Journal of Personal Injury Law

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Editorial

We have another interesting edition. Our first article "Duties of Care between Actors in Supply Chains" addresses the following scenario:

Suppose that Company A requires certain goods for its business but, for one reason or another, it chooses to source them from Company B rather than to fabricate them itself. Company B tortuously injures one of its own Employees. If Employee cannot obtain an affective remedy from Company B for some reason, a claim by Employee against Company A is likely to be confronted with numerous difficulties. This issue has never been considered by an English Court. It has not been the subject of sustained analysis in this country either. This article, written by James Goudkamp fills this gap.

An interesting case which was decided earlier in the year, relates to allegedly negligent spinal fusion surgery and the subsequent repair of a large incisional hernia, a fairly rare complication of spinal surgery. The case highlights the well-known difficulty in proving, with hindsight, that strong medical advice would have been refused, had a Claimant been properly consulted. The case is *Diamond v Royal Devon and Exeter NHS Foundation Trust*[1] and Fran McDonald gives a very interesting analysis of this case.

There have been many reforms to the court system in recent years and the recent proposals made by Jackson LJ, may result in still more.

Andrew Ritchie in "ADR and Arbitration—the Alternative to Civil Litigation for Personal Injury and Clinical Negligence claims" questions whether litigation through the courts is still the most efficient way of conducting litigation and sets out the arguments for using arbitration as an alternative. This article is very persuasive; pointing out that arbitration has been used extensively in commerce for many, many years, in order to avoid the delays and frustrations of the Civil Courts process, which are also experienced in personal injury cases.

For many years, Scottish victims of childhood abuse who attempted to bring civil compensation claims have been met with the Defence that their claims were time-barred as they had not raised proceedings within three years of reaching majority. These time limits have operated as an almost universal bar to survivors of childhood abuse, bringing forward civil claims in Scotland. The Scottish Government pledged to remove time limits in childhood abuse cases through the Limitation (Childhood Abuse) (Scotland) Bill which received Royal Ascent on 28 July 2017. Kim Leslie sets out the details of this legislation and concludes that whilst the legislation will create areas of dispute, the parameters have now shifted significantly in favour of the survivor.

Geoffrey Simpson-Scott gives his detailed views concerning fixed costs in clinical negligence cases. In his article "Justice, Proportionality and Fixed Costs in Clinical Negligence", he focuses on the recommendation that there should be fixed recoverable costs for cases with a value under £25,000. He has also suggested that certain other clinical negligence cases may later be included within the suggested framework. The author's concern is that the imposition and level of fixed recoverable costs may be such that it would not be financially expedient to advance a claim, thus undermining access to justice. The author suggests that the best way forward is to review the procedures in which such cases are conducted by ensuring that there is early agreement on central disputed issues, so these can be focussed on and resolved as quickly as possible.

I am delighted that Dr Andrew Frank has written an article for us regarding vocational rehabilitation. Dr Frank is one of, if not, the country's leading expert on this subject. The article deals with returning injured individuals to work being a primary responsibility of any rehabilitation programme as it facilitates optimal participation in society. All personal injury lawyers, in appropriate cases, will be concerned about a claimant's return to work. This article sets out in some detail how rehabilitation practitioners should go

[1] *Diamond v Royal Devon and Exeter NHS Foundation Trust* [2017] EWHC 1495 (QB).

about ensuring that this is done. As Dr Frank points out, this process often needs coordination of health professionals, employers and Government Departments to maximise the best outcome. Such assistance is best provided by vocational rehabilitation professionals who navigate the complex relationships between health and work. The role of the Personal Injury lawyer here, is obvious to see. Very often, funding for such a programme is unavailable, which is where interim payments can be used to ensure that such a programme takes place and is successful.

Daniel Lawson, Counsel at Cloisters, has written an article concerning claims involving somatoform disorders and chronic pain conditions. As he points out, these create special challenges for practitioners. This article deals with what has happened in recent High Court cases that have been concerned with such conditions. He concludes highlighting the number of things that have emerged from these cases. This is essential reading for anyone who has cases of this nature.

Following on from this, we have an article about Complex Regional Pain Syndrome written by Dr Christopher Jenner. Dr Jenner is a specialist in this area and gives a very useful explanation about CRPS which is one of the most painful types of chronic pain that exists. Again, essential reading for those involved in these cases.

Colin Ettinger

Duties of Care Between Actors in Supply Chains

James Goudkamp*

LT Assumption of responsibility; Corporate liability; Duty of care; Employers' liability; Parent companies; Supply chains; Third parties; Vicarious liability

Introduction

Rapid changes to employment practices have tested and will continue to test the limits of liability in tort law. To date, much of this pressure has been applied to the principles governing vicarious liability. That corner of tort law has undergone significant development in response to, in particular, the increasing sophistication of many employees and a growing tendency of businesses to outsource work.[1] One important recent change is that vicarious liability can now arise where the tortfeasor and defendant stand in relationship that is merely "akin" to one of employment.[2] Another noteworthy change concerns the recognition of so-called "dual vicarious liability", pursuant to which more than one defendant can incur vicarious liability for a tortfeasor's wrong.[3] These and related developments are reactions to the changing way in which work is done in the modern world. They are the result of the courts' efforts to ensure that the law of vicarious liability produces outcomes that are thought to be fair and just to contemporary eyes.

Another part of tort law that has come under significant pressure on account of shifts in employment practices concerns the duty of care element of the action in negligence. Increased outsourcing of work raises the question whether a company within a supply chain might owe a duty of care to employees of another company within the chain. It is this question with which this article is concerned. It is convenient to discuss it by way of the following scenario. Suppose that Company A requires certain goods for its business but, for one reason or another, it chooses to source them from Company B rather than to fabricate them itself. Company B tortiously injures one of its employees, Employee. If Employee cannot obtain a remedy from Company B for some reason (say, because Company B is insolvent, been wound up, or is without liability insurance), Employee may look to Company A for redress. A claim by Employee against Company A is likely to face several hurdles. However, a key issue in any such claim will be whether Company A owed Employee a duty of care. What are the prospects of a duty being owed in this scenario? That question has arisen for determination by the courts in several jurisdictions[4] and has received a certain amount of academic scrutiny.[5] However, the issue has not yet been considered by an English court. It has not been the subject of sustained analysis in this country either. This article fills this gap.

Two decisions of the Court of Appeal

At first glance, it might seem that there is little hope that Employee could establish that Company A owed him a duty of care to protect him from the consequences of negligence on the part of Company B. It is, of course, a foundational principle of tort law that, ordinarily, no duty arises to prevent a person from

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[1] As Lord Phillips of Worth Matravers PSC observed in an oft-cited remark in *Various Claimants v Institute of the Brothers of Christian Schools* [2012] UKSC 56; [2013] 2 A.C. 1 at [19], vicarious liability "is on the move". In *Cox v Ministry of Justice* [2016] UKSC 10; [2016] A.C. 660 at 664 Lord Reed JSC said that "[i]t has not yet come to a stop".

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

[3] *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2005] EWCA Civ 1151; [2006] Q.B. 510.

[4] See, e.g. *Doe v WalMart Stores Inc* 572 F 3d 677 (9th Cir, 2009).

[5] See, e.g. J. Phillips and Suk-Jun Lim, "Their Brothers' Keeper: Global Buyers and the Legal Duty to Protect Suppliers' Employees" (2009) 61 Rutgers L. Rev. 333; N. Farrell, "Accountability for Outsourced Torts: Expanding Brands' Duty of Care for Workplace Harms Committed Abroad" (2013) 44 Geo. J. Int'l. L. 1491; P. Rott and V. Ulfbeck, (2015) 23 E.R.P.L. 415; M. Conway, "A New Duty of Care? Tort Liability from Voluntary Human Rights Due Diligence in Global Supply Chains" (2015) 40 Queen's L.J. 741.

suffering injury at the hands of a third party. The mere fact that the injured person was particularly vulnerable to injury, or the fact that the third party could easily have been prevented from causing the injury concerned, are insufficient to displace this starting principle.[6] This basic rule is a formidable obstacle to Employee's prospects of establishing that Company A owed him a duty of care. This is because Company B is a third party in so far as the relationship between Company A and Employee is concerned.

However, Employee can, perhaps, find a glimmer of hope in two recent landmark decisions of the Court of Appeal: *Chandler v Cape Plc*[7] and *Thompson v Renwick Group Plc*.[8] These decisions establish that a parent company will in certain circumstances owe a duty of care to the employees of one of its subsidiaries. Because the parent/subsidiary situation bears at least some resemblance to the scenario with which we are concerned, *Chandler* and *Thompson* are of significant interest for present purposes.[9]

The claimant in *Chandler* had been negligently exposed to asbestos and contracted asbestosis as a result.[10] The exposure occurred in the course of the claimant's employment by a company known as Cape Building Products Ltd. However, that entity no longer existed by the time that the disease manifested itself and so the claimant looked to its parent company, Cape Plc, for redress. The two companies were highly integrated. They were both in the business of producing asbestos, the parent made corporate decisions with close regard to its subsidiaries' interests, and the parent had also appointed a medical doctor who had responsibility for the medical needs of employees within the corporate group generally. By virtue of the foregoing, the subsidiary was effectively a mere division of the parent. The Court of Appeal unanimously held that the parent owed the claimant a duty of care.

It is important to understand the basis on which *Chandler* was decided. *Chandler* was a not a case in which the independent legal personality of the subsidiary was disregarded. The corporate veil was not pierced.[11] The conditions for veil-piercing were plainly not satisfied[12] and, indeed, were not even considered. Rather, *Chandler* decided that the parent owed a duty of care directly to employees of the subsidiary. In reaching this conclusion, the court simply applied the *Caparo* test. The court was clearly concerned, however, that recognising a duty of care in these circumstances would, unless the ratio of the case was carefully defined, tend to undermine the basic principle that there is no duty to prevent third parties from causing harm. Respect for this principle prompted Arden LJ (with whom Moses and McFarlane LJJ agreed) to propound a narrow test regarding the circumstances in which a parent will owe a duty of care to one of its subsidiary's employees. Her Ladyship said:[13]

> "In summary, this case demonstrates that in appropriate circumstances the law may impose on a parent company responsibility for the health and safety of its subsidiary's employees. Those circumstances include a situation where, as in the present case, (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior

[6] These principles were confirmed by the Supreme Court in its recent decision in *Michael v Chief Constable of South Wales* [2015] UKSC 2; [2015] A.C. 1732.

[7] *Chandler v Cape Plc* [2012] EWCA Civ 525; [2012] 1 W.L.R. 3111.

[8] *Thompson v Renwick Group Plc* [2014] EWCA Civ 635; [2015] B.C.C. 855.

[9] Another decision in the same line of cases is *Lungowe v Vedanta Resources Plc* [2016] EWHC 975 (TCC). However, it is convenient to focus on *Chandler v Cape Plc* [2012] EWCA Civ 525; [2012] 1 W.L.R. 3111 and *Thompson v Renwick Group Plc* [2014] EWCA Civ 635; [2015] B.C.C. 855.

[10] *Chandler v Cape Plc* [2012] EWCA Civ 525; [2012] 1 W.L.R. 3111 has deservedly elicited a great deal of discussion. Contributions include A. Sanger, "Crossing the Corporate Veil: The Duty of Care Owed by a Parent Company to the Employees of its Subsidiary [sic]" (2012) 71 C.L.J. 478; W. Day, "Negligence and the Corporate Veil; Parent Companies' Duty of Care to their Subsidiaries' Employees" [2014] L.M.C.L.Q. 545; P. Morgan, "Vicarious Liability for Group Companies: The Final Frontier of Vicarious Liability" (2015) 31 P.N. 276.

[11] This has often been misunderstood. For illustrations see J. Fulbrook, "Case Comment: *Thompson v Renwick Group Plc*" [2014] J.P.I.L. 135 at 136; U. Grusic, "Responsibility in Groups of Companies and the Future of International Human Rights and Environmental Litigation" (2015) 74 C.L.J. 30 at 30–31.

[12] As to these conditions, see *Prest v Petrodel Resources Ltd* [2013] UKSC 34; [2013] 2 A.C. 415.

[13] *Chandler v Cape Plc* [2012] EWCA Civ 525; [2012] 1 W.L.R. 3111 at [80].

> knowledge for the employees' protection. For the purposes of (4) it is not necessary to show that the parent is in the practice of intervening in the health and safety policies of the subsidiary. The court will look at the relationship between the companies more widely. The court may find that element (4) is established where the evidence shows that the parent has a practice of intervening in the trading operations of the subsidiary, for example production and funding issues."

Chandler was carefully considered in *Thompson*. *Thompson* was another asbestos case in which an employee of a subsidiary company argued that the subsidiary's parent owed him a duty of care. This time, however, the facts were far less favourable to the claimant than in *Chandler*. The businesses of the parent company and the subsidiary company were fundamentally different from each other. The parent company was a mere holding company while the subsidiary provided haulage services. In these circumstances, and in view of the test that Arden LJ had propounded in *Chandler*, it is unsurprising that the Court held that the "evidence available fell far short of what is required for the imposition of a duty of care".[14]

It is obvious that *Chandler* and *Thompson* endorse a restrictive approach. The distinct impression that one obtains from the passage set out above from Arden LJ's reasons in *Chandler* is that if the criteria that her Ladyship identified do not point firmly in favour of the existence of a duty of care, it is unlikely that a duty will arise. Phillip Morgan correctly observes that "Arden LJ was careful to set a very narrow ratio".[15] Accordingly, *Chandler* and *Thompson*, despite initial appearances to the contrary, render unpromising any argument that a duty of care ought to be recognised in the supply chain context. It is obvious that the degree to which a parent and subsidiary are integrated is critical to whether a parent will owe a duty of care to an employee of the subsidiary pursuant to *Chandler* and *Thompson*. However, in a supply chain situation, the degree of integration required to generate a duty of care will nearly always be absent. The businesses may (and often will) be fundamentally different from each other, and one actor in the chain may be able to influence another actor only by way of applying commercial pressure rather than because, for example, the corporate governance of the entities is shared. That is clearly insufficient for the purposes of Arden LJ's test in *Chandler*.

General tests for the existence of a duty of care

Parent/subsidiary cases and the paradigm case involving a supply chain resemble each other to a degree. Ultimately, however, the analogy between the two types of case is not particularly close, for the reasons given in the previous paragraph. In the circumstances, arguing that a duty of care is owed in a supply chain case is likely to amount to a plea for a non-incremental extension of the circumstances in which a duty will arise. Given that the common law develops by analogy, such an argument is in principle unattractive.[16] Nonetheless, it is worth considering whether, pursuant to general tests for the existence of a duty of care, a duty might nonetheless arise in a supply chain case. Those general tests are, of course, the *Caparo* test and the assumption of responsibility test. Although the latter has perhaps come to the fore as a result of the decision of the Supreme Court in *Michael v Chief Constable of South Wales*,[17] it is convenient to begin with the *Caparo* test.

[14] *Thompson v Renwick Group Plc* [2014] EWCA Civ 635; [2015] B.C.C. 855 at [39] (Tomlinson LJ).

[15] P. Morgan, "Vicarious Liability for Group Companies: The Final Frontier of Vicarious Liability" (2015) 31 P.N. 276, 286. cf. M. Petrin, "Assumption of Responsibility in Corporate Groups: *Chandler v Cape Plc*" (2013) 76 M.L.R. 603, 619, who oddly describes *Chandler v Cape Plc* [2012] EWCA Civ 525; [2012] 1 W.L.R. 3111 as laying down a "dangerously broad" principle.

[16] In *Michael v Chief Constable of South Wales* [2015] UKSC 2; [2015] A.C. 1732 at [102], Lord Toulson JSC said: "The development of the law of negligence has been by an incremental process rather than giant steps. The established method of the court involves examining the decided cases to see how far the law has gone and where it has refrained from going. From that analysis it looks to see whether there is an argument by analogy for extending liability to a new situation, or whether an earlier limitation is no longer logically or socially justifiable. In doing so it pays regard to the need for overall coherence. Often there will be a mixture of policy considerations to take into account."

[17] *Michael v Chief Constable of South Wales* [2015] UKSC 2; [2015] A.C. 1732. See J. Goudkamp, "A Revolution in Duty of Care?" (2015) 131 L.Q.R. 519.

The Caparo test

The centre of attention in relation to the *Caparo* test for present purposes is likely to be the third stage of the test, that is to say, whether imposing a duty of care would be "fair, just and reasonable". The first stage of the test—reasonable foreseeability—is generally of little relevance because it is usually easily satisfied.[18] The second stage—proximity between the parties—is normally discussed only fleetingly by the courts.[19] And, probably adds little, if anything, to the third stage of the test. The discussion will therefore concentrate on the "fair, just and reasonable" enquiry.

It is well established that the third stage of the *Caparo* test requires the court to weigh anti-duty factors against pro-duty factors.[20] Three anti-duty considerations stand out for particular mention. First, if a duty of care is recognised significant difficulty may be encountered in confining it within sensible bounds. If it is held that Company A owed Employee a duty of care, why should only Company A owe Employee a duty? Why, if Company A is under a duty to Employee, should not all other companies in the supply chain, or at least those companies that stand in a contractual relationship with Company B, also owe Employee a duty? Furthermore, why should Company A come under a duty only vis-à-vis Company B's employees? Why should not Company A, if it is held to owe a duty to Employee, also owe a duty to all of the employees of other companies in the chain? The foregoing raises obvious concerns both about overly expansive liability and liability that is potentially indeterminate in its extent.

Secondly, the imposition of a duty of care as between Company A and Employee may disturb the contractual allocation of risk between actors in a supply chain. In *Pacific Associates Inc v Baxter*,[21] an employer engaged the claimant to carry out dredging work. The employer also engaged engineers to supervise that work. The claimant asserted that the engineers owed it a duty of care with respect to the provision of certain information. The Court of Appeal rejected this submission. Ralph Gibson LJ said:[22]

> "it seems to me to be neither just nor reasonable in the circumstances of the contract terms existing between the [claimant] and the employer … to impose a duty of care on the engineer to the [claimant] in respect of the matters alleged in the statement of claim … So to do would be to impose, in my judgment a duty which would cut across and be inconsistent with the structure of relationships created by the contracts, into which the parties had entered, including in particular the machinery for settling disputes."

This analysis militates against the erection of a duty of care as between Company A and Employee. Companies in a supply chain typically determine carefully how risks are to be allocated between them. If the courts recognise an exception to the principle that there is no duty to control the conduct of third parties by holding that Company A owes a duty to Employee, the entities' determination as to how all of the relevant risks are to be borne will be outflanked. In response, it might be said that the contractual allocation of risks as between companies in a supply chain is res inter alia acta in so far as the relationship between Company A and Employee is concerned. There is some force in this point. However, the fact of the matter is that the courts often pay, despite the res inter alia acta maxim, attention to contractual arrangements

[18] See J. Goudkamp, "When is a Risk of Injury Foreseeable?" (2008) 124 L.Q.R. 37.

[19] This is likely because it has never been made clear what the concept of "proximity" entails. The classic analyses in this regard are M. McHugh, "Neighbourhood, Proximity and Reliance" in P. Finn (ed), *Essays on Torts* (Sydney: Law Book Co, 1989), 5 and J. Stapleton, "Duty of Care Factors: A Selection from the Judicial Menus" in P. Cane and J. Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (Oxford: Clarendon Press, 1998), 59.

[20] In *Barrett v Enfield LBC* [2001] 2 A.C. 550 HL at [559], Lord Browne-Wilkinson wrote: "In English law the decision as to whether it is fair, just and reasonable to impose a liability in negligence on a particular class of would-be defendants depends on weighing in the balance the total detriment to the public interest in all cases from holding such class liable in negligence as against the total loss to all would be-claimants if they are not to have a cause of action in respect of the loss they have individually suffered."

[21] *Pacific Associates Inc v Baxter* [1990] 1 Q.B. 993 CA.

[22] *Pacific Associates Inc v Baxter* [1990] 1 Q.B. 993 CA at 1032. See also at 1023 (Purchas LJ) and 1037–1039 (Russell LJ).

with third parties for the purposes of deciding whether a duty of care exists. This is clear from *Baxter*, which has just been mentioned.[23]

Thirdly, holding that Company A owed a duty of care to Employee may tend to encourage Company A to become as unconcerned as possible for the interests of employees of Company B (and the employees of other companies in the supply chain). If Company A is held to owe a duty to Employee on the basis that, for example, Company A was involved to a degree in Company B's business, companies within a supply chain may try to distance themselves to the greatest extent possible from the way in which the other companies in the chain do business in the hope that doing so might insulate them from liability. In some situations, this will have significant adverse repercussions for vulnerable employees. Suppose, for example, that Company A is concerned to showcase its corporate social responsibility credentials. It may want to ensure that companies with which it contracts maintain proper employment standards. Commercial pressure may be applied by Company A to ensure that such standards are maintained. However, Company A and companies similarly situated may proceed differently if they are potentially exposed to liability in tort on account of their endeavouring to promote proper safety standards for employees. The point can be encapsulated in the following way: imposing a duty of care on Company A vis-à-vis Employee may paradoxically worsen the position of employees of companies that are in a position similar to that of Company B. That is arguably a reason not to countenance a duty of care on the part of Company A. Recognising a duty of care may have adverse social consequences.

Which pro-duty factors are in play and how compelling are they? One factor to consider in this regard is that of vulnerability. In some situations, the employees of Company B will be highly susceptible to injury. Their working conditions may be abysmal, and they may have no realistic opportunity to secure safer employment. Such vulnerability is arguably a reason to impose a duty of care. However, English law affords this consideration relatively little weight. For one thing, it is clear that mere vulnerability is insufficient to establish the existence of a duty of care.[24] This follows inexorably from the starting principle that, ordinarily, no one will come under a duty of care to control the conduct of third parties. Furthermore, while passages can be found case law and literature to the effect the claimant's vulnerability is a factor to consider for the purposes of the *Caparo* test, some doubt exists as to the significance of vulnerability as a pro-duty factor. For example, Jane Stapleton argues:[25]

> "Courts are becoming more explicitly hostile to claims of vulnerability by plaintiffs who have suffered economic loss because they have chosen to rely on the negligent advice of defendants when they had adequate means of checking the information themselves, even if not as good as the means available to the defendant. Often, but not invariably, this consideration surfaces in cases brought by commercial plaintiffs."

A second factor that might be thought to weigh in favour of recognising a duty of care is that of control. Control has been recognised as a pro-duty factor.[26] The significance of this factor will obviously vary from case to case. Companies such as Company A might be able to exert more or less influence over companies such as Company B depending on the unique circumstances of each case. However, while control is a relevant factor for the purposes of the duty of care analysis, it is certainly not a trump consideration. There are countless cases in which a defendant has enjoyed significant control over a given risk of injury yet no duty of care arose. Two leading cases that illustrate this point are *Customs and Excise Commissioners v*

[23] A. Robertson puts the position in the following terms: "A duty of care may also be denied on the basis that it is inconsistent with the contractual setting even where there is no privity of contract between the claimant and the defendant" (A. Robertson, "Justice, community welfare and the duty of care" (2011) 127 L.Q.R. 370 at 380).

[24] "Even if the plaintiff could do nothing to avoid or reduce the risk of the relevant event occurring … the courts may yet deny that the defendant owes a duty of care": J. Stapleton, "Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence" (1995) 111 L.Q.R. 301 at 319.

[25] J. Stapleton, "Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence" (1995) 111 L.Q.R. 301 at 305.

[26] See, e.g. *Sutradhar v Natural Environment Research Council* [2006] UKHL 33; [2006] 4 All E.R. 490 at [38] (Lord Hoffmann) and [48] (Lord Brown of Eaton-under-Heywood).

Barclays Bank Plc[27] and *Murphy v Brentwood DC*.[28] In *Customs and Excise Commissioners*, the claimants, who were seeking to recover unpaid taxes from two companies, obtained a freezing order against the companies and gave notice of that order to the defendant bank. However, the bank failed to put in place effective measures to prevent the companies from withdrawing funds from certain accounts. The claimants brought proceedings in negligence against the bank. The House of Lords held that the bank did not owe a duty of care for numerous reasons. What matters for present purposes, however, is that the House held that no duty arose even though the bank was obviously in a position to prevent the funds concerned from being withdrawn. Essentially the same points can be made in relation to *Murphy*. In *Murphy*, the defendant council approved plans for the construction of a house. However, the plans were based on erroneous calculations with the result that the house was defectively constructed. The claimant occupier sued the council in negligence. The House of Lords concluded that no duty of care was owed. It did so although the council, since it had the power to approve or disapprove plans, was in a position to control the risk of damage that materialised.

For the foregoing reasons, it is unlikely that a duty of care would be owed by Company A to Employee pursuant to the *Caparo* test. Several factors militate against the existence of a duty and the two pro-duty factors that are of the most relevance seem to be of limited significance.

The assumption of responsibility test

The assumption of responsibility test originates in the decision in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*.[29]*Hedley Byrne* was a case involving pure economic loss.[30] However, it is clear that the assumption of responsibility test is not confined to claims involving damage of that type. Thus, the test has, for example, been applied in the personal injury context.[31] It should also be noted that although *Hedley Byrne* involved a positive representation of fact made by the defendant to the claimant, the assumption of responsibility test has been extended to cases in which the defendant failed to act.[32]

It is conveniently briefly to recap the key principles that govern the assumption of responsibility test. A defendant will come under a duty of care according to that test where the defendant has: (i) voluntarily assumed responsibility for the claimant's safety; and (ii) the claimant relied upon that assumption of responsibility.[33] The test is applied objectively in that it is for the court to decide whether responsibility has been assumed. The parties' subjective views are not to the point.[34] An assumption of responsibility must be voluntary in the sense of being "'conscious', 'considered' or 'deliberate'".[35] By and large, the assumption responsibility test will be satisfied only where the relationship between the parties is "'equivalent to contract' that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract".[36]

The assumption of responsibility test is generally difficult to satisfy, all other things being equal. This is understandable since were the contrary the case, the general and well-established principle that no duty is owed to control third parties would be outflanked. A good and recent illustration at the highest level of

[27] *Customs and Excise Commissioners v Barclays Bank Plc* [2006] UKHL 28; [2007] 1 A.C. 181.
[28] *Murphy v Brentwood DC* [1991] 1 A.C. 398 HL.
[29] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] A.C. 465 HL.
[30] Comprehensive treatment of the decision is offered in K. Barker and R. Grantham (eds), *The Law of Misstatements: 50 Years on From Hedley Byrne v Heller* (Oxford: Hart Publishing, 2015).
[31] See, e.g. *W v Essex CC* [2001] 2 A.C. 592 HL; *Michael v Chief Constable of South Wales* [2015] UKSC 2; [2015] A.C. 1732.
[32] See, e.g. *Midland Bank Trust Co Ltd v Hett, Stubbs and Kemp* [1979] Ch. 384 Ch. D.
[33] Lord Bingham of Cornhill explained the concept of reliance in *Customs and Excise Commissioners v Barclays Bank Plc* [2006] UKHL 28; [2007] 1 A.C. 181 at [14]. His Lordship said: "reliance in the law is usually taken to mean that if A had not relied on B he would have acted differently."
[34] *Williams v Natural Life Foods Ltd* [1998] 1 W.L.R. 830 HL at 835 (Lord Steyn).
[35] *Customs and Excise Commissioners v Barclays Bank Plc* [2006] UKHL 28; [2007] 1 A.C. 181 HL at [73] (Lord Walker of Gestingthorpe)).
[36] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] A.C. 465 HL at 528 (Lord Devlin). Lord Bingham of Cornhill in *Customs and Excise Commissioners v Barclays Bank Plc* [2006] UKHL 28; [2007] 1 A.C. 181 at [4] said that the "paradigm situation" where responsibility will be assumed is where the parties' relationship has "all the indicia of contract save consideration".

the demanding nature of the assumption of responsibility test is *Michael v Chief Constable of South Wales Police*.[37] In this case, a woman was murdered by an ex-partner of hers. Shortly before she was killed, the woman had called the police in order to ask for help. However, the police call handler misallocated the call's priority (it was wrongly treated as not requiring an immediate response) and the police arrived at the woman's house too late to prevent the murder. The Supreme Court held that despite the fact that the woman had called the police for help and although the police knew the identities of both the woman and the murderer the police had not assumed responsibility to safeguard the woman's interests.

In view of the foregoing, it is obvious that it will be challenging to establish a duty of care on the assumption of responsibility test in the supply chain scenario. The courts are relatively slow to find that the test is satisfied, all things being equal. It is doubtful that anything short of a clear representation by Company A that it was accepting a duty to look out for Employee's interests will suffice to establish the existence of a duty. Two further considerations reinforce this conclusion. First, the courts will be slow to recognise a duty on the basis of an assumption of responsibility where to do so would amount to a non-incremental extension of the law. As Lord Bingham of Cornhill put it in *Commissioners of Customs and Excise v Barclays Bank Plc*:[38]

> "The closer the facts of the case in issue to those of a case in which a duty of care has been held to exist, the readier a court will be … to find that there has been an assumption of responsibility or that the proximity and policy considerations of the threefold [Caparo] test are satisfied."

For the reasons that have been given above, recognising a duty of care in the supply chain context would take the law rather a long way beyond the decisions of *Chandler* and *Thompson*. Secondly, to a considerable extent the policy factors that are relevant at the third stage of the *Caparo* test bear also on whether the assumption of responsibility test is satisfied.[39] It was explained earlier why those factors point against the existence of a duty of care in the supply chain scenario.

Conclusion

This article has addressed an issue that has not yet arisen for judicial determination in this jurisdiction, namely, whether a company within a supply chain might owe a duty of care to the employees of another company within the chain. It was argued that it is unlikely that a duty of care will arise in this type of case under English law. The suggestion that a duty of care is owed in this situation is confronted by the foundational principle that a duty of care does not arise to control third parties. Exceptional circumstances are required to displace that rule. It is doubtful whether such circumstances will obtain in the supply chain context.

[37] *Michael v Chief Constable of South Wales Police* [2015] UKSC 2; [2015] A.C. 1732.
[38] *Commissioners of Customs and Excise v Barclays Bank Plc* [2006] UKHL 28; [2007] 1 A.C. 181 at [7].
[39] See *Customs v Excise Commissioners v Barclays Bank Plc* [2006] UKHL 28; [2007] 1 A.C. 181 at [93] (Lord Mance).

Consent, Remoteness and the Prolonged Death of the *Chester* Exception: *Diamond v Royal Devon & Exeter NHS Foundation Trust*[1]

Fran McDonald

Breach of duty of care; Causation; Clinical negligence; Duty to warn; Informed consent; Surgical procedures

Diamond v Royal Devon & Exeter NHS Foundation Trust is an interesting judgment which came out in early July. The case arose from allegedly negligent spinal fusion surgery and the subsequent repair of a large incisional hernia, a fairly rare complication of spinal surgery.

The case highlights difficulty in proving with hindsight that strong medical advice would been refused, had a claimant been properly consented, despite the firmly held views of the claimant. It goes on to deal with some interesting submissions on damages for the psychiatric shock of suddenly learning after the fact of an effect of surgery, and on the application of the *Chester* exception to causation.

Breach of duty

The spinal surgeon, Mr Khan, failed to examine the claimant's swollen stomach wound (or indeed make any note of this) six-weeks following surgery. The evidence showed the claimant and her mother informed him of the swelling, but Mr Khan did nothing about it. The NHS Trust alleged that, regardless, this had not led to any delay. HH Judge Freedman (sitting as a Judge of the High Court) was having none of it and found a two-month delay proven:

> "In my judgment, logic and common sense dictate that if (as she should have been) the Claimant had been referred for an ultrasound scan after the review appointment on 21st January 2011, the whole process would have been expedited."

Damages for PSLA were assessed at £7,500.

The second issue turned on whether the general surgeon, Mr Wajed, had been told by the claimant that she did not want any further children. There was no such entry in the medical notes, and again HH Judge Freedman preferred the evidence of the claimant, as it was unlikely Mr Wajed would have any independent recollection of matters.

Both sides' experts, and in the event even Mr Wajed agreed, that if there was a possibility of future pregnancy, the adverse effects of a mesh repair of the claimant's hernia had to be discussed. Those risks were firstly of the mesh restricting growth of the uterus, possibly resulting in early delivery if a caesarean section was required, as access to the abdomen could be difficult in the presence of the mesh. Secondly the risk that after pregnancy the mesh and abdomen wall could be disrupted.

As a result the possibility of a suture rather than mesh repair, even with its higher risk of failure, should have been discussed with the claimant. Post-*Montgomery* (and I would say, even before it) there was clearly a lack of informed consent.

Looking at causation and the *Bolam/Bolitho* test, Mr Wajed's evidence was that he would have advised that a primary suture repair stood little, if any, prospect of success. The judge found that had the risks

[1] *Diamond v Royal Devon & Exeter NHS Foundation Trust* [2017] EWHC 1495 (QB).

been discussed, Mr Wajed would have reasonably advised a very high risk of failure from a suture repair of her hernia. The risk would have been put at 50% within two years and almost certainly occurring within the claimant's lifetime. Nonetheless, the claimant when giving evidence insisted she would have opted for the suture repair over the use of mesh if she had been given this option, stating:

> "I would never have agreed to have this procedure. The ability to have children has always been very important to me and I would not have wanted to be stripped of my womanhood in this way. This is especially as I witnessed what damage a hysterectomy has done to the psyche, self-esteem and consequent relationships experienced by my mother when she was 43 and my cousin (who is like a sister to me) at least 10 years ago."

The judge refused to accept her evidence. He highlighted the difficulties for a claimant in proving what they *would* have done if properly consented. Despite finding Ms Diamond to be an honest and credible witness in all other respects, it was decided that on matters of supposition the effect of hindsight made all the difference:

> "… recalling specific events or conversations is markedly different from attempting to reconstruct what her response would or might have been if given certain information. Expert witnesses, lawyers and others are trained not to use the benefit of hindsight to inform their opinion of what might or should have happened. It is, however, human nature for people to permit that which eventuated to influence their thinking on what they might have done if warned about a particular risk. To my mind, it would be quite impossible for the Claimant to divorce from her thinking, the fact that she was subsequently told by Mr Jones that it would be inadvisable for her to become pregnant because of the mesh and that, in the event, she has not had another child.
>
> Unquestionably, in my view, this sad outcome colours and informs her view of what she would have done if she had been appropriately warned.
>
> I conclude that the Claimant genuinely believes and has convinced herself that she would have opted for a suture repair, if she had been provided with all the relevant information. Accordingly, what she said to me in evidence accords with her honestly held belief. But it does not of course, automatically follow that what she now believes to be the case would in fact have been the position at the material time.
>
> I have weighed up, as I must, all the available evidence (both objective and subjective) on this issue and I have come to the conclusion, on the balance of probabilities that even if she had been in a position to give informed consent, exactly the same procedure would have been undertaken."

A further allegation regarding negligent selection of vicryl suture (a braided and slow- absorbing suture which some experts will say increases risk of infection[2]) was withdrawn at trial.

Foreseeability/remoteness

Perhaps sensing the way the judicial wind was blowing, counsel for the claimant made what the judge called an "ingenious" argument during closing submissions seeking damages for the shock of learning that she could not have children, which exacerbated her psychiatric illness.

Perhaps reflecting the fact that this argument was a late addition, the judicial response was particularly dismissive:

> "… in my judgment, [this submission] has neither factual or legal validity. The breach of duty on the part of Mr Wajed was to fail to warn the Claimant about possible complications in pregnancy.

[2] However, a number of studies have shown no greater risk of infection when using vicryl versus other sutures. See, e.g. *https://www.ncbi.nlm.nih.gov/pubmed/27179440* [accessed 19 October 2017].

> That is wholly different from being under a duty to tell a patient that if she undergoes a certain procedure, she would not be able to child-bear in the future. It cannot conceivably be said that it was a foreseeable consequence of the failure to warn about certain risks that another doctor (Mr Jones), nearly three years later would tell the Claimant that it was inadvisable to become pregnant. That such advice was given is, to my mind, unconnected to the breach of duty of the part of Mr Wajed or, at the very least, far too remote a consequence."

Is it really inconceivable that a foreseeable consequence of patient learning of an inability to have children arising from surgery, which she did not consent to or know of, might suffer psychiatric harm? It is suggetsed that many potential parents, if suddenly and unexpectedly told that it was not safe to have a child, would feel a grievous sense of wrong capable of causing psychiatric injury, regardless of it being nearly three years later (or more).

The judge also held:

> "Furthermore, it is the Claimant's case that by the time she was given advice by Mr Jones, she was already suffering depression and anxiety. It seems to me that it would be very difficult to measure, in any meaningful way, the extent to which the advice given by Mr Jones rendered her depression/anxiety more severe. Additionally, it is, of course, trite law that 'shock' on its own does not sound in damages."

The maxim that "a defendant takes his victim as he finds them" is also trite law. Measuring the extent of exacerbation of a pre-existing psychiatric illness from shock can be a difficult exercise, but it is one that Judges are required to do if there is evidence to support it.

Had she proven that any exacerbation had been suffered, Ms Diamond's PSLA award should have been adjusted upwards to reflect her increased personal suffering due to the failure to obtain consent. See for example *Richardson v Howie* [2004] EWCA Civ 1127; [2005] PIQR Q3 or more recently *Shaw v Kovacs* [2017] EWCA Civ 1028, in which Davis LJ said:

> "if, in any particular case, an individual's suffering is increased by his or her knowing that his or her 'personal autonomy' has been invaded through want of informed consent ...then that can itself be reflected in the award of general damages."

Ms Diamond's problem was a simple lack of evidence of any injury flowing from the breach of duty on which any assessment could be made, rather than difficulty in terms of legal principle.

Free-standing claim based on *Chester v Afshar*

Lastly, and perhaps legally most interesting, the claimant submitted that she had a free-standing claim for damages based on a failure to warn of a risk of surgery which eventuates, applying *Chester v Afshar*.[3]

In dealing with this submission, reference was made in the judgment to *Correia v University Hospital of North Staffordshire NHS Trust*[4] where Simon LJ said at [28]:

> "… there is an additional problem for the appellant in the present case. The crucial finding in *Chester v Afshar* was that, if warned of the risk, the claimant would have deferred the operation. In contrast, in the present case, it was not the appellant's case that she would not have had the operation, or would have deferred it or have gone to another surgeon …"

[3] *Chester v Afshar* [2004] UKHL 41; [2005] 1 A.C. 134.
[4] *Correia v University Hospital of North Staffordshire NHS Trust* [2017] EWCA Civ 356.

Making the same point as Simon LJ did, HH Judge Freedman observed that in his judgment had claimant been fully consented, her operation would not have been deferred to a different day. Everything would have happened exactly as it did. This was enough for the judge to distinguish *Chester*:

> "In my judgment, this Claimant cannot come within the *Chester* exception. In the first instance, it is difficult to see how it could be said that she has suffered an injury in consequence of the operation. Even if it be said that when, later, she was advised not to child-bear, that constituted an injury. It cannot sensibly be argued that that outcome was intimately connected to the duty to warn such that it should be regarded as being caused by the breach of the duty to warn.
>
> At all events, I am satisfied that *Chester* does not provide a claimant with a freestanding remedy in circumstances where there has been a failure to warn of risks attendant upon surgery. The same point was made by Simon LJ in *Correia* at [28]:
>
> > '… there is an additional problem for the appellant in the present case. The crucial finding in *Chester v Afshar* was that, if warned of the risk, the claimant would have deferred the operation. In contrast, in the present case, it was not the appellant's case that she would not have had the operation, or would have deferred it or have gone to another surgeon …'
>
> Of course, in this case, the Claimant does say that she would not have had this operation if properly warned but that is not my finding of fact. The important point is that if the Court of Appeal had construed *Chester* as modifying such principles of causation to the extent that a mere negligent failure to warn, without more, could sound in damages such could not be reconciled with what Simon LJ said at [28] set out above."

This approach has now been confirmed in Shaw v Kovacs, yet another case where both HH Judge Platts (sitting as a Judge of the High Court) below and Davis, Underhill and Burnett LJJ on appeal declined to apply Chester modification to causation, on the basis that had deceased Mr Ewan been informed of the risks, he would have declined the operation at all. Nor did their Lordships hold that the failure to consent as to risk gave rise to a freestanding claim for damages for "loss of personal autonomy". Davis LJ said:

> "[T]here is nothing in the actual majority decision in Chester which indicates the availability of a further, free-standing, award of the kind proposed in the present case. On the contrary, the damages awarded were (by reason of the majority conclusion on causation) of what I might call the conventional kind. In the present case the estate of Mr Ewan has likewise received an award of the conventional kind. Nothing further is mandated by reason of the decision in Chester."

Comment

The difficulty in bringing a claim within the *Chester* exception, and its judicial attenuation, is made very clear in *Diamond* .

Even where:

(i) surgery was required to correct a complication from previous surgery;
(ii) the second operation had been delayed by two months due to clinical negligence;
(iii) it was negligent not to mention the inevitable and significant adverse effect of the proposed surgery;
(iv) the claimant was adamant she would undergone different surgery, or would have dealt better with the effects of it, rather than learning three years later she should not have children ,

a claimant still cannot come within the exception.

It has been suggested that a better approach in *Chester* would have been to have assumed the middle ground of fashioning a modest, but significant, award for the "insult" of not being consented properly, to avoid the need to muddle the law of causation and/or for expensive psychiatric evidence showing psychiatric illness arose from the breach where no other award for general damages exists in which to uplift the suffering element.

At present there appears to be no chance of such a step being taken. Lord Hoffman in *Chester* stated that he had considered but rejected such an approach, as the law of torts would be "an unsuitable vehicle for distributing the modest compensation which might be payable."

Similarly, in *Shaw* Davis LJ was very firmly against even a modest award to recognise the importance of consenting patients would have very real, even if unquantifiable, financial, practical and other implications". Not only that but Davis LJ saw real force in the "floodgates" argument in what seems to be an express nod to fears of a modern'compensation culture':

> " [I]n the current climate of claims farming the risk is very much there for a proliferation of such claims. The fact that any prospective conventional award for the asserted head of loss might be for a relatively modest amount is no answer. On the contrary, the relative modesty of any prospective award of the kind for which the appellant now argues may, as experience teaches, of itself prove a spur to claims: in the hope that defendants will, fearful of costs, seek speedily to settle."

The zombie status of *Chester* means that a claimant who has not been consented in breach of duty will most likely be unable to bring any claim, unless the operation was one of only marginal benefit. Even if personally adamant that the procedure would not have been agreed to had matters been explained properly, an impressive witness such as Ms Diamond is likely to run into "disregarding the benefit of hindsight" arguments.

If, or rather when, the point again comes up for debate before the Supreme Court, it is submitted that perhaps it is after all hard to resist the view of Lord Bingham's in his dissenting speech in *Chester*:

> "The patient's right to be appropriately warned is an important right, which few doctors in the current legal and social climate would consciously or deliberately violate. I do not for my part think that the law should seek to reinforce that right by providing for the payment of potentially very large damages by a defendant whose violation of that right is not shown to have worsened the physical condition of the claimant."

It is time for the Supreme Court to decide that *Chester* is now bad law, or to come up with a better rationale for the exception's existence and explanation of its precise limits, so that it can be applied logically.

Why Should We and How Do We Support Injured Individuals Back into Work?

Andrew Frank*

Employment; Personal injury; Rehabilitation; Right to return to work

Abstract

Returning injured individuals to work (vocational rehabilitation) is a prime responsibility of any rehabilitation programme as it facilitates optimal participation in society. In addition, employment improves health and well-being in contrast to the ill health which often follows unemployment. Injured individuals may be injured at birth or at any stage in their lives, requiring different strategies to facilitate employment. Young people need to develop their education, work experience and self confidence. Those at work may need strategies to enable them to return to their old or new jobs whilst those who lose their work may need specific (re)training and/or specialist support to find a new job. This process should start at first contact with health professionals and subsequently often needs coordination of health professionals, employers and government departments to maximise the best outcome. Such assistance is best provided by vocational rehabilitation professionals who navigate the complex relationships between health and work.

Introduction

Many injuries affect an individual's ability to work. For some, these injuries may occur at birth affecting their education and possibly their ability to find work. Other injuries occur to individuals of working age and may or may not be work-related. These injuries may affect the ability to continue with their current work, but not be so severe that they are unable to work. For others, a prolonged period of worklessness may occur whilst a protracted recovery period ensues. For these individuals, a return to work ("RTW") may be problematic and only possible after a prolonged period of rehabilitation. If such rehabilitation has a work focus however, their chances of RTW are greatly increased. Such rehabilitation is known throughout the world as vocational rehabilitation ("VR").

It follows that there are three main forms of VR that are relevant to supporting injured individuals. First, there are those who experience injuries at birth or early in life. Secondly, there are those who have injuries that affect their working life and which may need support at work (job retention); and finally there are those who have lost their job and have to rebuild their working lives.[1]

Vocational rehabilitation has been defined as "any process, that enables persons with functional, psychological, developmental, cognitive and emotional impairments to overcome obstacles to accessing, maintaining or returning to employment or other useful occupation".[2] The background to the development and decline in medical rehabilitation services in the UK has been discussed elsewhere.[3] However, the

* Trustee and Past Chair, Vocational Rehabilitation Association. The opinions expressed in this review are those of the author and are not those of the Vocational Rehabilitation Association. Acknowledgement. I am grateful to John Pilkington, Chair of the VRA, for comments relating to the "Rehabilitation Code".

[1] A. O. Frank, "Vocational rehabilitation: supporting ill or disabled individuals in(to) work: a UK perspective" [2016] *Healthcare* 4(46). DOI:10.3390/healthcare4030046.

[2] Vocational Rehabilitation Association, *Vocational rehabilitation standards of practice*, 2nd edn (One Oak, Colchester Road, Thorpe le Soken, Essex, CO16 0LB, Vocational Rehabilitation Association, 2013) and British Society of Rehabilitation Medicine, *Vocational Rehabilitation—the way forward: report of a working party* (Chair: A. O. Frank), 2nd edn (London: British Society of Rehabilitation Medicine, 2003).

[3] A. O. Frank, "Vocational rehabilitation: supporting ill or disabled individuals in(to) work: a UK perspective" [2016] *Healthcare* 4(46). DOI:10.3390/healthcare4030046.

recent pathway for major trauma specifies that the major trauma centres will work with "local general rehabilitation services and Specialist Rehabilitation ("SR") providers". Rehabilitation consultants are now involved with the rehabilitation needs of those leaving the Major Trauma Unit. These patients will have a "rehabilitation prescription" which reflects their "physical, functional, vocational, educational, cognitive, psychological and social rehabilitation needs".[4] Whilst this is not a guarantee that all patients will receive adequate rehabilitation throughout their NHS care, at least the importance of rehabilitation has been accepted, certainly for those with major trauma. Furthermore the British Society of Rehabilitation Medicine ("BSRM") has issued standards for SR in the Trauma pathway which specifically include the need for all trauma patients to be assessed for their ability to RTW and for some this will need specialist VR.[5] The World Health Organisation has recently reported on the need for rehabilitation to be integrated "into and between primary, secondary and tertiary levels of health systems".[6] It also stipulated that "where health insurance exists or is to become available, it should cover rehabilitation services",[7] and also the provision of assistive technology ("AT").[8]

The importance of rehabilitation in the return to health and work process, together with the appreciation of the positive return on investment for rehabilitation services delivered, is increasingly understood.[9] The relative lack of good NHS rehabilitation services has also stimulated the development of private rehabilitation services, mostly paid for by the insurance sector. Three groups of professionals have been formed representing the three main streams of rehabilitation as it was developing in the private sector—the Case Management Society of the UK ("CMSUK"),[10] British Association of Brain Injury Case Managers ("BABICM")[11] and the Vocational Rehabilitation Association ("VRA") which has recently published the second edition of its standards of practice.[12] Whilst RTW planning may be provided by the rehabilitation team in the acute/sub acute settings, this is not always the case, particularly if consideration of a RTW has not been feasible during the rehabilitation process. It is in this situation that the private sector may provide assistance for those who are supported by an insurance claim and facilities not available under the National Health Service ("NHS") may be accessed. This is particularly important when NHS services are controlled by waiting lists as is often the case for certain investigations (e.g. magnetic resonance imaging) or clinical services (e.g. physiotherapy, counselling etc).

The International Underwriting Association and the Association of British Insurers have commissioned a number of UK Bodily Injury Studies, first published in 1997. The second report in 1999 included a voluntary "Rehabilitation Code" to encourage the use of rehabilitation by insurers and personal injury lawyers.[13] Since then, there have been two updates, the most recent being in late 2015. These have incorporated users' comments and responded to constructive feedback from the industry. The latest review is being carried out currently and will refer to a new "Rehabilitation Good Practice Guide" which has been prepared by the VRA, CMSUK, BABICM and the BSRM. This reflects the central role played by the injured individual and their rehabilitation professionals and will sit alongside the "Case Manager's Guide" which was an addendum to the 2015 version of the Code.

[4] NHS England, *NHS standard contract for major trauma service (all ages)* (London, UK: NHS England: 2017).
[5] L. Turner-Stokes, *Specialist Rehabilitation in the Trauma pathway: BSRM core standards* (London, UK, British Society of Rehabilitation Medicine, 2013).
[6] World Health Organisation, *Rehabilitation in health systems* (Geneva: World Health Organisation, 2017).
[7] World Health Organisation, *Rehabilitation in health systems* (Geneva: World Health Organisation, 2017).
[8] World Health Organisation, *Rehabilitation in health systems* (Geneva: World Health Organisation, 2017).
[9] SwissRe Australia, *Rehabilitation Watch 2016* (Sydney, NSW, Australia: 2016).
[10] CMSUK, *Case Management Society of the UK* (Sutton, UK: 2009) at *www.cmsuk.org/* [accessed 19 October 2017].
[11] *British Association of Brain Injury Case Managers*, British Association of Brain Injury Case Managers (2017) at *http://www.babicm.org/* [accessed 19 October 2017].
[12] Vocational Rehabilitation Association, *Vocational rehabilitation standards of practice*, 2nd edn (One Oak, Colchester Road, Thorpe le Soken, Essex, CO16 0LB, Vocational Rehabilitation Association, 2013).
[13] International Underwriting Association and the Association of British Insurers, *Third UK bodily injury awards study*, (London: International Underwriting Association of London, 2003).

Is work important?

For many years, the clear advantages of work (e.g. payment) may have been masked by the obvious disadvantages (sometimes long hours for low pay with risks to physical and mental health). The UK Government commissioned an independent review of the scientific evidence into whether work is good for health and well-being.[14] Waddell and Burton found extensive evidence to support the beneficial effects of work in terms of adequate economic resources to facilitate full participation in society; meeting important psychosocial needs; being central to individual identity, social roles and social status. Thus employment is the main driver of social gradients in physical and mental health and mortality.[15] Conversely, there is a strong association between worklessness and poor health in terms of higher mortality,[16] poorer general health and poorer mental health,[17] including an increased suicide risk.[18] Dame Carol Black summarised the advantages of employment:

> "For most people, their work is a key determinant of self-worth, family, esteem, identity and standing within the community, besides, of course, material progress and a means of social participation and fulfilment."[19]

As a result of Dame Carol's review, the Government agreed with the National Institute for Health and Care Excellence that their public health guidelines should include work-related outcomes,[20] a widely held view.[21] It follows that every attempt to secure a RTW should be made at the earliest possible time.[22]

General principles of VR

Early intervention

VR starts at the first contact with the patient (or their relatives). In the early stages of injury management, the clinical situation will dominate thinking, but nevertheless it is important that those involved understand the importance of remaining in contact with the employer; that reassurance is provided that much can be done to help those whose injuries may threaten their ability to work (and that sometimes there is a need to consider doing different work); and that unguarded comments about the potential for future RTW are avoided[23] (Table 1).

Vocational Rehabilitation Professionals ("VRPs") see a range of job options for individuals, whilst the individual and their family are likely to only consider a return to one's present position. Some individuals and/or their families may believe that a RTW is not possible e.g. after a spinal cord injury ("SCI"), and

[14] G. Waddell and A. K. Burton, *Is work good for your health and well-being?* (London: The Stationary Office, 2006).

[15] G. Waddell and A. K. Burton, *Is work good for your health and well-being?* (London: The Stationary Office, 2006).

[16] T. Clemens, F. Popham and P. Boyle, "What is the effect of unemployment on all-cause mortality? A cohort study using propensity score matching" [2015] *European Journal of Public Health* 25(1):115–121 and P. Meneton, E. Kesse-Guyot, C. Mejean, L. Fezeu, P. Galan and S. Hercberg, "Unemployment is associated with high cardiovascular event rate and increased all-cause mortality in middle-aged socially privileged individuals" [2015] *International archives of occupational and environmental health* 88(6):707–716.

[17] G. Waddell and A. K. Burton, *Is work good for your health and well-being?* (London: The Stationary Office, 2006).

[18] C. Breuer, "Unemployment and Suicide Mortality: Evidence from Regional Panel Data in Europe" [2015] *Health Economics* 24(8):936–950.

[19] Dame Carol Black, *Working for a healthier tomorrow* (London: TSO, 2008).

[20] Department for Work and Pensions, Department of Health, *Improving health and work: changing lives. The Government's Response to Dame Carol Black's Review of the health of Britain's working-age population* (London, UK: TSO, 2008).

[21] MASCIP (Multidisciplinary Association for Spinal Cord Injury Professionals), *Draft Vocational rehabilitation guidelines 2017* (Stoke Mandeville, Buckinghamshire, UK: MASCIP, 2017) at *https://www.mascip.co.uk/best-practice/mascip-best-practice/#* [accessed 19 October 2017].

[22] G. Hilton, C. A. Unsworth, G. C. Murphy, M. Browne and J. Olver, *Longitudinal employment outcomes of an early intervention vocational rehabilitation service for people admitted to rehabilitation with a traumatic spinal cord injury* (Spinal Cord 2017) at *http://dx.doi.org.rsm.idm.oclc.org/10.1038/sc.2017.24* [accessed 17 October 2017], S. Bevan, "Exploring the benefits of early interventions which help people with chronic illness remain in work" [2015] *Fit for Work Europe* and A. Tyerman, "The importance of work for people with a brain injury" [2017] *Brain Injury News* 9: 3–6.

[23] MASCIP (Multidisciplinary Association for Spinal Cord Injury Professionals), *Draft Vocational rehabilitation guidelines 2017* (Stoke Mandeville, Buckinghamshire, UK: MASCIP, 2017) and British Society of Rehabilitation Medicine, *Vocational assessment and rehabilitation for people with long-term neurological conditions: recommendations for best practice* (London: British Society of Rehabilitation Medicine, 2010).

these attitudes need to be challenged early, e.g. by asking what makes you think that?[24] Whilst these options have been summarised previously,[25] they involve considering continuing with one's current job, with or without modifications (accommodations), continuing with the employer in a different role, finding a new employer doing similar or different tasks, or considering self-employment. Work may be done at the worksite or at home, full-time or part-time. The role of the voluntary sector is increasingly seen to be valuable, sometimes offering financial assistance, often peer support[26] and less frequently voluntary work.[27] The appointment of a Vocational Navigator at the Golden Jubilee Regional Spinal Cord Injuries Centre in Middlesbrough increased the RTW rate from 23% to 56% showing the dramatic difference that can be made through appropriate VR provision. [28]

Assessment

Whilst the details of a vocational assessment are beyond the scope of this review, it is crucial to understand the nature of the difficulties associated with a RTW. In the UK, a system has developed which simplifies this process and has been summarised in Table 2. The flag system developed from the "red flags" that were used in the management of back pain. It was soon apparent that back pain management needed to identify the psychological risk factors likely to lead to chronic pain, which in turn might be complicated by social factors—in effect the biopsychosocial model of health management. This has usefully been used by VRPs to identify individuals whose difficulties in returning into employment might go beyond the severity of any residual impairments.[29] Thus an individual with multiple fractures following a road traffic accident might have mobility impairments complicated by post-traumatic stress disorder and depression. In spite of this, (s)he might have been able to child mind and their partner get employment which may in turn impact on a client's desire to RTW.

Roles of the Vocational Rehabilitation Professional ("VRP")

The key functions of the VRP are outlined in Table 3. The VRP assesses the difficulties perceived by both the employer and employee relating to RTW and works with them to develop a RTW plan which must embrace the difficulties in travel to work, all aspects of the tasks involved and negotiating with managers and co-workers when needed.[30] Worksite visits are usually important in facilitating a RTW[31] and may involve training at the worksite.[32] Such visits greatly facilitate the introduction of job modifications

[24] MASCIP (Multidisciplinary Association for Spinal Cord Injury Professionals), *Draft Vocational rehabilitation guidelines 2017* (Stoke Mandeville, Buckinghamshire, UK: MASCIP, 2017).

[25] A. O. Frank, "Vocational rehabilitation: supporting ill or disabled individuals in(to) work: a UK perspective" [2016] *Healthcare* 4(46). DOI:10.3390/healthcare4030046.

[26] MASCIP (Multidisciplinary Association for Spinal Cord Injury Professionals), *Draft Vocational rehabilitation guidelines 2017* (Stoke Mandeville, Buckinghamshire, UK: MASCIP, 2017).

[27] A. O. Frank, "Vocational rehabilitation: supporting ill or disabled individuals in(to) work: a UK perspective" [2016] *Healthcare* 4(46). DOI:10.3390/healthcare4030046.

[28] MASCIP (Multidisciplinary Association for Spinal Cord Injury Professionals), *Draft Vocational rehabilitation guidelines 2017* (Stoke Mandeville, Buckinghamshire, UK: MASCIP, 2017).

[29] World Health Organisation: report by the secretariat, *The International Classification of functioning, disability and health (ICIDH-2)* (Geneva, World Health Organisation, 2001).

[30] A. O. Frank, "Vocational rehabilitation: supporting ill or disabled individuals in(to) work: a UK perspective" [2016] *Healthcare* 4(46). DOI:10.3390/healthcare4030046 and MASCIP (Multidisciplinary Association for Spinal Cord Injury Professionals), *Draft Vocational rehabilitation guidelines 2017* (Stoke Mandeville, Buckinghamshire, UK: MASCIP, 2017).

[31] H. Squires, J. Rick, C. Carroll and J. Hillage, "Cost-effectiveness of interventions to return employees to work following long-term sickness absence due to musculoskeletal disorders" [2012] *Journal of public health* 34(1):115–124 and A. Tyerman and M. Meehan, *Vocational assessment and rehabilitation after acquired brain injury: inter-agency guidelines* (London: British Society of Rehabilitation Medicine, JobcentrePlus, Royal College of Physicians, 2004).

[32] British Society of Rehabilitation Medicine, *Vocational assessment and rehabilitation for people with long-term neurological conditions: recommendations for best practice* (London: British Society of Rehabilitation Medicine, 2010); H. Squires, J. Rick, C. Carroll and J. Hillage, "Cost-effectiveness of interventions to return employees to work following long-term sickness absence due to musculoskeletal disorders" [2012] *Journal of public health* 34(1):115–124; A. Tyerman, "Vocational rehabilitation after traumatic brain injury: models and services" [2012] *Neurorehabilitation* 31(1):51–62;

(accommodations). Since all these interventions demand the active involvement of the employer, the employer is now considered part of the rehabilitation process.[33]

Inter-agency liaison

The VRP liaises with all the agencies involved—the key factors being the personal attributes of the employee,[34] the health professionals' involved, the capabilities of the (actual or potential) employer and the insurers which may be private in addition to the Department for Work and Pensions ("DWP").[35] The nature of the state involvement varies from country to country, but in the UK it relates to the many interventions available from the DWP (summarised by the BSRM[36] but up-to-date information is always best obtained via the DWP website).

Government roles

The Government has a key role to play in vocational rehabilitation in providing "top-down" policies that support those providing the services—"bottom-up provision".[37] Legislation is important (e.g. Equality Act), but the provision of the "Fit note" in replacement of the "Sick Note" has also been significant.[38] It defines for all practitioners the principle of rehabilitation *that it is not what one cannot do that matters, but what one can do!* There is evidence that the Fit Note has been valued by employers.[39] It allows the general practitioner to suggest options to the employer: e.g. "a phased RTW, altered hours, amended duties and/or workplace adaptations".

The Government provides support for workers involved in RTW such as assessing literacy and numeracy skills, preparing a CV, preparing for job interviews, funding a suit for an interview etc. Access to Work ("AtW"),[40] is a highly successful government scheme designed to support disabled individuals and their employers with the adjustments needed for them to start or undertake their work. AtW may also pay a grant towards the extra employment costs resulting from a disability. Examples include providing hearing aid compatible telephones, loop systems and deaf awareness training for staff; taking a taxi to work e.g. if the results of injury prevent the individual from travelling to work using public transport when they are otherwise able to work; paying for a support worker e.g. for care needs after traumatic brain injury ("TBI"); and more recently to address workplace stress and mental health problems.[41] Permitted Work allows individuals to work whilst still receiving benefits under certain conditions.[42] The Disabled Student Allowance facilitates further education for those eligible using the definition of disability under the Equality Act.

[33] H. Squires, J. Rick, C. Carroll and J. Hillage, "Cost-effectiveness of interventions to return employees to work following long-term sickness absence due to musculoskeletal disorders" [2012] *Journal of public health* 34(1):115–124.

[34] A. O. Frank, "Vocational rehabilitation: supporting ill or disabled individuals in(to) work: a UK perspective" [2016] *Healthcare* 4(46). DOI:10.3390/healthcare4030046.

[35] British Society of Rehabilitation Medicine, *Vocational assessment and rehabilitation for people with long-term neurological conditions: recommendations for best practice* (London: British Society of Rehabilitation Medicine, 2010).

[36] British Society of Rehabilitation Medicine, *Vocational assessment and rehabilitation for people with long-term neurological conditions: recommendations for best practice* (London: British Society of Rehabilitation Medicine, 2010).

[37] A. O. Frank and P. Sawney, "Vocational rehabilitation" [2003] J.R. Soc. Med. 96:522–524.

[38] DWP, *Improving health through work* (London, DWP, 2013) and E. Wainwright, D. Wainwright, E. Keogh and C. Eccleston, "Return to work with chronic pain: Employers' and employees' views" [2013] *Occup Med* 63:501–506.

[39] E. Wainwright, D. Wainwright, E. Keogh and C. Eccleston, "Return to work with chronic pain: Employers' and employees' views" [2013] *Occup Med* 63:501–506.

[40] Department for Work & Pensions, *Access to Work* (London, 2016) and MASCIP (Multidisciplinary Association for Spinal Cord Injury Professionals), *Draft Vocational rehabilitation guidelines 2017* (Stoke Mandeville, Buckinghamshire, UK: MASCIP, 2017).

[41] Department for Work & Pensions, *Access to Work* (London, 2016).

[42] Disability Rights UK, *Permitted work Factsheet* (London, UK: 2017).

Roles of employers

The role of the employer is now considered fundamental to good VR practice and it has been argued that this is in the employers' own interests.[43] Many aspects of the employer's role are outside the scope of this review, but employment policies are crucial in facilitating not only a helpful/supportive milieu in the workplace, but also in the fundamental contributions of job modifications,[44] phased RTW etc. Understanding that individuals may RTW prior to a full recovery is increasingly being understood as an important route to reducing sickness absence and keeping trained personnel in the workforce. Most large organisations have occupational health ("OH") services which are outside the remit of this review, but where present OH departments can greatly assist the development of sound policies and facilitate good RTW strategies in addition to supporting the individual RTW plan. Employers' should also make allowances for ongoing health management which might reflect the need for continuing health management, e.g. speech and language therapy, counselling etc.

Who provides VR?

VRPs have an important and sometimes critical role to play in the RTW process. They go under a variety of names, e.g. vocational therapists/consultants/case co-ordinators/counsellors/navigators or sometimes return to work co-ordinators. Their prime functions include job matching whereby the abilities and aspirations of the client are matched with the demands of employment. They may arrange work with local employers[45] or with the voluntary sector.[46] This may lead to more formal work trials.[47]

VRPs in the UK may come from a variety of professional backgrounds. Most will be health/rehabilitation professionals who have developed particular skills within the health/work interface. Many will be therapists, but others will include nurses and psychologists. Less commonly in the UK, VRPs will be knowledgeable within the business community, e.g. human resources personnel who have developed particular skills related to this interface. Others will be graduates from other countries, e.g. Australia where VR skills can be learned at degree level.

The increased survival of those having had cancer has stimulated thinking about the levels of support needed. Macmillan Cancer Support together with the Department of Health have outlined levels of support as:

- **Level 1:**

  Information and support provided electronically or through the printed media;

- **Level 2:**

  One-to-one support through telephone hotlines and digital media;

- **Level 3:**

  Self management programmes access during or after treatment;

[43] A. O. Frank, "Navigating the health/work interface—vocational rehabilitation in the UK" *Occupational Medicine*, 2017, in press.

[44] MASCIP (Multidisciplinary Association for Spinal Cord Injury Professionals), *Draft Vocational rehabilitation guidelines 2017* (Stoke Mandeville, Buckinghamshire, UK: MASCIP, 2017).

[45] M. Westmorland, R. Williams, B. Amick, H. Shannon and F. Rasheed, "Disability management practices in Ontario workplaces: employees' perceptions" [2005] *Disability and Rehabilitation* 27(14):825–835.

[46] A. Saunders, G. Douglas, and P. Lynch, *Tackling unemployment for blind and partially sighted people: summary of findings from a three-year research project (ENABLER)* (London: RNIB, University of Birmingham, 2013).

[47] British Society of Rehabilitation Medicine, *Vocational assessment and rehabilitation for people with long-term neurological conditions: recommendations for best practice* (London: British Society of Rehabilitation Medicine, 2010); A. Tyerman, "Vocational rehabilitation after traumatic brain injury: models and services" [2012] *Neurorehabilitation* 31(1):51–62; D. McNaughton, G. Symons, J. Light and A. Parsons, "'My dream was to pay taxes': The self-employment experiences of individuals who use augmentative and alternative communication" [2006] J. Vocat. Rehabil. 25(3):181–196.

- **Level 4:**

  Specialist VR services.[48]

This however, ignores the fact that VR services are provided both generically and in specialist areas.[49] There is evidence that some VRPs need to be expert in just one area, e.g. epilepsy[50] or specialist TBI where they are likely to be part of a clinical specialist TBI team.[51]

There is a strong private rehabilitation sector (reflecting inadequate NHS rehabilitation facilities). There, the term case manager is often used for professionals coordinating the rehabilitation services needed and some will have appropriate VR experience. They are particularly valuable where complex navigation between insurance companies and the legal profession is needed.[52]

Many people who are assisted back into old or new jobs will require on-going support to ensure the job is secured for the long term. Such individuals often remain disadvantaged in that career progression is often limited.

Preparing disadvantaged young people for the world of work

Helping disadvantaged young people is difficult as there needs to be close working relationships between the local education and social service departments, local and sometimes specialist health services, equipment providers and often the charitable sector. All these bodies have defined budgets giving scope for endless negotiations between them as to who pays for what.

Numerous studies for those with many different conditions show that the level of education achieved and qualifications gained are crucial to achieving an optimal lifestyle,[53] but other factors are also fundamental. Social and personal development is one such factor,[54] which may be assisted through exposure to role models in the areas of motherhood, sport and work. The development of self confidence can be assisted through such means as sport,[55] adventure (e.g. scouting) and crucially through meaningful work experience. Internships may lead on to apprenticeships. The charitable (voluntary) sector is often helpful in giving specific advice to individuals with specific conditions e.g. for those with hearing impairments,[56] or SCI[57] and broader charities such as Disability Rights UK offer a wide variety of factsheets e.g. on

[48] E. Gail, *Thinking positively about work: delivering work support and vocational rehabilitation for people with cancer* (London: Macmillan Cancer Support; Department of Health, University College London, 2014).

[49] E. D. Playford, K. Radford, C. Burton, A. Gibson, B. Jellie and C. Watkins, "Mapping vocational rehabilitation services for people with long-term neurological conditions" (2011) at *https://www.networks.nhs.uk/nhs-networks/vocational-rehabilitation/documents/FinalReport.pdf* [accessed 19 October 2017].

[50] British Society of Rehabilitation Medicine, *Vocational assessment and rehabilitation for people with long-term neurological conditions: recommendations for best practice* (London: British Society of Rehabilitation Medicine, 2010).

[51] A. Tyerman, "Vocational rehabilitation after traumatic brain injury: models and services" [2012] *Neurorehabilitation* 31(1):51–62.

[52] A. O. Frank and P. Sawney, "Vocational rehabilitation" [2003] J.R. Soc. Med. 96:522–524.

[53] G. Hilton, C. A. Unsworth, G. C. Murphy, M. Browne and J. Olver, *Longitudinal employment outcomes of an early intervention vocational rehabilitation service for people admitted to rehabilitation with a traumatic spinal cord injury* (Spinal Cord 2017); British Society of Rehabilitation Medicine, *Vocational assessment and rehabilitation for people with long-term neurological conditions: recommendations for best practice* (London: British Society of Rehabilitation Medicine, 2010) and M. Cogne, L. Wiart, A. Simion, P. Dehail and J. Mazaux, "Five-year follow-up of persons with brain injury entering the French vocational and social rehabilitation programme UEROS: Return-to-work, life satisfaction, psychosocial and community integration" [2017] *Brain Injury* 1–12.

[54] British Society of Rehabilitation Medicine, *Vocational assessment and rehabilitation for people with long-term neurological conditions: recommendations for best practice* (London: British Society of Rehabilitation Medicine, 2010).

[55] A. O. Frank, "Neuromuscular conditions for physicians—what you need to know" [2016] Clin. Med. 16(5):496.

[56] L. Matthews, *Unlimited potential: a research report into hearing loss in the workplace*, 1st edn (London: Action on Hearing Loss, 2012) at *https://www.actiononhearingloss.org.uk/supporting-you/policy-research-and-influencing/research/hearing-loss-in-the-workplace.aspx* [accessed 19 October 2017].

[57] MASCIP (Multidisciplinary Association for Spinal Cord Injury Professionals), *Draft Vocational rehabilitation guidelines 2017* (Stoke Mandeville, Buckinghamshire, UK: MASCIP, 2017).

internship and apprenticeships.[58] Given the Government's support for apprenticeships, e.g. AtW[59] this is always a worthwhile consideration. Volunteering is often a good entry point into the world of work[60] as well as giving those with severe residual impairments an ability to contribute to society.[61] Appropriate careers advice is essential from those with in-depth knowledge of the capabilities of those with disabilities and the careers of the future, both for young people, e.g. from the National Careers Advisory Service[62] as well as for older individuals changing careers due to illness/injury.

In recent years, rehabilitation within the workplace has been seen to be an important component to "getting better".[63] Thus developing skills from within the workforce, e.g. for those with intellectual impairments or severe mental health issues, is more effective than pre-work training—"place then train" is now preferred to "train then place".[64]

Whilst there has been concern for some years about the services available in the UK for the transition between childrens' services and those for adults,[65] little attention appears to have been given from the NHS to the preparation of disadvantaged young people for working life.[66] A number of factors seem important. Planning for an adult world of work needs to begin around the time of puberty, or attending secondary education.[67] Childrens' services need to plan for the young person to become the centre of the clinic consultation, rather than the parents. Parents must be confronted with the question as to whether they want their child to become a young adult with, as nearly as possible, the same chance of an independent life as their non-disadvantaged peers. For those parents grasping this issue, allowing increased personal independence, either through the use of AT or through other means, can greatly enhance the life-chances for their child as they develop into a young adult.[68]

Equipment and assistive technology

The provision of AT to support physically disabled young people, e.g. that of communication equipment (Alternative and Augmentative Communication ("AAC")) can transform the lives of even the most severely impaired individuals including facilitating employment.[69]AAC is not always provided by the NHS, being costly and poorly funded.

[58] Disability Rights UK, *Into Apprenticeships: the guide for disabled people* (London, UK: 2017) at *https://www.disabilityrightsuk.org /intoapprenticeships* [accessed 19 October 2017] and P. Connolly and T. Stevens, "Get back to where we do belong" (2016) at *https://www .disabilityrightsuk.org/sites/default/files/pdf/GetBack30November.pdf* [accessed 19 October 2017].

[59] Department for Work & Pensions, *Access to Work* (London, 2016) and P. Connolly and T. Stevens, "Get back to where we do belong" (2016).

[60] P. Connolly and T. Stevens, "Get back to where we do belong" (2016).

[61] S. Copstick, "Supporting people back to work through volunteering" [2017] *Brain Injury News* 9 at 7–8.

[62] P. Connolly and T. Stevens, "Get back to where we do belong" (2016).

[63] B. Grove, "International employment schemes for people with mental health problems" [2016] *BJPsych International* 12(Research Supplement):97–99.

[64] B. Grove, "International employment schemes for people with mental health problems" [2016] *BJPsych International* 12(Research Supplement):97–99.

[65] S. Clarke, P. Sloper, N. Moran, L. Cusworth and J. Beecham, "Multi-agency transition services; greater collaboration needed to meet the priorities of young disabled people with complex needs as they move into adulthood" [2011] *Journal of Integrated Care* 19(5):30–40.

[66] A. O. Frank, "Neuromuscular conditions for physicians—what you need to know (letter)" [2016] Clin. Med. 16(5):496.

[67] A. O. Frank, "Neuromuscular conditions for physicians—what you need to know" [2016] Clin. Med. 16(5):496.

[68] A. O. Frank, "Neuromuscular conditions for physicians—what you need to know (letter)" [2016] Clin. Med. 16(5):496.

[69] D. McNaughton, G. Symons, J. Light and A. Parsons, "'My dream was to pay taxes': The self-employment experiences of individuals who use augmentative and alternative communication" [2006] J. Vocat. Rehabil. 25(3):181–196 and MASCIP (Multidisciplinary Association for Spinal Cord Injury Professionals), *Draft Vocational rehabilitation guidelines 2017* (Stoke Mandeville, Buckinghamshire, UK: MASCIP, 2017).

Powered wheelchairs are now seen, not only as transforming lives of profoundly immobile individuals[70] and greatly assisting their carers[71] but also as important therapeutic interventions.[72] They often have long waiting times even though the NHS has stringent criteria.[73] Experience suggests that the potential for use of interim payments to fund such equipment, or other socially critical equipment (e.g. a car), may be life-changing (by avoiding months of delay whilst waiting for NHS or other provision); and may be used to support a rehabilitation programme including VR when appropriate.[74] The voluntary sector may also be helpful in equipment provision, particularly for children.

These issues are raised as employment opportunities often relate to the degree of social integration and personal independence achieved by the disabled individual[75] and for many these employment opportunities are "in offices and using computers".[76]

All those who find difficulty in using mobile handsets, e.g. to control a television, should be assessed for environmental control units, available through the NHS. Together with powered wheelchairs, severely disabled youngsters can control their environment, leave home and meet their friends etc. Mobile phones give parents some degree of reassurance that they can remain in contact to be available if needed. The rapid changes in technology create many advantages that increasingly can transform the lives of severely disabled individuals.

These arguments hold true for disadvantaged individuals of all ages, but are perhaps most crucial for young people seeking independence for the first time.

Job retention

Assuming that there is an effective absence policy, which maintains good contact between employee and employer, then the first step in the RTW process is to establish the RTW plan,[77] essential when sickness absence is likely to be prolonged. The next step is to establish if there are any components of the employee's work that can still be performed and if so build on that. This may be assisted by job modifications (accommodations) which may be very simple e.g. changing the site of an office desk.[78] The Equality Act insists on reasonable accommodations or job modifications being made. The RTW may be organised simultaneously with the provision of physical support (e.g. a graded exercise programme) or counselling and employers should understand the importance of allowing this. It will be greatly facilitated when support from an OH team is available.

[70] S. Evans, C. Neophytou, L. H. De Souza and A. O. Frank, "Young people's experiences using electric powered indoor-outdoor wheelchairs (EPIOCs): potential for enhancing users' development?" [2007] Disabil. Rehabil. 19(16):1281–1294 and A. O. Frank, J. H. Ward, N. J. Orwell, C. McCullagh and M. Belcher, "Introduction of the new NHS Electric Powered Indoor/outdoor Chair (EPIOC) service: benefits, risks and implications for prescribers" [2000] Clin. Rehabil. 14(December):665–673.

[71] A. O. Frank, J. H. Ward, N. J. Orwell, C. McCullagh and M. Belcher, "Introduction of the new NHS Electric Powered Indoor/outdoor Chair (EPIOC) service: benefits, risks and implications for prescribers" [2000] Clin. Rehabil. 14(December):665–673 and A. O. Frank, C. Neophytou, J. Frank and L. H. De Souza, "Electric Powered Indoor/outdoor Wheelchairs (EPIOCs): users views of influence on family, friends and carers" [2010] *Disability & Rehabilitation Assistive Technology* 5(5):327–338.

[72] D. E. Dicianno, J. Lieberman, M. Schmeler, A. Souza, R. Cooper and M. Lange, *RESNA position on the application of tilt, recline, and elevating leg rests for wheelchairs: 2015 current state of the literature* (Arlington, VA, USA, 2015).

[73] . O. Frank, J. H. Ward, N. J. Orwell, C. McCullagh and M. Belcher, "Introduction of the new NHS Electric Powered Indoor/outdoor Chair (EPIOC) service: benefits, risks and implications for prescribers" [2000] Clin. Rehabil. 14(December):665–673.

[74] MASCIP (Multidisciplinary Association for Spinal Cord Injury Professionals), *Draft Vocational rehabilitation guidelines 2017* (Stoke Mandeville, Buckinghamshire, UK: MASCIP, 2017).

[75] British Society of Rehabilitation Medicine, *Vocational assessment and rehabilitation for people with long-term neurological conditions: recommendations for best practice* (London: British Society of Rehabilitation Medicine, 2010).

[76] British Society of Rehabilitation Medicine, *Vocational assessment and rehabilitation for people with long-term neurological conditions: recommendations for best practice* (London: British Society of Rehabilitation Medicine, 2010).

[77] A. O. Frank, "Vocational rehabilitation: supporting ill or disabled individuals in(to) work: a UK perspective" [2016] *Healthcare* 4(46). DOI:10.3390/healthcare4030046.

[78] A. O. Frank, "Vocational rehabilitation: supporting ill or disabled individuals in(to) work: a UK perspective" [2016] *Healthcare* 4(46). DOI:10.3390/healthcare4030046.

In some situations, working from home may be helpful either temporarily, as part of the rehabilitation into work[79] or permanently. Home working may make sense for many in terms of reducing long and sometimes painful journeys into work (may on occasions be paid for by AtW) and may be in any combination of days at work and days at home. For a minority of individuals, home working may be permanent, particularly if personal independence is problematic and time consuming; and there are family or other individuals able and willing to support it. A disadvantage, however, may be that of social isolation.

For those with complex injuries (e.g. SCI,TBI), additional training, supervision and support, e.g. education and training for supervisors and co-workers, a "buddy" trained to respond to specific needs (e.g. seizure) in the workplace, mentoring, advocacy and on-going reviews with the supervisor, manager and colleagues facilitate a successful RTW.[80]

Finding new work

People seeking to RTW following an extended period of leave should usually be offered an assessment of vocational skills by a suitably qualified practitioner. Success is not only dependent on the previous level of education, but also the client's previous work experience. If this person is not part of a rehabilitation team supporting the RTW, then there should be close liaison with the primary (or other) care team(s) to ensure that all the medical obstacles to RTW are clearly understood and strategies to overcome them adopted. This is particularly important in certain conditions such as those with cognitive impairments.[81]

For those whose loss of job related to acute health-related conditions, some will require rehabilitation from a multi-professional team (e.g. SCI,TBI[82]) and this has been shown to be particularly helpful in Scotland for those with musculoskeletal conditions.[83]

A vocational assessment not only considers the difficulties associated with RTW (see above) but also embraces an individual's previous education, qualifications, employment, hobbies that might convert into a job and transferable skills; medical/rehabilitation history; social and family circumstances; current state of the labour market etc.[84] A key factor in determining the future job roles is that of the personal inclinations of the potential employee which will not only influence job uptake but also the likelihood of sustaining the new job. Whilst understanding the nature of any new job, the rehabilitation team should be assessing the potential for working at home—see above. Such work may be within employment or self employment and the DWP has a number of support services for those seeking either. Advice about self-employment from those who have achieved it in spite of severe communication impairments has been given[85] quoted by the BSRM,[86] and includes the importance of taking practice jobs (work trials), networking with future co-workers and employers, demonstrating competence and learning social interaction skills.

It is clear from the above that many potential employees will need (re)training to facilitate any RTW. This may be provided directly via the DWP or through other schemes. In addition to the strategies listed

[79] A. O. Frank, "Vocational rehabilitation: supporting ill or disabled individuals in(to) work: a UK perspective" [2016] *Healthcare* 4(46). DOI:10.3390/healthcare4030046.

[80] A. O. Frank, "Vocational rehabilitation: supporting ill or disabled individuals in(to) work: a UK perspective" [2016] *Healthcare* 4(46). DOI:10.3390/healthcare4030046 and British Society of Rehabilitation Medicine, *Vocational assessment and rehabilitation for people with long-term neurological conditions: recommendations for best practice* (London: British Society of Rehabilitation Medicine, 2010).

[81] British Society of Rehabilitation Medicine, *Vocational assessment and rehabilitation for people with long-term neurological conditions: recommendations for best practice* (London: British Society of Rehabilitation Medicine, 2010)

[82] A. Tyerman, "The importance of work for people with a brain injury" [2017] *Brain Injury News* 9: 3–6.

[83] J. Brown, D. Mackay, E. Demou, J. Craig and E. Macdonald, *Reducing sickness absence in Scotland - applying the lessons from a pilot NHS intervention* (Glasgow, University of Glasgow, 2013) at *http://www.gla.ac.uk/researchinstitutes/healthwellbeing/research/publichealth/hwlgroup /currentresearch/sickness%20absence/* [accessed 19 October 2017].

[84] A. O. Frank, "Vocational rehabilitation: supporting ill or disabled individuals in(to) work: a UK perspective" [2016] *Healthcare* 4(46). DOI:10.3390/healthcare4030046 and British Society of Rehabilitation Medicine, *Vocational assessment and rehabilitation for people with long-term neurological conditions: recommendations for best practice* (London: British Society of Rehabilitation Medicine, 2010).

[85] D. McNaughton, G. Symons, J. Light and A. Parsons, "'My dream was to pay taxes': The self-employment experiences of individuals who use augmentative and alternative communication" [2006] J. Vocat. Rehabil. 25(3):181–196.

[86] British Society of Rehabilitation Medicine, *Vocational assessment and rehabilitation for people with long-term neurological conditions: recommendations for best practice* (London: British Society of Rehabilitation Medicine, 2010).

above (Table 3), for those returning to their previous employment (with or without job modifications), additional components may be needed to assist in preparation for and support in pursuing alternative occupation. These may include using links with any local Employers' Partnership or Employers' Forum, a "work taster" to sample alternative avenues of occupation, assisted job selection, search, application, interviews, voluntary work trials and permitted work options. The needs of the person must be communicated clearly to the employer who needs appropriate Health and Safety training and insurance cover for any work trial which should not impact negatively on either person or their relatives.[87]

Conclusion

Vocational rehabilitation offers ill and injured individuals the best hope of successful employment in spite of often serious injuries. Different strategies may be needed for those at different stages of working life. But aiming for employment from the first stage of an injury or acute illness gives the best likelihood of a successful return to work and the financial, health and social advantages that this brings.

Table 1 Points for the initial consultation

Although at the earliest consultation the clinical state and prognosis may be unclear:

1. **Questions to be asked of your client or family if relevant**
   - (a) What is the nature of your work/responsibilities?
   - (b) What difficulties do you foresee in RTW?
2. **Points that must be made**
   - (a) You must stay in touch with your employer.
   - (b) There are many ways of helping people back to work.
3. **At the end of the consultation**
   - (a) RTW may sometimes involve changing the nature of work—if appropriate.
   - (b) Avoid making unguarded prognostications regarding work capabilities.

Table 2 The flag system of obstacles in RTW[88]

Red—severity of impairment (a)

Yellow—psychosocial obstacles (b)

Orange—those with pre-existing psychological impairments (b)

Blue—perceived obstacles in the workplace—changeable (c)

Black—unalterable workplace obstacles—e.g. national agreements (c)

Chequered—social obstacles (c)[89]

- (a) Biological
- (b) Psychological
- (c) Social

(a)–(c) Components of the "bio-psycho-social" model

[87] A. O. Frank, "Vocational rehabilitation: supporting ill or disabled individuals in(to) work: a UK perspective" [2016] *Healthcare* 4(46). DOI:10.3390/healthcare4030046 and British Society of Rehabilitation Medicine, *Vocational assessment and rehabilitation for people with long-term neurological conditions: recommendations for best practice* (London: British Society of Rehabilitation Medicine, 2010).

[88] N. Kendall and A. K. Burton, *Tackling musculoskeletal problems: a guide for clinic and workplace identifying obstacles using the psychosocial flags framework*, 1st edn (London: TSO, 2009).

[89] J. Ford, G. Parker, F. Ford, D. Kloss, S. Pickvance and P. Sawney, *Rehabilitation for Work Matters*, 1st edn (Abingdon, Oxon: Radcliffe Publishing Ltd, 2008).

Table 3 The key principles of VR

Early intervention improves prognosis for RTW.

Assessment of the main difficulties associated with RTW.

Working with other health/other professionals involved.

RTW usually occurs before the health/injury episode has fully resolved.

The employer has a key role in facilitating a RTW.

The VRP liaises with the employer* (often requiring worksite visits) to:

- Maintain good communication between employer/employee.
- Identify difficulties associated with RTW—environmental/managerial etc.
- Develop the RTW plan—may involve a phased return to hours/tasks/responsibilities.
- Identify job modifications (accommodations) needed.
- Explain responsibilities under the Equality Act if needed.
- Train/support line managers/human resources/co-workers or "work buddies" when needed.
- Explain need for further health consultations/therapies, albeit in work time.
- Arrange a work trial if needed.
- Offer support after RTW.

The VRP liaises with the Disability Employment Adviser (at Job CentrePlus) re services needed, e.g. Access to Work.[90]

The VRP Advises on support available from all sectors including e.g. health, education, charitable or insurance sectors:

- Where the employer has occupational health services available they may be key facilitators in the RTW process.

[90] Department for Work & Pensions, *Access to Work* (London, 2016) at *https://www.gov.uk/access-to-work/overview* [accessed 19 October 2017].

Somatoform Disorders and Chronic Pain: A Practitioner's Guide

Daniel Lawson

Cloisters

Breach of duty of care; Causation; Malingering; Medical evidence; Pain; Personal injury; Psychiatric harm; Settlement

Introduction

Claims involving somatoform disorders and chronic pain conditions create a special challenge for practitioners. Above all, there is the question of how best to assess litigation risks on the claim. What factors should guide reasonable settlement level? This article seeks to draw guidance from a review of recent High Court cases involving such conditions. The approach adopted is empirical, avoiding pre-conceptions and simply looking at what actually happens when claims of this type are fully litigated in the High Court.

Relevant conditions

Before turning to the cases, it is necessary to say a little more about the conditions under consideration and why it makes sense to group them together for analytical purposes. A useful starting point is the grouping contained in the 13th edn Judicial College Guidelines for the Assessment of General Damages. Chapter 8 is headed "Chronic Pain" and it opens with these words:

> "This chapter deals with a variety of what may loosely be described as 'pain disorders'. This includes Fibromyalgia, Chronic Pain Syndrome, Chronic Fatigue Syndrome (also known as ME), Conversion Disorders (also known as Dissociative Disorders) and Somatoform Disorders. Many such disorders are characterized by subjective pain without any, or any commensurate, organic basis … With the exception of cases of Complex Regional Pain Syndrome (also known as CRPS), no attempt has been made to sub-divide between different clinical conditions. Guidance instead reflects the impact, severity, and prognosis of the condition."

There are sound reasons for this approach. The splitting off of Complex Regional Pain Syndrome ("CRPS") notwithstanding its relationship to some of the other conditions mentioned is logical given the tighter diagnostic conditions that apply in respect of CRPS and its specific physical manifestations e.g. temperature and/or skin colour asymmetry, oedema and/or sweating asymmetry. Clear cut CRPS cases form a special category because physical signs of the condition can more readily be relied up to exclude any suggestion of malingering or fabrication. Moreover, with clear cut CRPS it will generally be a good deal harder for the defendant to argue that the claimant was at significant risk of developing the condition even if the accident had not occurred. There is research to suggest that CRPS does not have any predictable psychological precursor.[1]

By the same token, when one or other of the other conditions listed in Ch.8 of the JC Guidelines is in issue, there is often little to be gained from becoming overly fixated on turf wars between experts as to the best diagnostic label to attach. Expert evidence taken in the round will often confirm that a range of

[1] *Clinical Pain Management*, 2nd edn, p.370.

diagnostic labels could reasonably be applied to the claimant's specific collection of symptoms. There is a tendency for Psychiatrists and Pain Management Consultants to favour slightly different terminology. As will be seen, for the purpose of assessment of damages, differences in diagnostic criteria are rarely the telling factor. The key point is that one is dealing with a range of conditions that are psychologically mediated in the sense that there is no simple organic explanation for the level of pain or functional limitation presented. For litigation purposes this has three key implications. First, there is the theoretical space for malingering to be a serious issue in the proceedings. Secondly, proving that the accident caused the condition, rather than independent factors, becomes more challenging. Defendants have greater opportunity to argue by reference to pre-accident records that a similar condition would likely have arisen in any event. Thirdly, prognosis is often uncertain. The chances of significant recovery over time may be far greater than for say a severe orthopaedic injury.

Recent cases

There are at least seven recent cases that offer useful insight into the courts' approach when dealing with these claims.

It is helpful to look first at a case involving a diagnosis of CRPS, *Connery v PHS Group Ltd*.[2] Here the claim succeeded with some qualifications. The initial injury was simply whiplash to the neck and back in an RTA. The claimant went on to develop widespread right-sided pain in her right arm, hand, leg and foot. The judgment incorporates a careful analysis of the objective criteria that were held to support a diagnosis of CRPS e.g. temperature differences between the left and right lower legs, changes in skin colour, swelling and increased sweating in the affected upper limb. Given these signs the court accepted the evidence of the claimant's pain medicine consultant Dr Munglani and rheumatologist Dr Webley that CRPS was the correct diagnosis. A collateral finding was that the evidence the parties had called from consultant psychiatrists little advanced understanding of the case. The judge described CRPS as "a complicated and poorly understood condition". On the facts, however, the claimant's CRPS was held to have been caused by the accident because the records demonstrated sufficient temporal and physiological connection.

A significant feature of the case was the role played by surveillance evidence obtained by the defendant. Even the claimant's experts accepted that this showed her to have significantly more function than she had led doctors to believe. The judge was particularly concerned by some footage which showed altered function immediately before and after examination by one of the defendant's experts. However, in a finding that appears generous to the claimant this was put down to "increasing apprehension about the forthcoming examination … and her relief once it was over". The judge concluded that the claimant was not deliberately attempting to deceive the court for financial gain. Be that as it may, the surveillance evidence had a real impact because it went to support a finding that with further treatment significant improvement was likely. It thus helped reduce markedly the overall value of the claim.

One can contrast with the preceding case the decision in *Cunningham v Sainsburys Plc* which also involved full-blown CRPS.[3] This was a claim which effectively failed. The claimant suffered a minor soft tissue injury to her left shin when she stumbled on a carelessly parked trolley. She developed further left leg symptoms over the following two years and it was agreed that she had developed CRPS in the left leg. The issues were causation and alleged exaggeration of symptoms. The claimant had long-standing problems in her left knee. These had been the focus of a physiotherapy appointment some two weeks post-accident when no reference was made to any lower leg trauma. Moreover, in a statutory sick pay claim the claimant had linked her symptoms to the knee, not the work accident. There was again surveillance evidence. The

[2] *Connery v PHS Group Ltd* [2011] EWHC 1685 (QB).
[3] *Cunningham v Sainsburys Plc* [2015] EWHC 1382 (QB).

experts agreed that this showed the claimant to have exaggerated the extent of her disability. Whilst the video footage alone was not decisive, close analysis of the records undermined the credibility of the claimant's reporting of symptoms. Her recall and reliability were held unimpressive. The overall result was that the claimant could not establish a clear, unbroken temporal and physiological connection between the CRPS and the accident. It was found more likely that the CRPS arose from the pre-existing knee problem.

As noted at the outset, the Judicial College Guidelines treat CRPS as somewhat distinct from the broader range of psychologically mediated somatoform and chronic pain disorders. For other conditions evidence from a consultant psychiatrist must take on a more central role, albeit in many cases supplementing evidence from a pain management consultant or neurologist specialising in functional neurological disorders. An example is provided by the decision in *Murphy v Ministry of Defence* .[4] The claimant was a serving soldier who had been struck on the head and knocked unconscious by a heavy roll of fabric thrown by colleagues from a truck. He went on to develop pain affecting in particular his upper and lower back spreading to his hips. He was discharged from the army but had found alternative lighter work. Reliability was again challenged. There was surveillance evidence, but this was held to be consistent with experts' examinations. The pain medicine consultant Dr Munglani gave evidence which the judge accepted. He considered the claimant to have developed chronic widespread pain ("CWP") also known as fibromyalgia. He thought there had been a transition from a physical to a psychological/psychiatric cause for the symptoms. This analysis was supported by the claimant's psychiatric expert, Dr Spencer, who diagnosed depression in addition to chronic pain disorder. The analysis of the claimant's experts was accepted by the court, including their view that symptoms arose from the original work accident.

An important feature of the case is the reasoning on causation. The judge began by observing that "the mechanism of the causation of CWP has not been identified by medical science". However careful analysis of the records and history *taken in the round* showed a clear temporal association with the accident and an association between initial physical symptoms and the main sites of long-term pain. The judge expressly criticised the defendant's pain expert for taking a "frame by frame" approach rather than looking at the pattern. The court also made a useful point in respect of reliability and alleged exaggeration of symptoms:

> "… the Claimant suffers from CWP. By that very diagnosis, the Claimant is somebody who is focused on symptoms. He is focused on his disability. He will overemphasise his problems. His position and attitude is entrenched. If there is any overstatement of difficulties or problems it is by reason of the Claimant's ongoing symptomatology and not by reason of any lack of veracity."

The decision in *Connor v Castle Cement*[5] can be regarded as a further example of the same approach on causation. The claimant had been exposed to noxious fumes in a cement factory. He initially suffered acute chest pain and breathing difficulties. He was hospitalised and treated with steroids but subsequently went on to develop a childlike mental state, obsessive compulsive behaviour, blackouts and hallucinations. The claimant lacked mental capacity to manage his property and affairs. Tests ruled out organic brain injury. Having conducted a detailed analysis of the evidence the judge concluded that the claimant had developed an actionable psychiatric injury, hysterical pseudodementia, as a result of the defendant's breach of duty. There was no alternative causal mechanism that could more satisfactorily explain the onset of the claimant's severe psychiatric condition.

Malvicini v Ealing Primary Care Trust[6] takes matters a step further in respect of both diagnostic label and causation. Here the claim succeeded with overall damages assessed at about £690,000. The claimant was a nurse who suffered minor soft tissue injury to the left upper arm and scapular region in a lifting

[4] *Murphy v Ministry of Defence* [2016] EWHC 3 (QB).
[5] *Connor v Castle Cement* [2016] EWHC 300 (QB).
[6] *De Oliveria Malvicini v Ealing Primary Care Trust* [2014] EWHC 378 (QB).

accident at work. She went on to develop widespread pain throughout her body which significantly restricted mobility. It was common ground that the claimant's symptoms were largely mediated by psychological factors. No CRPS diagnosis was suggested. The defendant's position was that there had been dishonest malingering and exaggeration. Alternatively, if the disability was genuine and psychological, it demonstrated such vulnerability to minor trauma that the claimant would have been in the same position within a year of the accident. Both contentions were ultimately rejected by the court having regard to the detailed history.

A variety of diagnostic labels had been offered to categorise the claimant's condition. The parties' pain management experts agreed that the claimant presented with widespread chronic pain that was primarily psychologically mediated. The defendant's expert offered CWP as a diagnosis (the label that was applied in the *Murphy* decision above) but more generally the pain experts:

> "agreed that chronic pain syndrome was more of a description than a diagnosis and that pertinent formal diagnoses were in the psychiatric domain, namely conversion disorder, persistent somatoform pain disorder/pain disorder."

The parties' psychiatrists agreed the claimant fulfilled the diagnostic criteria for Persistent Somatoform Disorder according to ICD-10. However, the judge attached most weight to the views of Dr Stone, a neurologist specialising in psychologically based pain syndromes. His view was that the diagnosis Pain Disorder under DSM-IV was the best fit, but like others thought there were elements of Conversion Disorder, and that other reasonable diagnoses would be chronic pain syndrome and fibromyalgia.

Dealing with this plethora of labelling the judge made simply the following finding:

> "I am satisfied on the totality of the evidence … that the presentation of the claimant's condition … is of a known and medically recognised chronic condition in which chronic and disabling pain is suffered, and genuinely suffered, without any discernible physical explanation, driven by psychological factors which may be known, or discoverable, but often are not."

However, it is clear that the court regarded any attempt to draw subtle distinctions between the physical and the psychological, and between slightly differing diagnostic labels, as largely fruitless:

> "[Dr Stone] made it clear that these disorders were both neurological and psychological. Psychological factors were very relevant to the perpetuation of the disorder. Helpfully for the layman he explained the phenomenon as the 'pain volume being turned up in the brain'. This does involve an actual physiological change in the neurological pathways. Therefore, he said, most pain experts say it makes no sense to divide these disorders into the physical and psychological. I found Dr Stone's analysis particularly helpful in a field in which it is difficult to grasp the distinctions between diagnoses. Guided by him it seems to me that the diagnostic label attached to a presentation such as the claimant's depends as much on the specialism of the diagnostician as it does on any subtle distinction between their criteria. Certainly there appears to me to be no difference about the nature of the diagnosis between the experts of significance to the assessment of damages, subject to the court's view on whether the claimant is malingering or consciously exaggerating …"

The decision in *Malvicini* is also helpful on the issue of causation and pre-accident vulnerability. The defendant's psychiatric expert Dr Reveley had sought to draw an inference from the minor nature of the initial trauma. She suggested the very fact that such severe symptoms had followed so minor an incident in itself showed that similar symptoms were likely to arise in any event. The judge described this approach as tautological: "the disorder was going to happen anyway because we now know it did happen". He rejected the validity of reasoning back from the injury sustained *and nothing more*. One must at least draw upon some form of evidence from the claimant's pre-accident medical history.

Such evidence may show that due to an underlying vulnerability there is indeed a non-trivial chance that the claimant would have suffered similar symptoms even if the defendant's tort had not occurred. Applying *Heil v Rankin*[7] it was held that in assessing damages the court could have regard to such vulnerability by simply making a broad brush percentage discount from all heads of loss—general damages, past loss and future loss. Drawing upon Dr Stone's evidence a 10% discount was applied in the instant case.

This nuanced approach to pre-accident vulnerability contrasts markedly with that adopted in *Everett v London Fire & Emergency Planning Authority*[8] where a three month cut-off point on recovery of damages was applied. The claimant was a firefighter who suffered a soft tissue injury to her back during a training drill. She should have made a full recovery from such injury within three months in the ordinary course of events. When encouraged to recommence work she declined, having developed depression and a marked reluctance to return to operational duties. She complained of ongoing pain, but the court found there was no organic or neurological explanation for this. In a decision that turns very much upon its own facts, the judge took the view that the accident had become a peg on which the claimant sought to hang her inability to cope with the duties of a firefighter. He found that if the accident had not happened a similar problem would likely have arisen in any event within three months. From the report taken alone this appears a relatively harsh decision, but the case is illustrative of the significant litigation risks that can arise on causation in this type of claim.

Finally mention must be made of *Rathore v Bedford Hospitals NHS Trust*.[9] This was a complex clinical negligence case in which a distinction between the diagnostic criteria for somatic symptom disorder ("SSD") as defined by DSM-V and more extensive CWP played a relatively significant role. In essence, the court found on causation that the defendant's negligence in failing to treat an infection had caused a limited SSD over a period of about 1.5 years, presenting primarily in the form of abdominal symptoms. The claimant went on to develop more widespread CWP but this was held attributable to a series of independent stressors not the defendant's negligence. The overall effect was that on a claim for more than £3 million only about £69,000 was recovered.

The judgment in *Rathore* demonstrates the exceptionally tight focus upon medical records and forensic history apt to be applied in somatoform disorder cases. The claimant's narrative account was undermined, the judge expressing serious doubts as to her reliability and honesty when set against independent records. A notable feature of the case was the reliance upon a series of Facebook postings the claimant had made. Taken in the round these were taken to show that she enjoyed better mobility and a more extensive social life than she had claimed.

Conclusions

A number of themes emerge from these cases. The courts recognise chronic pain and somatoform disorder conditions as medically complex, their causation not being fully understood as a matter of medical science. Most cases will involve an interplay of physical and psychological symptoms, though in *Malvicini* the very validity of the distinction was put in question in this area. In a clear cut CRPS case such as *Connery*, psychiatric evidence may add little. Generally, however, it will be necessary to deploy evidence from a consultant psychiatrist alongside other disciplines. The appropriate disciplines will depend upon the facts of the individual case. Evidence from a consultant orthopaedic surgeon or neurologist is often required to exclude any straightforward organic explanation for particular symptoms. Evidence from a pain management consultant will usually be appropriate if chronic pain is central.

[7] *Heil v Rankin (Appeal Against Damages)* [2001] P.I.Q.R. Q3.
[8] *Everett v London Fire & Emergency Planning Authority* LTL 29/11/2013.
[9] *Rathore v Bedford Hospitals NHS Trust* [2017] EWHC 863 (QB).

Diagnostic labels are usually less important than the fashion in which the entire case hangs together on causation, prognosis and the extent of prior vulnerability. On causation it is critical that the records show a reasonably clear progression of symptoms temporally linked to the accident, with no clear independent intervening cause. It requires a holistic assessment of the entire pattern. "Frame by frame" analysis is not helpful. The decided cases show that very close attention must be paid to the detail of documentary records and the forensic history. Reliability of the claimant is likely to be to the fore. Surveillance evidence and analysis of DWP records will often play a role. However, as *Murphy* shows, there can be non-sinister explanations for exaggeration of symptoms.

When it comes to determining the reasonable settlement value of claims there can be no magic formula. It involves weighing combined risks on reliability, causation, vulnerability, extent of disability and prognosis. Risks on reliability are particularly important, as the *Cunningham* and *Rahore* decisions both demonstrate. If a claimant is likely to present in unsympathetic fashion to the court there is a much higher chance that he or she will not get the rub of the green when finely balanced issues of causation and attribution fall to be decided. In many cases discounting of the claimant's top case to reflect improvement post-litigation will be warranted on the medical evidence. A further allowance for pre-accident vulnerability can then be made by applying a broad brush percentage discount to all heads of claim, as occurred in *Malvicini*. Finally, much as in a difficult liability claim, one must usually factor in some appropriate discount to allow for the risk the claim will either fail outright on causation or result only in a very modest level of damages.

Complex Regional Pain Syndrome

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Causation; Delay; Diagnosis; Malingering; Medical evidence; Pain; Personal injury

Complex Regional Pain Syndrome ("CRPS") is one of the most painful types of chronic pain that exists. It commonly affects one limb but can spread to affect other limbs. CRPS is believed to be caused by damage and/or dysfunction of the peripheral and central nervous systems.

CRPS encompasses a variety of clinical presentations characterised by chronic persistent pain that is disproportionate to any preceding injury (if any) and not restricted anatomically to the distribution of a specific peripheral nerve.[1] The International Association for the Study of Pain ("IASP") introduced the diagnostic label of CRPS in the 1990s,[2] and since then, others have identified a number of conditions and diagnostic terms,[3] including reflex sympathetic dystrophy ("RSD"), reflex neurovascular dystrophy, Sudeck's atrophy, causalgia, algodystrophy and algoneurodystrophy.

The exact cause of CRPS is unclear, but in excess of 80% of cases are caused by an accident, injury or surgical intervention. Fractures and burns can also act as a trigger but it is usually the former circumstances which initiate a potential medico legal claim.

The main symptoms of CRPS include prolonged and severe pain often described as burning, throbbing or stabbing pain. Physical changes in the affected limb such as skin temperature, colour, swelling, sensitivity to light touch (allodynia), stiffness and acceleration in hair and nail growth may be present.

Due to the severity of the pain, living with CRPS typically has a very adverse impact on the sufferer's life including activities of daily living, relationships and employment. Medico legal cases involving CRPS can be extremely complicated and challenging to prove to the court because of the subjective nature of the pain itself.

Significant progress has been made in Pain Medicine in recognising a legitimate diagnosis of CRPS. This is reflected in law, indeed, the 11th and 12th edition of the Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases introduced a separate section for Chronic Pain Disorders including CRPS. It follows that judicial findings of CRPS are seen more often than previously as a result of tested expert medical opinion. Accordingly, awards made by the court are now more often reflecting the significant level of disability a claimant is suffering.

Typical issues arising in CRPS cases

- **Causation:**

  The pain that follows the injury or accident is often disproportionate to the original injury sustained. Because of this, the defendant will often argue that the origin of pain is not the physical injury and that a previous event or continuing organic cause is the explanation for the pain/CRPS suffered by the claimant.

  Hence, the defendant will commonly deny negligent actions causing an injury or reject their client's actions caused or contributed to the development of CRPS. Using a pain consultant

[1] S. Bruehl, "An update on the pathophysiology of complex regional pain syndrome" [2010] *Anesthesiology* 113(3):713–25.

[2] H. Merskey and N. Bogduk, *Classification of Chronic Pain: Descriptions of Chronic Pain Syndromes and Definitions of Pain Terms*, 2nd edn (Seattle: IASP Press, 1994).

[3] R. N. Harden and S. Bruehl, "Introduction and diagnostic considerations" in R. N. Harden (ed), *Complex Regional Pain Syndrome: Treatment Guidelines* (Reflex Sympathetic Dystrophy Syndrome Association, 2006) and R. N. Harden, S. Bruehl, R. S. Perez, F. Birklein, J. Marinus and C. Maihofner, "Validation of proposed diagnostic criteria for complex regional pain syndrome" [2010] *Pain* 150(2):268–74.

specialising in CRPS as an expert witness is highly recommended to establish liability in these circumstances.

- **Presentation:**

  The subjective nature of CRPS pain and its other fluctuating symptoms can mean a patient is unlikely to exhibit or present with typical symptoms, all the time. As a result, when examined, a claimant may exhibit symptoms such as temperature changes, oedema or changes in skin colour in one examination and not in the next. This can present potential problems when experts acting for the defence examine the claimant and do not find consistent findings with other medical reports. A credible pain expert can assist the court in explaining these inconsistencies.

- **Delay in Treatment:**

  Lack of, or a delay in treatment (rather than the accident or injury itself) has also been attributed to the cause of CRPS and can be used to try to absolve blame. Early treatment in suspected CRPS cases is therefore recommended as essential.

- **Allegations of malingering and somatoform disorder:**

  Another common issue in CRPS medico legal cases is whether the symptoms and pain are "in the mind" of the claimant and to what extent CRPS is a psychological issue rather than an organic one. There is an increasing acceptance that serious and complex chronic pain disorders should not be seen as a purely psychological issue. The Royal College of Physicians UK Guidelines (2012) clearly states that "It is now clear that CRPS is not associated with a history of pain-preceding psychological problems, or with somatisation or malingering".[4]

CRPS specialists acknowledge that the experience of pain is both organic and psychological and that it has an impact on a sufferer's mental state. Indeed, it is known that sufferers of chronic pain have higher levels of anxiety and depression. The supporting evidence of a psychiatrist with a specialist interest in pain is often useful but it is essential to establish for the court that the claimant has clear physical signs corroborated through an established diagnostic criterion. There are several physical features that can be identified during an examination for example which include swelling, pigmentation change, temperature change, excessive hair and nail growth and changes revealed by thermography or bone densitometry. A report which discusses the physical symptoms along with the psychological impact of the condition is beneficial to provide a full and holistic picture of the claimant's symptoms and suffering.

There is a widely accepted diagnostic criteria for the diagnosis of CRPS, the Budapest Criteria 2010. Essentially the burden is on the claimant to establish an appropriate or sufficient injury for consideration by the court to make an award for damages. If a claimant can establish with expert opinion and evidence an identifiable condition, such as Complex Regional Pain Syndrome then that should be accepted as sufficient injury to satisfy a cause of action.

However, if no organic cause can be identified, provided the pain had its origin in a physical injury, and the court accepts the claimant's evidence that it is continuing, then there should be no problem in principle for a claimant. In the case of *Thorp v Sharp*,[5] the Court of Appeal reiterated that it is sufficient that the pain is a consequence of the injury, regardless of whether its causative mechanism can or cannot be explained by medical evidence. In this situation, an expert in Pain Medicine is the ideal expert clinician

[4] Royal College of Physicians, "Complex regional pain syndrome in adults: UK guidelines for diagnosis, referral and management in primary and secondary care", London, 2012.

[5] *Thorp v Sharp* [2007] EWCA Civ 1433.

to provide evidence to the court in respect of the severity of the pain, impact on the claimant's life, treatment options and prognosis.

ADR and Arbitration: The Alternative to Civil Litigation for Personal Injury and Clinical Negligence Claims

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Alternative dispute resolution; Arbitration; Civil procedure; Clinical negligence; Personal injury

Abstract

Using civil litigation to resolve personal injury and clinical negligence claims is nowadays the equivalent of masochism—submitting to a system which is painful, expensive, slow, cumbersome, authoritarian and no longer funded by the taxpayer. Using ADR (alternative dispute resolution) specifically arbitration, provides insurers and injured members of the public with systems which are cheaper, faster, more efficient and less painful.

Personal injury

Causing personal injury is a very bad thing for society and individuals for so many reasons. The injured person will suffer pain and disability; will be unable to enjoy life to the full; may not be able to work and contribute to the family; will lose productivity, income or business, and the State will lose taxes and GDP. In serious cases, the injured person will have to claim State benefits.

Recognising the need to avoid these bad outcomes States pass laws to avoid or reduce them. The criminal law and the criminal courts deal with intentional and reckless acts causing injury or loss. The civil law and the civil courts deal with reckless and negligent acts causing injury or loss.

The State discourages negligence by imposing statutory duties on the populous and the common law discourages negligence by imposing the common law duty of care on all of us.

Some regard these duties as springing from the religious principle to "love thy neighbour". Others regard these duties as no more than common sense. But whatever their genesis, these duties bind society together, protect society and its members and delineate "good" behaviour from "bad" behaviour.

The criminal process is funded almost entirely by the State. The result of which is acquittal or conviction and punishment which is seen either as a deterrent or as a penance or both.

The civil process in the personal injury field is now funded entirely by insurance companies, the NHSLA and local authorities who lose cases. Its product is either dismissal of the claim or an order for compensation to be paid to the injured person.

The purpose of compensation is not to punish the wrong doer but to put the injured member of the public back into the position which would have occurred but for the injuries.

So how widespread is breach of duty causing personal injury in England and Wales at the moment?

* The views expressed here are my own.

The size of the English and Welsh market in personal injury and clinical negligence claims: CRU data

The Compensation Recovery Unit ("CRU") provides accurate figures on personal injury and clinical negligence claims in England and Wales because all such claims must be registered.

Year	Clinical negligence	Employer	Motor	Other	Public	Liability not known	Total
2016/17	17,894	73,355	780,324	20,047	85,504	1,692	*978,816*
2015/16	17,895	86,495	770,791	11,388	92,709	2,046	*981,324*
2014/15	18,258	103,401	761,878	12,972	100,072	1,778	*998,359*
2013/14	18,499	105,291	772,843	14,467	103,578	2,123	*1,016,801*
2012/13	16,006	91,115	818,334	17,695	102,984	2,175	*1,048,309*
2011/12	13,517	87,350	828,489	4,435	104,863	2,496	*1,041,150*
2010/11	13,022	81,470	790,999	3,855	94,872	3,163	*987,381*

The CRU cases settled in each year were as follows:

Year	Clinical negligence	Employer	Motor	Other	Public	Liability not known	Total
2016/17	18,449	133,934	755,366	13,194	92,042	505	*1,013,490*
2015/16	19,620	99,329	732,788	11,625	100,085	324	*963,771*
2014/15	17,299	97,097	751,437	12,996	111,555	436	*990,820*
2013/14	15,052	96,320	808,016	14,141	115,044	444	*1,049,017*
2012/13	12,955	90,189	786,587	9,584	109,906	496	*1,009,717*
2011/12	12,409	89,888	754,159	4,122	100,715	624	*961,917*
2010/11	10,813	98,586	659,671	3,463	93,220	727	*866,480*

From these figures we can safely state that there are about *1 million claims per annum* in England and Wales. Standing back, that means that a lot of negligent actions causing injury are occurring every day: *2,740* in fact. We should all be more careful.

How does the civil process work?

Currently nearly all of personal injury cases are dealt with by civil litigation. In simple terms the pre-action protocols and Civil Procedure Rules ("CPR") govern the process and most cases are settled either before or after being issued through the civil courts. The pre-action protocols front load and specify the legal work expected, requiring focus on the issues arising from breach of duty, causation and damages and require early disclosure of documentation.

CPR, in force since 2000, also require front loading of the legal work and likewise require focussed pleading on the issues arising from breach of duty, causation and damages; early disclosure of documentation; early service of written witness statements and then disclosure of expert evidence.

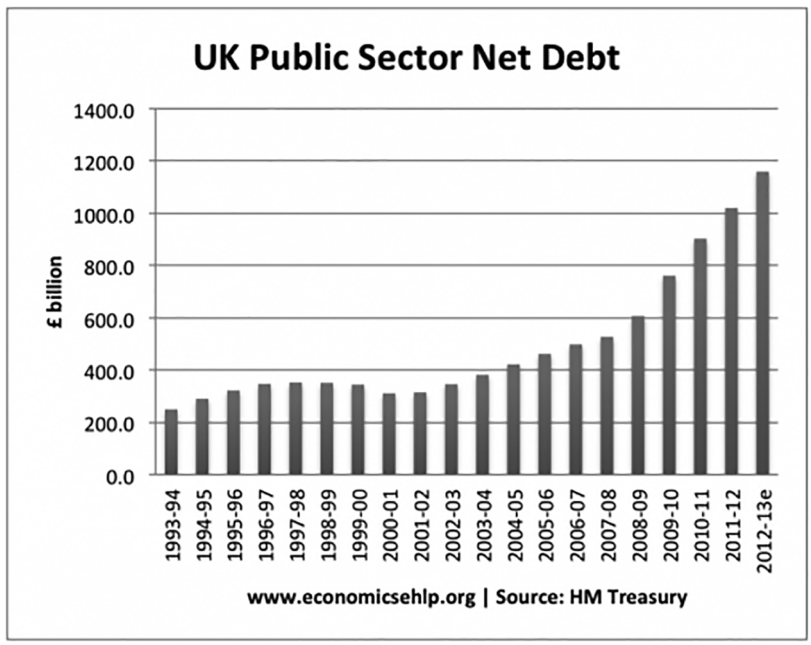
Furthermore, CPR requires the courts actively to manage personal injury cases, which means requiring the parties to come before the courts on multiple occasions to explain what they are doing and why they are doing it and to request permission for every step which they are taking. No step can be taken without

permission. The parties do not have control over the process, the courts jealously retain control and strike parties out for breaches of court orders.

The problems with the current civil court process

Despite the very high quality and independence of our High Court and County Court judges the Civil Court process is now expensive, poor, slow and restrictive. "Active Case Management" clearly seemed like a good idea to Woolf LJ when he invented it in 1999. He was intent on tackling the problem of delay caused by slow lawyers. On the claimant side, these lawyers were running cases, funded at the public expense on Legal Aid or by unions under before the event insurance, who were paid win or lose and the longer the case went on the more they were paid. On the defence side, the lawyers were also paid win or lose and the longer the case went on the more they were paid.

So, the CPR, in 1999, gave power to the courts to manage cases and to push them along with time limits for doing everything. Remember in those *Tony Blair* years the State was far less burdened by debt and the courts were well staffed and funded.



Wind forwards 17 years to today. HM Court Service's funding has been massively reduced; scores of courts are being closed; hundreds staff have been laid off; the county courts no longer provide a front desk service or a telephone service; in Central London County Court, files are lost regularly and parties bring extra copies for the judges; the High Court is struggling to recruit High Court judges due to the reductions in pay and pensions; delays in getting hearings are far too long not just for costs budgeting hearings but also for trials and interim payments:

> "The *Ministry of Justice* will see a *15% cut* by 2019–20, with its *administrative budget falling by 50% over the same period*. Other savings will come from efficiencies within the prisons and courts systems."[1]

Despite this reduction in the service, more cases were struck out per annum after 2013 as a result of the vicious rule changes introduced by Jackson LJ and the decisions made in *Mitchell* and *Denton* than prior to 2013. Parties to civil litigation still have to ask permission and extensions of time for everything.

Parties pay more and get less

> "Over the last year, HM Courts and Tribunal Service (HMCTS) has generated fee income of nearly *£800m*, £186m from family justice fees and more than *£602m from civil justice fees*, surpassing its own spend by £102m, while cuts to the service continue."[2]

The civil courts are now funded by civil litigants not the taxpayer. Yet perversely the courts still consider that "the convenience of the courts" should be part of the overriding objective. I respectfully disagree.

It was a huge error for Woolf LJ to alter the overriding objective in 1999 away from the interests of justice alone and instead towards the convenience of the courts (see the changes to CPR r.1). The prodigy of that error are:

- arrogant interlocutory decisions restricting evidence;
- excessive interlocutory control over parties' activities;
- excessive tendency to strike out;
- inflexibility; and
- delay and high cost.

The civil courts should stick to their core business

In this era, we are all suffering the sequalae of the banking crisis, enormous Government debt, austerity and reduced funding. To cope with these challenges sensible service providers are focussing their activities on their *core business*.

The core business of the civil courts is to determine the issues brought before them by the parties at trials and interlocutory hearings, nothing more. "Active case management", or inactive case delay depending on your experience of the courts, is not a *core business*. It is peripheral. The parties bring the issues to court, the courts decide upon them. If the civil courts restricted their activities to their core business they would need far fewer interlocutory hearings and would need fewer staff. They could work within their reduced budgets and be more efficient.

Changes to the civil process

Disappointingly, at every stage those in charge of changing the civil process have made the same mistakes and have failed to stick to their core business. They ignore that fact that the parties now fund the system. The pretend that they run a system funded by the taxpayer and they act accordingly.

They impose stricter and stricter procedural rules on the parties and require more and more front loading of legal work under the threat of strike out.

They impose budgeting or fixed costs on the parties to reduce recoverable legal costs from the wrongdoer, whilst themselves charging higher and high court fees for a worse and slower service.

[1] 2015 Civil Service World at *https://www.civilserviceworld.com/articles/news/spending-review-2015-departmental-settlements* [accessed 20 October 2017].

[2] *Law Society Gazette*, 20 July 2017.

They impose greater and greater control over evidence and restrict the parties' rights to call the evidence which they wish to call.

As a result, the civil courts find themselves dealing with far too many interlocutory hearings, facing more dissatisfied litigants and tackling more litigants in person who cannot get lawyers to represent them, who block up the courts with unfocussed ramblings and who waste enormous amounts of court time.

Online e-filing and e-service

The nirvana for the civil courts is online e-filing and e-service so that HM Courts can reduce staff further and save money by abolishing paper court files. This has been achieved in many court systems in the US.

Even under Briggs LJ's plans there is no money or scope for online court filing system to be introduced in the next five years in personal injury or clinical negligence litigation. The parties pay more than the system costs but the profits go to the Government not the system.

Only the criminal courts and some commercial courts have electronic court filing in some form or other.

Jackson LJ's proposed changes

So we must now turn to Jackson LJ's recent suggested changes to civil process. Tasked with reducing costs in personal injury claims and other topics he published his recommendations in July 2017. I deal here only with those relating to personal injury and clinical negligence claims.

The first matter to note is that he has not cut the court process back to its core business. Quite the opposite.

The second matter to note is that he has not suggested the courts should become more efficient by providing e-filing. He has ignored it.

The third matter to note is that he praises his own creation: costs budgeting and then abolishes it for cases under £100,000. Did someone mention hubris?

Jackson LJ has recommended a new intermediate track for claims between £25,000 and £100,000. He produced a matrix of fixed fees payable by reference to the band of the claim (determined by amount of damages) and the stage at which the claim settles or ends.

In addition, he recommended a bunch of fetters on the evidence which the parties can call and more fetters on the civil process including:

- Pleadings cannot be longer than 10 pages;
- No witness statement may be more than 30 pages long;
- No witness can give his own story in his own words at trial, his written evidence shall be read instead;
- Cross examination will be the first time any witness may speak;
- No trial may last longer than three days;
- No party may call more than two experts to give oral evidence; and
- No party may recover in costs from the loser, more than the sum on the matrix.

However clever the architect of the changes and his assessors may be, however well-intentioned they may be, these fetters are arbitrary and restrict the parties' rights to a fair trial. So the customer is paying more for less.

It is not difficult to see why the fetters are unfair. Let us assume that we are involved in an employer's liability claim relating to a defective machine which caused an amputation of three of the claimant's fingers and depression. The claimant wishes to call three experts: the engineer, the hand surgeon and the consultant psychiatrist. The defendants have three too and they do not agree on key issues. Which expert will arbitrarily be prevented from giving live evidence?

Jackson LJ's approach is wholly commensurate with the HM Court Service's policy identified above. Which might be described by an ex *Sun* Newspaper reporter as follows:

> "We believe (mistakenly) that we are a service provided at the taxpayers' expense. We will do what we like with Civil process because we are very busy and important. You personal injury litigants (injured and insurers alike) are bloody lucky to be able to use us at all considering how odious you all are and how overpaid your lawyers are. So take it or leave it."

Below I set out the way to *leave it*.

Alternative Dispute Resolution: The old ways

In my early days of personal injury litigation, experienced insurance company claims managers would come to experienced union solicitors firms' offices with a briefcase full of files and would sit and negotiate them to settlement. Then more often than not they would go to the pub for a pint. That was ADR. Quick, fair and inexpensive.

More recently, in the early 2000s, we adopted mediation. The parties in multi-track cases met with their lawyers and a mediator and most such cases settled.

But the costs of mediation were stripped out of personal injury practice when the practice of joint settlement meetings really took over. Nowadays and for the last 10 years, most cases are settled either by JSMs or by solicitors on the phone or by Pt 36 offers. JSMs are efficient—nearly all are done in a day or less—satisfactory and less expensive than trials. That is ADR in a nutshell. So why do we still issue cases and use the courts at all?

Arbitration

Arbitration is widely used by insurers and litigants in commerce. A Price Waterhouse Coopers International Arbitration Survey carried out in 2013 and called "Corporate choices in International Arbitration" identified that *52% of respondents preferred arbitration* over other means of dispute resolution. Broken down by sector, this corresponded to: Construction: 68%; Energy: 56%.

The clinical negligence and personal injury pre-action protocols expressly require parties to consider arbitration and state that "Litigation is the last resort".

In reality, there is only one alternative to binding civil litigation and that is binding arbitration. Mediation is useful in some cases where one party or one set of lawyers is not seeing the issues clearly, but mediation is not binding and so does not offer an equivalent alternative service to binding civil litigation. Only arbitration offers a binding alternative.

Enforceability

Arbitration is well known to and used by commercial and shipping practitioners, building law and government lawyers. But it grew up in the provinces. The history of arbitration in England and Wales stretches further back than most would guess. The first Arbitration Act was passed in 1698 by William III. It was drafted so as to make the awards of local arbitrators in local commercial disputes enforceable through the courts. The same principle remains at the core of the current Arbitration Act 1996. A specialist arbitrator resolves a dispute between two parties and the award is made enforceable through the courts by a simple CPR Pt 61.18 application.

The parties have control over the procedure in arbitrations

The basic tenet of the Arbitration Act 1996 is the giving back of control over procedure to the parties. So s.1 of the Act states:

> **"General Principles:**
>
> S.1 The provisions of this Part are founded on the following principles, and shall be construed accordingly—
>
> (a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
>
> (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;
>
> (c) in matters governed by this Part the court should not intervene except as provided by this Part."

Note how the convenience of the courts is nowhere to be seen. See how justice between the parties is paramount. Revel in the freedom to determine your own procedures and evidence. Free yourself from the fetters imposed on your right to gather and call evidence by the civil courts.

Arbitration agreements

Historically, there has been quite a lot of criticism of arbitration in the commercial field because of arguments over jurisdiction which can be long and expensive. However, arbitration arising from a pre-event contract which contains an arbitration clause is the cause of those complaints.

In personal injury and clinical negligence claims, the arbitration agreement is signed after the event and specifically covers the issues to be arbitrated. It may cover all of them: breach, causation and quantum, or only the outstanding one. So the costs of arguing over the scope of the arbitration clause and whether the particular contractual dispute is covered by it do not arise.

Standard form arbitration agreements have been drafted by arbitration institutions such as PIcArbs and are available on the internet.[3]

Once the parties have signed an agreement to arbitrate neither one can issue court proceedings and if they do the courts will stay the proceedings and enforce the agreement to arbitrate.

e-filing and e-service

It would not make sense to arbitrate any personal injury claim without the advantages of e-filing and e-service. So systems like PIcArbs provide a dedicated e-filing system through which all pleadings and evidence are filed, served and stored online providing access 24 hours per day 7 days per week.

This service reduces costs enormously because printing, copying, posting and stamping are time consuming and expensive. The online file is accessible by the parties' lawyers, barristers, the arbitrator and the insurers. It is used for hearings which are paperless (unless old fashioned barristers wish to print out some of the papers) and it saves time and money.

Commencing the arbitration

Under most domestic personal injury arbitration agreements the arbitration does not start until one party or the other issues the claim form via the online platform. Once this is done the parties can either plead out the case or stay it by agreement and simply use the e-filing to swop evidence and settle the case.

[3] See *www.picarbs.co.uk/index_files/downloads.htm* [Accessed 20 October 2017].

Pleadings

The pleadings in arbitration are exactly the same as in civil litigation.

Directions

The claimant in any multi-track case should be represented by an experienced solicitor and insurers always are. Such lawyers take advantage of the flexibility of arbitration and agree directions without the need for permission from a grumpy overworked district judge for every witness statement or expert report.

If a party gathers too many witness statements or expert reports then at the JSM or final hearing the costs of the irrelevant evidence can be disallowed. The beauty of taking back control over the evidence from the courts is that multiple permission applications and case management hearings are wholly unnecessary and are avoided. The costs savings by avoiding permission applications makes arbitration much more efficient than civil litigation.

Of course, if one of the few objectionable lawyers in the world is instructed in an arbitration against you and fails to agree anything then either party can invite the arbitrator to determine any directions on the phone, by email or by face to face hearings. This flexibility allows the speed of throughput for cases to increase dramatically.

Unless orders

So long as the rules of the arbitration institution make provision for the power, the arbitrator can impose unless orders on errant parties and can strike out parts of claims or defences. Usually the power to strike out is tied to the old approach: a party who has broken an unless order and has no reasonable excuse for doing so and of course the interest of justice between the parties, not the convenience of the courts.

Interim payment applications and disclosure

The arbitrator has the same power as a judge to order interim payments.

One power which the arbitrator does not have is to order disclosure against a 3rd party. Disclosure between the parties can be ordered but a court order is needed for 3rd party disclosure. In personal injury litigation, with the powers granted in the Data Protection Act for access to medical records and other records, 3rd party disclosure orders are rare.

Limitation Act issues

There is no difference between and arbitrator's power in relation to limitation issues and that of a judge.

Part 36 offers

Good arbitration institutions build into their rules the Pt 36 provisions or their equivalent so practitioners carry on as usual making such offers in arbitration.

Costs penalties for refusing to arbitrate

Refusing an arbitration proposal is financially dangerous. The courts have begun to add teeth to the ADR requirement in the pre-action protocols. Refusal to agree to an arbitration (and in law silence is taken refusal) will probably result in costs sanctions win or lose. Per Master O'Hare in *Reid*:

> "If the party unwilling to (mediate) is the losing party, the normal sanction is an order to pay the winner's *costs on the indemnity basis,* … This penalty is imposed because a court wants to show its disapproval of their conduct. I do disapprove of this defendant's conduct …"

The case law has developed since *Halsey*[4] in which the Court of Appeal gave guidance on when costs penalties for refusal to engage in ADR should be applied. In *PFG*, the Court of Appeal approved a costs penalty imposed on a *winning defendant* for refusing to mediate. In *Garritt-Critchley*,[5] the winning claimant was granted indemnity costs because the defendant refused ADR. In *Laporte*,[6] the winning defendant was deprived of 1/3rd of its costs due to his failure to engage in ADR. In *Reid*, the defendant refused to mediate. Master O'Hare awarded indemnity costs to the winning party due to the losing party's refusal to mediate. In *Bourn* ,[7] the winning defendant was deprived of 50% of his costs due to his refusal to engage in mediation.

These cases have all focussed so far on refusal to mediate but the first national arbitration service: PIcARBS was opened for business in June 2015 so is only two years old. Arbitration was not available for personal injury and clinical negligence claims before 2015.

Conclusions

In our modern age, when the parties not the taxpayer are paying for the civil court service, it is remarkable that insurers and lawyers still put up with the poor service and poor procedures provided by the civil courts for personal injury litigants. Arbitration has been used extensively in commerce for over 300 years to avoid the delays and frustrations of the civil courts process. It is now being used in more and more personal injury and clinical negligence claims and with good reason. We should get what we pay for, not just accept what we are given.

[4] *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576.
[5] *Garritt-Critchley v Ronnan* [2014] EWHC 1774 (Ch).
[6] *Laporte v Commissioner of the Police of the Metropolis* [2015] EWHC 371 (QB).
[7] *Glimovitch v Bourne Leisure Ltd* [2016] EWHC 3228 (QB).

Limitation (Childhood Abuse) (Scotland) Act

Kim Leslie

Child abuse; Emotional harm; Historical offences; Personal injury; Scotland

Background

For many years, Scottish victims of childhood abuse who attempted to bring civil compensation claims have been met with the defence that their claims were time-barred as they had not raised proceedings within three years of reaching majority.

At present the time limit for a claim of this nature is three years from the date the child becomes an adult, which in Scotland is now 16. So, survivors of childhood abuse are expected to have the wherewithal to seek advice and raise or settle a claim all before their 19th birthday.

Studies have confirmed that, on average, in childhood abuse cases, it takes a woman 18 years to come forward and speak out about the abuse. For men the average is 25 years.

Therefore, current time limits have operated as an *almost universal bar to survivors of childhood abuse bringing forward civil claims in Scotland*. As Lord McEwan observed in *A v N*:[1]

> "I have an uneasy feeling that the legislation and the strict way the Courts have interpreted it has failed a generation of children who have been abused and where attempts to seek a fair remedy have become mired in the legal system."

The Scottish Government pledged to remove time limits in childhood abuse cases through the Limitation (Childhood Abuse) (Scotland) Bill, which passed its stage 3 debate in the Scottish Parliament in June 2017 and received Royal Assent on 28 July 2017.

The grant of Royal Assent does not bring the provisions of the Act into force. The Scottish Ministers will require to do this through a Commencement Order. It is anticipated that this will be done by Autumn 2017.

This landmark decision has come about due to the recognition that the present time-bar regime has completely failed successive generations of historical childhood abuse victims.

Legislation

The legislation has been brought into force will herald a new dawn for historical childhood abuse cases in Scotland.

What is covered by the Act?

The Act defines abuse as *including* sexual abuse, physical abuse, neglect and emotional abuse.

The word "includes" permits a broad interpretation of what constitutes abuse.

There may be some uncertainty as to what might constitute emotional abuse. In some cases, there will be little doubt that the conduct amounted to emotional abuse, whereas other more borderline cases may present difficulties in interpretation.

Emotional abuse is not defined in the Act. The Scottish Government is proposing to introduce a Bill criminalising emotional abuse.

[1] *A v N* [2008] CSOH 165.

However, in the meantime, we may draw an inference as to what is intended to be covered by emotional abuse from the Scottish Government's publication on *National Guidance for Child Protection Scotland*.

It defines emotional abuse as:

> "Emotional abuse is persistent emotional neglect or ill treatment that has severe and persistent adverse affects on a child's emotional development. It may involve conveying to a child that they are worthless or unloved, inadequate or valued only in so far as they meet the needs of another person. It may involve imposition of age or developmentally inappropriate expectations on a child. It may involve causing children to feel frightened or in danger, or exploiting or corrupting children. Some level of emotional abuse is present in all types of ill treatment of a child; it can also occur independently of other forms of abuse."

The legislation does not remove all risk that the court will, indeed, allow the action to proceed. Section 17D sets out the circumstances in which an action may not proceed:

> "17D (2) It will be open to the defender to satisfy the court that it is not possible for a fair hearing to take place."

One concern raised in the consultation process is that this will simply substitute one discretion battleground for another. However, the burden of proof on this issue is shifted from the claimant to the alleged abuser and it is suggested that the passage of time alone may not be sufficient to satisfy this test.

Section 17D(3) introduces a further argument that may be advanced for the defender, namely, that as a result of the *retrospective* operation of the law, the defender would be *substantially* prejudiced were the action to proceed.

It will again be for the Scottish Courts to draw a line balancing the competing interests of both parties.

Claims previously raised by a survivor

There is a section in the Act that prevents the re-raising of an action where the survivor has had *any* financial benefit from a previously *litigated* action. Even if the financial benefit was only a token payment, a survivor will be prevented from re-raising their claim.

This should be contrasted with those survivors who raised a claim in court but did not receive any financial benefits. If they received *no* financial benefit they will be permitted to raise a fresh action.

It is not yet entirely clear on which party the onus will be placed to demonstrate whether a financial benefit was received in a previously litigated case, or how this is likely to be evidenced.

Conclusion

In conclusion, the Act although short, will inevitably create areas of dispute between parties. There are a number of areas of dispute where, at least initially, parties will want clarity from case law.

However, over several decades defenders have consistently and successfully taken the time bar plea in the vast majority of Scottish cases. The parameters have now shifted significantly in favour of the survivor. This is to be welcomed. The purpose of this legislation is to recognise the "silencing effect" which these crimes often have on the victims. It is to be hoped that the Scottish Judiciary will enable more Scottish survivors' voices to be heard in our courts.

Justice, Proportionality and Fixed Costs in Clinical Negligence

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Clinical negligence; Fixed costs; Low value personal injury claims; Proportionality

Introduction

At p.117 of his Supplemental Report on Fixed Recoverable Costs,[1] Sir Rupert Jackson recommended that fixed recoverable costs cannot simply be imposed in clinical negligence cases in the absence of also changing the procedural rules. I made this point in *A Practical Approach to Clinical Negligence Post-Jackson*.[2] It recognises that the average clinical negligence case is inherently more complex than the average civil litigation case of comparable value.

However, Sir Rupert also recommends that both sides of the profession work towards finding a way of making fixed recoverable costs ("FRC") work for cases under £25,000[3] and that certain other clinical negligence cases might later be included within the suggested framework. Understandably, the Supplementary Report does not discuss how this success might be achieved and it remains an extremely challenging problem once one looks at what an FRC scheme would mean for the different types of cases which fall within the sub-£25,000 bracket.

The objective

In Ch.1 para.1.2, Sir Rupert expresses the view that the holy grail of reform is to arrive at a system where the "actual costs of each party are a modest fraction of the sum in issue, and the winner recovers those modest costs from the loser". At para.1.9, he says that "[c]ontrolling the costs of litigation and providing clarity at each party's financial commitment are vital elements in achieving access to justice". This implies to some that justice can only be achieved where modest costs are paid in addition to damages.

FRC is seen as an alternative to costs budgeting. At the end of Ch.2, Sir Rupert reproduces the organisational chart from his earlier work *The Reform of Civil Litigation* at p.222.[4] This chart illustrates the five strategic objectives of his reforms. It can be divided into four sections with "proportionality" at its centre. Proportionality connects to everything else in the chart. To the upper quarter are factors affecting case management; to the right are those affecting funding; the bottom quarter contains costs management factors (including FRC); and to the left, ADR. FRC is therefore linked to every part of the overall reform picture via proportionality via the intention to control costs in advance. Within the bottom quadrant's relationships, costs management (i.e. budgeting) is an alternative means of achieving this aim. Limiting the cost of expert evidence is a sister-branch also affecting advanced costs control whereas the aim of clarity and precision of costs forms a separate branch from the central proportionality concept leading to

[1] Right Honourable Lord Justice Jackson, "Review of Civil Litigation Costs: Supplement Report Fixed Recoverable Costs", 31 July 2017. See *https://www.judiciary.gov.uk/wp-content/uploads/2017/07/fixed-recoverable-costs-supplemental-report-online-2-1.pdf* [accessed 19 October 2017].

[2] G. Simpson-Scott, *A Practical Approach to Clinical Negligence Post-Jackson* (Law Brief Publishing, 2016). See *http://www.lawbriefpublishing.com/product/practicalapproachtoclinicalnegligence/* [accessed 19 October 2017] e.g. p.51 and p.183.

[3] Right Honourable Lord Justice Jackson, "Review of Civil Litigation Costs: Supplement Report Fixed Recoverable Costs" 31 July 2017 Executive Summary, para.11.

[4] Right Honourable Lord Justice Jackson, *The Reform of Civil Litigation* (Sweet and Maxwell, 2012), Supplementary Report, p.24, fn.12 and p.26 for the diagram.

reforms of the assessment process. As such, costs clarity and precision is not directly related to advanced costs control. At Ch.1 para.3.2, Sir Rupert says: "The proposals made in this report fit neatly into that scheme".

Accordingly, failing to agree on a suitable FRC scheme for lower-value clinical negligence cases does not, by itself, prevent effective costs management within the context of Sir Rupert's reforms. This is because costs budgeting and, thereafter costs assessment applying the test of "proportionality", seeks to achieve the same result by a different method. Justice is not necessarily served by imposing FRC on these cases now and Sir Rupert recognises this.

Proportionality revision

Although the Jackson Reforms redefined "proportionality" and made it clear that "necessity" is no longer considered relevant, clinical negligence claims are usually complex enough to include what would have previously been described as "necessary" within the new definition.

CPR 1.1 requires courts to deal with cases at a proportionate cost. It is often said[5] that proportionality has been put on the same level of importance as "justice". This arises from CPR 1.1(1)[6] which states: "These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost." CPR 44.3[7] sets out the test for assessing whether the costs claimed (after 1 April 2013) are proportionate. Specifically, CPR 44.3(5) sets out a five-stage test:

> "(5) Costs incurred are proportionate if they bear a reasonable relationship to—
> (a) The sums in issue in the proceedings;
> (b) The value of any non-monetary relief in issue in the proceedings;
> (c) The complexity of the litigation;
> (d) Any additional work generated by the conduct of the paying party; and
> (e) Any wider factors involved in the proceedings such as reputation or public importance."

"Reasonableness" is subordinate to "proportionality" and this can be illustrated by Lord Neuberger's comment in *Ted Baker Plc v Axa UK Plc* .[8] Lord Neuberger said obiter that:

> "… disproportionate costs, whether necessarily or reasonably incurred, should not be recoverable from the paying party. To put the point quite simply, necessity does not render costs proportionate."

Accordingly, "reasonably" or "necessarily" incurred costs are already reduced to make them "proportionate" in the Jackson Reforms.

If justice and proportionality are parallel concerns under the CPR's procedural code, then any FRC scheme must address each in equal measure in the context of clinical negligence cases (just as costs budgeting ought to). As costs budgeting does not assess the amount of past incurred costs or the allowable hourly rates, and as the court has a wide discretion over costs, there remains considerable scope for arguing over costs at the end of every case. On one view, therefore, the certainty of knowing the costs the successful party would get in advance (subject to QOCS) is seen as a considerable advantage FRC has over costs budgeting in achieving proportionality and, thereby, justice.

[5] e.g. in the Points of Dispute served on behalf of NHS Resolution.
[6] See *https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part01* [accessed 19 October 2017].
[7] See *https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part-44-general-rules-about-costs#rule44.3* [accessed 19 October 2017].
[8] *Ted Baker Plc v Axa UK Plc* [2014] EWHC 4178 (Comm).

Practical considerations

Equality of arms and balancing conduct

Certainty is not the only factor at play, however. Equality of arms is also important especially if proportionality and justice have equal status. At para.3.4, Sir Rupert quotes from para.6.29 of Briggs' LJ Civil Courts Structure Review, final report[9] to say that clinical negligence cases are "… an area where the playing field is at first sight sharply tilted against the individual claimant, facing a sophisticated insurance company as the real … Defendant". As costs budgeting, QOCS and increased general damages have powerfully promoted access to justice already, caution ought to be exercised when considering whether to impose FRC, how best to do it and in setting any the level of fixed costs.

At para.3.3, Sir Rupert recognises that the reforms to date have already had a significant impact on reducing costs. Specifically, he cites the changes to Pt 36 as promoting settlement; costs management as reining in litigation costs after the first CCMC; and CPR r.3.9 post-*Denton v TH White Ltd*[10] as reducing the costs incurred via adjournments. He recognises, however, that costs remain disproportionate in many cases (para.3.5) and that more needs to be done. The arguments put forward by the defendants were, however, largely rejected by Sir Rupert. In Appendix 13,[11] he sets out the advice received from a senior clinical negligence Silk dated 17 April 2017 and which he accepts as being accurate. These criticisms were:

- The quality of case preparation varies between fee earners at NHS Resolution and between instructed panel firms.
- There is general difficulty in getting sensible instructions on cases worth under £250,000 and practical difficulties on getting individual clinicians and Trusts to agree to how the case is handled.
- There is a strict adherence to unimaginative processes which prevents early costs-savings solutions being adopted.
- Claimants can be fairly certain of never facing a problematic Pt 36 Offer.

Practitioners on both sides of the profession will undoubtedly have experienced examples of conduct which has increased costs. This does not necessarily mean that those costs were also disproportionate or otherwise worthy of censure. Nor does it follow that costs which are higher than the amount in issue are automatically disproportionate just as costs which are lower than the settlement amount are necessarily proportionate. What is required is balance in the face of the facts of the case in question. Whilst costs budgeting allows some leeway in case preparation, FRC finds it far more difficult to do so because it effectively limits the work done to conclude the case. Theoretically, they are fixed recoverable costs, not fixed total costs. Practically, however, the costs cap shifts the costs burden onto the winner which tends to reduce the work done in seeking to win the case. Although the three sets of figures proposed by NHS Resolution in the concurrent proposals made by the Government[12] are based upon its own view of how much work should be done at each stage, these do not withstand close scrutiny.

Due to the dual proscriptive and prescriptive nature of FRC, there is no safety net to the winner if costs at any stage exceed the set limits. By its very nature, the amount of recoverable costs is set in advance of the issues in the case being known. In the absence of escape mechanisms, there is an incentive for the

[9] Briggs LJ, "Civil Court Structure Review; Final Report" (2016). See *https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf* [accessed 19 October 2017].

[10] *Denton v TH White Ltd* [2014] EWCA Civ 906.

[11] See *https://www.judiciary.gov.uk/wp-content/uploads/2017/07/Appendix_13_Review-of-Civ-Lit-Costs-Supp-Report-FRC.pdf* [accessed 19 October 2017].

[12] See *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/586641/FRC_consultation.pdf* [accessed 19 October 2017] (Tables 5 and 6).

defendant (as the party not having to prove its case in negligence) to delay matters; raise further questions or otherwise widen the issues; and to refuse to make suitable concessions. Conversely, it is possible that escape routes could be abused by claimants if their qualifying criteria are too lax. One must also take into account how such matters are to be policed and enforced. If it is simply by way of making an application to the court, the additional delay and expense runs counter to the objective of litigating at proportionate cost. If it is to be via the parties' adopting reasonable positions, then the lack of judicial scrutiny is likely to make this ineffective in practice.

Process mapping

The answer is also unlikely to be found in unilateral process-mapping (which might offer the efficiency savings Sir Rupert seeks). First, the complexities of an average clinical negligence case exceed those of a comparably-valued PI or general civil litigation case and this cannot be safely ignored. Attempting to account for (and then value) the possible combinations for cases which fall within the £25,000 value is extremely difficult. A negligent delay in diagnosing a scaphoid fracture has very different considerations to a stillbirth and both differ again from dental cases or cosmetic surgery cases. A one-size fits all approach risks imposing unfair assumptions on these cases. Secondly, creating a process to deal effectively with FRC cannot work if only one side uses it whilst the other has its own process. The adversarial nature of litigation does not lend itself to agreeing an approach which limits your client's ability to win their case. Add into that the often deeply personal nature of perceived negligence to a patient and the entirely natural indignation that a hard-working and dedicated clinician feels at it and it is easy to see how imposing a seemingly arbitrary and generic process on them is unlikely to be seen as just and reasonable. Any system which fails to be seen as fair by the individuals it is intended to help is unlikely to succeed.

Grade of fee earner

Lower-value clinical negligence cases are usually dealt with by relatively junior or inexperienced fee earners. There is an almost overwhelming temptation to assume that this is the only method of running cases profitably under a FRC regime both in terms of the commercial realities of running a business and in terms of the likely judgements a court would currently make on assessment. However, the lower hourly rates charged by junior fee earners do not translate easily into the efficiency savings Sir Rupert maintains will be made under FRC. As either the client or the instructed firm bears the burden of paying for the costs over the FRC figures, it tends to be presumed that market forces will come into play to eventually weed out the unhealthy and inefficient practices currently believed to infest clinical negligence. Such Darwinian thoughts are more in keeping with a 19th Century caveat emptor view of justice than the empathic and collegiate approach to clinical negligence which so many practitioners on both sides of the profession seek to achieve. Inexperienced fee earners are, by definition, more likely to require greater time to deal with a given case and setting the FRC rates too low only serves to enhance the problem and risk rather than to ameliorate them.

Factual evidence

This is particularly so with efficiently marshalling documentary and lay witness evidence. Just as the substantive law is not being simplified, the importance factual evidence plays in building or undermining a case is not being reduced. If the factual evidence relied upon is ambiguous or inconsistent, then the entire case is weakened, unrecovered costs are likely to increase and a less advantageous result achieved. Cutting corners in the preparation of factual evidence is likely to result in ambiguity or inconsistency but it is often asserted that the time spent in avoiding this is disproportionate. Striking the right balance in practice

depends on file handlers' possessing the ability to recognise what evidence is required to prove the case; marshal it into an effective whole; analyse the content; and accurately assess where the remaining weak spots lie.

The inherent risk of setting the FRC level too low is to encourage advisors to fall into the trap of taking one fact or apparent evidence trail in isolation or of jumping to a premature conclusion when considering the facts of a case. Any set of facts is not open-ended and so proper investigation will eventually lead to a reasonable conclusion being drawn pre-trial or a clear idea of the reasonable inferences which the trial judge is likely to feel able to draw where gaps exist. Accordingly, proportionality in this area is aimed at investigating the entire set of facts efficiently and not allowing oneself to be led up the garden path in doing so. Cross-referencing and looking for corroboration from other sources of evidence is not a one-off process and needs to be catered for in the level of FRC.

Expert evidence

Seeking savings on the cost of expert evidence is also unlikely to do much to promote justice. Drawing on the experience gained from legally aided cases, a system which seeks to cap expert fees brings an imbalance into play which reverberates throughout the rest of the case. It might be considered reasonable to approach the level of FRC in lower-value cases by moving straight to expert evidence and effectively using the opinion to screen the case. The risks of doing so include the expert having insufficient information available to them to provide an opinion that stands up to scrutiny and that serious imperfections in the case go unnoticed. If they are noticed in time, the cost of correcting the position very likely falls outside of the recoverable costs awarded. If noticed too late, the case is lost. Everything else being equal, this tends to affect claimants more than defendants because: (a) defendants have better access to employed experts; (b) they know the lower cost of losing under a FRC scheme from the outset; (c) they do not have to live with the effects of the injuries sustained if no damages are awarded; and (d) the onus remains on the claimant to prove their case.

Expert evidence necessarily remains the backbone of any clinical negligence case and increasing costs pressures are likely to make it harder to recover the costs of considering and reconsidering expert evidence. The *Bolam* test[13] is unlikely to be lowered which makes it essential to adopt a clear plan to ensure that each expert is providing a persuasive opinion at the outset which will stand up to close scrutiny at trial. The level of FRC ought to allow for just and reasonable sums to be recovered accordingly.

Early admissions

Returning to basic principles, FRC needs to find a way of dealing fairly with the substantive legal issues of limitation, breach of duty, causation of damage and quantification of losses as well as dealing justly with the issues encountered with factual and expert evidence. The substantive, evidential and procedural law is not being simplified to accommodate proportionality and it would be wrong to do so. It would be equally wrong to assume that these factors are simpler in lower-value cases. They are not. The claimant must still prove their case to the requisite standards and the defendant must have the right to defend itself fully if justice between the parties is to be maintained. Attempting to prevent these issues being dealt with effectively by limiting the amount of FRC to uneconomic levels risks being seen as unjust.

One way of achieving the correct balance between maintaining justice and saving costs is to focus on the relevance of the pre-litigation investigations which have occurred. These can arise from an inquest; disciplinary or regulatory proceedings; or Duty of Candour investigations. Although each of these differ from the adversarial nature of litigation, it is a reasonable general principle that different tribunals are

[13] *Bolam v Friern Hospital Management Committee* [1957] 1 W.L.R. 582 at 586–587 and *Bolitho v City & Hackney Health Authority* [1998] A.C. 232.

likely to come to the same conclusion on the same set of facts. Accordingly, if such an investigation concludes that the equivalent of a breach of duty has occurred which has caused more than a minimal avoidable injury, liability ought to be admitted at the outset. If the investigation falls short of doing so, then suitable admissions should be forthcoming going no further than that. In either case, significant costs savings can then be achieved by not seeking to re-investigate those issues. Adopting such an approach would go a considerable way to identifying a corpus of cases which could reasonably fall within the FRC limits suggested by Sir Rupert (i.e. lower-value cases where liability has been admitted promptly). The Supplementary Report implies that these would be cases where a full Pre-Action Protocol investigation has been undertaken. However, if the ultimate goal is to achieve proportionate costs, this would appear to provide a reasonable solution by recycling work already undertaken, by not continuously reinventing the wheel and by achieving more with less.

Clinical governance

Looking at this in a wider context, it ought to also be remembered that behind the front-line clinical care and expertise patients receive is an entire clinical governance system based on the human factors approach to risk management. This has been in place for over 10 years and draws on lessons learned from the space and aeronautics industries and elite sports such as F1, football or cycling. The fundamental principle underpinning this concept is that catastrophic failures in a system can be eliminated by having robust checks and balances in place to minimise the scope for human error. As an immense amount of work has already been done by the NHS (in particular) over the years, we ought to see the benefit of this in the quality and reliability of pre-litigation investigations and in the costs savings in the litigation itself. However, as Sir Rupert failed to find little evidence of this in his consultation, this really ought to be a pre-requisite for agreeing FRC in lower-value clinical negligence cases. Without this, we are unlikely to ever see the sort of marginal gains which other sectors produce.

Conclusion

Sir Rupert Jackson's Supplementary Report attempts to strike a fair balance between limiting the costs of clinical negligence litigation and maintaining access to justice. In return for fixed recoverable costs not applying to cases over £25,000, it is not unreasonable to accept that they should apply to cases worth less than that even though those cases are not necessarily simple. However, with that comes the expectation that the level of FRC does not fatally undermine justice itself. If proportionality has genuinely been elevated to equal status with justice, then it is only equal: it is not superior. The imposition and level of FRC must properly protect the individual claimant and impugned clinician whilst maintaining access to justice at a reasonable cost. Negligence is inadvertent but can often have very drastic consequences going beyond the amount of compensation awarded. General Damages awards are rarely seen as being generous. The key to reducing costs lies in the early, accurate agreement on the central disputed issues so that these can be focussed on and resolved as quickly as is possible without selling either party short.

Case and Comment: Liability

Dodd v Raebarn Estates Ltd

(CA (Civ); McFarlane LJ; Lewison LJ; McCombe LJ; 21 June 2017; [2017] EWCA Civ 439)

Fatal accidents—liability—negligence—landlord and tenant—torts—defective premises—duty of care—landlords' duties—occupiers' liability—repairs—stairs—Defective Premises Act 1972 s.4—Occupiers' Liability Act 1957 s.2

Defective premises; Disrepair; Duty of care; Fatal accident claims; Landlords' duties; Stairs; Tripping and slipping

On Christmas Day 2007, Paul Dodd and his wife, both Australians, were on their honeymoon. At the time, they were the guests of the sixth defendant (D6), who was then the leasehold owner of flat 2, Nos 194–196 Kensington Park Road, Notting Hill. While leaving the flat to go out, Paul Dodd fell down the stairs from the first floor, suffered a major brain injury, and died two years later.

The building was made up of three storeys. In 1987, the freeholder had kept the ground floor for retail premises while granting a lease over the first and second floors to a developer who created residential flats and replaced the staircase between the ground and first floor. The new stairs were steep with no handrail. It was those stairs that Paul Dodd fell down in 2007.

It was alleged that defects in the staircase, and above all the lack of a handrail, were responsible for his fall, and that the freehold owner of the whole of Nos 194–196 Kensington Park Road and head lessor of (at least) the first and second floors, was answerable for those defects. The widow claimed that the freeholder had failed to discharge common law duty of care as occupier to her husband as a visitor under the Occupiers' Liability Act 1957 s.2, and had failed to take reasonable care under the Defective Premises Act 1972 s.4 to see that those likely to be affected by the condition of the staircase were reasonably safe in using it.

At a hearing before a High Court master, it was questioned whether the freeholder had demised the staircase to the developer owing to some potentially contradictory wording in the lease. The master applied the principle of corrective interpretation and concluded that the parties had obviously intended a means of access to the first floor to be demised. He therefore found that the freeholder had no control or duty of care over the replacement staircase under the 1957 Act. He also concluded that the staircase was not defective under the 1972 Act. He gave summary judgment against the widow who appealed, lost again[1] and appealed to the Court of Appeal.

The widow submitted that when the head lessee removed the original staircase, it breached cl.3(3) of the head lease by causing damage to the physical condition of the building. She argued that the head lessee had failed to remedy that breach of covenant by installing a staircase which complied with building regulations, meaning that the freeholder had been entitled to enter under cl.3(7) in order to rectify the breach. She maintained that the right to enter triggered the application of s.4(4) of the Act, thus giving rise to a duty owed to the husband.

[1] *Dodd v Raeburn Estates Ltd* [2016] EWHC 262 (QB).

The Court of Appeal held that it was clear that the phrase "maintenance or repair" in s.4 of the Act was to be interpreted according to the meaning that it had in the general law of landlord and tenant, and did not extend to defects in a general sense. The scope of the duty to repair was no wider than that of the covenant to repair owed by the freeholder. It was also clear that a duty to repair could not be equated with a duty to make safe.[2]

The difficulty with the widow's argument was that it did not take account of the fact that the head lease permitted the head lessee to make alterations with the freeholder's consent. In those circumstances, the removal of the old staircase could not possibly amount to a breach of cl.3(3) of the head lease and the right to enter under cl.3(7) could not have been triggered.

Once the staircase had been installed, cl.3(3) would have attached to that staircase and the "clock would have started again". If the new staircase never had a handrail, there had been no subsequent damage to or deterioration in the fabric of the staircase such as to give rise to an obligation to repair it and the claim under s.4(4) would have to fail.

The judge[3] had rejected the alternative hypothesis that the new staircase originally had a handrail which was subsequently removed. He described that hypothesis as "speculative and fanciful" although the widow maintained that it was sufficiently plausible to sustain a real prospect that it would be found to be correct at trial.

They reiterated that an appeal court had to be slow to interfere with an evaluation carried out by a first instance judge. Given the extent of the evidence before the judge and the widow's inability to point to any further evidence that might become available at trial, they conclude that the judge had been entitled to reject the hypothesis.[4]

They went on to hold that even if the judge had been wrong in that respect, it would not have made any difference if the handrail had been removed at some time after the new staircase was installed. The test of functionality was not the correct test. Part of a building might function inadequately, but it did not follow that it was in disrepair or that there was a "relevant defect" for the purposes of s.4(3).[5] Because there was no disrepair, the questions of compliance with building regulations did not arise.

The appeal was dismissed.

Comment

The Court of Appeal have now looked carefully at this very sad case of an Australian on his honeymoon in London, Paul Dodd, who plunged down a staircase without a handrail. In consequence he suffered irreversible brain damage, remained in a coma, and died two years after this incident on Christmas Day nearly 10 years ago. Not only has progress on this matter been glacial, but the outcome on appeal is similarly dismal. One can admire the tenacity of the widow, Megan Dodd, but this is now the third attempt to obtain justice, and the result has been the same before Master Leslie, the High Court and now the Court of Appeal.

At first instance[6] before HH Richard Parkes QC, the case foundered on the routine, and shocking, response of tort law in these claims. That result was echoed a month afterwards in the Court of Appeal case of *Sternbaum v Dhesi*[7] where the victim similarly plunged down a staircase without a handrail or a banister fitted. Hallett LJ in *Sternbaum* notes the uncomplicated finding by Mr Recorder Davies that the injuries "would not have happened had there been a handrail" and then her own observation from the

[2] *Alker v Collingwood Housing Assoc* [2007] EWCA Civ 343 applied.
[3] Judge Richard Parkes QC.
[4] *Three Rivers DC v Bank of England (No.3)* [2003] 2 A.C. 1 followed.
[5] *Hannon v Hillingdon Homes Ltd* [2012] EWHC 1437 (QB), doubted, *Sternbaum v Dhesi* [2016] EWCA Civ 155 and *Alker v Collingwood Housing Assoc* [2007] EWCA Civ 343 applied, *Quick v Taff Ely BC* [1986] Q.B. 809 explained.
[6] *Dodd v Raeburn Estates Ltd* [2016] EWHC 262 (QB).
[7] *Sternbaum v Dhesi* [2016] EWCA Civ 155.

photographs, given the "steepness" of the layout, that there was "little doubt that, without a handrail, it was a hazard".[8] But in the current state of the law on "disrepair" Hallett LJ had to conclude that "much as I sympathise with the Appellant, who suffered a nasty injury in her fall" the appeal had to be dismissed.[9]

A significant factor in these handrail cases, where there seems to be much judicial hand-wringing but little else to assist claimants, is the long overdue reform of Building Regulations. After the appalling tragedy of Grenfell Tower it may be that there is now the impetus for the Government to scrutinise fire safety issues in those Regulations. But with handrails here is another topic of obvious deficiency in safety, allied to the pusillanimous failure of the courts to protect victims.

A brave attempt is made here in *Dodd* at the Court of Appeal to argue some new points. One issue was on a replacement staircase, and the suggestion that originally this had a handrail, as approved by the planning authorities, which may have been subsequently removed. But the judge at first instance had rejected that alternative hypothesis as "speculative and fanciful".[10] Counsel for Mrs Dodd mounts a determined assault on that finding, in the context that the lack of a handrail in 1988 would have been a breach of the building regulations and, perhaps, it had been removed as so often happens in the course of shifting furniture up and down the stairway. Inevitably the Court of Appeal indicated it would be loathe to interfere with the factual evaluation by the judge at first instance, and in their view there was no new and compelling evidence on that point.[11] A difficulty here was that, with the Master's ruling that there was no case to answer, so no trial of the issues had taken place. As Lord Hobhouse indicated in the *Three Rivers* decision:[12] "The hope that something may turn up in cross-examination of a witness at the trial does not suffice" as potential new evidence.

In addition, even if the learned judge had been wrong on that matter, and if the handrail had indeed been removed, the Court of Appeal ruled that it did not follow that there was "disrepair". This inevitably becomes a circular argument on "defects". As pointed out by the Court of Appeal in the leading case of *Alker v Collingwood Housing Assoc*, there is no general duty at common law to make the premises safe for a tenant, and a fortiori neither for a non-tenant visitor. In that case, the claimant had pushed on the ribbed glass panel of a front door which gave way and caused injuries described as "horrific and traumatic". Laws LJ, in a careful review of the authorities,[13] concluded that to find for the victim would "represent a major liability to be borne by landlords, including of course local authorities and housing associations" and that if "it were desired to impose such a liability, it would be for Parliament to effect it".

Negotiating stairways without the means of holding on to a handrail is self-evidently perilous. There are myriad examples of injury resulting. Although since 1965 there have been national building standards, and Pt K specifically deals with "Protection from falling, collision and impact", with the obvious risk assessment protective "control" of fitting a handrail, there is no "retro-fitting" requirement. Elderly buildings in Kensington of the sort in the *Dodd* case are still in use but are not therefore subject to "building regs".

The research is clear-cut that failure to provide a handrail on stairs of any sort is a major cause of injuries and occasionally results in lethal consequences. Studies in the US, where "tens of people die and tens of thousands of people get injured every year from … falls on stairs", show that such injuries, and the cost of them, are second only to injuries caused by motor vehicles.[14] And a study for the Health and Safety Executive in 2005 indicated that in the UK there are nearly as many deaths each year from accidents in the home as from traffic accidents, and that "Falls account for over half of these accidental deaths, and

[8] *Sternbaum v Dhesi* [2016] EWCA Civ 155 at [8] and [29].
[9] *Sternbaum v Dhesi* [2016] EWCA Civ 155 at [34].
[10] *Dodd v Raebarn Estates* [2017] EWCA Civ 439 at [9] and [10].
[11] *Dodd v Raebarn Estates* [2017] EWCA Civ 439 at [38].
[12] *Three Rivers DC v Bank of England (No.3)* [2003] 2 A.C. 1 at 160.
[13] *Alker v Collingwood Housing Assoc* [2007] EWCA Civ 343 at [17].
[14] American National Council on Compensation Insurance estimate in 2002.

half of the deaths from falls relate to stairs".[15] Indeed, in the workplace the HSE *Hazard Spotting Checklist* recommends that all employers should "Provide a handrail on at least one side of the stairs".[16]

Building regulations and British Standards design templates now have detailed recommendations for handrail shape, diameter, and fixing distance from a wall. These guidelines are scrupulously observed and are obviously near-universal in new build, because they are conscientiously followed by professional architects and builders.

Criminal prosecutions on a lack of a handrail are also possible in the workplace environment, in social care premises, or generally in the public realm; for example a case involving a carpet fitter who plunged down a cellar staircase which had not been fitted with a handrail;[17] a fall through a banister which gave way in a care home;[18] and a failure to carry out a risk assessment for a handrail on social premises used for bingo.[19]

Prosecutions are also possible, although rare, against private landlords, and these are brought by local authorities, usually relating to the enforcement of planning laws. One example was the successful prosecution by Redbridge LBC in 2013 of a landlord engaged in letting out "houses in multiple occupation", where alterations had been made without planning or building consent, and where there was a catalogue of defects, including a lack of banisters and handrails; the landlord was fined £40,000.[20]

The Occupiers' Liability Act 1957, essentially codifying the common law, imposes a "common duty of care" on an occupier for every visitor, and this is:

> "a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there."[21]

Sixty years on it is time for another clear-sighted look at its provisions. For example, one of the issues in *Dodd v Raebarn Estates* , as in many other cases, was to locate the "occupier", as so often premises are multi-occupancy in nature.

In *Wheat v Lacon* , famously, the House of Lords had to consider a fatality in The Golfer's Arms public house in Great Yarmouth, where a visitor in a holiday flat on the top floor fell down a back staircase. Winn J held there were two causes: an inadequate handrail that did not reach down far enough; and a missing light bulb, taken out by an unknown person from the fitting at the top of the stairs. But in giving ultimate judgment Lord Denning found there was no liability on any of the three defendants for any breach of duty.[22]

Similarly, in *Dodd* Lewison LJ noted that "Although I have profound sympathy for Mrs Dodd for her tragic loss, in my judgment Raebarn is not the culprit".[23] Given the grievous nature of some of these cases a strong argument could be made for strict liability on the freeholder, with apportionment thereafter, as significantly concentrating the mind on inspecting premises and ensuring their safety.

The standard negligence reliance of "reasonability" when applied to freeholders and landlords certainly leaves much to be desired. What is "reasonable" is inevitably a question of fact to be determined by a judge. A review of the cases indicates a fairly gloomy prospect for claimants when focusing on poor design or defect in a building that renders it hazardous. It was for this reason that the Defective Premises Act 1972 s.4 was enacted, in which a landlord:

[15] Anita Scott, "Fall on Stairways—Literature Review" HSL/2005/10, p.7.
[16] See *www.hse.gov.uk/pubns/ck4.pdf* [accessed 20 October 2017].
[17] "Firm fined £10K after man fell to his death", *Manchester Evening News*, 17 January 2015.
[18] "Care home pair fined £120,000 over fall tragedy", *Leicester Mercury*, 2 December 2015.
[19] "Great-gran was badly injured in steps fall", *Newcastle Evening Chronicle*, 13 February 2010. 82-year-old leaving by a fire escape without a handrail, and following prosecution an £11,000 fine.
[20] "HMO Landlord fined for endangering tenants' lives", *Inside Housing*, 31 July 2013.
[21] OLA 1957 s.2(2).
[22] *Wheat v Lacon* [1966] 1 All E.R. 552.
[23] *Dodd v Raebarn Estates* [2017] EWCA Civ 439 at [41].

> "owes to all persons who might reasonably be expected to be affected by defects in the state of the premises a duty to take such care as is reasonable in all the circumstances to see that they are reasonably safe from personal injury or from damage to their property caused by a relevant defect."

Until the passage of that Act, builders who constructed unsafe properties were indeed largely protected against prosecution and landlords who rented properties where a non-tenant visitor was injured also had immunity. So the Act was a significant step forward at the time. But now in a modern era the frontier should be expanded in an endeavour to protect further both residents and visitors to property.

Because the 1972 Act focuses on "reasonability" it does not actually assist greatly. First, it has been made abundantly clear that there is no statutory warranty under this Act, or any other, that a landlord is under a duty to make the premises safe with an "obligation … for the maintenance or repair".[24] This is now confirmed, once again, in *Dodd v Raebarn Estates* . But in addition that case, now with the imprimatur of the Court of Appeal, makes it clear that non-compliance with Building Regulations does not alone constitute a "relevant defect" within the meaning of the Defective Premises Act 1972 s.4(3).

These contentious issues of defective premises, and particularly in respect of landlord and tenant obligations, have of course been rehearsed on many occasions. One perspective was that of the Law Commission in 1996, but we are now two decades along.[25] It looks unlikely that judicial thinking has moved on, so perhaps taking up the invitation of Laws LJ the time would certainly seem appropriate for the Law Commission and indeed Parliament to re-visit the scenario of handrails on staircases in respect of non-tenant visitors. Or one can perhaps hope for the Supreme Court to be less timid in one such case, and germinate something from the general common law of negligence. As with so many commonplace safeguards, a determined effort to insist on such a protective "norm" would serve to shield against ruinous injury, and occasionally lethal consequences.

Practice points

- The Court of Appeal reiterates the point that tort law does not impose liability at common law or under statute for falls on stairways without handrails, and particularly not when the staircase was built before 1965, in respect of non-tenant visitors. Many such cases involve premises of a vintage prior to national building regulations commencing then.
- Laws LJ in *Alker v Collingwood Housing Assoc* indicated that there is no general duty on a landlord to make premises safe for a tenant, and that it "would represent a major liability to be borne by landlords, including of course local authorities and housing associations … If it were desired to impose such a liability". He suggested that Parliamentary intervention would be required.
- That view is essentially reaffirmed in *Dodd v Raebarn Estates* . With respect, it would appear time to invite Parliament, as indicated by Laws LJ, to effect change on the issue of the lack of a handrail causing death or injury, certainly by making breach of the building regulations a "relevant defect" under the Defective Premises Act 1972. Or, perhaps optimistically, the Supreme Court could fashion a new tortious right from the protean workings of the Common Law.

Julian Fulbrook

[24] See *Alker v Collingwood Housing Assoc* [2007] EWCA Civ 343, but also in the Court of Appeal *Ratcliffe v Sandwell MBC* [2002] EWCA Civ 06.

[25] Law Commission, *Landlord and Tenant: Responsibility for State and Condition of Property* (1996) (Law Com No.238).

Various Claimants v Barclays Bank Plc

(QBD; Nicola Davies J; 26 July 2017; [2017] EWHC 1929 (QB))

Vicarious liability—torts—independent contractors—doctors—medical examinations—sexual assault—conditions of employment

LT Banks; Conditions of employment; Doctors; Medical examinations; Sexual assault; Vicarious liability

In this group litigation, 126 claimants sought damages from Barclays Bank Plc ("the Bank") in respect of alleged sexual assaults to which they were subjected by a doctor—Dr Gordon Bates—between 1968 and 1984. Most of the claimants were, at the time of the alleged assaults, applicants for employment with the Bank (the rest were existing employees). As part of the Bank's recruitment process, applicants were required to attend a medical assessment, with Dr Bates having been nominated by the Bank to carry out the assessments for applicants from North East England.

Dr Bates practised from a consulting room at his home, which is where the alleged sexual assaults took place. He died in 2009. A recent police investigation into the cases of 48 complainants found sufficient evidence to prosecute Dr Bates had he been alive.

The court had to determine, as a preliminary issue, whether the Bank was vicariously liable for assaults that Dr Bates allegedly committed. The Bank contended that Dr Bates was not an employee but an independent contractor and it was, therefore, not vicariously liable. The Bank also argued that Dr Bates was not performing a role for the Bank that was akin to employment.

The judge, Nicola Davies J, held that the issue of whether the Bank was vicariously liable fell to be determined according to a two-stage test, namely: (i) was the relevant relationship one of employment or "akin to employment"; and, if so, (ii) was the alleged tort sufficiently closely connected with that employment or quasi-employment such that it was fair and just to impose vicarious liability.

Her Ladyship observed that, in connection with the first stage of the test, five relevant criteria had been isolated by the Supreme Court in *Various Claimants v Institute of the Brothers of the Christian Schools*[1] and *Cox v Ministry of Justice*.[2] She had the following to say about each of these factors, in outline.

- Was the employer more likely to have the means to compensate the victim than the employee, and to have insured against that liability?

The judge observed that the doctor was dead and that his estate had long since been distributed. Dr Bates's liability insurers were not required to indemnify his estate for liability in respect of sexual assaults. Conversely, the Bank and its insurers had the means to meet such claims.

- Was the tort committed as a result of activity being undertaken by the employee on behalf of the employer?

The judge noted various matters in connection with this second factor. She observed, among other things: (i) that the medical assessments and subsequent reports to the Bank were performed for the Bank's benefit and on its behalf; (ii) the Bank had selected and contracted with Dr Bates; (iii) prospective employees had no choice but to undergo the assessments if they wished to be considered for a place with the Bank;

[1] *Various Claimants v Institute of the Brothers of the Christian Schools* [2012] UKSC 56; [2013] 2 A.C. 1.
[2] *Cox v Ministry of Justice* [2016] UKSC 10; [2016] A.C. 660.

(iv) the Bank made arrangements for the assessments; (v) the cost of the assessments was met by the Bank; and (vi) it was in the Bank's interests that its employees were fit to work.

- Was the employee's activity part of the business activity of the employer?

In relation to this factor, the Judge observed that the medical assessment enabled the Bank to be satisfied that a prospective employee was physically suitable for the work. A fit and healthy workforce was an intrinsic part of the Bank's business activity. Thus, in conducting the assessments, Dr Bates was acting for the Bank's benefit and was an integral part of the Bank's business activity.

- Had the employer, by employing the employee to carry out the activity, created the risk of the tort committed by the employee?

The claimants had no choice as to the doctor who would assess them and they were directed by the Bank to see Dr Bates at his home. The Bank instructed Dr Bates to perform a physical assessment which included a chest measurement. The claimants were predominantly young girls who saw Dr Bates alone in his consulting room and who were asked to remove clothing. In these circumstances, the judge held that the Bank had created a risk of the torts that were allegedly committed.

- Was the employee, to a greater or lesser degree, under the control of the employer?

The fact that Dr Bates organised his own professional life and carried out other medical activities did not, the judge held, undermine the argument that he was under the Bank's control. Neither did the fact that Dr Bates performed the examinations in his home. The Bank had exerted more control than was usually found in the context of a doctor's assessment. The Bank identified the questions to be asked and the physical assessments to be carried out. Control was also manifested in directing the claimants to a particular doctor.

In light of the five foregoing factors, the judge held that the first stage of the test that controlled whether vicarious liability was to be imposed was satisfied.

The second stage of the test required the judge to decide if there was a sufficiently close connection between the alleged conduct of Dr Bates and the work that he carried out on behalf of the Bank such that it was just and fair for vicarious liability to be imposed.

As to closeness of connection, her Ladyship emphasised: (i) that the alleged sexual assaults occurred during the course of medical assessments that the Bank required candidates for employment to undergo; (ii) the claimants were in physical proximity to Dr Bates by reason of the nature of the assessment; (iii) Dr Bates was likely to be viewed by the claimants as being in a position of authority; and (iv) the alleged sexual abuse took place while Dr Bates was engaged in duties at a time and place required by the Bank. The judge concluded that the alleged torts were thus closely connected with the scope of Dr Bates's work on behalf of the Bank.

This left the issue of whether it was "just and fair" for vicarious liability to be imposed on the Bank. The court recognised that had the claims been made earlier, Dr Bates's estate could have had the financial means to meet them. The judge also noted that the claims had been made many years after the alleged abuse and the Bank had taken a point on limitation. In all of the circumstances, the judge considered that it was fair and just that the Bank be held vicariously liable for any of the sexual assaults that the claimants might prove to have been perpetrated against them by Dr Bates in the course of his medical assessments.

Consequently, the preliminary issue was determined in the claimants' favour.

Comment

Many cases regarding the doctrine of vicarious liability engage only one of the two stages of the test by which the doctrine is governed. The issue is generally either:

- whether the tortfeasor is an employee as opposed to an independent contractor; or
- whether, if the tortfeasor is an employee, he or she acted within the scope of that employment at the relevant time. In *Barclays Bank*, however, both stages of the test were in contention, although the focus was predominantly on the first stage.

One of the most notable phenomena in the modern law of torts is the relentless expansion of the vicarious liability doctrine. Many constraints that previously applied to the doctrine have been either substantially or completely removed, with a particularly undemanding approach having been taken by the Supreme Court in its recent decision in *Mohamud v Wm Morrison Supermarkets Plc*.[3] In that case, the Supreme Court held that a petrol station worker who attacked a customer who had asked whether he could use the petrol station's printer had acted within the scope of his employment.

The reach of the vicarious liability doctrine has been extended by way of adjustments made to both parts of the two-stage test. Stage one was significantly relaxed by, in particular, changes to the law being made that permitted relationships that were merely "akin to that of employment" to satisfy it.[4] While it remains the law that vicarious liability will not arise for the torts of independent contractors,[5] the practical significance of that limitation has been seriously diminished. The undemanding nature of the first stage of the test is amply demonstrated by *Barclays Bank* itself. Although the judge seems to have forgotten to make a finding as to whether Dr Bates was or was not an employee of the Bank, it is tolerably clear that Dr Bates was in private practice and, hence, not an employee. As the judge observed: "Dr Bates organised his own professional life and carried out other medical activities" (at [45]). It is only by the most liberal use of language that Dr Bates can be considered to have stood in a relationship "akin to that of employment" with the Bank.

The height of the hurdle posed by the second stage of the test that must be satisfied before vicarious liability will be imposed has similarly been significantly reduced. It is possible for tortfeasors who commit serious criminal offences or who engage in conduct that the defendant has expressly prohibited to be acting within the scope of their employment. Again, *Barclays Bank* vividly demonstrates the lenient approach that the courts have taken, with the judge remarking that it was enough to satisfy stage two of the test that the task that Dr Bates had been entrusted to carry out "placed him in a position to deal with the claimants" (at [46]).

One particularly unsatisfying feature of the law of vicarious liability is that no compelling justification for the doctrine has ever been isolated. A wide range of rationales have been floated in the literature and the cases but it is quite clear that none of them is capable of supporting the doctrine in anything like its present form.[6] It is often suggested, for example, that the desirability of finding a deep-pocket supports the vicarious liability doctrine. However, it is obvious that that argument does not justify the doctrine as it stands. On the contrary, it suggests that vicarious liability should, in fact, never be imposed on private individuals or companies but on the deepest pocket of all: the state. It is similarly sometimes ventured that vicarious liability is something that must be tolerated as part and parcel of participating in profit-making activities. However, this explanation does not explain why the vicarious liability doctrine applies equally to for-profit and not-for-profit undertakings alike. The fact of the matter is that no convincing justification for the current law has been identified.

The absence of a compelling justification for the law of vicarious liability means that there is no clear reference point by which it should be developed. There is no way of knowing whether a particular extension

[3] *Mohamud v Wm Morrison Supermarkets Plc* [2016] UKSC 11; [2016] A.C. 677. *Mohamud* is discussed in P. Morgan, "Certainty in Vicarious Liability: A Quest for a Chimaera?" (2016) 75 *Cambridge Law Journal* 202.

[4] See *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938; [2013] Q.B. 722.

[5] As P. Morgan puts it: "It is seen as a basic principle of vicarious liability that whilst one may be vicariously liable for an employee's wrong, one is not vicariously liable for the wrongs of an independent contractor" (P. Morgan, "Recasting Vicarious Liability" (2012) 71 *Cambridge Law Journal* 615 at 622 (footnote omitted)).

[6] Criticisms of the various policy arguments are powerfully developed in R. Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007), pp.257–259.

or contraction of the law that is proposed should be accepted or rejected. In these circumstances, what is required is a fundamental revision of the law of vicarious liability, with the scope of the doctrine being brought into line with a satisfying rationale for the institution. Both the nature and scale of the changes that would be required are such that it is difficult to see how they could realistically be achieved other than by the legislature.

Practice Points

- Always remember vicarious liability will be imposed subject to a two-stage test.
- The first stage is concerned with the relationship between the tortfeasor and the defendant.
- The second with whether the tortfeasor acted within the scope of that relationship.
- A key issue in relation to the first stage of the test is the degree of control that the defendant exercised over the tortfeasor.
- The second stage of the test has degenerated into a multi-factorial and largely discretionary enquiry. The ultimate question is whether it is fair and just to hold the defendant vicariously liable.
- Factors of which cognisance are taken in the second stage of the test are broadly similar to those that are material to the third, policy-based stage of the *Caparo*[7] test for the existence of the duty of care.

Dr James Goudkamp

Baker v KTM Sportmotorcycle UK Ltd

(CA (Civ Div); Hamblen LJ, Lloyd Jones LJ; 3 May 2017; [2017] EWCA Civ 378)

Liability—personal injury—consumer protection—defective products—motorcycles—brakes—causation—Consumer Protection Act 1987 s.3, s.3(1), s.3(2)

Brakes; Causation; Defective products; Design defects; EU law; Motorcycles; Personal injury

On 24 February 2010, the claimant, Mr Baker, was riding his KTM Supermoto 990 motorcycle ("the motorcycle") along Manor Road, Derby. The bike was secondhand and had been purchased by Mr Baker from a dealer. The bike was two years old, fully serviced and had low mileage. At the time Mr Baker was travelling within the speed limit. Suddenly, and without warning, the front brake of the motorcycle seized, causing Mr Baker to be thrown from the motorcycle, as a result of which he sustained severe personal injuries.

Mr Baker sued the manufacturer of the motorcycle ("KTMW), alleging that the accident and the resulting injuries were caused by a defect in the motorcycle contrary to the Consumer Protection Act 1987 ("the CPA") s.3(1)[1] and/or KTM's negligence.

Following a five-day trial, in early 2015 the judge, Mr Recorder Mainds QC, in a judgment dated 8 May 2015, upheld Mr Baker's claim under the CPA and awarded him for provisional and special damages. The Recorder found that the cause of the seizing of the brakes was galvanic corrosion which had happened "as a result of a design defect combined with faulty construction or the use of inappropriate or faulty

[7] See *Caparo Industries Plc v Dickman* [1989] Q.B. 653.
[1] Meaning of "defect".

materials". KTM appealed on the ground that there was no or no sufficient evidence before the court that the galvanic corrosion was caused by a defect in the motorcycle within the meaning of the CPA. It argued that Mr Baker had to show that there was a defect, and that there had been no evidence from the bike's previous owner as to his cleaning regime.

The Court of Appeal held that there was no need for the claimant to plead a specific defect. It was sufficient for the judge to find that there was a defect.[2] The bike was less than two years old, had been serviced regularly, had low mileage and was appropriately cleaned. Hamblen LJ said that it was self-evident that one did not expect to find galvanic corrosion in such a bike. There must have been a defect in the design or manufacturing process for galvanic corrosion to have occurred but the respondent did not need to identify the defect.

The Recorder had found that the bike had been serviced and was in excellent condition at the time of the claimant's purchase so the previous owner's evidence was irrelevant. There was galvanic corrosion where there ought not to have been and the Recorder had been entitled to infer that there must have been a defect in the braking system on the bike. That finding had been open to him on the evidence and there was no error of law. The appeal was dismissed.

Comment

The law behind this decision had been established since 2008; a rare occurrence in a subject that has more academic writings on it than jurisprudence. In truth this was an appeal on the facts and otherwise was an example of a proper application of the Consumer Protection Act as envisaged by the Directive from which it emanated.[3]

The Directive preamble records:

> "The term 'product' means all movables, with the exception of primary agricultural products and game, even though incorporated into another movable or into an immovable and it also includes electricity.
>
> Producer in the sense of the Directive means the manufacturer of a finished product, the producer of any raw material or of a component part and any person who presents himself as producer by trade mark or name. The supplier shall be treated as producer unless he identifies the producer or pre-supplier.
>
> A product is defective when it does not provide the safety a person is entitled to expect. It is not defective if only an improved product is subsequently available.
>
> It is the person suffering the damage who has to prove the damage, the defect of the product and the causality between both. Damage can be material or health damage. National laws on non-material damage are not affected by the Directive."

In the UK, the Consumer Protection Act 1987 s.3(1) provides:

> "… 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; …"

The Directive was intended to create a strict liability regime for damage caused by products whilst seeking to achieve total harmonisation of strict product liability producing enhanced consumer protection but all the while balancing the interests of consumers and producers by the "fair apportionment of risks" referred to in the second recital, giving effect to "liability without fault".

[2] *Ide v ATB Sales Ltd* [2008] EWCA Civ 424 followed.

[3] 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 .

The clarifying decision, *Ides*,[4] referred to in this judgment, saw the court make clear that whilst the process of establishing the defect may lead to an explanation of the defect, proving its mechanism or cause was not required, Thomas LJ said it was "unnecessary to ascertain the cause of the defect".[5]

As the judge here said:

> "26. The *Ide* case accordingly illustrates that there may be a defect within the meaning of section 3 of the CPA, *even though the precise mechanism by which that defect arose is not proven*. In the *Ide* case, the handlebar was defective in that it failed following normal use and in circumstances where a standard non-defective handlebar would not have failed."(emphasis added)

In *Ides*, another Consumer Protection Act claim, the claimant had sustained serious head injuries in an accident while riding his mountain bike and had no recollection of the accident and there were no witnesses to the accident itself. After the accident the claimant was found lying unconscious with the bike with the left-hand end of the handlebar snapped off. The bike had been imported into the UK by the defendant.

The issue was whether the handlebar had failed in normal use as a result of a "defect" within the terms of the Act or whether, as the defendant maintained, the claimant had simply lost control of the bike and fallen as a result of which the handlebar then broke on impact.

At first instance the court accepted Mr Ide's engineering expert's opinion that there had been weakening of the handlebar due to fatigue cracking although subsequent microscopic examination of the fracture surface had not confirmed the presence of fatigue. The judge described fatigue cracking as being "at least a possible cause" of the fracture.

On appeal it was argued that the claimant had failed to discharge the burden of proof of causation and without a finding that fatigue cracking was the probable cause of the fracture the claimant had not established his case.

In dismissing the *Ides* appeal Thomas LJ giving the unanimous lead judgment said that there had been only two competing mechanisms for the failure advanced at trial and neither was inherently improbable. Having rejected the explanation for the fracture given by the defendant's expert, the judge below was fully entitled to accept the only alternative explanation put forward. In addition, the judge was entitled on the evidence, to find that the handlebar had failed in normal use as a result of a defect. He had not reached that conclusion simply because the presence of a defect was the less improbable of the two competing explanations. Once the theory of an accidental fall had been eliminated all the evidence pointed to the presence of a defect in the handlebar. Then once the judge had found that there was a defect such that the handlebar failed in normal use and caused the injury it was not necessary for him to go further and make any finding as to the cause of that defect.

Against that legal background and the clear statement of the law from the Court of Appeal in *Ides*, permission had been given to this defendant in respect of the following grounds of appeal:

- the Recorder was wrong to find that there was a defect in the construction and design of the motorcycle's front braking system;
- the Recorder was wrong to find that the galvanic corrosion was the result of a design defect and/or faulty construction or the use of faulty or inappropriate materials; and
- the Recorder was wrong to conclude that the galvanic corrosion was the immediate cause of the accident.

[4] *Ide v ATB Sales Ltd* [2008] EWCA Civ 424.
[5] *Ide v ATB Sales Ltd* [2008] EWCA Civ 424 at [19].

At the appeal hearing the defendant had conceded the third ground arguing that galvanic corrosion was not a defect within the meaning of the CPA s.3 and that the claimant had in fact not pleaded a case setting out a specific design or manufacturing defect which would lead to this corrosion.

There was a significant factual and expert evidence dispute the court was asked to arbitrate. The claimant had purchased the bike second hand from a dealer in 2009, it having been first registered in 2008. Its first owner was a Mr Michael Pegler, from whom there was no evidence at trial. At the time of purchase its mileage was 1,676 miles and it had been fully serviced by a dealership owned by the defendant throughout. By the time of the accident its mileage was 3,935 miles, which was approximately halfway through its service cycle of 4,500 miles.

The court heard evidence from another owner of a similar KTM motorcycle, who had given evidence that when he was riding his motorcycle at 30MPH the wheel had locked and he was thrown from the motorcycle. His complaint was dismissed on the basis that he was at fault for not cleaning the motorcycle properly. However, the claimant also called expert evidence which, he alleged showed evidence that the brake disc had been subject to significantly high operating temperatures on the right disc and that the brakes were not operating in an evenly balanced way. The expert supported the claimant's criticisms.

He found deposits containing copper, iron, chromium, nickel and zinc to the area on the inner wall of the piston between the top edge of the housing and the first seal of the piston ball. Mr Taylor considered these white deposits to be aluminium oxide/hydroxide as produced by galvanic corrosion rather than the build-up of road salt. He explained the galvanic corrosion process as follows:

> "The body parts of aluminium alloy in the calliper become an electrical anode on one side and what appears to be the steel of the brake pistons on the other side of any liquid bead of salted water becomes the cathode of what is effectively an electric battery. The galvanic corrosion process apace principally the aluminium alloy of the anode because of the direction of the flow of electrical current in the electrolyte between the anode and the cathode."

Mr Taylor pointed out that aluminium oxide/hydroxide is insoluble in water and would be difficult to wash out of confined spaces within a brake by the recommended procedure for cleaning. His conclusion was that, although there might be some provision in the brakes of the motorcycle for resistance against galvanic corrosion, it did not appear to provide sufficient protection.

The defendant on the other hand, argued that the finding of a defect was not supportable without some evidence that there had been a departure from the standards employed by other motorcycle manufacturers and there was no such evidence. However, this argument would seem to seek to import "avoidability" into the Act when it is not provided for.

In fact, the court decided:

> "the essential point, however, is that there was galvanic corrosion when there ought not to have been. There was no necessity for comparative evidence. The Recorder was entitled to infer from that fact that there must have been a defect in the braking system on this particular motorcycle."[6]

It is encouraging that the Court of Appeal again has enforced the strict liability intended by the Act emanating from the fair apportionment of risk required by the Directive. Thus, the producer profits from the sales but should remove from the state the burden of caring for the injured by the producer and remove from the consumer, the claimant, the burden of proving the cause of the defect.

Practice Points

- Identify all evidence to exclude irrelevant causes of the injury.

[6] *Baker v KTM Sportmotorcycle UK Ltd* [2017] EWCA Civ 378 at [34].

- Consider the nature and contents of all warnings.
- Use specialist counsel.

Mark Harvey

Marsh v Ministry of Justice

(QBD; Thirlwall LJ; 21 July 2017; [2017] EWHC 1040 (QB))

Personal injury—liability—negligence—breach of duty of care—prison officers—conduct—misconduct—disciplinary procedures—investigations—suspension—witness statements—psychiatric harm—Damages (Personal Injury) Order 2017

LT Breach of duty of care; Disciplinary procedures; Investigations; Prison officers; Psychiatric harm

The claimant James Marsh was a prison officer in a female prison. In January 2009, a prisoner ("the complainant") alleged that he had slapped her on the bottom. The prison took no action. Later that year, the claimant asked for the complainant to be moved, maintaining that she was making vindictive allegations against him.

In late 2009, police began an investigation of allegations that officers in the prison were involved in sexual misconduct with prisoners. In January 2010, the complainant was moved to another prison where she alleged that James Marsh had supplied her with spiked alcohol and had sexual intercourse with her. Mr Marsh was suspended from duty in February 2010 and the police searched his home.

In September 2010, the police indicated that Mr Marsh would not be charged. The Ministry of Justice instigated a disciplinary investigation into his conduct but suspended it in November 2010 because of ongoing criminal proceedings against other officers. Mr Marsh remained suspended on full pay and the disciplinary investigation resumed in October 2011.

In June 2012, the Ministry of Justice dismissed the disciplinary complaint and invited Mr Marsh to return to work. However, he was suffering from depression and unable to work. In May 2013, he was dismissed on ill health grounds. He claimed damages for psychiatric injury resulting from the negligence and/or breach of contract by the defendant Ministry of Justice.

The claimant maintained that the defendant had negligently and in breach of contract failed to investigate the first complaint when it was made and had failed to remove the complainant from the prison. He also asserted that the defendant had failed to complete the disciplinary process within a reasonable time, which prolonged his psychiatric injury.

Liability was denied and the defendant asserted that, in all probability, the claimant did misconduct himself, including by supplying alcohol or spiked alcohol to the complainant before engaging in sexual intercourse with her and by slapping or grabbing her buttock. At the end of the trial, the claimant applied to strike out the defence as an abuse of process.

Thirlwall J was not satisfied that the claimant had slapped or assaulted the complainant. She held that there was no credible evidence that he had supplied alcohol or had sexual intercourse with the complainant. She found that the claimant had failed to report his suspicions about sexual misconduct between the complainant and another prison officer. However, that had not been a reason to discipline him and the prison had still invited him to resume his post. Further Mr Marsh had been unaware of sexual misconduct on the part of another prison officer. Other allegations were unproved. The judge accepted that a few incidents might have occurred, but they did not prove that the claimant was liable to dismissal.

The judge found that there had been no breach of duty or contract in the period up to and including the search of the claimant's home and his suspension from duty. She concluded that if the slapping allegation had been investigated when it was first made, it would have been found to be malicious, but the complainant would not necessarily have been moved from the prison. There had been a delay of just over two months in moving her, but it was held that was not a breach of contract and did not expose the claimant to a risk of injury.

Thirlwall J also held that the defendant had not been under a duty to inform the police of exculpatory material before a decision was made to search the claimant's home. The decision to suspend him was not a breach of contract or duty of care. However, the defendant had breached its duty of care at common law and under contract by postponing its internal investigation in November 2010. The disciplinary process should have concluded by May 2011 when the suspension should have been lifted.[1] Without the breach of duty, the claimant would have recovered from the psychiatric injury and returned to work by May 2012. Accordingly, he was entitled to damages for the prolongation of his illness from May 2012.

The judge awarded general damages of £23,500. The claimant was awarded damages for loss of earnings, with a deduction for a discretionary payment which he had received to mitigate his loss of employment.[2] The court determined the correct reduction factor in respect of future loss of earnings. In respect of loss of pension, it applied the discount rate of -0.75% introduced by the Damages (Personal Injury) Order 2017.[3]

The judge held that the claimant had raised a number of justified concerns about the defendant's approach to the litigation. There were flaws in the way some of the statements had been drafted. Witnesses had been interviewed but statements not drafted for months or years. She commented that such a method was unlikely to achieve the best evidence. However, the judge said that she was quite sure that this was done because the pressure of work did not allow for the best preparation and not for any sinister reason. One defence witness had contacted the claimant's legal team to complain about an inaccuracy in his statement. However, the defendant's solicitor had removed the relevant passages and the judge concluded that no harm had been done to the claimant's case. She concluded that the defendant's conduct had not prevented a fair trial.

Judgment was entered for the claimant and his application to strike out the defence as an abuse of process was dismissed.

Comment

This snowball of a case, very much a matter of analysing truthfulness at trial, turned into a nightmarish quagmire of liability and quantum issues. Thirlwall LJ, trying the case at first instance before her promotion to the Court of Appeal in February 2017 retained the case until the bitter end. It was clearly no easy task: she heard evidence from 29 witnesses in a 15-day trial, imposed a limit on the number of pages in the bundles to 3,000 (although offered many thousands of pages more), and refused an application to extend the time estimate because "I considered then as I do now that the proposed number of witnesses and documents was wholly disproportionate to the issues and value of the claim".[4]

Having given a 197 paragraph draft judgment on liability in June 2017, the learned judge, perhaps somewhat optimistically, "expected agreement on quantum" in the light of her analysis. Unfortunately, the parties failed to agree, and after a further hearing and 43 more paragraphs in the judgment, the matter has been concluded—for now.

[1] *Malik v Bank of Credit and Commerce International SA (In Liquidation)* [1998] A.C. 20 followed.
[2] That payment was not a lump sum in respect of an ill-health pension, *Parry v Cleaver* [1970] A.C. 1 and *Longden v British Coal Corp* [1998] A.C. 653 not applied.
[3] Damages (Personal Injury) Order 2017 (SI 2017/206).
[4] *Marsh v Ministry of Justice* [2017] EWHC 1040 (QB) at [17].

The fallout here from malicious allegations against a male prison officer in Downview, a female prison, has been monumental. Dealing with false accusations, first of sexual assault, and then of rape allegedly induced by a "spiked drink", is unlikely to be straightforward, but the Ministry of Justice in a series of procedural blunders compounded the case. The famous aphorism of Denis Healey that "when in a hole stop digging" went unheeded.

The female prisoner making the allegations and trying to coerce other prisoners into supporting her fabrications was serving a 17-year sentence for drug smuggling. Some officers regarded her as a "very engaging character", others as "manipulative". Thirlwall LJ concludes that "It is likely that she was both, on the evidence".[5] Between 2006 and 2010, she was having a sexual relationship with Russell Thorne, a prison governor, who was then sentenced in July 2011 to a five-year prison term for wilful misconduct in a public office. Prosecuting counsel at the trial urged the jury to resist the temptation to view this crime as a "real life version of what 20 or 30 years ago the Carry On team might have suggested as 'Carry On Inside'".[6] Another prison officer, Christopher Bevan, threw himself from a fifth floor balcony on the morning of his criminal trial for related offences, and a third officer was released after two juries failed to agree on similar charges against him.[7]

These unedifying matters came to light when Mr Bevan visited a tattoo convention with a relatively new prison officer and "both had a great deal to drink". The new recruit was "upset and distressed by the nature and extent of the corrupt behavior" at HMP Downview and his statement led to a significant police inquiry, Operation Daimler. In one of several pre-trial hearings Sweeney J observed that "over 10,000 documents were obtained from the police" for use in this case, "proof positive" that no attempt had been made to restrict documents "which were proportionate and relevant to the pleaded issues", and that "On the contrary there had been something resembling an indiscriminate trawl".[8]

The unfortunate claimant, James Marsh, was trapped in this dragnet. In February 2010, a search warrant was executed by "between 8 to 10 police officers" early in the morning at his one bedroom flat, just as neighbours were leaving for work, an action regarded subsequently by a medical witness, Dr Vicenti, as contributing to stress and for being "somewhat heavy-handed … [leaving the claimant] feeling violated and overwhelmed".[9]

The claimant was then suspended from work and arrested with the two accusations made against him. The first accusation was originally that Mr Marsh had "slapped" a prisoner, but Thirlwall LJ noted that: "What began as a slap on the bottom became 'smacked, grabbed and then squeezed'."[10] The alleged victim was not available to give evidence at the civil trial, as she is "now living in Colombia". However, a full transcript of the defendant's disciplinary proceedings was available, which demonstrated a comprehensive destruction of her testimony; in consequence Thirlwall LJ says that the dismissal of this charge against Mr Marsh was "unsurprising".

While he had been "interviewed at length on two occasions by experienced police officers" and "answered all questions and denied the allegations", it was "plain that her complaint was malicious" and his accuser had been "seeking to coerce other prisoners to make false allegations".[11] When asked at the disciplinary hearing why she had lied repeatedly about the affair with her lover, the prison governor, the accuser responded "I would not say it was a lie, I was just omitting the truth".[12]

Given that three prison officers were prosecuted for misconduct in public office in respect of sexual relationships with prisoners, the second allegation against Mr Marsh of alcohol-induced rape on Christmas

[5] *Marsh v Ministry of Justice* [2017] EWHC 1040 (QB) at [23].
[6] "Prison chief who had sex with woman inmate jailed" *Reigate Mirror* 21 July 2011, "Affair officer guilty", *The Times*, 16 July 2011.
[7] "Officer was upset night before sex case trial", *Sutton Advertiser*, 27 January 2012.
[8] *Marsh v Ministry of Justice* [2015] EWHC 3767 (QBD).
[9] *Marsh v Ministry of Justice* [2017] EWHC 1040 (QB) at [183].
[10] *Marsh v Ministry of Justice* [2017] EWHC 1040 (QB) at [71].
[11] *Marsh v Ministry of Justice* [2017] EWHC 1040 (QB) at [8] and [11].
[12] *Marsh v Ministry of Justice* [2017] EWHC 1040 (QB) at [65].

Eve 2007 was clearly potentially more serious. Again, a judgment had to be made on the veracity of the accuser and her accomplices.

Thirlwall LJ notes that the accuser had made the "outrageous allegation" that a female prison officer had informed her that she "had seen officers raping prisoners"; this was strenuously denied by the female officer. The accuser blithely admitted having "blackmailed" a prison officer (her word) because of his relationship with a prisoner. With the overwhelming evidence that the accusation of rape was belatedly made (two years later) and was flimsy in the extreme, Thirlwall LJ concludes that there was no need to "rehearse any of this at greater length".[13] There was simply "no credible evidence in support" of this allegation of rape and in her judgment it "should not have been pursued in these proceedings".[14]

Two factors stand out. One is the fixation of the defendants, denying liability against all the odds and asserting to the last that the complainant did in fact misconduct himself in the manner suggested by a wholly unreliable source. And the second is the glacial delay in dealing with the disciplinary investigation, which when it was conducted was rapidly dealt with and an offer of reinstatement made.

The timeline is critical. By September 2010, the police indicated that the claimant would not be charged. But it took until June 2012 for the defendants to dismiss the disciplinary complaint and invite Mr Marsh to return to work. By then he was severely depressed. In the words of his counsel he had not been faced "with the ordinary storms of life, but with a hurricane".[15]

Thirlwall LJ steers a careful path through the paperwork mountain, and the continued claims of the Ministry of Justice about the alleged perfidious nature of the claimant. The "hurricane" of conjecture, hearsay, gossip and rumour against him seems unabated even to the end of this trial. On liability the learned judge adopts what she correctly notes as the "magisterial review" of the law on psychiatric "wounding" of Underhill LJ in *Yapp v Foreign and Commonwealth Office*.[16] While the suspension on full pay and the search warrant were distressing there was clearly much to be investigated at Downview, so it is the failure to carry out investigations in a timely manner and then the excessive prolongation of the suspension that are matters for redress.

At an earlier stage, if issues had been dealt with expeditiously, the claimant could have returned to prison work, which he took some pride in, and would have gone on in this career until aged 65. Having commenced an investigation its postponement in November 2010 was, in the view of Thirlwall LJ,[17] "a clear breach of the defendant's duty of care". In consequence, the medical experts were agreed that the claimant's subsequent problems with depression and alcohol were "aggravated by the continued suspension and the shame and humiliation of not being able to go back to work because of false allegations made against him".[18]

On quantum the expectation was certainly that the parties would be able to agree, and when they could not, the learned judge had to do this for them. Apart from a minor point on pension discount, where the new rate is applied from the Damages (Personal Injury) Order 2017, there seems little that could be controversial. But perhaps by this stage there was little trust remaining. Thirlwall LJ noted[19] that "The lack of focus in the defendant's case led to a huge workload which was wholly disproportionate to the real[20] issues" but disregards some of the counter-claims from the claimant's side by rejecting that this was done "for any sinister reason".

[13] *Marsh v Ministry of Justice* [2017] EWHC 1040 (QB) at [65] and [67].
[14] *Marsh v Ministry of Justice* [2017] EWHC 1040 (QB) at [83].
[15] Quoting Moore-Bick LJ in *James-Bowen v Commissioner of Police of the Metropolis* [2016] EWCA Civ 1217.
[16] See in particular [119] in *Yapp v Foreign and Commonwealth Office* [2014] EWCA Civ 1512; [2015] I.R.L.R. 112 .
[17] *Marsh v Ministry of Justice* [2017] EWHC 1040 (QB) at [161].
[18] *Marsh v Ministry of Justice* [2017] EWHC 1040 (QB) at [175].
[19] *Marsh v Ministry of Justice* [2017] EWHC 1040 (QB) at [235] and [232].

Practice points

- This was a long drawn out trial in respect of a very untoward situation in a female prison. Male officers were first allowed in female prisons in 1989, and vice versa, generally without any problems. Unhappily the backdrop to this case in Surrey is of flagrant abuse and corruption.
- At no time was the claimant charged with any offence, but to his bewilderment he was dragged into a large-scale police operation, Operation Daimler, which investigated a myriad of allegations, many made, as was subsequently established, maliciously.
- Psychiatric damage claims arising out of employment are increasingly common, but the key factor here in *Marsh* [2017] EWHC 1040 (QB) is timeousness of an investigative process.
- The Ministry of Justice should have at least made some attempt to keep within the time limits of their own procedures.
- Instead they made a classic error of suspending that investigation in November 2010 because of ongoing criminal proceedings against other officers, probably in the Micawberish hope that something might "turn up" to incriminate the claimant.
- Prolongation of the claimant's suspension led to increasing psychiatric damage, and ultimately to his incapacity in being able to return to work.

Julian Fulbrook

PT Civil Engineering v Davies

(QBD; Lewis J; 30 June 2017; [2017] EWHC 1651 (QB))

Personal injury—liability—negligence—duty of care—reasonable care—fire—motor vehicles—causation

Breach of duty of care; Causation; Fire; Motor vehicles; Negligence; Reasonable care

Paul Barry Davies, had been working as a self-employed ground worker. On 27 March 2014, he was returning to Aberdare driving a van owned by PT Civil Engineering ("PT"). There were two passengers with him in the vehicle. As the vehicle was travelling along the A470, a fire erupted in the vehicle causing the claimant and the two passengers to leap from the vehicle whilst it was still in motion. Davies sustained injuries and brought a claim for damages alleging that the accident had been caused by PT's negligence in failing to maintain the vehicle adequately or at all.

The judge considered the evidence of experts instructed by both parties. He held that there was no known cause for the fire. He found that the vehicle had been poorly maintained and inferred that that had caused the fire. PT appealed and submitted that on the evidence, the judge had erred in inferring that it had been liable.

Lewis J held that as a matter of principle, a defendant was liable to compensate an individual if the defendant owed him a duty of care to take reasonable care, he failed to do so and that failure caused the person to suffer loss or injury. The burden of proving those matters fell on the claimant. It was common ground that PT owed a duty to Mr Davies to take reasonable care to ensure that the vehicle that he provided was safe for the purposes for which it was to be used. The central question was whether PT had failed to exercise reasonable care and whether that failure had caused the fire, which in turn, caused the respondent to suffer his injuries.

At first instance the judge had accepted that the cause of the fire in the vehicle was unknown. The experts could not identify the precise cause of the accident. The judge sought to apply the maxim res ipsa loquitur, or to draw inferences that the fire must have been the result of a failure by PT to take reasonable care to maintain the vehicle adequately. He inferred that from the evidence of PT's expert that "a properly maintained electrical system did not usually burst into flames". Given that the van had been the subject of repeated faults requiring repair, he inferred that the cause of the accident was the negligent failure on PT's part to maintain it adequately.

Lewis J held that the judge had been wrong to draw the inference that he had on the facts as found by him. He accepted the experts' evidence, that the particular defects in the van were not linked to the cause of the fire in the vehicle. The mere fact of the previous defects could not of itself lead to the inference that the fire had been caused by those defects as there was no link between the defects and the fire.

In addition, Lewis J held that the expert's evidence did not support the inference that the judge had drawn. It had not been open to him to regard that evidence as indicating that a poorly maintained electrical system or a poorly maintained vehicle did not usually burst into flames and, therefore, to draw the inference from the fact that there had been poor maintenance that that had caused the fire.

The appeal was allowed and the claimant's claim failed.

Comment

It seems from what we know that Mr Davies, had been working as a self-employed ground worker. I suspect in the past he might well have been working "on the lump". My immediate thought when I read this case was to question the employment status of the claimant. We hear a lot today about the so called "gig economy". Workers in the gig economy are classed as independent contractors. But are they really?

In February 2017, in the *Pimlico Plumbers v Smith* case[1] the Court of Appeal held that although a plumber was "a self-employed contractor" he was a worker within the meaning of the Employment Rights Act 1996 s.230(3)(b) and the Working Time Regulations 1998 reg.2,[2] and his working situation fell within the definition of "employment" in the Equality Act 2010 s.83(2)(a). This was in spite of the fact that Pimlico Plumbers had no obligation to provide Mr Smith with work on any particular day, and if there was no work for him he was not paid.

The origin of "the lump" lay in the construction industry. It typically involved men working for periods of varying length on a single site, often as ground workers, for a single "employer". They usually did not supply their own tools; they rarely, if ever, supplied their own materials; and they rarely, if ever, quoted a contract price, but were paid by the day or the week, the price often being decided unilaterally by the "employer". There were fiscal advantages for both sides, and health and safety advantages for the employer. There was nothing approaching equality of bargaining power, and control of the work to be done and the manner of doing it lay substantially with the "employer".

The debate about who is an employee goes back many years. Could his case have been pursued as an employer's liability claim with all the additional legal protections that implies? The American Supreme Court, in *United States of America v Silk*,[3] asked the question whether men were employees "as a matter of economic reality". Was Mr Davies in reality a self-employed ground worker or legally an employee?

In *Market Investigations Ltd v Minister of Social Security*,[4] Cooke J considered the issue of who is an employee in the context of workmen's compensation legislation saying:[5]

[1] *Pimlico Plumbers Ltd v Smith* [2017] EWCA Civ 51.
[2] Working Time Regulations 1998 (SI 1998/1833).
[3] *United States of America v Silk* [1946] 331 U.S. 704.
[4] *Market Investigations Ltd v Minister of Social Security* [1969] 2 Q.B. 173.
[5] *Market Investigations Ltd v Minister of Social Security* [1969] 2 Q.B. 173 at 173.

> "The fundamental test to be applied is this: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?' If the answer to that question is 'yes', then the contract is a contract for services. If the answer is 'no', then the contract is a contract of service.
>
> No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases.
>
> The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determinative factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of the task."

This passage was expressly endorsed by the Privy Council in *Lee Ting Sang v Chung Chi-Keung*[6] and the thinking of it was developed by Henry LJ in *Lane v Shire Roofing Co (Oxford) Ltd*.[7] This was a case in which it was being contended by a Sch.D tax payer that his employer owed him duty of care in respect of health and safety at work as an employee.

Lane was injured while doing tiling work for the defendant building contractor who had advertised for men to work on a particular contract and had taken on Lane at a daily rate when he responded to the advertisement. Lane had at one time had his own one-man firm as a builder/roofer/carpenter, but that work had dried up, his public liability insurance had lapsed and at the time he answered the advertisement he was usually working for others. The defendant submitted that no duty of care was owed, because the claimant was an independent contractor. Henry LJ said:

> "We were taken through the standard authorities on this matter [including *Market Investigations*] … Two general remarks should be made. The overall employment background is very different today (and was, though less so, in 1986) than it had been at the time when these cases were decided. First, for a variety of reasons there are more self-employed and fewer in employment. There is a greater flexibility in employment, with more temporary and shared employment. Second, there are perceived advantages for both workmen and employer in the relationship between them being that of an independent contractor. From the workman's point of view, being self-employed brings him into a more benevolent and less prompt tax regime."

That sounds very like the "gig economy" to me. The protection of employee's rights in the employment protection legislation of the 1970s brought certain perceived disincentives to the employer to take on full-time long-term employees. Even in 1986 there were reasons on both sides to avoid the employee label.

But Henry LJ continued by saying:

> "… there were, and are, good policy reasons in the safety at work field to ensure that the law properly categorises between employees and independent contractors … Certain principles … emerge.
>
> First, the element of control will be important: who lays down what is to be done, the way in which it is to be done, the means by which it is done, and the time when it is done? Who provides (i.e. hires and fires) the team by which it is done, and who provides the material, plant and machinery and tools used?

[6] *Lee Ting Sang v Chung Chi-Keung* [1990] 2 A.C. 374 at 382D–G.
[7] *Lane v Shire Roofing Co (Oxford) Ltd* [1995] I.R.L.R. 493.

> But it is recognised that the control test may not be decisive—for instance, in the case of skilled employees, with discretion to decide how their work should be done. In such cases the question is broadened to whose business was it? Was the workman carrying on his own business, or was he carrying on that of his employers?"

That is where the economic reality test becomes so important.[8] The answer to this question covers much of the same ground as the control test (e.g. whether the workman provides his own equipment and hires his own helpers) but may also involve looking to see where the financial risk lies, and whether and how far he has an opportunity of profiting from sound management in the performance of his task.

Henry LJ importantly pointed out that these questions must be asked in the context of who is responsible for the overall safety of the men doing the work in question. The court not only held that the defendant was the plaintiff's employer, but described the situation as substantially nearer "the lump" than that of a specialist sub-contractor. *Lane* was an employee not an independent sub-contractor.

It seems to me from what we know that Mr Davies was, like *Lane*, an employee not an independent sub-contractor. He worked under a contract of service not for services. In such circumstances, the defendant should have assumed a responsibility for the health and safety of men like Mr Davies. That responsibility was equivalent to that of an employer to a direct employee.

If the defendant was the claimant's employer, it is clear that the Provision and Use of Work Equipment Regulations 1998[9] would have applied to the car as "work equipment" as defined in reg.2(1). It looks like it was being used by the claimant "at work", so that by reg.3(2) the requirements of the 1998 Regulations would apply to it. Those requirements include, by reg.5(1) that every employer shall ensure that work equipment is maintained in an efficient state, in efficient working order and in good repair. In a situation like this, when a fire erupted in the vehicle, as the Court of Appeal confirmed in *Stark v Post Office*[10] there would have been strict liability.

Of course, since 1 October 2013 under the post Enterprise and Regulatory Reform Act 2013[11] regime such a case as this, would not necessarily be straightforward. As here in *Stark*, the clamant was unable to establish negligence against the employer. He would not have recovered compensation for his injuries if he had not had the right to rely directly on the breach of the regulations. That right no longer exists. Cases like this can now very difficult.

However, that ignores the Employer's Liability (Defective Equipment) Act 1969 cl.1(1) of which states:

> "Where … (a) an employee suffers personal injury in the course of his employment in consequence of a defect in equipment provided by his employer for the purposes of the employer's business; and (b) the defect is attributable wholly or partly to the fault of a third party (whether identified or not), the injury shall be deemed to be also attributable to negligence on the part of the employer (whether or not he is liable in respect of the injury apart from this subsection)."

The act confirms that "employee" includes a person who is employed under a contract of service for the purposes of a business carried on by another person. "Equipment" includes any vehicle. This little used piece of legislation could have been the route to success for Mr Davies.

Practice points

- Many "self-employed" claimants are in fact legally "employees".

[8] See *United States of America v Silk* [1946] 331 U.S. 704.
[9] Provision and Use of Work Equipment Regulations 1998 (SI 1998/2306).
[10] *Stark v Post Office* [2000] I.C.R. 1013.
[11] Enterprise and Regulatory Reform Act 2013 cl.69 amended the Health and Safety at Work Act 1974 s.47 which contained a presumption that regulations made under the Act (in effect all post 1974 health and safety regulations) carried civil liability for breach, unless expressly excluded. The amendment *reversed* that presumption.

- Always consider "as a matter of economic reality" if the claimant was an employee.
- Always consider who was actually in control of the relevant work.
- Decide on the evidence whether the claimant worked under a contract *of* service or *for* services.
- If the claimant worked under a contract *of* service the "employer" should have assumed a responsibility for the health and safety equivalent to that owed to a direct employee.
- In accidents since 1 October 2013 involving a failure of "work equipment" a claimant may be able to rely on the Employer's Liability (Defective Equipment) Act 1969 which still imposes strict liability.

Nigel Tomkins

Case and Comment: Quantum Damages

Thomas V Hugh James Ford Simey Solicitors

(CA (Civ Div); Jackson LJ, Henderson LJ; 4 September 2017; [2017] EWCA Civ 1303)

Low value personal injury claims—professional negligence—solicitors' powers and duties—special damages—vibration white finger—breach of duty of care

LT Damages; Low value personal injury claims; Professional negligence; Solicitors' powers and duties; Vibration white finger

Graham Thomas worked as a coal miner from 1974 to 1991. In March 2000, he instructed the defendants to act as his solicitors in making a claim under a scheme set up by the Department of Trade and Industry seeking damages for vibration white finger. Claims such as this were of modest value and the scheme had been set up to enable them to be handled expeditiously and at modest cost.

Under the scheme, a person with Mr Thomas's level of disability was entitled to general damages and also special damages if other people were helping him with decorating, DIY, gardening, car washing and car maintenance.

The claim handlers made an offer in respect of general damages of £10,373.00. The solicitors advised Mr Thomas that he might be able to consider a claim for special damages if he was unable to carry out any of the specified tasks. The solicitors discussed special damages with him and the claimant instructed them that he did not wish to claim special damages. He stated that he was not able to provide evidence that he had received help with services. Mr Thomas indicated that he had received help with decorating, but that the people who had helped him had received cash in hand payments and would therefore be unwilling to provide confirmation. He accepted the offer of general damages in full and final settlement of his claim.

Seven years later another firm of solicitors, Mellor Hargreaves, came on the scene. They were advertising for new business. Their advertisement stated:

> "Thousands of ex miners have had these VWF claims settled for much less than they should have received."

Mr Thomas read the advertisement and went to see Mellor Hargreaves. Having taken advice, he commenced these proceedings alleging that if he had been properly advised he would have made a claim in respect of decorating, DIY and gardening. The judge found that there had been no breach of duty by the solicitors.

The claimant appealed and submitted that the solicitors had been in breach of duty by failing to provide an approximate valuation of the claim for services; failing to inform him of the availability of an interim payment in the event that he pursued a services claim; and treating his comment about cash in hand payments and difficulty in obtaining evidence as putting an end to the services claim.

It was accepted that the solicitors had not provided an approximate valuation of the services claim; had not informed the claimant that an interim payment was available in respect of the services claim; and had treated the claimant's comments as putting an end to the services claim. However, the Court of Appeal recognised that the issue was whether those facts constituted a breach of duty by the solicitors. They noted

that the original retainer required the solicitors to advise the claimant about his possible claims for general or special damages and to pursue such claims where appropriate. The solicitors had advised Mr Thomas about the possibility of a claim for special damages in respect of services and had discussed the matter with him. They had indicated that the amount of compensation payable under that head could be significant.

The judge had found the claimant was an intelligent and articulate man who knew his own mind and instructed his solicitors that he had decided not to pursue a claim for special damages. The Court of Appeal agreed. They held that the solicitors had not been under a duty to probe matters in the hope of changing his mind. In those circumstances, the quantification of special damages and the availability of an interim payment ceased to be relevant.

They held that it was not the role of a solicitor to tempt the client by referring to large sums once it was clear that supporting evidence for a claim was not available. Jackson LJ stated that if a client instructed his solicitor that he did not wish to pursue a particular head of claim and that he did not have evidence to support it, the solicitor was not necessarily under a duty to challenge that decision or to try to change the client's mind. He said[1]: "if the client is an adult of full capacity, there comes a point when his autonomy should be respected".

It was significant that the claim was a modest one which the solicitors were running under a fixed costs regime and under a scheme for dealing with high volume, low value personal injury cases. They held that there had to be a sensible limit upon what solicitors could be expected to do in such cases. Such schemes might be the only practicable way of facilitating access to justice in such cases at proportionate costs. The solicitors still had to exercise reasonable skill and care in advising clients and pursuing claims, but they could not be expected to turn over every stone and pursue avenues of enquiry which the client had closed down.

The solicitors could not be criticised for not going the extra mile.[2] On the judge's findings of fact, the solicitors were not in breach of duty. The appeal was dismissed.

Comment

The headlines in relation to this case have focused on the comments made in [50] and [51] of the judgment by Jackson LJ. The comments highlighted just one possible detriment to the civil justice system as a whole that comes from the use of a low cost scheme that benchmarks efficiency on the lowered costs of a claim being processed as opposed to individual justice.

In many cases, such an approach can also lead to under settlement. A significant part of the risk of under settlement comes from the de-skilling of the individuals who process the claims under those schemes. With a downward pressure on the costs recoverable for successfully pursuing certain types of claims also comes a real risk of costs savings being implemented by a reduction in the level of care and skill being made available to the client.

The remainder of the judgment focuses on that increasingly important area. Regrettably, the decision heightens the risk of further de-skilling. The traditional role of a legal representative in such a claim would be to, amongst many other things, advise on the likelihood of success, the availability of damages and importantly the likely quantum of any losses.

The proceedings brought by the second solicitors were in respect of alleged negligence by the first solicitors in not quantifying a claim for services and thereby giving inadequate advice on that issue. The simple fact is that Jackson LJ was correct to say that the role of the appeal court was narrowly focused on whether the following facts found by the court below amounted to a breach of duty:

- A failure to provide a valuation of the services claim.

[1] *Thomas V Hugh James Ford Simey Solicitors* [2017] EWCA Civ 1303 at [42].
[2] *Procter v Raleys Solicitors* [2015] EWCA Civ 400 applied

- A failure to advise on the availability of an interim payment in the event of a services claim being made.
- Once the solicitor had been told by the client that they could not find evidence to quantify the loss of the services they treated that as bringing an end to that claim.

The issue was properly defined as a question of how far does a solicitor have to go where the client has indicated an unwillingness to pursue a line of enquiry—here that of services.

The decision, in turn, was simple. Once the client had instructed the solicitors not to pursue the claim for services and indicated a lack of evidence to support any such claim there is no duty to challenge that decision. Jackson LJ, in turn, commented that:

> "The CHA is a scheme for dealing with high volume, low value personal injury cases for fixed costs. There must be a sensible limit upon what we can expect solicitors to do in such cases."

Whilst such schemes do provide a means of accessing justice at a proportionate cost the ultimate loser in that scheme is to be the client. If solicitors are to be held to a "realistic standard" based on the nature of the low value scheme then that inevitably means a downward pressure on the quality of advice.

Practice points

- This should not though be seen as a judgment that opens the floodgates to limited advice to clients in such schemes.
- The "realistic standard" is something that will depend on the facts.
- The court here concluded that there was no breach on the basis of the claimant's capacity to make independent decisions and the fact that the solicitor met with the claimant personally on two occasions.
- Such face to face meetings, I would suggest, are not a regular feature of how cases are pursued in low value schemes.
- If that standard is required, then there must be a realisation that the level of costs fixed for similar schemes should reflect that and make allowance for it.

Brett Dixon

QUANTUM/DAMAGES

Blackmore v Department for Communities and Local Government

(CA (Civ Div); Lloyd Jones LJ, David Richards LJ, Moylan LJ; 27 July 2017; [2017] EWCA Civ 1136)

Damages—personal injury—measure of damages—breach of statutory duty—contributory negligence: asbestos—lung cancer—smoking

LT Asbestos; Cancer; Causation; Contributory negligence; Fatal accident claims; Personal injury claims; Smoking

This fatal accident claim arose out the death of Cyril Leonard Hollow on 28 October 2010 as a result of lung cancer. It was admitted that during his employment with the defendant he was exposed, as a result of breaches of statutory duty and negligence, to asbestos dust. Causation was established, and primary

liability was not in issue. Quantum of damages under the Law Reform (Miscellaneous Provisions) Act 1934 and the Fatal Accidents Act 1976 was agreed in the sum of £118,460.57.

The sole issue at trial was whether by reason of the fact that Mr Hollow was a smoker (and continued to smoke when he knew or ought to have known that in so doing he was liable to damage his health) there should be a finding of contributory negligence and if so at what level.

On 23 October 2014, Judge Cotter QC held that any approach to assessing relative contribution or apportionment had to take into account the fact that cancer was an indivisible injury, and there were possibly other factors at play. He found that reliance could be placed on the analysis of relative risk. However, this could only be used as a basic broad guide and with caution.[1] The agreed view was that historical lack of knowledge of the dangers of smoking required a deduction for contributory negligence from the mid-1970s only. Any calculation should ignore the contribution to risk of smoking before then. It should also build into the assessment of relative risk, as against asbestos, the additional synergistic effect of the combination of asbestos exposure and tobacco for the 10 years preceding the mid-1970s.

The judge held that simply could not be done with the precision put forward by the defendant's expert. It would be wrong to proceed on the assumption that the precise calculation based on relative risk from smoking and exposure to asbestos produced by the expert was a sufficiently reliably accurate assessment of the biological processes at play that it could translate directly into an apportionment of contributory fault. As broad guidance as to relative contributions the court proceeded to use a relative risk for asbestos towards the bottom of the range of 2–5, and a relative risk for smoking between 5.5 and 9.1.

The defendant's submission relied on the concept of blameworthiness as being no more than a statement of the extent to which the claimant contributed to the damage. Judge Cotter QC held that such an approach was wrong in principle. It placed no extra weighting on the fact that a statutory duty was imposed upon the defendant and was breached. Parliament had placed directly on the employer's shoulders the responsibility for ensuring compliance with statutory duties. Such duties bore in mind the cross-section of individuals who would be affected by breach, including the occasionally careless and those whose care for their own health could be seen as below that required. The consequences of the defendant's breaches of duty should not be emasculated by a high finding of contributory negligence.[2]

The judge concluded that the risk from smoking in this case was probably between double and treble the risk from asbestos, viewing the assessment of relative risk in the round. Mr Hollow was a smoker long before he commenced employment with the defendant, and long before it was known to be a hazard to health. He did not have an extensive history of having been advised to stop smoking. He had tried to give up twice, and eventually succeeded in cutting down. Having considered all the relevant features, the judge assessed the degree of contributory negligence at 30%.

On 26 June 2016, although there had been a serious failure to comply with the rule as to time limits and no excuse for the failure the defendant was granted leave to appeal. They contended that the judge's conclusion the defendant should bear the lion's share of responsibility even where the court concludes that the evidence shows that the claimant's smoking was a greater contribution to the cancer than asbestos exposure was wrong in law. The Court of Appeal held that the correct approach to the assessment of contributory negligence was as summarised by Stanley Burnton J, in *Badger v Ministry of Defence*:[3]

> "… [O]nce contributory negligence has been established, the court must take into account both the extent of the claimant's responsibility for his injury and damage and the blameworthiness of his conduct as opposed to that of the defendant in deciding on the reduction in damages that is just and

[1] *Shortell v BICAL Construction Ltd* , unreported, 16 May 2008 and *Sienkiewicz v Greif* [2011] UKSC 10; [2011] 2 A.C. 229 applied.
[2] *Reeves v Commissioner of Police of the Metropolis* [2000] 1 A.C. 360, *Toole v Bolton MBC* [2002] EWCA Civ 588, *Ashbridge v Christian Salvesen Plc* [2006] CSOH 79 and *Badger v Ministry of Defence* [2005] EWHC 2941 (QB) applied.
[3] *Badger v Ministry of Defence* [2005] EWHC 2941 (QB) at [16].

> equitable. The decision as to the appropriate reduction in the claimant's damages is to be dealt with in a broad, jury like and common sense way …"

They confirmed that in carrying out the apportionment exercise under s.1 of the 1945 Act, Judge Cotter QC gave appropriate weight to all of the competing considerations and underlying policies. Had his approach been limited to an assessment of relative contributions to causation, it would necessarily have failed to differentiate between the blameworthiness of the employer in exposing employees to asbestos and that of the employee in smoking. They agreed with the judge that such an approach would have been wrong in principle.

The court reaffirmed that there is a particular policy underlying Parliament's strict prohibition of the exposure of workers to asbestos and other harmful substances which needs to be reflected in the apportionment of responsibility.[4] They held that the judge was right to give very considerable weight to the blameworthiness of the employer in exposing its employee to asbestos in breach of a strict statutory duty in circumstances where the dangers of asbestos to health were well known. By comparison, a lesser degree of blame attached to the conduct of Mr Blackmore in continuing to smoke after the dangers of smoking to health became known.

In addition, as the judge concluded, it was necessary to take account of the earlier period of innocent smoking and the medical uncertainty attaching to the impact and synergistic effect of that earlier period of innocent smoking. In all the circumstances, the court considered that the judge's apportionment of contributory negligence at 30% was well within the range of options open to him.

Judge Cotter QC's approach was entirely in conformity with that adopted in the three first instance High Court decisions[5] referred to by him concerning responsibility in cases of exposure to asbestos by a worker who smoked. The reduction for contributory negligence at which he arrived was consistent with the reductions in those cases. The appeal was dismissed.

Comment

Mesothelioma is not the only asbestos related cancer that kills those exposed to the carcinogenic mineral. It is estimated by the HSE that there are in excess of 2,000 asbestos related lung cancer ("ALC") deaths each year in Britain. However, the overall scale of ALC deaths has to be estimated rather than counted. Unlike mesothelioma, (a cancer of the lining of the lung caused by asbestos exposure), ALC cases are not always properly diagnosed as such. The competing cause of smoking is often blamed for lung cancer and an ALC diagnosis relies upon the diagnosing consultant asking pertinent questions about the patient's past exposure to asbestos.

Many of those exposed to asbestos at work also smoked, and we know that smoking tobacco and inhaling asbestos fibres interact synergistically within the body, causing a multiplicative rather than an additive risk of the person developing ALC. Consequently, issues of contributory negligence and the contribution of the sufferer to their own cancer by their past smoking history are relevant in ALC cases in a way that doesn't arise in mesothelioma cases, where smoking is not relevant as a causal factor.

The traditional approach taken by the courts when determining contributory negligence in such cases has hitherto been to factor into their calculation both causative potency and blameworthiness (on both sides). The relevant legislation is to be found in Law Reform (Contributory Negligence) Act 1945 s.1:

[4] *Reeves v Commissioner of Police of the Metropolis* [2000] 1 A.C. 360 considered.

[5] *Badger v Ministry of Defence* [2005] EWHC 2941 (QB); *Shortell v BICAL Construction Ltd* , unreported, 16 May 2008 (Mackay J); and *Horsley v Cascade Insulation Services Ltd* [2009] EWHC 2945 (QB).

> "1. **Apportionment of liability in case of contributory negligence**
>
> Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."

The appellants were seeking to persuade the court in ALC cases that moral blameworthiness should not factor in the calculation. They sought to argue that causative potency alone was relevant when apportioning blame.

Therefore, the stakes were high for both sides in this appeal. If the appellants had been able to persuade the court that a purely mathematical calculation of the relative contribution to risk was the appropriate way of calculating contributory negligence in ALC cases, then the savings to the insurance purse could have been significant: not only in this case (where based upon the defendant expert's calculations it would have meant the deceased was between 85–90% contributory negligent) but also in many other cases.

The Court of Appeal, however, were not dissuaded in this case from the well worn path of adopting a holistic approach to the calculation of contributory negligence in such cases. They were not persuaded by the appellants arguments that a pure calculated/scientific approach based on epidemiology should be preferred and that the courts should specifically exclude considerations of blameworthiness from assessment of contributory negligence in cases where a precise mathematical calculation could be made as to causative percentages of competing agents.

Interestingly, this was in a context where both experts in the case agreed that tobacco smoke is the most common cause of cancer of the lungs, with exposure to asbestos being the second most common cause.

It was also against a background of this particular claimant smoking from age 14 until his death at age 74, and being advised to stop by his GP in 1976. So arguably he had made a significant contribution to his own condition although evidence suggested he had tried to give up smoking several times unsuccessfully.

This is also in a context in which the vast majority of those suffering or who will suffer from ALC are also either past or current smokers as that was typical of the generation predominantly affected by this asbestos related condition.

Had the court accepted the appellants arguments, then their expert's mathematical calculation (albeit itself questionable and not agreed as correct by either the judge at first instance or the claimant) would have resulted in the deduction for contributory negligence being in the region of 85% to 90%.

The court was clear that a key principle underpinning the Law Reform (Contributory Negligence) Act 1945 s.1 was to ensure that concepts of relative moral blameworthiness were weighed in the balance. So negligently exposing your employees to asbestos in breach of statutory duties imposed by parliament on employers was a relevant consideration when determining contributory negligence. The intent and purpose behind the statute, reflected in its wording, was to ensure that the courts had sufficient flexibility to allow them to take into account and weigh all factors, both scientific as to causative potency but also crucially blameworthiness on both sides. This allowed the courts flexibility to come to a broad brush decision as to what the court considered to be "just and equitable".[6]

The Court of Appeal was keen to reiterate that the application of contributory negligence was a "broad jury question" and should not purely be left to scientific causative statistical data. They quoted Mackay J in *Shortell v Bical*[7] with approval:

[6] *Davies v Swan Motor Co (Swansea) Ltd* [1949] 2 K.B. 291.
[7] *Shortell v Bical* , unreported, 16 May 2008.

> "It is helpful to have regard to the kind of detailed calculations … (that deal with relative risk) … the final stage of any judgment of contributory negligence is a jury like exercise decided on a broad brush and common sense basis."

One could argue that the appellant expert's scientific calculation was itself flawed and therefore it was not really a scientific approach at all. One of the great difficulties with ALC cases is that there is no precise way of proving what has caused the ALC. Experts agree that smoking is the primary cause of lung cancer and asbestos another main cause. They also agree (as previously stated) that these agents interact with each other in a synergistic rather than a multiplicative way to cause the ALC. So is it even possible within medical science to have such a precise mathematical calculation at all regarding the relative percentage that smoking rather than asbestos has caused in any particular ALC?

In my view, even if the court and respondents had accepted the appellants expert's mathematical calculation as of fact and agreed the calculation could be made with this level of precision on ALC cases, the court would have come to the same view that the findings in relation to contributory negligence should not solely be based on scientific causes but on the basis that moral blameworthiness should form a significant part of the rationale for imposition of the relevant percentages when apportioning blame in such cases. This is clearly a public policy decision underpinning the act itself and the court will not easily abandon it.

One of the arguments deployed by the appellants was that because smoking was not a work related activity, it should fall outside the scope of contributory negligence jurisprudence. They opined that it should be treated more like a contributory factor and dealt in a way analogous with the Civil Liability (Contribution) Act 1978 s.2; i.e. more akin to a concurrent tortfeasor.

This argument was rejected by the Court of Appeal, which followed the clear line of case law in this area including the Supreme Court in *Sienkiewicz v Grief*,[8] the High Court decision in *Shortell v Bical* and *Badger v Ministry of Defence*.[9] The case of *Badger* makes clear that an individual cannot be criticised for smoking prior to the mid-1970s and this date was cited with approval in *Blackmore*.

Another important consideration is the interaction between the *Blackmore* case and the recently decided case of *Heneghan v Manchester Dry Docks*.[10] These cases were heard at similar times but *Blackmore* at first instance was heard before *Heneghan* at first instance. The *Heneghan* first instance judgment does not refer to *Blackmore*. The *Heneghan* Court of Appeal was heard before the *Blackmore* Court of Appeal Decision and in *Heneghan* the Court of Appeal did not refer to the *Blackmore*. The Court of Appeal in *Blackmore* do refer to *Heneghan* in passing at [33].

It is regrettable that the judges in the two cases did not have the opportunity to consider in the round the arguments deployed in both cases at all stages. Amongst asbestos practitioners there is broad agreement that this area of law is crying out for greater clarity. Reading both cases also illuminates how much issues of causation and contributory negligence in this complex area of asbestos litigation are inextricably linked and that perhaps there has been a missed opportunity here for the courts to clarify matters.

In *Blackmore*, there was only one defendant that exposed the decreased negligently to asbestos dust and crucially the defendant had admitted breach of duty and causation (that it had doubled the risk of the claimant contracting ALC) and so that was not in issue. This meant that ordinary causation principles applied, i.e. the asbestos exposure was at a level sufficient to double the risk of contracting lung cancer, therefore apportionment or not between multiple defendants was not something that needed to be considered. All that needed to be considered was contributory negligence, looking at both the relative contributions to the Deceased's death of smoking and asbestos exposure and the approach the court should take when deciding on the percentage for contributory negligence purposes.

[8] *Sienkiewicz v Grief* [2011] UKSC 10.
[9] *Badger v Ministry of Defence* [2005] EWHC 2941 (QB).
[10] *Heneghan v Manchester Dry Docks* [2014] EWHC 4190 (QB) and [2016] EWCA Civ 86.

In *Heneghan*, there were multiple tortfeasors but only one of those tortfeasors could be sued. The claimant had smoked in *Heneghan* (as in so many ALC cases) but both the experts in *Heneghan* had agreed that the deceased's smoking history was not significant enough in and of itself to have caused the lung cancer, but had acted in a synergistic way with the asbestos. This meant that there was agreement that the background cause of the ALC was the asbestos exposure.

The Court of Appeal in *Heneghan* adopted a two-stage test. Stage one involved the claimant establishing medical causation as between the competing causes of smoking and on the basis of a material contribution to risk analysis. Stage two involved the court apportioning damages between tortfeasors (sued and unsued), in line with the contribution to increase in risk test. So the claimant only recovered the percentage of damages against the defendant to which that particular defendant had been held to expose the deceased rather than on a 100% basis from the sued defendant.

The court in *Heneghan* did not seem to consider the effect of the smoking in terms of contribution when considering apportionment and did not look at contributory negligence in that particular case.

The interaction between the two decisions is complex and worth deeper analysis and leaves many questions unanswered. There is, of course, the possibility of certain factual scenarios of a claimant or a deceased being exposed by more than one tortfeasor to asbestos but also to having smoked more than the deceased in *Heneghan*, therefore the smoking being the background cause of the asbestos related lung cancer rather than the asbestos, or there being a dispute between both sides as to the background cause. In this scenario, what would happen if causation could not be established on the doubling of the risk basis, but instead was established on the material contribution to risk test (i.e. *Fairchild*)? This leaves open a possibility of defendants in certain factual scenarios arguing that damages should be apportioned in very low percentages based on material contribution to risk and it seems likely that there will be further litigation on this point, indeed one cannot see how there will not be given the current levels of uncertainty.

The final point to consider is whether or not this was in fact a victory for claimants or a hidden one on some ways for defendant insurers. The Appellants, on the face of it, lost their primary argument that findings of contributory negligence in ALC cases should be solely limited to a mathematical calculation as to relative contribution to risk. However, in previous ALC cases dealing with contributory negligence for smoking, findings of 15% (*Shortell*) and 20% (*Badger* and *Horsley v Cascade Insulation Services*[11]) have been made by the courts.

In this case, the judge at first instance, considering all the relevant features of the case, including the respective culpability of the defendant for exposing the deceased to asbestos as opposed to the claimant's smoking history, decided to assess contributory negligence at 30%. This is higher than in other decided cases despite rejecting the defendant's primary arguments as to the approach to be taken in making that assessment.

This leaves open the possibility that in certain cases, a defendant could argue there should be higher rates of contributory negligence than the 30% found in this case.

The judge at first instance in Blackmore was clear that the "rule of thumb" was that if there is a breach of statutory duty, then contributory negligence should not exceed 50% and the Court of Appeal did not interfere with that part of the judgment. I think it unlikely that the 50% point will ever be breached by defendant insurers. What *Blackmore* has reiterated is that the courts remain set on ensuring the moral blame worthiness of exposing workers to carcinogenic asbestos dust is not minimised as a matter of public policy.

However, that does leave open the possibility that in the right of sort of case, where perhaps there is a smaller, ill-resourced and arguably therefore more ignorant employer that persuasive arguments could be made around knowledge of risk and foreseeability. Combine that with a claimant who has been a heavy smoker from a young age and has refused to give up despite repeated warnings, then it is not beyond the

[11] *Horsley v Cascade Insulation Services* [2009] EWHC 2945 (QB).

realms of possibility that there could be a finding of contributory negligence for smoking that exceeds the 30% mark.

This actually gives the defendants in ALC cases some leeway they didn't have previously to start to argue for higher levels of contributory negligence for smoking than we have hitherto seen.

Practice points

- It is clear that the courts are not going to be persuaded by pure mathematical calculations in ALC cases. They are keen to ensure that the jury broad brush common sense approach is applied when considering contributory negligence.
- The question as to what would happen in a multi-defendant case where doubling of the risk cannot be proven and yet the claimant was a heavy smoker with a background cause to the lung cancer being that of smoking with asbestos as the contributory factor remains to be determined and the law in this area remains unclear for both claimant and defendant practitioners alike.
- It is vitally important to obtain a detailed history from the claimant if instructed during his lifetime and the family if instructed after death of the claimant/deceased's smoking history, including attempts to give up smoking and to properly advise claimants as to the possible risks regarding contributory negligence findings exceeding the 20% mark previously seen as "standard".

Kim Harrison

Shaw v Kovac

(CA (Civ Div); Davis LJ, Underhill LJ, Burnett LJ; 18 July 2017; [2017] EWCA Civ 1028)

Clinical negligence—personal injury—measure of damages—loss of personal autonomy—bias—consent to treatment—duty to warn—informed consent—recusal—risk—surgical procedures—Administration of Justice Act 1982 s.1

Clinical negligence; Consent to treatment; Informed consent; Measure of damages; Recusal; Risk; Surgical procedures

The claimant Mrs Gabriele Shaw claimed damages against the first defendant surgeon and second defendant NHS trust on behalf of the estate of her deceased father Mr William Ewan. At age 86, Mr Ewan had been diagnosed with aortic valve sclerosis. He was referred to the trust to see if he was suitable for a transcatheter aortic valve implantation ("TAVI"), a new procedure at the time, whereby an artificial valve was placed into the defective valve. The alternative would have been open heart surgery or conservative symptomatic treatment. An angiogram was performed, and it was advised that he was suitable for the TAVI procedure. Shortly after the operation, he began to bleed from the aorta, and despite attempts to stem the blood flow, he died.

The claimant's case was that the deceased should have been told the risks of the new procedure and if he had been properly informed he would not have proceeded any further. After disclosure, the defendants agreed not to defend the claim and judgment was entered against them. The heads of loss were: (i) pain,

suffering and loss of amenity; (ii) damages for loss of expectation of life; (iii) funeral costs and expenses. Damages were assessed at £15,500, including £5,500 for pain, suffering and loss of amenity.[1]

The claimant appealed and subsequently made a late application for two of the appeal judges to recuse themselves. One of the judges had been involved in earlier judicial review proceedings against the outcome of an inquest into her father's death. The second judge had been involved in an application for permission to appeal against the outcome in that case. Both judges had made decisions adverse to the claimant.

The claimant submitted that:

- the judges had made adverse remarks about her; the first judge had suggested that a schedule she had prepared in the judicial review proceedings was misleading and the second judge had agreed with comments that her judicial review case was based on speculation and assertion; in addition, the first judge had found that her father had given informed consent; and
- a sum should have been awarded for the unlawful invasion of her father's personal rights and his loss of personal autonomy caused by the failure to obtain informed consent.

On apparent bias the court held that even if the first judge's comment about the claimant's schedule was seen as a reproof, it could not begin to show a predilection against her when viewed from the perspective of a fair-minded and informed observer.[2] It plainly came within the principles set out in *Locabail (UK) Ltd v Bayfield Properties Ltd*,[3] where it was said that:

> "the mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection."[4]

The comments of the second judge also fell into that category.

The first judge had not made a decision about informed consent. In any event, there was no longer an issue about informed consent because the defendants had conceded the point, and judgment had been entered against them. The fact that the claimant did not wish to have two judges sitting on her appeal who had previously been involved in decisions adverse to her could not, of itself, procure a recusal. The law was clear and the test was objective. There was no proper basis for recusal and apparent bias did not arise. The judges had a judicial obligation to hear the appeal.

The court then turned to loss of personal autonomy as a cause of action. The claimant had suggested that the wrongful invasion of her father's personal autonomy represented a separate and free-standing cause of action. As such a cause of action had never been pleaded it could not be raised on appeal. Even so the court confirmed that it was clear from the authorities that the failure to obtain informed consent should be formulated as an action in negligence/breach of duty.[5]

Loss of personal autonomy was then considered as a head of loss. The court noted that a free-standing award as suggested by the claimant had never been expressly awarded in a negligence case in any previous reported authority. The claimant could derive no real assistance from the decisions in *Chester v Afshar*[6] or *Montgomery v Lanarkshire Health Board*[7] in order to justify the head of loss she proposed. They concluded that it was contrary to legal principle.

[1] *Shaw v Kovac* [2015] EWHC 3335 (QB).
[2] *Porter v Magill* [2001] UKHL 67 followed.
[3] *Locabail (UK) Ltd v Bayfield Properties Ltd (Leave to Appeal)* [2000] Q.B. 451.
[4] *Locabail (UK) Ltd v Bayfield Properties Ltd (Leave to Appeal)* [2000] Q.B. 451 and *Otkritie International Investment Management Ltd v Urumov* [2014] EWCA Civ 1315 followed.
[5] *Chester v Afshar* [2004] UKHL 41 and *Montgomery v Lanarkshire Health Board* [2015] UKSC 11 followed.
[6] *Chester v Afshar* [2004] UKHL 41.
[7] *Montgomery v Lanarkshire Health Board* [2015] UKSC 11.

The court pointed out that the existence of the patient's personal rights had always been the foundation of, and rationale for, the existence of a duty of care on doctors to provide proper information. An additional award was unnecessary, as the appropriate damages were those for pain, suffering and loss of amenity in the usual way. If an individual's suffering was increased by his knowledge that his "personal autonomy" had been invaded through want of informed consent, that could be reflected in the award of general damages.[8]

If the claim to an additional award had been well-founded an award would also in principle have been recoverable where there was a lack of informed consent but the operation was a success, or where the patient would have consented even if given the correct information. They could see no justification for such an outcome. Nor were there any policy reasons to justify imposing a fixed sum for such a head of loss. In reality, her claim was for loss of expectation of life, but that was precluded by the Administration of Justice Act 1982 s.1. Moreover, if what was sought was vindicatory damages, that was also precluded for the reasons given in *R. (on the application of Lumba) v Secretary of State for the Home Department*.[9] The appeal was dismissed.[10]

In our jurisdiction awards for fatal injury are atrociously low, and if there is no basis for making a dependency claim the overall quantum can seem wholly disproportionate to the harm caused. Relatives in this situation routinely find this hard to understand or accept. In the present case, the deceased's daughter was a qualified though non-practising barrister and it is clear that she wanted to do all she could to ensure that there was atonement for her father's death. This included procuring a lengthy jury inquest. Her persistence was saluted by Hallett LJ who said that "no daughter could have done more or fought harder to ensure that the circumstances of her father's death were brought to light".[11]

In the civil action, no doubt recognising the limited quantum available, she included claims for "restitutionary damages … and punitive damages (exemplary and/or aggravated damages)". Unsurprisingly these claims were struck out by the Master at an interlocutory stage. Exemplary damages are only available in very limited circumstances and not typically for negligence.[12] Aggravated damages are also tightly confined and are to compensate for a person's injured feelings and mental distress arising from the motives and conduct of the defendant.

Undeterred by the striking out of her restitutionary claim, the claimant contended at trial that she should be able to recover damages for the invasion of her father's personal right to choose what treatment to accept, and for the associated loss of his autonomy. This, she claimed, formed a free-standing cause of action for which support could be derived from the judgments in *Chester v Afshar*, and *Montgomery*. The trial judge rejected the submission as did the Court of Appeal who found the arguments "shifting" and "unfocussed".

The first hurdle which could not be overcome was that the proposed cause of action had not been pleaded. It was not permissible to permit any cause of action, let alone a novel cause of action, to be tried where it had not first been pleaded assuming limitation issues could be overcome. The only cause of action pleaded was negligence in failing to obtain informed consent, and the remedy for this was damages on a conventional basis.

Such damages would include pain, suffering and loss of amenity ("PSLA"), but could not include any loss of expectation of life as such was expressly prohibited by the Administration of Justice Act 1982 s.1. Injury to feelings including any indignity, mental suffering, distress, humiliation or anger can be brought into account in an award of PSLA,[13] which can also include the suffering endured by a person knowing

[8] *Richardson v Howie* [2004] EWCA Civ 1127 applied.
[9] *R. (on the application of Lumba) v Secretary of State for the Home Department* [2011] UKSC 12.
[10] *R. (on the application of Lumba) v Secretary of State for the Home Department* [2011] UKSC 12 followed.
[11] *Shaw v Kovac* [2015] EWHC 3335 (QB) at [24].
[12] See *Kuddus v Chief Constable of Leicestershire* [2001] UKHL 29; [2002] 2 A.C. 122.
[13] See per Thomas LJ in *Richardson v Howie* [2004] EWCA Civ 1127.

that their autonomy had been invaded through want of informed consent; but lack of informed consent does not give rise to any new cause of action such as to warrant a separate award of compensatory damages. What was being claimed was not only novel and not supported by authority, but it was contrary to legal principle.

Where Lord Steyn in *Chester* had referred to the necessity to ensure the autonomy and dignity of each patient,[14] he offered this as being a reason why a doctor should provide information before obtaining consent, not as a free-standing actionable right. In the same case, Lord Hoffmann (in his dissenting judgment) had in fact contemplated that there might be the potential for a "modest solatium" in cases where doctors fail to warn patients of risks, with a view to vindicating the patient's right to choose for himself. However, he rejected the proposition stating that the law of torts would be an "unsuitable vehicle for distributing the modest compensation which might be payable".

In an apparent effort to assist Mrs Shaw's arguments that there should be a new and novel cause of action, Davis LJ raised the issue of "vindicatory damages" stating that there was authority at a high level supporting an award of such damages for egregious violation of constitutional rights,[15] though the scope for such a remedy was extremely limited. Counsel for Mrs Shaw denied any suggestion that an award of vindicatory damages was being sought, and instead contended that compensatory damages were the appropriate remedy.

In argument it was also noted that consent cases in clinical negligence are not treated as trespass to the person actionable per se in the absence of fraud or bad faith. This is because the consent given is not regarded as a nullity.[16]

One of the many reasons found by the Court of Appeal for rejecting Mrs Shaw's arguments on the appeal was that it was not possible to identify a principled basis upon which the courts could assess damages under the new cause of action claimed. Moreover, the right not to have one's body invaded without informed consent was the same from one individual to the next. Whilst this is true, it seems to the author that the assessment of damages for such a cause of action—if established—could be dealt with on the basis that you leave assessment to the hypothetical jury (which applies to any head of general damages).

In conclusion, what the claimant in this case was really trying to do was get around the statutory (AJA s.1) prohibition on claims for loss of expectation of life, and to overcome the desultory award for PSLA. The case has usefully clarified conventional wisdom which is that consent cases do not give rise to any new cause of action based on human rights-type principles surrounding the sanctity or autonomy of the individual. The *Montgomery* decision has perhaps given sufficient recognition to the court's respect for fundamental human rights without the need for a new cause of action, and in the present case it was held that there was no need of a new award of the type sought even allowing for the incremental development of the common law.

Practice points

- It is perhaps obvious, but reliance on novel causes of action requires well honed, focussed and coherent submissions. Even more essential is the need to plead the cause of action in good time and comprehensively. The viability of the cause of action could then be addressed at an interlocutory stage.
- Where apparent bias is raised the test is objective and cannot be determined by the subjective views or wishes of the objecting party.

[14] See [18] of *Chester v Afshar* [2004] UKHL 41.
[15] See *Shaw v Kovac* [2017] EWCA Civ 1028 at [53] citing *Att-Gen of Trinidad and Tobago v Ramanoop* [2005] UKPC 15.
[16] See, e.g. *Chatterton v Gerson* [1981] Q.B. 432.

- There is a judicial obligation to carry on hearing cases if recusal is not warranted on objective assessment even if it would make the judge (and the parties) more comfortable if the recusal took place.[17]
- If there is to be a change to the abysmally low level of damages for fatal accident it is going to have to come from the Government as the courts cannot address it through the common law.

Nathan Tavares

[17] See Chawick LJ in *Triodos Bank NV v Dobbs* [2005] EWCA Civ 468.

Case and Comment: Procedure

Howe v Motor Insurers' Bureau

(CA (Civ Div); Sir James Munby PFD, McFarlane LJ, Lewison LJ; 6 July 2017; [2017] EWCA Civ 932)

Civil procedure—personal injury claims—road traffic accidents—costs—motor insurers' bureau—untraced drivers—Motor Vehicle (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003—EU law—interpretation—principle of effectiveness—principle of equivalence—damages—civil debts—qualified one-way costs shifting—CPR r.44.13

LT Compensation; Motor Insurers' Bureau; Personal injury claims; Principle of effectiveness; Qualified one-way costs shifting; Road traffic accidents

On 30 March 2007, Michael Howe, was rendered paraplegic. He was driving in France and collided with a wheel which came off a lorry ahead of him. Investigation by the French authorities drew a blank as to the identity of the lorry from which came the wheel or its driver or its insurer.

Mr Howe informed the MIB of the accident later in the year. The MIB handled the driver's claim on behalf of its equivalent French organisation ("the FDG"). Negotiations between the parties continued for some years, with the driver being medically examined and the FDG making interim payments. In 2014, the FDG refused an interim payment as the amount the driver had already received matched its overall offer to him. The driver issued proceedings in December 2014.

On 22 March 2016, Stewart J held[1] that that the requirement under the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003[2]reg.13(1)(b) for a driver to make a request for information from the MIB under reg.9(2) was not a necessary ingredient in the cause of action to found a statutory claim against the MIB.

However, the claim was dismissed as being time-barred. The claimant was ordered to pay 85% of the MIB's costs. The issue was whether his claim was for damages for personal injury within the meaning of r.44.13 so as to limit the costs recoverable by the MIB.

The judge held that the rationale for the qualified one-way costs shifting regime was to protect those who had suffered injuries from the risk of facing adverse costs orders obtained by insured or well-funded parties, which would deter injured persons from making compensation claims.[3] The purpose had to be borne in mind when interpreting the words of r.44.13.[4]

Stewart J referred to *McGregor on Damages* and stated that it made it clear that "damages" were simply an award of money for a civil wrong. To retain the requirement of a wrong was entirely necessary as it was an essential feature of damages. He pointed out that actions claiming money under statute, where the claim was made independently of a wrong, were not actions for damages.

The judge held that as no breach of duty or any other wrong had been alleged against the MIB, a claim based on reg.13 was not a claim for damages for personal injury within the meaning of r.44.13. Regulation 16 was consistent with that analysis; it enabled recourse to the court to recover a sum due under the

[1] *Howe v Motor Insurers' Bureau* [2016] EWHC 640 (QB).
[2] Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003 (SI 2003/37).
[3] *Wagenaar v Weekend Travel Ltd (t/a Ski Weekend)* [2014] EWCA Civ 1105; [2015] 1 W.L.R. 1968 considered.
[4] *Bloomsbury International Ltd v Sea Fish Industry Authority* [2011] UKSC 25; [2011] 1 W.L.R. 1546 followed.

Regulations as a civil debt, which was recoverable by statute independently of any breach of duty or other wrong by the MIB.

Stewart J held that on the clear construction of r.44.13, the claimant's claim was not one for damages for personal injury. Whether the non-applicability of the qualified costs regime offended the EU principles of equivalence and effectiveness was not for the instant court to determine. Accordingly, the claimant did not have protection under the qualified costs regime. The claimant appealed.

There were three issues on appeal:

- Whether the EU principles of effectiveness and equivalence were engaged in relation to CPR.
- Whether reference in r.44.13 to "damages for personal injuries" could be interpreted, conformably with the *Marleasing* principles, to include a claim for compensation under reg.13.
- Whether the claimant had claimed a sum that was "due and owing" under the Regulations.

The court held that unlike the 2003 Regulations, the CPR was not passed in order to implement any provision of EU law. However, the interpretative duty (including the application of the principles of equivalence and effectiveness) applied not only to national provisions enacted in order to give effect to EU directives, but also to national law as a whole. What mattered was that the national rule had to be interpreted compatibly with the objective of the directive, and that included the application of the principles of equivalence and effectiveness. Accordingly, the *Marleasing*[5] principles, and the associated principles of equivalence and effectiveness, were engaged.

The court pointed out that applying orthodox domestic common law principles of interpretation, in order to fall within the scope of r.44.13 a claim had to be for both "damages" and "for personal injuries". They held that there was a clear distinction between a claim sounded in debt and a claim sounded in damages. A debt was a definite sum of money payable by one person to another usually in return for the performance of a specified obligation by the payee or on the occurrence of some specified event or condition.

A claimant who claimed payment of a debt need not prove anything beyond the occurrence of the event or condition on the occurrence of which the debt became due. He did not need to prove loss, and the rules about remoteness of damage and mitigation of loss were irrelevant. Damages, on the other hand, consisted of a sum fixed by law in consequence of an antecedent breach of obligation or duty.

The rationale underlying QOCS was a domestic version of the principle of effectiveness. Those who had valid claims for damages for personal injury should not be deterred from pursuing them by the risk of having to pay the defendant's costs. If the claimant's claim under reg.13 was covered by QOCS, he would be in an equivalent position to an injured person who sued an insured driver.

The outcome sought by the claimant required the court to treat the word "damages" in r.44.13 as including compensation under that regulation. That was a departure from the strict and literal application of the words, but it did not go against the grain of the CPR. The glossary of terms in Appendix E to the CPR itself described "damages" as a "sum of money awarded by the court as compensation to the claimant". Nor did that interpretation run counter to the underlying thrust of either the CPR or QOCS. The claimant was within the rationale which inspired QOCS.

The court pointed out that reg.16 provided that "any sum due and owing" under the Regulations was recoverable as a civil debt. Here the claimant did not claim a sum that was "due and owing" under the Regulations. One of the characteristics of a debt was that its amount was ascertained at the time when proceedings were begun. It was only when the amount of a debt had been ascertained that it could be said

[5] *Marleasing v La Comercial Internacional de Alimentación SA* (C-106/89) EU:C:1990:395; [1990] E.C.R. I-4135.

to be "due and owing". Regulation 16 would apply to the claimant's claim once the amount of his compensation had been assessed but not before.

The appeal was allowed.

Comment

The application of the qualified one-way costs shifting ("QOCS") rule is not obvious. The complication comes from two things:

- The complex provision of exceptions to the basic rule.
- The decision taken to permit orders for costs to be made but bar enforcement.

Those two issues together incentivise parties to challenge the rules. The costs order made, but not enforceable, is too tempting a carrot for a defendant who has succeeded in a case. For those bringing claims it is perhaps tempting to seek shelter from an exception. This is not one of those cases, but the defendant seeking shelter in a contribution/indemnity claim in *Wagenaar*[6] is one example, and the claimant seeking shelter when a claim primarily for malicious prosecution in *Jeffreys v Commissioner of Police for the Metropolis*[7] is perhaps another.

A simple approach where costs orders were prohibited would have allowed the focus of interpretation to be solely on whether the claim was for personal injury or whether a simply defined exception applied.

Here we are concerned only with whether a type of case fell within the definition of personal injury and not with the operation of any exception. It is against that backdrop that the Motor Insurers Bureau challenged the definition of a personal injury claim which would both enable them to obtain costs in this case and presumably be a springboard for doing so in many other cases.

We should not forget the real tragedy at the heart of this claim—the injured individual, whilst we delve into the procedural issues this case solves for the moment. You could not hope for a more stark exposition of the benefits to the injured person of membership of the EU.

At first instance, Stewart J applied orthodox domestic common law interpretation and reached a conclusion that belied the purpose of QOCS—to provide protection to an injured person seeking to enforce their rights. In a conventional sense, he was not wrong.

The Court of Appeal went on to correctly apply the interpretive duty contained in *Marleasing*, which has two distinct advantages:

- it focuses on the purpose of the provision; and
- the powers to ensure the provision is equivalent and effective are both broad and far reaching.

Those powers are not limited to provisions that directly enact community law requirements either as was made clear in *Pfeiffer v Deutsches Roles Kreutz*:[8]

> "Although the principle that national law must be interpreted in conformity with Community law concerns chiefly domestic provisions enacted in order to implement the directive in question, it does not entail an interpretation merely of those provisions but requires the national court to consider national law as a whole in order to assess to what extent it may be applied so as not to produce a result contrary to that sought by the directive …"

Once engaged, the *Marleasing* duty ensured that the purpose both of the introduction of QOCS and the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003

[6] *Wagenaar v Weekend Travel Ltd (t/a Ski Weekend)* [2014] EWCA Civ 1105.
[7] *Jeffreys v Commissioner of Police for the Metropolis* [2017] EWHC 1505 (QB).
[8] *Pfeiffer v Deutsches Roles Kreutz* [2004] E.C.R. 1-8835.

reg.13 could be realised in this context. The claimant was entitled to be in an equivalent position to a person pursuing an insured driver as far as QOCS protection was concerned.

Practically, though, this issue has not gone away despite this judgment. The reason for that if we do indeed leave the EU the interpretative duty that led to this outcome will leave also unless it is replaced by transitional or other provisions required for access to the single market or customs union.

Once that duty goes, then we fall back to the orthodox approach taken by Stewart J and the outcome would be different. Unless the rules are changed to reflect the outcome intended—that all personal injury claims would be covered by QOCS, then that risk remains.

Of course, we may not actually leave the EU. If that is the case then that risk would fall away.

Practice points

- Practitioners must carefully advise their clients, whether claimant or defendant, on the boundaries of QOCS.
- A claimant would remain sensibly advised to seek a provision for no order for costs on the conclusion of unsuccessful cases in circumstances where that is achievable by negotiation or where there is some element in the defence of the claim that would suffice for a court to be persuaded to exercise its discretion under CPR 44.2[9] to depart the normal costs follow the event order.
- Practitioners should be concerned about the consequences of Brexit regardless of whether there is a cross border element to the case and regardless of whether the provision in question is one that directly enacts a community law requirement.

Brett Dixon

Blake v Croasdale

(QBD; Judge Purle QC; 19 April 2017; [2017] EWHC 1336 (QB))

Personal injury—civil procedure—negligence—road traffic accidents—withdrawal of admissions—brain damage—insurer seeking to raise ex turpi causa defence—CPR r.14.1B

LT Admissions; Brain damage; Ex turpi causa; Liabilities; Personal injury claims; Road traffic accidents; Withdrawal

The second defendant insurer applied to withdraw an admission of liability in a personal injury claim following a road traffic accident.

On 1 September 2013 at around half-past midnight, Dominic Croasdale, the first defendant driver, drove on the wrong side of the road during a police chase and collided with a car. The claimant, Kieran Blake, was a rear-seat passenger in Croasdale's car. Blake suffered severe brain injuries. Another of the passengers died. As a result of the accident Croasdale was subsequently convicted of causing death by dangerous driving.

9 "(2) If the court decides to make an order about costs—
(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
(b) the court may make a different order."

Over a year later on 23 October 2014, solicitors for the claimant wrote to Esure's Motor Claims Department as the first defendant's insurer notifying Esure that a claim had been submitted via the Ministry of Justice Portal on 16 October 2014 and enclosing a claims notification form. The Ministry of Justice portal is appropriate for claims not exceeding £25,000.

By letter of 24 November, Esure stated in terms: "Primary liability for the accident is admitted." The insurer also stated that it intended to raise an argument on contributory negligence as the claimant had not been wearing a seat belt and the driver had consumed drugs. The admission was queried by a letter of 14 January 2015 from the claimant's solicitors saying:

> "We are pleased to note that primary liability is admitted. Please advise whether this is an unequivocal and irrevocable admission or if you seek to reserve your position in any way."

The same letter also expressed the view that the claim was not suitable to be dealt with via the portal and sought acceptance of the letter as formal notification that the claim had left the portal. The claim came out of the portal.

Esure replied saying:

> "With regard to liability, we have made our position abundantly clear. We accept primary liability. No further clarification is needed."

Later the insurer offered £100,000. Following a further medical report, the claim was valued at between £3–5 million.

Proceedings were served on 28 November 2016 and the defence pleaded that Dominic Croasdale's injury had been caused by his own criminal act, namely that he had been acting in the course of a joint criminal enterprise as a drug dealer jointly with the first defendant. The insurer applied to withdraw its admission of liability to enable it to plead the defence of ex turpi causa. The claimant submitted that there was no realistic prospect of the ex turpi causa defence succeeding.

The judge held that the ex turpi causa defence could succeed without direct evidence so long as the circumstantial evidence was sufficiently cogent.[1] An admission had been made which necessarily precluded an ex turpi causa defence. The admission was binding and could only be withdrawn by consent or with the permission of the court under CPR r.14.1B (3).[2]

However, he concluded that the sensible course was for both the ex turpi causa defence and the contributory negligence defence to remain on the pleadings and proceed to trial together. He held that those defences had a realistic prospect of success and could not be struck out.

Considering all the circumstances of the case in particular those set out in the Practice Direction to CPR 14, whilst the material which enabled the insurer to raise the defence of ex turpi causa had been available from an early stage, the judge was satisfied that it could not have imagined that it was facing a multi-million pound claim when the claimant's solicitors had started it within the portal. Neither party's conduct was open to criticism. There would be prejudice to the insurer if it was not allowed to rely on the defence. The general justice of the case required permission to withdraw the admission to be granted. The application was granted.

[1] *Joyce v O'Brien* [2013] EWCA Civ 546 and *Smith (by his Mother and Litigation Friend Bonner) v Stratton* [2015] EWCA Civ 1413 followed.

[2] Admissions made under the RTA Protocol: 14.1B (3) The defendant may, by giving notice in writing withdraw any other pre-action admission after commencement of proceedings—(a) if all the parties to the proceedings consent; or (b) with the permission of the court.

Comment

Introduction

Admissions, including pre-action admissions, are an integral part of the litigation process as appropriate admissions help to narrow the issues, save costs and help in dealing with matters proportionately. To achieve these objectives, however, admissions should, generally, be binding because, otherwise, the party making the admission is able to keep options open whilst the party receiving that admission cannot be sure that such an admission can safely be relied upon. There will always be exceptions, and a just system needs to make limited provision for circumstances in which a party will not be bound by an admission.

Whilst parties have traditionally been bound by admissions made in pleadings a relatively modern innovation, reflecting the importance of predictability and proportionality, is the concept of the "pre-action admission" where a party who makes an admission, at least of a distinct part of the claim, will generally be bound by that admission if made in response to a letter of claim sent in accordance with a pre-action protocol.

CPR Pts 14.1A and 14.1B define a pre-action admission for these purposes. The judgment in this case highlights a number of issues, related to admissions, from the proper assessment of the potential value of claims, through the scope of admissions to the circumstances in which it will be appropriate for the court to allow an admission to be withdrawn.

Valuing the claim

A curious feature of this case is that although the claimant is described as having suffered a "severe brain injury" the claim was originally commenced under the RTA Protocol. The RTA Protocol, as its full title makes clear, is intended for low value claims, the upper limit (excluding vehicle related losses) being £25,000.

It is important, so far as possible, to establish, at the outset, whether a claim potentially within scope of the so-called low value protocol is suitable in terms of value. Whilst there are potential cost risks for failing to put a suitable claim into one of the low value protocols[3] it is important to remember the countervailing issues where cases that are not within scope and, nevertheless, started in one of those protocols. Such a claim will, unless and until allocated to the multi-track, be subject to fixed costs[4] and, moreover, the whole process is not suited to more complex claims with the consequent risk the full nature and extent of the injuries may not be properly picked up.

Whilst it might be thought that entering a claim into one of the low value protocols will more readily prompt an early admission of liability the judgment in this case illustrates that the failure to properly value the claim may be a relevant factor in determining whether such an admission will be binding.

The admission

If an admission is given or received it is essential to be clear about the nature of that admission, as that may have a significant bearing on the extent to which matters can subsequently be put in issue.

Here the admission was on "primary liability". That admission did not have the difficulties which sometimes arise of the admission failing to meet the definition of an "admission of liability" found in the RTA Protocol namely:

> "'admission of liability' means the defendant admits that—
> a) the accident occurred;

[3] See CPR Pt 45.24.
[4] See *Qader v Esure Services Ltd* [2016] EWCA Civ 1109.

b) the accident was caused by the defendant's breach of duty;
c) the defendant caused some loss to the claimant, the nature and extent of which is not admitted; and
d) the defendant has no accrued defence to the claim under the Limitation Act 1980."

Similarly, the PI Protocol provides, in para.6.3, that:

> "The defendant (insurer) will have a maximum of three months from the date of acknowledgment of the Letter of Claim (or of the CNF where the claim commenced in a portal) to investigate. No later than the end of that period, the defendant (insurer) should reply by no later than the end of that period, stating if liability is admitted by admitting that the accident occurred, that the accident was caused by the defendant's breach of duty, and the claimant suffered loss and there is no defence under the Limitation Act 1980."

The phrase "primary liability" is usually understood to mean that the defendant reserves the right to argue contributory negligence (and indeed an unqualified admission may preclude that right). There is, of course, a very important distinction between an admission of primary liability and an admission of breach of duty only where causation is disputed, the latter not amounting to an admission of liability at all.

In the context of contributory negligence liability will be established, whatever the reduction, as there cannot be 100% contributory negligence[5] where, in reality, the defendant argues that the claimant's conduct is the sole cause of the damage suffered, so a denial of causation and hence a denial of liability. It might be said, to some extent, the issue of primary liability and contributory negligence were conflated when considering the defendant's application to withdraw the admission.

The issues

The judge held that there was a crucial feature of the defendant's defence. That, in addition to expressly pleading a defence on the basis the claimant's injuries were, effectively, caused entirely by his participation in an activity carrying an increased risk of harm, that defence alleged, when dealing with contributory negligence, the claimant's knowledge, or deemed knowledge, the defendant might drive in the dangerous manner he did (inevitably connected with the matters giving rise to the criminal conduct on which the defendant sought to rely as a complete defence).

The view taken by the judge was that, given the nature of the admission made, the defendant was allowed to allege contributory negligence and if permitted, on the basis there was a reasonable prospect of establishing this, to advance an argument the general circumstances were enough to show the claimant had knowledge of the likelihood the defendant would drive in a dangerous manner, it was appropriate for the defendant to be allowed to defend the case in its entirety and thus to be given permission to withdraw permission (so far as it would be appropriate to do so having regard to all the circumstances as required by the Practice Direction to Pt 14).

There is a logic in approaching the matter on the basis that, if sustainable, these arguments would need to be explored at the trial even if only in the context of contributory negligence. That does, perhaps, overlook the fundamental distinction between allegations of contributory negligence, which can never amount to a complete defence, and the denial of causation, which if established will mean that the claimant does not establish liability.

[5] See, e.g. *Anderson v Newham College of Further Education* [2002] EWCA Civ 505.

Permission

It was in that context the judge, quite properly, turned to consider all the circumstances of the case, with particular reference to those identified in para.7.2 of the Practice Direction to Pt 14. It is worth considering the analysis of these in turn.

Grounds for the application

The grounds for withdrawing the admission were that it was anticipated, when the admission was made, the claim would be of low value, with nothing to indicate the damages would run into millions so:

> "proportionality persuaded Esure to adopt a pragmatic approach of not taking the *ex turpi* defence in a claim which, to make good the costs of that defence, would or might have exceeded the benefit to be derived from endeavouring to settle, upon the footing of an admitted liability, a relatively small claim."

Consequently, the judge held:

> "In my judgment, Esure's approach was a perfectly sensible one and I do not consider that it is to be criticised for what has been described, in my judgment erroneously, as a last-ditch effort to avoid liability."

The judge went on to observe:

> "Accordingly, it seems to me that Esure should be entitled to withdraw its admission and that to refuse to do so would discourage defendants, especially insurers, from acting proportionately, which would make the giving of admissions in like cases where it is appropriate, in the interests of reasonableness and proportionality, to give them, more difficult to secure."

Surely, if liability should be admitted, that is so whether the claim is of modest value or of high value. Moreover, the approach of the judge in this case differs markedly form that of Elisabeth Laing J in *Wood v Days Health UK Ltd*[6] who held that:

> "It is true that the potential value of C's claim has increased since 2010; and that is the real ground for the application. But that is a risk which is inherent in any personal injuries claim, and is a reason why it can sometimes be commercially advantageous to try and settle a claim at an early stage. I accept Mr Bright's submission that D1 took a commercial decision to avoid the costs of fighting liability in what it then thought was a low-value claim. I also consider that as experienced loss adjusters, Garwyn took a calculated risk that the value of the claim might increase after the admission. I do not consider that the fact that potential value of the claim has increased since the admission is a good reason for allowing D1 to withdraw the admission."

Conduct

Neither party's conduct was open to criticism.

Prejudice (if the admission is withdrawn)

There was an obvious prejudice to the claimant if he no longer had a claim where liability was admitted, but if that was treated as a determining factor then permission to withdraw an admission would never be given after the commencement of proceedings.

[6] *Wood v Days Health UK Ltd* [2016] EWHC 1079 (QB).

Whilst emphasis was placed on difficulties in proof which would have increased over time, and since the admission was made, that was a matter to be taken into account but which the judge held could be exaggerated.

This approach seems the antipathies of that which would normally be taken on an application under the Limitation Act 1980 s.33 where the court, although this may not prevent the limitation period being disapplied, will usually conclude the elapse of time inevitably causes difficulties and a degree of prejudice.

Prejudice (if the application is refused)

The insurer would be prejudiced if not allowed to rely upon a realistically arguable defence of ex turpi. This approach, however, could be seen as treating prejudice to the defendant as trumping corresponding prejudice to the claimant.

Stage in the proceedings

There was no imminent likelihood of a trial, the application being made shortly after commencement of proceedings to withdraw the admission.

Prospects of success

The defendant's arguments had a realistic prospect of success and it was not appropriate to conduct a mini-trial.

Administration of justice

In one sense, a shorter trial was always better than a long trial, but that could not justify holding the defendant to the admission in circumstances where overall the general justice of the case required permission be given.

Once again, a rather different approach was taken in *Wood* where Elisabeth Laing J held that:

> "In my judgment, the interests of justice include finality; but also a fair outcome. Those two considerations are in tension with each other in this case. It would not be fair to D1 to prevent it from running a good defence to C's claim that D1 was the producer of the 'accident' wheelchair. On the other hand, D1 made an admission on professional advice, having had a good opportunity to investigate the facts and to inspect the accident wheelchair, and should, in the interests of finality, be held to that admission."

Practice points

A number of practice points can be drawn from this judgment.

- Care is required before entering a claim into one of the low value protocols.
- An admission, including a "pre-action admission" is significant because permission to withdraw that admission will be required from the court.
- It is essential to determine the nature of the admission, in particular whether it is an unqualified admission, an admission of primary liability (where contributory negligence may be alleged) or, strictly, not an admission at all (as defined by the relevant protocol), often because causation is not admitted.
- Even with an admission of primary liability it would seem the scope of the issues on contributory negligence may be a vehicle for seeking to undermine even the primary

admission, despite the fundamental dichotomy between an admission, even with allegations of contributory negligence, and a denial of causation.

- Whilst, inevitably, each case will be fact sensitive there does seem, as in so many areas of the law, to be a divergence of approach in the application of legal principles to the facts and this case provides an interesting contrast with *Wood v Days Health UK Ltd* .[7]

John McQuater

Vilca v Xstrata Ltd

(QBD; Stuart-Smith J; 30 June 2017; [2017] EWHC 1582 (QB))

Personal injury—civil procedure—civil evidence—abuse of process—case management orders—conditional judgments and order—courts' powers and duties—disclosure—expert witnesses reports—extensions of time

Conditional judgments and orders; Courts' powers and duties; Disclosure; Expert reports; Expert witnesses; Extensions of time; Personal injury

The claimants were 22 Peruvian nationals who claimed damages for personal injuries allegedly sustained in the course of a protest at the Tintaya copper mine in Peru. The second defendant was registered in Peru and owned the mine. It was an indirect subsidiary of the first defendant, which was registered in England. The claimants alleged that their injuries occurred as the second defendant had called Peruvian security forces to deal with the protest.

The trial was set for October 2017 and was expected to determine whether the defendants might be liable under Peruvian law for acts committed by the security forces. Both sides were ordered to serve evidence from experts in Peruvian law by 24 May 2017. Early in the proceedings, the defendants replaced their first expert with a more experienced expert when they realised the case was unlikely to be settled before trial. However, the second expert had to withdraw in May 2017 owing to ill-health and the defendants applied for an extension of time to instruct a new expert.

The claimants submitted that, according to case law,[1] the court should grant the application only on condition that the defendants disclose the reports of their first and second experts. The court had to decide whether to impose a condition on the defendant companies' application to extend time to serve their expert evidence in a personal injury claim.

Stuart-Smith J held that the first question for the court when faced with an application such as the defendants' was whether the circumstances gave rise to any power to impose a condition.[2] If the court determined that it had case management powers, the second question was how those powers should be exercised on the facts of the particular case. He recognised that the authorities had consistently said that the object of imposing a condition that reports of previous experts should be disclosed was to prevent "expert shopping" and to ensure that the court had full information. However, he held that there was no rule of practice or procedure requiring that the condition be imposed if those two factors were not in issue

[7] *Wood v Days Health UK Ltd* [2016] EWHC 1079 (QB).

[1] *Beck v Ministry of Defence* [2003] EWCA Civ 1043, *Vasiliou v Hajigeorgiou* [2005] EWCA Civ 236 and *Edwards-Tubb v JD Wetherspoon Plc* [2011] EWCA Civ 136.

[2] *Beck v Ministry of Defence* [2003] EWCA Civ 1043, *Vasiliou v Hajigeorgiou* [2005] EWCA Civ 236 and *Edwards-Tubb v JD Wetherspoon Plc* [2011] EWCA Civ 136 followed.

and there was no other good reason to impose it. Where the two factors were in issue, the court would usually impose the condition but it was not inevitable.

He concluded that the circumstances of this case give rise to the court's discretionary case management powers. The defendants needed an extension of time, which brought into play the court's powers to control its process. Those powers included the power to order that the substance of the opinion of prior experts be disclosed as a condition of granting the extension. Stuart-Smith J decided that the condition should not be imposed in this case.

He held that there was no sound basis here for concern about undesirable expert shopping. There was no reason to doubt that the defendant' second expert would have been their expert at trial but for her ill-health. Also, the defendants had coherently explained the switch from their first expert to the second, and it was material that no question of that switch could have arisen for the court's consideration but for the second expert's ill-health. The defendants had been entitled to change experts at that time and would have had no reason to suppose that they would be unable to comply with the court's time limit for serving expert evidence. If their second expert had become unwell even a short time earlier, no question of requiring the court's intervention would have arisen as the defendants would have obtained an alternative expert's report within the time limit.

In addition, there was no sound basis for any suspicion of abuse of process by the defendants. The circumstances in which the new expert was to be instructed did not suggest any substantial reason for thinking that the court and the claimants would not have full information. Some differences in opinion between different experts in any discipline were to be expected. It did not follow that such differences would necessarily or even probably assist the court or the opposing party in identifying the correct resolution of any issues to decide. There was also equality of arms between the parties as the claimants had confidence in their own expert.

Stuart-Smith J held that there was no reason to suppose that the defendants' new expert would omit material that might have been included in the second expert's report, but if there was an error or omission in the new expert's report, the claimants would be able to identify it. Lastly, he held that there was no other good reason for imposing the condition.

Comment

Introduction

Whenever a party wishes to rely upon expert evidence permission from the court will be required. If the party wishing to call expert evidence wants to change the expert who is to be relied upon, in a relevant area of expertise, the court's permission to do so may be on the basis of a conditional order, requiring that party to voluntarily waive privilege and produce the evidence of the expert to be discarded in order for the permission to be effective.

The judgment in this case illustrates that the making of a conditional order, when a party wishes to change experts, is not inevitable. That is because the courts attach importance to the privilege which applies to evidence being gathered to support or defend a claim and because parties will usually be entitled to change experts, at least during the early stages of litigation. Consequently, when a party wishes to change experts the circumstances may not generate the court's power to impose a conditional order and, even if they do, the court may conclude it would not be appropriate to exercise that power.

Before identifying some key practice points from this decision it is worth considering, to put those practice points in context, a number of topics including: the general approach of the courts to changing experts; the proper approach to conditional orders, where there is to be a change of experts; and an analysis of the guidance given to these issues by this decision.

Changing experts

A party preparing a case for litigation will, generally, be at liberty to change experts in the sense of obtaining a report and, if that is thought necessary, seeking a second opinion which, ultimately, may be relied upon instead of the evidence of the first expert.

In *Hort v Charles Trent Ltd*,[3] where the claimant had lost confidence in the expert on whose evidence he had permission to rely, Eady J, allowing an appeal and granting permission to change experts where the evidence of the discarded expert had already been disclosed to the defendant, held that:

> "The emphasis here appears to me to have been on discipline for discipline's sake and the overriding objective has slipped temporarily out of view."

The approach of the court is, however, likely to change the later the application to change experts is made. For these purposes the watershed, in the litigation process, is likely to be the stage at which experts of like discipline prepare a joint statement. That is because the whole purpose of a joint statement is to facilitate any appropriate modification of opinion and that objective would be defeated if a litigant, unhappy with any concession made by an expert, could at this stage too readily change experts.

Hence in *Stallwood v David*,[4] Teare J held:

> "It follows, in my judgment, that where a court is asked for permission to adduce expert evidence from a third expert in circumstances where the applicant is dissatisfied with the opinion of his own expert following the experts' discussion it should only do so where there is good reason to suppose that the applicant's first expert has agreed with the expert instructed by the other side or has modified his opinion for reasons which cannot properly or fairly support his revised opinion, such as those mentioned in the note in the White Book to which I have referred. It is likely that it will be a rare case in which such good reason can be shown. Where good reason is shown the Court will have to consider whether, having regard to all the circumstances of the case and the overriding objective to deal with cases justly, it can properly be said that further expert evidence is "reasonably required to resolve the proceedings."(CPR 35.1)

Prior to joint statements the court, in principle, may be ready to give permission for a party to rely on expert evidence which is reasonably required, whether at the stage of initial case management or by amendment to an order already made, even if that involves a change of experts. When, however, it is clear that the party has expert evidence in the same field of expertise which is to be discarded there is a line of case law, reviewed in this case, suggesting a conditional order, granting such permission, may be appropriate.

Conditional orders

The power to make a conditional order is conferred by CPR Pt 3.1(3)(a). When coupled with the need, under Pt 35.4(1), for a party to secure permission in order to rely on expert evidence that provides a convenient way for the court to guard against expert shopping. The objective of avoiding expert shopping can be achieved by a conditional order for permission to rely on expert evidence, the condition being disclosure of expert evidence that it is proposed be discarded.

Such an order does not abrogate the law of privilege because the party who wishes to change experts is simply put to an election; the permission requested will be granted subject to that party voluntarily waiving privilege and producing the discarded report.

[3] *Hort v Charles Trent Ltd* [2012] EWHC 3966 (QB).
[4] *Stallwood v David* [2006] EWHC 2600 (QB).

An analysis of the judgment in this case, when read with judgments given in other cases that deal with this topic, helps to identify the circumstances in which the court has power to make a conditional order as well as, when there is such a power, the proper forensic approach to the exercise of that power.

Analysis

Stuart-Smith J, giving judgment in this case, suggested there were two questions for the court when considering whether it was appropriate to make a conditional order when allowing a party permission to change experts in a particular discipline. He said:

> "The first question for the court of first instance when it is faced with an application such as the present is whether the circumstances give rise to any power to impose a condition. In answering this first question, *Beck* and *Vasiliou* stand as useful examples of cases falling on either side of the line. In *Beck* the Defendant needed the Court's permission for a second examination. That gave the Court the power to exercise its discretionary case-management powers, which are always to be exercised in accordance with the overriding objective. On the other side of the line, in *Vasiliou* the previous order of the Court had not specified a particular expert and the Defendant could have complied with all existing orders on time even with its new expert. When the Defendant raised the issue with the Claimant, there was nothing to give rise to further powers to control the conduct of the parties. No question of imposing a condition therefore arose."

Stuart-Smith J then went on to say:

> "The second question, which arises if the court has determined that it has case-management powers, is how they should be exercised on the facts of the particular case. I have already said that they should always be exercised in accordance with the overriding objective. The cases to which I have referred above do not establish some different principle. What they establish is that the court will always have regard to the possibility of undesirable expert shopping and the instinctive desire for the court to have full information (with the associated desire for the other party to be assured that the court's process is not being abused). The Court of Appeal has consistently said (albeit in slightly differing terms) that the object of imposing a condition that reports of previous experts should be disclosed is to prevent expert shopping and to ensure that full information is available."

When read with earlier authorities this decision confirms that there are a number of circumstances when the power to impose a conditional order, subject to which a party may change experts, will apply. Whilst the circumstances in which the court does, and does not, have power to make a conditional order are not likely to have yet been exhaustively determined, an analysis of the decisions on this topic does give some guidance.

First, the power to impose a conditional order will apply where a party wishes to secure facilities to obtain evidence from the new expert, a point considered in *Beck v Ministry of Defence*.[5] A conditional order may be appropriate, in these circumstances, even if the party concerned is not tied, under case management directions, to a particular expert. Whether the court makes such an order may depend upon the nature of the facilities required. In *Beck*, the defendant sought facilities for a second examination of the claimant by another consultant psychiatrist, and the court concluded a conditional order should be made, whilst in *Vasiliou v Hajigeorgiou*[6] the Court of Appeal was not prepared to impose a conditional order where the facilities requested were for inspection of premises, with Dyson LJ observing:

[5] *Beck v Ministry of Defence* [2003] EWCA Civ 1043.
[6] *Vasiliou v Hajigeorgiou* [2005] EWCA Civ 236.

> "… we consider that to impose such a requirement as a condition of giving (the new expert) permission to inspect the premises would have been unreasonable and disproportionate. The circumstances here are a far cry from a personal injury case where a second expert wishes to conduct a second medical examination on the claimant, and issues such as those discussed in *Lane v Willis* [1972] 1 W.L.R. 326 arise."

Secondly, it is implicit from the judgment in *Vasiliou* that where a party is given permission by the court to rely on a named expert it will be necessary to vary the order if a different expert, even in the same field of expertise, is to be relied upon and that will generate the power to make a conditional order (without having to consider whether such an order is justified on the basis of any facilities required to obtain such evidence).

Thirdly, where a party has engaged in the process of joint selection of experts, for example under the Pre-Action Protocol for Personal Injury Claims or the Practice Direction Pre-Action Protocols and Conduct, the court may exercise the power to make a conditional order even at the stage of first granting permission to rely upon an expert.

The power to make an order in these circumstances was confirmed by the Court of Appeal in *Edwards-Tubb v J D Wetherspoon Plc*[7] where Hughes LJ explained:

> "Authority apart, it seems to me that the imposition of a condition of disclosure is as justified in pre-issue as in post-issue cases. I certainly accept that there may be perfectly good reasons for a party to wish to instruct a second expert. Those reasons may not always be that the report of the first expert is disappointingly favourable to the other side, and even when that is the reason the first expert is not necessarily right. That means that it will often, perhaps normally, be proper to allow a party the option, at his own expense, of seeking a second opinion. It would not usually be right simply to deny him permission to rely on expert B and thus force him to rely on expert A, in whom he has, for whatever reason, lost confidence. But that is quite different from the question whether expert A's contribution should be denied to the other party by the fact of who instructed him. An expert who has prepared a report for court is different from another witness. The expert's prime duty is unequivocally to the court. His report should say exactly the same whoever instructed him. Whatever the reason for subsequent disenchantment with expert A may be, once a party has embarked on the pre-action protocol procedure of co-operation in the selection of experts, there seems to me no justification for not disclosing a report obtained from an expert who has been put forward by that party as suitable for the case, has been accepted by the other party as suitable, and has reported. Thus although the instruction of a medical expert is a matter almost of course in most personal injury cases, it is appropriate for the court to exercise the control afforded by CPR 35.4 in order to maximise the information available to the court and to discourage expert shopping. Whilst at the time of Access to Justice this development may not have been foreseen, the ethos of litigation which it established is promoted rather than prevented by the exercise of this power."

Fourthly, as this case illustrates, the power to impose a condition will apply where a party wishes to obtain an extension of time from the court for the exchange of expert evidence (and it is implicit that additional time will be required because the identity of the expert is changed). The same approach was adopted by Master Cook in *Jebaraj v Esure Insurance*.[8]

In other circumstances, the power to impose a conditional order may not apply. For example, in *Vasiliou* the order giving permission to rely on expert evidence did not identify a named expert. In *Mack v Clarke*,[9] the court held that if permission to withdraw an admission had been required that would not have been a

[7] *Edwards-Tubb v J D Wetherspoon Plc* [2011] EWCA Civ 136.
[8] *Jebaraj v Esure Insurance*, unreported, 10 December 2015.
[9] *Mack v Clarke* [2017] EWHC 113 (QB).

valid basis for imposing a conditional order which required the disclosure of expert evidence upon which any earlier admission had been based.

Whilst, doubtless, the circumstances in which the court has power to impose a conditional order are not limited to the situations already dealt with in case law the first of the tests identified by Stuart-Smith J does appear to be reasonably clear. Accordingly, parties should be well aware of the likely consequences, so far as conditional orders are concerned, if embarking on the process of joint selection of experts, at a pre-action stage, when obtaining permission to rely on expert evidence, on the basis of the court order giving permission identifying the expert concerned, and, as this case illustrates, when committing to a timescale for exchange of expert evidence.

Less satisfactory, perhaps, is the approach of the courts to the second question identified by Stuart-Smith J, which deals with the circumstances in which, if the power exists, the court is likely to consider it just to make a conditional order. Given the approach in earlier cases it is, though the reasons for the order are clearly articulated by Stuart-Smith J, perhaps a little surprising that a party was not subject to a conditional order when seeking to change experts not once but twice. The consequent risk, for the future, is that of satellite litigation whenever the power to make a conditional order is available and the issue is whether or not such an order should be made and, if so, the extent to which disclosure will be required.

Although the court did not make a conditional order in *Vasiliou* Hughes LJ observed, so far as the scope of disclosure required by any conditional order was concerned, that:

> "A question that was not considered in *Beck*'s case is whether the condition of disclosure should relate only to the first expert's final report, or whether it should also relate to his or her earlier draft reports. In our view it should not only apply to the first expert's 'final' report, if by that is meant the report signed by the first expert as his or her report for disclosure. It should apply at least to the first expert's report(s) containing the substance of his or her opinion."

In *Coyne v Morgan*[10] partial disclosure, with some redactions allowed, was ordered. In *Allen Tod Architecture Ltd v Capita Property & Infrastructure Ltd* ,[11] the court held strong evidence of expert shopping would be required before imposing a term that required disclosure of documents other than the report of the first expert. In *Jebaraj*, the requirement for disclosure, under a conditional order, was held to cover all communications with the experts in which the substance of the experts' opinions were expressed or discussed and that included attendance notes and letters of instruction to the experts.

In these circumstances the practice points which can be drawn from the judgment are inevitably somewhat general.

Practice points

- Claimants should think carefully before embarking on joint selection of experts under the PI Protocol . There are advantages, but also potential disadvantages, in taking this route.
- All parties, at the stage of initial case management, may need to be cautious about naming experts in the order, unless confident the relevant expert will be relied upon.
- Any problems that do arise with expert evidence need to be sorted out before joint statements are prepared because, after that, the court may be reluctant to allow any party to change experts at all.

John McQuater

[10] *Coyne v Morgan* [2016] B.L.R. 491.
[11] *Allen Tod Architecture Ltd v Capita Property & Infrastructure Ltd* [2016] EWHC 2171 (TCC).

Catalano v Espley-Tyas Development Group Ltd

(CA (Civ Div); Longmore LJ, Beatson LJ, David Richards LJ, Costs Judge Gordon-Saker; 28 July 2017; [2017] EWCA Civ 1132)

Procedure—personal injury—legal advice and funding—conditional fee agreements—discontinuance—funding arrangements—cost protection—qualified one-way costs shifting—CPR r.43.2(1)(K)(I), r.48.2, r.48.2(1), r.48.2(1)(A)

LT Conditional fee agreements; Funding arrangements; Personal injury; Personal injury claims; Qualified one-way costs shifting; Success fees

June Catalano brought an action by a claim form issued on 26 July 2013 for loss and damage suffered as a result of noise induced hearing loss sustained during employment. She claimed that while working for the defendant company she was exposed to harmful noise.

Proceedings were initially funded by way of a CFA entered into on 13 June 2012. There was no dispute that this CFA was "a funding arrangement as defined by rule 43.2(1)(k)(i)" for the purposes of CPR 48.2(1)(a)(i). This arrangement was notified to the defendant in a letter of claim dated 6 September 2012. On the same day, the claimant's application for ATE insurance was declined. Expert evidence was obtained during the period in which that CFA was in force.

On 1 April 2013, the QOCS regime came into force. On 15 July 2013, the claimant and her solicitors entered into a new CFA which was said to have replaced the prior arrangement. Proceedings were issued on 16 December 2013. The claimant's solicitors submitted their costs budget to the court which referred to pre-action costs of £5,375 as having been incurred. The defendant was served with a notice of funding on 20 January 2014 which explained that the case was now being funded by way of a CFA dated 15 July 2013. This notice referred to the existence of the earlier CFA of June 2012 "which provides for a success fee" but did not tick the box available for saying it had been terminated.

The trial was due to take place on 14 January 2015. However, the claimant served a notice of discontinuance on 13 January 2015. Pursuant to CPR r.38.6 the claimant was, in principle, liable to pay the defendant's costs and a defendant's costs order was deemed to have been made on the standard basis. The defendant filed and served a bill of costs on the claimant on 28 April 2015 amounting to £21,675.52 excluding interest.

A dispute arose as to whether the QOCS regime was applicable to this case. Ms Catalano argued that the litigation services provided by her solicitors were provided pursuant to a funding arrangement made after 1 April 2013 and that QOCS ("the new regime") applied so that she could not be liable for costs after discontinuance. Deputy District Judge Harris found that the new regime was not applicable on these facts. She appealed.

Ms Catalano submitted that the judge should have followed *Casseldine v Diocese of Llandaff Board for Social Responsibility (A Charity)*[1] because her solicitors had terminated the first CFA, just as the solicitors in *Casseldine* had done. She also submitted that it was irrelevant that her solicitors remained the same after terminating the first CFA because the second CFA had replaced the first abandoned one. She also argued that she was not operating under a pre-commencement funding arrangement and did not have the benefit of ATE cover and should therefore have the benefit of QOCS.

[1] *Casseldine v Diocese of Llandaff Board for Social Responsibility (A Charity)* , unreported, 3 July 2015, Cardiff County Court (Phillips J).

The employer did not agree and argued that the employee was not entitled to read the word "un-terminated" into CPR r.48.2(1)(a) as the rule had not been intended to allow a claimant to cherry pick the advantages of both regimes by adopting a new CFA to avoid the costs consequences of losing the case. It contended that the claimant had continued proceedings despite the refusal of ATE insurance so she had known she was liable for the costs if she lost.

The Court of Appeal said that the concept of a pre-1 April 2013 funding arrangement under CPR 48.2(1)(a) was remarkably wide. They held that it included not only an agreement where services had been provided before 1 April 2013, but also an agreement made before 1 April 2013 for the provision of such services in the future. It was clear that the claimant's solicitors had provided services before 1 April 2013, for which a charge of £5375 had been included in their costs budget. So, unless the claimant was right to read the word "un-terminated" into CPR 48.2(1)(a)(i), there was undoubtedly a pre-commencement funding arrangement within CPR r.48.2(1).

They held that not only did the claimant seek to read a word into the rules which was not there, but such a construction would lead to a situation where a claimant could have the best of both worlds. The correct construction of CPR 48.2(1)(a)(i) was to give the words "funding arrangement" their natural meaning and apply them to any pre-1 April 2013 agreement whether terminated or not.

They noted that the rule defining a pre-commencement funding arrangement was mirrored in Legal Aid, Sentencing and Punishment of Offenders Act 2012 s.44(4) which prohibited the recovery of a success fee as costs but then in s.44(6) preserved the position for those CFAs entered into before it came into force on 1 April 2013.

The Court of Appeal held that in any case in which litigation services had been provided under a CFA made before 1 April 2013, success fees could continue to be recovered as costs and QOCS would not apply even if the CFA was terminated and a second CFA was made.[2] The appeal was dismissed.

Comment

There are likely to be more cases following *Catalano* as the surge in claims where clients were signed up to CFAs and ATE insurance immediately prior to the commencement of the Legal Aid, Sentencing and Punishment of Offenders ("LASPO") Act 2012 on 1 April 2013 play out.

At that time, the consensus among practitioners with ongoing cases was that a pre-LASPO CFA backed by an ATE insurance policy was preferred to a post LASPO CFA where the ATE insurance premium would be unrecoverable. This was even though the balancing features of the legislative changes were a 10% uplift in damages and the protection of qualified one-way costs shifting ("QOCS").

But in situations where the claim is lost, the post-LASPO position can be beneficial for the claimant who can claim the benefit of QOCS to avoid paying the successful defendant's costs. This decision shows the dangers for claimants who try to have their pre-LASPO cake and eat it later. The decision offers some welcome clarity, but it will have some practitioners reaching for their indemnity insurance policies.

Can a party terminate a CFA and then benefit from the new costs rules post 1 April 2013? The case law was conflicting and relied in large part upon the definition of "proceedings". Prior to *Catalano* practitioners had to contend with conflicting decisions in the lower courts to solve this question, notably *Landau v Big Bus Co Ltd*[3] and *Casseldine v Diocese of Llandaff Board for Social Responsibility*.[4]

In *Landau*, the claimant had an ATE policy in place along with a CFA dated 16 August 2011. Landau's personal injury action was dismissed in October 2013. He appealed and signed up to a second CFA in November 2013 to cover the appeal. The original ATE policy did not cover the costs of an appeal to the

[2] *Plevin v Paragon Personal Finance Ltd* [2017] UKSC 23 followed, *Landau v Big Bus Co Ltd*, unreported, 31 October 2014 considered and *Casseldine v Diocese of Llandaff Board for Social Responsibility (A Charity)* , unreported, 3 July 2015 doubted.

[3] *Landau v Big Bus Co Ltd*, unreported, 31 October 2014, SCCO (Master Howarth).

[4] *Casseldine v Diocese of Llandaff Board for Social Responsibility (A Charity)* , unreported, 3 July 2015, Cardiff County Court (Phillips J).

Court of Appeal. The appeal was dismissed in August 2014 and Landau sought QOCS protection for the costs of his appeal. He maintained that, for the purposes of CPR 44.17, the claim on appeal was a separate set of proceedings from the original claim at first instance and there was no pre-commencement funding arrangement. He relied upon *Hawksford Trustees Jersey Ltd v Stella Global UK Ltd*.[5]

The defendant argued that there was one set of damages at stake in this case and as such, only one set of proceedings. Additionally, that there was a pre-commencement funding arrangement in place (even if the cover did not reach as far as the appeal) as defined by CPR 48.2(1)(i)(aa) and as such, QOCS did not apply. The court agreed.

The rule defines a pre-commencement funding arrangement as relating "to the matter that is the subject of the proceedings in which the costs order is to be made" rather than the claimant's truncated reading of it as relating to "proceedings in which the costs order is to be made". The fact that the ATE cover had not extended as far as the Court of Appeal was irrelevant. Parliament's intention was to link the funding arrangement to the 'matter' arising from any proceedings and disapply QOCS to those cases.

With no separate definition of "proceedings" Master Haworth found that:

> "all that can be derived from the *Hawksford* case is that 'proceedings' must be decided in the context in which the words appear. It is clear … that 'proceedings' can have different meanings … it cannot be assumed that the word 'proceedings' can or should in every case mean separate proceedings by way of trial and by way of an appeal."

In *Landau* he found that on any view, proceedings both at first instance and on appeal plainly meant the same "claim": it was obvious that CPR 44.13(1) and 44.17 were intended to include an appeal. The claimant could not claim QOCS protection for the appeal.

In *Casseldine*, the court defined "proceedings" much more narrowly and found that the claimant could claim QOCS protection. The claimant had entered into a CFA and obtained ATE insurance cover in March 2012. In January 2013, her solicitors terminated the CFA and in August 2013, she instructed a new firm of solicitors with which she signed a new CFA.

The district judge distinguished *Landau* on the basis that in *Casseldine*, proceedings were never commenced in relation to the first CFA, but only the second. The first CFA was terminated by the original firm of solicitors which, as a consequence, was not entitled to costs or a success fee.

In the "proceedings" in this context, the court was never in a position to order the defendant to pay the claimant's additional liabilities arising from the first CFA: it had no continuing effect upon the recoverability aspects related to her claim. Her second CFA, which post-dated LASPO allowed the claimant to rely on the protection afforded by QOCS.

Pre-commencement funding arrangements and "proceedings"

Shortly before *Catalano* was heard this year, the Supreme Court's decision of *Plevin v Paragon Personal Finance Ltd*[6] returned to the effect of a pre-LASPO pre-commencement funding arrangement on post-April 2013 proceedings.

In *Plevin*, the respondent had entered into a CFA in 2008, backed by an ATE insurance policy. In August 2013, having been given leave to appeal from the dismissal of her claim by the trial judge, the claimant and her solicitor's firm entered into a deed of variation extending the CFA to cover the conduct of the appeal. A second deed of variation was executed in January 2014 when leave was given to appeal to the Supreme Court. On both occasions, an existing pre-LASPO ATE policy was "topped up" to cover the

[5] *Hawksford Trustees Jersey Ltd v Stella Global UK Ltd* [2012] EWCA Civ 987.
[6] *Plevin v Paragon Personal Finance Ltd* [2017] UKSC 23.

appeals. The respondent sought to recover both a success fee and the ATE premium upon the dismissal of Paragon's appeal by the Supreme Court.

Paragon, the appellant, submitted that the deeds of variation were new post-LASPO agreements for the provision of legal services and that the appeals to the Court of Appeal and Supreme Court were separate "proceedings"—not part of the same proceedings as the original trial. As a consequence, the respondent argued, there was no ATE policy which related to the appeal "proceedings" and the substantial ATE premium was not recoverable.

The Supreme Court found that the trial and successive appeals were brought in support of a claim and that the "proceedings" were not over until the courts had disposed of that claim one way or the other at whatever level of the judicial hierarchy. The ATE policy in place pre-LASPO covered all stages of those proceedings and remained a recoverable expense.

Lord Sumption said:

> "The purpose of the transitional provisions of LASPO, in relation to both success fees and ATE premiums, is to preserve vested rights and expectations arising from the previous law."

Turning then to *Catalano*: the court followed the reasoning in *Landau* and *Plevin*. It found that litigation services had been provided under a CFA made before 1 April 2013, and the success fees for this agreement remained recoverable (as would any ATE premium paid at that stage). The fact that the appellant's application for ATE insurance had been declined did not alter that interpretation and her abandonment of the first CFA in favour of a post-LASPO agreement did nothing to dislodge the continuing effect of her first CFA.

As in *Casseldine*, after first CFA had been terminated the claimant had entered into a second post April 2013 agreement. But in *Catalano* there was no suggestion that the solicitors would have been unable to recover their success fee, had the claim succeeded: the first CFA continued to have an effect even after the new post LASPO CFA had been signed.

As in *Landau* and *Plevin* it was clear that her solicitors had provided services before 1 April 2013 and after the LASPO changes and introduction of QOCS. It was also similarly clear that the wide concept of a pre-2013 "funding arrangement" in CPR 48 encompassed her solicitors' pre-2013 services. The definition included not only an agreement where services had been provided before 1 April 2013, but also an agreement made before 1 April 2013 for the provision of those services in the future.

Under the transitional provisions of LASPO Act 2013 s.44(6), the first CFA's success fee could continue to be recovered as costs. Even if the first CFA had been terminated (or varied as in the case of *Plevin*) and a second CFA was in force.

Longmore LJ confirmed this. He said:

> "in any case … in which litigation services have in fact been provided under a CFA made before 1st April 2013, success fees can continue to be recovered as costs and QOCS will not apply even if the CFA is terminated and a second CFA is made."[7]

Practice points

- The claimant had consciously terminated the first CFA to claim the benefit of the new costs rules with a second, post 1 April 2013 CFA. The court has rejected that strategy: litigation services had been provided under the first CFA signed before 2013: those arrangements were preserved by the transitional provisions in LASPO.
- The definition of a pre-commencement funding arrangement in CPR 48.2 is sufficiently wide to encompass her solicitors' pre-2013 services even without ATE cover. In this case

[7] *Catalano v Espley-Tyas Development Group Ltd* [2017] EWCA Civ 1132 at [27].

"once insurance was refused but it was decided that the litigation should continue, she (or they) would be at risk of the defendants recovering their costs in any event".

- Proceedings are not over until they are really over. The Supreme Court's judgment in *Plevin*, which doubts the decision in *Casseldine*, holds that "proceedings" continue in an uninterrupted line until the matter that is the subject of the proceedings has been disposed of by the courts at whatever level of the judicial hierarchy.
- Practitioners should review the costs advice given to clients in those cases where a pre-LASPO CFA has been superseded by another agreement signed after 1 April 2013, or where a pre-commencement funding arrangement was in place prior to that date.
- The implication is clear: claimants cannot pick and choose which set of rules they wish to use by artificially terminating one agreement and starting another in the same proceedings to benefit from the new costs recovery regime.

Helen Blundell

Kupeli v Cyprus Turkish Airlines

(CA (Civ Div); Lewison LJ, Kitchin LJ, Floyd LJ; 21 July 2017; [2017] EWCA Civ 1037)

Civil procedure—legal profession—conditional fee agreements—Cancellation of Contracts Made in a Consumer's Home or Place of Work etc. Regulations 2008 reg.5(b), reg.7, reg.5

Business premises; Conditional fee agreements; Consumer contracts; Meetings

The 669 claimants were members of the Turkish Cypriot community in north London. They had alleged that the airline failed to honour airline tickets originally bought from another airline. The committee which ran the local Turkish Cypriot community centre found solicitors who were prepared to take on their case. A meeting between some of the claimants and the solicitors took place in 2012 at the community centre and CFAs were signed.

A default judgment was subsequently entered against the airline, but was later set aside. The airline was ordered to pay costs. At the detailed costs assessment, the master held that the meeting was caught by the Cancellation of Contracts Made in a Consumer's Home or Place of Work etc. Regulations 2008 ("the 2008 Regulations")[1] as it had been organised by the solicitors away from their business premises, and was thus an "excursion" for the purposes of reg.5(b).[2] Accordingly, as the right to cancel the CFAs had not been given to some of the claimants at the time the CFAs had been made, as required under reg.7,[3] those CFAs were invalid and unenforceable. Consequently, the airline was not liable to pay costs.

Subsequently, Slade J[4] overturned the master's original decision finding that the Regulations did not apply to the CFAs, as the meeting was not an "excursion" organised by the solicitors for the purposes of reg.5. The defendants appealed.

PROCEDURE

[1] Cancellation of Contracts Made in a Consumer's Home or Place of Work etc. Regulations 2008 (SI 2008/1816).

[2] These Regulations apply to a contract, including a consumer credit agreement, between a consumer and a trader which is for the supply of goods or services to the consumer by a trader and which is made—(b) during an excursion organised by the trader away from his business premises.

[3] 7.(1) A consumer has the right to cancel a contract to which these Regulations apply within the cancellation period. (2) The trader must give the consumer a written notice of his right to cancel the contract and such notice must be given at the time the contract is made except in the case of a contract to which regulation 5(c) applies in which case the notice must be given at the time the offer is made by the consumer.

[4] *Kupeli v Cyprus Turkish Airlines* [2016] EWHC 1125 (QB).

The issue was whether the meeting at the community centre was "an excursion organised by the trader away from his business premises". The Court of Appeal held that the meeting could not be said to have been an "excursion organised by the trader away from his business premises". The dictionary definition of "excursion" in various different languages had a meaning which was something more than merely a trip or journey. That something more was that, at the very least, the trip or journey in question was not undertaken for the very purpose of entering into the consumer contract in question.

Accordingly, as a matter of ordinary language, a consumer's visit to a community centre for the express purpose of meeting solicitors with a view to instructing them to take on his case, could not be characterised as an "excursion". Furthermore, that meaning did not conflict with the purpose of Directive 85/577[5] to protect the consumer in respect of contracts negotiated away from business premises, and in particular to protect them against the element of surprise and unpreparedness which would be occasioned if he were presented with a legally binding document to sign. A consumer who attended such a meeting whose purpose had been announced in advance would not be surprised or unprepared to give instructions.

Although it was possible to divide the question of whether the meeting was an "excursion organised by the trader" into two parts, namely was it an "excursion" and, if so, was it "organised by the trader", both parts had to be considered together. Here contact with the solicitors had been initiated by the community centre committee. The initiative for the meeting came from the committee and it was the committee that arranged the meeting, albeit at the request of the solicitors. The invitation to the community to attend the community centre was issued by the committee. The date and time of the meeting was determined by the committee and it was the committee that invited the solicitors to attend, not the other way around.

The court held that it was quite unrealistic to view the committee as in some way acting as agents for the solicitors. If the committee was to be viewed as acting on behalf of anyone, it was acting on behalf of its members and other members of the Turkish Cypriot community.

The location and purpose of the meeting was well advertised in advance. Many of the claimants were individually notified. The community centre contained banners erected by the solicitors. Consequently, the premises were clearly identified, at least in relation to that time and date, as a place for sales to the public. There was no element of surprise in the meeting. In those circumstances, the meeting could not be said to have been an "excursion organised by the trader".[6]

The appeal was dismissed.

Comment

The Cancellation of Contracts made in a Consumer's Home or Place of Work etc Regulations 2008 has been superseded for contracts that came into force on or after 13 June 2014. The relevant regulations now will be the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.[7] As with the former regulations, they regulate most contracts made between a "trader" and a "consumer". They continue to apply to solicitors' retainers and the interpretation of the old regulations by this court will remain relevant to newer contracts.

The original regulations applied to agreements that were commenced after 1 October 2008 and extended to the provision of credit, goods or services made in a consumer's home or place of work during a visit by the contracting trader, unless suitably excluded. Regulation 7 required that the trader give the consumer a written notice of their right to cancel the contract within a specified seven-day cancellation period. The notice was required to be contained within the document and set out in a mandatory format on a detachable slip.

[5] Directive 85/577 to protect the consumer in respect of contracts negotiated away from business premises [1985] OJ L372/31.
[6] *Crailsheimer Volksbank eG v Conrads* (C229/04) EU:C: 2005:640 and *Travel Vac SL v Sanchis* (C423/97) EU:C:1999:197 considered.
[7] Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134).

It is not a particularly harsh comment to suggest that the regulations came in originally with very little notice given to them by the legal profession. For many it was simply more cooling off regulations to be applied for home selling and aimed at double glazing salesmen not lawyers! Indeed, when they first came in, the Law Society did not even have any guidance to deal with them.

Once lawyers started to appreciate the applicability of the regulations and in particular the draconian outcome of a completely failed retainer if the regulations were not followed, ripples of concerns went through the legal industry. In hundreds, if not thousands of cases it led to lawyers having to tear up existing retainers with their clients and to encourage their clients to enter into new ones.

Mandatory language of the regulations meant that if they were not complied in any shape or form the retainer would fail. In *Cox v Woodlands Manor Care Home Ltd*,[8] the Court of Appeal handed down its first interpretation of these regulations as applying to Conditional Fee Agreements ("CFA"). In this case, the claimant had an employers' liability personal injury claim, which was started by her solicitor attending to take instructions at her home. She went on to be successful in recovering six-figure damages and standard basis costs.

In the detailed assessment proceedings, the defendant examined the claimant's CFA and noticed that no notice of cancellation had been attached, as required by the regulations. It was therefore argued that the contract was unenforceable as between the claimant and her solicitor and on that basis applying the indemnity principle, the paying party, the defendant, should not pay any costs. The Court of Appeal rejected the claimant's appeal against the decision of HH Judge Denyer QC and determined that the CFA had been entered into at the claimant's home and at that point, the claimant's solicitor should have been adhering to the 2008 Regulations. The claimant had not done so and so the claimant's costs were assessed at nil.

The Court of Appeal affirmed the fact that the regulations applied to cases funded by CFA's between solicitors and their clients, saying that solicitors did indeed satisfy the description of "trader", whilst clearly the client would be a "consumer". The effect of this case is to put at risk any CFA's entered into between 1 October 2008 and 13 June 2014 where the Regulations have not been complied with. There is currently no sight of any Court of Appeal solutions of "non-material breaches"[9] which saved many lawyers' CFAs although this decision is helpful of course.

Regulation 5 provides:

> "These Regulations apply to a contract including a Consumer Credit Agreement between a consumer and a trader which is for the supply of goods or services to the consumer by a trader and which is made:
>
> a) During a visit by the trader to the consumer's home or place of work, or to the home of another individual;
>
> b) During an excursion organised by the trader away from his business premises; or
>
> c) After an offer made by the consumer during such a visit or excursion."

Regulation 7 provides:

> "… 2. The trader must give the consumer a written notice of his right to cancel the contract and such notice must be given at the time the contract is made, except in the case of a contract which Regulation 5 (c) applies, in which case the notice must be given at the time the offer is made by the consumer."

These Regulations had their birth in the EU under Directive 85/577 art.1. The preamble explains the purpose of the Directive:

[8] *Cox v Woodlands Manor Care Home Ltd* [2015] EWCA Civ 415.
[9] *Hollins v Russell* [2003] EWCA Civ 718 and *Myatt v National Coal Board/Garrett v Halton BC* [2006] EWCA Civ 1017.

> "Whereas the special feature of contracts concluded away from the business premises of the trader is that as a rule, it is the trader who initiates the contract negotiations, for which the consumer is unprepared or which he does not [expect]; …
>
> Whereas this surprise element generally exists not only in contracts made at the doorstep but also in other forms of contract concluded by the trader away from his business premises;
>
> Whereas the consumer should be given a right of cancellation over a period of at least seven days in order to enable him to assess the obligations arising under the contract;
>
> Whereas appropriate measures should be taken to ensure that the consumer is informed in writing of this period for reflection …
>
> The contracts concluded away from the business premises of the trader are as a rule initiated by the trader for which the customer is unprepared and is often unable to compare the quality and prices of the offer with other offers, the consumer should be given a right of cancellation over a certain period."

Master Rowley in the Supreme Court Costs Office had determined the issue at first instance and had found that the claimants who signed the CFA's at the meeting did so before they had received any client care letter or any of these enclosures that were required by reg.7.[10]

The parties had agreed the summary facts relevant to the first instance appeal which included the fact that the committee had placed advertisements in newspapers and sent out bulk text messages because it had been aware that there were hundreds if not thousands of disgruntled members of the community. It was acknowledged that the lawyers had entered into a rental agreement for the venue and displayed banners and large numbers were expected although no one knew precisely how many attended. As a result, when the meeting began it transpired that the plan of taking instructions properly and thoroughly would not work given the large number of clients and relatively few members of staff available.[11]

There was some factual dispute about how the meeting itself unfolded but Master Rowley found that as the claimants arrived their initial details were taken by paralegals who took photographs and relevant details to complete the CFA's; these were then sorted by a solicitor who completed the relevant information. The costs judge's finding meant that the regulations could not have been complied with because the CFA's were entered into and therefore completed before any written notification to satisfy the regulations could have been dispatched.

Master Rowley and Slade J who considered the first appeal, disagreed in that Master Rowley determined that the meeting was "an excursion organised by the trader away from his business premises". It was on this issue that the appeal eventually turned.

The Court of Appeal found itself examining the Directive in such detail that it actually had to be referred to four different language versions of the recitals, including French, Italian and Spanish.[12] The Court of Appeal commented:

> "The elements of surprise and unpreparedness emerge even more strongly from these other language versions of the recital. It is this recital which explains the overall purpose of the Directive. As Mr Beal correctly pointed out, its focus is consumer protection. I accept his submission that the Directive is concerned with contracts made away from the trader's usual business premises, but only up to a point. First, some contacts are expressly excluded from the scope of the Directive wherever and in whatever circumstances they are made. Second, for others they must fall within the terms of Article 1 which sets out additions that must be fulfilled before a consumer contract falls within the scope of the Directive."

[10] *Kupeli v Cyprus Turkish Airlines* [2016] EWHC 1125 (QB) at [84].
[11] *Kupeli v Cyprus Turkish Airlines* [2016] EWHC 1125 (QB) at [112] and [113].
[12] *Kupeli v Cyprus Turkish Airlines* [2016] EWHC 1125 (QB) at [15].

Lewison LJ went on to consider the meaning of "excursion". Again, he examined English, French, Italian and Spanish dictionaries and concluded:

> "… thus in all of these various languages 'excursion' or its cognates has a meaning which is something more than merely a trip or journey."[13]

He noted that the Recital emphasised that what the consumer was being protected from was the element of surprise and unpreparedness therefore he could not accept that where the consumer was specifically going to the community centre for the express purpose of instructing solicitors in relation to their complaint that this could be considered an excursion. There was no element of surprise.

The court gave short thrift to the second argument that one should divide the question "an excursion organised by the trader" into two parts (was it an excursion and if so, was it organised by the trader?). It had to be considered together. He acknowledged that on the facts the initiative of the meeting actually came from the committee and not from the solicitors. It was the committee who had arranged the meeting. Thus, the judge was able to say that it was not an excursion organised by the trader.

It is likely that it was a very relieved set of lawyers receiving this judgment where it was said that the costs ran into seven figures. It is to be hoped that these two appellate decisions will provide some guidance as to the interpretation of these and the up to date relevant regulations; the problem being of course that this may be too late to assist an arrangement that would fall foul of the regulations and therefore it would only be of limited assistance for arrangements going forward.

It may be thought that such meetings are few and far between but for example, matters affecting an entire community, for example an environmental nuisance would often see meetings of this sort. It is assumed from the attitude of the Court of Appeal that the more defined the meeting's purpose is and the more that is communicated to the enquiring client prior to the meeting, the greater protection the solicitors will have from the regulations.

Nevertheless, good practice would dictate the importance of doing one's best to ensure compliance with the regulations in all cases and arguably to treat every arrangement as one that is potentially trapped by the regulations. For example it may therefore be good practice to ensure that every CFA in the firm has the mandatory wording and detachable notice rather than having to apply a judgment call as to when the regulations are triggered and the nature of the wording of the retainer.

Practice points

- Consider having the mandatory wording of the regulations in all contractual documentation.
- When arranging to see prospective clients outside of the solicitor's premises ensure there is as much notice and information about the meeting being provided to the client as possible in advance of the meeting.
- If there is any significant doubt that the regulations have been complied with then enter into a new retrospective arrangement that does comply.

Mark Harvey

PROCEDURE

[13] *Kupeli v Cyprus Turkish Airlines* [2016] EWHC 1125 (QB) at [23].

Redman[1] v Zurich Insurance Plc

(QBD; Turner J; 26 July 2017; [2017] EWHC 1919 (QB))

Civil procedure—striking out—personal injury claims—dissolved companies—insurance: retrospective legislation—insurers' liabilities—transitional provisions—Third Parties (Rights Against Insurers) Act 2010—Third Parties (Rights Against Insurers) Act 1930

LT Asbestos; Dissolved companies; Insurers' liabilities; Personal injury claims; Retrospective legislation; Third parties

Between 1952 and 1982, Peter Redman worked for the Humber Electrical Engineering Co Ltd latterly known as ESJS1. On 5 November 2013, Mr Redman died from lung cancer alleged to have been caused by exposure to asbestos during the course of his employment. Soon after, ESJS1 was the subject of a voluntary winding up on 30 January 2014 and was eventually dissolved on 30 June 2016.

The claimant, Mrs Redman, alleged that her husband's death had been caused by exposure to asbestos during his employment with the second defendant ESJS1. She brought a claim under the Third Parties (Rights Against Insurers) Act 2010. The first defendant insurer applied for the striking out of the claimant's claim.

The issue was whether Mrs Redman, as Mr Redman's widow and administratrix, was entitled to circumvent the more stringent procedural requirements of the Third Parties (Rights Against Insurers) Act 1930 regime on the basis that the 2010 Act applied to her claim.

The judge held that Sch.3 to the 2010 Act expressly made it clear that the Third Parties (Rights Against Insurers) Act 1930 continued to apply where, before 1 August 2016, someone had become insolvent for the purposes of the 2010 Act and had incurred a liability against which they were insured. It was not disputed that the employer had become insolvent when it was being wound up voluntarily. In addition, as liability was incurred when damage was caused, not when a claimant had established a right to compensation, the claimant accepted that the 1930 Act applied.[2]

The judge then considered whether application of 1930 Act precluded retrospective but parallel operation of 2010 Act to all claims previously falling within 1930 Act. He held that such a parallel operation would be wholly inconsistent with the wording of s.1[3] of and Sch.3 to the 2010 Act. Additionally, there would be no transition period, which was the purpose of the transitional provisions, because the 2016 regime would apply retrospectively and indiscriminately to any point or circumstances of transition.

The judge pointed out that it would have been relatively straightforward for Parliament to have drafted the appropriate legislation if it had intended the 2010 regime to apply retrospectively to all third party claims against insurers. In addition, if both Acts were to apply in parallel, the judge said he would have expected there would be some merit in affording a choice. However, the claimant's counsel was unable to suggest when a claimant would choose the more procedurally unfavourable 1930 Act.

It followed that the application to strike out the claim under the 2010 Act had to succeed under CPR 3.4 on the basis that it disclosed no reasonable grounds for bringing a claim.

[1] Shirley Anne Redman (Administratrix of the Estate of Peter Redman, Deceased).

[2] *Post Office v Norwich Union Fire Insurance Society Ltd* [1967] 2 Q.B. 363 applied and *Bradley v Eagle Star Insurance Co Ltd* [1989] A.C. 957 followed.

[3] "Transitory, Transitional and Saving Provisions—Despite its repeal by this Act, the Third Parties (Rights against Insurers) Act 1930 continues to apply in relation to—cases where the event referred to in subsection (1) of section 1 of that Act and the incurring of the liability referred to in that subsection both happened before commencement day: cases where the death of the deceased person referred to in subsection (2) of that section happened before that day. In this Schedule 'commencement day' means the day on which this Act comes into force."

Comment

This central issue in this case related to the extent to which the Third Parties (Rights Against Insurers) Act 2010 applied retrospectively to cover claims to which the remedies of the claimant would previously have been covered only by the less attractive 1930 regime. This involved analysis of the relevant transitional provisions which led to what seems to me to have been an inevitable conclusion that it did not. It also led to a look at the historical background starting on 27 January 1927.

That day Mr Walter Chaplin obtained a judgment against the Harrington Motor Co in the sum of just over £541. This was in respect of damages and costs arising from a claim for compensation for injuries which he had sustained when he was knocked down in the street by a car being driven negligently by one the defendant's employees.

The Harrington Motor Co was insured against such claims under a policy issued by the Universal Automobile Insurance Co Ltd. Unfortunately, Harrington went into liquidation and the insurers paid over the sums due under the policy to the liquidator. Mr Chaplin argued that this money should go to him. The Court of Appeal disagreed and held that the money should be distributed between all of the creditors of the insolvent company. Mr Chaplin almost certainly ended up recovering very little indeed. The Court of Appeal took no pleasure in this outcome but felt obliged by authority to deprive Mr Chaplin of most of his damages.

Atkins LJ observed:[4]

> "In this case I am of the opinion that the applicant has a real grievance, and if it were possible to decide for him I should very willingly do so. But it appears to me that the general rules of law which govern cases of insurance and indemnity have been laid down in such terms that it is impossible to make an exception in the particular class of cases of which this forms one, and I am bound to say that I myself should be well satisfied if, by the decision of a higher tribunal or by legislation, the general rule of law were altered so as to cover this particular case. Any member of the public would thoroughly appreciate the position."

To mitigate the harsh consequences of the strict application of the common law to such cases the Third Party (Rights Against Insurers) Act 1930 was passed. The broad effect of the 1930 Act was to transfer the rights of the insured under the policy to the person to whom the liability was incurred.

However, the 1930 Act failed to provide a panacea for all victims of insolvent tortfeasors as the Post Office[5] was to discover to its cost in 1967.

A contractor damaged a Post Office cable but went into compulsory liquidation before any proceedings had been commenced it. The Post Office purported to bring a claim directly against the contractor's insurers. The Court of Appeal concluded that a victim could only sue the tortfeasor's insurers when the right to do so under the policy had accrued. The Post Office could not circumvent the proper process by suing the insurers before the insured's rights had been formally established whether by judgment, declaration or otherwise. Lord Denning MR held:[6]

> "In these circumstances I think the right to sue for these moneys does not arise until the liability of the wrongdoer is established and the amount ascertained. How is this to be done? If there is an unascertained claim for damages in tort, it cannot be proved in the bankruptcy; nor in the liquidation of the company. But nevertheless the injured person can bring an action against the wrongdoer. In the case of a company, he must get the leave of the court. No doubt leave would automatically be given. The insurance company can fight that action in the name of the wrongdoer. In that way liability

[4] *In Re Harrington Motor Co Ltd Ex p. Chaplin* [1928] Ch. 105 at 117.
[5] *Post Office v Norwich Union Fire Insurance Society Ltd* [1967] 2 Q.B. 363.
[6] *Post Office v Norwich Union Fire Insurance Society Ltd* [1967] 2 Q.B. 363 at 375.

can be established and the loss ascertained. Then the injured person can go against the insurance company."

The Court of Appeal in the *Post Office* case wrongly assumed that the effect of its decision would simply be to add somewhat to the procedural burden facing the party suffering loss without ultimately affecting his substantive claim. It was wrong. The leave of the court to proceed, which Lord Denning was so confident would be given in the case of a company in liquidation, was simply not available in the case of any company which had been dissolved and had thus ceased to exist as a legal entity. The House of Lords ruled in *Bradley v Eagle Star Insurance Co*,[7] that an insurer would remain safe behind the impervious procedural barrier provided by the corporate carcass of a defunct insured.

This problem was particularly acute in the field of industrial disease litigation. Many years were liable to pass between exposure to the relevant harmful agent and the manifestation of a pathology. Such long periods of latency gave rise to a correspondingly greater risk that within the relevant time period the tortfeasor company would cease to exist.

The practical impact of *Bradley* has been ameliorated by statute. Most recently, by the operation of the Companies Act 2006 s.1030.[8] Now for the purpose of bringing an action in respect of personal injuries or death an application can be made to restore a company to the register at any time.[9] An even greater change has now been introduced upon the coming into force of the Third Parties (Rights Against Insurers) Act 2010 which, in respect of claims to which it applies, removes entirely the need for a struck off company to be revived.

Here the question was did the 2010 Act apply retrospectively and thereby cover claims previously only covered by the much less attractive 1930 regime? Now we know the answer was no. It was nevertheless a question worth asking.

Practice points

- Under the Third Parties (Rights Against Insurers) Act 2010 s.1, anyone who has become insolvent for the purposes of the Act incurs a liability when damage was caused, not when a claimant had established a right to compensation.
- The transitional provisions do not provide for the 2010 regime to be applied retrospectively, so as to run in parallel with the regime under the Third Parties (Rights Against Insurers) Act 1930.

Nigel Tomkins

[7] *Bradley v Eagle Star Insurance Co* [1989] A.C. 957; [1989] 2 W.L.R. 568.
[8] Dealing with when application to the court may be made.
[9] Within six years in any other case.

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