate or cause an injury.

[37] A test which, by its very nature, whilst in theory objective is in practice infinitely fact-sensitive because, whether it is a standard applicable to the special situation of sport or in ordinary, everyday, life, what will be required will always be "reasonable care *in the circumstances*". However, in the example addressed at the end of the preceding section, the reason why a duty does not ordinarily extend to responsibility for mental welfare is explained by the answer to the first of these questions.

[38] *Watson v British Boxing Board of Control Ltd* [2001] Q.B. 1134 CA (Civ Div).

- Clubs and sporting bodies will be vicariously liable[39] if those for whom they are legally responsible do wrong in the sense of causing personal injury. This may include assaults (sexual or otherwise) committed in the course of their duties.
- However, save where the activity in question is especially dangerous, the organiser/occupier will not be liable for those who are true independent contractors: see *Bottomley v Todmorden Cricket Club* and *Lear v Hickstead*.[40] Nevertheless, some duties are non-delegable; see *Woodland v Swimming Teachers Association*[41] (though the duty in that case was framed in such a way as to apply to limited groups such as those who are particularly dependent or vulnerable:[42] this was a case about who was or should have been providing supervision at a swimming pool; see further below, particularly in relation to swimming pool cases, under "Occupiers/providers of facilities").
- A club or sporting body may be liable even for another player's or employee's horseplay if it is committed in the course of his employment: *Aldred v Nacanco*.[43]
- Whether a "club" or a "sporting body" owes a duty of care will depend on the three ingredients for a duty of care, expressed as foreseeability/proximity/reasonableness or policy on the one hand, or as assumption of responsibility/reliance and reasonableness or policy on the other. That will be a fact-sensitive series of questions which I look at more closely under the heading "organisers" next.

Organisers and employers

- Organisers, particularly of dangerous events, will usually be held to owe a general duty and the standard of care required will depend on the extent of the risk and whether serious injury is foreseeable: see *Uren v Corporate Leisure (UK) Ltd* (organised games), *Perry v Harris* (bouncy castle), *Blair-Ford v CRS Adventures Ltd* (welly-wanging).[44] How far this applies to informal events run by amateur volunteers where the participants are adults is not a question to which one can give a definitive answer. I look at the issue in the context of safety equipment next.
- A duty will be readily established if the organiser has assumed responsibility for safety, as by the provision of lifeguards at a swimming pool who do not do their job properly: *RXDX v Northampton BC*,[45] *Woodland v Essex CC* and further under "Occupiers/providers of facilities" below.
- Employers' duties arise under statutory regulation and at common law. So the question will not be about whether any duty is owed by an employer but about the extent of the duty and standard of care; see, for example, *Uren v Corporate Leisure*. However, the question about the extent of that duty also raises the issue of whether the injury was sustained in the course of employment.
- That may not make a material difference if there is also a common law duty in negligence. In *Reynolds v Strutt & Parker LLP*, the employer was the organiser of an activities afternoon at a country park which included a cycle race. The claimant, like most of the competitors, did not wear a helmet and expert evidence was that, had he done so, he would probably not

[39] See above.
[40] *Bottomley v Todmorden Cricket Club* [2003] EWCA Civ 1575; [2004] P.I.Q.R. P18; *Lear v Hickstead Ltd* [2016] EWHC 528 (QB); [2016] 4 W.L.R. 73.
[41] *Woodland v Swimming Teachers Association* [2013] UKSC 66; [2014] A.C. 537.
[42] See also (but in a different context) *NA v Nottinghamshire CC* [2015] EWCA Civ 1139; [2016] Q.B. 739.
[43] *Aldred v Nacanco* [1987] I.R.L.R. 292 CA (Civ Div).
[44] *Uren v Corporate Leisure (UK) Ltd* [2011] EWCA Civ 66; (2011) 108(7) L.S.G. 16; *Perry v Harris* [2008] EWCA Civ 907; [2009] 1 W.L.R. 19; *Blair-Ford v CRS Adventures Ltd* [2012] EWHC 2360 (QB).
[45] *RXDX v Northampton BC* [2015] EWHC 1677 (QB).

have sustained the injury.[46] The judge rejected the argument that the claimant was in the course of his employment (so that the relevant regulations did not arise) but the organisers were held negligent because they had done no adequate risk assessment nor had they taken expert advice. It was not enough to leave it to the claimant to make his own decision.

- Similarly, in *MOD v Radclyffe*, although the claimant was technically off duty when he jumped into the lake with his senior officer's approval, the relationship of assumption of responsibility and reliance was still in place. It was, as May LJ explained, artificial to say that the claimant had made an informed and free choice.
- But not all clubs or organisers will necessarily be held to owe a duty of care as regards safety even if, as a matter of good practice or expression of social duty, they do actually take care. For example, it cannot sensibly be suggested that those who run a village cricket club or organise a sailing regatta on a small scale[47] will be held to owe an actionable duty of care to fellow players or competitors. That answer will arise from the application of each of the three limbs of either of the two tests of the duty of care and/or what one might hope[48] would be a sensible and pragmatic application of the standard of care and/or the principle of free will. But one would not need to change the facts much to produce a different answer: for example, if the sailing regatta were for children, the organisers would certainly be expected to insist on lifejackets and provide safety boats. On the other hand, it would (one hopes) be regarded as ridiculous if an adult member of the village cricket team who got hit on the head when not wearing a helmet tried to bring a claim against the captain. So it is impossible to lay down a single rule of universal application: all one can do is identify the principles and recognise that their application—and particularly that of the third element of reasonableness—is hugely fact and policy sensitive, as we see in the discussion of safety equipment which follows.

Safety equipment

- An employer certainly will and an event organiser may owe a duty which extends to recommending or, in some circumstances, requiring people to wear appropriate safety equipment; see above.
- As I have already said, such duty would certainly extend to insisting that younger children do so in the examples I have given. But the same duty will not necessarily extend to adults and how far it extends, even to children, will always depend on the circumstance; *Murray v McCullough*[49] (school not liable to 15-year-old girl who did not wear a gum shield for hockey); but compare *Reynolds v Strutt & Parker* in relation to helmets to be worn by cyclists in a race.[50]
- How far a body responsible for running an event should *require* rather than just advise competitors to use safety equipment will very much depend on the facts. For example, in cycling or motor-cycling events, even where adults are involved, organisers make it a rule

[46] The issue of causation is always important but is outside the scope of this article. As for whether it may be contributory negligence not to wear a cycle helmet, see *Smith v Finch* [2009] EWHC 53 (QB).

[47] Examples of sports in respect of which the author must declare a modest interest.

[48] However, experience tells us that judges are sometimes inclined, perhaps for understandable reasons of sympathy for the injured or bereaved, to set standards and apply hindsight in a way that has little regard for practical reality or common sense.

[49] *Murray v McCullough* [2016] N.I.Q.B. 52.

[50] A note of caution here: a first-instance decision may be persuasive but is not binding. Authoritative decisions are only reached by the appellate courts. Very few "sports" cases go to the Court of Appeal: *Caldwell v Maguire* [2001] EWCA Civ 1054; [2002] P.I.Q.R. P6 is an obvious exception. Courts also tend to be cautious about laying down too many guidelines in relation to future conduct: note, for example, how May LJ in *Ministry of Defence v Radclyffe* [2009] EWCA Civ 635 felt the need to explain what he had meant in *Poppleton v Trustees of the Portsmouth Youth Activities Committee* [2008] EWCA Civ 646; [2009] P.I.Q.R. P1 (discussed further below).

that helmets are worn and in an offshore sailing race such as the Fastnet, various elements of safety equipment are compulsory. How far such rules are the product of good practice rather than the expression of a legal duty is not definitively settled. A rider who chooses not to wear a helmet and suffers a preventable head injury or a sailor who does not wear a lifejacket and drowns may have taken the risk himself and have no claim. But *Reynolds* suggests that wearing a helmet should have been made a rule and the crew member in a sailing race may not have the same freedom of choice as the skipper.[51]

- Since it is impossible to define precisely the circumstances in which a duty may or not be imposed on an event's organiser, the only prudent thing for any organiser to do is to make sure he is adequately covered by insurance.[52]

Occupiers, providers of facilities

- As occupiers of stadiums, pitches or facilities such as racetracks or velodromes, clubs or bodies will be responsible if they have not taken reasonable care to ensure that they are reasonably safe and suitable for the purpose for which they are to be used. But they cannot be expected to eliminate all risk, even for spectators: see *Murray v Harringay* and *Browning v Odyssey Trust*, both being cases in which spectators were struck by an ice hockey puck.
- Nevertheless, reasonable care is required to protect both categories of persons: see *Corbett v Cumbria Kart Racing*[53] (racing motorcyclist left track and hit adjacent ambulance) and *Phee v Gordon*[54] (discussed below, under "Competitors to each other").
- In relation to the standard of care, the adequacy (or otherwise) of the risk assessment will be a material (though not necessarily decisive) factor: see *Bowen v National Trust*;[55] *Corbett*; *Phee v Gordon*; *Reynolds v Strutt & Parker*; and *West Sussex CC v Pierce*.[56]
- Occupiers of land and people who hold parties, at least where adults are involved, do not necessarily have a supervisory responsibility for those who do foolish things, such as diving into shallow pools or ponds, where the risk of serious injury is obvious: see *Darby v National Trust*; *Cockbill v Riley*; *Risk v Rose Bruford*; *Bourne Leisure v Marsden*; *Clare v Perry*; and *Grimes v Hawkins*.[57] The situation is entirely different if the visitors are children or are expecting to (and should be) supervised as a matter of arrangement or common sense.[58]
- Appropriate design and operational advice will be relevant to the standard of care but the defendant will not be vicariously liable for bad advice given by outside and independent bodies: see *Wattleworth v Goodwood Road Racing*[59] (design and construction of racetrack); see also *Reynolds v Strutt and Parker*.

[51] Against whom the crew member would have a stronger claim than against the event organiser.
[52] See above in relation to the level of cover now required.
[53] *Corbett v Cumbria Kart Racing Club* [2013] EWHC 1362 (QB); [2013] L.L.R. 671.
[54] *Phee v Gordon* [2103] CSIH 18; 2013 S.C. 379.
[55] *Bowen v National Trust for Places of Historic Interest or Natural Beauty* [2011] EWHC 1992 (QB).
[56] *West Sussex CC v Pierce* [2013] EWCA Civ 1230; [2014] E.L.R. 62.
[57] *Darby v National Trust for Places of Historic Interest or Natural Beauty* [2001] EWCA Civ 189; (2001) 3 L.G.L.R. 29; *Cockbill v Riley* [2013] EWHC 656 (QB); *Risk v Rose Bruford College* [2013] EWHC 3869 (QB); [2014] E.L.R. 157; *Bourne Leisure Ltd (t/a British Holidays) v Marsden* [2009] EWCA Civ 671; [2009] 29 E.G. 99 (C.S.); *Clare v Perry (t/a Widemouth Manor Hotel)* [2005] EWCA Civ 39; (2005) 149 S.J.L.B. 114 and *Grimes v Hawkins* [2011] EWHC 2004 (QB). See also *Baldacchino v West Wittering Estate Plc* [2008] EWHC 3386 (QB).
[58] An interesting challenge is to decide at what age a duty of care might arise to supervise the activities of children—say on the trampoline or in the family pool. The age of majority (18) cannot be the decisive consideration: the house-holder could hardly be expected to tell a group of 17 year olds how to behave. For those aged, however, 14 or under a different answer might be given. Between those ages, whenever the author has canvassed this question amongst members of a knowledgeable audience, views have differed as to whether a supervisory duty can exist notwithstanding the inevitable variation that there will be in individual circumstances and, if so, at what age it arises on facts such as those in this example. A first instance case *Cockbill v Riley* [2013] EWHC 656 (QB) had to address some of these issues but whether it was right that the defendant should have admitted a duty of care is doubtful: hence the decision of little or no authoritative value.
[59] *Wattleworth v Goodwood Road Racing Co Ltd* [2004] EWHC 140 (QB); [2004] P.I.Q.R. P25.

- However, a club may be held liable if, for example, it has failed to check there were no obvious dangers on the pitch before a match began; *Sutton v Syston RFC*[60] (player alleged he was injured by broken boundary marker that a walking inspection should have revealed: club held not liable on appeal).
- Whilst those who run a sporting facility should ensure it is designed according to appropriate standards with suitable equipment,[61] unless they offer tuition or supervision they are not liable for adults who use (and abuse) the facility where the dangers are obvious: see *Poppleton v Trustees of Portsmouth YAC*[62] (bouldering walls)[63] and *Poole v Wright*[64] (go-kart provided and clamant wearing scarf which got caught). If there is a general expectation that supervision will be provided, or it is in fact provided, as may be true of some of the swimming pool cases discussed below, a duty may arise.
- If, however, they do give advice or let people engage in activities where the dangers are not self-evident, organisers/event managers should ensure that people are adequately prepared with proper advice: see *Lowdon v Jumpzone*[65] (Hyper-Jump ride).[66]
- Generally, if the dangers of the facility provided are self-evident and it is properly designed than the provider will have discharged his duties, at least as regards adults. Those who provide commercial swimming pools may have wider duties than those who are providing only a private facility.[67] But, again, there is no duty to guard against obvious risks, such as diving into shallow water where the depth is marked or readily ascertained and no supervision is offered: see *Evans v Kosmar;*[68] *Tomlinson v Congleton, Grimes v Hawkins*; and *Donoghue v Folkestone Properties*,[69] etc.

Referees and coaches

- Referees and coaches of contact and other sports with the potential for injury[70] will also owe a duty because they exercise a degree of control, albeit the standard of care may vary as between games played by professional adults and children: see *Vowles v Evans* and *Smoldon v Whitworth*.[71]

[60] *Sutton v Syston RFC* [2011] EWCA Civ 1182.

[61] See also *Wattleworth v Goodwood Road Racing Co Ltd* [2004] EWHC 140 (QB); [2004] P.I.Q.R. P25 and *Hide v Steeplechase Co (Cheltenham) Ltd* [2013] EWCA Civ 545; [2014] 1 All E.R. 405.

[62] *Poppleton v Trustees of Portsmouth YAC* [2008] EWCA Civ 646.

[63] See also *Maylin v Dacorum Sports Trust (t/a XC Sportspace)* [2017] EWHC 378 (QB) and *Pinchbeck v Craggy Island Ltd* [2012] EWHC 2745 (QB).

[64] *Poole v Wright* [2013] EWHC 2373 (QB); (2013) 157(33) S.J.L.B. 33.

[65] *Lowdon v Jumpzone Leisure UK Ltd* [2015] EWCA Civ 586.

[66] Or an activity such as bungee-jumping: providers will not only owe a duty to explain the risks and what to do but that explanation should include a warning about any dangers of risks to health that might not be obvious. Whether that duty would extend to declining the custom of an adult obviously unfit but nevertheless keen to have a go is a moot point. The duty would probably extend to clear explanation of the dangers but no further.

[67] The swimming pool cases are themselves interesting for what is and sometimes is not argued or conceded about duty of care; see, for example, *O'Shea v RB of Kingston* [1995] P.I.Q.R. P208. We are here concerned with accidents which happen when, for example, someone hits their head in shallow water and/or gets into difficulties when there is inadequate supervision; see, for example, *RXDX v Northampton CC* [2015] EWHC 1677 (QB), a case which was settled before it reached appeal. In some cases, the dangers of shallow water are obvious, no supervision is offered and no duty arises; see, for example, *Grimes v Hawkins* [2011] EWHC 2004 (QB), *Tomlinson v Congleton BC* [2003] UKHL 47; [2004] 1 A.C. 46 etc. In some of the older swimming pool cases, however, the defendant has apparently conceded that a common law or 1957 Act duty arises and so the issue in the case will have been whether that duty had or had not been discharged. Whether such concession was appropriate where the absence of supervision was self-evident and the clamant was an adult, must be doubtful. All that might be said from the other point of view is that in, say, municipal pools, there may be an expectation that lifeguards are present particularly if there are formal guidelines to that effect.

[68] *Evans v Kosmar Villa Holidays Plc* [2007] EWCA Civ 1003; [2008] 1 W.L.R. 297.

[69] *Donoghue v Folkestone Properties Ltd* [2003] EWCA Civ 231; [2003] Q.B. 1008.

[70] An umpire who allowed play to continue when the ground was too wet was found not liable by Judge Lopez in *Bartlett v English Cricket Board Association of Cricket Officials* , unreported, 27 August 2015 CC (Wolverhampton). This was on the basis that the real cause of the injury was the fielder's technique, not the state of the ground. However, a boxing referee who failed to stop a fight when he should or a cricket umpire who took no steps to prevent a bowler who was bowling dangerously to a defenceless batsman on a bad pitch might well be held liable.

[71] *Vowles v Evans* [2003] EWCA Civ 318; [2003] 1 W.L.R. 1607, *Smoldon v Whitworth* [1997] E.L.R. 249 CA (Civ Div).

- Coaches owe a duty to coach carefully and to take reasonable steps in accordance with good practice to minimise the risk of injury particularly in the case of potentially hazardous activities such as diving: see *Stratton v Hughes*[72] (gymnastics); *Fowles v Bedford CC* (accident in gymnasium) and *Ireland v David Lloyd Leisure*[73] (ditto). How far that duty extends to putting an athlete through a physical or mental pain barriers is, as already discussed, going to be a difficult and fact-sensitive issue.[74]
- Similarly, those who organise or provide teaching or supervision in sports such as skiing or tobogganing will owe a duty: see *Anderson v Lyotier;*[75]*Chittock v Woodbridge School*; and *R. (on the application of Robert) v Ski Llandudno*.[76] Whilst the test is an objective one, and someone is entitled to expect the same standard of care from a young as opposed to an old professional coach; see *FB v RANA*[77]—the circumstances of the parties and the facts of the case will always inform that standard: that is, the instructor or supervisor in an informal session, as where an experienced skier acts as the informal guide of a number of friends, will not necessarily have to meet the higher standard expected of a professional.

Competitors to each other

- Competitors owe duties of care to each other but the standard imposed allows for the heat and pressures of competition: see *Caldwell v Maguire*[78] (jockey's momentary carelessness not enough to establish liability); *Wilks v Cheltenham Homeguard Motor Cycle & Light Car Club*[79] (moto-cycle scramble rider likewise); *Elliott v Saunders;*[80]*Condon v Basi;*[81] and *Collett v Smith*[82] (football injuries).
- Even mere "horseplay" can amount to an assault/battery[83] or negligence; *Blake v Galloway*.[84] But a school supervisor would not reasonably foresee injury arising from 13-year-old children's playground games: *Orchard v Lee*.[85]
- What is or is not the appropriate standard will depend on the nature of the sport as well as all the circumstances, so in *Phee v Gordon* the Court of Session (Inner House) upheld a finding that both the club and the other player were liable when the claimant golfer was struck by mishit ball from an adjacent tee: it adjusted the first-instance findings of liability to hold the golf-course owners 80 per cent and the player 20 per cent liable. In a rather faster moving game, where instant decisions are needed, a court will be less inclined to find liability made out at least as regards the other player.

[72] *Stratton v Hughes* , unreported, 22 May 1998 QBD.
[73] *Ireland v David Lloyd Leisure Ltd* [2013] EWCA Civ 665.
[74] A parallel can be drawn with an employer's duty to watch out for and respond to warning signs that an employee is at risk of psychiatric harm. A valuable discussion of this issue can be found in Edward Bishop QC, *Kemp and Kemp: Quantum of Damages* (London: Sweet & Maxwell), Ch.32.
[75] The defendant was given permission to appeal against Foskett J's decision but the appeal was compromised—see [2010] J.P.I. Law 183, for further analysis.
[76] *Anderson v Lyotier (t/a Snowbizz)* [2008] EWHC 2790 (QB); *Chittock v Woodbridge School* [2002] EWCA Civ 915; [2002] E.L.R. 735; and *R. (on the application of Robert) v Ski Llandudno* [2001] P.I.Q.R. P5 CA (Civ Div).
[77] *FB v RANA* [2017] EWCA Civ 334. See also *Wilsher v Essex AHA* [1987] QB 730 CA (Civ Div).
[78] *Caldwell v Maguire* [2001] EWCA Civ 1054; [2002] P.I.Q.R. P6.
[79] *Wilks v Cheltenham Homeguard Motor Cycle & Light Car Club* [1971] 1 W.L.R. 668 CA (Civ Div).
[80] *Elliott v Saunders* (1994) N.L.J. 144 QBD.
[81] *Condon v Basi* [1985] 1 W.L.R. 866 CA (Civ Div).
[82] *Collett v Smith* [2008] EWCA Civ 583; (2009) 106(26) L.S.G. 18.
[83] "trespass to the person".
[84] *Blake v Galloway* [2014] EWCA Civ 814; [2004] 1 W.L.R. 2844.
[85] *Orchard v Lee* [2008] EWCA Civ 295; [2009] E.L.R. 178.

Spectators

- See also "Free will" above. Spectators must recognise that they are exposed to an element of risk at many sporting events.
- Nevertheless, the organisers should take reasonable steps to minimise that risk, which probably explains why the claimant succeeded in *Fenton v Thruxton*,[86] whereas a competitor at a 20/20 game struck by a cricket ball would not because the balance between the utility and purpose of the event and the risk of injury which is remote and very unlikely to be serious usually comes down against any breach of duty.[87]

[86] An accident at the Thruxton circuit—a County Court decision of Judge Hughes QC in 2008. This case is a good example of the organiser's or occupier's need to look beyond written guidelines or the risk assessment and manage risk actively.

[87] See *Murray v Harringay Arena* [1951] 2 K.B. 529; [1951] 2 All E.R. 320n and also *Perry v Harris* [2008] EWCA Civ 907; [2009] 1 W.L.R. 19. There echoes here too of s.1 of the Compensation Act 2006, a provision which may perhaps help to focus some judicial thinking; see *Sutton v Syston Rugby Football Club* [2011] EWCA Civ 1182. But, as the Court of Appeal observed in *Uren v Corporate Leisure (UK) Ltd* [2011] EWCA Civ 66; (2011) 108(7) L.S.G. 16, the provision has probably added little or nothing to the law, at least since *Tomlinson v Congleton BC* [2003] UKHL 47; [2004] 1 A.C. 46.

Contempt, Committal and *Qader*: The Battle for Costs in Low Value Personal Injury Claims

Helen Blundell*

Fixed costs; Low value personal injury claims; Multi-track; Personal injury; Road traffic accidents

Helen Blundell looks at the recent decision in Qader v Esure *and the wider implications for low value personal injury claimants facing allegations of fraud.*

PROCEDURE

On 16 November 2016, the Court of Appeal handed down its judgment in the appeal of *Qader v Esure*[1] in which both APIL and PIBA had intervened. While the law had been ably argued by the main parties' counsel, other aspects of this appeal was troubling and gave rise to APIL's decision to intervene. This appeal had a wider potential significance for all injured people bringing claims following the procedural reforms introduced in April 2013 by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO"). In particular, the appeal had a particular significance for claimants whose legitimate claims for damages were disputed and who needed to defend allegations of fraud made in the proceedings. Their inability to recover anything other than the fixed costs, pursuant to CPR r.45.29A and the provisions contained in CPR r.45.29J (as per the decision of the lower court) had wider repercussions.

For ease of reference in this article the original claimants, who became the claimant/appellant and claimant/respondent in each of the appeals, are referred to as the claimants and the original defendants, who became the defendant/respondent and defendant/appellant in each of the appeals, are referred to as the defendants.

The crux of *Qader*'s appeal was that on the basis that multi-track cases with a value of more than £25,000 are not subject either to the RTA Protocol or CPR r.45.29A, then so too must other multi-track cases which have been allocated to the multi-track on grounds other than value, for example on grounds of complexity. Such multi-track cases are subject to costs budgeting under CPR r.3.12 and not fixed costs.

If this argument was not correct, Qader argued, and multi-track cases with a value of less than £25,000 are subject to CPR r.45.29A, then the court is entitled to exercise its discretion in such cases, pursuant to CPR r.45.29J and depart from the CPR r.45.29C fixed costs. This discretion may be exercised at any time, including on allocation of the claim to the multi-track (which is what occurred in the linked appeal of *Khan v McGee*, in the lower court).

In *Qader* , a road traffic accident-related claim, the defendant had alleged that Qader had deliberately induced the accident by braking sharply "to a standstill" so that the defendant's collision with the rear of Qader's car was unavoidable and that "all claims arising from the alleged collision [were] fraudulent".[2]

Allocation questionnaires were filed, the claim was allocated to the multi-track and a costs and case management conference ("CCMC") was subsequently listed. At the CCMC, District Judge Salmon held that CPR r.45.29A applied and consequently the claimant was entitled only to fixed costs.[3] The claimant appealed that decision: the appeal was dismissed by HH Judge Grant[4] and so the matter proceeded to the Court of Appeal.

* Helen Blundell is the legal services manager at the Association of Personal Injury Lawyers. She can be contacted by email at helen.blundell@apil.org.uk.

[1] *Qader v Esure Services Ltd* [2016] EWCA Civ 1109; [2017] 1 W.L.R. 1924.

[2] *Qader v Esure Services Ltd* , unreported, 15 October 2015 TCC (Birmingham) at [3].

[3] *Qader v Esure Services Ltd* , unreported, 13 June 2015 CC (Birmingham).

[4] *Qader v Esure Services Ltd* , unreported, 15 October 2015 TCC (Birmingham) per HH Judge Grant.

One of the problems caused by allegations of fraud within a civil context is that they have a tendency to spill out and affect the recipient of those allegations in a serious and far-reaching manner. There was a concern that if the lower court's decision in *Qader* was allowed to stand, then such claimants would be at the mercy of a finding of fraud, with only a small fixed costs budget with which to counter the allegations. Faced with a well-financed, insured defendant, the claimant and his lawyers would find themselves outgunned on the resources front, armed with the equivalent of a water pistol in the face of the defendant's full artillery battalion.

At this point it is worth going back to the final report written by Lord Justice Jackson in his *Review of Civil Litigation Costs*[5] to look at what he said about complexity.

Original intentions of Lord Justice Jackson: "complexity"

Lord Justice Jackson considered the prospect of fixed costs in his final report: *Review of Civil Litigation Costs*. He made it clear that fixed costs should be applied only to the fast track and not to multi-track cases, with an escape clause for cases "of particular complexity". He wrote:

> "5.18 **Escape clause.**
>
> The escape clause in the existing FRC scheme is contained in CPR rules 45.12 and 45.13. It applies where (a) the court considers that there are exceptional circumstances and (b) upon assessment the costs turn out to be at least 20% higher than the fixed costs. This escape clause has proved satisfactory and has not led to any mass escapes from the FRC regime. I am advised that the escape clause is seldom used; it does not in practice undermine the principle of the FRC regime. I recommend that an escape clause in similar terms be incorporated in the new comprehensive fixed costs regime for personal injury cases.
>
> 5.19 *In my view, there should be no further escape clauses. If a case is of particular complexity, it may be allocated or re-allocated to the multi-track. If a party acts unreasonably (as opposed to presenting its case in the normal way and losing) the court can override the fixed costs regime by making an order for indemnity costs."*

Jackson LJ recognised that there would be cases in the multi-track which were of modest value, but which had been allocated there for reasons of complexity or importance. So while his points about proportionality and fixed costs apply to the vast majority of cases, there will be a small minority of cases where proportionality has more to do with the issues and importance to the parties than the value of the claim. Allegations of fraud inevitably add a level of particular complexity and importance to a personal injury claim, as will be seen below.

In the context of suspected fraudulent claims HH Judge Grant in *Qader* (in the county court) made the following observation:[6]

> "It is perhaps permissible to observe that *the nature and ambit of the allegations of fraud which are made in the present case are discernibly of a different nature from the types of allegation often made in cases of commercial fraud in proceedings* in the Chancery Division, the Commercial Court, or the TCC. Such cases often involve examination of considerable volumes of documents, analysis of legal principles of fiduciary duty, and consideration of often complex commercial factual matrices. In contrast, the central factual issue in the present case is simply whether the First Claimant applied the brakes in such a manner that he induced a relatively minor road traffic accident to occur.

[5] Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (The Stationery Office, December 2009).
[6] *Qader v Esure Services Ltd* Unreported 15 October 2015 TCC (Birmingham) at [39] (emphasis added).

> While the claimant's overall probity will no doubt be explored at trial, perhaps involving consideration of their conduct before the accident, at the accident, and indeed after the accident, and *it may be necessary to consider some documents* (such as relevant medical records), the overall nature of the case to my mind still answers the description of a low value personal injury claim arising out of a road traffic accident, albeit proceeding on the multi-track. *It does not therefore appear that the nature of the underlying proceedings is such that the implementation of fixed recoverable costs for such a claim would—of itself—cause affront to the overriding objective*."

The effects of a civil finding of fraud:[7]

> "The nature and ambit of the allegations of fraud which are made in the present case are discernibly of a different nature from the types of allegation often made in cases of commercial fraud in proceedings". HHJ Grant, *Qader*

It is clear from this extract that the judge misunderstood the effects of an allegation of fraud in a low value personal injury claim. On a personal level, if fraud is proven within the civil context, it can have wide-ranging effects: from an inability to obtain car insurance, credit or purchase property with a mortgage, for example. Allegations of fraud can have a devastating effect on the reputation of an individual, whose life can be dramatically affected by allegations of dishonesty.

Most seriously, many insurers who indemnify defendants in personal injury claims now advocate following up a civil finding of fraud with proceedings for contempt. For an example of this, the paper "Fraudulent claims, exaggerated claims and how to deal with them" by Richard Methuen QC and William Featherby QC of 12 Kings Bench Walk, ("the Featherby QC paper")[8] is a good starting point. This presentation, written for an insurer audience in 2012 describes the "problem" as a "vast and increasing fraud, much of it encouraged by 'professionals'. An apathetic and ineffectual civil and criminal justice system". The authors add:

> "The police and the CPS don't want to know. Prosecutions for perjury and perverting the course of justice arising out of civil proceedings are exceedingly rare. The former Attorney-General indicated that she would not intervene to support insurers outraged by frauds against them; there is no reason to believe that the current A-G's stance is different. Until recently, claimants didn't just think—they knew—that they could attempt to defraud with a good chance of success and only a tiny risk of adverse consequences."

The solution, they suggest, is "proceedings for contempt of court".

In the same paper, the authors describe the shocking effects of a finding of contempt:

> "Penalties: up to two years imprisonment or an unlimited fine (which does not, of course, go to the insurer but to the state). Mrs Kirk[9] was only fined but, in fact, the result for her and her family was disastrous (this may have mitigated imprisonment down to a financial penalty in the judge's mind): she and her family owned their own home and had to stump up £200,000 to £250,000 or so for all the various parties' costs. The Shikells[10] and the Richards[11] went to prison."

So, a civil finding of fraud can lead to devastating criminal consequences. In *Summers v Fairclough Homes Ltd*,[12] Summers had been injured in an accident at work. He put his claim at more than £800,000,

[7] *Qader v Esure Services Ltd* , unreported, 15 October 2015 TCC (Birmingham) at [39].

[8] Richard Methuen QC and William Featherby QC, "Fraudulent Claims, Exaggerated Claims and how to deal with them", *http://www.12kbw.co.uk /userfiles/Documents/Fraudulent_Claims_Exaggerated_claims_and_How_to_Deal_With_Them.pdf* [Accessed 15 July 2017].

[9] *Kirk v Walton* [2008] EWHC 1780 (QB); [2009] 1 All E.R. 257 per Cox J, and *Walton v Kirk* [2009] EWHC 703 (QB) per Coulson J.

[10] *Motor Insurers' Bureau v Shikell* [2011] EWHC 527 (QB) per HH Judge Belcher sitting as QB judge.

[11] *Brighton and Hove Bus and Coach Co Ltd v Brooks* [2011] EWHC 806 (Admin).

[12] *Summers v Fairclough Homes Ltd* [2012] UKSC 26; [2012] 1 W.L.R. 2004.

but undercover surveillance subsequently revealed him to have grossly exaggerated the effect of his injuries. At the trial on damages the court found that while he had undoubtedly suffered serious injuries, he had also fraudulently misstated the extent of his claim. In the *Fairclough* appeal Lord Clarke quoted Moses LJ in *South Wales Fire and Rescue Service v Smith* as follows:[13]

> "Those who make such false claims if caught should expect to go to prison. There is no other way to underline the gravity of the conduct. There is no other way to deter those who may be tempted to make such claims, and there is no other way to improve the administration of justice.
>
> The public and advisors must be aware that, however easy it is to make false claims, either in relation to liability or in relation to compensation, if found out the consequences for those tempted to do so will be disastrous. They are almost inevitably in the future going to lead to sentences of imprisonment, which will have the knock-on effect that the lives of those tempted to behave in that way, of both themselves and their families, are likely to be ruined."

Lord Clarke commented:[14]

> "We have set out those paragraphs verbatim because we agree with them and in order to make clear to all what is the correct approach to contempt of court on the facts of cases such as this."

He added:[15]

> "it is open to the defendant (or its insurer) to seek to bring contempt proceedings against the claimant, which are likely to result in the imprisonment of the claimant if they are successful."

Six other recent cases emphasise the gravity of the consequences, should civil allegations of fraud be made out, and followed up with contempt proceedings.

In *South Wales Fire and Rescue* an application was made to commit the defendant, Smith, to prison for contempt of court on the ground that, having been injured at work as a fireman, he made a false loss of earnings claim on the basis that since his accident he had been unable to work. The Divisional Court sentenced him to 12 months' imprisonment for the contempt. The *South Wales Echo* even printed his address in Beddau, South Wales, in their news report of his conviction—there was no escaping his wrongdoing.

In *Nield v Loveday*,[16] Mr Loveday brought a personal injury action following a road traffic accident. He was committed to prison for nine months for contempt as he had verified his statement of claim and witness statement despite knowing that it contained false information which exaggerated the value of his claim. His wife had verified false statements to support his claim and was given a suspended six-month sentence.

In *Lane v Shah*[17] Ms Shah claimed that she had been unable to work following injuries caused in a road traffic accident and signed statements of truth on her witness statements to confirm that. She was sentenced to six months' imprisonment after surveillance evidence showed that she was, in fact, working. Two members of her family were also sentenced to three months' imprisonment, each for contempt of court.

In *Homes for Haringey v Fari*[18] Ms Fari was sentenced to three months' imprisonment for deliberately exaggerating her personal injury claim and making false statements. Her husband was held to be complicit in her fraud and was sentenced to two months in prison, suspended for two years. The story was splashed across the pages of *The Guardian*, *Evening Standard* and made it onto the BBC's news page.

[13] *South Wales Fire and Rescue Service v Smith* [2011] EWHC 1749 (Admin) at [5] and [6].
[14] *South Wales Fire and Rescue Service v Smith* [2011] EWHC 1749 (Admin) at [61].
[15] *South Wales Fire and Rescue Service v Smith* [2011] EWHC 1749 (Admin) at [61].
[16] *Nield v Loveday* [2011] EWHC 2324 (Admin); [2011] 4 Costs L.O. 470.
[17] *Lane v Shah* [2011] EWHC 2962 (Admin); [2012] A.C.D. 1.
[18] *Homes for Haringey v Fari* [2013] EWHC 3623 (QB).

In *Surface Systems Ltd v Wykes*[19] HH Judge Robinson held that six months' imprisonment was appropriate for Mr Wykes, a personal injury claimant, who had pleaded guilty at a late stage to contempt of court following deliberate exaggeration of the extent of his injuries in his statement of claim, which was supported by a signed statement of truth.

In *AIG Europe Ltd v Parmar*,[20] Mr Parmar was described by the judge as "a patently and persistently dishonest witness" and his evidence "wholly unworthy of belief" after he concocted a RTA and subsequent whiplash claim. He was sentenced to 12 months' imprisonment for contempt after making six separate false statements of truth.

> "It may be necessary to consider some documents"HH Judge Grant, *Qader*.

When the risks of a finding of fraud are as outlined above, then allegations of fraud made in civil personal injury claims of whatever value must be vigorously defended by the accused claimant. In order to do so, the claimant's defence to the allegations must be properly made out, which requires a substantial amount of work.

APIL's members were asked to provide bills of costs submitted in personal injury cases where fraud was alleged and defended in the multi-track. All those cases, supplied on an anonymous basis, involved allegations of fraud which were either defeated at trial or settled part-way through the trial in the claimant's favour.

The bills of costs revealed that the average cost of time spent by the claimant's representatives on these cases was £30,000 with a range of £20,915 to £62,579 (the latter was in a multi-claimant and defendant claim where the costs related to one claimant only). As for disbursements, the average spend (including counsel, engineering and medical evidence), was £36,070.75 ranging from £2,900 to £62,506.70 per case. These figures are more than reflected by the actual costs incurred by defendants in similar cases.

All claims involved additional work which regularly included:

- consideration of defence containing allegations of fraud;
- indemnity issues;
- reviewing evidence in view of the allegations of fraud;
- obtaining further witness statements re: veracity of claim;
- advising on risks;
- conference with counsel relating to fraud allegations;
- insurers joined as second defendants;
- Pt 18 requests;
- Pt 20 defendants;
- costs budgeting; and
- applications to amend pleadings in light of allegations

A paper on the website of Park Square Chambers, "Fixed recoverable costs can apply to multi-track cases"[21] refers to the additional work required where fraud is alleged and notes that it is in the defendant's best interests to keep the claimant on fixed costs to limit its ability to defend the allegations:

> "It is a painful fact that in the low value fraud cases, the costs implications of a claim are often more commercially important than the value of the claim and decisions will be made guided by that fact. I would continue to advise any defendant solicitor in this situation to attempt to keep such claims

[19] *Surface Systems Ltd v Wykes* [2014] EWHC 422 (QB).
[20] *AIG Europe Ltd v Parmar* , unreported, 23 August 2016 QBD (Birmingham) per Judge Robert Owen QC.
[21] Judy Dawson, "Fixed recoverable costs can apply to multi-track cases" (16 October 2015), *http://www.parksquarebarristers.co.uk/news/fixed-recoverable-costs-can-apply-to-multi-track-cases/* [Accessed 15 July 2017].

> within the fast track (with an almost guaranteed fixed recoverable costs regime) if possible unless there are good reasons why not.
>
> One matter that often arises is where there are potential multiple persons from whom oral evidence may be required (multiple occupancy in such accidents being an almost inevitable feature), particularly if interpreters will be required, such that the claims will inevitably need more than a day's court time. In those circumstances it is helpful to get an Order allocating to the multi-track to specifically state that such allocation is "solely as a result of the estimated length of the trial."

These paragraphs highlight the amounts of extra work generated by the defendants in order to prove the fraud, creating additional work for the claimant's representatives who must consider the evidence, deal with the additional applications and rebut the allegations, none of which was contemplated by those involved in fixing costs in the fast track.

Those who allege fraud in these cases acknowledge that there is a particular complexity to dealing with these claims, yet they are prepared to ensure that the claimant is deprived of anything other than fixed costs, reducing their ability to defend the allegations. At the same time, those defendants are prepared to spend considerable sums defending the original claim, alleging fraudulent activity and then bearing the cost of subsequent committal proceedings.

Without fixed costs for defendants there is no restriction on the defendant being able to recover its costs (as can be seen in the consequences for Mrs Kirk mentioned above, who had to pay between £200,000 to £250,000 or so for all the various parties' costs once she had reached the end of the committal proceedings). In the interests of parity the claimant needs to be in a position, to be able to resist the allegations, of recovering costs without being limited to fixed costs and for that to be cleared prospectively at an early stage in the proceedings.

No lawyer acting for a claimant will object to a finding of fraud, with the consequences which follow, where it has been pleaded and proved. In many cases, however, those lawyers deal with allegations of fraud which are ultimately never made out. These never reach the court, but, faced with the risk of only recovering fixed costs, the claimant risked, following the lower court decisions in *Qader*, being left with no option but to settle or not to proceed at all.

Not only do claimants have a better chance of defending their claim against allegations of fraud if they are properly funded, but the court also benefits in the longer term. The allegations of fraud are then properly investigated. Access to justice is reduced by the simple expedient of an inference or pleading of fraud where the individual claimant is unable to afford to counter those allegations and if the claim does proceed, then the court is better served by having a well-prepared case in front of them, rather than one which is under-funded and ill-prepared, squandering finite court resources.

Human Rights Act 1998 Article 6 issues

Claimants must also be able to properly defend allegations of fraud in the interests of ensuring the fairness of the claimant's trial and ensuring that justice is properly served. In order to do so, they need to be able to recover the costs of their legal representatives' work. When the suggestion of fraud is raised, the court risks a miscarriage of justice if the amounts the parties are able to spend (and as importantly, potentially recover) are set on an unequal footing. The European Court of Human Rights decision in *Steele and Morris v The United Kingdom*[22] (the *McLibel* case) makes it clear that:[23]

[22] *Steele and Morris v The United Kingdom* [2005] EMLR 314.
[23] *Steele and Morris v The United Kingdom* [2005] EMLR 314 at [59], [60], [61], and [62].

> "It is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court and that he or she is able to enjoy equality of arms with the opposing side.
>
> Article 6 § 1 leaves to the State a free choice of the means to be used in guaranteeing litigants the above rights.
>
> The question whether the provision of legal aid is necessary for a fair hearing [the means of funding under discussion in this case was legal aid] must be determined on the basis of the particular facts and circumstances of each case and will depend, inter alia, upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively.
>
> Moreover, it is not incumbent on the State to seek through the use of public funds to ensure total equality of arms between the assisted person and the opposing party, *as long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis the adversary*."

Limiting claimants to fixed costs when defending allegations of fraud in the multi-track ensures that they are not afforded a reasonable opportunity to present their cases and are forced to do so under conditions which place them at a substantial disadvantage vis-à-vis their adversary. Claimants cannot afford to properly fund their defence of the fraud allegations if they are confined to fast track fixed costs.

> "An affront to the overriding objective"HH Judge Grant, *Qader*.

Applying fast-track fixed costs to personal injury claims which have been allocated to the multi-track where fraud has been alleged *is* an affront to the overriding objective. Contained in CPR r.1.1, the overriding objective is designed to ensure that the court can deal with cases justly and at proportionate cost. CPR r.1.1(2)(a) provides for ensuring that the parties are on an equal footing. It seems clear that the parties will not be an on equal footing when the claimant risks personal financial and reputational ruin, and is prevented from properly funding the defence of fraud allegations made by the defendant, but the defendant does not face similar catastrophic consequences. Similarly, CPR r.1.1(2)(ii) requires the court to consider the importance of the case. The outcome of the case, to both parties, in these circumstances is of great importance. For the claimant, there is the risk that a civil finding of fraud will lead to proceedings for contempt. Whereas in the past there was a tendency for courts to order suspended sentences in cases of contempt in civil actions, over the last few years that has changed and custodial sentences are now "appropriate". Moore-Bick LJ in *Airbus Operations Ltd v Roberts* said:[24]

> "It was accepted in light of the observations made by Lord Clarke in … *Summers* … that applications for committal for contempt are an appropriate means of controlling, punishing and as far as possible eliminating, dishonesty in the conduct of civil proceedings."

For the defendant and his or her insurer, a successful finding of fraud, and the potential of committing the claimant to prison attract substantial publicity. The headlines which can appear in both the national and local print press should give pause for thought. As William Featherby QC writes in the Featherby QC paper:

> "the deterrent effect seems to be enormous: a claimant who is lying or tempted to lie is going to think twice if he or she is advised or learns that prison might be the destination. His CFA solicitors are likely to be similarly wary."

[24] *Airbus Operations Ltd v Roberts* [2012] EWHC 3631 (Admin); [2013] A.C.D. 25 at [17].

CPR r.1.1(2) (iii): Complexity of the issues

Fraud allegations are by necessity complex. Additional evidence in the form of medical reports, engineering reports, witness statements, surveillance records and financial investigations may all need to be obtained by one party and rebutted by the other: all of which were items not factored by Professor Fenn in his original calculations for fixed costs for Lord Justice Jackson. In fact, the word "fraud" or "fraudulent" only appears nine times in Jackson LJ's 584-page final report.

CPR r.1.1(2)(iv): The financial position of each party

In personal injury claims, the defendant is invariably backed by an insurer, but the claimant, (who may be insured either by way of a motor vehicle, household, union or ATE/BTE insurance policy) is the party who faces the avoidance of his insurance policy, and the consequent costs liabilities which follow that, should there be a finding of fraud. This places the claimant's financial position in more jeopardy than the defendant, who will be backed by his insurer, regardless of whether or not the claimant's fraud is proved.

If the defendants' arguments in *Qader* and *Khan* had been accepted by the court, there would have been no financial risk to defendants for alleging fraud. The defendants would only have had to pay fixed recoverable costs to the claimants in the event that their allegations were not made out. There was a risk that in those circumstances, the courts would have seen more of the sorts of cases where defendants, on the weakest and flimsiest of evidence, would "have a go" at either an inference or allegation of fraud, without the risk of costs sanction.

It is right that issues of fraud should be investigated when appropriate, but it would be wrong for the defendant to be the beneficiary of greater financial backing or security without the risk of having to meet the claimant's costs and without the restraining effect that might have on defendant behaviour, while the claimant, armed only with fixed costs, faces financial and personal ruin.

Committal Proceedings

Marcus Grant*

Committal proceedings; Contempt of court; Custodial sentences; False statements; Personal injury; Statements of truth

A sanction to inject transparency and fairness back into civil litigation (Practical advice to practitioners on advising clients of the risk of committal proceedings)

This article is intended to provide some insight into the principles underpinning committal actions for contempt of court in injury litigation, the mechanics of CPR Pt 81 in bringing such actions, the sentencing parameters and recommendations to claimant injury lawyers on how best to protect their clients from the risk of prison.

The advent of "no win no fee" funding arrangements in the 1990s combined with compulsory motor insurance obligations made injury litigation accessible to all. It generated a claims industry with many parties along the supply chain with a financial interest in the outcome of the litigation. Unsurprisingly, it proved to be a fertile breeding ground for abuse. By the turn of the century insurance companies were setting up dedicated fraud investigation teams to engage in cat and mouse litigation; warfare between claimants and insurers ensued thereafter.

Before long most cases were viewed by insurers through a prism of disbelief. That prism resulted in delay and distress to all bona fide litigants which invariably fed into more expensive claims.

Insurers perceived that the cards were stacked in favour of claimants who were furnished with all the information at the outset of any case. When insurers succeeded in exposing an abusive claimant who had approached the litigation dishonestly, then more often than not the entire claimant would suffer was a day of their time in court. Their lawyers took the hit on their own costs and disbursements and insurers found that any judgments in their favour were hard, if not impossible to enforce.

In 2010, the Divisional Court indicated a willingness to dust off the cobwebs on the rarely used committal provisions of Ord.52 of the old Rules of the Supreme Court, which had survived the introduction of the CPR in 1999, in the case of *Barnes v Seabrook*.[1] It signalled a profound change in injury litigation. Suddenly, litigants who wished to bring injury claims contaminated by dishonesty risked more than just a day in court; they now risked their liberty.

In the case of *Lane v Shah*,[2] Laws LJ sent three members of a family to prison for signing statements of truth on statements to support an exaggerated injury claim. There was no doubt that Mrs Lane, an Accountant, had developed a compensable chronic pain condition. She was able to cope with some part-time work despite her pain, a fact she concealed from the defendant and the court. The claimant's 22-year-old daughter, a university graduate working for a charity, signed a statement in support of her mother's claim that contained the words: "Mum has not returned to work yet." That was the only untrue sentence in the entire statement. She was sent to HMP Holloway for six weeks. It was shocking. It emphasised the importance of reality checking with each witness the accuracy and truth of every assertion made in any document verified with a statement of truth.

Why should so much importance be attached to a statement of truth? The answer is simple. When the CPR was introduced in 1999 and the new provisions regarding statements of truth were introduced in

* Temple Garden Chambers. *http://tgchambers.com/member-profile/marcus-grant/*.

[1] *Barnes (t/a Pool Motors) v Seabrook* [2010] EWHC 1849 (Admin); [2010] C.P. Rep. 42.

[2] *Lane v Shah* [2011] EWHC 2962 (Admin); [2012] A.C.D. 1.

CPR Pt 22, it was envisaged that the volume of litigation would reduce because parties would be able to trust implicitly what the other was saying in formal court documents verified by statements of truth. Such trust was thought to be missing before then. Statements of truth apply to claim notification forms at the commencement of intimated proceedings and follow through to pleadings, lists of documents, witness statements, expert reports and Pt 18 replies.

An untruth can be told by omission as well as commission; failure to disclose relevant unhelpful facts or documents—for example, non-disclosure of relevant pre-existing medical conditions or a post-traumatic incident that might break the chain of causation—will engage the committal provisions of contempt of court.

Trust is the oil on which our underfunded and creaking civil justice system depends. Anything that compromises it imperils the system and that is why the sanction of committal proceedings was felt to be needed as a stick to maintain the checks and balances of the justice system.

In 2012 Zurich Insurance funded the appeal to the Supreme Court in *Summers v Fairclough Homes*[3] seeking a judge-led solution to dishonest exaggeration of bona fide injury claims in the form of a public policy strike out of the entire claim should any constituent element be found to have been "fundamentally dishonest".

The Supreme Court declined to establish such a public policy, which would have resulted in the unpicking of 132 years of jurisprudence since Lord Loreburn's dicta of "not a penny more, not a penny less" in *Livingstone v Rawyards Coal Co*,[4] as the basis for assessment of damages in tort law. The Supreme Court stated that such public policy should be parliament, not judiciary-led. Their lordships reviewed the leading authorities on committal at that time favourably and expressed the view that committal was the appropriate control measure to police dishonesty in injury litigation.

In the event Parliament, under the Chris Grayling-led era of the Justice Ministry, introduced a "fundamental dishonesty" strike out sanction in the form of s.57 of the Courts and Criminal Justice Act 2015 for all claims issued after 13 April 2015; the sanction is diluted in that it bestows on judges with a discretion to disapply it, where its application would otherwise be deemed unjust.

After the case of *Barnes* established the procedural machinery for bringing committal claims, the first such injury claim to come before the courts for sentencing in the post-*Barnes* era was the case of *South Wales Fire and Rescue Service v Smith*.[5] Moses LJ handed down a judgment, [2]–[7] addressed the scourge of dishonesty in injury litigation in colourful terms; those paragraphs have been cited frequently in subsequent cases. He signalled that there would be a zero-tolerance policy from the judiciary towards dishonest litigants; any litigant caught out should expect to go to prison.

The first contested injury committal case in the post-*Barnes* era was *Nield v Loveday*.[6] Mr Loveday was caught out by devastating surveillance and Facebook evidence dishonestly exaggerating his six-figure injury claim. His defence was to attempt to blame his solicitors for failing to take clear instructions from him and for asking him to sign off a statement that he was unable properly to understand by reason of his injuries. Mr Loveday was ordered to disclose his privileged client-solicitor file in the litigation below; this revealed that he personally made handwritten changes to circa 125 of the 150 paragraphs of the first draft of his statement and, further, he was provided with very clear warnings in writing by his solicitors about the importance of the statement of truth. The contempt was proved and he was given a sentence of nine months imprisonment.

The lesson to take away from these cases is that all claimant lawyers must emphasise the importance of honesty from the outset of their client-solicitor relationship, identifying the consequences of being dishonest. I consider it important to advise claimants how the compensation process works, so that they

[3] *Summers v Fairclough Homes Ltd* [2012] UKSC 26; [2012] 1 W.L.R. 2004.
[4] *Livingstone v Rawyards Coal Co* (1880) 5 App. Cas. 25 HL.
[5] *South Wales Fire and Rescue Service v Smith* [2011] EWHC 1749 (Admin).
[6] *Nield v Loveday* [2011] EWHC 2324 (Admin); [2011] 4 Costs L.O. 470.

can gain a better insight into appreciating what information is likely to be relevant to issues in the case. Crucially, they must understand that the level playing field obliges them to disclose facts and documents that are unhelpful to their case.

I recommend that any document requiring a statement of truth should be accompanied with a covering letter that includes a standard contempt of court warning in bold and in a box, reflecting the provisions of the contempt of court warning to be found at CPR Pt 81.

For clients whose native tongue is not English, consideration must be given to having the document translated; judges are becoming increasingly unsympathetic to discrepancies at trial attributed to language misapprehension. Many judges will dismiss cases at trial where it is evident that a claimant has not properly understood a document to which his or her statement of truth has been appended.

The class of contempt that the above cases and narrative refer to is defined by reference to CPR r.81.17(1)(a) as: "Making a false statement in a document verified by a statement of truth" contrary to CPR r.32.14. The applicant must prove beyond reasonable doubt that:

- one or more statements of fact in one or more documents verified with a statement of truth was untrue;
- it/they was/were untrue in such a way that the untruth(s) interfered with the course of justice in a material respect; and
- it was made in the knowledge by the respondent who signed it (or on whose behalf his authorised legal representative signed it) that it was/they were untrue.

The statutory provisions for these quasi-civil and quasi-criminal proceedings are to be found in CPR Pt 81 which came into force with effect of 1 October 2012. If the statement of truth is made in the course of County Court proceedings CPR r.81.12(1)(d) is engaged, namely a "committal application in relation to interference with the due administration of justice in connection with proceedings in an inferior court (which includes a county court)". An application for permission to commence committal proceedings is required pursuant to CPR r.81.12(1)(d) and "may be made only to a single judge in the Queen's Bench Division".

Civil proceedings for contempt of court are criminal proceedings within the meaning of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 s.14(h) and the Criminal Legal Aid (General) Regulations 2013 (SI 2013/9) reg.9(v) and consequently respondents will be eligible for legal aid funding for representation; see *Brown v Haringey BC*.[7]

The Divisional Court at [41] of the judgment in *Barnes*[8] set out the threshold tests that must be satisfied before the court will consider exercising its discretion to give permission to an applicant to commence committal proceedings for this class of alleged contempt. In summary, it established a three-stage test:

- there must be a strong prima facie case;
- committal proceedings must be in the public interest; and
- it must be proportionate to bring committal proceedings.

Of these (1) is the most important. If the evidence is largely circumstantial, then a court is unlikely to find that the threshold has been met; see *Axa Corporate Solutions v Khan*.[9] The same decision emphasised the importance of insurers issuing committal proceedings swiftly as delay is against the public interest and likely to cause the defendants prejudice. Since Moses LJ's judgment in *South Wales Fire and Rescue*, High Court judges require little persuasion that it is both in the public interest and proportionate that a claimant accused of dishonesty in injury proceedings should face committal proceedings. There is no

[7] *[2017] 1 W.L.R. 542.*
[8] *Barnes (t/a Pool Motors) v Seabrook* [2010] EWHC 1849 (Admin); [2010] C.P. Rep. 42 at [41].
[9] *AXA Corporate Solution Services Ltd v Khan* [2017] EWHC 1122 (QB).

minimum threshold below which such dishonesty is considered disproportionate to merit the satellite criminal proceedings. Indeed, Spencer J in *Quinn Insurance v Altintas*[10] made the observation that a statement of truth assumes greater import in low value claims where it is not proportionate for the insurer to spend time and money investigating it. In that case the claim contaminated by dishonesty was only worth £3,268.

The maximum sentence for this class of contempt is two years' imprisonment. Typically sentences range from three to 12 months with a one-third reduction for an early guilty plea and a suspension of the sentence in cases where exceptional hardship can be proven.

[10] *Quinn Insurance v Altintas* , unreported, 26 March 2014 QBD.

The Future of CPR Pt 36 (Part 11)

John McQuater

Acceptance; Costs; Part 36 offers

Introduction

The last article in this series, which has been looking at the development and future of CPR Pt 36, reviewed recent case law which dealt with the making of offers, clarification of offers, withdrawing offers and the acceptance of offers.

This article picks up where the last finished, with the acceptance of offers, before moving on to consider some further important decisions on the cost implications of Pt 36 offers as well as rulings dealing with the distinction, for costs purposes, between Pt 36 offers and non-Pt 36 offers.

Acceptance

The previous article concluded by reviewing the analysis of CPR r.36.11(6) made in *Bingham v Abru Ltd*.[1]

The same approach to the interpretation of that part of the rule was subsequently taken in *Titmus v General Motors UK Ltd*.[2]

In that case judgment was given on both an application by the claimant, that a sum of money offered by the defendant under Pt 36 be promptly paid on acceptance of that offer, and an application by the defendant, that there be an extension of time for payment by the defendant of the sum which had been offered.

Elisabeth Laing J held that the court did not have discretion under CPR Pt 3 to extend time for payment following acceptance of a Pt 36 offer, because Pt 36 was a self-contained code.

Payment after 14 days from acceptance would be appropriate in one circumstance only, namely when that was agreed in writing between the parties under the terms of Pt 36 itself.

There was no power to order the Pt 36 sum be paid into court as security for the defendant's costs.

It was, however, appropriate to order that the claimant pay the defendant a reasonable sum on account of costs, but not as an equitable set off.

This is a further decision emphasising the self-contained nature of Pt 36, hence the requirement that on acceptance payment of the sum due be made under the terms of the rule, namely 14 days.

The only exception is where the offer stipulates payment will be made more than 14 days after acceptance and the claimant agrees to treat that as a Pt 36 offer (the claimant gets the benefit of provisions as to costs even though, in these circumstances, payment of damages will be delayed).

A defendant, even though qualified one-way costs shifting is unlikely to apply, will not be entitled to delayed payment on acceptance of a Pt 36 offer. The best a defendant can hope for is that the court, having made the usual order for costs on late acceptance that there be a detailed assessment of the defendant's costs after the end of the relevant period, will order a payment on account of costs under CPR r.44.2(8).

Another case focusing on the self-contained nature of Pt 36, and the significance of this in the context of accepting offers, is *DB UK Bank Ltd v Jacobs Solicitors*.[3]

This was a judgment, given in a professional negligence claim, on whether the claim had been settled.

[1] *Bingham v Abru Ltd* , unreported, 13 November 2015 CC (Sheffield).
[2] *Titmus v General Motors UK Ltd* [2016] EWHC 2021 (QB).
[3] *DB UK Bank Ltd (t/a DB Mortgages) v Jacobs Solicitors* [2016] EWHC 1614 (Ch); [2016] 4 W.L.R. 184.

The claimant bank alleged the defendant solicitors had failed to adequately report that the claimant's borrower was purchasing a properly by way of a form of sub-sale.

The claimant alleged that a loan to the borrower would not have been made if the defendant had reported properly.

Whilst making a partial admission on breach of duty the defendant denied any causative loss, on the basis the claimant would have made the loan to the borrower in any event.

On 28 August 2015 the defendant made the claimant an offer which was expressed to be "without prejudice save as to costs" and indicated that, if accepted, payment should be made within six to eight weeks (as the defendant's insurer was in default and funds would have to be obtained from the Financial Services Compensation Scheme).

Whilst the defendant recognised the offer was not compliant with Pt 36 (which was stated to be solely due to the unusual circumstances surrounding the insurers, meaning payment could not be made within 14 days of acceptance) the defendant, nevertheless, stated that Pt 36 consequences would be sought "should the matter proceed to trial". Subsequently, on 19 May 2016, the claimant made a Pt 36 offer to the defendant.

With the trial due to commence on 27 June 2016 the claimant, on 22 June 2016, sent the defendant a letter which stated: "Our client … accepts the offer contained within your letter dated 28 August 2015."

An issue was whether that offer had been implicitly rejected by the counter offer contained in the claimant's Pt 36 offer made on 18 May 2016. On this point the judge recognised that at common law a counter offer will amount to rejection of an earlier offer, for example *Hyde v Wrench*.[4] The judge rejected an argument that this common law rule did not apply because the defendant's offer was a Pt 36 offer, explaining:[5]

> "When looking at the effect on a common law, non-Pt 36 offer of a counter-offer, the common law rule *had* to be applied. It made no difference whether the counter-offer was one which was compliant with Pt 36 or not. It was still a counter-offer and therefore amounted to a rejection of the earlier, common law, non-Pt 36 offer. By contrast, the effect on a Pt 36 offer of any counter-offer, whether Pt 36 compliant or not, had to be addressed by reference to the Pt 36 "self-contained" regime. That produced a different result and the justification was to be found in the potential benefits conferred on the maker of a Pt 36 offer, or indeed counter-offer."

The judge also dealt with the question of whether, had it not been rejected, the defendant's offer would have remained open for acceptance. At common law it was not appropriate to construe the offer as containing such a time limit. The judge relied on the observation of Lord Neuberger in *Arnold v Britton*[6] when he had observed:[7]

> "The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of highsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingy, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party."

On this basis the judge concluded that no time limit for acceptance could be implied and went on to observe:[8]

[4] *Hyde v Wrench* (1840) 3 Beav. 334.
[5] *DB UK Bank Ltd (t/a DB Mortgages) v Jacobs Solicitors* [2016] EWHC 1614 (Ch); [2016] 4 W.L.R. 184 at [26].
[6] *Arnold v Britton* [2015] UKSC 36; [2015] A.C. 1619.
[7] *DB UK Bank Ltd (t/a DB Mortgages) v Jacobs Solicitors* [2016] EWHC 1614 (Ch); [2016] 4 W.L.R. 184 at [32].
[8] *DB UK Bank Ltd (t/a DB Mortgages) v Jacobs Solicitors* [2016] EWHC 1614 (Ch); [2016] 4 W.L.R. 184 at [33].

> "Unlike a common law offer, a Pt 36 offer may still be accepted after the date of expiry. If a party wishes to make a non-Pt 36 offer, it can do so without any time limit, and it will still be efficacious from a business perspective, because it can always be withdrawn at any time prior to acceptance."

For these reasons the judge concluded that the claim had not been settled and it must, therefore, proceed to trial.

This decision is a further example of the important distinction for the purposes of acceptance, as well as costs consequences, between Pt 36 and non-Pt 36 offers due to the self-contained nature of Pt 36 which will, where appropriate, prevail over the general law of contract (for the reasons explained in *Gibbon v Manchester CC*,[9] a point which will be picked up, in a slightly different context, later in this article.

Costs on judgment (under Pt 36)

The costs, and other, consequences provided for under Pt 36 on judgment, and also acceptance (a separate topic which will be returned to later in this article), are key features of the rule. It is unsurprising that there have been a number of decisions looking at different facets of this broad topic.

Those decisions have included a consideration of, first, what the term "costs" means when used in Pt 36, specifically whether that has the effect of prevailing over the more general discretion on costs conferred by CPR Pt 44. Secondly, the courts have considered the apparent tension between the terms of CPR Pt 45, where fixed costs will generally apply, and Pt 36. Thirdly, rulings have reviewed the circumstances in which it will be "unjust" for the usual costs and other consequences provided for under Pt 36 to apply.

Costs?

Part 36 provides, whether this be on acceptance or on judgment (where that judgment is "more advantageous" or "at least as advantageous" as the relevant offer) for there to be an entitlement to "costs".

Exactly what, in this context, "costs" means was considered by the Court of Appeal in *Webb v Liverpool Women's NHS Foundation Trust*.[10] This was an appeal by the claimant against a ruling on costs which followed judgment on substantive issues, for the claimant in clinical negligence proceedings brought against the defendant.

The claimant advanced two main allegations on breach of duty against the defendant but only established breach on a single ground.

The claimant had made a Pt 36 offer on the basis that the claimant would, if the offer was accepted, receive 65 per cent of the damages that would accrue on a 100 per cent basis.

When dealing with costs the trial judge concluded that the first question was whether, in the absence of a Pt 36 offer, a proportionate costs order would have been appropriate under CPR r.44.2(6).

Here the claimant's case had two distinct limbs with neither dependent on the other and, rather than being separate, self-contained, discrete claims, each limb was supported by its own separate expert evidence.

On this basis the judge concluded that, in the absence of a Pt 36 offer, he would have been disposed to make a costs order requiring the defendant to pay only a proportion of the claimant's costs, to recognise the failure of the claimant to establish the second limb of her claim.

The question was then how that view was affected by the actual Pt 36 offer the claimant made.

The judge concluded a successful Pt 36 offer did not mean the court was unable to make an issue based or proportionate costs order and accordingly, ruled that:[11]

[9] *Gibbon v Manchester CC* [2010] EWCA Civ 726; [2010] 1 W.L.R. 2081.
[10] *Webb v Liverpool Women's NHS Foundation Trust* [2016] EWCA Civ 365; [2016] 1 W.L.R. 3899.
[11] *Webb v Liverpool Women's NHS Foundation Trust* [2015] EWHC 449 (QB); [2015] 3 Costs L.O. 367 at [54].

> "In the circumstances I propose to make a costs order in favour of the claimant limited to a percentage of her costs. The figure shall be that which is appropriate to reflect the percentage of time expended on establishing the First Limb but not the Second and 100% of the disbursements directly incurred in establishing the First Limb but not the disbursements directly incurred in seeking to establish the Second Limb. In this context I have particularly in mind the fees of the experts but there may be others. The costs order shall include all the enhancements stipulated in Pt 36.14 from the Relevant Time. The starting point is that the Pt 36.14 costs consequences *will* apply to those costs awarded to the offeror. I see no injustice in applying them."

In the Court of Appeal both parties accepted the claimant's entitlement to costs before the end of the relevant period (in the judgment described as "the effective date") of the Pt 36 offer was to be determined in accordance with Pt 44. So far as costs incurred after the effective date were concerned the issues were more complex, and involved an analysis of the relationship between Pt 44 and Pt 36.

The Court of Appeal dealt first with the issue on costs incurred before the effective date of the claimant's Pt 36 offer, concluding that the trial judge could not have properly deprived the claimant of her costs relating to the second allegation. The court adopted the approach taken by Jackson LJ in *Fox v Foundation Piling Ltd* when he had said:[12]

> "In a personal injury action the fact that the claimant has won on some issues and lost on other issues along the way is not normally a reason for depriving the claimant of part of his costs: see *Goodwin v Bennett UK Limited* [2008] EWCA Civ 1658. For example, the claimant may succeed on some of the pleaded particulars of negligence, but not on others. Indeed the fact that the claimant has deliberately exaggerated his claim may in certain instances not be a good reason for depriving him of part of his costs: see *Morgan v UPS* [2008] EWCA Civ 1476."

The Court of Appeal then dealt with costs incurred after the effective date of the claimant's Pt 36 offer.

The first question was what the word "costs" in CPR r.36.14(3)(b) meant. Sir Stanley Burnton held that in that rule the words "his costs" meant "all his costs" and the subsequent removal of the word "his" in April 2015 did not alter that meaning. Hence he concluded:

> "On this basis, a successful claimant is entitled to all her costs on an indemnity basis, unless it would be unjust (as provided in 36.14(3)) for her to be awarded those costs."

Whilst a different view on the meaning of Pt 36, as it then read, was taken by the Court of Appeal in *Kastor Navigation Co Ltd v AGF MAT (The Kastor Too)*[13] that decision was based on provisions in Pt 36 and Pt 44 which were materially different to the current terms of those rules, and hence the case was distinguishable. In particular there was then an express reference in Pt 44 to Pt 36 offers whilst the current wording in Pt 44 exclude from the court's consideration any offer to which the costs consequences of Pt 36 apply.

In these circumstances Sir Stanley Burnton concluded:[14]

> "These differences in my judgment require this court to consider the meaning and effect of rule 36.14 untrammelled by the decision in *The Kastor Too*. My view as to the meaning of rule 36.14 is supported by the substantial line of authority to the effect that Part 36 is now a self-contained code, see, eg, Ward LJ in *Shovelar v Lane* [2012] 1 WLR 637, para 52:

[12] *Fox v Foundation Piling Ltd* [2011] EWCA Civ 790; [2011] C.P. Rep. 41 at [48]; *Webb v Liverpool Women's NHS Foundation Trust* [2016] EWCA Civ 365; 2016] 1 W.L.R. 3899 at [28].

[13] *Kastor Navigation Co Ltd v AGF MAT (The Kastor Too)* [2004] EWCA Civ 277; [2005] 2 All E.R. (Comm) 720.

[14] *Webb v Liverpool Women's NHS Foundation Trust* [2016] EWCA Civ 365; [2016] 1 W.L.R. 3899 at [36].

> 'Part 36 is a separate, self-contained code. It must be applied as such. If the offer is one to which the costs consequences under Part 36 apply, then it cannot be taken into account under Part 44 because, although CPR r 44.3(4)(c) requires the court to have regard to "any payment into court or admissible offer to settle", those words are qualified by the words *3911 which follow namely "which is not an offer to which costs consequences under Part 36 apply". Part 36 trumps Part 44.'"

Consequently, in deciding what costs order to make under CPR r.36.14 the court did not first exercise discretion under Pt 44, as the only discretion is that conferred by Pt 36 itself.

On this basis Sir Stanley Burnton held:[15]

> "It follows from the above, and in particular that Pt 36 is a self-contained code, that the discretion under 36.14 relates not only to the basis of assessment of costs, but also to the determination of what costs are to be assessed. I agree with the Judge that Pt 36 does not preclude the making of an issue-based or proportionate costs order. However, a successful claimant is to be deprived of all or part of her costs only if the court considers that would be unjust for her to be awarded all or that part of her costs. That decision falls to be made having regard to 'all the circumstances of the case'. In exercising its discretion, the Court must take into account that the unsuccessful defendant could have avoided the costs of the trial if it had accepted the claimant's Pt 36 offer, as it could and should have done. The principles were aptly summarised by Briggs J (as he then was) in *Smith v Trafford Housing Trust* [2012] EWHC 3320 (Ch)."

The appeal was, accordingly, allowed and the defendant ordered to pay all of the claimant's costs, such costs to be on the indemnity basis from the effective date of the offer.

This judgment is important as confirmation that a Pt 36 offer makes the first entitlement of a party able to rely on that offer, after the effective date, to "all costs". The claimant is, of course, also entitled to have those costs assessed on the indemnity basis, enhanced interest and an additional amount but it is important not to overlook the preliminary point about being entitled to costs in the sense of "all costs".

Moreover, the case is yet a further ruling, surely now a definitive ruling, that in the majority of personal injury and clinical negligence claims a claimant who succeeds overall, even if not succeeding on all the allegations advanced, is likely to recover costs without any deduction for an issue that fails, or at least unless the allegation was unreasonable and/or unsupported by the evidence.

Fixed costs and assessed costs

At first sight the post-2013 version of the CPR appeared to contain tension between the terms of Pt 36 and CPR Pt 45 where, in a claim subject to fixed costs under Pt 45 s.IIIA, the claimant obtained judgment "at least as advantageous" as the claimant's own Pt 36 offer and the provision, in CPR r.36.17(4) for the claimant to have "costs" assessed on the indemnity basis from the end of the relevant period in any such offer.

This point was considered by the Court of Appeal in *Broadhurst v Tan*.[16]

The claim arose out of a road traffic accident. Following a fast-track trial the district judge held that the defendant was wholly liable for that accident.

When dealing with costs, following the trial, the attention of the district judge was drawn to (as the rule then read) CPR r.36.14 and CPR r.36.14A, being invited to apply at least some of the consequences set out in CPR r.36.14(3). The judge ruled against these submissions on behalf of the claimant, explaining:

[15] *Webb v Liverpool Women's NHS Foundation Trust* [2016] EWCA Civ 365; [2016] 1 W.L.R. 3899 at [38].
[16] *Broadhurst v Tan* [2016] EWCA Civ 94; [2016] 1 W.L.R. 1928.

> "The court declines to apply CPR 36.14(3)(a) and (b) … or (b) and (c) on the basis that … the Pt 36 offers relate solely as to liability and not as to quantum and secondly, in any event there appears to be a tension between that part and Pt 36.14(3), and permission to appeal is granted in an attempt to resolve that tension."

The claimant appealed the ruling on costs.

At the hearing of the first appeal the preliminary issue was whether the judge was right to hold CPR r.36.14(3) applied only to a Pt 36 offer dealing with quantum, and not liability.

HH Judge Robinson accepted, applying *Huck v Robson*,[17] the offer of 50 per cent was a valid a Pt 36 offer and went on to hold:

> "I am driven to conclude that rule 36.14(3) must apply to a case where a claimant makes a Pt 36 offer to settle in a case where Section IIIA of Part 45 applies, and where the judgment is at least as advantageous to the claimant as the proposals contained in that offer."

That was not, however, the end of the matter as the judge considered there were difficulties inherent in conducting any assessment of costs in a case which would otherwise be subject to the fixed costs regime, given that the expiry date of the offer was bound to fall within one of the stages and could result in an award of costs on top of the staged costs with the prospects of a "windfall".

Accordingly, HH Judge Robinson held:

> "I find that the reasoning of the Court of Appeal in *Solomon v Cromwell Group PLC* is applicable also to the factual circumstances of this case. The generality of rule 36.14(3) does not trump the specific fixed costs regime of Section IIIA of Part 45."

On this basis the judge concluded that whilst there was a valid Pt 36 offer and the terms of CPR r.36.14(3) applied there was not, in a case such as this, any difference between profit costs assessed on the indemnity basis and fixed costs provided by CPR Pt 45 s.IIIA (subject always to CPR r.45.29J).

The claimant pursued a further appeal, to the Court of Appeal.

In the Court of Appeal, recognising that the issue concerned the interplay between Pt 45 s.IIIA and Pt 36, the Master of the Rolls went on to observe that Pt 45 s.IIIA made no provision as to what should happen when a claimant had made a successful Pt 36 offer and held:[18]

> "The effect of rules 36.14 and 36.14A when read together is that, where a claimant makes a successful Pt 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."

It would not, accordingly, be necessary to resolve the apparent tension between different aspects of the CPR on the basis of identifying the specific provision in the way the Court of Appeal, under the previous version of the CPR, had concluded that specific costs provisions in Pt 45 prevailed over the more general provision in the then Pt 36: *Solomon v Cromwell Group Plc*.[19]

Accordingly, the Court of Appeal concluded there was no doubt as to the true meaning of the rule, the tension being clearly resolved in favour of CPR r.36.14A. If that were not so then it would have been

[17] *Huck v Robson* [2002] EWCA Civ 398; [2003] 1 W.L.R. 1340.
[18] *Broadhurst v Tan* [2016] EWCA Civ 94; [2016] 1 W.L.R. 1928 at [25].
[19] *Solomon v Cromwell Group Plc* [2011] EWCA Civ 1584; [2012] 1 W.L.R. 1048.

legitimate to use the explanatory memorandum as an aid to construction (as the condition specified by Lord Browne-Wilkinson in *Pepper v Hart* would be satisfied).[20] That explanatory memorandum stated:[21]

> "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 Pt 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."

The Master of the Rolls also observed:[22]

> "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. This conceptual difference was accepted in *Solomon* at para 19."

Whilst there might be some difficulties in assessment where costs were partly fixed and partly assessed these were not insurmountable. The Master of the Rolls held:[23]

> "Where a claimant makes a successful Pt 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."

HH Judge Robinson had suggested that assessment of costs on the indemnity basis would lead to windfalls where lawyers were retained on terms they would be paid only fixed costs yet there was no evidence to support that statement. Hence the Master of the Rolls concluded:[24]

> "In my view, the problems identified by Judge Robinson on which Mr Laughland relies do not suggest that Parliament could not have intended to create a scheme which is to be interpreted in the way that I have described."

Consequently, if judgment, in a claim otherwise subject to fixed costs under Pt 45 s.IIIA, is "at least as advantageous" to the claimant as a Pt 36 offer that the claimant has made then, unless this would be "unjust" the claimant will receive the fixed costs, under Pt 45 s.IIIA, applicable at the "staging point" when the relevant period in the offer expires and, thereafter, costs which will be assessed on the indemnity basis.

[20] *Pepper (Inspector of Taxes) v Hart* [1993] A.C. 593; [1992] 3 W.L.R. 1032.
[21] *Broadhurst v Tan* [2016] EWCA Civ 94; [2016] 1 W.L.R. 1928 at [15].
[22] *Broadhurst v Tan* [2016] EWCA Civ 94; [2016] 1 W.L.R. 1928 at [30].
[23] *Broadhurst v Tan* [2016] EWCA Civ 94; [2016] 1 W.L.R. 1928 at [31].
[24] *Broadhurst v Tan* [2016] EWCA Civ 94; [2016] 1 W.L.R. 1928 at [33].

The approach taken in *Broadhurst* was followed, and extended, in *Lowin v W Portsmouth & Co Ltd*[25] which was an appeal, by the claimant, against an order dealing with costs of detailed assessment proceedings.

The claimant's costs were provisionally assessed at a sum higher than a Pt 36 offer made by the claimant on costs. However, the Master concluded that CPR r.36.17(4) did not dislodge the application of CPR r.47.15(5), capping the maximum amount awarded for a provisional assessment.

On appeal Elisabeth Laing J held that the terms of CPR r.47.40 imported Pt 36 into Pt 47, though with some express modifications. Although costs under Pt 47 were capped rather than fixed the reasoning in *Broadhurst v Tan*[26] was of assistance.

Pt 36 applied, and was not displaced by CPR r.47.15(5), so the cap on the costs of a provisional assessment did not displace the entitlement to having costs assessed and on an indemnity basis. That would increase the incentive to accept a sensible Pt 36 offer.

"Judgment"?

The concept of a "judgment" is central to the costs, and other, consequences of Pt 36 offers. If the defendant makes a Pt 36 offer the claimant is likely to face adverse costs consequences unless a judgment is obtained which is "more advantageous" than such an offer. If the claimant has made a Pt 36 offer it is necessary for the claimant to obtain judgment which is "at least as advantageous" as that offer.

Consequently, what will amount to a "judgment" for these purposes is an important consideration. That point was considered in *Vanden Recycling Ltd v Tumulty*.[27]

That case concerned "employee competition" litigation which was brought by the claimant against three defendants. A consent order was made containing terms of settlement agreed between the claimant and the second defendant, including provision for payment of £275,000 in full and final settlement of the claimant's claims against the second defendant.

The third defendant argued that as the judgment by consent against the second defendant had been satisfied that satisfied judgment, as against a joint or concurrent tortfeasor, discharged the tort so there was no claim left to bring against the third defendant.

Cox J rejected the claimant's argument that there was no reference in the order to a "judgment", and hence no "judgment" that had been satisfied, as well as the argument that it was clear, from the terms of the order, that the claim was to continue against the third defendant, explaining:[28]

> "There is no basis, first, for the suggestion that the Consent Order of 25 June is not to be regarded as a consent judgment. Mr Quinn described it in argument as 'an agreement by the Claimant not to continue to sue the Second Defendant, which is incorporated in the order of the court staying the action', but this somewhat strained interpretation of a straightforward court order cannot in my view remove or reduce its status as a judgment of the court containing the terms agreed by the parties. Consent judgments and orders are referred to interchangeably at CPR 40.6 and what matters is its substance rather than its form. It is therefore correct to refer to this consent judgment as having been satisfied, it being accepted that Bolton has paid the sums it was ordered to pay."

That was important for the purposes of determining the application but, on a broader basis, may be of significance to Pt 36 as where the parties agree an order, or the court makes an order, reflecting terms agreed that can properly be regarded as a "judgment" that will trigger the benefits conferred by CPR

[25] *Lowin v W Portsmouth & Co Ltd* [2016] EWHC 2301 (QB); [2017] C.P. Rep. 1.
[26] *Broadhurst v Tan* [2016] EWCA Civ 94; [2016] 1 W.L.R. 1928.
[27] *Vanden Recycling Ltd v Bevin Tumulty* [2015] EWHC 3616 (QB).
[28] *Vanden Recycling Ltd v Bevin Tumulty* [2015] EWHC 3616 (QB) at [44].

r.36.17. The appropriateness of an order recording the terms agreed, for example, on late acceptance of an offer by the defendant, was acknowledged in *Ontulmus v Collett*.[29]

At least as advantageous/unjust?

If there is a "judgment" the court will need to determine whether such a judgment is, as appropriate, "more advantageous" or "at least as advantageous" as the relevant offer and, if so, deal with the sometimes connected question of whether, nevertheless, it would be "unjust" for the usual consequences to apply.

These related topics were considered in *Jockey Club Racecourse Ltd v Willmott Dixon Construction Ltd*.[30] The background was that the defendant had been engaged by the claimant to design and construct a new grandstand at Epsom Racecourse. Problems subsequently arose with the roof of the grandstand. In high winds, which were not unexpectedly high, the roof was damaged in two places.

The claimant had to carry out repairs to the roof and the costs of those repairs, and consequential losses, were claimed in the proceedings brought by the claimant against the defendant, ultimately formulated in schedules to amend the particulars of claim served on 30 January 2015. Also on 30 January 2015 the claimant made the defendant an offer to settle:[31]

> "the issue of liability for losses arising out of the defects in the roof … (including losses arising out of storm damage occurring in January 2012 and December 2013)."

This was on the basis that the defendant would: "accept liability to pay 95% of our client's claim for damages to be assessed."

By the time of the pre-trial review on 17 December 2015 the defendant had conceded liability, so the preliminary issue was resolved, by consent, in the claimant's favour.

The claimant contended entitlement to the benefits conferred by Pt 36 on a claimant who has bettered the claimant's own Pt 36 offer.

The defendant argued that the offer had been made before the claimant's claim had been fully pleaded. Edwards-Stuart J disposed of this point shortly by concluding:[32]

> "The offer related to liability, not to quantum. The fact that quantum had not been fully pleaded by the time when the offer was made does not affect its validity, although it may be a factor to take into account when deciding whether or not it would be unjust to make an order for indemnity costs from the date when the offer could have been accepted."

The defendant also argued that the claimant would only have beaten the offer if at least 95 per cent of the roof required replacement. Edwards-Stuart J again disposed with this argument shortly by holding:[33]

> "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."

The next issue was whether the offer was an offer within the meaning of Pt 36 and, if so, a genuine attempt to settle liability (a related point being whether an offer coming close to requiring total capitulation could be an offer at all).

Edwards-Stuart J considered the most relevant authorities to be *Huck v Robson*[34] and *AB v CD*.[35]

[29] *Ontulmus v Collett* [2014] EWHC 4117 (QB).
[30] *Jockey Club Racecourse Ltd v Willmott Dixon Construction Ltd* [2016] EWHC 167 (TCC); [2016] 4 W.L.R. 43.
[31] *Jockey Club Racecourse Ltd v Willmott Dixon Construction Ltd* [2016] EWHC 167 (TCC); [2016] 4 W.L.R. 43 at [13].
[32] *Jockey Club Racecourse Ltd v Willmott Dixon Construction Ltd* [2016] EWHC 167 (TCC); [2016] 4 W.L.R. 43 at [19].
[33] *Jockey Club Racecourse Ltd v Willmott Dixon Construction Ltd* [2016] EWHC 167 (TCC); [2016] 4 W.L.R. 43 at [19].
[34] *Huck v Robson* [2002] EWCA Civ 398; [2003] 1 W.L.R. 1340.
[35] *AB v CD* [2011] EWHC 602 (Ch).

In *Huck* Tuckey LJ did accept that a judge would have discretion to refuse the offeror Pt 36 benefits where "if was self-evident that the offer made was merely a tactical step" and Schiemann LJ endorsed this approach where, in his words, the claimant offeror had "recovered in full after making a Pt 36 offer for marginally less".[36]

Edwards-Stuart J also endorsed the views, on this point, of Norris J in *Wharton v Bancroft* when he said:[37]

> "All Pt 36 offers are tactical in the sense that they are designed to take advantage of the incentives provided by Pt 36. A low offer in a case where the offeror considers that the offeree's position has no merit cannot be written off as self evidently "merely a tactical step". But the principle has no application here. The sum to be received by each of the Daughters was small. But the offer was not derisory."

Consequently, Edwards-Stuart J concluded:[38]

> "I am persuaded by the authorities that the offer in this case was a valid offer within the meaning of Pt 36 and 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."

Finally, the defendant argued *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 CPR r.36.17(5)(e), namely: "whether the offer was a genuine attempt to settle the proceedings", a specific factor now found in the rule to which the court should have regard when deciding whether the usual costs consequences under CPR r.36.17 would be "unjust". Rejecting this argument Edwards-Stuart J held:[39]

> "I have no doubt whatever that Tuckey LJ's observations would have been to no different effect if that provision had been included in the rule at the time."

This is, accordingly, an important decision considering what is an "offer", confirming any such offer, for the purposes of Pt 36, does not have to reflect an available outcome of the litigation and clarifying that the change to CPR r.36.17 in April 2015 affirms, rather than displaces, the approach which should be taken to claimant offers on liability adopted in *Huck*.

Purrunsing v A'Court & Co[40] considered the very specific point about whether, in deciding whether a judgment was "at least as advantageous" as a Pt 36 offer interest accrued, from the end of the relevant period in the offer up to judgment, should be left out of account. On this point HH Judge Pelling QC held:[41]

> "As is apparent from the extract from the Rules set out above, by CPR r.36.5(4) a Pt 36 offer to pay money is deemed to include all interest down to the date when the relevant period for acceptance of the offer expires. In order to work out whether a judgment is more advantageous than such an offer it is necessary to ensure that the offer or the judgment sum is adjusted by eliminating from the comparison the effect of interest that accrues after the date when the relevant offer could have been accepted. In my judgment this is the effect of the words '… *better in money terms* …' in CPR r.36.17(2). If that is not done then comparing the offer with the judgment is not comparing like with like and thus it is not possible to assess whether the judgment is '… *more advantageous* …' in money terms than the offer. Interest compensates for the loss of use of money over a given period. In theory

[36] *Jockey Club Racecourse Ltd v Willmott Dixon Construction Ltd* [2016] EWHC 167 (TCC); [2016] 4 W.L.R. 43 at [32].
[37] *Wharton v Bancroft* [2012] EWHC 91 (Ch); [2012] W.T.L.R. 727 at [22].
[38] *Jockey Club Racecourse Ltd v Willmott Dixon Construction Ltd* [2016] EWHC 167 (TCC); [2016] 4 W.L.R. 43 at [37].
[39] *Jockey Club Racecourse Ltd v Willmott Dixon Construction Ltd* [2016] EWHC 167 (TCC); [2016] 4 W.L.R. 43 at [36].
[40] *Purrunsing v A'Court & Co* [2016] EWHC 1528 (Ch); [2016] C.I.L.L. 3861.
[41] *Purrunsing v A'Court & Co* [2016] EWHC 1528 (Ch); [2016] C.I.L.L. 3861 at [15].

> at least interest that accrues due for the period between the last date when the offer could have been accepted and the date of judgment is neutral and so immaterial in deciding the question whether a subsequent judgment is '… *more advantageous* …' than a previous offer. The only interest that is material is that included or deemed included within the offer."

Accordingly, the judge ruled that the claimant had not obtained judgment "at least as advantageous" as the claimant's offer and so was not, therefore, entitled to the benefits provided for under CPR r.36.17(4).

Costs on judgment (under CPR Pt 44)

Case law continues to draw a sharp distinction between the, as they are sometimes termed, "automatic" costs consequences under Pt 36 and the more general discretion under Pt 44. This is of particular significance when a party elects not to make an offer pursuant to Pt 36 as some recent decisions confirm.

In *Burrell v Clifford*[42] the claimant (who was employed by the Royal Family latterly as butler to the late Diana, Princess of Wales) was awarded damages of £5,000 in the substantive claim for breach of confidence and misuse of private information by the defendant (for many years a prominent and successful public relations consultant).

The claimant's costs budget had been set at £128,695.41 (excluding VAT).

Following the award of damages the claimant sought an order that the costs of the proceedings be paid by the defendant, on the basis the usual starting point is that costs follow the event and there were no particular circumstances which warranted any different order.

The defendant relied on the terms of an offer which had been made on 30 January 2015, without prejudice save as to costs, to pay the clamant damages of £5,000 and also payment of the claimant's reasonably incurred legal costs and disbursements up to £5,000 inclusive of VAT. The defendant argued that the court should make a different order to the one that costs follow the event on the basis of the discretion conferred by CPR r.44.2 and as the offer letter stated:

> "If your client fails to do better than the settlement offer at trial, we intend to seek an order requiring your client to pay our client's costs from the expiry of the deadline together with the interest on those costs from that date until payment."

The judge noted the sum offered by the defendant in damages was exactly the amount awarded to the claimant but the proposal for costs in the offer did not reflect the incurred costs and disbursements up to the date of that offer, a point confirmed by the costs budgeting exercise. For these reasons the judge concluded that costs, at the time of the offer, were "well in excess of the sum offered by that without prejudice save as to costs letter".

Accordingly, the judge concluded:

> "So, dealing with that letter, it seems to me that it was an inadequate offer. It did not give the defendant protection. (Counsel for the defendant) is fully entitled to invoke the last paragraph of the letter, and refer me to it. But the position is that, in my judgment, Mr. Burrell has done better than that settlement offer at trial, and Mr. Clifford's appropriate remedy was to offer the £5,000 in respect of damages that he happens, in my judgment, to have got right, and the costs incurred down to that date subject to detailed assessment in the usual way."

Sugar Hut Group Ltd v AJ Insurance Service[43] was an appeal, by the claimant, against a costs order made following an assessment of damages after earlier agreement on liability between the parties.

[42] *Burrell v Clifford* [2016] EWHC 578 (Ch).
[43] *Sugar Hut Group Ltd v AJ Insurance Service* [2016] EWCA Civ 46; [2016] C.P. Rep. 19.

Damages had been assessed by the court so that, after apportionment to reflect an agreement reached on liability, the sum payable by the defendant to the claimant was £1,090,021.02 (though after allowing for interim payments already made the balance payable was only £277,021).

Tomlinson LJ summarised the status of negotiations by observing:[44]

> "Pt 36 and Calderbank offers had been made by both sides, but it was common ground that none had been 'effective', in that each of the Claimants' offers had been for sums higher than in the event recovered, and each of the Defendant's offers had been for sums lower than in the event allowed. The last of the Pt 36 offers made by the Defendant was on 23 May 2014. It offered to settle the claim for a payment of a further £250,000 in addition to the payments made on account."

At first instance, whilst agreeing with the approach of Ramsey J in *Hammersmatch Properties (Welwyn) Ltd v Saint-Gobain Ceramics and Plastics Ltd*[45] that a "near miss" offer should not be relevant for these purposes, Eder J concluded that the offer was relevant to conduct, in particular whether it was reasonable for a party to pursue or contest an allegation or issue and whether a party who succeeds, in whole or part, had exaggerated its claim.

On appeal Tomlinson LJ considered that:[46]

> "Although the Judge directed himself correctly by reference to the relevant authorities concerning the exercise of the court's discretion under CPR 44.2, I have no doubt that he fell into error in his approach to the Pt 36 offer and, partly in consequence thereof, mischaracterised the conduct of the Claimants as unreasonable. His award of costs fell outside the ambit of reasonable decision-making."

Tomlinson concluded:[47]

> "The Claimants' recovery exceeded the Pt 36 offer by a comfortable margin and in any event there is no longer a 'near-miss' rule. There is no basis upon which it is appropriate to deprive the Claimants of their costs after 13 June 2014, still less to require them to pay the Defendant's costs. The Claimants' failure to succeed on all of their claim is adequately reflected in the Judge's Order depriving them of 30% of their costs."

Costs on acceptance (under Pt 36)

The decisions in *Webb* and *Broadhurst* clearly identify the proper approach to costs where judgment is "more advantageous" or "at least as advantageous" as a Pt 36 offer, but do those principles apply where a Pt 36 offer is accepted, particularly after expiry of the relevant period?

The general approach adopted in *Webb* was applied, in the context of late acceptance, by the Court of Appeal in *Dutton v Minards*.[48]

On 30 July 2010, the defendant made a Pt 36 offer of £25,000. The claimant subsequently commenced proceedings and, on 21 October 2011, made a Pt 36 offer of £18,000. The defendant, quite deliberately, waited until one minute after the 21-day relevant period in the claimant's offer dated 21 October 2011 had expired before accepting that offer.

The defendant then argued that the claimant should have accepted the defendant's earlier offer of £25,000 and, having pursued the litigation but ending up with a lower sum it was not fair or just for the defendant to have to bear the additional costs incurred after the defendant's offer.

[44] *Sugar Hut Group Ltd v AJ Insurance Service* [2016] EWCA Civ 46; [2016] C.P. Rep. 19 at [10].
[45] *Hammersmatch Properties (Welwyn) Ltd v Saint-Gobain Ceramics & Plastics Ltd* [2013] EWHC 2227 (TCC); [2013] B.L.R. 554.
[46] *Sugar Hut Group Ltd v AJ Insurance Service* [2016] EWCA Civ 46; [2016] C.P. Rep. 19 at [13].
[47] *Sugar Hut Group Ltd v AJ Insurance Service* [2016] EWCA Civ 46; [2016] C.P. Rep. 19 at [31].
[48] *Dutton v Minards* [2015] EWCA Civ 984; [2015] 6 Costs L.R. 1047.

At first instance the judge concluded that, "on the facts" it was not "unjust" to apply the terms of CPR r.36.10(5). Accordingly, the defendant was not entitled to the costs after 21 days from the defendant's offer.

In the Court of Appeal Lewison LJ observed that it was clear from the terms of CPR r.36.10(5) the starting point was that the claimant would be entitled to costs up to the end of the relevant period and that the offeree, which in this case was the defendant, would be liable for the claimant's costs thereafter to the time of acceptance. However, that was subject to the important qualification "unless the court ordered otherwise".

In deciding whether to order otherwise the Court of Appeal confirmed in *SG v Hewitt*,[49] by analogy with the terms of CPR r.36.14, the order envisaged by CPR r.36.10(5) would be made unless that would be "unjust".

By concluding "on the facts" the application of CPR r.36.10(5) was not unjust the judge had both posed the right question.

In answering that question the judge had, first, to decide whether or not applying the presumption in CPR r.36.10(5) would be unjust and, if so, deciding what other order to make as to costs. That was an exercise of judicial discretion. In these circumstances Lewison LJ observed:[50]

> "There is, therefore, a formidable hurdle to overcome on appeal because the question is not whether we would have made the order that the judge made, but whether the conditions exist for an appeal court to interfere with the value judgment of and exercise of discretion by the lower court."

The defendant's argument, that the judge adopted the wrong starting point by failing to recognise the claimant had not obtained judgment which was "more advantageous" than the defendant's offer, was rejected with Lewison LJ observing:[51]

> "in a sense, the Claimants had beaten the offer of 30 July because the costs consequences for them, at any rate if the default position in Pt 36.10(5) applied, were much to their financial advantage, which, after all, is why this appeal is being brought at all."

Furthermore, Lewison LJ accepted the claimant's argument that:[52]

> "the primary focus of Pt 36.10(5) insofar as it enables a court to disapply the presumption is the costs incurred since the expiry of the relevant period. That is certainly how the point has arisen in previous cases. Here, by contrast, the Defendants seek to obtain advantage from the late acceptance of the Pt 36 offer and, moreover, an advantage that relates to a period before the relevant period even began."

The costs consequences of late acceptance, and the need for the court to conclude it would be "unjust", before departing from the usual consequences set out in Pt 36, was also considered in *C v Barts Health NHS Trust*.[53]

The claimant alleged delay on the part of the defendant in treatment after he suffered a dissection of his aorta. The claimant contended that with timely surgical repair he would have made a better recovery and avoided a blood clot forming in the aorta which occluded the left middle cerebral artery causing a catastrophic infarction of the brain. The defendant admitted breach of duty at a relatively early stage but, initially, denied causation of any injury, loss or damage.

[49] *SG (A Child) v Hewitt (Costs)* [2012] EWCA Civ 1053; [2013] 1 All E.R. 1118.
[50] *Dutton v Minards* [2015] EWCA Civ 984; [2015] 6 Costs L.R. 1047 at [27].
[51] *Dutton v Minards* [2015] EWCA Civ 984; [2015] 6 Costs L.R. 1047 at [40].
[52] *Dutton v Minards* [2015] EWCA Civ 984; [2015] 6 Costs L.R. 1047 at [42].
[53] *C v Barts Health NHS Trust* [2016] EWHC 500 (QB); [2016] 2 Costs L.R. 271.

The claimant's claim was put at a figure exceeding £1 million. However, on 24 February 2016, shortly before the trial was due to commence on 7 March 2016, the claimant accepted a Pt 36 offer of £50,000, which had been made by the defendant on 4 June 2015.

HH Judge McKenna concluded it would not be "unjust" to depart from the usual order and held:[54]

> "The difficulty with the broad thrust of the Defendant's submissions as it seems to me is that the Defendant had the means and opportunity to protect itself in respect of the costs that it was going to have to incur in respect of the causation issue but chose for whatever reason when making its Pt 36 offer to frame the offer as a settlement of the whole claim and then subsequently when that offer was not accepted did not make any revised offer excluding causation. True it is that in rejecting the offer and pursuing the action up to or close to trial the Claimant acted unreasonably but Pt 36 expressly provides an effective remedy to cater for that very situation in that the Claimant will have to pay all the Defendant's costs incurred post expiry of the Pt 36 offer and in the circumstances of this case it seems to me that the assessment of those costs should be on the indemnity basis. To my mind, there is nothing unjust about making the usual order in the circumstances of this case, accepting as I do, the thrust of the Claimant's submissions on this issue."

The decision to make the party accepting late pay costs after the end of the relevant period on the indemnity basis is of particular significant, given the judgment in *Broadhurst*, to claims subject to fixed costs under Pt 45 s.IIIA, a point explored in *Sutherland v Khan*.[55]

The claimant and defendant were involved in a road traffic accident. The claimant's claim was dealt with in accordance with the Pre-action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ("The RTA Protocol"). The claim subsequently left the RTA Protocol and Pt 7 proceedings were issued.

The claimant made a Pt 36 offer to settle the whole claim at £2,475. The defendant accepted that offer but only some 28 days after the relevant period in the offer had expired.

The defendant resisted an argument by the claimant for indemnity costs by relying on *Fitzpatrick Contractors Ltd v Tyco Fire & Integrated Solutions (UK) Ltd*.[56] Giving judgment in that case Coulson J, on the basis of earlier authorities such as *Petrotrade Inc v Texaco Ltd*,[57] held that the claimant, who had been spared the costs, disruption, and stress of trial, should not recover indemnity costs on late acceptance of a Pt 36 offer by the defendant.

The claimant, however, emphasised the importance of Pt 36 in the need to incentivise parties to both make and accept offers, an example cited being *Broadhurst v Tan*.[58]

District Judge Besford preferred the argument advanced by the claimant and held:[59]

> "The interpretation of these cases put forward by Coulson J is not, with respect how I read the more recent cases coming forth from higher courts. My understanding is, as I have alluded to, that there has been a tightening up as to the 'carrot and stick effect' of Pt 36 offers. To my mind, notwithstanding the comments of Coulson J, if there was no incentive or penalty there would be little point in a defendant accepting offers early doors, as opposed to waiting immediately prior to trial. It also seems to me unsatisfactory that there should be penalties flowing if you do not beat an offer at trial, whereas if you settle before trial there are none. This position does not sit comfortably with the overriding

[54] *C v Barts Health NHS Trust* [2016] EWHC 500 (QB); [2016] 2 Costs L.R. 271 at [17].
[55] *Sutherland v Khan* , unreported, 21 April 2016 CC (Kingston upon Hull).
[56] *Fitzpatrick Contractors Ltd v Tyco Fire and Integrated Solutions (UK) Ltd (formerly Wormald Ansul (UK) Ltd)* [2009] EWHC 274 (TCC); [2009] B.L.R. 144.
[57] *Petrotrade Inc v Texaco Ltd* [2000] All E.R. (D.) 724.
[58] *Broadhurst v Tan* [2016] EWCA Civ 94; [2016] 1 W.L.R. 1928.
[59] *Sutherland v Khan* , unreported, 21 April 2016 CC (Kingston upon Hull) at [19].

> objective of saving expense. In my view, I think that *Fitzpatrick* is perhaps a statement of the law as it was in 2009, but not necessarily the way the law in respect of Pt 36 is being interpreted in 2016."

Consequently, the judge held that:[60]

> "In conclusion, I do not find that the court has to find that the defendant has, in some way been guilty of inappropriate behaviour or conduct capable of censor before I can consider making an order for costs on an indemnity basis."

The claimant was, accordingly, awarded costs, to be assessed on the indemnity basis, from the end of the relevant period in the claimant's Pt 36 offer.

Whilst, anecdotally, other judges have reached a different view on the costs consequences of late acceptance the decision in *Sutherland* is, at the time of writing, the only reported decision on this point.

Conclusion

The recent cases, reviewed in this and the previous article, confirm the increasing importance of Pt 36, particularly in the new era of fixed costs for some types of claim, and, more generally, how Pt 36 affords a degree of certainty not available where reliance is placed, under Pt 44, on a non-Pt 36 offer to settle.

For the reasons outlined by the last article in this series, however, it remains crucial, if parties are to secure the potential benefits of Pt 36, to ensure the rules on form and content are complied with and that parties do appreciate exactly what the consequences of Pt 36 offers are.

[60] *Sutherland v Khan* , unreported, 21 April 2016 CC (Kingston upon Hull) at [20].

Judicial Review: An Unlikely Remedy for The Defaulting Indemnity Insurer: *R. (on the application of Enterprise Insurance Company PLC) v The Financial Ombudsman Service and Mr George Head (Interested Party)*[1]

Angela Sandhal[*]

LT After the event insurance; Costs orders; Financial Ombudsman Service; Judicial review

This article charts the unsuccessful attempt by the now defunct Enterprise Insurance Company PLC ("Enterprise") to judicially review a decision of the Financial Services Ombudsman ("FSO") in what has been a long and protracted set of legal proceedings involving both private and public law.

Mr George Head, the claimant in an unsuccessful claim for professional negligence against his former solicitors in an industrial disease claim, had successfully complained to the FSO about his after the event ("ATE") insurers after they refused to indemnify him in respect of an adverse costs order made against him for the not insubstantial sum of £26,012.80. Enterprise had claimed that they were entitled to repudiate cover ab initio on the grounds that misrepresentation had occurred in the facts Mr Head had provided to his solicitors and which were subsequently used to create his insurance cover. The FSO did not agree and upheld Mr Head's complaint ("the decision").[2]

There is no right of appeal of an FSO's final decision and therefore the only remedy available to any party seeking to challenge the outcome is by bringing a judicial review in the Administrative Court in the High Court of Justice. As with any claim for judicial review, an application must be made "promptly and in any event not later than 3 months after the grounds to make the claim first arose" as required by CPR Pt 54; and there must be arguable public law grounds capable of challenging any decision. However, the threshold for challenging public bodies is especially high in cases of specialist tribunals like the FSO which has a wide discretion when making decisions and is not bound by the same rules of evidence that apply in court.

The Decision of the FSO in Mr Head's case seemed perfectly reasonable and reflected what is the central characteristic of the statutory scheme: a complaint is determined by reference to what is, in the opinion of the ombudsman, "fair and reasonable" in all the circumstances of the case, i.e. a subjective test. The FSO found amongst other matters that "the fact that [Mr Head] turned out to be a poor witness doesn't necessarily mean he deliberately lied".[3]

It did, therefore, come as a surprise when Enterprise decided to issue a judicial review one day before the three-month period was about to expire. Prior to that, Mr Head was not aware of the proceedings, having not been served with the letter before claim despite his clear status as an interested party in the claim. This omission was unfortunate as by the time the details were known, Mr Head had already brought a claim in the County Court to enforce the FSO's decision—claim which subsequently had to be stayed pending the outcome of the judicial review.

[1] *R. (on the application of Enterprise Insurance Company PLC) v The Financial Ombudsman Service and Mr George Head (Interested Party)* 20 October 2014.

[*] Public Law and Judicial Review Solicitor at Atherton Godfrey Solicitors, who acted for Mr Head in these proceedings.

[2] Sarah Naylor, "What to do when After-the-Event Insurers Refuse to Indemnify" [2016] J.P.I. Law 56.

[3] Complaint Reference 1550-8768/AMC/IF54 (19 June 2015).

Unsurprisingly, the judicial review was sternly defended by both the FSO and Mr Head. Although Mr Head could have chosen not to participate in the proceedings in the expectation that the FSO would itself successfully defend the claim for him, this was an unusual case where Enterprise was seeking an order that the court dismiss Mr Head's complaint to the FSO as part of the remedy sought. Although such a move by the Administrative Court would be very rare indeed, it would have essentially left Mr Head without a remedy. Moreover, the prospect of having to deal with further lengthy proceedings against a well-resourced insurance company provided an incentive to bring an end to the claim sooner rather than later.

The grounds for judicial review raised by Enterprise were not compelling. The central argument in the claim seemed to be that the FSO may not have considered the correct legal test when concluding whether there had been "misrepresentation" by Mr Head. As well as submissions on conduct and "promptitude" the claim was, in Mr Head's submission and those advanced by the FSO, misconceived and without merit. Enterprise was simply seeking a rehearing of the primary complaint rather than a review of the FSO's decision on public law principles—a mistake often made by those unfamiliar with the jurisdiction of judicial review.

The case came before HH Judge Allan Gore QC sitting as a Judge of the High Court on 11 December 2015 who refused the claimant permission to bring a claim. His reasons included Enterprise's conduct and lack of promptitude causing prejudice to Mr Head. In relation to merits, HH Judge Gore QC gave the following informative judgment:

> "The challenge misconceives the role and function of the Defendant, the jurisdiction of the Defendant is simply to decide what upon a subjective test is considered to have been fair and reasonable. Although directed to take into account relevant law, regulations, regulatory rules guidance and standards, codes of practice and industry standards, including therefore the judgement of Her Honour Judge Belcher QC, at the end of the day the Defendant makes a decision of fact and judgment as to what is considered to have been fair and reasonable. This challenge is nothing more than an attempt to appeal that decision. The Defendant had evidence and argument that entitled him to come to his decision. It is not for this court to substitute its views of the evidence for those of the Defendant. The Defendant COULD have come to the conclusion that the Interested Party consciously gave a deliberately false account which could be characterised as misrepresentation, but he was not obliged to do so on the evidence for the reasons stated in the Defendant's Summary Grounds of Resistance. No error of law is apparent. This was not a Wednesbury unreasonable or irrational or perverse decision. There are no public law grounds to challenge the decision."

The permission application was renewed and refused a second time at an oral hearing. The judgment was given ex tempore and unfortunately there is no transcript available, although there is no reason to suppose that the reasons differed in any substantial terms to those provided by HH Judge Gore QC earlier. Enterprise did not apply for permission to appeal to the Court of Appeal and the adverse costs order was subsequently discharged by Enterprise bringing to an end all substantive proceedings.

What is interesting about this case is that it highlights the suitability of the FSO as a low cost and effective arbitrator for aggrieved claimants in litigation cases dealing with ATE insurers seeking to repudiate ATE cover—something which occur with increasing regularity as defendants in personal injury litigation seek to focus on attempts to establish a "fundamentally dishonest" claimant in order to displace the usual cost protection. Although that was not an issue in Mr Head's case, Enterprise had sought to rely, however erroneously, on the trial judge's remarks about inconsistencies in his evidence as between that which appeared in his written statement and that given at trial orally, suggesting that insurance companies are alive to the possibility of repudiating cover if the circumstances might allow it.

Even so, the current case should serve as a warning to ATE providers that attempts to repudiate cover will almost inevitably find themselves being arbitrated by the FSO whether the insurance company wishes it or not. What follows will be a legally binding decision in what is essentially a private dispute between two parties to an insurance contract and the High Court will rarely intervene in such decisions.

Similarly, those acting for claimants will need to be cautious when preparing their client's evidence. Mr Head's complaint to the FSO was in part successful after the FSO had found that Mr Head was in the hands of his former solicitors who had drafted his witness statement based on questions they had asked him.

Rehabilitation for Traumatic Brain Injury: The Long-Term Perspective

Daniel Friedland*

Brain; Community care; Personal injury; Rehabilitation

Abstract

Rehabilitation for traumatic brain injury can take place at different stages, including the acute stage, the in-patient stage, and in the community. This paper argues that all the stages of rehabilitation are important, but that rehabilitation in the community—which is not always as comprehensively covered as rehabilitation in the other stages—is a crucial part of the overall rehabilitation process. The effectiveness of community rehabilitation and vocational rehabilitation is discussed, including the need for longer periods of community rehabilitation, and the need for specialised vocational rehabilitation. Finally, this paper considers the importance of community rehabilitation in the longer term, and in particular the importance of rehabilitation at different stages, including at times of specific life changes or stressors which can lead to the development of psychiatric disorders.

Introduction

Traumatic brain injury ("TBI") has been defined as an alteration in brain function, or other evidence of brain pathology, caused by an external force. Alteration in brain function includes amnesia for events before the injury (retrograde amnesia), amnesia for events following the injury (post-traumatic amnesia), loss or decreased consciousness following the injury, and neurological deficits (change in vision, aphasia). Evidence of brain pathology can include neuroimaging such as MRI and CT scans of the brain demonstrating trauma-related abnormalities.[1]

Falls are the leading cause of TBI among all age groups (35 per cent), followed by motor vehicle collisions or traffic accidents (17 per cent), being struck by an object (16.5 per cent) and assaults (10 per cent). The leading cause of death following TBI is road traffic accident (32 per cent). The main risk factors for TBI are age, gender, and socioeconomic status. Individuals at the extremes of age, young men, and those of lower socioeconomic status are at highest risk of sustaining a TBI.[2]

TBI can be divided into two broad categories: mild TBI and moderate-severe TBI.[3] A mild TBI is generally defined as one in which the individual does not lose consciousness for more than 30 minutes, post-traumatic amnesia does not exceed 24 hours, and the individual's Glasgow Coma Scale score is at least 13/15 within 30 minutes of the injury. If any of the above criteria are exceeded, or if trauma-related abnormalities are apparent on neuroimaging, then the TBI falls into the moderate-severe range. The incidence of TBI is approximately 200 per 100,000 population per year. Mild TBI accounts for approximately 75 per cent of TBI, and moderate-severe TBI accounts for approximately 25 per cent of TBI.[4] This article focuses on moderate-severe traumatic brain injury.

* Daniel Friedland is a Consultant Clinical Neuropsychologist/Psychologist, P.P.C.S., at 14 Devonshire Place, London, W1G 6HX; Honorary Clinical Research Fellow in the Division of Brain Sciences, Department of Medicine, St Mary's Hospital Traumatic Brain Injury Clinic,Imperial College.

[1] D.K. Menon et al., "Position statement: definition of TBI" (2010) 91 Arch. Phys Med. Rehabil. 1637.

[2] F.S. Zollman, *Manual of traumatic brain injury management* (New York: Demos Medical Pub, 2011).

[3] J. Malec et al., "The Mayo Classification System for TBI Severity" (2007) 24 *Journal of Neurotrauma* 1417.

[4] J. Bruns J. and W.A. Hauser, "The Epidemiology of Traumatic Brain Injury: A Review" (2003) 44 *Epilepsia* 2.

TBI is the main cause of disability in patients under 40 years of age. It has a significant impact on social and work reintegration and on quality of life.[5] The nature of disability following moderate-severe traumatic brain injury is diverse and can include both physical impairments (motor and sensory impairments), cognitive impairments (impairments of attention, processing speed, memory, organisational skills, planning and problem-solving, and emotional regulation), and psychological impairments (anxiety, low mood). For some people these impairments can be subtle and may only be evident in situations involving stress, in busy work environments, and/or when skills or emotional/behavioural control are under pressure.[6] These deficits, along with behaviour and personality changes, have a greater impact on post-TBI quality of life than do physical disabilities. Inability to return to preinjury employment, poor everyday functioning, relationship difficulties, and loss of independence are estimated to contribute to more than 80 per cent of the lifetime cost of TBI to society because of their impact on burden of disease, lost productivity, and long-term care needs.[7]

The stages of neurorehabilitation following moderate-severe traumatic brain injury

The acute stage

Individuals who have sustained a TBI may be treated in neurosurgical units or in local hospitals. Treatment may be conservative, i.e. monitoring without any neurosurgical intervention. Alternatively, there may be neurosurgical management of acute TBI including evacuation of an intracranial lesion, and decompressive craniectomy for control of intracranial hypertension. Survival rates following severe TBI have improved dramatically in recent years due to advances in acute neurosurgical intervention, potentially increasing the demand for rehabilitation.[8]

In-patient rehabilitation

In-patient rehabilitation usually involves a multi-disciplinary team approach in a hospital setting. The disciplines involved can include occupational therapy, neuropsychology, physiotherapy, speech and language therapy and nursing. The programme may be overseen by a consultant in rehabilitation medicine or a neurologist. Some services have access to neuropsychiatry. The length of in-patient rehabilitation can vary from six weeks to several months, or even up to a year or two in very severe TBI cases. The majority of services focus on less complex cognitive and physical impairments. There are some in-patient rehabilitation services which focus on individuals with highly complex physical and cognitive issues; for example, there are some specialised services that have been set up to manage complex physical impairment, low awareness, challenging behaviour, and neuropsychiatric impairments.

Overarching principles of in-patient rehabilitation include a multi-disciplinary team approach, the use of goal setting, the use of outcome measures, a client-centred approach, and a participation/functional approach.[9]

Leon-Carrion et al. (2013) looked at whether early neurorehabilitation improves a patient's functional recovery.[10] Their retrospective study was carried out on patients with severe TBI who underwent a minimum of four months of integral and multidisciplinary neurorehabilitation. Two groups were formed based on

[5] D. Steadman-Pare et al., "Factors associated with perceived quality of life many years after TBI" (2001) 16 *Journal of Head Trauma Rehabilitation* 330.

[6] A. Tyerman and N. King, *Psychological approaches to rehabilitation after traumatic brain injury* (Malden: BPS Blackwell, 2008).

[7] P. Bragge et al., "Quality of guidelines for cognitive rehabilitation following traumatic brain injury" (2014) 29 *The Journal of Head Trauma Rehabilitation* 4.

[8] P. Hutchinson and H. Seele, "Rehabilitation Following Traumatic Brain Injury: Challenges and Opportunities" (2006) 2(6) A.C.N.R. 22.

[9] J. McGrath, "Post-Acute In-Patient Rehabilitation" in A. Tyerman and N. King (eds), *Psychological approaches to rehabilitation after traumatic brain injury* (Malden: BPS Blackwell, 2008).

[10] J. Leon-Carrion et al., "The sooner patients begin neurorehabilitation, the better their functional outcome" (2013) 27 *Brain Injury* 1119.

time elapsed from brain injury to onset of rehabilitation. The early treatment group included patients who began rehabilitation within nine months post-TBI. The late treatment group began after the nine-month cut-off point. After neurorehabilitation, all subjects showed significant improvement in cognitive, motor, communication and psychosocial functioning. In particular, the early treatment group showed better global functional outcome at discharge than patients who began later treatment. The study concluded that the sooner patients begin neurorehabilitation, the better their functional outcome.

Singh et al.'s (2016) preliminary single-centre study identified a considerable gap in provision of specialised rehabilitation for neurosurgical patients, which needs to be addressed if patients are to fulfil their potential for recovery.[11] This study estimated that a five-fold increase in bed capacity would cost £9.3 million per year, but could lead to potential net savings of £24 million per year. Singh et al. note that there is now a strong body of evidence for the effectiveness and cost-benefits of rehabilitation. They further note that earlier transfers to rehabilitation are associated with better functional outcomes and reduced length of stay in hospital. The authors note that the value of specialist rehabilitation services for neurosurgical patients is well established as a critical component of the neurosurgical pathway, without which acute care services will fail to generate their full potential. This multi-disciplinary input can maximise an individual's recovery and reintegration into society.

Community rehabilitation

Many people with TBI require specialist rehabilitation in the community to help them manage their cognitive impairments, psychological difficulties, and behaviour. This rehabilitation should also include family members and carers/support workers. In the UK, services for people with TBI has traditionally tended to concentrate on acute and in-patient rehabilitation, with rehabilitation diminishing dramatically after six months.[12] This can result in improvements made during the in-patient stage being lost once the person returns to the community.

Powell and Greenwood (2002) conducted one of the first randomised controlled studies of community multi-disciplinary team input for severe TBI.[13] This study was conducted in the London area and showed that the treatment group in the community were significantly more likely to show gains on the measures of independence, self-organisation and psychological wellbeing subscales compared with a control group who received written information. Time since injury was unrelated to the magnitude of gains. This would suggest that the introduction of a rehabilitation program further down the line may be of benefit, even if there has been no rehabilitation for over a year.

Cicerone et al. (2008) evaluated the effectiveness of comprehensive, holistic neuropsychologic rehabilitation compared with standard, multidisciplinary rehabilitation for people with TBI in the community.[14] Participants with TBI were recruited from clinical referrals and referrals from the community. Sixty-eight participants who met inclusion criteria were randomly allocated to treatment conditions. Most participants (88 per cent) had sustained moderate-severe TBI, and more than half (57 per cent) were more than a year post-injury at the beginning of treatment. Treatment was conducted 15 hours per week for 16 weeks. Standard neurorehabilitation consisted primarily of individual, discipline-specific therapies (34 subjects). Intensive cognitive rehabilitation emphasised the integration of cognitive, interpersonal, and functional interventions within a therapeutic environment (34 subjects). Intensive cognitive rehabilitation

[11] R. Singh et al., "Unmet need for specialised rehabilitation following neurosurgery: Can we maximise the potential cost-benefits?" (2016) *British Journal of Neurosurgery* 1.

[12] A. Tyerman and N.S. King, "Community Rehabilitation" in A. Tyerman and N. King (eds), *Psychological approaches to rehabilitation after traumatic brain injury* (Malden: BPS Blackwell, 2008).

[13] J.H. Powell, R. Greenwood and J. Heslin, "Community based rehabilitation after severe traumatic brain injury: A randomised controlled trial" (2002) 72(2) *Journal of Neurology Neurosurgery and Psychiatry* 193.

[14] K.D. Cicerone et al., "A Randomized Controlled Trial of Holistic Neuropsychologic Rehabilitation After Traumatic Brain Injury" (2008) 89(12) *Archives of Physical Medicine and Rehabilitation* 2239.

participants showed greater improvements on the Community Integration Questionnaire as well as improved self-efficacy for the management of symptoms compared with standard neurorehabilitation treatment. These gains were maintained at the six-month follow-up.

Very recently, Malec and Kean (2016), have conducted one of the largest studies to date into the effectiveness of intensive residential and outpatient/community-based post-inpatient brain injury rehabilitation.[15] This study looked at post-inpatient brain injury rehabilitation in relation to intensive residential programmes (205 subjects), outpatient/community-based programmes (2,781 subjects), and supported living programmes (101 subjects). The findings revealed significant improvements in active rehabilitation programmes that were targeted towards the intensive residential subjects and outpatient/community subjects. There were improvements both in subjects' adjustment and participation. Significantly, subjects were found to benefit even from rehabilitation received several years post-injury.

A key point about the above study is that average period of rehabilitation for the intensive outpatient/community-based rehabilitation programme was 131 days, i.e. more than three months of rehabilitation. This raises questions about the effectiveness of brief periods of input, i.e. six to eight weeks provided within the NHS. The average period of rehabilitation for the study's intensive residential programme was even longer at 173 days (i.e. five to six months). It is important to note that this study did not just include TBI but also included other acquired brain injury such as stroke. Once again, this study showed that rehabilitation even a year post-injury leads to improvements.

Issues specific to the community setting

Vocational rehabilitation

There are different vocational models aimed at getting people back to work after brain injury. Individual rehabilitation teams can assist patients return to work after a TBI. There are also more specialist services which focus on vocational issues. Tyerman et al. (2012) note that vocational outcome for people with severe TBI has been disappointing as there are very few specialist vocational rehabilitation services in the UK.[16]

There is evidence for the success of vocational rehabilitation. Kendall et al. (2006) conducted a quantitative synthesis of 26 outcome studies involving 3,688 adults with TBI. The aggregated results indicated that intervention studies appear to produce higher and quicker return to work than non-intervention studies.[17]

Murphy et al. (2006) looked at the outcome of 232 patients undertaking Rehab UKs Vocational Rehabilitation Programme, over three consecutive years, in three centres across the UK.[18] Forty-one per cent of participants were discharged into paid competitive employment, with a further 16 per cent gaining voluntary work and 15 per cent taking up mainstream training or education. The remaining 28 per cent were referred to other services or withdrew from the programme. The study concluded that vocational rehabilitation offering educational and experiential learning opportunities is effective in enabling participants with severe acquired brain injuries to return to paid employment.

Radford et al. (2013) looked at whether a TBI specialist vocational rehabilitation intervention was more effective at work return and retention 12 months after injury than usual care.[19] Work outcomes of TBI

[15] J.F. Malec and J. Kean (2016). "Post-Inpatient Brain Injury Rehabilitation Outcomes: Report from the National Outcome Info Database" (2016) 33(14) *Journal of Neurotrauma* 1371.

[16] A. Tyerman "Vocational rehabilitation after traumatic brain injury: models and services" (2012) 31(1) *NeuroRehabilitation* 51.

[17] H. Muenchberger, E. Kendall and T. Gee, "Vocational rehabilitation following traumatic brain injury: A quantitative synthesis of outcome studies" (2006) J. Vocat. Rehabil. 149.

[18] L. Murphy et al., "Effectiveness of vocational rehabilitation following acquired brain injury: Preliminary evaluation of a UK specialist rehabilitation programme" (2006) 20(11) *Brain Injury* 1119.

[19] K. Radford et al. "Return to work after traumatic brain injury: Cohort comparison and economic evaluation" (2013) 27(5) *Brain Injury* 507.

vocational rehabilitation were compared to usual care. Ninety-four participants (40 TBI vocational rehabilitation) with TBI resulting in hospitalisation ≥48 hours, who were working at injury were followed up by postal questionnaire at three, six and 12 months post-hospital discharge. The primary outcome measure was return to work. Secondary outcome measures were functional ability, mood, and quality-of-life. Health resource use was measured by self-report. At 12 months, 15 per cent more TBI vocational rehabilitation participants (27 per cent more with moderate-severe TBI) were working than those who received usual care (27/36, 75 per cent versus 27/45, 60 per cent). This study demonstrated that more TBI-vocational rehabilitation participants returned to work than those receiving usual care. Patients with moderate-severe TBI benefitted most. This specialist intervention was provided without greatly increased health costs, which indicates cost-effectiveness.

The requirement for rehabilitation at various stages following TBI

There is a dearth of literature looking at the need for rehabilitation at different life stages following TBI. One of the quality requirements from the National Service Framework for Long-Term Conditions is community rehabilitation and support. It is noted that people with long-term neurological conditions living at home should receive ongoing access to a comprehensive range of rehabilitation, advice and support to meet their *continuing and changing needs*, increase their independence and autonomy and help them to live as they wish. This reference to continuing and changing needs points to the need for rehabilitation at different points but this is not discussed in detail.[20]

Lefebvre et al. (2008) looked at the repercussions of TBI on individuals' long-term social integration at 10 years post-looked-at outcomes.[21] The results show that TBI is an experience that continues to present difficulties, even 10 years after the accident, and that different barriers contribute to this difficulty. These include not going back to work, depressive episodes, and relationship difficulties. Lefebvre's study shows that the negative effects of TBI extend long after the TBI, and thus rehabilitation should be considered at different stages following TBI.

There several reasons why rehabilitation may be required at different points following traumatic brain injury. Firstly, patients with TBI who return to work are not necessarily able to remain in their previous role. Poessl et al. (2001) looked at the stability of employment after brain injury.[22] This was a seven-year follow-up study. The study concluded that some subjects, distributed over all patient groups, were unable to remain in work, despite the work adjustments and had retired within two years after the work trial. This study indicates that community rehabilitation is required beyond the usual timeframe of post-acute rehabilitation, particularly because long-term vocational outcome is difficult to predict in individual cases. If patients with TBI are not able to remain in their place of work, community rehabilitation will be required to help the individual either find more appropriate work or consider non-vocational interests.

TBI has a negative impact on marital relationships and family relationships. In terms of the former, cognitive and neurobehavioural impairments can lead, over time, to a breakdown in the relationship. This does not necessarily happen in the first or even second year following the TBI. As Ponsford et al. (2013) notes, there are relatively few divorces in the early years, but in cases of severe TBI, many more divorces or separations occur in the longer term. In severe TBI cases, the patient's partner is likely to provide an important supportive role. If that relationship ends, the person with the TBI would require rehabilitation in order to determine what care and support they need, and to help them build up their psychological coping resources.[23]

[20] Department of Health, *The National Service Framework for Long-Term Conditions* (2005).

[21] H. Lefebvre, G. Cloutier and L.M. Josée, "Perspectives of survivors of traumatic brain injury and their caregivers on long-term social integration" (2008) 22 *Brain Injury* 535.

[22] J. Pössl et al., "Stability of employment after brain injury: A 7-year follow-up study" (2001) 15(1) *Brain Injury* 15.

[23] J.L. Ponsford, S.M. Sloan and P.C. Snow, *Traumatic brain injury Rehabilitation for everyday adaptive living* (Hove, East Sussex and New York: Psychology Press, 2013).

One of the issues not addressed in the literature is the increased need for support and rehabilitation if an individual with a TBI gives birth to a baby, or their partner/spouse gives birth to baby. This is a period of increased stress and challenge, and ideally there should be further community rehabilitation at this point. Another issue not addressed in the literature is what happens when parents caring for a child with a TBI, who may in fact be an adult, are no longer able to do so due to their own ill health. Rehabilitation would probably be required at that stage to determine the care needs of the individual with the TBI as well as the appropriate accommodation, care and support.

TBI can lead to depression, anxiety, substance misuse, and anger management problems. Rogers and Read (2007) looked at the increased risk for development of severe, long-term psychiatric disorders for survivors of TBI.[24] They systematically reviewed the most current prevalence rates and evidence for causality, in terms of established criteria. This study found that psychiatric syndromes are consistently more likely to occur following TBI. Survivors of TBI are particularly susceptible to major depression, generalised anxiety disorder and post-traumatic stress disorder. The timing of onset varied and reliable critical periods for the post-injury development of a psychiatric disorder remain to be identified; however, individuals appear to remain at risk for years following injury. The important point about this study, and other studies looking at the development of psychiatric disorders post-TBI, is that the onset is variable, and can occur many years post-injury. Thus, rehabilitation may be indicated many years post-TBI to treat a late-onset psychiatric disorder post-TBI.

Conclusions

Rehabilitation following TBI requires a long-term approach. This spans acute emergency care, in-patient rehabilitation, and community rehabilitation. Each stage is crucial in the recovery following TBI. Community rehabilitation is probably the most neglected area of the TBI rehabilitation process. Without rehabilitation in the community, the gains made in the in-patient stage may be lost. Research tends to focus on a single stage of rehabilitation. However, what is required is more long-term research covering all of these stages in the rehabilitation process.

In terms of community rehabilitation, there is strong evidence for the effectiveness of rehabilitation. This rehabilitation needs to last for more than eight weeks, and ideally should be multi-disciplinary in nature. It is important to note that the research shows that community rehabilitation over a year post-injury can be effective. Unfortunately, specialist vocational rehabilitation services are limited in the UK, especially given that research has demonstrated the efficacy of vocational rehabilitation in helping people return to work following a TBI.

An area which requires further research is the need for long-term community follow-up at different stages for an individual who has sustained a TBI. The different strands of research including the prevalence of the breakdown of relationships following TBI, the prevalence of psychiatric disorders following TBI, and the lack of stability in return to work following TBI all point to the need for blocks of community rehabilitation targeted at different stages post-TBI.

[24] J.M. Rogers and C.A. Read, "Psychiatric comorbidity following traumatic brain injury" (2007) 21 *Brain Injury* 1321.

Case and Comment: Liability

ABC v St George's Healthcare NHS Trust

(CA (Civ Div), Gloster LJ, Underhill LJ, Irwin LJ, 16 May 2017, [2017] EWCA Civ 336)

Duty of care—clinical negligence—personal injury—mental health—confidential information—diagnosis—disclosure—diseases and disorders—doctors—families—genetic testing—mental patients—special relationships—public interest

Clinical negligence; Confidential information; Diagnosis; Disclosure; Doctors; Duty of care; Families

In 2007, the claimant's father shot and killed her mother. He was convicted of manslaughter on the grounds of diminished responsibility. He was sentenced to a hospital order under s.37 of the Mental Health Act 1983 and subjected to a restriction order under s.41 of the Act. He was detained at a clinic run by the second defendant.[1] He was referred to St George's Hospital for exploration of his condition, that hospital being the responsibility of the first defendant.[2] Whilst resident in the clinic he was seen by a social worker for whom the third defendant[3] was responsible. The defendants were responsible for treating the claimant's father.[4]

In early 2009, it was suspected that the father might be suffering from Huntington's disease. The father's doctors considered whether they should override his patient confidentiality, and his expressed wishes, and inform his children of the suspected diagnosis. They chose not to do so. Genetic testing subsequently confirmed he father's diagnosis during 2009. Late 2009, the claimant informed her father that she was pregnant. Again, his doctors considered whether to inform his children of what was then still a provisional diagnosis, but decided against it.

This condition is inherited. The child of a parent with Huntington's disease has a 50 per cent chance of developing the condition. Huntington's disease causes damage to brain cells, giving rise to disruption of movement, cognition and behaviour. It typically brings about personality change, irritability, altered behaviour, and often aggression. It is incurable and the progress of the disease cannot be reversed or slowed. The condition is progressive and fatal.

The claimant gave birth in April 2010. On 23 August 2010, she was accidentally informed of her father's condition by one of his doctors. She subsequently underwent genetic testing, and in January 2013 was herself diagnosed as suffering from Huntington's disease.

She brought her claim in negligence on the basis that the respondents should have informed her of her father's diagnosis: they knew of the 50 per cent risk to her and knew that a diagnosis would have a direct effect on her health, welfare and life. On 19 May 2015 Nicol J acceded to the defendants' application, and struck out the claim at common law on the ground that there was "no reasonably arguable duty of care" owed to the claimant by the defendants. He also struck out a claim formulated under the Human Rights Act 1998 on the basis that the defendants had breached the claimant's rights under art.8 of the European Convention on Human Rights holding that:

[1] South West London and St George's Mental Health NHS Trust.
[2] St George's Healthcare NHS Trust.
[3] Sussex Partnership NHS Foundation Trust.
[4] It was not necessary for the purposes of the appeal to distinguish between the defendants.

> "even assuming Article 8 was engaged, any interference would plainly be justified under Article 8(2) for all of the reasons relied upon in answer to the common law claim."

The claimant appealed and relied on clinical guidance entitled: "*Consent and Confidentiality in Genetic Practice, Guidance on Genetic Testing and Sharing Genetic Information*." She submitted that the guidance made it clear that there were professional obligations towards those who, although not in an existing doctor/patient relationship with a clinician, had a vital interest in genetic information which the clinician had obtained. She argued that those obligations were a good foundation for an extension of the legal duty of care to individuals affected in that way.

The Court of Appeal held that it was arguably fair, just and reasonable to impose on the defendants a duty of care towards the claimant on the facts alleged. They accepted that the ambit and content of the duty of care in cases such as this had long been a matter for common law, developed by judicial decision. If it were otherwise, the law would have ossified in that area. It had not done so.[5] The policy reasons relied on by the defendants to argue against any extension of the duty of care were not persuasive. The appeal was allowed.

Comment

Warning

A note of caution is always necessary when considering any judgment determining whether a case should be struck out on the basis it is unarguable and cannot succeed. This is particularly so when, as here, the case concerns an action that would amount to a development of the law if it succeeded. The appellate court is concerned not so much with the law as it stands but rather with the question of whether it is *reasonably arguable* that the law could potentially be extended in a particular way. If the strike out is resisted the issue is not resolved, it is merely permitted to be argued.

A doctor's duty to disclose to third parties?

The current case is concerned with just such a situation where, if the claim does eventually succeed, the law relating to the duty of care owed by the medical profession will have been developed quite significantly. The Court of Appeal were being asked to consider whether the doctors treating a patient who refused to disclose to his family that they were at risk of a genetically inherited disease, were under a duty of care to disclose that risk to affected family members.

Doctors and other medical practitioners do have a right to breach patient confidentiality in certain circumstances. Extensive clinical guidance provided by a number of medical bodies makes it clear that it can sometimes be permissible for doctors to breach patient confidence in order to inform a third party of a risk of harm. The issue for the court was whether this *right* to override patient confidentiality could be emasculated to a legal *duty* for which the law provides redress if breached.

Basic principles

Consideration of such a question necessitates a return to the basic principles of the law of negligence. The court is very much in snails in bottles of ginger beer territory. The starting point for an assessment of whether a duty of care arises between parties is the tripartite test laid down in *Caparo v Dickman*.[6]

[5] *JD v East Berkshire Community Health NHS Trust* [2005] UKHL 23; [2005] 2 A.C. 373 and *Montgomery v Lanarkshire Health Board* [2015] UKSC 11; [2015] A.C. 1430 considered.

[6] *Caparo Industries Plc v Dickman* [1992] A.C. 605 HL.

1) The harm must be reasonably foreseeable as result of the defendant's conduct.
2) The parties must be in a relationship of proximity.
3) It must be fair, just and reasonable to impose a duty of care.

The first two limbs of this test were not in dispute in this case and the appeal focused solely on the question of the justification for extending the duty of care owed by medical practitioners to this further category of people beyond their patients.

The defendants here mounted a multi-pronged resistance, citing nine different reasons why it was neither fair, just nor reasonable for such a duty of care to be imposed. It was, for example, suggested that the imposition of such a duty might encourage doctors to breach patient confidence when it was not justified, or it may result in doctors placing undue pressure on patients to agree to disclosure. Doctors would have conflicting duties, liable to be sued if they disclose information and sued if they do not. In addition, it was argued that some third parties may not want to receive the information, or they might be harmed by it. It would also be unduly burdensome for doctors to be required to assess all potential third parties who might be adversely affected by information they receive about their patients.

Opening the floodgates or a narrow issue?

The Court of Appeal was not persuaded by these arguments and did not find that they individually or collectively gave grounds to preclude the case from at least being argued at trial. But in doing so, much emphasis was placed on this being a discreet issue specific to genetics. As Irwin LJ put it:

> "It is only in the field of genetics that the clinician acquires definite, reliable and critical medical information about a third party, often meaning that the third party should become a patient."[7]

In seeking to restrict this potential duty to disclose to genetic risks, Irwin LJ was looking to close the door on a "floodgates" argument. Imposing a duty on medical practitioners to disclose information to third parties might otherwise open the door to a broad range of potential claims. For example, a claim by the partner of a patient who refused to disclose to them that they have a sexually transmitted disease; or that a vasectomy had failed. Whether the "important distinction" drawn by Irwin LJ between genetics and such examples holds up to further scrutiny remains to be seen.

Bearing in mind that this was a case considering a strike out, it would be premature to cite this decision as any sort of clear authority that medical practitioners can owe a duty of care to non-patient third parties. Nevertheless, the argument has not fallen at the first hurdle. Should the claim proceed to trial and succeed it would amount to a significant extension of the common law duty of care in this jurisdiction, certainly in the context of clinical negligence litigation.

Other jurisdictions

Interestingly, similar issues have already been considered in other common law jurisdictions and on occasions a duty of care has been imposed upon the medical profession to make disclosure to third parties. In *Tarasoff v Regents of the University of California*[8] the Supreme Court of California found that a therapist was under a duty of care to inform an identifiable third party she was at risk of being murdered by a patient who had expressed his intention do so on being released from police custody. Also, the New Jersey Superior Court held in *Safer v Pack*[9] that a physician had a duty to warn the child of a patient with a hereditary condition that they were at genetic risk of the disease. It should, however, be noted that the state legislature subsequently introduced legislation to firmly close the door on any such duty to disclose. Meanwhile in

[7] *Caparo Industries Plc v Dickman* [1992] A.C. 605 HL at [43].
[8] *Tarasoff v Regents of the University of California* 17 Cal. 3d 425 (Cal. 1976).
[9] *Safer v Pack* 291 N.J.Sup. 619 (1996).

this jurisdiction it remains to be seen if that door will be opened but for the time being it could be said that the door is perhaps ajar.

Practice points

- This case should not be viewed as any sort of authority for the proposition that medical practitioners can owe a duty of care to a non-patient third party to warn them of a risk, but practitioners in this area should be alert to the possibility of such a duty.
- If such a duty of care is to be established it is perhaps most likely to be within the limited context of genetic risks that are quantifiable. Indeed, it is suggested here that it is one of the clinical functions of the geneticist to calculate such risks. Arguably it is a distinct area of medicine where it could be said to be incumbent upon medical practitioners to pass on information about those risks to those who may be affected.

Richard Geraghty

Wilkes v Depuy International Ltd

(QBD, Hickinbottom J, 6 December 2016, [2016] EWHC 3096 (QB))

Personal injury—consumer protection—defective products—EU law—medical implants—product safety—testing—defects—Consumer Protection Act 1987 s.3—Directive 85/374—liability

LT Consumer protection; Defective products; EU law; Medical implants; Product safety; Statutory interpretation

[1] In January 2007 the claimant underwent a surgical procedure at the North Manchester General Hospital, to insert an artificial left hip made up of metal components manufactured by the defendant. One component was a steel femoral shaft called a "C-Stem". Three years after surgery, in January 2010, the C-Stem fractured, causing metal debris to be shed around the joint.

Mr Wilkes pursued a claim against the manufacturer alleging that the fracture and the metallosis were caused by the negligence of the defendant. In addition a claim was also brought under the Consumer Protection Act 1987 ("the Act"). Mr Wilkes contended that, when the C-Stem component was put into circulation by the defendant, there was a "defect" in it, as defined in the Act, because its safety was not such as persons generally were entitled to expect. Damages were claimed on the basis of each cause of action.

As a preliminary issue the court was required to determine whether, in addition to the negligence claim Mr Wilkes could also claim damages under the Consumer Protection Act 1987 s.3.[2]

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

[2] Consumer Protection Act 1987 s.3— "Meaning of 'defect'. (1) Subject to the following provisions of this section, there is a defect in a product for the purposes of this Part if the safety of the product is not such as persons generally are entitled to expect; and for those purposes *"safety"*, in relation to a product, shall include safety with respect to products comprised in that product and safety in the context of risks of damage to property, as well as in the context of risks of death or personal injury. (2) In determining for the purposes of subsection (1) above what persons generally are entitled to expect in relation to a product all the circumstances shall be taken into account, including— (a) the manner in which, and purposes for which, the product has been marketed, its get-up, the use of any mark in relation to the product and any instructions for, or warnings with respect to, doing or refraining from doing anything with or in relation to the product; (b) what might reasonably be expected to be done with or in relation to the product; and (c) the time when the product was supplied by its producer to another; and nothing in this section shall require a defect to be inferred from the fact alone that the safety of a product which is supplied after that time is greater than the safety of the product in question."

The judge confirmed that Pt 1 of the Act implemented Directive 85/374 and that both aimed to protect consumers' interests. He held that the Directive had a further dimension, namely that in the second recital of aiming to "solve the problem, peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production". It did so by imposing "liability without fault on the part of the producer". Thus, an "injured party" did not have to prove negligence or fault, but still had to prove the damage, the defect, and the causal relationship between the two.

There had been considerable academic discussion about a claimant's proper approach to that task, but few authorities had considered the relevant issues. However, the judge held that the proper approach was *not* that in *A v National Blood Authority (No.1)*[3] which concentrated on causation without first identifying whether there was a defect. The focus of the Directive and the Act was on defect. He concluded that the addressing causation at such an early stage distracted from that focus.[4]

Turning to the question of defects and product safety the judge found that the Act and the Directive focused on the condition or state of the product, not on the acts or omissions of those involved in production. That was fundamental to the move away from fault-based liability. Their concern was with safety, not with fitness for purpose. Safety was a relative concept. Expected standards of safety were incapable of precise definition because no medicinal product could be absolutely safe; the potential benefits had to be balanced against the risks.

Both the Directive and a subsequent EU report on product liability deliberately declined to define "defect", it being envisaged at that time that guidance would be provided by a body of developing case law. No such body of law had developed, but the fact that matters were expected to be dealt with on a case-by-case basis indicated that the test for safety required an objective approach. Such an approach involved the court assessing the appropriate level of safety at the time that the relevant manufacturer first put the product on the market, taking into account the information and circumstances before it. The judge held that it did not involve considering the safety expectations of a particular patient or of the general public.

The judge decided that, so far as safety assessments were concerned, there was no restriction on the considerations that the court should take into account in determining whether the safety of a product was at an acceptable level. A holistic approach was required, which involved balancing all relevant factors. Given the wide range of products to which the Directive and the Act applied, the court had to be flexible about which circumstances were relevant and the weight to be given to each; any attempt at formal rigid categorisation would conflict with the Directive's inherent flexibility. His view was that courts should guard against over-complicating or over-analysing the exercise.

In this case, there were five circumstances for particular scrutiny:

1) risk benefit and the "avoidability" of the defect;
2) whether the product was "standard" or "non-standard" in accordance with the distinction in *National Blood Authority*, which was not followed;
3) compliance with appropriate standards;
4) compliance with any regime under which the product was regulated; and
5) any warnings given about the product.

In this case the claimant failed to establish that the C-Stem suffered from a manufacturing or design defect. The judge held that it did not fall below the safety that persons were generally entitled to expect at the time it was put into circulation.

The loading to which the stem had been exposed, through a combination of the patient's anatomy and gait; the extent of any arthritis and/or pre-existing conditions; surgical technique, the precise positioning

[3] *A v National Blood Authority (No.1)* [2001] 3 All E.R. 289 QBD.
[4] *A v National Blood Authority (No.1)* [2001] 3 All E.R. 289 QBD doubted.

and alignment of the stem in his body, and the amount of movement between it and the surrounding cement, was greater than the stem could withstand and for which it had been tested.

It was uncontroversial that the manufacturer had performed tests at a higher standard that those set by the relevant British Standard. The fact that a safer design could be envisaged did not mean that a current product was defective. The fracture was a rare and unpredictable event, but it was a risk that had been expressly warned of in the instructions for use. The patient had been made aware of other, much higher, risks of failure, but had not been warned about that particular failure.

The judge answered "no" to the question posed by the preliminary issue. He concluded that the defendant was not liable to the claimant under the provisions of the 1987 Act.

Comment

The Product Liability Directive was adopted on the 25 July 1985. It went on to be incorporated into the law of England and Wales by the Consumer Protection Act 1987.

The European Union ("EU") had in 1975 established as an element of policy, consumer protection. This included the protection of consumer health and safety and the EU set out several principles including the protection of the consumer "against the consequence of physical injury caused by defective products and services supplied by manufacturers of goods and providers of services". At the same time it set out its intention to protect consumers' economic interests to the harmonisation of the law on product liability. As a result it moved to the drafting of a Product Liability Directive. Early progress was delayed because of the disagreement between various member states on the appropriate draft and the inevitable opposition by those who would ultimately be treated as producers and who were unhappy at the movement towards a form of strict liability.

When the Directive was finally published it provided for a form of strict liability where a consumer had suffered a death or personal injury or damage to a consumer goods caused by defective products which had been put into circulation in the course of a business.

It identified those as being liable as being the product's manufacturer or producer but it also added in an own brander as well as the importer of the product from outside the EU. It provided for liability on the part of the supplier too, but only on the basis that they were unable or unwilling to identify the producer of the product involved.

The liability did not depend on proof of negligence and a limited number of defences were established including the development risk defence. This was an addition to the Directive at the behest of business lobbyists where previously the intention of the Directive was that it would simply be necessary to prove damage. It is noteworthy that the first recital to the Directive (the part that explains the purpose of the Directive) was that the law was necessary "because the existing divergences may distort competition and affect the movement of goods within the common market and entail a degree of protection of the consumer against damage caused by defective products to his health or property". So although it remains most people's perception that the Directive is there for consumer protection it is in fact there equally on the basis of improving freedom of trade; the fundamental policy behind the Treaty of Rome.

In Britain the Directive became law as the Consumer Protection Act 1987 ("the Act"). Section 3 of the Act deals with the existence of a defect in the product. A product is defective when it does not provide the safety which persons generally are entitled to expect taking all circumstances into account. The circumstances include: the manner in which, and purposes for which, the product has been marketed; its get up, and the use of warnings or instructions; what might reasonably be expected to be done with or in relation to a product; and the time when the product was supplied by its producer to another.

Most observers comment that the definition of a "defect" has been the most difficult aspect of the Directive and therefore inevitably the Act. Article 6 of the Directive has a shorter definition:

"1. A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including:
(a) the presentation of the product;
(b) the use to which it could reasonably be expected that the product be put;
(c) the time when the product was put into circulation.
2. A product shall not be considered defective for the sole reason that a better product is subsequently put into circulation"

In contrast to product liability as it is litigated in the US, the definition of defect is not divided into the various types such as manufacturing, design and warning. The learned observer Professor Jane Stapleton has commented as to the circularity of the definition of defects: "What a person is entitled to expect is the very question a definition of defect should be answering."

As mentioned by the judge, in 2003 the law firm Lovells, commissioned by the EU, produced a report: "Product Liability in the European Union: A Report for the European Commission, MARKT/2001/11/D". In their report there was a discussion as to whether "defect" should be further defined but then it was decided by the authors that this would restrict the ability of judges to address the matters on a case by case basis and they (naively) expected that a body of case law would emerge that would enable clarification and inevitably the European Court of Justice would end up doing this. In fact the case law, sadly, has been very slow to develop. Presumably it was for this reason that the judge in this case felt emboldened enough to put forward his own view on defect in direct contrast to the already existing view of the High Court in the form of his brother judge Burton J in the so called "Blood Products" case.[5]

The objective and reasonable expectation is what is generally known as a jury question (would that the consumers of England and Wales were so lucky as to have such a body of people determining defects in a case). Instead one has judges seeking to determine that without any form of consultation of course. In *Richardson v LRC Products Ltd*,[6] Kennedy J decided that a failing condom was not a defective product because whilst the user may expect the condom not to fail, the defendant had never claimed it would not and generally it was acknowledged that this form of contraceptive could not be 100 per cent effective. Burton J in the Hepatitis C litigation *A v National Blood Authority*, following Kennedy J's view,[7] did not agree with this approach and decided that in that case the Hepatitis C infected blood products were defective because "the public at large was entitled to expect that the blood transfused to them would be free from infection".

In the US several of the courts have moved the consumer expectation test there into a balance between risk and utility taking into account the benefit derived from the product set against its cost. Many have expressed the view that this is the appropriate way to interpret the Directive and the Act but it begs the question if that was intended and that risk utility should be a significant element then why does it not appear in the text?

Sadly, certainly in the case of the judges of England and Wales, the majority having practiced and judged in a fault-based regime have inevitably found it difficult to move into a strict liability one. It was noteworthy how long it took judges to accept the strict liability aspect of the so called "six pack" legislation that implemented safety regulations into the work place and replacing the old statutes of England and Wales such as the Factories Act with their considerable reliance upon reasonableness; with cost being taken into account in terms of safety. There were considerable murmurs of concern particularly amongst employers and their insurers when the Provision and Use of Work Equipment Regulations 1992 (SI 1992/2966) were held to be sufficiently strict that the postman who suffered injury when his bike failed

[5] *A v National Blood Authority (No.1)* [2001] 3 All E.R. 289 QBD .
[6] *Richardson v LRC Products Ltd* [2000] P.I.Q.R. P164 QBD.
[7] *A v National Blood Authority (No.1)* [2001] 3 All E.R. 289 QBD.

in the absence of any evidence of fault on the part of the employer in its maintenance of the bicycle.[8] However these regulations, EU derived of course, recognised the disparity between the employee with little control over the equipment that he or she is provided with and the overarching position of control of the employer. Similarly, in product liability where the consumer has little or no control of the often deep pocketed large multinational producers of a good that caused injury. Many point to the US in support of their argument of risk utility but that is generally a court-led jurisdiction and omits the fact that here in England and Wales as currently a member state of the EU there is a clear piece of legislation designed to fix consumer safety. Inevitably it is not the injured consumer's expectations that are measured but the "safety which the public at large is entitled to expect".

Burton J in the blood products case remains as good law today as these more recent views of Hickinbottom J despite the way in which his views in this case have been taken by the defence industry, its lawyers and insurers and raised to the level of infallibility as if spoken by a Pope.

Burton J had determined that the public at large was entitled to expect that blood transfused to them would be free of infection particularly bearing in mind the lack of any warnings or indeed the material publicity of there being any risks in transfusion. On 1 March 1988, 114 claimants had been infected with Hepatitis C through blood transfusions, mostly during surgery. The source of infection was actually not contamination but within the donor's blood. The defendant was the government's body responsible for the obligations arising from the supply. It was known to the medical profession that there was a risk of a virus being transferred but no warnings were given. In the end Burton J determined that the liability under the Directive in the act was strict and did not require negligence to be established. Thus evidence from the defendant as to having taken all steps available to it to reduce the risk of contamination but that it was simply impossible to make it avoidable completely were discounted. The public's legitimate expectation particularly in the absence of any warnings was absolute and there should be no risk of infection. In reaching that view Burton J decided to look at products in terms of "standard" and "non-standard". Thus the standard product was the product supplied in the form intended by the producer whilst non-standard of course was not.

It is often forgotten that the view subsequently of High Court judges, including for example Field J in *B v Macdonald's Restaurants Ltd*,[9] also agreed that the avoidability of the risk was not a relevant circumstance to take into account when determining the safety of the product and the legitimate expectations. Unfortunately, in the so called "hot coffee" litigation so infamous but successful in the US where an elderly woman suffered third degree burns through coffee that had been boiled to 140 degrees because of the cheapness of the bean, the claims by children here were unsuccessful. The conclusion was that persons generally would expect such drinks to be hot and therefore a risk of them being spilled. A surprising decision at the time and one that still beggars belief in the context of children scalded by a liquid hotter than one would serve it in the home and heated that way on the basis of an economic reason.

Burton J in comparing the standard and non-standard product identified the harmful characteristic which rendered the product different to that which was intended by the producer. His reasoning appears at [71]:

> "If a standard product is unsafe, it is likely to be so as a result of alleged error in design, or at any rate as a result of an allegedly flawed system. The harmful characteristic must be identified, if necessary with the assistance of experts. The question of presentation/time/circumstances of supply/social acceptability etc will arise as above. The sole question will be safety for the foreseeable use. If there are any comparable products on the market, then it will obviously be relevant to compare the offending product with those other products, so as to identify, compare and contrast the relevant features. There will obviously need to be a full understanding of how the product works — particularly if it is a new product, such as a scrid, so as to assess in safety for such use. Price is obviously a

[8] *Stark v Post Office* [2000] I.C.R 1013 CA (Civ Div).
[9] *B (A Child) v Macdonald's Restaurants Ltd* [2002] EWHC 490 (QB).

significant factor in legitimate expectation, any may well be material in the comparative process. But again it seems to me there is no room in the basket for:

1. what the producer could have done differently; and
2. whether the producer could or could not have done the same as the other did."

It could be said that *Wilkes* was a design or manufacturing defect case. In the US the courts have consistently considered the consumer expectation test in the context of design defects as an abject failure as a test for defectiveness. It is said that the consumer would not know what to expect in terms of design and how safe the product could be made. However that appears to be taking into account the conduct or potential conduct of the producer rather than looking at the end point, the safety of the design.

There are few lawyers who regularly represent injured individuals who would not speak fully in support of the EU and its regular intervention in a way such as to improve the health and safety of individual consumers. Whether this be by reason of the so called "six-pack" of health and safety employment-related statutory instruments (before they were rendered near impotent by the Government in the Enterprise Act 2016) or other such matters such as the Working Time Directive.[10] In addition, legislation enacted in member states in response to EU Directives that have included the Denied Boarding Regulations[11] and the so called Package Travel Regulations 1992 (SI 1992/3288) have all been generally held, outside of the industries themselves, to have been a benefit to the consumer.

It was widely thought that Burton J had captured the essence of the Directive's intention whilst the producers and their representatives had long wailed that the refusal to acknowledge avoidability was unfair.

For the level of criticism that the blood products case derived from representatives of the affected industries, one would have assumed that the floodgates had been opened and a whole series of unmeritorious claimant claims pursued. Nothing could be further from the truth. Experienced practitioners in the field will know that the number of successful claims were very modest indeed. The industries were good at settling away on confidential terms flagrantly defective products and for a long time the Legal Aid Board and its successor bodies were effective gatekeepers at stopping other attempts to pursue claims under the Act from reaching trial.

In recent times there have been, arguably, the greatest number of product liability-related group actions to be prosecuted in the courts of England and Wales and elsewhere. The PIP breast implant litigation has recently reached its concluding parts where clearly all were the victims of a defective product—namely a breast implant which its manufacturers had knowingly altered the design of from the original CE certification and had then deliberately used non-medical grade cheaper silicone than medical grade silicone. However, owing to the liquidation of the manufacturer in the absence of valid insurance, those claims were actually pursued on a contract based claim either against the suppliers where the products were clearly not of satisfactory quality or fit for purpose or for the same breach of contract claim against the credit card funders under the Consumer Credit Act 1974.

Which brings us back to *Wilkes*. More recently, the courts have been occupied by thousands of middle aged and elderly Britons who allege they have suffered serious injuries as a result of the early failure with consequent significant body and tissue destruction of their so-called metal-on-metal hip prostheses. The High Court currently has some nine group litigation orders in front of it, in relation to different but similar hip prostheses; whilst hundreds of other claims have been resolved by manufacturers.

In the mid-1990s, Smith & Nephew developed a new form of hip replacement known as the resurfacing. This embraced metal-on-metal components with a large acetabular head which was considered to be a device that was now possible to implant in younger patients because it would last longer and be easier to

[10] Directive 2003/88 concerning certain aspects of the organisation of working time [2003] OJ L299/9.

[11] Regulation 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation 295/91 [2004] OJ L46/1.

change when it inevitably wore out. Other manufacturers seeing the success of this product, sought to produce their own. DePuy the defendant in this case produced two versions of the metal-on-metal device. They did so in both resurfacing and total hip replacement form with the ASR, ASR XL and the Pinnacle devices. The ASR was marketed from 2003. The manufacturers sought to persuade clinicians that their product was similar to the previously successful Birmingham devices but actually better and even argued that there was less prospect of wear on the surfaces which led to metal debris which could in some circumstances cause injury. Its early installation was successful and many victims of arthritic hips were able to derive considerable earlier benefit by having the device implanted, where in the past they would have had to wait another 10 years or so for the more traditional hip replacement.

Unfortunately, by 2010 it was evident that the ASR products were failing at a much greater rate than other comparator products. The products were wearing and releasing cobalt and chromium ions into the blood stream where the body was not always so successful in expelling the metal from the body. This would result in a collection of fluid around the joint which in turn would sit acid-like destroying the tissue and bone around the hip; thus making early revision necessary but also more difficult.

In late 2010, the level of revisions were such that DePuy Orthopaedics issued a voluntary worldwide recall of its ASR™ XL Acetabular Hip System and DePuy ASR™ Hip Resurfacing System. DePuy announced that the rate of ASR patients who needed a second surgery, the revision surgery, was not in line with data previously reported in the UKs National Joint Register. The 2010 UK data indicated that within five years of having an ASR resurfacing device implanted, approximately 12 per cent of patients had revision surgery, and that within five years of having an ASR total hip replacement, approximately 13 per cent of patients had revision surgery. This was considerably higher than would be expected.

Over time the MHRA issued an alert requiring surgeons to investigate all patients with other metal-on-metal hip devices and now very few patients would ever be considered suitable for these devices to be implanted. The nine group litigation orders presently proceeding in the court are a reflection of that. Similar litigation is mirrored in the US where four companies have already implemented large compensation schemes for patients with such prostheses and in Australia where claimants settled a large-scale claim against DePuy for its ASR prosthesis just before the judge gave judgment in consumer-led claims.

This metal-on-metal hip litigation had all been brought together in the Royal Courts of Justice in London in the High Court under the joint management by Master Cook and Mr Justice Gary Hickinbottom. They determined that the cases of Corin and Pinnacle should proceed to trial with a determination of the meaning of a defective product in relation to a metal-on-metal hip prosthesis whilst all other litigation was stayed pending that outcome. It was acknowledged by the court both in terms of its limited resources for determining all the cases at the same time, that the court's views in relation to a defective product as a metal-on-metal hip prosthesis in the Corin and Pinnacle litigation, whilst not binding on the other cases, would guide a narrowing of the dispute if not a settlement or indeed discontinuation of the litigation.

The selection of Hickinbottom J was a controversial one. In view of the sheer size of the litigation and the need to manage it, the selection of a judge from an originally personal injury background and who was a former solicitor was welcomed by many. For those who remembered the judge in his solicitor phase as being the mastermind of the failure of the Benzodiazepine product liability litigation in the 1990s, they viewed his selection with concern.

Early case management hearings before him in the metal-on-metal litigation tended to throw support towards the latter category. Despite a court room with some 12 devices—which other than in a very limited category of cases would never be implanted by surgeons in patients ever again—days of expensive lawyers arguing proceeded over the meaning of whether or not these devices were defective.

Unknown at least to the claimant sector of this litigation, the judge had been required to try this case of *Wilkes* which was outside of the metal-on-metal litigation. It involved one of the products that was at the heart of the litigation but the injury complained of was not a metal-on-metal related injury but the

fracture of the device. It was disappointing therefore that despite a considerable assembly of the leading claimant practitioners in consumer product liability work both from the bar and solicitors in this litigation they were not consulted in relation to the presentation of the meaning of defect to this judge.

Hickinbottom J was, in the autumn of 2016, elevated to the Court of Appeal. He would therefore no longer manage or determine the metal-on-metal related litigation. Perhaps it was his frustration that he was not going to be able to offer his views in the metal-on-metal cases that led him to accept this case of *Wilkes* because it gave him an unfettered opportunity to express his strongly held views as to what he considered a proper interpretation of the Consumer Protection Act. His view was considerably at odds with his brother judge Burton J and in many respects was a decision that could have been authored within the constituency in which he had acted as a solicitor for so many years, defending producers as defined by the Act.

It is not difficult to understand the protests that have emanated from those representing the victims not only of the Pinnacle and other metal hip prostheses but indeed claimant lawyers everywhere. In the Pinnacle and Corin litigation the judge's views were seized upon by the defendants as support for their case. It removed any prospect of the parties being able to contemplate alternative dispute resolution. After all why would the defendants not feel that they could use this recent view to influence the new judge; so why negotiate? Hickinbottom J had purported not to understand the claimants' case throughout his time in charge of this litigation.

The claimants had a simple case. The products were defective because of their propensity to cause an adverse reaction to metal debris. The circumstances surrounding this included some devices being made out of specification; early failure, soft tissue destruction, and higher rates of revision. Some or all of these circumstances may have been found in each claimant and this meant the product was defective at supply; it was irrelevant that eventually the product may or may not develop one or more of the harmful characteristics. In the same way as a tablet capable of giving a catastrophic brain injury to a significant group of patients was defective when given to a patient even if it did not cause that injury, so was the case with these devices.

This is the view of the European Court in *Boston Scientific*[12] which is the most authoritative and recent examination of the definition of defect. It placed an emphasis on whether a product "poses risks jeopardising the safety of its user [which have] an abnormal, unreasonable character exceeding the normal risks inherent in its use".[13]

With echoes of Burton J, the European Court rejected the suggestion that it was generally accepted that no implanted pacemaker could be 100 per cent safe and that this should therefore lower the general expectations as to safety:

> "[i]n view of the life-threatening risk presented by a defective device, the patient may, in principle, reasonably expect the implanted device to have a failure rate of close to zero."[14]

The producer here of defective pacemakers was liable for the cost of surgeries for replacing all implanted faulty devices, even though only some of the devices were potentially defective.

> "Accordingly, where it is found that such products belonging to the same group or forming part of the same production series have a potential defect, it is possible to classify as defective all the products in that group or series, without there being any need to show that the product in question is defective."[15]

[12] *Boston Scientific Medizintechnik GmbH v AOK Sachsen-Anhalt - Die Gesundheitskasse* (C-503/13 and C-504/13) EU:C:2015:148; [2015] 3 C.M.L.R. 6.

[13] *Boston Scientific Medizintechnik GmbH v AOK Sachsen-Anhalt - Die Gesundheitskasse* (C-503/13 & C-504/13) EU:C:2014:2306; [2015] 3 C.M.L.R. 6, point 13, endorsed here at [40].

[14] *Boston Scientific Medizintechnik GmbH v AOK Sachsen-Anhalt - Die Gesundheitskasse* (C-503/13 & C-504/13) EU:C:2015:148; [2015] 3 C.M.L.R. 6 at [26].

[15] *Boston Scientific Medizintechnik GmbH v AOK Sachsen-Anhalt - Die Gesundheitskasse* (C-503/13 & C-504/13) EU:C:2015:148; [2015] 3 C.M.L.R. 6 at [41].

This decision represented the most recent interpretation of defect and the expectations of the consumer.

> "38 The safety which the public at large is entitled to expect, in accordance with that provision, must therefore be assessed by taking into account, inter alia, the intended purpose, the objective characteristics and properties of the product in question and the specific requirements of the group of users for whom the product is intended.
>
> 39 With regard to medical devices such as the pacemakers and implantable cardioverter defibrillators at issue in the main proceedings, it is clear that, in the light of their function and the particularly vulnerable situation of patients using such devices, the safety requirements for those devices which such patients are entitled to expect are particularly high.
>
> 40 Moreover, as observed, in essence, by the Advocate General at point 30 of his Opinion, the potential lack of safety which would give rise to liability on the part of the producer under Directive 85/374 stems, for products such as those at issue in the main proceedings, from the abnormal potential for damage which those products might cause to the person concerned.
>
> 41 Accordingly, where it is found that such products belonging to the same group or forming part of the same production series have a potential defect, it is possible to classify as defective all the products in that group or series, without there being any need to show that the product in question is defective."

As a well-known expert in the field of consumer protection commented:

> "In *Boston Scientific* the CJEU underlined the role of consumer expectations and conceptualised defect in terms of a product's potential for damage[16] rather than by reference to the nature of what might be said to be wrong with it, or in terms of a risk/benefit[17] assessment."[18]

Curiously this decision does not appear anywhere in the *Wilkes*' judgment; the latest and most authoritative view from the European Court on the definition of defect under the Directive. It is known that the claimants were not represented by mainstream specialist consumer product lawyers. It is inconceivable that the defendant was not aware of this decision and indeed for a judge as familiar with the subject as Hickinbottom J, difficult to believe it could not feature in his judgment whether he agreed with it or not, but it is not mentioned. This, in the context of this very device being the subject of one of the largest worldwide recall of a medical device, and the European court's view:

> "43 It follows from all the foregoing considerations that the answer to Question 1 is that Article 6(1) of Directive 85/374 must be interpreted as meaning that, where it is found that products belonging to the same group or forming part of the same production series, such as pacemakers and implantable cardioverter defibrillators, have a potential defect, such a product may be classified as defective without there being any need to establish that that product has such a defect."

With a nod to the original basis for the Directive the court added:

> "42 Moreover, such an interpretation is consistent with the objectives pursued by the EU legislature, seeking to ensure, in particular, as is apparent from the second and seventh recitals in the preamble to Directive 85/374, a fair apportionment of the risks inherent in modern technological production between the injured person and the producer."

[16] Akin to the "harmful characteristic" approach seen in *A and others* (n.112).
[17] Risk/benefit considerations were held to be irrelevant to the defectiveness enquiry by Burton J.
[18] Marcus Pilgerstorfer, "EU Law and Policy on Pharmaceuticals Marketing and Post-Market Control Including Product Liability" in Tamara K. Hervey, Calum Alasdair Young and Louise E. Bishop (eds), *Research Handbook on EU Health Law and Policy* (Sheffield: Edward Elgar Publishing, 2017).

This view must contrast with Hickinbottom J's interpretation. Perhaps the clue was in his decision to quote some of the country's leading defence practitioners in product liability matters. Worst of all these were not even in one of the leading product liability texts but a clinical negligence one!

> "14. Risk-benefit in this context is explained in the commendable consideration of the issues surrounding 'Product liability for medicinal products' in the chapter of that name by Charles Gibson QC, Geraint Webb QC and James Purnell in '*Clinical Negligence*' (Michael Powers QC and Anthony Barton eds, 5th Edition (2015), Chapter 13) ("Powers & Barton"), at paragraph 13.29."

The judge went on to devote no less than 11 paragraphs to the system of regulatory approval whilst omitting any reference to the fact that the defendant had in fact already recalled the product.

> "98. In an appropriate case, compliance with such standards will have considerable weight; because they have been set at a level which the appropriate regulatory authority has determined is appropriate for safety purposes."

It is unclear what evidence, if any, the judge heard about the system of regulatory approval that enabled him to place such weight upon it. Very little is the implication, as the manufacturers of medical devices do not have to submit pre-marketing data on safety and efficacy or a risk/benefit evaluation to any regulatory authority for grant of marketing authorisation. Both the Medical Devices Directive[19] and the European Medicines Directive[20] emphasise their main objective of ensuring an appropriate benefit risk profile of their respective products under their jurisdiction in their introductory recitals. This is especially in the Class III (high risk) medical devices. The Medicines Directive however stipulates in great detail the clinical database that should be generated to allow for a robust evaluation of safety and efficacy such that a risk benefit profile can be assessed both at the time of market authorisation and post-marketing. The Medical Devices Directive however does not stipulate the details of this database in detail although supposedly having the same overall objective.

Regulatory compliance is not a defence. In fairness the judge does not say that it is but he raises it to a very high level but again ignoring the European Court's view. As Pilgerstorfer put it:[21]

> "More recently, at the supranational level, the Advocate General in Boston Scientific (Opinion paras 43–45) confirmed his conclusions as to the level of safety which persons were entitled to expect by reference to the regulatory regime for medical devices. Compliance (or lack of compliance) did not determine the issue of defect. Nor did particular regulatory decisions feature in his analysis. Rather, it was the very fact that products of that type were closely regulated that was significant. While the issue of principle was not confronted head-on in that case, it reignites the debate as to the relevance of regulation to the defectiveness question."

Finally, in defeating this claimant's claim, the judge decided the warning of the fracture of the stem in the Instructions For Use ("IFU") was adequate. Yet as he acknowledged this warning goes to the surgeon and not the patient. More importantly, for a warning to be effective it must have an effect. At one extreme, enough to prevent the choice of the particular product, at the other, to enable the patient to take adequate steps to reduce or preferably remove the risk of the hazard warned off. If a car manufacturer warns that somewhere between 30mph and 75mph there is a risk that the air bag will suddenly inflate, then surely that is of no effect as a warning. In the usual course of driving there would be no realistic steps the driver could take to avoid the dangerous incident occurring. Contrast that with a warning that a child below a

[19] Directive 93/42 concerning medical devices [1993] OJ L169/1.
[20] Directive 2001/83 on the community code relating to medicinal products for human use [2004] OJ L311/67.
[21] Marcus Pilgerstorfer, "EU Law and Policy on Pharmaceuticals Marketing and Post-Market Control Including Product Liability" in *Research Handbook on EU Health Law and Policy* (2017)

certain weight is at risk when sitting in the front passenger seat, if the air bag should be deployed. This at least means one can sit the child in the rear seat, thus rendering the warning of the defect of some use.

One can argue whether this claimant ever had a case that could have won under the Act. The reason this case stands out as unfair is the manner in which a judge set out his views on the interpretation of the Act despite the issue being examined in much greater detail and spread over a larger number of devices at the request of the court. Then for his opinions and interpretation of the Act to be lifted to some higher plain in preference to the other views of judges, in particular Burton J.

So whilst it is unsurprising that those commonly representing manufactures and their insurers' interests have used headlines boldly announcing the "High Court restores balance in product liability claims"[22] one should pause and take a minute to reflect that this judge's opinion is of no greater weight than another. Indeed, Foskett J commented appropriately in a judgment on case management in another product liability case:[23]

> "Reference has been made to the recent decision of Hickinbottom J in *Wilkes v Depuy International Limited* [2016] EWHC 3096 (QB). Without, I trust, doing any injustice to his lengthy judgment, all he did in the section of his judgment dealing with the Consumer Protection Act 1987 was to make observations on the meaning of the relevant words in the Act in the context of the case with which he was dealing."

Practice points

- Claims under the Consumer Protection Act 1987 involve a specialised area where the defendant will be expertly represented.
- It is unclear whether risk/benefit is a consideration under the Consumer Protection Act when determining the issue of a defective product.
- Regulatory approval may be a circumstance for the court to consider but the precise nature of that approval process including the clinical trials involved, if any, must be properly examined.

Mark Harvey

Whyatt v Powell

(QBD, Lewis J, 17 March 2017, [2017] EWHC 484 (Admin))

Personal injury—road traffic accidents—insurance—uninsured drivers—passengers—knowledge—indemnity—Motor Insurers' Bureau

LT Knowledge; Passengers; Personal injury; Road traffic accidents; Uninsured drivers

On 15 April 2013, Jamie Whyatt (aged 23), Gary Rees (aged 16) and Arron Rees (who's 15th birthday it was) were passengers in a car driven by the first defendant, Anthony Powell. They had been together at the house of a mutual friend prior to the accident leaving at about 22.00. Subsequently there was an

[22] Kennedys, *News and Insights* (7 December 2016).
[23] *Bailey v Glaxosmithkline (UK) Ltd* [2017] EWHC 377 (QB).

accident in which the three claimants suffered injuries. Mr Powell was subsequently convicted of a road traffic offence and disqualified from driving as a result of the accident.

The claimants each brought a claim against Powell in respect of their personal injuries, contending that he had been negligent. Judgment was entered against him. As Powell was uninsured, the Motor Insurers' Bureau ("MIB") was joined as a defendant.

The MIB argued that it was not liable. It maintained that its obligation to compensate a person in respect of an unsatisfied judgment was subject to the cl.6(1)(e)(ii)[1] exception in the 1999 Agreement, which provided that the obligation did not arise where the claimant knew, or ought to have known, that the vehicle was being used without the relevant insurance. The MIB's case was that Powell had previous driving disqualifications for driving offences and that the claimants had "turned a blind eye" to the issue of whether he was insured.

HH Judge John concluded that he had not been given a full or truthful account of the evening in issue, or the underlying relationship of the people involved. He determined that the claimants ought to have known that the vehicle was being driven without insurance because they knew more than enough to arouse suspicions and they did not ask. The claimant's appealed.

On appeal the issue was whether, given the findings of fact, the judge had properly addressed the question of whether each appellant knew or ought to have known that the vehicle was uninsured when they got into it.[2] Lewis J noted that a significant part of the reasoning underlying the conclusion of HH Judge John was that prior to the accident, Anthony Powell had convictions for driving offences and that he had been sentenced to imprisonment for those offences.

The MIB (on whom the burden of proof of establishing that the exception applied) did not adduce any evidence of Mr Powell's convictions and, in particular, the MIB did not adduce any evidence that Mr Powell had convictions relating to driving which had led to him being sentenced to a period of imprisonment prior to the accident that was the subject of this claim. Mr Powell did not give evidence. Nevertheless, HH Judge John was influenced by the belief or assumption that, prior to the accident, Powell had convictions for driving offences and had been sentenced to imprisonment for those offences. He inferred, from the circumstances and the fact that it was a small local community, that the claimants would have known more about Powell than was admitted and that therefore they would have known that he had been to prison for driving offences. The judge simply assumed that such evidence existed.

Lewis J held that on the basis of the evidence recorded, there was no basis for any inference that the claimants had information that Powell had been to prison for driving or other offences, and realised from that that he might not have been insured and deliberately refrained from asking questions. The case law established that a failure to make enquiries that a reasonable passenger might have made, with knowledge of that information, would not be sufficient to fall within the exception. That issue was not addressed by HH Judge John.

Lewis J pointed out that even if one of the claimants had believed that Powell had been imprisoned for driving offences, and even if that would have caused a reasonable person to make enquiries, that would not have been sufficient to enable MIB to rely on the exception if, in fact, the claimant genuinely but negligently failed to make enquiries and simply assumed that Powell must have been insured. HH Judge John failed to address that issue. Accordingly, there had been a procedural shortcoming in the trial which meant that it would be unjust to allow the finding to stand on the evidence and the matter was remitted to the county court for rehearing.

[1] MIB Uninsured Drivers' Agreement 1999 cl.6(1)(e)(ii): "(e) a claim which is made in respect of a relevant liability … by a claimant who, at the time of the use giving rise to the relevant liability was voluntarily allowing himself to be carried in the vehicle and either before the commencement of the journey or after such commencement if he could reasonably be expected to have alighted from it, knew or ought to have known that —…. (ii) the vehicle was being used without there being in force in relation to its use such a contract of insurance as would comply with Part VI of the 1988 Act."

[2] *White v White* [2001] UKHL 9; [2001] 1 W.L.R. 481 and *Akers v Motor Insurers' Bureau* [2003] EWCA Civ 18; 2003] Lloyd's Rep. I.R. 427 applied.

Comment

Shortly after midnight, in the early moments of 5 June 1993, Brian White was going to a late-night party. He was a front seat passenger in a Ford Capri being driven along a country road by his brother Shane a few miles outside Hereford. Shane lost control of the car coming out of a bend. It crashed, rolled over violently and Brian was very seriously injured. No other vehicle was involved. Shane's negligent driving was the entire cause of the accident. Although Shane had never passed a driving test he was actually disqualified from driving. Neither Shane nor the car was insured. Brian looked to MIB to satisfy his claim for damages against Shane.

Under the 1988 MIB Uninsured Driver Agreement the MIB did not incur any liability in a case where a person suffering death or bodily injury was allowing himself to be carried in or upon the vehicle and before the commencement of his journey in the vehicle he knew or ought to have known that the vehicle was being used without there being in force in relation to its use such a contract of insurance as would comply with Pt VI of the Road Traffic Act 1972. On the basis that Brian knew or ought to have known that Shane was driving uninsured the MIB declined the claim.

In fact, at the time of the accident Brian did not know his brother was unlicensed and, hence, uninsured. What he did know was that in the past that his brother had been driving without a licence. The judge said that while it would be going too far to say that Brian knew Shane was uninsured, it "stands out a mile" that he ought to have known. He ought to have made sure one way or the other, and he made no effort to do so. These simple facts took the case to the House of Lords.[3]

The Lords went back to the source of the law leading to the agreement and applied "purposive interpretation". Article 1(4) of Directive 84/5,[4] allowed Member States to exclude the right to compensation only where a person "knew" that the vehicle was uninsured. The Court of Appeal had ruled that was not directly enforceable. The Lords held, allowing the appeal, that for the purpose of art.1(4), "knew" encompassed actual knowledge that the driver was uninsured and the situation where the victim deliberately refrained from finding out whether insurance had been taken out. Since Brian White had merely been "careless", the MIB could not rely on art.1(4). Importantly the Lords also held that the phrase "knew or ought to have known" in the MIB Agreement was intended to mirror the exception permitted by the Directive and was therefore to be restrictively construed so as to exclude carelessness or negligence on the part of the victim. Brian White won.

Sixteen years later in this case the MIB essentially ran their *White v White* defence almost as if that case had never been to the House of Lords. HH Judge John accepted the defence holding that the claimants "ought to have known" that the vehicle was being driven without insurance because they knew "more than enough to arouse suspicions and they did not ask".

HH Judge John observed that the MIB was not alleging actual knowledge but was relying on the second category of cases identified in *White* deciding that the question was whether this case "is the type of case where, as applied in the present context, a passenger had information from which he drew the conclusion that the driver might well not be insured but deliberately refrained from asking questions, lest his suspicions be confirmed".

The judge considered that the issues did not relate to actual knowledge but distilled to:

> "a central question of whether on the facts of this case these claimants ought to have known in a sense that they were put on inquiry and did not undertake that enquiry. Are these claimants then to be cast as passengers who ought to have known in accordance with that interpretation?"

His answer was yes.

[3] *White v White* [2001] UKHL 9; [2001] 1 W.L.R. 481.

[4] Directive 84/5 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles [1984] OJ L8/17.

In *White v White* Lord Nicholls put it like this:[5]

> "'Ought to have known' is apt to include knowledge which an honest person who enters the vehicle would have. It includes the case of a passenger who deliberately refrains from asking questions. It is not apt to include mere carelessness or negligence. A mere failure to act with reasonable prudence is not enough."

White did not fall within the exception. In *Akers,*[6] considering the phrase "knew or ought to have known" as interpreted in *White* Keene LJ said this:[7]

> "the phrase 'knew or ought to have known' is to be given the same meaning as 'knew' in the directive … as an exception to a general obligation, this phrase is to be given a narrow interpretation. A mere failure to make enquiries as to insurance, however negligent in the circumstances, is not enough by itself to bring the exception into play.
>
> It certainly will apply, however, either if the passenger had actual knowledge of the lack of insurance, or if he had information from which he realised that the driver might well not be insured but he deliberately refrained from asking questions lest his suspicions be confirmed … It follows that it is not enough for the MIB to show that the passenger failed to make the enquiries which a reasonable person would have made in the circumstances. More than that is required."

The judge here clearly got the law wrong. Judges sometimes do. What troubles me more is the fact that the MIB ran a defence which seems not to have been backed by any worthwhile evidence as if they had never heard of *White v White*. That does not inspire confidence in their claim on their website to compensate victims of uninsured and untraced drivers fairly and promptly.

Practice points

- The burden of proof of establishing that an injured passenger "knew" that their driver was uninsured rests with the MIB.
- It is not enough for the MIB to show that the passenger failed to make the enquiries which a "reasonable person" would have made in the circumstances.
- The phrase "knew or ought to have known" does not appear in the current MIB Uninsured Drivers' Agreement if is replaced by the word "knew".
- Knowledge in these cases is very difficult for the MIB to establish.
- As this case shows it is never safe to assume that an MIB repudiation is supported by evidence.

Nigel Tomkins

[5] *White v White* [2001] UKHL 9; [2001] 1 W.L.R. 481 at [23].
[6] *Akers v Motor Insurers' Bureau* [2003] EWCA Civ 18; 2003] Lloyd's Rep. I.R. 427.
[7] *White v White* [2001] UKHL 9; [2001] 1 W.L.R. 481 at [6].

Darnley v Croydon Health Services NHS Trust

(CA (Civ Div), Jackson LJ, McCombe LJ, Sales LJ, 23 March 2017, [2017] EWCA Civ 151)

Liability—negligence—accident and emergency departments—causation—duty of care—hospitals—waiting time—triage

Accident and emergency departments; Duty of care; NHS; Personal injury; Waiting time

On Monday 17 May 2010, the claimant Michael Darnley was unlawfully attacked and struck on the head by unknown assailants. After a time, he began to feel unwell. A friend drove him to the Accident and Emergency Department of the Mayday University Hospital, Croydon.[1]

Michael Darnley was booked in at the hospital A&E reception at 20.26. The receptionist told him that he would be seen in four or five hours, but she should have told him that he would be seen by a triage nurse within 30 minutes. Had he realised that he would be seen by a triage nurse, he would have stayed in A&E. Instead he left the hospital after 19 minutes without having been seen by a clinician.

Having returned home, his condition deteriorated. An ambulance was called at about 21.42. He was first taken to the defendant's hospital. A CT scan showed the presence of an extra-dural haematoma. He was transferred to St George's Hospital for neurosurgery to remove the haematoma. He suffered a left hemiplegia causing long-term disabilities. That would have been prevented had he received prompt treatment.

Clinical guidelines stated that a patient with a head injury should be assessed by a clinician within 15 minutes of arrival. Experts agreed that a slightly longer period of 30 minutes would also be appropriate. At trial, HH Judge Robinson concluded that the hospital had not breached its duty of care by failing to examine him within 15 minutes and by failing to give accurate information about waiting times. He concluded that information about waiting times was a courtesy rather than a legal obligation.

The claimant appealed submitting that the trust's failure to triage him within 15 minutes was a breach of duty, and his presentation on arrival was such as to merit priority triage. He also submitted that HH Judge Robinson erred in assessing the scope of the duty owed by reception staff and in his application of the "fair, just and reasonable" test under *Caparo Industries Plc v Dickman*.[2]

The Court of Appeal held that HH Judge Robinson provided logical reasons for deciding that Michael Darnley had not merited priority triage. It was not open to them to interfere with that decision. Further, two experts were of the opinion that on a busy night, such as the night in question, it might not be possible to triage all head injury patients within the target time of 15 minutes. HH Judge Robinson had been entitled to conclude that a longstop position of 30 minutes was appropriate and that there had been no breach of the duty of care by the trust's failure to examine the appellant within 15 or 19 minutes.

The court confirmed that for a duty of care to arise there should be proximity between the parties, and the situation should be one in which it was "fair, just and reasonable" for a duty to be imposed.[3] It was not a binary question giving a yes or no answer. It was necessary to consider the scope of the suggested duty and the range of consequences for which the defendant was to be held responsible.[4]

[1] Now known as the Croydon University Hospital.
[2] *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605 HL.
[3] *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605 HL followed.
[4] *Rahman v Arearose Ltd* [2001] Q.B. 351 CA (Civ Div) followed.

A duty of care had been imposed on the ambulance service after errors by telephone staff in *Kent v Griffiths (No.3)*.[5] However, the court pointed out an important distinction between an ambulance service telephonist and an A&E receptionist. An ambulance service telephonist often passed information to paramedics or patients for them to act on. Patients waiting for ambulances needed to decide whether to stay where they were or arrange their own transport to hospital. The law therefore imposed on the ambulance service a duty to take reasonable care to pass on correct information.

They held that the position of receptionists in A&E departments was different. Their function was to record the details of new arrivals, tell them where to wait and pass on details to the triage nurses. It was not their function to give any wider advice or information to patients.[6] There was no general duty on receptionists to keep patients informed about likely waiting times. Nor was it fair, just and reasonable to impose a duty not to provide inaccurate information about waiting times.

Even if a duty to provide the information had existed, they concluded that the scope of that duty could not extend to liability for the consequences of a patient walking out without telling the staff that he was about to leave. There was therefore no causal link between the breach of any duty and Michael Darnley's injury. The appeal was dismissed.

Dissenting McCombe LJ found on the very particular facts of this case the trust was in breach of its duty to Michael Darnley, and that breach had caused his injury. In his opinion when given information about waiting times, patients needed to know that in true emergencies the hospital could act quickly, and that initial assessments would occur sooner than the average waiting time for treatment. The functions of a hospital could not be divided up into those of receptionists and medical staff. If the hospital had a duty not to misinform patients, the duty was not removed by interposing non-medical reception staff as a first point of contact. In his opinion, the failure to inform Michael Darnley of the triage system was a breach of duty by the hospital.

Comment

The majority reasons in *Darnley* concentrated on whether a duty of care was owed by the defendant trust to Mr Darnley. However, it is surprising that this was the Court's focus given that it is, of course, very well established that hospitals owe a duty of care to their patients (which Mr Darnley was, or was closely analogous to, on account of his having presented himself at the A&E department for treatment despite his not having been admitted). The fact of the matter is that *Darnley* is not a duty of care case at all and the Court of Appeal erred in analysing it as such. There should not even have been any serious dispute between the parties as to whether a duty of care was owed considering that the case fell within a recognised duty category. *Darnley*, properly understood, is in fact a case concerned with the breach element of the action in negligence.

The error that the Court of Appeal committed in *Darnley* is, unfortunately, far from an isolated mistake. Judges not infrequently treat breach cases as though they were duty cases. Judges who commit that error typically say things like:

> "there was no duty of care owed by the defendant in the present case to do X because the reasonable person in the defendant's position would not have done X."

However, the structure of this phrase reveals immediately that the duty of care element is not, in fact, in play at all. The very fact that the court is discussing what the reasonable person in the defendant's position would have done indicates that the dispute is actually about the breach element, that being the only element of the action in negligence that addresses the satisfactoriness of what the defendant did.

[5] *Kent v Griffiths (No.3)* [2001] Q.B. 36 CA (Civ Div).
[6] *Kent v Griffiths (No.3)* [2001] Q.B. 36 CA (Civ Div) distinguished.

The late Tony Weir rightly decried in his *An Introduction to Tort Law* the tendency to elide the breach and duty elements of the tort of negligence. Weir described a case (*Sam v Atkins*)[7] in which the Court of Appeal held that a motorist owed no duty of care to a pedestrian. Weir wrote:[8]

> "In a quite simple case where the defendant motorist collided with a pedestrian who suddenly stepped out from behind a parked vehicle which blocked the defendant's vision, the trial judge held that though the defendant was negligent in driving too fast, her negligence did not cause the injury. The Court of Appeal correctly dismissed the claimant's appeal, but held that the trial judge had given the wrong reason: the right reason, forsooth, was that the motorist owed the pedestrian no duty! In fact, the trial judge was quite correct. Although the defendant was driving faster than was safe in the circumstances, the accident could only have been avoided if she had been driving much more slowly than proper care required; accordingly, her excess speed did not contribute to the injury, for it would have occurred had she been driving quite properly. To decide the case on the ground of 'no duty' rather than, as the trial judge did, on causation, is decidedly peculiar."

Weir properly described the Court of Appeal's decision in *Sam* as "decidedly peculiar". He was right to do so because motorist/pedestrian is an established duty category.

That *Darnley* was a breach case emerges particularly clearly from the fact that all of the judges were overwhelmingly concerned with what the reasonable person in the position of the defendant trust would have done. Sales LJ, for example, referred to the fact that patients who present at A&E departments cannot expect perfectly accurate information regarding waiting times (at [87]). Similarly, Jackson LJ referred to the fact that waiting areas in A&E departments are "not always havens of tranquillity" and that staff often have to operate under difficult conditions (at [54]). Matters such as these, of course, classically pertain to the breach element of the action in negligence.

The Court of Appeal should have analysed the appeal in *Darnley* as follows. Any suggestion that no duty of care was owed to Mr Darnley should have been given short shrift. That is because the parties stood within an established duty category. In these circumstances, it is straightforward that a duty of care was owed to Mr Darnley. The only question in *Darnley*, relevantly, was whether reasonable care was exercised with respect to Mr Darnley. That question was one for the trial judge, and it required him to apply the familiar negligence calculus pursuant to which the risk and magnitude of the injury to which Mr Darnley was exposed had to be weighed against the cost of taking precautions that would have avoided the risk and the utility of the defendant's conduct.

Moving beyond the error in classification that the Court of Appeal committed in *Darnley*, it is worth noting that many of the reasons given by the Court of Appeal are not, in any event, free from difficulty. Jackson LJ said, for example, that[9] "the position of the A & E staff … is to record the details of new arrivals, to tell them where to wait and to pass on relevant details to the triage nurses. It is not their function or their duty to give any wider advice or information to patients". The problem here is that Jackson LJ has merely cited the consequence of holding that there was no duty of care as though it were a reason for concluding that there was no duty. Jackson LJ has not explained *why* no duty of care should be recognised. Jackson LJ further said:[10]

> "Nor do I think it is fair, just and reasonable to impose upon the receptionist (or the defendant acting by the receptionist) a duty not to provide inaccurate information about waiting times. This would add a new layer of responsibility to clerical staff and a new head of liability for NHS health trusts."

[7] *Sam v Atkins* [2005] EWCA Civ 1452; [2006] R.T.R. 14.
[8] Tony Weir, *An Introduction to Tort Law*, 2nd edn, (Oxford: OUP, 2006), p.33 (footnote omitted).
[9] *Darnley v Croydon Health Services NHS Trust* [2017] EWCA Civ 151; [2017] Med. L.R. 245 at [51].
[10] *Darnley v Croydon Health Services NHS Trust* [2017] EWCA Civ 151; [2017] Med. L.R. 245 at [53].

Again, this is, with respect, unconvincing since Jackson LJ has stated only that to impose a duty would be to impose a duty and, therefore, it would be wrong to impose a duty.

Practice points

- Where the parties are in an established duty relationship, precedent dictates that no question regarding the duty of care element of the action in negligence can arise.
- If the claimant's complaint is that the defendant took insufficient care of his or her interests, the complaint pertains to the breach element of the action in negligence.

Dr James Goudkamp

Casson v Hudson[1]

(CA (Civ Div), Patten LJ, Sales LJ, David Richards LJ, 3 March 2017, [2017] EWCA Civ 125)

Personal injury—liability—torts—health and safety at work—breach of statutory duty—community work—ladders—prisoners—release on licence—supervision—Provision and Use of Work Equipment Regulations 1998

Breach of statutory duty; Community work; Health and safety at work; Ladders; Personal injury; Release on licence

On 10 December 2009 Peter Casson sustained serious injuries when he fell from a ladder, while carrying out decorating work at the St Wilfred's Church Hall in Mereside, Blackpool. At the time Mr Casson was a serving prisoner at HMP Kirkham. He had been granted resettlement day release in November 2008 and until September 2009 he had been working at the Mereside Community Centre. He then transferred to the church hall, as a general handyman.

He was supervised at both places by Lisa Reid, a community worker at the community centre. He accepted that Ms Reid had told him not to use ladders. He also accepted that he had read and signed a placement memorandum of understanding that stated, among other things, that he was not permitted to use ladders.

Mr Casson fell from near the top of a 15-rung metal ladder that belonged to the defendants and was kept at the church hall. It was in good condition. It had rubber feet and the floor was not slippery. Mr Casson said he was clearing cobwebs and dust off a wall using a brush in his right hand, in preparation for painting it, when the ladder slipped and moved from its position. It moved due to a combination of Mr Casson reaching out from the ladder and the fact that it was un-footed.

During the trial of his claim the recorder found that Mr Casson was not an employee and the church had not provided him with instructions or supervised his work. He was treated as being independent in his activities, and the painting was done at his own instigation. His case was dismissed.

Mr Casson did not challenge the decision that he was not employed by the defendants. His appeal was limited to a claim for breach of statutory duty under the Provision and Use of Work Equipment Regulations 1998. He submitted that the recorder's factual findings were wrong because the Reverend Philip Hudson

[1] Parochial Church Council of St Wilfred's Church, Mereside.

had instructed him to paint the hall and had showed him the ladders. He argued that the recorder should have found that the defendants breached reg.3(3).

Regulation 3(2) provides that the requirements imposed by the Regulations "on an employer in respect of work equipment shall apply to such equipment provided for use or used by an employee of his at work". Regulation 3(3) applies those requirements outside the context of employment stating:

> "(3) The requirements imposed by these regulations on an employer shall also apply—
> (a) to a self-employed person, in respect of work equipment he uses at work;
> (b) subject to paragraph (5),[2] to a person who has control to any extent of—
> (i) work equipment;
> (ii) a person at work who uses or supervises or manages the use of work equipment; or
> (iii) the way in which work equipment is used at work,
> and to the extent of his control."

Regulation 3(4) provides that any reference in para.3(3)(b) to a person having control is a reference to "a person having control in connection with the carrying on by him of a trade, business or other undertaking (whether for profit or not)".

The court noted that the recorder had made a clear finding that Peter Casson was not instructed by the defendants to carry out any painting and decorating at the hall, but that that work was carried out at his own initiative. The recorder had formed the view that Mr Casson was not a reliable witness, and they confirmed that was fully entitled to reject the evidence that Mr Casson sought to rely on. It was said that Mr Casson did not know from the judgment why this evidence was rejected. As Richards LJ said: "The answer is that the recorder did not believe him. It is as simple as that."

Turning to the Regulations the court noted that they imposed a number of different duties, as to the suitability, maintenance and inspection of work equipment and as to the provision of information, instructions and training to employees and others. They confirmed that reg.3(3) applied to those outside the context of employment where a person had control. Under reg.3(4) any reference in reg.3(3)(b) to a person having control was held to be a reference to "a person having control in connection with the carrying on by him of a trade, business or other undertaking (whether for profit or not)".

However, the court held that even if reg.3(3)(b) applied to Mr Casson, it did not bring all the requirements of the Regulations into play, but only the duty of maintenance[3] under reg.5.[4] The ladder was in good condition and Mr Casson's injuries were not caused by the state of the ladder, but by the way that he was using it.

In order to engage the duties to provide information, instructions and training and to ensure that the ladder was suitable for the purpose for which it is used[5], the defendants would have to have had control to any extent of either: "a person at work who uses or supervises or manages the use of work equipment" or "the way in which work equipment is used at work".

In the light of the finding that Peter Casson was not instructed to do any painting but did so on his own initiative, and was forbidden from using ladders both by the terms of his placement memorandum and by the instructions of the community worker, it was impossible to conclude that the defendants fell into either of those categories.

The appeal was dismissed.

[2] Provision and Use of Work Equipment Regulations 1998 reg.3(5): "The requirements imposed by these Regulations shall not apply to a person in respect of work equipment supplied by him by way of sale, agreement for sale or hire-purchase agreement."

[3] Provision and Use of Work Equipment Regulations 1998 reg.5(1): "Every employer shall ensure that work equipment is maintained in an efficient state, in efficient working order and in good repair."

[4] See *Mason v Satelcom Ltd* [2008] EWCA Civ 494; [2008] I.C.R. 971.

[5] Provision and Use of Work Equipment Regulations 1998 regs 8, 9 and 4.

Comment

This case is a good example of how the Court of Appeal will invariably support the findings at first instance on the evidence. The claimant was unable to prove his case. His evidence that he was required to carry out work that would involve using the ladders simply was not accepted. As a result, his case failed.

It should also be borne in mind that the claimant actually signed documents to the effect that he would not use a ladder and was required by the prison authorities not to use it. However, it is interesting to consider the position had the claimant been given authority to use a ladder by the occupiers. The ladder was not defective, what went wrong was the way in which the individual actually used the ladder. It may well be that he was not given proper training and instruction regarding the use of the ladder but whose responsibility was this?

Reference is made in the decision to the Court of Appeal case of *Mason v Satelcom Ltd*.[6] In that case the Court of Appeal was required to interpret various statutory obligations. In particular, they were asked to consider the extent to which the owner of work equipment had obligations to non-employees. They interpreted the relevant regulation (reg.21 of the Provision and Use of Work Equipment Regulations 1998) on the basis that there had to be control over the individual in question and it was found that there was no control other than the provision of the ladder. Accordingly, the owners of the ladder were not found liable to any extent, however the employers were liable.

Applying this approach to this case, it seems clear that even if the claimant had been permitted to use the ladder then it would not have been found that he was under the control of the defendant. They merely provided the ladder, and were not under any statutory obligation to instruct how this should be used.

Accordingly, would the claimant have been able to have brought an action against the prison authorities on the basis that they should have given instruction regarding the use of the ladder? As mentioned above, the circumstances of this are that the claimant signed a document saying that he would not use the ladder. It is difficult to see how they would have an obligation to show him how to use the ladder safely. Nevertheless, it is worthwhile considering the position if such a document had not been signed and the claimant was free to use a ladder in the circumstances. Would the prison authorities have responsibility for him?

Reference is made to *Cox v Ministry of Justice*[7] which went to the Supreme Court. The Supreme Court was concerned as to whether or not the prison authority was responsible for the actions of a prisoner. It found that the work carried out by prisoners relieved HM Prison Service from engaging employees at market rates. It was work done for their benefit and on their behalf. This is not the position in this case. The work that was being done by the claimant was on a settlement day release for work as a general handyman. It is a matter of controversy as to whether or not the prison authorities would have had responsibility concerning his training and instruction on health and safety matters. It seems to me untenable that an individual should be allowed to carry out work in a workplace but not be given the appropriate training concerning health and safety matters when they are not working on their own account. Nevertheless, this may well have been the position here.

Practice points

- In any case involving an accident in the work place, there may well be issues as to the extent to which an organisation, other than the employer, is responsible for the negligence of others.

[6] *Mason v Satelcom Ltd* [2008] EWCA Civ 494; [2008] I.C.R. 971.
[7] *Cox v Ministry of Justice* [2016] UKSC 10; [2016] A.C. 660.

- Take nothing for granted, and ensure the evidence is always carefully scrutinised I addition to the case law in this particular area of the law.

Colin Ettinger

Maylin v Dacorum Sports Trust (t/a XC Sportspace)

(QBD, Judge McKenna, 9 March 2017, [2017] EWHC 378 (QB)

Liability—personal injury—negligence—sports and leisure facilities—climbing centres—falls from height—risk—supervision—duty to warn—warnings—volenti non fit injuria—disclaimers

Disclaimers; Duty to warn; Falls from height; Risk; Sports and leisure facilities; Supervision; Volenti non fit injuria

On 11 January 2014 Miss Emma Maylin went to the XC climbing and skate park in Hemel Hempstead. This is an activities centre occupied and operated by the defendant, Dacorum Sports Trust. She went to undertake indoor rock climbing activities with Neil Proctor, whom she had recently met. Miss Maylin was a novice having never before tried this sport. Mr Proctor had previously completed a beginner's climbing course at the centre in August 2013 and been signed off as "rope competent". He was a competent climber permitted by the defendant to supervise Miss Maylin.

They paid for general admission. Some of the options available to customers using the climbing facilities included supervision and training, but general admission did not include any supervision or training. However, general admission customers had to complete and pass a rope test or be accompanied by someone who had.

Miss Maylin was required to complete a disclaimer, which included a "Participation Statement" stating that climbing was an activity with a danger of personal injury or death, and that participants "should be aware of and accept [those] risks and be responsible for their own actions". Customers had to also answer yes or no to certain questions. Miss Maylin answered "yes" to questions concerning her understanding that failure to exercise due care could result in injury or death and to abide by the rules of the centre. She hired a harness, but declined to hire specific climbing shoes. No safety briefing was given.

After a short time on a climbing wall, the couple moved on to the bouldering wall. Mr Proctor ascended and descended two or three times. On her third attempt at a particular climb, Miss Maylin fell from almost the top of the wall onto matting. She fractured a disc in her back. Since the accident, novice bouldering wall climbers have been required to undertake a safety induction session at the centre prior to climbing. Emma Maylin claimed damages from the defendants.

In support of her case she relied upon a code of practice produced by the Association of British Climbing Walls. She alleged that the defendant, in breach of its common law duty of care, had failed to draw her attention to the risks involved in the activity, and had failed to provide basic, but necessarily obvious, safety information. Her case was that such failures had caused the injuries she sustained.

The heart of the case was the question of whether the defendant had had a duty to provide a safety induction or briefing, or to supervise the claimant and warn her that there was a risk of injury despite the provision of matting. Following *Poppleton v Trustees of the Portsmouth Youth Activities Committee*[1] the judge recognised that this involved consideration of whether the risks were inherent and obvious. He held

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

that the risk of falling from the bouldering wall was obvious, as was conceded by the claimant when giving evidence. Indeed, no amount of matting could absolutely avoid the risk of serious injury from an awkward fall, the possibly of which was an obvious and inherent risk of climbing up a bouldering wall. Accordingly the defendant was not required to train, supervise or warn the claimant, and it made no difference that she was charged to use the wall.[2]

The judge also held that even if he was wrong on that argument, the claim failed because the defendant had taken sufficient steps to draw the claimant's attention to the risks inherent in climbing, and in particular the risk that the presence of matting would not prevent injury in all cases. The participation statement at the top of the disclaimer, which the claimant accepted that she had read, made it plain that climbing was an activity with a danger of personal injury or death. There were also at least two notices warning users of the bouldering wall that matting did not make it any safer. There was at least one notice which spelt out that broken or sprained limbs were common. The notices were located on both sides of the entrance to the bouldering area and were there to be seen, regardless of whether the claimant had read them.

The mere fact that the defendant could have done more by perhaps having a receptionist spell out the risks verbally or by handing out a photocopy of the notice warning of the risks and that the mat did not make it any safer was irrelevant. The steps which were taken were themselves held to be sufficient. That meant there was no breach of duty. The claim was dismissed.

Comment

This High Court case follows the Court of Appeal decision in *Poppleton v The Trustees of the Portsmouth Youth Activities Committee* referred to above. It offers assistance to operators of similar types of leisure centres on the appropriate standard for assessing liability: whether the risks are inherent and obvious. It also highlights the steps taken in this case which operators of similar premises can take to ensure that risks are sufficiently drawn to the attention of the premises' visitors.

Occupier's duties

The claim was pleaded in both common law negligence and under the Occupiers' Liability Act 1957. However, it was conceded at the start of the trial that the claim had nothing to do with the state of the premises (s.1(1)), but that the accident occurred within the context of undertaking an activity which had inherent dangers.

Common law duty

The claimant argued that the defendant climbing centre failed to draw her attention to the risks involved in bouldering and failed to provide basic safety information in order to keep her safe.

Previous decisions suggest that the courts will only impose a duty of care where there is an assumption of responsibility by the "operator" for the injured party. In *Smoldon v Whitworth*[3] the referee assumed responsibility for the safety of the scrum and the game's participants. Schoolboy rugby players, took part in the game with the expectation that referee would "take a tight grip on the scrimmaging" to prevent repeated collapses and the foreseeable injuries which could follow.

In *Fowles v Bedfordshire CC*,[4] a university student regularly attended the Bedfordshire Youth House ("BYH") to practice gymnastics. The BYH operated an "open house" policy with no membership requirements and young people were free to drop in at any time to use its facilities. Activity was "discreetly

[2] *Poppleton v Trustees of the Portsmouth Youth Activities Committee* [2008] EWCA Civ 646; [2009] P.I.Q.R. P1 followed.
[3] *Smoldon v Whitworth* [1997] E.L.R. 249 CA (Civ Div).
[4] *Fowles v Bedfordshire CC* [1996] E.L.R. 51 CA (Civ Div).

supervised" by local council-employed youth workers who also offered counselling when needed. When Fowles was injured while attempting a forward somersault, the Council was found liable as it had assumed responsibility for teaching and supervising gymnastics at the BYH. The case of *Maylin* differs in that there was no organisation or assumption of responsibility for supervising climbers on the walls.

No duty to warn of obvious dangers

In *Tomlinson v Congleton BC*[5] the House of Lords held that the injury arose from the claimant's own actions. He was a person of full capacity who voluntarily engaged in an activity (diving into a lake) which had an inherent risk. The premises were not in a dangerous state and there was no duty to warn or take steps to prevent him from diving, as the risks were perfectly obvious.

Similarly in *Poppleton* there was no assumption of responsibility for the claimant's safety. The risks associated with the climbing wall in that case were obvious. May LJ, summarising Lord Hoffman's comments in *Tomlinson*, said:[6]

> "it would be extremely rare for an occupier of land to be under a duty to prevent people from taking risks which are inherent in the activities they freely chose to undertake. If people want to climb mountains, go hang gliding or swim or dive into ponds or lakes, that is their affair. The land owner may take a paternalistic view and prefer people not to undertake risky activities on his land. But the law does not require him to impose conditions."

In *Maylin*, no safety briefing or training was given and HH Judge McKenna, adopting the position set out in *Tomlinson* and *Poppleton*, found that the operator of the climbing centre owed no duty to warn the claimant about what was plain for her to see. The "risk of falling from the bouldering wall was plainly obvious" and it was equally plain that "no amount of matting could absolutely" avoid the risk of serious injury, should she fall awkwardly. The fact that the centre charged the claimant and her friend for entry was immaterial and did not amount to an assumption of responsibility or creation of a duty to warn.

Even if the court was wrong about the lack of duty to warn, the judge found that the defendant had taken sufficient steps in any event to draw attention to the risks inherent in climbing its wall and bouldering wall. It had made the risk of falls and injuries clear in notices around the centre along with reminders that the matting would not make falling from the walls any safer. The signs warned climbers that "broken or sprained limbs are common". The defendant's receptionist had also asked the claimant to sign a participation statement and this, too, warned of the inherent dangers of climbing.

Practice points

- The standard for assessing the defendant's liability in these types of claims is whether the dangers are inherent and obvious. If so, there is no duty to warn the claimant about those obvious risks.
- Similarly, there is no duty to train or supervise even if an entrance fee has been charged.
- The provision of a written warning upon registration, along with visible signage around the premises is sufficient notice and warning of the risks of the inherently dangerous activity.
- An additional verbal warning was not necessary even though the defendant could have done more, such as requiring the receptionist to read out the risks upon registration at the centre or to hand out a copy of the notices on the wall.
- Operators of premises offering dangerous leisure activities such as the climbing walls in this particular case should consider these to be the minimum steps which ought to be taken

[5] *Tomlinson v Congleton BC* [2003] UKHL 47; [2004] 1 A.C. 46.
[6] *Poppleton v Trustees of the Portsmouth Youth Activities Committee* [2008] EWCA Civ 646; [2009] P.I.Q.R. P1 at [17].

to avoid liability for injuries on their premises, since inevitably these cases will turn, to some extent, upon their individual facts.

Helen Blundell

R&S Pilling (t/a Phoenix Engineering) v UK Insurance Ltd

(CA (Civ Div), Sir Terence Etherton MR, Beatson LJ, Henderson LJ, 12 April 2017, [2017] EWCA Civ 259)

Motor insurance liability—policies—interpretation—causation—fire—policy wordings—cars—use—repairs—roads—third party insurance—EU law—Directive 2009/103—Road Traffic Act 1988—compatibility

LT Insurance policies; Interpretation; Motor insurance; Repairs; Vehicles

On Saturday 12 June 2010, Mr Thomas Holden, a mechanical fitter employed by the Phoenix Engineering was working overtime at his employer's premises. The day before his car had failed its MOT due to corrosion on its underside. Having completed his first piece of work that day he asked his employer if he could use the loading bay at the premises to do some work on the car which would hopefully enable it to pass the MOT. His employer agreed. His intention was to weld some plates onto the underside of the car to deal with the corrosion.

He disconnected the car battery so there were no live circuits which the welding equipment might interfere with. He then used a fork-lift truck to push the car up on its side so that he could get at the underside. He used a grinder first to prepare the underside and then successfully welded a plate under the driver's side. He then reconnected the battery, started the car and moved it round the other way before disconnecting it again and lifting it up once more but now with the underneath of the passenger side exposed.

At this point he started to weld, but then his phone went and he stood up to take the call. As he did so, he saw flames inside the car. What had happened was that sparks from the welding had ignited flammable material inside the car including the seat covers. The fire spread and set alight some rubber mats lying close to the car. The fire then took hold in Phoenix's premises and adjoining premises and substantial damage was caused before it was extinguished.

Phoenix's insurer was AXA. It paid out to Phoenix and the owner of the adjoining property in excess of £2 million. Being subrogated to Phoenix's rights, AXA made a claim against Mr Holden in the name of Phoenix for an indemnity in respect of the sums it had paid out. If Mr Holden had any insurance in respect of the claim, it was only through his ordinary car insurance effected with UK Insurance Ltd. UK Insurance applied for a declaration that the car insurance policy it had issued to Mr Holden did not cover the damage he had caused to property belonging to Phoenix while repairing his car.

The policy with the claimant provided cover for an individual who had an accident "in your vehicle" which killed or injured someone or caused damage to "their property" or "their vehicle". It stated that it provided the minimum cover required under UK and EU law. The insurer contended that its policy did not cover accidents involving the car on private premises or while it was being repaired,

At first instance HH Judge Waksman QC held[1] that cl.1a of the policy booklet, which stated that coverage was provided "if you have an accident in your vehicle", was too narrow. He concluded that it should be interpreted as providing for coverage "if there is an accident caused by or arising out of your use of your vehicle", which reflected the words in the Road Traffic Act 1988 s.145(3)(a). He held that the repair to the car was not "use" of the vehicle within the policy and within s.145(3)(a), on the basis that the car was not being operated in any way at the time, but was immobile and raised partly off the ground. Observing that in *Vnuk v Zavarovalnica Triglav dd*[2] it had been held that "use" of a vehicle covered any use which was consistent with the "normal function" of that vehicle, he concluded that it was not a "normal function" of a car to undergo repair. The declaration was granted. The employer appealed.

The Court of Appeal held that HH Judge Waksman QC's interpretation of cl.1a was erroneous, and narrowed the cover in a way and to an extent not justified by the express language. The policy stated expressly that the "Certificate of Motor Insurance" formed part of the policy, so the two documents had to be read together. The certification that the policy "satisfie[d] the requirements of the relevant law applicable in Great Britain" meant that the cover provided by the policy was to be read as extending to all the matters in s.145(3).

That did not mean a narrowing of the cover provided by the express terms of the policy, as the judge seemed to think, but an extension of cover insofar as the express terms did not embrace the matters specified in s.145(3). If the cover under cl.1a was interpreted as being extended but not limited by s.145(3), and removing the express condition that Mr Holden be in the car at the time of the accident, the cover extended to the loss and damage caused by the accident which occurred.

They held that it could not be argued that motor insurance cover was never intended to extend to such loss and damage, or that no reasonable person in the position of the parties at the time the policy was entered into would have perceived that to have been the scope of the cover, or that there was an insufficient causative link between the accident and the loss and damage to be indemnified under the policy.

In their view the opposite was the case, in circumstances where the car, having failed its MOT, was driven to a private location to be repaired and was manoeuvred into position to enable the repairs to be effected, where the object of the repairs was to make the car safe to drive, and where the accident occurred by virtue of the repairs being undertaken. The circumstances in which the repairs were necessary and the purpose for which they were effected were entirely commonplace for drivers generally.

The Court of Appeal also found that HH Judge Waksman had erred in concluding that the carrying out of the repairs by Mr Holden was not "use" of the car within s.145(3)(a). The following propositions as to the meaning of "use of the vehicle" in s.145(3)(a) could be derived from Directive 2009/103,[3] the CJEU jurisprudence and the English authorities:

- "use" was not confined to the actual operation of the car in the sense of being driven;
- there could be "use" of a car when it was parked or even immobilised and incapable of being driven in the immediate future;
- "use" of a vehicle included anything which was consistent with the normal function of the vehicle; and
- damage or injury could "arise out of" the use of the car if it was consequential, rather than immediate or proximate, provided that it was, in a relevant causal sense, a contributing factor.[4]

[1] *UK Insurance Ltd v Holden* [2016] EWHC 264 (QB); [2016] 4 W.L.R. 38.
[2] *Vnuk v Zavarovalnica Triglav dd* (C-162/13) EU:C:2014:2146; [2016] R.T.R. 10.
[3] Directive 2009/103 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability [2009] OJ L263/11.
[4] *Vnuk v Zavarovalnica Triglav dd* (C-162/13) EU:C:2014:2146; [2016] R.T.R. 10 followed, *Elliott v Grey* [1960] 1 Q.B. 367; [1959] 3 W.L.R. 956, *Pumbien v Vines* [1996] R.T.R. 37 and *Dunthorne v Bentley* [1996] R.T.R. 428 CA (Civ Div) considered.

They concluded that it followed that the repair of a car, which the owner wished to effect as soon as possible in order to be able to drive the car lawfully and safely, was "use" of the car within s.145(3)(a), being an activity consistent with its normal function for the purpose of that statutory provision. Alternatively, injury or damage resulting from such repair in such circumstances arose out of the use of the car, for the purposes of s.145(3)(a), because it was, in a relevant causal sense, a contributing factor. The appeal was allowed.

Comment

I feel quite embarrassed by this case as I was quite critical that we took the matter to trial and now, having taken it to appeal, I have the proverbial "egg on face". Leaving aside my consuming a large slice of "humble pie" this is an interesting judgment and goes a long way to solve the simple, but taxing, question of when is a vehicle being "used". It also examines the interplay between UK and EU law in the context of s.145 of the Road Traffic Act 1988 and Sixth Combined European Motor Insurance Directive.

A small part of the issue in this case was that Churchill's policy was not happily worded as it implied that an indemnity would only be given in respect of damage to property if it belonged to someone who was killed or injured in an accident. As is common with a number of insurance policies worded in so called "plain English", the operative clause is only triggered if the policyholder (Mr Holden) were to have an accident *in* his vehicle. In other words, if someone was to park their car on a slight slope but failed to fully apply the handbrake and left the car which subsequently rolled away and damaged another vehicle there would be no cover.

Clearly that would be nonsense and it was accepted that the proper construction of the clause should read something like:

> "We will cover you for our legal responsibility if there is an accident caused by or arising out of your use of your vehicle and you kill or injure someone or damage their property."

This then brings us to the question of what constitutes "use". However, as the Churchill policy purported to comply with UK law, there is a need to consider the Road Traffic Act and, for a while at least, the Act in the context of the EU Directives and case law.

As we all know, s.145 of the Road Traffic Act seeks to restrict the need for compulsory motor insurance to the use of vehicles on a road or other public place but that the Act itself must be interpreted so as to give life to the Sixth Combined Motor Insurance Directive which implies a far broader application of compulsory motor insurance. That inevitably leads to consideration of *Vnuk* which held that "use" of a vehicle included "any use of a vehicle which is consistent with the normal function of that vehicle". At first instance, HH Judge Waksman, correctly, had no difficulty in extending in appropriate cases compulsory motor insurance to private premises but he could not see how repairing a car in the way that Holden's car was being repaired was "use".

Sir Terence Etherton MR in giving the lead judgment did not fully agree with HH Judge Waksman in respect of subsidiary issues of policy construction and interpretation. He pointed to clauses in the policy where "use" was clearly intended to encompass a broad range of activities and also referred to the contingent cover provided when the vehicle insured was in the custody and control of a member of the motor trade "for maintenance or repair". However, the main grounds for the Court of Appeal overturning HH Judge Waksman's decision relate to what constitutes use in context of the Road Traffic Act and EU law, particularly *Vnuk*.

In reaching its decision the appeal court, in addition to considering *Vnuk,* examined a number of English decisions as well as Canadian and Australian decisions. *Elliot v Grey*[5] involved conviction for using a car

[5] *Elliott v Grey* [1960] 1 Q.B. 367; [1959] 3 W.L.R. 956.

on the road without insurance. The car in question had no battery, no petrol in the tank and needed electrical work. Elliot had no intention of moving, let alone driving his car that day. The court held that he still had use of the car on the road.

Pumbien v Vines[6] involved a car parked at the road side for several months during which time the brakes had seized, the tyres deflated and gearbox leaked oil rendering it useless, but Pumbien was still convicted of using a vehicle on a road without insurance. The court held that Pumbien had use of the car even though it was impossible to move its wheels. In *Dunthorne v Bentley*[7] the owner of a car that had run out of petrol was still using that car once they had left it and caused an accident when going to get fuel. And finally drugging and raping female passengers constituted use of a vehicle in *AXN v Worboys*.[8]

The Commonwealth decisions provided further authorities that the concept of "use" should be interpreted in the context of statutory provisions. Indeed, *Elias v Insurance Corp of British Columbia*[9] arises out of similar circumstances to this case. Elias was welding his wife's car at his place of work when fire accidentally broke out. The court held that "use" means "the ordinary and well-known activities to which automobiles are put". It went on to state that it included such things as "siphoning gasoline for use as a cleaning agent and for use as fuel, modifying wiring and preparation for maintenance". It also went onto say that:

> "The work being done went to the 'use' of the vehicle. It was not repair work without which the vehicle would have been immobile, unsafe or underperforming but it was consonant with, and not severable from, its use during a hoped-for period of long service. … Repair work need not be necessary to immediate drivability to come within the meaning of 'use'."

Taking all these decisions into account, the Master of the Rolls had no hesitation in finding that using a fork lift truck to tilt a car up so as undertake welding work constituted use:

> "I consider that it follows that the repair of a car, which the owner was driving but due to disrepair cannot be lawfully and safely driven, and which the owner wishes to effect as soon as possible in order to be able to drive the car lawfully and safely, is 'use' within the section 145(3)(a) of the RTA, being an activity consistent with the normal function for the purpose of that statutory provision. Alternatively, injury or damage resulting from such repair in such circumstances arises out of the use of the car, for the purposes of section 145(3)(a), because it is, in a relevant causal sense, a contributing factor."

So, if the "use" to which a vehicle is being put is consistent with its *normal function* then that "use" falls within the ambit of road traffic legislation.

Practice points

This is an important decision for insurers and practitioners as it shows that the court has adopted a broad approach when looking at the interpretation of both insurance provision and the meaning and effect of s.145 of the Road Traffic Act 1988 and EU Directives. The decision has provided some helpful guidance as to what constitutes "use".

- "Use" is not confined to the actual operation of car, e.g. use is not merely driving it.
- A vehicle can be "used" when parked and immobilised and incapable of being driven for the time being.
- "Use" of a vehicle includes anything consistent with the normal function of the vehicle.

[6] *Pumbien v Vine* [1996] R.T.R 37.
[7] *Dunthorne v Bentley* [1996] R.T.R. 428 CA (Civ Div).
[8] *AXN v Worboys* [2012] EWHC 1730 (QB); [2013] Lloyd's Rep. I.R. 207.
[9] *Elias v Insurance Corp of British Columbia* (1992) 95 DLR (4th) 303.

- Damage or injury may "arise out of" the use of the car if it is consequential rather than immediate or proximate, provided that it is in a relevant causal sense, a contributing factor.

In other words, "use" is very broad indeed.

David Fisher

Bowes v Highland Council

(OHCS, Lord Mulholland, 24 March 2017, [2017] CSOH 53)

Liability—road traffic accidents—negligence—bridges—defects—duty of care—local authorities' powers and duties

LT Bridges; Defects; Duty of care; Local authorities' liabilities; Road traffic accidents; Scotland

David Michael Bowes was self-employed, running a heating and plumbing business. At about 10.00 on 2 February 2010, he was driving his Toyota Hilux 4x4 pickup on the A838 road in a westerly direction. Whilst travelling across the Kyle of Tongue bridge the vehicle crossed from the westbound to the eastbound lane, mounted the kerb on the north side of the bridge, collided with the parapet and fell into the water. Mr Bowes was unable to escape from the vehicle and drowned.

His family raised an action of damages against the local roads authority on the basis that the accident had been caused by their failure at common law to take reasonable care for his safety while crossing the bridge. Quantum was agreed subject to liability.

Mr Bowes had been travelling alone and in poor weather conditions and the road surface had been covered with snow and slush. Unchallenged evidence was led that he was a careful and slow driver. There were no witnesses to the accident but it could be inferred from the evidence that as the vehicle had crossed the bridge, it had travelled into the opposite lane, mounted the kerb and collided with the parapet. The railings of the parapet had broken off at the welds and had swung out. The vehicle had fallen into the water.

In July 2005, an engineer carried out a principal inspection of the bridge which found defects, namely continued deterioration of major structural elements. In a report, defects to the parapet were categorised as severe, meaning that they affected the integrity of the structure and it was essential to repair at an early date. In addition, twice yearly monitoring of the bridge and parapets was recommended.

Five further inspections between early 2006–2008 detected no defects in the section of parapet which failed, however, those that were detected were sufficiently serious to adversely affect the parapet's containment strength and there was an increase in defects. Subsequently the council ceased to monitor the parapet.

In 2008, the council commissioned a report from consultant engineers. It noted that the parapet did not comply with current standards for restraint, its defects reduced containment strength and the containment level was unclear. The pursuers claimed that in accordance with the common law duty of care, Highland Council ought to have introduced interim measures prior to the accident, such as a temporary barrier, a reduction in the speed limit to 30mph, temporary traffic lights and consequential single lane carriage and warning signs.

The council's case was that they did not owe a duty of care to the deceased and as a result there was no obligation on them to provide a parapet of any strength. Accordingly, there was no requirement to put

in place temporary measures pending replacement of the defective parapet. Given the low risk of an accident arising out of the condition of the parapet temporary measures were unnecessary given their cost, limited utility and the other risks created by such measures.

Lord Mulholland found that there was no evidence that the deceased's loss of control had been caused by mechanical failure or medical condition. Nor was there any evidence that the bridge carriageway surface had been responsible. The tyre tracks in the snow veered at a shallow angle. Significantly, there was no indication that the vehicle had violently swerved. The judge held that it was an inescapable inference that the loss of control had been due to the driver's negligence and not to any failure on the council's part.

However, the parapet had not operated as it ought to have in the accident. It was designed to contain vehicles weighing up to one and a half tonnes travelling at 50mph and striking it at an angle of 20 degrees. The weight of the deceased's vehicle was 2,050kg, his speed was in the range of 20–40mph and the angle of impact had been less than 15 degrees. Therefore, had the parapet been acting to its design capacity, the vehicle would have been contained and would not have left the bridge and at worst, Mr Bowes would only have sustained minor injury.

The judge held that the council's decision to discontinue monitoring was wrong. It made no sense. It was contrary to previous advice in relation to a matter clearly related to safety. It meant that Highland Council had no idea of the parapet's containment strength, whether it was continuing to deteriorate, the extent and rate thereof, and the measures, if any, which ought to be taken to address it. It was essential that decisions thereon ought to be kept under review and revisited in the light of the state of the parapet. In addition, the council had carried out no risk assessment in relation to the parapet prior to this accident and basic health and safety principles had not been applied to the critical issue of its safety.

The pursuers had established that immediately prior to the accident, Highland Council knew that:

- the parapet was not compliant with current standards;
- the parapet was defective;
- its containment capacity was compromised to an unknown extent;
- it would not operate as intended; and
- had it been operating as designed, it would have contained the vehicle.

Highland Council was the roads authority responsible for managing and maintaining the bridge. The parapet was an integral part of the road. There was a long tract of authorities requiring roads authorities to exercise reasonable care in their management of the roads. The judge held that the parapet was clearly defective in that its containment capacity, if any, was unknown, which posed a danger to road users and there was a significant risk of an accident. It was designed to safeguard road users who came into contact with it. Mr Bowes had been entitled to rely on it to prevent serious injury or loss of life. Had it been functioning as designed, he would not have drowned, thus it was a hazard.

Lord Mulholland also held that Highland Council had been placed on notice that the parapet was defective to the extent that the containment capacity was unknown at the date of the accident. The hazard had not been dealt with and the risks that it posed had not been mitigated. There had been an urgent requirement to address the hazard. The council had taken six years to do so after being placed on notice of the problem. A reduction in speed and single lane carriageway was not unduly onerous and had in fact been imposed during the remedial works in 2011. The interim measures were reasonably practicable and the cost modest. The possibility of an accident of the kind which occurred was foreseeable, and Highland Council had breached its duty to deal with the hazard by implementing interim measures until the parapets were replaced. Had it done so, Mr Bowes' death would have been prevented.[1]

[1] *MacDonald v Aberdeenshire Council* [2013] CSIH 83; 2014 S.C. 114, applied and *Sargent v Secretary of State for Scotland* 2001 S.C.L.R. 190 CSOH, considered.

There was no basis for any finding of contributory negligence on the deceased driver's part. The action succeeded in full.

Comment

This is an interesting Scottish case on bridge repair and maintenance, displaying a robust adherence to safety standards, on the basis of repairs and monitoring risk not having been carried out. It is a classic case on the tension between risk assessment and the financial constraints on local authorities in a period of "austerity". The bridge, built in 1971, is part of the causeway which traverses the Kyle of Tongue waterway, a sea loch on the north coast of Sutherland.

The area is inevitably subject to adverse wintertime weather. The speed limit on the bridge was originally 70mph, but was reduced to 60mph in February 2010 after this incident. As well as financial considerations in considering repairs, there was also a logistical problem; if the bridge has to be closed for any reason, then there will be a detour of around 100 miles, as was seen when major repairs were carried out in 1989.

When David Bowes, a local plumber, drove his four-wheel drive pick-up truck across the bridge the conditions were standard for that location at that time of year:

> "The weather between 9.20–10.00am was poor with squalls of snow showers and the road surface was covered with snow and slush."[2]

As with so many incidents of this nature the precise cause of the vehicle slewing across the bridge and crashing through the parapet is still a mystery. From the pathologist's report Mr Bowes was able to release his seat belt but was unable to get clear of the vehicle, and before help could arrive, he had drowned. One of the earliest witnesses on the scene was a Highland Council roads foreman and coastguard, who swam out to the truck and attached a rope for the vehicle to be winched ashore.[3]

In the Outer House of the Court of Session Lord Mulholland notes that the loss of control was not apparently due to a medical condition or a mechanical defect, and the evidence was incontrovertible that Mr Bowes was a steady and careful driver. Nonetheless there was prior authority that there "is no non-negligent explanation for the loss of control and manner of driving"[4] and therefore the "inescapable conclusion" of the learned judge was that the loss of control was due to driver negligence.[5]

In examining the factual circumstances, and listening to the witnesses, the learned judge was particularly scathing about the computations made by a witness for Highland Council, a "forensic collision investigator", who seems to have based his calculations on the spot where the vehicle was towed clear of the water rather than where it landed straight from the bridge, and "added to this was his lack of knowledge of the behavior of parapets and lateral and longitudinal velocities, as calculated by him, producing accelerations and speeds at impact which were incredible (120mph)".[6]

However, the key issue was the nature of the bridge parapet. As on so many roads where there is a need for barriers, this consisted of aluminium posts with aluminium rails designed to be frangible and which will shear on vehicle impact, but with the aim that they are designed to re-direct a vehicle back onto the carriageway, having operated "like elastic" in absorbing energy. If these safety features had operated correctly, the learned judge found as fact that "the deceased would not have drowned" and at worse "he would only have sustained minor injury".[7]

[2] *Bowes v Highland Council* [2017] CSOH 53; 2017 Rep. L.R. 52 at [6].
[3] "David Bowes crash death on bridge 'avoidable'" (10 January 2012), *BBC News*, *http://www.bbc.co.uk/news/uk-scotland-highlands-islands-16488412* [Accessed 8 July 2017].
[4] *Weatherstone v T Graham & Son (Builders) Ltd* [2007] CSOH 94 per Lady Dorrian at [16].
[5] *Bowes v Highland Council* [2017] CSOH 53; 2017 Rep. L.R. 52 at [11].
[6] *Bowes v Highland Council* [2017] CSOH 53; 2017 Rep. L.R. 52 at [12].
[7] *Bowes v Highland Council* [2017] CSOH 53; 2017 Rep. L.R. 52 at [16].

Sadly the paper trail of inspections clearly showed defects over a period of time, including a report in 2005 which recommended that "major repairs to the structure are carried out without delay".[8] The learned judge notes that this was made in the clear realisation of the financial constraints on the council, and that interim measures such as a reduction in the speed limit, traffic lights and a one-way system as well as temporary barriers should be effected, pending the full repair in the next financial year. Nothing was done and, astonishingly, there came a point when the monitoring checks every six months were discontinued. Lord Mulholland notes scathingly that this was "wrong, did not make sense, [and] was against previous advice". It led to a situation where:

> "Given that the restraint capacity of the parapet related to safety, as the defender well knew, and the consequences of a defective parapet with little or no restraint capacity could lead to the death of a member of the public, it is surprising and alarming that basic health and safety principles of risk assessment were not applied to the critical issue of the safety of the parapet."[9]

Various authorities were considered in the judgment. Understandably there was a discussion of the Selby rail disaster in 2001, when a driver, recklessly failing to sleep before a lengthy journey with a trailer, fell asleep and veered off the M62 and down on to the main east coast railway line, into the path of an oncoming train travelling at 125mph, which derailed and struck a freight train. Ten people died and over 70 were injured.

Moreland J rejected an argument that there was no duty of care to provide a safety fence at this location to prevent the egress of vehicles.[10] A judgment was given along the lines of the *Caparo Industries Plc v Dickman* formula.[11] Additional assistance was given by the Scottish authority of *Sargent v Secretary of State*, where a driver had swerved to avoid a bus crossing in front of his vehicle, with the result that he crashed 20ft down into a loch. The widow of the deceased successfully argued that there should have been an Armco barrier at this obvious hazard point.[12]

It has to be said that elsewhere in the UK "road design" cases have not fared particularly well for the claimant. A significant obstacle has been the House of Lords decision in *Gorringe v Calderdale MBC*,[13] although the claimant in that case was clearly driving too fast and her case against the local authority that they should have painted "Slow" on the road as she approached the sharp crest of a hill can perhaps be confined to the facts.

In turn *Gorringe* relied on *Stovin v Wise*[14] (a majority House of Lords decisions on sight lines near a mound of earth which may have contributed to a collision, although the motorist had primarily failed to keep a proper lookout at a junction) and *Larner v Solihull MBC*[15] (a Court of Appeal case where a claim based on failure to erect a warning sign at a junction was dismissed, but an indication was given that there might be a common law duty of care if an authority acted "wholly unreasonably"). With respect, that standard of a local authority acting "wholly unreasonably" would seem to fit the circumstances here in *Bowes*, where a cavalier disregard of previous safety reports, a failure over six years to carry out urgent repairs, and a total failure to monitor problems with the parapet led inexorably to this drowning.

In response, Highland Council, the defender in this case, argued that the defective parapet was not the hazard, but rather the sea and rocks below. Furthermore, they argued that the parapet was designed for

[8] *Bowes v Highland Council* [2017] CSOH 53; 2017 Rep. L.R. 52 at [17].
[9] *Bowes v Highland Council* [2017] CSOH 53; 2017 Rep. L.R. 52 at [21], [22].
[10] *Great North Eastern Railway Ltd v Hart* [2003] EWHC 2450 (QB).
[11] *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605 HL. Adopted into Scots Law in *Mitchell v Glasgow City Council* [2009] UKHL 11; [2009] 1 A.C. 874 per Lord Hope of Craighead at [21]–[25]. Note also the points made in the Scottish case of an unprotected bridge in *Gibson v Orr* , 1999 S.C. 420 CSOH at 435C, in the dicta of Lord Hamilton, supporting the *Caparo* formula, on the application of tests such as reasonable foreseeability of harm, proximity of relationship, and what would be fair, just and reasonable.
[12] *Sargent v Secretary of State for Scotland* 2001 S.C.L.R. 190 CSOH.
[13] *Gorringe v Calderdale MBC* [2004] UKHL 15; [2004] 1 W.L.R. 1057.
[14] *Stovin v Wise* [1996] A.C. 923; [1996] 3 W.L.R. 388.
[15] *Larner v Solihull MBC* [2001] R.T.R. 32 CA (Civ Div).

"careful road users". The learned judge resisted any such suggestions, indicating that the parapet was "designed to safeguard road users who come into contact with it to prevent the obvious danger of falling off the bridge being realized".[16]

The council had clearly been placed on notice as to the defects. They had indeed considered some alleviating measures. Yet they had not carried out proper inspection or repairs, even despite the modest financial outlay that this might entail. In the circumstances, the learned judge came to the conclusion that if the Highland Council had implemented appropriate measures this "would have prevented the death of the deceased".[17]

Practice points

- Of critical importance in this case was the discovery and inspection of the council's internal documentation, which showed a lamentable failure to act on a risk assessment in 2005 and to ignore its clear warnings of the need both for interim temporary measures and then for major repairs in the following financial year.
- Even accidents such as this at an obvious hazard point on a bridge crossing a waterway need to be clearly evidenced by things such as:
  - a documentary trail of inspection reports showing major defects;
  - ignoring an urgent need to carry out repairs;[18]
  - that those repairs would have involved relatively inexpensive maintenance; and
  - there had been discontinuance of regular monitoring inspections.
- Scottish practice may diverge from that elsewhere in the UK.
- All UK road design cases may now default to the *Caparo* formula with Scotland just somewhat more advanced in that trajectory.

Julian Fulbrook

Cavanagh v Witley Parish Council

(QBD, Sir Alistair MacDuff, 14 February 2017, Unreported)

Personal injury—liability—negligence—local authorities—powers and duties—trees—accidents—duty of care—inspections

LT Duty of care; Inspections; Local authorities' powers and duties; Negligence; Personal injury; Plant diseases; Trees

On 3 January 2012, Andrew Cavanagh was driving a single-deck bus along the A283 Petworth Road in Witley, Surrey. Suddenly a large lime tree fell across a road and onto the bus. Miraculously Mr Cavanagh escaped with his life. He was seriously injured and was in intensive care for 13 days after the accident. He sought damages for the personal injuries and consequential loss suffered alleging that the accident was caused by the negligence of the defendants.

[16] *Bowes v Highland Council* [2017] CSOH 53; 2017 Rep. L.R. 52 at [29].
[17] *Bowes v Highland Council* [2017] CSOH 53; 2017 Rep. L.R. 52 at [33]. It would appear that an appeal is being considered; "Family slam council after bridge tragedy", David Kerr, *The Press and Journal*, 10 April 2017.
[18] Here the parapet guardrails system, with its built-in elasticity, had become defective, and there was clearly an urgent need for action.

The land was owned by the first defendant, Witley Parish Council. Tree inspections were carried out every three years. The second defendant was tree surgeon Kevin Shepherd.[1] Shepherd had been instructed by the council in 2006 and 2009 to inspect and report on the condition of the trees. The roots of the tree in question were extensively decayed.

The claimant asserted that the decay would have been detected by a competent arboriculturist at any time during the preceding four to five years. He claimed that the council had been negligent in employing Shepherd because he did not have the appropriate qualifications or expertise, and they had failed to ensure that he had adequate insurance cover.

The council denied liability and argued that a three-year inspection cycle was reasonable, and that it had relied on Shepherd's inspection and report which expressly stated that "no works" were required to the tree. Shepherd initially confirmed that the tree had been inspected in 2009, but later stated that he had not inspected it in 2009, as no maps of the particular area had been provided, despite repeated requests. He said that "no works" referred to trees which had not been inspected. Expert evidence confirmed that the fungal disease was just beginning to form in late summer 2009.

At trial, there were three issues:

1) whether Shepherd had inspected the tree in 2009;
2) whether the council had been negligent in instructing Shepherd; and
3) whether a three-year inspection cycle was adequate, or whether a two-year or shorter inspection regime should have been adopted.

Sir Alistair MacDuff noted that Shepherd had insurance, but confirmed that it did not protect him from liability for such an accident. When the claim was first made, he notified his insurers and told the council's solicitors that he had inspected the tree in 2009 and that there had been no sign of disease. His solicitors subsequently notified the council's solicitors that the inspection had taken place "sometime in July/August 2009". It was not until Shepherd's insurers declined cover that he denied having inspected the tree. His evidence regarding the lack of maps and his requests for them was rejected.

The judge held that Shepherd had inspected the tree in 2009. When he knew that it had fallen because of root decay, he made the reasonable assumption that he had missed the fungal disease. He might have remembered that he had only given the tree a cursory examination, and expected to be found to have been negligent. He was not to know that, according to the expert evidence, the disease would not have been detected in the autumn of 2009. He therefore lied in an attempt to escape liability. If he had been insured, he would have continued to accept that the tree came within his survey and that the words "no works" meant, as might reasonably be thought, that no works were needed.

On the issue of whether the council had been negligent in instructing Shepherd the judge concluded that it was irrelevant. Given the finding regarding the age of the disease, the question as to whether the council was negligent in instructing Shepherd was academic. In any event, such negligence, if proved, would not have been causative of the accident.

The key question was whether the council was negligent in adopting its three-yearly inspection policy. The tree was alongside a relatively busy public road and in a high-risk position. The judge held that it required regular inspection, more frequently than every three years. Applying simple negligence principles, taking account of the risk of failure together with the risk of serious damage, the tree should have been inspected at least every two years.

The judge went on to hold that an 18-month inspection cycle, when trees were in and out of leaf, would have been reasonable. The Forestry Commission Practice Guide supported that finding. It was significant that, prior to the accident, that was the advice being given to the council by arboriculturists, including Shepherd.

[1] Trading as Shepherd Tree Surgeons and Forestry Contractors.

The vast majority of trees in the parish were not along the roadside, or were not of a size and weight where they would cause severe injury or damage if they fell. The council's resources were finite, but it had not been suggested that the inspection policy had been influenced by a lack of funds. Recently instituted zoning policy enabled council resources to be channelled to a more frequent inspection of some trees, with savings made in making fewer inspections in zones where there was little or no risk. That was held to be a more sensible and economic policy.

Judgment was entered for claimant against the first defendant. The claim against the second defendant was dismissed.

Comment

Perhaps unsurprisingly, trees are a fruitful source of litigation. They are omnipresent and frequently the cause of accidents, yet the standards of care owed by owners of trees and contractors working on them are variable and very fact specific. In addition, the circumstances of and reasons for tree failures are infinitely variable. Whilst the present case determined no point of legal principle, the judgment may be said to have importance in setting the standard occupiers (or those otherwise responsible for trees) should meet in relation to the frequency with which they inspect trees which are in high-risk locations. The duty owed must inevitably be a matter of fact and degree in each case, but Sir Alastair McDuff determined that the guiding principles were as follows:

> "Where a tree (or group of trees) is within an area (one may say high-risk area but the language is unimportant) where people or high value property are within their falling distance, inspection is necessary. If it can be reasonably foreseen that there is a risk of serious injury/damage a duty arises to minimise that risk; this is particularly the case alongside a public road, more so if it is busy and more so if the relevant tree(s) is/are large or old. It is known that trees (particularly older trees) can become disease and unstable within a short time frame."

He then held that the tree in question was in a high-risk area and should have been inspected more frequently than every three years. Inspection should have been at least every two years. There was no suggestion that a different or higher standard was being imposed because the tree was owned by a public body, but such reasoning has applied in other highway tree cases where a higher standard of inspection has been required of corporate owners.[2] In an ideal world the liability to an innocent motorist hit by a tree ought not to depend upon the status of the tree's owner so much as where the tree was located and what state it was in, but that is not the law. However, this case ought to sound a warning even to owners of ordinary domestic properties who may have trees which could cause injury or serious damage if they fell.[3]

Whilst this case does not set a legal precedent, it is hard to see why the minimum of two-yearly inspections (founded on the judge's review of the published guidance and expert evidence) should not apply to any civil action relating to trees in high-risk areas. Of note, however, it was found by the judge that the council had not followed the advice of its own expert, tree consultant Mr Shepherd, who had recommended two-yearly inspections. This is important because a reasonable occupier in the council's position would probably have satisfied its duty of care if it had acted on expert advice. This is likely to have been so even if the advice was wrong unless the owner ought reasonably to know it is wrong. Whether and to what extent an ordinary domestic owner of trees would be expected to engage an expert is another matter.[4]

[2] See *Stagecoach South Western Trains Ltd v Hind* [2014] EWHC 1891 (TCC); [2014] 3 E.G.L.R. 59, and an appeal from another decision of McDuff J (as he then was) in *Micklewright v Surrey CC* [2011] EWCA Civ 922.

[3] Though for ordinary individual landowners the standard of inspection required may not be high; see *Caminer v London & Northern Investment Trust Ltd* [1951] A.C. 88 HL, and *Stagecoach South Western Trains Ltd v Hind* [2014] EWHC 1891 (TCC); [2014] 3 E.G.L.R. 59.

[4] See *Stagecoach South Western Trains Ltd v Hind* [2014] EWHC 1891 (TCC); [2014] 3 E.G.L.R. 59.

Practice points

- Arboricultural experts are likely to be required in most cases of serious injury arising from failed trees.
- Ensure experts are instructed and carry out site visits promptly and that evidence is preserved. The tree in this case failed due to severe decay evidenced by a fungal bracket, but only one of the three experts actually assessed the fungus before it was destroyed. His evidence carried the day.
- The standard of care owed by landowners in respect of trees is very site specific. Not all trees in a wood will have the same inspection intervals, and landowners will act reasonably if they follow expert advice.
- Landowners must ensure that the expert they obtain advice from is suitably qualified, experienced and insured.

Nathan Tavares

McHugh[1] v Okai-Koi

(QBD, David Pittaway QC, 31 March 2017, [2017] EWHC 1346 (QB))

Liability—torts—fatal accident claims—causation—causing death by careless or inconsiderate driving—defence of necessity—contributory negligence—ex turpi causa

☞ Causation; Causing death by careless or inconsiderate driving; Contributory negligence; Ex turpi causa; Fatal accident claims

On 4 March 2013 Mrs Okai-Koi had parked her car in the car park of the Lord Kitchenor public house. The claimant and his wife had been drinking in the pub. The couple were unhappy with where Mrs Okai-Koi had parked and remonstrated with her. She got into her vehicle and began to drive away, but stopped at the exit. The couple thought she was attempting to block the exit and approached her again, pulling the handles of her car doors and shouting for her to get out of the car.

Mrs McHugh sat on the bonnet of the motor car and her husband, the claimant, moved to the rear of the vehicle. Mrs Okai-Koi rang the police for assistance, but then drove away from the scene while Mrs McHugh was still on the bonnet. Mrs Okai-Koi turned right on to East Barnet Road, London where almost immediately there is a pedestrian crossing. Mrs McHugh slipped off the bonnet and struck her head on a Belisha Beacon situated on the pavement. She sustained serious head injuries from which she died.

On 6 June 2014 Mrs Okai-Koi was acquitted by a jury at the Harrow Crown Court of causing death by dangerous driving but convicted of causing death by careless driving. She was sentenced to 12 months' imprisonment. The claimant Mr McHugh sought damages. The defendant submitted that she should not be held liable in tort given the exceptional circumstances, and that if a breach of duty were found, the deceased's actions were sufficiently gross as to allow her to rely on the defence of ex turpi causa. The court was required to determine liability.

The court was satisfied that Mr and Mrs McHugh had been very intoxicated, that the deceased Mrs McHugh had been the main antagonist, and that the defendant Mrs Okai-Koi had remained calm while

[1] John McHugh (Administrator of the Estate of Christine McHugh (Deceased)).

suffering sustained abuse from both. The judge found that the defendant had stopped her car close to the exit in order to put on her seatbelt and collect her thoughts following the initial incident. The deceased and the claimant jumped to the conclusion that she was trying to block them from leaving the car park.

In the court's view Mrs McHugh had been spoiling for a fight and had attempted to get into the defendant's vehicle. The defendant called the police. The court accepted that she had been in genuine fear, that she thought that the couple were going to break into her car and attack her and that she panicked. But her decision to drive off while Mrs McHugh was on the bonnet was a fatal misjudgement. She should have waited for the police to arrive.

On the basis of the conviction and the evidence before him, the judge held that the defendant had not exercised due care and attention. She had suffered a terrifying verbal and physical attack and there was no evidence that she had behaved in a provocative manner. The behaviour of the claimant and the deceased had been highly culpable. However, a jury had rejected the defence of necessity in respect of causing death by careless driving and had been satisfied that the defendant had not been careful or prudent.

The fatality was held to have had two causes: the deceased's own actions and the defendant's decision to drive the car. The deceased Mrs McHugh had been the highly culpable protagonist, but the defendant should not have moved her car. The judge concluded that Mrs McHugh's share of the responsibility was considerably greater than that of Mrs Okai-Koi. Mrs McHugh was held to have behaved in a highly culpable manner as the protagonist of the altercation that took place because she was very intoxicated. Nevertheless, Mrs Okai-Koi should not have moved off when she knew that Mrs McHugh was on the bonnet but she did so in extraordinary circumstances. The defendant was held to be 25 per cent liable with the deceased 75 per cent liable.[2]

Comment

This case concerned the appropriate relationship between criminal law and negligence actions, as well as the defences of both illegality and contributory negligence.

Breach of duty and criminal convictions

Counsel for the defendant argued that she had not been negligent in all the circumstances of the case and, in doing so, drew on cases such as *Marshall v Osmond*[3] and *North v TNT Express (UK) Ltd*.[4] Marshall had been a passenger in a stolen car, which was being chased by the police. The defendant police officer was driving alongside in order to make an arrest but struck the car and injured the plaintiff. Having accepted that the officer should owe the same duty as other drivers, the judge concluded that he had made an error of judgment as otherwise the cars would not have come into contact. Nevertheless, he had been driving on a gravel surface at night and in stressful circumstances and so avoided liability.

The defendant in *North* similarly escaped liability for a road accident, which was deemed to have been caused by the claimant's own drunkenness and irresponsibility. The claimant had been drinking with friends and was waiting for a taxi home near a roundabout. As the defendant drove onto the roundabout, the claimant stepped into the road in front of his lorry and asked for a lift home, which the defendant refused. The claimant then climbed onto the lorry, stood on the bumper and held onto the windscreen wipers. He refused to move and so the defendant drove off slowly. After a short distance he fell off and was struck by the lorry. The judge accepted that the defendant would have been in breach of duty if he

[2] *Patel v Mirza* [2016] UKSC 42; [2016] 3 W.L.R. 399, *Jackson v Murray* [2015] UKSC 5; [2015] 2 All E.R. 805 and *Beaumont v Ferrer* [2016] EWCA Civ 768; [2016] R.T.R. 25 followed.
[3] *Marshall v Osmond* [1983] 1 Q.B. 1034 CA (Civ Div).
[4] *North v TNT Express (UK) Ltd* [2001] EWCA Civ 853.

had braked sharply but this was not the case. Instead, it was late at night and the defendant had had little alternative but to drive off.

The judge in *McHugh* accepted that the submissions based on these cases were well argued but nevertheless rejected them. Whilst Mrs McHugh was highly culpable for the accident, the defendant had not exercised the degree of care that a reasonable, competent and prudent driver should have exercised in the circumstances. It had been "inherently unsafe" to drive onto a busy main road with Mrs McHugh on the bonnet. However, the judge noted that the defendant's conviction for careless driving was also relevant.

Section 11 of the Civil Evidence Act 1968 provides that a criminal conviction is admissible as evidence in a civil claim. However, it is not admissible as evidence of negligence as some mistakenly assume but of the fact that the relevant offence was committed. This means, for example, that someone convicted of speeding cannot then suggest that they were not speeding in any later civil action. Illegal behaviour may well be viewed as negligent in many cases but, in terms of legal technicalities, this is not automatic. As such, it is for the judge in negligence claims to set the appropriate standard of care and to determine whether the defendant met that standard. This is reflected in cases such as *Barna v Hudes Merchandising Corp,* where the defendant was not found to be negligent despite the fact that he was speeding.[5]

However, in cases involving a conviction for careless driving, it appears that the criminal and civil law may be more interlinked. Counsel for the claimant had referred the judge to *Scott v Warren* where the defendant had made an emergency stop and crashed into the car in front of him.[6] It was contended in that case that the driver should have been found guilty of driving without due care and attention simply because, in contravention of the Highway Code, he had not left sufficient space between himself and the car in front of him to avoid the collision. Nonetheless, the Court of Appeal noted that the standard of care in civil claims is assessed with reference to all of the circumstances of the case and that a higher standard should not apply in the criminal context to someone charged with careless driving.

The judge in *McHugh* referred to *Scott* as authority "for the proposition that the obligation of the driver in criminal law cannot be the subject of a more stringent test than in civil law". This proposition was, of course, not directly relevant in *McHugh* because counsel for the defendant was not seeking to apply a higher standard of care in the criminal context than had been applied in a civil context but to apply a lower standard in the civil context than had been applied in the criminal context. Yet, the judge presumably concluded that it was appropriate for him to consider the conviction because the standard of care applied to the defendant's actions in the criminal court would have been similar, or at least no higher, than the standard he was obliged to apply himself.

Illegality and contributory negligence

The defence of illegality stems from Lord Mansfield's dictum in *Holman v Johnson* that, as a matter of public policy, "no court will lend its aid to a man who founds his cause of action upon an immoral or illegal act".[7] In their 2009 report, the Law Commission had urged the courts not to rely on rigid tests in applying the defence but to consider whether its application could be justified in policy terms. As a result, the courts have increasingly adopted a more policy-oriented approach, with Lord Hoffman in *Gray v Thames Trains*[8] stating that the defence is "not so much a principle as a policy … based [not] upon a single justification but on a group of reasons", which vary in different circumstances.

In *McHugh*, the judge rejected the defendant's argument that Mrs McHugh's conduct was sufficiently gross to bring her within the maxim ex turpi causa. In doing so, he relied on *Patel v Mirza* where Lord Toulson had explained that the rationale underlying the defence is that it would be contrary to the public

[5] *Barna v Hudes Merchandising Corp* (1962) Crim. L.R. 321 CA.
[6] *Scott v Warren* [1974] R.T.R. 104.
[7] *Holman v Johnson* (1775) 1 Cowp. 341 at 343.
[8] *Gray v Thames Trains* [2009] UKHL 33; [2009] 1 A.C. 1339.

interest to enforce a claim if to do so would be harmful to the integrity of the legal system.[9] In assessing whether the public interest would be harmed, Lord Toulson noted it was necessary to consider:

- the underlying purpose of the prohibition which had been transgressed and whether that purpose would be enhanced by the denial of the claim;
- any other relevant public policy on which denial of the claim may have an impact; and
- whether the denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts.

In relation to the first consideration, the judge referred to *McCracken v Smith*,[10] where an accident was caused by both the dangerous driving of a motorbike (of which the claimant was a pillion passenger) and the negligent driving of a minibus. Richards LJ stated that the fact that criminal conduct was one of two causes was not a sufficient basis for the defence of illegality to succeed. That too was the case in *McHugh* where the fatal injury had been caused both by Mr and Mrs McHugh's criminal conduct and the defendant's decision to drive off with Mrs McHugh still on the bonnet.

In relation to the second consideration, counsel for the claimant had argued that denying the claim would deprive Mrs McHugh's children of damages as dependants because of circumstances for which they were not responsible. However, the judge rejected this on the basis that it was inconsistent with s.5 of the Fatal Accidents Act 1976, which allows deductions to be made for contributory negligence. Finally, the judge concluded that the defence of illegality would not be proportionate because the defendant had already been convicted for driving without due care and attention and was not the sole cause of the accident.

In the circumstances, the judge concluded that it would be preferable to apply the defence of contributory negligence so that he could reach a decision that reflected both the defendant's negligence and Mrs McHugh's own fault. In deciding to reduce the damages by 75 per cent, the judge had taken into account both the blameworthiness of the parties and the causative potency of their acts. He recognised that there are cases where the causative potency of the driver's negligence has been greater than the pedestrian's involvement because cars are seen as "potentially dangerous weapons". However, he stressed that each case must depend on its own facts and so there was little to be gained from "detailed comparisons of outcomes in other cases". In this case, the defendant should not have driven away as she did but she had done so in exceptional circumstances.

Practice points

- Section 11 of the Civil Evidence Act 1968 states that a criminal conviction is evidence, not of negligence, but of the fact the offence was committed. As such, it is open to defendants to argue that illegal behaviour does not necessarily fall below the reasonable standard of care. However, such arguments may be more difficult to pursue in road traffic accident claims where the defendant has been convicted of careless driving.
- Where an injury has been caused not only by the defendant's negligence but also by the claimant's illegal behaviour, judges may well prefer to apply the partial defence of contributory negligence rather than the "all or nothing" defence of illegality.

Annette Morris

[9] *Patel v Mirza* [2016] UKSC 42; [2016] 3 W.L.R. 399.
[10] *McCracken v Smith* [2015] EWCA Civ 380; [2016] Lloyd's Rep. I.R. 171.

Case and Comment: Quantum Damages

JR[1] v Sheffield Teaching Hospitals NHS Foundation Trust

(QBD, William Davis J, 25 May 2017, [2017] EWHC 1245 (QB))

Personal injury—clinical negligence—damages—birth trauma—cerebral palsy—future loss—claim for lost years following injury sustained at birth—cost of special accommodation—negative discount rate— Roberts v Johnstone *approach*

Brain damage; Care costs; Clinical negligence; Damages; Loss of earnings; Residential accommodation

JR was born prematurely on 14 November 1992 and was delivered by vaginal breech delivery. Due to the traumatic nature of that delivery he suffered intracranial haemorrhage and brain injury causing moderately severe spastic cerebral palsy and significant cognitive impairment. It was not disputed that his injury was caused by the negligence of the defendant.[2] Nor was it in dispute that, because JR was a pre-term infant in breech presentation, the appropriate mode of delivery was caesarean section. Those who had the care of JR's mother were in breach of duty in attempting a vaginal delivery.

Substantial parts of the claim were agreed but the damages recoverable because of the defendant's breach of duty in part remained in dispute. Subject to approval, general damages for pain, suffering and loss of amenity were agreed in the sum of £300,000. The entirety of the claim for past financial loss was agreed subject to approval. What were said to be appropriate sums for the future cost of occupational therapy, speech and language therapy, orthotics and podiatry were also agreed together with a substantial sum for miscellaneous expenses. However, significant areas of dispute remained particularly in relation to two matters—loss of future earnings and accommodation—where there was an issue as to the proper legal principles to be applied.

General principles were not in issue. It was accepted that the award of damages should so far as is possible put JR in the position he would have been in had he not been injured at birth due to the defendant's breach of duty. He was "entitled to be compensated as nearly as possible in full for all pecuniary losses".[3]

In deciding whether a head of loss is recoverable in the amount claimed or at all, there must be an assessment of the reasonableness of the head of loss and of its amount.[4] The principle is that "full compensation" should be provided and this applies to pecuniary and non-pecuniary damages alike. The compensation must remain fair, reasonable and just. Fair compensation for the injured person. The level must also not result in injustice to the defendant, and it must not be out of accord with what society as a whole would perceive as being reasonable.[5]

On loss of earnings and pension the judge held that JR has no prospect at any time of engaging in remunerative employment. It was not in dispute that he was entitled to recover a sum to represent his loss of earnings and pension for life. The two live issues were:

[1] A Protected Party by his Mother and Litigation Friend JR.
[2] As the party responsible for the hospital in Sheffield at which he was delivered.
[3] *Wells v Wells* [1999] 1 A.C. 345 HL at 382.
[4] *Sowden v Lodge* [2004] EWCA Civ 1370; [2005] 1 W.L.R. 2129.
[5] *Whiten v St George's Healthcare NHS Trust* [2011] EWHC 2066 (QB); [2012] Med. L.R. 1.

1) What was the appropriate annual figure for loss of earnings and for loss of pension for the single year for which any pension would be payable prior to JR's expected date of death?[6]
2) Could JR recover for the loss of pension during the "lost years"?

It was in dispute whether a "lost years" claim could be made at all.[7] If a "lost years" claim was sustainable, it was agreed that the multiplier to be applied to any annual figure was 26.64. The defendant argued that the Court of Appeal in *Croke v Wiseman*[8] decided that someone in the position of JR cannot recover for "lost years". Although not a child, they argued that the rationale in *Croke* applied equally to him. JR was catastrophically injured at birth. He would never have any dependants. The court should refuse to speculate, speculation being the only route by which the judge could find that JR could have any dependants in the future.

On behalf of JR it was argued that the decision in *Croke* did not apply to someone in his position. *Croke* has been subject to significant judicial criticism[9] over the years nevertheless the principle in *Croke* was binding on the judge. However, he concluded that the policy considerations which led to the decision in *Croke* did not apply to JR. JR was no longer a catastrophically injured child but a 24-year-old man who can engage with others. He held that speculation was not required in order to identify a potential "lost years" claim. Whether such a claim was sustainable could be assessed by reference to the available evidence. The judge assessed the multiplicand for the "lost years" to be £6,337.50.

It was not in dispute that JR's then current accommodation—a three-bedroomed bungalow which he occupied along with his parents and his elder sibling—was wholly unsuited to his needs. It was agreed that a new property must be purchased and that adaptations to that property would be required. What the judge had to deal with was the effect of the recent change[10] in the discount rate[11] on the long-established *Roberts v Johnstone*[12] approach to recovery of the cost of alternative accommodation. In JR's case the judge was satisfied that applying the *Roberts v Johnstone* approach, which he concluded he was bound to do, led to a nil award in relation to the cost of special accommodation.

He reached this decision concluding that he had to consider the return on a risk-free investment as representing JR's loss. The only evidence available to him, namely the discount rate based on interest-linked gilts, showed that no return was possible on a risk-free investment. He recognised that this position may not persist and could change very quickly. He recognised that were it to do so, a positive investment return might once again become available. However, he had no evidence as to likely trends so he could only proceed on the basis of the position as it was then. Davis J decided it was not practical to use a multiplier that was a minus figure and that the multiplier in these circumstances should be zero.

Although the judge concluded that there should be a nil award in respect of the capital cost of special accommodation, a very substantial claim for adaptation costs was recoverable irrespective of the lack of recoverability of the capital purchase price of any property. £840,000 was awarded which included the costs of converting a property to JR's needs, increased running costs (for life), and relocation costs.

Comment

On this case, comments will be confined to the claim for loss of accommodation. In doing so, it is worthwhile reminding ourselves of the basic principle of when assessing damages which is the principle

[6] Resolution of this issue was fact specific so the outcome depended on what inferences properly could be drawn from the available evidence.
[7] *Pickett v British Rail Engineering* [1980] A.C. 136 HL and *Gammell v Wilson* [1982] A.C. 27 HL considered.
[8] *Croke (A Minor) v Wiseman* [1982] 1 W.L.R. 71 CA (Civ Div).
[9] See for example *Iqbal v Whipps Cross University NHS Trust* [2007] EWCA Civ 1190; [2008] P.I.Q.R. P9 and *Totham v King's College Hospital NHS Foundation Trust* [2015] EWHC 97 (QB); [2015] Med. L.R. 55.
[10] 27 February 2017.
[11] The discount rate was then set at ?0.75 per cent.
[12] *Roberts v Johnstone* [1989] Q.B. 878 CA (Civ Div).

of restitution established in *Livingstone v Rawyards Coal Co*.[13] The most recent endorsement of this decision was by the Supreme Court in *Knauer v Ministry of Justice*[14] when Lloyd Neuberger and Lady Hale in a joint judgment held:

> "It is the aim of an award of damages in the law of tort, as far as possible, to place the person who has been harmed by the wrongful acts of another in the position in which he or she would have been in had the harm not been done; full compensation, no more but certainly no less."

In the foreword to the consultation paper on the discount rate published in March 2017, the Lord Chancellor said: "I remain absolutely committed to the principle of full compensation — the '100% principle'."[15]

In JR's case, no award of compensation was made in respect of the capital costs of purchasing the new home. This decision was reached on the basis that the (then new) discount rate of 75 per cent should be applied in accordance with the principles as set out in *Roberts v Johnstone*.[16] But is such an approach correct?

It is necessary to scrutinise three decisions in order to consider the claim for compensation for accommodation cost. The starting point is *George v Pinnock* where Orr LJ said:[17]

> "The next issue concerns a head of damage not separately dealt with by the judge, namely, expenses incurred in or as a result of the acquisition of the bungalow in Dorset. The case put for the plaintiff is that either the judge had included these expenses in his figure of £19,000 for the remaining elements of general damages, in which case it was contended that that figure was manifestly too low, or alternatively he had wrongly failed to make a separate award under this heading. Nothing in the judgment suggests that any figure under this heading was included in the £19,000, or that indeed the judge appreciated that he was being asked to make an award under this heading. We were told that a note made by Mr. Dow for the purpose of his opening the case at the trial indicated that he was putting forward these expenses as a separate head of damage, but I have not been satisfied that this was ever made clear to the judge. It has, however, been agreed that, rather than remit the case for a further hearing, we should deal with this issue on such material as is available to us. For the plaintiff it has been contended, in the first place, that she should receive as additional damages either the whole or some part of the capital cost of acquiring the bungalow, since it was acquired to meet the particular needs arising from the accident. But this argument, in my judgment, has no foundation. The plaintiff still has the capital in question in the form of the bungalow.
>
> An alternative argument advanced was, however, that as a result of the particular needs arising from her injuries, the plaintiff has been involved in greater annual expenses of accommodation than she would have incurred if the accident had not happened. In my judgment, this argument is well founded, and I do not think it makes any difference for this purpose whether the matter is considered in terms of a loss of income from the capital expended on the bungalow or in terms of annual mortgage interest which would have been payable if capital to buy the bungalow had not been available. The plaintiff is, in my judgment, entitled to be compensated to the extent that this loss of income or notional outlay by way of mortgage interest exceeds what the cost of her accommodation would have been but for the accident."

[13] *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 HL at 39.
[14] *Knauer v Ministry of Justice* (2016) UKSC 9; [2016] A.C. 908.
[15] Ministry of Justice, *The Personal Injury Discount Rate: How it should be set in future* (30 March 2017), *https://consult.justice.gov.uk/digital-communications/personal-injury-discount-rate/supporting_documents/discountrateconsultationpaper.pdf* (Accessed 10 July 2017).
[16] *Roberts v Johnstone* [1989] Q.B. 878 CA (Civ Div).
[17] *George v Pinnock* [1973] 1 W.L.R. 118 CA (Civ Div) at 124–125.

This case establishes that the basis upon which an award of damages is made for accommodation is the additional cost incurred by the claimant by way of extra outlay of mortgage interest. Accordingly, the compensation is based on the level of mortgage interest payable.

The next case to consider is *Roberts v Johnstone*. In this case the decision in *George v Pinnock* was endorsed. However, concern was expressed by the court that if mortgage interest rate was applied, it would be 9.1 per cent which it considered was too high. There was some discussion as to what the appropriate rate should be that should be applied. The Court of Appeal was influenced by the fact that the reality of the case was that the purchase was financed by capital sum paid by way of interim payment. As an alternative to using the mortgage rate, the Court of Appeal applied a tax-free yield of two per cent in risk-free investment.

The court acknowledged that it adopted the same approach as was adopted in *George v Pinnock* but just applied a different interest rate. It should be noted in this case that no reference was made to the discount rate. This was dealt with by the House of Lords in *Wells v Wells*.[18] *Wells* is of course very well known for its decision relating to the assessment of the discount rate. But it was also required to consider compensation for the increased cost of accommodation. The approach adopted in *George v Pinnock* and *Roberts v Johnstone* was used. However, the interest rate of two per cent used in *Roberts v Johnstone* was rejected. Lord Lloyd held:

> "I can see no reason for regarding 2% as sacrosanct now that the average net return on ILGS has changed. The current rate is 3%. This therefore is the rate that should now be taken for calculating the cost of additional accommodation. It has two advantages. In the first place, it is the same as the rate for calculating future loss. Secondly it will be kept up-to-date by the Lord Chancellor when exercising his powers under Section 1 of the Act of 1996."

On this basis it may be considered that the court has no alternative but to follow whatever the discount rate is that the Lord Chancellor has fixed. However, to do this with the current discount rate would mean that the claimant would receive no compensation for any capital expenditure for accommodation. This is in fact what has happened here. The Law Lords in 1998 would not have anticipated a minus discount rate. Had they had done so they would surely have ensured that application of this would not have resulted in zero compensation in respect of this head of loss. This is particularly the case as the 100 per cent principle was reinforced as part of the *Wells* decision.

William Davis J made reference to the recent Court of Appeal decision in *Manna*.[19] He noted that the *Roberts v Johnstone* approach was described as pragmatic. Such an approach suggests that changes can be made to it without affecting the underlying principle. A review could have been made of the interest rates that have been used. In *George v Pinnock* it was the mortgage interest rate, *Roberts v Johnstone* relied on two per cent, in *Wells v Wells* three per cent based on ILGS. Bearing in mind that the basis of this head of loss is to compensate the claimant for the loss of use of the money, the court should have had regard to the current interest rate sought on mortgages.

In this regard the Bank of England provides information on the average standard variable rates available through the data series on its interactive database. The series CFNZ61X provides the monthly average of UK resident banks' sterling standard variable rate mortgage to individuals and individual trusts (in per cent) not seasonally adjusted. The last rate published was the 17 March figure which was 3.3 per cent. It is interesting that William Davis J used a different rate to the discount rate in any event, zero per cent.

Had the decisions in the cases referred to been given closer scrutiny, then it may well have been found that the appropriate interest rate to use was 3.3 per cent. Evidence along these lines was not presented in the *JR* case. It would have been expected that any such loss would have been limited to the capital cost.

[18] *Wells v Wells* [1999] 1 A.C. 345 HL.
[19] *Manna (A Child) v Central Manchester University Hospitals NHS Foundation Trust* [2017] EWCA Civ 12.

As mentioned, William Davis J quoted from the recent Court of Appeal decision in *Manna*, Tomlinson L J also said:

> "Society as a whole would not perhaps understand that an award elaborately structured in the manner which will ostensibly permit the attainment of a number of objectives desirable in the interests of the disabled claimant might not in fact succeed in enabling the claimant even to acquire the accommodation deemed appropriate for his care."

This is what has happened in this case, resulting in a decision that does not satisfy the 100 per cent principle. Leave to appeal has been granted.

Practice points

- Claimants are entitled to recover compensation for their losses. This includes the cost of accommodation. The issue is, how do you assess such a loss? One approach is set out above.
- In cases where there is a claim for the capital costs of accommodation, serious consideration should be given to challenging the decision in this case.

Colin Ettinger

RE (A Minor) v Calderdale and Huddersfield NHS Foundation Trust

(QBD, Goss J, 12 April 2017, [2017] EWHC 824 (QB))

Personal injury—liability—clinical negligence—birth—psychiatric harm—nervous shock—primary victims—secondary victims—mother—grandmother

LT Birth; Clinical negligence; Damages; Post-traumatic stress disorder; Primary victims; Psychiatric harm; Secondary victims

The first claimant, RE, was born on 22 April 2011 at 39 weeks' gestation at a midwifery led unit under the control and management of the defendant. She weighed 4.7kg (10lb 6oz). RE had suffered a hypoxic injury due to a lack of oxygen to the brain immediately prior to and following her birth at the midwifery unit.

RE was a very large baby weighing more than 10 pounds. After her head had been delivered there was a delay in her birth as her shoulder had become stuck. She was pale, floppy and without respiratory or heart rate after delivery. Resuscitation was commenced and a heart rate was noticed after 10 minutes and a first gasp after 12 minutes. RE's mother suffered post-traumatic stress disorder as did her grandmother, who had been present throughout the birth and witnessed the aftermath.

RE brought a claim for personal injury arising out of the circumstances of her birth. The mother and grandmother, brought claims for personal injury caused by "nervous shock". RE's father was the third claimant but did not pursue his claim.

Causation was not in issue. The claimants' case was that RE's delivery should have been achieved sooner and that after RE's head had been born there was shoulder dystocia. This delayed the delivery of her head for longer than was appropriate, and such delay was a consequence of failings by the midwives and obstetrician.

In relation to claims for nervous shock the issues were whether the mother was a primary victim and whether the event was of a sufficiently sudden and "shocking" nature as to entitle the mother and grandmother to damages for psychiatric damage.

The judge held that knowing that the mother was giving birth to a big baby, the midwife should have realised that there was a risk of shoulder dystocia. Once crowning of the head had occurred and the baby had not been delivered after the next contraction she should have appreciated that there was a real possibility of shoulder dystocia. Whether or not there was shoulder dystocia after crowning by 16.34 and the head had not delivered after one or two contractions, RE was stuck in the birth canal. The midwife should have diagnosed potential shoulder dystocia and in accordance with all the guidelines, summoned help immediately.

A slow heart rate commenced sometime between 16.38 and 16.43. Hypoxic injury commenced from 16.45 and lasted until RE had given her first gasp at 17.05. Assistance should have been summoned at around 16.37. If it had been, the birth would have been completed at 16.42, but was delayed for another 11 minutes.

The agreed evidence of the neonatologists and paediatric neurologists was that if RE had been delivered within the next three minutes, she would have "avoided all damage". The judge concluded that there was negligence in RE's delivery by delaying the summoning of help. That was causative of the hypoxic injury that commenced at about 16.45.

The judge also held that negligence occurred when RE's head had crowned but her body remained in the birth canal. At that point she was not a separate legal entity from her mother and in law, they were treated as one. The delayed delivery triggered the commencement of the hypoxic event whilst she was still in the uterus. She remained compromised and sustaining injury until eight minutes after her birth. The extent of the injury was dependent upon the totality of the insult which began at the time that mother and child were a single legal entity. Accordingly the mother was a primary victim.

As a primary victim recovery for psychiatric injury had to be in accordance with the principles in *Page v Smith*[1] and not subject to the control mechanisms applicable to claims by secondary victims.[2] The mother's experience was an outwardly shocking one that was exceptional in nature and horrifying as judged by objective standards and by reference to persons of ordinary susceptibility. It was not an event of the kind to be expected as part and parcel of the demands and experience of childbirth. Whether as a primary or secondary victim the mother was entitled to damages for nervous shock. Her PTSD was triggered by the birth of a lifeless baby who required a sustained period of resuscitation, and who she thought was dead.

The judge noted that the grandmother was present throughout the birth. She was also convinced that the baby was dead. There was agreement between the consultant psychiatrists that she had suffered PTSD as a result of observing the events of RE's birth. Her first-hand observation of the period immediately following RE's birth was the triggering event for PTSD. It had not been suggested that she was not sufficiently close in terms of relationship to the baby and to the event to be capable of being a secondary victim.[3] As in the case of the mother the judge held that the event was sufficiently sudden, shocking and objectively horrifying to conclude that the grandmother's claim for damages for nervous shock was established.

Judgment was entered for the claimants.

Comment

Whilst the mother and grandmother's claims succeeded, this case nevertheless reinforces Lord Steyn's observation in *White v Chief Constable of South Yorkshire Police* that the law governing psychiatric harm

[1] *Page v Smith* [1996] A.C. 155 HL.
[2] *Page v Smith* [1996] A.C. 155 HL followed.
[3] *McLoughlin v O'Brian* [1983] 1 A.C. 410 HL and *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 A.C. 310 HL applied.

is a "patchwork quilt of arbitrary distinctions which are difficult to justify".[4] In its 1999 report, the Law Commission had recommended a range of reforms to bring coherence and clarity to the law but these remain unimplemented.[5] As a result, the courts are still grappling with the complex concepts and tests that operate in this area. This case, which concerned the distinction between primary and secondary victims and the need for shock-induced harm, was no exception.

Mothers in childbirth and primary victimhood

The Law Commission had concluded that the distinction between primary and secondary victims was "more of a hindrance than a help".[6] Nevertheless, for as long as the distinction continues, claimants like the mother in this case are keen to be classified as primary victims in order to avoid the extra legal constraints imposed on secondary victims. These include the need for psychiatric harm to be reasonably foreseeable to a person of normal fortitude and the specific proximity requirements (proximity of relationship, physical and temporal proximity and proximity of perception). However, the problem is that the boundaries of what constitutes a primary victim are unclear. At the very least, primary victims include Lord Lloyd's narrow formulation in *Page v Smith* of those who are "directly involved in the accident" and "well within the range of a foreseeable physical injury".[7] The question is whether the boundary stretches further given Lord Oliver in *Alcock* had defined primary victimhood more broadly as including "those cases in which the injured plaintiff was involved either mediately or immediately as a participant".[8]

This uncertainty has meant that it is unclear how mothers suffering from psychiatric harm as a result of the negligent delivery of their baby should be categorised. The appeal courts do not yet appear to have ruled on the issue. However, in the very limited number of first instance decisions available for analysis, mothers have been classed as primary victims on two different grounds.

In *Farrell v Merton Sutton and Wandsworth HA*, the judge found the mother to be a primary victim because her psychiatric injury had been triggered by the "trauma of the birth" rather than the gradual realisation of her baby's disability, as contended by the defendant.[9] The trauma of the birth in that case "encompassed not only the events in the operating theatre but also the position up to and including the first sight of her baby and being told of his disability". Unfortunately, the judge did not clearly articulate why the trauma of the birth meant she was a primary rather than secondary victim and does seem to have conflated the issue with the need to prove shock, which is discussed below. It may have been that the mother herself was deemed to have been at risk of physical injury though it seems more likely that she was classed as a "participant", as referred to by Lord Oliver in *Alcock*.

In contrast, other mothers have been construed as primary victims because they and their baby have been treated as one legal entity. In *Wild v Southend University Hospital NHS Foundation Trust*, the foetus had died in utero and the defendant hospital had simply accepted that the mother was a primary victim.[10] In *Wells v University Hospital Southampton NHS Foundation Trust*, the baby died shortly after birth as a result of meconium aspiration in the womb.[11] Liability was not established on the facts but Dingemans J commented, obiter, that the mother was a primary victim because "the negligence (if it had been established) would have occurred when [the baby] and Mrs Wells were still one". This was the approach taken in the *RE* case.

[4] *White v Chief Constable of South Yorkshire Police* [1999] 2 A.C. 455 HL at 500.
[5] Law Commission, *Liability for Psychiatric Illness* (HMSO, 1999), Law Com. 249.
[6] Law Commission, *Liability for Psychiatric Illness* (HMSO, 1999), Law Com. 249, para.5.51.
[7] *Page v Smith* [1996] A.C. 155 at 184.
[8] *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 A.C. 310 HL at 407.
[9] *Farrell v Merton Sutton and Wandsworth HA* (2000) 57 B.M.L.R. 158 QBD.
[10] *Wild v Southend University Hospital NHS Foundation Trust* [2014] EWHC 4053 (QB); [2016] P.I.Q.R. P3.
[11] *Wells v University Hospital Southampton NHS Foundation Trust* [2015] EWHC 2376 (QB); [2015] Med. L.R. 477.

The defendant had tried to distinguish *Wild* and *Wells* on the basis that RE had survived and the permanent neurological injury had been sustained ex utero from around 16.45 until about 17.03. However, Goss J found that the critical trigger was the timing of the negligence and not the injury. The midwife's failure to call for assistance occurred when RE's head had crowned but her body had become stuck in the birth canal. As RE was still in utero at this point, mother and baby were a single legal entity. The delay that then followed in the delivery of RE triggered the commencement of the hypoxic event which caused RE to remain compromised and in the process of sustaining injury for eight minutes after her birth.

The "in utero" argument would seem to be the strongest if this is available on the facts though, as John de Bono QC has noted, existing cases contain little analysis and so the issue remains open for argument.[12]

The "shock" requirement in clinical negligence cases

In accordance with Lord Ackner in *Alcock*, secondary victims (and some argue also primary victims) must establish that their psychiatric harm has been induced by "shock", which he defined as "the sudden appreciation by sight or sound of a horrifying event which violently agitated the mind".[13] This requirement has two related but different strands.

First, claimants' appreciation of the relevant event must be "sudden" rather than gradual. This proved problematic in *Sion v Hampstead HA*, for example, where a father was unable to claim for psychiatric harm sustained as a result of watching his son die over a two-week period, during which he became increasingly aware of the hospital's negligence.[14] However, this does not mean that the relevant event cannot take place over a period of time. In *Walters v North Glamorgan NHS Trust*, for example, a mother was able to recover for pathological grief syndrome sustained as a result of a 36 hour "drawn-out experience", which started with her 10-month-old son suffering an epileptic fit and which ended with her agreeing to switch off his life support machine. Ward LJ concluded that it was "a seamless tale with an obvious beginning and an equally obvious end".[15]

The second strand, which was in issue in the *RE* case, is that the relevant event must be sufficiently "horrifying". This requirement can prove problematic in clinical negligence claims where victims may be deemed to have had a chance to "steel their nerves". For example, in *Liverpool Women's Hospital NHS Foundation Trust v Ronayne*, Tomlinson LJ stressed that a "visitor to a hospital is necessarily conditioned as to what to expect, and in the ordinary way it is also likely that due warning will be given by medical staff of an impending encounter likely to prove distressing".[16] As a result, he went on to note that something "exceptional in nature" is required for liability to arise. This is to be assessed objectively rather than subjectively as in *Shorter v Surrey and Sussex Healthcare NHS Trust*, Swift J stated that the event must be one which would be "recognised as 'horrifying' by a person of ordinary susceptibility, that is, by objective standards".[17] The claimant in *Ronayne* had failed on this basis as Tomlinson J had concluded that "the appearance of the claimant's wife was as would ordinarily be expected of a person in hospital *in the circumstances* in which she found herself". Her condition was both "alarming and distressing" but not in the context "exceptional".

In the *RE* case, Goss J was satisfied that the grandmother (and the mother, if she were a secondary victim) could reach the very high bar that seems to be applied in such cases. The event they experienced was not the kind to be expected as "part and parcel" of the demands and experience of childbirth and there was no conditioning or warning that RE would be born lifeless and require a sustained period of

[12] John de Bono QC, The Ten Rules of Nervous Shock (paper delivered at AVMA Conference, July 2016), *https://www.serjeantsinn.com/wp-content/uploads/2017/01/Nervous-Shock-final.pdf* [Accessed 10 July 2017].
[13] *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 A.C. 310 HL at 401.
[14] *Sion v Hampstead HA* [1994] EWCA Civ 26; [1994] 5 Med LR 170.
[15] *Walters v North Glamorgan NHS Trust* [2002] EWCA Civ 1792; [2003] P.I.Q.R. P16.
[16] *Liverpool Women's Hospital NHS Foundation Trust v Ronayne* [2015] EWCA Civ 588; [2015] P.I.Q.R. P20.
[17] *Shorter v Surrey and Sussex Healthcare NHS Trust* [2015] EWHC 614 (QB); (2015) 144 B.M.L.R. 136.

resuscitation. As such, this was "an outwardly shocking experience" that was sufficiently exceptional in nature.

Practice points

- It is inevitably preferable to frame a mother who suffers psychiatric injury during childbirth as a primary victim as she can then avoid the extra-legal constraints placed on secondary victims. The stronger argument to pursue, if allowed by the facts, is that the baby was "in utero" at the time of the hospital's negligence so that mother and baby should be treated as one legal entity. Alternatively, it can be argued that the mother was a "participant" and so included in Lord Oliver's broader definition of primary victims in *Alcock*.
- Where psychiatric harm has resulted from an event that has taken place over a period of time, it is advisable when pleading the claim to frame the event as one shocking but seamless drawn-out experience. The risk otherwise is that the psychiatric harm will be deemed not have been induced by shock but to have resulted from a gradual realisation of events as they unfold/a gradual deterioration in condition.
- In the context of clinical negligence cases, it is advisable when pleading to specifically address how and why the horrifying event was exceptional in nature. This would include an explanation as to how the claimant was insufficiently conditioned towards or warned about the distressing event they experience.

Annette Morris

Criminal Injuries Compensation Authority v First Tier Tribunal (Social Entitlement Chamber)[1]

(CA (Civ Div), Sir Brian Leveson, McFarlane LJ, Henderson LJ, 14 March 2017, [2017] EWCA Civ 139)

Personal injury—damages—criminal injuries compensation—rape—incest—victims—congenital disabilities—Criminal Injuries Compensation Act 1995 s.1

LT Children; Congenital disabilities; Criminal injuries compensation; Incest; Rape; Victims

From the age of nine years, M was sexually abused by her father KM which, after two years, progressed to full sexual intercourse. Ten years later, on 14 October 1987, Y was born following incestuous sexual intercourse (agreed to have constituted rape) between M and KM and just over two years later, M gave birth to another child, also by KM. Thereafter, this course of conduct came to light and KM subsequently pleaded guilty to incest and was sentenced to a term of three years' imprisonment. M brought a successful claim under the Criminal Injuries Compensation Scheme 1990 ("the 1990 Scheme") on the basis of the crimes of violence (including that which led to the conception of Y) of which she was a victim.

Tragically, Y was born with a serious genetic disorder which it is accepted was probably caused by the incestuous intercourse. This conclusion had been reached on the basis that there was a 50 per cent chance of such problems appearing in those born of an incestuous relationship as compared with a chance of two

[1] And Y (by his Mother and Litigation Friend) Interested Party.

to three per cent in the general population. The compensation which M received did not encompass any payment in relation to the condition, care or upbringing of Y.

In February 2012, a claim was made on behalf of Y under the Criminal Injuries Compensation Scheme 2008 which, on 25 June 2012, was refused on the grounds that Y was not a victim of a crime of violence and that his congenital condition was a result of the relationship between his parents and not of the assault itself. The decision was maintained after review. On appeal the First-tier Tribunal ("FTT") followed the reasoning of Lord Osborne in the Scottish case of *Millar*.[2] It concluded that Y "did not have and could never have had an uninjured state" and had not suffered an injury within the terms of the 2008 Scheme. The appeal was dismissed.

Acting with his mother as his litigation friend, Y then sought judicial review of the FTT by application to the Administrative Appeals Chamber of the Upper Tribunal ("UT") which stayed the hearing pending an appeal in *Criminal Injuries Compensation Authority v First-tier Tribunal (Social Entitlement Chamber)*.[3] That case concerned foetal injury caused by maternal self-induced alcohol poisoning. As a result, it was only on 25 April 2016 that Judge H. Levenson sitting in the UT determined the appeal, reversing the decision and concluding that Y was eligible for an award of compensation.

The case proceeded to the Court of Appeal. Y argued that the scheme should be construed, as the UT had, in every day terms; he cited *R. v Criminal Injuries Compensation Board Ex p. Warner*[4] which, discussing the then non-statutory scheme, stated that the court should not construe the scheme as if it were a statute but should decide what would be a "reasonable and literate man's understanding" of the circumstances in which compensation could be paid.

The Court of Appeal held that the scheme was now governed by the Criminal Injuries Compensation Act 1995 s.1 and had been approved by Parliament. It had to be governed by the rules of statutory construction which applied to all such instruments; the observations that some different standard should be deployed no longer applied.

They noted that Y had been unable to point to a difference between an approach under the usual rules of construction and one applying the "reasonable and literate man" test.[5] Although compensation was no longer to be approached using common law models, that was not because the scheme was a different species of law, but because the Act and the scheme no longer assessed damages by reference to common law principles but on a prescribed tariff.

The terms of the scheme meant that the victim of the crime of violence in this case could only be the mother. To suggest that Y, who had not been conceived at the time of the crime, was himself a victim of crime, or that it was possible to assess compensation on the basis that Y would otherwise have been born without disability and so should be compensated for the genetic disorder from which he suffered was to go beyond what the scheme sought to cover.

They made it clear that the mother should receive compensation for the difficulties she had experienced in caring for a disabled child born as a result of the crime committed against her. However, that was another matter, and one that should be addressed by the secretary of state. It was difficult to see why, as a matter of fairness, the common law approach to that matter adopted in *Parkinson v St James and Seacroft University Hospital NHS Trust*[6] should not be incorporated into the scheme.[7] They concluded that although aspects of *P's Curator Bonis* no longer fitted with developments in the common law, its fundamental analysis remained sound.[8] It was insufficient for the UT to have concluded that in common parlance Y had suffered injury without adequate reasoning to justify that conclusion.

[2] *P's Curator Bonis v Criminal Injuries Compensation Board* 197 S.L.T. 1180 CSOH.
[3] *Criminal Injuries Compensation Authority v First-tier Tribunal (Social Entitlement Chamber)* [2014] EWCA Civ 1554; [2015] Q.B. 459.
[4] *R. v Criminal Injuries Compensation Board Ex p. Warner* [1987] Q.B. 74 CA (Civ Div).
[5] *R. v Criminal Injuries Compensation Board Ex p. Warner* [1987] Q.B. 74 CA (Civ Div) considered.
[6] *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530; [2002] Q.B. 266.
[7] *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530; [2002] Q.B. 266 considered.
[8] *P's Curator Bonis v Criminal Injuries Compensation Board* 197 S.L.T. 1180 CSOH applied.

The appeal was allowed and the order of the FTT restored.

Comment

This is a fascinating decision involving "deep philosophical discussions about the nature of life and existence", which according to Judge H Levenson, who had upheld the applicant's appeal in the Upper Tribunal below, it was "inappropriate to consider".[9] The Court of Appeal thought otherwise. However, one wonders whether all this navel-gazing could have been avoided as all that was required was a bit of statutory interpretation.

Paragraph 9 of the Criminal Injuries Compensation Act 1995 which governs the compensation scheme has this to say about the victims of sexual offences:

> "Compensation will not be payable… in respect of a sexual offence, unless the applicant… (c) was the non-consenting victim of that offence (which does not include a victim who consented in fact but was deemed in law not to have consented)".

Who consents to be being born? In reality Y's condition was a result of the biological proximity of his parents, not the crime itself. Indeed, the sexual violence occurred prior to the claimant's existence. As the Court of Appeal recognised "the question had to be articulated whether, prior to the assault, there was a person or entity 'Y' upon whom, the impact of the crime of violence could be measured. The answer was that there was not".[10]

How broad can the definition of those who have been the victims of a rape be? Y's mother was clearly capable of consenting *in fact* but because she did not, she had already been compensated under the scheme as a result. But how could this apply to the product of that rape, Y?

This was not a case akin to a birth injury claim, where a healthy foetus may be injured through the negligent treatment of his or her mother during pregnancy. In such cases damages can be claimed by the child under the Congenital Disabilities (Civil Liabilities) Act 1976, even though the child is not a "legal person" at the time of the tort.

Y was always an injured foetus, never having "an uninjured state". It follows that it cannot be said that he suffered any injury, other than for "wrongful life", which is not countenanced by our common law, never mind the CICA scheme. *McKay v Essex AHA*[11] is a useful comparator, quoted with approval by Sir Brian Leveson in Y's case in the Court of Appeal: McKay's mother contracted rubella whilst pregnant. As a result her child would be born with severe disabilities. The child sued the hospital because her mother was refused a termination, and she was born into her life as a disabled person. Ackner LJ considered that to compensate her (the child) would require a comparison between her "non-existence" and the value of her existence in a disabled state:

> "But how can a court begin to evaluate non-existence, 'the undiscovered country from whose bourn no traveller returns'? No comparison is possible and therefore no damage can be established which a court could recognise."[12]

Since then, claims for the financial costs of giving birth to a disabled child, over and above those that would be incurred had the child been completely healthy, have been allowed in *McFarlane v Tayside Health Board*[13] (failed vasectomy) and *Parkinson v St James and Seacroft University Hospital NHS Trust*[14]

[9] *Criminal Injuries Compensation Authority v First-tier Tribunal (Social Entitlement Chamber)* [2017] EWCA Civ 139; [2017] 4 W.L.R. 60 at [17].
[10] *Criminal Injuries Compensation Authority v First-tier Tribunal (Social Entitlement Chamber)* [2017] EWCA Civ 139; [2017] 4 W.L.R. 60 at [10].
[11] *McKay v Essex AHA* [1982] Q.B. 1166 CA (Civ Div).
[12] *McKay v Essex AHA* [1982] Q.B. 1166 CA (Civ Div) at 1189.
[13] *McFarlane v Tayside Health Board* [2000] 2 A.C. 59 HL.
[14] *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530; [2002] Q.B. 266.

(failed sterilisation). These are claims by the mothers or parents, not the child. As such in common law, Y would have no claim, although his mother could have had a claim against the tortfeasor (Y's father/grandfather) for the additional costs of bringing up a disabled child.

It was recognised too that there were other practical difficulties over quantification. If Y's case had been upheld, where does Y's condition feature in the tariff of awards? And how would one assess loss of earnings capacity for example? The only comparator could be a child not born with the genetic disorder from which Y suffers, but sadly Y was never going to be that child.

Practice points

- There is no claim that can be made for a "wrongful life", either within the common law or the statutory CICA scheme. The problem for the claimant here is that he was never someone who was "uninjured" which was an insurmountable hurdle for him in assessing any compensation which may have been due.
- The claimant came into existence after the criminal act complained of, and his injury (if any) was not as a result of the crime of violence but as a result of the biological proximity between his parents.
- Having said that, under the rules of the CICA scheme it would appear that compensation can only ever be awarded to a victim of a sexual offence where that person did not consent *in fact*. That cannot apply to a child born as a result of that assault.

Jonathan Wheeler

Wastell v Woodward (Deceased)

(QBD, Master Davison, 28 February 2017, Unreported)

Personal injury—road traffic accidents—compensation—motor insurance—indemnity—Road Traffic Act 1988 s.145(3)—use of a vehicle on a road

LT Compensation; Motor insurance; Personal injury; Road traffic accidents

"Johnny" Woodward had a hamburger van which he has converted from a former ambulance. For some years, he had been in the habit of parking it in a layby on the A429 and trading from there. At that point, the A429 is a single carriageway in each direction. He and his van were a familiar sight. It was there most mornings and evenings.

On 27 July 2012 at about 08.25 Mr Woodward was adjusting a sign which he had placed on that side of the road. The sign was to indicate that his hamburger van was open for business. After adjusting the sign, Mr Woodward waited for a car to pass and then stepped out into the road in order to cross back over to his van. He did this without looking properly to his right. He had not seen the motorcycle being driven by the claimant and which was behind the car that had just passed. He stepped out directly into the path of the motorcyclist which was travelling at around 50mph. A collision was unavoidable. Mr Woodward was killed immediately. The claimant was very badly injured. No blame attached to the claimant.

Mr Woodward had no public liability insurance but his partner had a motor insurance policy with the second defendant company, on which he was a named driver. However, the policy did not cover use of the van as a business.

The court had to determine whether the accident arose out of "the use of a vehicle on a road" for the purposes of the Road Traffic Act 1988 s.145(3). If the claimant could show that that was the case, the second defendant would be statutorily liable to meet the claim. If not, his only remedy would be against the van owner's estate, which would be an empty remedy.

The court held that the relevant use in this case was use as a hamburger van. It was true that the deceased and his partner did not disclose to the second defendant insurer that the van was to be used as a hamburger van. However, as between the claimant and the second defendant that was irrelevant because the claim had to be adjudicated upon according to the wording of the statute rather than upon the scope of the contract of insurance between the deceased's partner and the second defendant.

The accident arose out of the use of the van as a hamburger van. The van was parked up in a lay-by at the side of the road in order to sell hamburgers. The deceased met with the accident having set up a sign precisely in order to further that activity. He was on his way back to the van. Temporally, geographically and qualitatively, the accident was closely linked to using the van on the road as a hamburger van.[1]

The preliminary issue was determined in favour of claimant.

Comment

The correct construction of s.145(3) of the 1988 Act is an issue which has come before the courts on a number of previous occasions, most notably in the Court of Appeal case of *Dunthorne v Bentley*.[2] In *Dunthorne* a vehicle ran out of petrol and came to a standstill at the side of the road. The driver got out and stood at the rear of the car with the hazard lights flashing. Some 10 minutes elapsed. A colleague stopped on the other side of the road. There was a shouted conversation. The driver of the stranded vehicle ran across the road. There was a collision in which she was killed and the claimant (who was driving a car) was seriously injured. The claimant's claim succeeded on the basis that the accident fell within the wording of s.145(3). In other words, it arose out of the use by the deceased of her car on the road.

At first instance, Laws J, inferred that the purpose of the deceased in running across the road was to get help and, in particular, petrol. Her wider purpose was to continue with her journey and hence her use of her car as a means of getting from A to B. He found that the claimant's injuries did therefore arise out of the deceased's use of her vehicle on the road. The decision was upheld by the Court of Appeal.

This was not surprising when one considers the case of *Dickinson v Motor Vehicle Insurance Trust*[3] decided in the High Court of Australia in 1987. Tabitha Dickinson was severely burnt when the interior of her father's motor car caught fire. At the time Tabitha was two years and two months old. She was a passenger in the car with her four and a half years old brother. Her father parked the car temporarily in order to buy some records at a nearby record shop.

Whilst the father was away, Tabitha's brother began to play with a box of matches which he found between the two bucket seats in the front of the car. A floor mat caught alight and the fire spread. The brother managed to get out of the car, but Tabitha, who was asleep, was trapped in it until she was rescued by a passer-by.

Tabitha, suing by her next friend, commenced an action to recover damages for her injuries. She sued both her father and the trust, which was the father's insurer under a policy issued pursuant to the provisions of the Motor Vehicle (Third Party Insurance) Act 1943 (WA) ("the Act").[4] The claim against the insurer was for a declaration that it was liable to pay such amount of any judgment against the father as was unsatisfied. By way of third party proceedings the father claimed an indemnity against insurer.

[1] *Dunthorne v Bentley* [1996] R.T.R. 428; [1996] P.I.Q.R. P323 applied.
[2] *Dunthorne v Bentley* [1996] R.T.R. 428; [1996] P.I.Q.R. P323.
[3] *Dickinson v Motor Vehicle Insurance Trust* [1987] HCA 49; (1987) 163 CLR 500.
[4] In order to comply with the Act, a policy of insurance had to cover, amongst other things, "all liability for negligence which may be incurred … in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle in any part of the Commonwealth": Motor Vehicle (Third Party Insurance) Act 1943 (WA) s.6(1)(b).

The trial judge found negligence on the part of the father and awarded the child damages. In the third-party proceedings judgment was given in favour of the father against the insurer by way of indemnity against his liability to Tabitha. The insurer appealed successfully and the judgments against it in the action and in the third-party proceedings were set aside.

The High Court were in no doubt that the motor car was being used within the meaning of the Act at the time at which the child sustained her injuries. It was in use to carry her and her brother as passengers in the course of a journey which was interrupted to enable the father to do some shopping. There was no suggestion that the interruption was other than temporary. "Use" for the purposes of the Act was held to extended to everything that fairly fell within the conception of the use of a motor vehicle and included a use which did not involve locomotion.

The cases of *Dickinson* and *Dunthorne* show that deliberate human acts of respectively starting a fire and of crossing the road do not prevent the bodily injury being held to have arisen out of the use of the motor vehicle. What was crucially important in *Dunthorne* in reaching the decision that the injuries of the claimant arose out of Mrs Bentley's use of the car is that she would not have crossed the road if she had not run out of petrol and sought help to continue her journey.

By the same token in *Dickinson*, the Chief Justice and his colleagues explained that:

> "There can, in our view, be no doubt that the motor vehicle was being used within the meaning of the Act at the time at which the appellant sustained her injuries. It was in use to carry the appellant and her brother in the course of a journey which was interrupted to enable the father to do some shopping."

All of these cases fit completely with the decision of the European Court of Justice in *Vnuk v Zavarovalnica Triglav dd*[5] which held that "use of vehicles" in art.3(1) of the First Motor Insurance Directive[6] meant "any use of a vehicle that is consistent with the normal function of that vehicle". It seems to me that the Master's decision here was sound.

Practice points

- The term "arising out of" contemplates more remote consequences than those envisaged by the words "caused by".[7]
- "Arising out of" extends a test of simple cause and effect to include "a result that is less immediate; but it still carries a sense of consequence".[8]
- The critical phrase "arising out of" does not mean a proximate cause or an effective cause but not necessarily an immediate cause as this is too narrow a test.
- The term "arising out of" still excludes the use of the vehicle being "casually concomitant but not causally connected with" the act in question.[9]
- The relationship to which the words "arising out of" must be applied is between the injuries suffered (not the negligent and wrongful acts) and the use of the vehicle not at the start of the journey, but as at the time when the injuries were suffered.
- The application of the words "bodily injury … arising out of the use of a vehicle" entails a consideration of all the material circumstances.

[5] *Vnuk v Zavarovalnica Triglav dd* EU:C:2014:2146; [2016] R.T.R. 10.

[6] Directive 72/166 on the approximation of the laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability [1972] OJ L103/1.

[7] See *Dunthorne v Bentley* [1996] R.T.R. 428; [1996] P.I.Q.R. P323 per Rose LJ.

[8] See *Government Insurance Office (NSW) v RJ Green & Lloyd Pty Ltd* [1966] HCA 6 per Windeyer J.

[9] The words originate in the judgment of *Government Insurance Office (NSW) v RJ Green & Lloyd Pty Ltd* [1966] HCA 6 per Windeyer J.

- The purpose of the user of the motor vehicle is relevant in deciding whether what occurred and in particular whether the bodily injuries arose out of the use of the motor car.[10]

Nigel Tomkins

[10] See *Dunthorne v Bentley* [1996] R.T.R. 428; [1996] P.I.Q.R. P323 per Rose LJ.

Case and Comment: Procedure

Archbishop Bowen v JL

(CA (Civ Div), Lewison LJ, Sir Ernest Ryder, Burnett LJ, 21 February 2017, [2017] EWCA Civ 82)

Limitation periods—assault—child sexual abuse—trespass to the person—unincorporated associations—chaplains—ministers of religion—vicarious liability—Limitation Act 1980

Assault; Child sexual abuse; Historical offences; Limitation periods; Vicarious liability

JL alleged that he had been groomed by Father Anthony Laundy since the age of eight and sexually abused by him from the age of 16. JL continued to visit Father Laundy as an adult, and sexual contact took place between them until Laundy's arrest in 1999, when JL was aged 31. JL alleged that the sexual contact had not been consensual because of emotional manipulation and grooming. Father Laundy pleaded guilty to eight counts of sexual assault, five of which related to JL.

JL claimed that it was only after receiving counselling in 2010 that he realised the damage caused by the sexual abuse. He issued his claim in November 2011. The cause of action was in trespass to the person. Father Laundy died in April 2014 but before his death stated that the sexual contact had been consensual and he had only pleaded guilty to avoid further adverse publicity for the church.

Amongst the issues at trial was whether, throughout the period during which JL claimed he had been sexually assaulted, he had consented to the activities which founded his claim. His case was that he did not consent to any of the sexual touching throughout the period from when he was 16 to when he was 31 because he had been groomed by Father Laundy and emotionally manipulated.

JL only saw Father Laundy once or twice whilst he was at university, instigated by JL. Although JL was unsure whether there was any sexual contact on that (or those) occasions, the judge determined that there probably was. The judge concluded that JL had consented to all sexual contact which followed his going to university but not that which preceded it. This meant that JL failed to establish the balance, indeed the bulk of his claim, that Father Laundy had assaulted him sexually for the nine or 10 years up to 1999 after he had completed his law degree. During that period, JL qualified as a solicitor, worked as such and then turned to acting and to business.

The judge exercised his discretion under the Limitation Act 1980 s.33 to disapply the limitation period and allow the claim to proceed, despite finding that JL had delayed for between nine and 23 years in bringing the claim. He also criticised JL's credibility on some matters. JL only succeeded in his claim relating to the period between the ages of 16 and 18. The balance of his claim was rejected on the basis that he had consented to sexual activity as an adult.

The defendants appealed and submitted that there had been no good reason for the delay in bringing the claim, and the judge had erred in his application of s.33 and the test set out in *B v Nugent Care Society*.[1]

The Court of Appeal pointed out that in *Nugent* Lord Clarke MR stated that:[2]

> "where a judge determines the section 33 application along with the substantive issues in the case he or she should take care not to determine the substantive issues, including liability, causation and

[1] *B v Nugent Care Society* [2009] EWCA Civ 827; [2010] 1 W.L.R. 516.
[2] *B v Nugent Care Society* [2009] EWCA Civ 827; [2010] 1 W.L.R. 516 at [21].

quantum before determining the issue of limitation and, in particular, the effect of delay on the cogency of the evidence."

The logical fallacy which the court was concerned with in *Nugent* and in *KR v Bryn Alyn Community (Holdings) Ltd (In Liquidation)*[3] was proceeding from a finding on the evidence that the claimant should succeed on the merits to the conclusion that it would be equitable to disapply the limitation period. That would be to overlook the possibility that, had the defendant been in a position to deploy evidence now lost to him, the outcome might have been different.[4] The judge's misunderstanding of *Nugent* might have been avoided if he had adopted the approach of Thomas LJ in *Raggett v Society of Jesus Trust 1929 for Roman Catholic Purposes*.[5]

They also concluded that the judge had erred in quoting the extract from *Nugent*, and stating that he would apply it, implicitly irrespective of any factual findings he made. The conclusions arising from his rejection of the claim for the bulk of the period and the adverse findings he made against JL were important in determining the length of delay, the reasons for it and the extent of prejudice suffered by the defendants in defending the claim. In particular:

- He had concluded that the delay was between nine and 23 years. However, in the light of his finding that there were no assaults after September 1987, in respect of which the primary limitation period expired in September 1990, the delay was between 21 and 23 years.
- He found that the reason for the delay between 1988 and 1999 was "plausible and reasonable" because it was not until late 1999 that JL appreciated that he was not the only person with whom there had been sexual contact and he understood that he had been manipulated. The judge found the delay until JL concluded his counselling in 2010 was understandable. However, reliance upon a revelatory experience at counselling was based upon a false premise. The circumstances were far removed from those contemplated in *A v Hoare*,[6] namely that the psychological harm caused by the abuse provided the very reason why an earlier claim had not been brought, *Hoare* considered. The reality was that, until the criminal prosecution, JL delayed in bringing a claim because he believed that he was in a relationship with the priest which was unique. Even when that realisation was shattered he did not wish to bring proceedings. He had not provided an understandable or good reason for the delay which followed the prosecution of the priest in 1999.
- The overall delay had a profound impact on the ability of the defendants to discharge the burden on them to show that the priest was wrongly convicted. The court was deprived of evidence from the priest relating to the alleged grooming. The absence of the priest, in the context of a reverse burden of proof, was highly prejudicial to the defendants. That was all the more apparent in view of the judge's findings that JL was an unreliable witness in some respects.

In this case the prejudice to the defendants in disapplying the limitation period was held to significantly outweighed any prejudice to JL in not doing so. Accordingly, the appeal was allowed.

PROCEDURE

[3] *KR v Bryn Alyn Community (Holdings) Ltd (In Liquidation)* [2003] EWCA Civ 85; [2003] Q.B. 1441.
[4] *B v Nugent Care Society* [2009] EWCA Civ 827; [2010] 1 W.L.R. 516 and *KR v Bryn Alyn Community (Holdings) Ltd (In Liquidation)* [2003] EWCA Civ 85; [2003] Q.B. 1441 followed.
[5] *Raggett v Society of Jesus Trust 1929 for Roman Catholic Purposes* [2010] EWCA Civ 1002; [2010] C.P. Rep. 45, *Raggett* considered.
[6] *A v Hoare* [2008] UKHL 6; [2008] 1 A.C. 844.

Comment

There are winds of change blowing through our court rooms. Since 2008, the application of s.33 of the Limitation Act, as applied through the lens of *A v Hoare,*[7] has allowed many survivors of abuse to bring successful cases out of time. Limitation has not been seen as quite the obstacle that had defined litigation in this area before then. But even before the Court of Appeal considered *JL*'s case, a number of test cases arising out of abuse at St Williams', a Catholic-run children's home in North East England, were thrown out by Gosnell J late last year, essentially because the defendants were prejudiced by the cases being litigated so late.[8]

JL's case was one that would have scored well in most claimant lawyers' risk assessments at the time of instruction. The priest had after all pleaded guilty to five counts of sexual assault against the claimant in 2000. It would not have been seen as unusual that JL only felt able to instruct solicitors 10 years later. To meet the defendants' limitation defence, the fact that these had been *sexual* assaults, which had caused the claimant psychological harm, allegedly impairing his ability to make a claim, coupled with the fact that the abuser was a priest who had pleaded guilty to the assaults, would, on a cursory view, have met with Lord Brown's approval in *A v Hoare*. In many cases sexual acts which started when the claimant was a child may be found to have continued long into adulthood, such is the power of the grooming. Equally, it is not unusual that the dawning self-realisation that one has been manipulated into having sex comes much later in life.

So what went wrong for the claimant? First, whilst the claimant's evidence was seen as credible in some respects, the trial judge noted that he had "a tendency to embellish and exaggerate details of events when describing them",[9] particularly his claim that the sexual abuse had caused him immense problems in his personal and working life. The judge rejected that submission completely, with the dire consequences that he awarded £20,000 on a claim pleaded at £500,000.

Secondly, the judge made the somewhat bizarre finding that the assaults between the ages of 16 and 19 were non-consensual in that JL had been groomed and manipulated by the priest and so did not give free consent. However, the assaults which continued after the claimant had been to university were not proven trespasses to his person as he was consenting by that time. This was a bizarre finding because—even though JL was under the age of criminal consent at the time of the assaults—in common law an under-age claimant can be seen to have consented *in fact* to sex. In *R. (on the application of A (A Child)) v CICAP*,[10] a boy as young as 13 who was working as a male prostitute, was found to have consented to being buggered by a 54-year-old man, even though the age of consent for that activity at the time was 21. It was therefore open for the judge in *JL*'s case to accept that he had consented in fact between the ages of 16 and 19 and he did not. However, by then going on to find that the coercion and control was not maintained in later years shows a misunderstanding of the psychological power an adult may have over a child which can reach long into the child's adult life. To add to the picture, in this case the adult was of great standing in the claimant's church and community, aged 44 at the time the abuse started.

In any event, on making that finding, the judge then miscalculated the delay in bringing proceedings. Having dismissed the claims for the post-university assaults, the delay was not between nine and 23 years as the judge said, but between 21 and 23 years.

Another unusual aspect of the case was how the defendants argued their limitation defence in the face of a valid conviction. The defendants alleged prejudice because whilst Father Laundy had pleaded guilty to assaulting the claimant (and others) in criminal proceedings back in 2000, he had since died. The defendants had intended to advance evidence that Laundy had only pleaded guilty to avoid publicity, and

[7] *A v Hoare* [2008] UKHL 6; [2008] 1 A.C. 844.
[8] *GH v The Catholic Child Welfare Society (Diocese of Middlesbrough)* [2016] EWHC 3337 (QB); [2017] E.L.R. 136.
[9] *Archbishop Bowen v JL* [2017] EWCA Civ 82 at [29].
[10] *R. (on the application of A (A Child)) v Criminal Injuries Compensation Appeals Panel* [2001] Q.B. 774 CA (Civ Div). Reasoning upheld in *R. v Criminal Injuries Compensation Appeals Panel Ex p. CD and JM* [2004] EWHC 1674 (Admin) per Silber J.

the likelihood that he may have received a longer sentence had the case gone against him. The court felt able to ignore the evidential (let alone the moral) questions raised by the priest apparently admitting he lied to the criminal court for his own benefit. The Church had obtained an unsigned statement from Laundy, prepared for the purpose of the proceedings, in which he said that the sexual activity with JL was consensual. Proceedings were issued in 2011, the unsigned statement was taken in 2012, and Laundy had died in 2014. It seems an indulgence that in such circumstances a defendant can pray in aid the death of a witness they should have proofed much earlier. But that is indeed what the Court of Appeal found in overturning the judge's decision on limitation.

Lord Brown in *A v Hoare* indicated that where an assailant had been convicted in criminal proceedings, and a claim is brought against his employer on the basis of vicarious liability rather than in systemic negligence, the task for the court in determining the factual disputes is a much narrower enquiry. As a result, one could see that a fair trial may well still be possible even if the claim is brought some way out of time. However, the Court of Appeal in *JL* said that here the criminal conviction did not necessarily prove the tort and consent was a live issue and capable of being argued, even if the conviction shifted the burden onto the defendant under the Civil Evidence Act 1968.

It is rare for an appellate court to overturn a judge's exercise of his discretion under s.33 of the Limitation Act. However here the court felt able to do so because the judge had not considered that—had the case been brought earlier—the defendants could have adduced evidence now lost to them, which might have altered the outcome of the trial.

We are already seeing defendants taking a tougher line on limitation in the light of JL and GH; consent too is being raised with increasing regularity: claimant firms would be wise to revisit risk assessments. Perhaps of equal utility would be to keep a close eye on events north of the border where the Scottish Government is legislating to do away with limitation periods in such cases; there will undoubtedly soon be calls for similar legislation here.[11]

Practice points

- Defences raising limitation in child abuse cases will need to be considered carefully in the light of this judgment. In anticipation that these will be raised more routinely, it is important for risk assessment purposes to proof clients at an early stage and explore the reasons for any delay on their part in bringing their claim. Practitioners would be well advised to use the points that the court is mandated to consider under s.33(3) of the Limitation Act 1980 as a basis for a check-list.
- Criminal convictions may no longer be the "trump card" to a limitation defence as they were once seen to be. In *JL*, the court was clear that it was open to the defendant to argue that a guilty plea may not be indicative of actual guilt, as an abuser may have sought to reduce his sentence and avoid publicity. Whilst that actual argument was not explored further, there is surely a risk that by doing so, the criminal justice system could be brought into disrepute. This should certainly form the basis of any counter-argument.
- It is not unusual that groomed children continue to engage in sexual acts with their abuser beyond the age of criminal consent and well into adulthood. It should be noted that in the civil courts, claimants can be deemed to have consented *in fact* even if they are below the age of criminal consent at the time. For either scenario, good psychiatric evidence targeted to answer the point should be sought from your expert.

Jonathan Wheeler

[11] The Limitation (Child Abuse) (Scotland) Bill reached its Stage 2 reading in the Scottish Parliament on 23 May 2017.

Cameron v Hussain

(CA (Civ Div), Gloster LJ, Lloyd Jones LJ, Cranston J, 23 May 2017, [2017] EWCA Civ 366)

Civil procedure—road traffic accidents—motor insurance—defendants—drivers—identity—unknown persons—insurers' liabilities—judgments and orders

LT Defendants; Drivers; Identity; Insurers' liabilities; Motor insurance; Road traffic accidents; Unknown persons

Bianca Cameron was injured in a hit-and-run collision. The driver of the car at fault was never identified, but its registered keeper was. An insurance policy covered one named individual, not the registered keeper, to drive the car. In January 2014, the motorist issued proceedings against the registered keeper, erroneously believing him to be the driver. When it became clear that he was not, she added the insurer as a defendant, seeking a declaration under the Road Traffic Act 1988 s.151 that it was obliged to satisfy any unsatisfied judgment against the registered keeper.

The insurer denied liability, arguing that the policy did not cover the registered keeper and the driver had not been identified. It sought summary judgment on its defence. The motorist applied for permission to amend her claim form and particulars of claim by removing the registered keeper as first defendant and substituting "the person unknown driving vehicle [registration number] who collided with vehicle [registration number] on [date of accident]".

The district judge dismissed her application and granted summary judgment in favour of the insurer. A judge upheld those decisions on appeal, holding that the motorist could submit a claim under the Motor Insurers' Bureau Untraced Drivers' Agreement ("UTDA"). Bianca Cameron appealed again. There were three issues.

1) Did s.151 only apply where the driver could be named? The answer was no.

The court held that an insurer's s.151 liability in relation to an insurance policy covering a specific vehicle and named insured did not depend on whether the driver could be identified by name.[1] Where such a policy was in place and a notice of issue of third party proceedings had been served, the insurer had generally to meet liabilities to third party victims, whether or not the policy covered the driver, and irrespective of the driver's identity. That was so unless the insurer could demonstrate that it was off-cover, or should never have been on-cover.

The insurer bore the economic risk as to the existence or non-existence of the insured or named drivers; the possibility of the insured allowing uninsured persons to drive the vehicle; and the possibility of uninsured persons driving the vehicle without the insured's consent. Where an insurer had to pay out in the absence of any contractual obligation to do so, the Act provided it with rights of recourse against the insured or culpable third parties. However, insurers would commonly have to meet judgments without any hope of enforcing against the culpable party. To permit a judgment to be entered against an unknown driver in circumstances where the vehicle, the insurer and the purported name of the insured could all be identified, would not open the floodgates to a raft of fraudulent claims against insurers.

[1] *Sahin v Havard* [2016] EWCA Civ 1202 considered.

2) Could a judgment for damages be obtained against an unnamed driver? Their answer was yes.

They held that there was no reason in principle why, in appropriate cases, it should not be permissible under the CPR for a claimant to bring proceedings against an unnamed defendant, suitably identified by an appropriate description. The fact that the CPR expressly provided for situations in which that could be done did not mean that it could not be done in other situations. There was no reason why proceedings could only be brought against an unnamed defendant if an injunction or future relief was being sought, and there was no reason why an unnamed defendant could not be pursued for damages.[2] Whether the court should allow an unnamed defendant, identified only by description, to be pursued in any particular case depended on whether such a course would further the overriding objective. The circumstances did not have to be exceptional.

3) Did the availability of a remedy under the UTDA preclude the motorist from pursuing an unnamed defendant? The answer was no.

The court pointed out that the motorist had a substantive right to a judgment for damages against the driver and a statutory right to payment by the insurer if the judgment was not satisfied. It would be unjust to deprive her of the remedy giving effect to those rights simply because she had an alternative remedy under the UTDA. She was not obliged to pursue the UTDA remedy, which could in any event be regarded as inferior to a court action for damages.[3]

On the other hand, there would be no injustice to the insurer in permitting her to pursue an unnamed driver. In cases such as this one, claimants should be permitted to amend their claim forms and particulars to substitute an unnamed driver, identified by reference to a specific vehicle driven at a specific time and place.

The appeal was allowed.

Comment

In my opinion, not only is this a bad decision for insurers it is also an unsatisfactory one. I am also fearful that the "law of unintended consequences" will come into play. There was never any doubt that the claimant here would not be compensated in respect of their injuries; that is why we have an UTDA and a Motor Insurers Bureau but the costs recoverable by a claimant solicitor are significantly less and, of course, subrogated claims are not recoverable. While this case might possibly have been motivated by recoverable costs, ultimately the decision drives the proverbial coach and horses though the UTDA and it may be subject to further appeal.

The accident circumstances giving rise to claim are unremarkable and there is no doubt that Bianca Cameron was hit by another car, the registration number of which was noted down by a passing taxi driver. This vehicle was insured by LV= but it seems probable that the policy was taken out fraudulently as the policyholder does not seem to exist. LV= did not pursue a s.152 declaration, presumably as the driver could not be identified.

While it was accepted by all the parties that an insurer has an obligation under Road Traffic Act 1988 s.151(2) to satisfy a judgment "obtained against any person other than one who is insured by the policy" the issue here that an unidentified driver can now apparently be sued. In exercising its procedural discretion to allow this there are a number of unanswered questions.

[2] *Bloomsbury Publishing Group Plc v News Group Newspapers Ltd (Continuation of Injunction)* [2003] EWHC 1205 (Ch) applied and *Clarke v Vedel* [1979] R.T.R. 26 considered.

[3] *Carswell v Secretary of State for Transport* [2010] EWHC 3230 (QB) considered.

- The decision does not deal with the mechanics of how one goes about suing an unidentified driver of an identified vehicle. It seems implicit though that approval of the court would be required.
- What is the interplay with the Limitation Act 1980 where s.14(1)(c) requires knowledge of the defendant?
- Similarly, how does the decision effect the European Communities (Rights against Insurers) Regulations 2002? Will claimants continue to use this legislation where the tortfeasor cannot be identified? Regulation 3—Right of Action refers specifically to "insured person", implying that they can be identified.
- Will claimants seek to extend the principles of this decision to uninsured vehicles or those which have no registered keeper even though the decision is only stated to apply to where an insurer may have a liability under s.151 of the Road Traffic Act 1988?

I am also fearful that one of the unintended consequences is that it will encourage even more fraudulent claims. Bluntly, this will not help either side of the divide and will further serve to bring the compensation into disrepute. There are already a number of cases involving fictitious defendants which hitherto have been defended. There is a risk that the number of these cases will increase. We may also see the "farming" of late intimated claims and the resurrecting of previously abandoned claims as the defendant could not be identified.

The MIB will also be reviewing their unidentified cases and will be looking to pass back to the relevant insurer.

Practice points

- From an insurer's perspective, early and effective investigation and seek early s.152 declaration where possible.
- From a claimant's perspective, there is no longer a need to bring a claim under the UTDA where there is an insured identified vehicle.

David Fisher

Cumulative Index

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