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Editorial

We have, once more, an array of very interesting articles. The first is about policy and we are extremely grateful to Lord Sumption for allowing us to publish in full the lecture that he gave to the Personal Injury Bar Association last year with the very controversial title "Abolishing Personal Injuries Law—a Project". The lecture focused on the views expressed by Professor Atiyah, which originated from the book he published in 1970, called *Accidents Compensation and the Law*. Lord Sumption summarises the opinions expressed by Professor Atiyah and gives his support for them. However, he concludes that he considers it highly unlikely that proposals made will be implemented but does consider that rights of claimants will continue to be restricted. His views are very provocative and I would welcome all contributions focusing on the points that he has raised.

In the liability section we have four more articles. The first by John-Paul Swaboda is a revisit of the *Bolam* test. The articles outlines the history to this test, a careful analysis of the decision itself and how, in recent years, there has been a noticeable shift in the court's approach to this test. The effect has been to restrict the impact of this test.

H. Vosper and S. M. Hignett have written an article concerning the pharmacy legislative framework work and patient safety. This focuses on what type of safe system should be in place to ensure that patient safety is maximised. The human factors/ergonomics mechanism is the one advanced and has been adopted by a number of Healthcare agencies.

Our third article on liability relates to contributory negligence in pedestrian road traffic accidents. Daniel Dyal conducts an assessment and analysis of the types of cases where contributory negligence may well arise when a pedestrian is involved. His analysis of the general principles deriving from statutes and the recent Supreme Court decision in *Jackson v Murray* is extremely useful.

Finally, we have an extremely interesting article from Per Laleng. The article reports findings from an empirical study of 458 personal injury cases decided by the Court of Appeal spanning 15 years. The conclusion that has been reached upon a careful analysis is that defendant appellants reverse more often than claimant counterparts and defendants also successful resist more appeals than claimants. He concludes that this demonstrates a bias on the part of the Court of Appeal towards defendants. An interesting feature of the article is reference to the use of machine learning platforms such as data robot and Watson, which are much higher accuracy of prediction rates than that which is achieved by human legal advice.

There are two articles on damages, in this edition. Both are concerned with the alterations to the discount rate. Rob Weir QC there is an interesting analysis of the position concerning damages for the cost of accommodation. He deals with all the various alternatives and comes up with a very credible solution to the problem. Sabrina Hartshorn gives a very useful assessment of the impact of the proposed legislation regarding the discount rate concerning the recovery of fees for investment advice. Under the current law, it is well established that the victims are entitled to be compensated on a full compensation principle, but the costs of investment advice has been rules unrecoverable. There are questions under the new legislation whether this position is going to change.

We are delighted that Master Roberts has written an article on cost budgeting for us. The rules relating to costs will change so that attempts be made to control costs in advance. The way of achieving this is by imposing the Cost Budget for each individual case. As a result of the introduction of cost budgeting, there has been many issues that have arisen before the courts, indeed, Master Roberts has had to adjudicate on these on several occasions. His article is a very helpful analysis of the position that has been reached regarding costs management.

Colin Ettinger

Abolishing Personal Injuries Law: A Project[1]

An address to the Personal Injury Bar Association

Lord Sumption JSC

Accidents; Insurance; Negligence; No-fault compensation; Personal injury; Personal injury claims; Tortious liability

It is now exactly 20 years since Patrick Atiyah published The *Damages Lottery*,[2] one of the most eloquent polemics ever to be directed against a firmly entrenched principle of law. Professor Atiyah was concerned with the law of negligence generally. But his book has generally been treated as an attack on personal injuries law and its practitioners. Most of his arguments and all of his solutions were directed against the concept of fault-based liability for personal injury. He proposed to abolish liability in tort for causing personal injury. In the case of road accidents, then as now by far the largest single source of personal injury claims, the right to sue for negligence would be replaced a system of compulsory, no fault, first-party insurance. In the case of other sources of personal injury, there would be no alternative source of provision. Atiyah proposed to encourage people to buy first-party insurance, but to leave it, in the final analysis, up to them.

Atiyah's criticisms had never previously been advanced with such rhetorical force, but they were not new. Many of them had appeared in his textbook *Accidents, Compensation and the Law*, the first edition of which appeared in 1970.[3] A year before that, the Woodhouse Committee in New Zealand had proposed to replace the right to sue with a system of state-funded social provision. These recommendations were accepted by the New Zealand Government and enacted in the Accident Compensation Act 1972. Even more radical proposals had been made by an Australian commission of inquiry, over which Sir Owen Woodhouse also presided, and of which Atiyah himself was a member, but these were never acted on. In England, the Pearson Commission had been appointed in 1973 and reported in 1978. They recommended a somewhat similar scheme, but funded from general taxation. After some years of hoping that the whole issue would go away, the British Government eventually binned the report and resolved to take no action. As a result, the issue had almost disappeared from sight by the time that *The Damages Lottery* was published in 1997.

The book generated some brief ripples in the placid waters of academic journals, and was the subject of a formidable riposte by Professor Burrows as well as some more technical criticisms by other academic lawyers and sociologists. It is still read as a masterpiece of polemical contrarianism, but it completely failed in its main object, which was to interest the policy makers, journalists and general public to whom it was primarily addressed. More recent editions of *Accidents, Compensation and the Law*, which are due to Peter Cane,[4] have kept the cause alive, but his proposals, which are slightly different from Atiyah's, have had limited influence.

You may well ask then why I should think it worth returning to this controversy tonight. I think that there are at least two reasons for doing so.

One is that we are witnessing a renewed bout of indignation about "compensation culture". This has been a recurring source of controversy in the press for some years, but more recently, the cause has been

[1] Personal Injuries Bar Association Annual Lecture 2017.
[2] P. Atiyah, *The Damages Lottery* (Hart Publishing, 1997).
[3] P. Atiyah, *Accidents, Compensation and the Law*, 1st edn (Littlehampton Book Services Ltd, 1970).
[4] P. Cane, *Accidents, Compensation and the Law*, 8th edn (Cambridge University Press, 2013).

taken up by the Government. In 2004 and again in 2012, government intervention followed intensive and very public lobbying by motor insurers. This has resulted in a series of measures to curtail the activities of claims management companies, and changes to the solicitors' conduct rules with the same end in view. At the same time, there have been radical changes to the incidence of costs, most of which have been largely unfavourable to claimants. More recently, the Queen's speech included proposals to introduce legislation requiring the submission of prescribed forms of medical evidence before insurance claims can be settled, and a statutory scale of damages awards for whiplash claims. The mounting concern about compensation culture is powered by a number of factors. The main ones are the upward pressure on motor insurance premiums arising from an increase in the number and value of claims, governmental concern about the cost of claims against the National Health Service, and persistent stories in the press (not always strictly accurate) about unmeritorious claims.

There is, however, a more fundamental reason for returning to Professor Atiyah's radical proposals. There are some propositions which are so deeply entrenched in the instincts of lawyers and the public at large that they are never critically examined. The duty of care to avoid injuring our fellow men may well be the most deeply entrenched of all. As Hale LJ observed in her judgment in the Court of Appeal in *Parkinson v St James and Seacroft University Hospital NHS Trust* at [56]:[5] "the right to bodily integrity is the first and most important of the interests protected by the law of tort."

By the leisurely standards of the common law, this is a relatively recent development. The modern law of negligence was made by 19th century judges, who first recognised the existence of duties of care independent of the much older duties recognised by the law of trespass. This major development of our law occurred largely in cases about negligently inflicted personal injury and property damage. The law of tort recognises these species of physical injury as inherently actionable, subject only to special defences such as *volenti*, or limitations on the recoverable damages, such as causation and remoteness. By comparison, purely economic interests are not inherently actionable, but only in specific and carefully circumscribed cases. It is, as a general principle, desirable that judges and practitioners should reflect on the social and moral foundations of the law which they practise. The duty not negligently to injure other people is imposed by law, in other words by the state. Like any non-consensual obligation, it must ultimately be founded either on social utility or on collective moral values.

Atiyah's basic argument against the law of negligence was that it lacked social utility. Drawing mainly on the material collected by the Pearson Commission, he pointed out that almost all personal injury claims were brought against insured parties or public bodies. The Pearson Commission estimated that in 1973 88% of personal injury claims by number and 94% by value were brought against insured parties, and most of the rest against public bodies. That conclusion will surprise no one. In most cases, it is not worth suing anyone else. Given that most of the increase since Pearson comes from road accidents, where liability insurance is compulsory, the proportion of insured claims is likely to be at least as high today.

The cost of meeting claims for negligently caused personal injury was estimated by Pearson at about 1% of the gross national product of the UK. There is a measure of uncertainty about all such estimates, but whatever the true proportion, it is a significant figure, and it represents a substantial social cost. In the first place, liabilities that fall to be met by insurers or by the state are effectively socialised across the population at large. We all, or almost all, pay for them in the form of higher insurance premiums or taxes. Studies suggest that although individual insurance premia do to some extent vary with an individual's personal claims record, premiums are still largely fixed according to class of business and risk category.

Secondly, the cost is not limited to the amount of the damages. Perhaps the most remarkable figure in the statistical annexes to the Pearson Report was the Committee's estimates of the cost of making and processing claims for personal injury. They concluded that legal and administrative costs amounted to 47% of the total cost of settling personal injury claims. This figure was proposed subject to a large margin

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

of error, but it is broadly consistent with other evidence. According to the Young Report, published in 2010, legal costs of resolving claims against the National Health Service had accounted for 36% of the total cost of settling personal injury claims in the previous year, and this figure does not include non-legal administration costs. There is no reason to think that the insurers' costs of processing claims against non-state bodies is any different.

Thirdly, although the taxpayer has a bottomless pocket, insurers do not. Beyond a certain point, the cost of rising claims volumes cannot simply be piled onto premiums, and begin to erode profits. In the longer term, the result is likely to be a contraction of insurance capacity. In extreme cases, insurers can simply withdraw from the more exposed sectors of the liability market. This is not a purely hypothetical prospect. It is what actually happened to product liability insurance in the US in the late 1980s, as a direct result of the explosion of claims for long-term latent industrial diseases and environmental pollution. The market effectively ceased to exist, and had to be recreated offshore on more restrictive terms.

A number of things might be thought to follow from the socialisation of the cost of personal injury claims. A system which makes compensation dependent on fault makes little sense if the damages are being paid not by the persons at fault, but by society as a whole. One is entitled to ask: why should the private law distribution of rights and liabilities between individuals or their employers determine the incidence of what is, in reality, a social cost? Let us leave the moral dimension out of it for the moment. I will return to it later. From a purely utilitarian point of view, if the cost of compensating people for personal injury falls on society at large, there is no rational reason to distinguish between personal injury which has been caused by some one's fault, and personal injury which has occurred without fault. Equally, there is no rational reason why the victims of accidents, however caused, should necessarily recover a full indemnity as the law of tort presently requires. Since we are all paying for the tortiously inflicted injuries, we might as well treat it as a social service and make it respond to our collective social priorities rather than to the common law rights of individual claimants.

Let me start with compensation culture. The problem about this protean phrase is that it is a slogan, and not a carefully thought out position. It encompasses at least two complaints, which are very different although they share a common rhetoric. One is that too many fraudulent claims are being made: in other words, people are being too greedy. The other is that too many justified claims are being made: in other words, the law is being too generous. The Government seems to be making the first point, but Professor Atiyah was making the second.

There undoubtedly is a problem about fraudulent claims, but I do not think that it is a problem calling for a fundamental rethink of our law. Detected frauds have increased significantly, although how much of this is due to more diligent detection and how much to declining standards of honesty is hard to say. The main issue concerns small consumer claims, where it is likely to cost the insurers a great deal more to investigate a claim than just to pay up. Motor insurance fraud, which accounts for nearly two thirds of detected fraud, is particularly difficult for insurers to control through the terms of their contracts. Insurance is compulsory and contractual restrictions on cover or procedural conditions for pay-outs are tightly controlled by statute. So it may well be that legislation is needed in order to deal with it, but it is hard to regard this as raising a great issue of principle. The law does not countenance fraud and never has. Subject to seeing the draft bill, the current proposals strike one as a relatively modest regulatory adjustment.

The more fundamental and controversial issue is not about fraudulent claims but about justified ones.

There has been a persistent rise in both the number and value of claims for personal injuries. The Pearson Commission estimated that in 1973 there had been about 250,000 claims a year. According the Association of British Insurers, the corresponding figure for 2013–2014 was about 1,200,000. Almost all of this increase was attributable to road accidents, which now account for about 80% of all accidents. Since the number of road accidents does not seem to have increased in proportion, it is reasonable to conclude that the main factor at work is an increased propensity to claim, especially among those involved in road accidents. The

Pearson Commission concluded that only 11% of people injured in accidents even considered the possibility of claiming. Survey evidence suggested that by far the most significant reason was that they did not realise that they could. The main reason for that was ignorance: ignorance of the significance of their symptoms; ignorance of the law or the workings of the legal system; ignorance of the standards expected of others. It seems likely that the increased propensity to claim is due, at least in part, to greater knowledge of these matters. This is not in itself a bad thing. If people know more today about their rights, that may well be due, at least in part, to the active solicitation of claims by solicitors and claims management companies. To those like me who believe that litigation is an evil, the active solicitation of claims can seem distasteful, but it is really not a matter of taste, and I find it impossible to say that it is wrong. If the law entitles the victim of an accident to compensation, it ill becomes us to criticise him for knowing it and claiming. It is true, of course, that people who know that there is a claim to be made tend to reinterpret events in a way that justifies claiming. But there is nothing new about that, nor is it peculiar to personal injuries claims. Wish fulfilment is a basic trait of human nature, and a problem about witness evidence in every field of litigation.

Behind the growing propensity to claim lies another fundamental change which is perhaps even more significant. Unlike their forbears, people are no longer disposed to accept the wheel of fortune as an ordinary incident of human existence. They regard physical security not just as the normal state of affairs but as an entitlement. I do not find this surprising or discreditable. It is a perfectly rational response to some significant developments over the last half-century: higher expectations of government, to some extent encouraged by governments themselves; higher expectations of the law as an instrument of social welfare; higher professional standards; a more intense regulatory environment; and improvements in the technical competence of humanity, which have given us much more control over our own and other people's fortunes. The result of these developments is that a far higher proportion of personal injuries are regarded as avoidable. Now, to say that injury was avoidable does not mean that it was negligently caused, but it is a major step in that direction. It has inevitably affected the standards of responsibility which the law imposes on us in our treatment of each other.

Judges have undoubtedly expanded the scope of duties of care over the past half-century, as well as the range of consequences for which a wrongdoer may be liable. But in doing this, they have merely followed the collective instincts and values of the public at large, which within limits is a legitimate influence on the common law. If the law says that we are entitled to blame other people for rather more of our misfortunes than hitherto, it is really rather absurd to complain about a culture of blame, as if this was somehow a symptom of our collective moral degeneration. The importance of Professor Atiyah's work was that he was honest enough to recognise that if we want to influence the number and incidence of personal injury claims, the only way to do it is to alter peoples' legal rights, instead of going around lamenting the enforcement of what legal rights we have.

There are two basic criticisms to be made of the use of tort law to address the problems of personal injury, and they point in different directions. One is directed against the use of fault as the touchstone of liability. The other is directed at the scale of claims and at the corresponding social cost.

Let me deal with fault first. There are a number of arguments in favour of fault-free systems on the New Zealand model. One is that they are more efficient, because they avoid considerable investigatory and legal costs of attributing blame. The second is that if the object of the exercise is to address the problem of personal injury, there is no obvious reason to give special treatment to those victims who have had the good fortune to discover that their injuries were someone else's fault. A third is that fault-based systems tend to influence behaviour in ways that are over-defensive and not necessarily in the public interest.

Let me take a well-known example, which illustrates all three points: the disputes in the latter half of the 20th century about birth deformities attributed to drugs designed to relieve the symptoms of morning sickness in pregnancy. Thalidomide was invented in Germany. It was marketed as a treatment for nausea

and insomnia in pregnancy, at a time when scientists believed that drugs taken by pregnant women could not cross the placental barrier and affect the developing foetus. This view was tragically mistaken, and as a result many thousands of babies were born with serious physical deformities. The drug was marketed in the UK between 1958 and 1961 by Distillers Biochemicals. The only cause of action available in England to the children who suffered the deformities was an action in tort against Distillers. This depended on proving negligence against Distillers, which formulated the product under licence but was neither the inventor nor the manufacturer of the active ingredient. That proved to be an expensive and time-consuming process with distinctly uncertain prospects of success. After six years of litigation there was a settlement in 1968 under which the allegations of negligence were withdrawn in return for an offer of 40% of the proved damages. That even this much was achieved was due to a press campaign in which the main theme was that Distillers owed social and moral obligations going beyond the legal obligations imposed by the law of tort.

Now let me turn to another well-known case. Bendectin was the brand name of a product comprising vitamin B6 and a standard anti-histamine, which was marketed in the US in the early 1980s for the treatment of morning sickness and insomnia in pregnancy. A number of women who had taken it gave birth to deformed babies. Yet these deformities were never shown to have been caused by Bendectin. Comprehensive testing both before and after the event showed it to be safe. It had been approved by the US Food and Drugs Administration, one of the world's more effective drug licensing authorities, which had persistently refused to allow the marketing of Thalidomide at a time when it was available in most other countries of the world. Indeed, the FDA has recently reauthorised the marketing of the active ingredient of Bendectin under a different brand name. Yet the manufacturers had been forced to withdraw it from the market in 1983 because the cost of defending class actions made it unprofitable, even though none of these actions succeeded. Some of the literature suggests that the disappearance of Bendectin from the market for 30 years had really quite serious consequences. It deterred drug companies from developing any drugs specifically designed for pregnant patients, and pushed many patients towards other less reputable and less intensively tested treatments.

The legal environment is very different in the US, but Thalidomide was primarily a British and German tragedy, and defensive responses to the threat of liability are certainly not confined to the US. *Tomlinson v Congleton BC*[6] is a good illustration of the way in which the fear of liability in tort can lead to the total withdrawal of facilities that are valued by the great majority of the population who use them responsibly. The basic problem in *Tomlinson* was the attempt of the local authority to eliminate all risk, instead of drawing a balance between risk and the adverse consequences of eliminating it. In doing this, they went beyond what the law required. The effect on the liberty of others was deplorable, and the House of Lords duly deplored it, but the reaction of the local authority was, in fact, a perfectly rational response to a real problem posed by the current state of the law. Balancing risk of injury against the consequences of eliminating it requires a complex and no doubt expensive case-by-case assessment. For every case in which the risk is too remote to justify the infringement of liberty, there will be half a dozen where a judge will decide the other way. From the point of view of the rational defendant, it is simpler, cheaper and safer to ban the relevant activity, and far more likely to protect council officers from criticism when something goes wrong.

These are all in their different ways extreme cases. Nevertheless, they do, I think, illustrate why the law of tort is an extraordinarily clumsy and inefficient way of dealing with serious cases of personal injury. It often misses the target, or hits the wrong target. It makes us no safer, while producing undesirable side effects. What is more, it does all of these things at disproportionate cost and with altogether excessive delay.

[6] *Tomlinson v Congleton BC* [2003] UKHL 47; [2004] 1 A.C. 46.

It is sometimes suggested that the fault is a necessary element in any scheme of compensation, because it deters sloppy practices, thereby improving general standards of safety. I am sceptical about this proposition. Most of the available empirical studies have been carried out in the US. I cannot claim to have read all of them, although I have read a fair number. My tentative conclusion is that in spite of the dramatically higher level of US damages awards, there is no consistent evidence of any deterrent effect specifically attributable to the prospect of fault-based civil liability.

The whole notion of deterrence assumes that there is a minimum of reflection behind the actor's decisions. Negligence normally consists in the absence of the very processes of reflection which the notion of deterrence assumes. It generally happens through ignorance, incompetence, or oversight, none of them states of mind which are normally associated with reflection upon the possible consequences. On the roads, which is where the great majority of personal injuries occur, a collision is just as likely to injure the negligent driver himself as other road-users. Yet for all that, personal injuries sustained in road accidents have risen inexorably.

The deterrence theory has more to be said for it at what one might call the procedural level. The designer of a safety procedure or a product is deliberately applying his mind to the question of safety, but even here, any deterrent effect is heavily diluted by the availability of liability insurance, which is compulsory in the case of liability to employees and normal in the case of product liability. The evidence tends to suggest that the prospect of liability in tort achieves nothing that would not be achieved anyway by the prospect of reputational damage or criminal sanctions. Criminal sanctions are now more widely enacted and more efficiently enforced. They are also, as a general rule, uninsurable. All the survey evidence tends to suggest that as a way of educating those whose job it is to design for safety, they are a great deal more persuasive than the law of tort.

I suspect that the main reason why most people instinctively approve of the fault principle has nothing to do with utilitarian considerations of this kind. The law is generally sensitive to considerations of economic efficiency, although judges rarely acknowledge the fact. But one area which has been more or less impervious to considerations of economic efficiency is the legal right to bodily integrity. It is a right founded on profound cultural instincts. Questions of cost tend to seem trivial by comparison. The debate about compensation culture really turns on complex cultural issues about moral responsibility and blame which have very little to do with economic efficiency. The public's view is based on two simple moral judgments. One is that he who causes physical injury must make it good financially. The other is that it is a proper function of the courts to find facts and distribute blame, simply as a satisfaction for victims or their relatives.

Personally, I would question whether there really is a moral case for imposing liability in damages on the ground of negligence. One might perhaps make an exception for professional failures where the defendant has undertaken to exercise an appropriate measure of care and the relationship with the victim, although not actually contractual, is equivalent to contract. Except in that situation, negligence is not morally culpable. It is a normal feature of human behaviour. This is not the place and 6.40pm in the evening is certainly not the time to embark on a profound survey of corrective or distributive justice. I will only say this. I can imagine a moral case for imposing an absolute liability on those who cause physical damage to others, simply on the ground that they are the agents of some invasion of the victim's physical integrity. That was the basis of the more limited and now largely redundant tort of trespass to the person. I can also imagine a moral case for imposing liability on those who intentionally or recklessly cause physical damage to others, but liability for negligence does not depend on a person's mere infliction of damage, nor on his state of mind. It depends on his falling below some objective standard of conduct to which he has not usually assented, but which the law imposes upon him. It seems to me that the only possible justification for the law doing that is its social utility. Yet the arbitrary results and incomplete

coverage of a fault-based system, combined with its prodigious cost and unwelcome side-effects, seriously undermine the social utility of the law of tort as a way of dealing with personal injury.

To some extent, we are already moving towards a system of strict liability, or at any rate of stricter liability. This has been the tendency of legislation on the subject for some years. Thus, strict liability is in principle imposed by the Animals Act 1971 for physical injury done by animals and by the Consumer Protection Act 1987 for injury done by defective products offered for sale commercially. There are special defences in each case, but they are narrowly framed and even more narrowly construed. Such legislation seems to me to be a perfectly reasonable response to the general availability and widespread use of liability insurance in these classes of case. It would probably have made litigation like thalidomide a great deal easier to resolve, had it been in force at the time.

My own experience, and perhaps yours too, is that even in areas where traditional notions of fault prevail in theory, the courts have in practice moved noticeably closer to strict liability, albeit very gradually and without acknowledging that they are doing it. This is because the whole forensic process of attributing fault is inherently biased in favour of the claimant. Once it is established that something has gone wrong that was caused by the defendant's act, it can be very difficult to persuade a judge that it wasn't the defendant's fault. The law determines the standard of care which it imposes on individuals in advance, but the court finds fault in arrears with all the forensic advantages of hindsight. The evidence will commonly reconstruct the exact chain of causation by which the injury occurred, starting from the injury and working backwards to the act, but the judge finding fault, looks at the chain from the other end, starting with the defendant's act. The outcome seems obvious. What actually has happened was always going to happen, and what was always going to happen should have been obvious to the reasonable man, even if it wasn't at all obvious to the particular defendant. The whole forensic process lends a spurious clarity and inevitability to a chain of events that is actually a lot less straightforward. The result may be very like strict liability, but it is strict liability with most of the uncertainty and all of the costs associated with a fault-based system.

It will by now be apparent that I am not a great admirer of our current system of distributing liability according to fault, but, and this is where the title of my lecture is misleading, I have no doubt that it will survive. There are at least three reasons why it will survive.

First, the only obvious alternative is a system of fault-free compensation funded either from taxation or by compulsory insurance. This would be a great deal less wasteful, because it would reduce the proportion of the cost of settling personal injury claims represented by investigatory and legal costs, but the additional coverage involved in dispensing with fault would enormously increase the overall cost. The New Zealand example is said to have been accepted by public opinion there, but it has not been adopted in a single other common law country. The second reason why fault will survive as the essential criterion for compensation is the phenomenon so familiar to economists of concentrated benefits but diffused costs. The hardships and costs associated with grave disabilities are visible and for those affected catastrophic; while the costs are subtle, indirect, and thinly spread across the whole population. The one area where the public feels the cost directly is motor accidents. Annual motor premiums are a significant item in family budgets and we all notice when they have gone up. That no doubt accounts for the fact that government initiatives in this area have been concentrated in the motor sector. The third and perhaps most significant reason why it will survive is that it responds to widespread public notions about personal responsibility and the proper function of law. I do not myself share these notions, but I am in a minority on this. It is fundamental to my conception of the judicial function, that I do not sit just to give effect to my personal moral preferences.

My prediction would be that fault will remain the touchstone of our law of personal injuries, but that the principle will be eroded at the edges by statutory intervention from one end and judicial hindsight from the other. The result will be to increase the overall cost of personal injury claims and, I suspect, to provoke a legislative reaction as mounting insurance premiums and pressures on the NHS budget lead to

calls to control the costs. The outcome is likely to be the abolition of the principle of full indemnity and its replacement by a statutory measure of damages with a view to achieving a better balance between public and private interests.

I would expect this to take two forms. One is the imposition of value thresholds on personal injury claims, with a view to eliminating small claims. Small claims account for the great majority of claims and are disproportionately costly and cumbersome to administer. The second will be the capping or abolition of certain heads of loss. There is a case for abolishing damages for non-pecuniary losses, or at least limiting it to long-term pain and suffering and loss of amenity. There is a case for limiting damages for loss of earnings to the amount necessary to support a reasonable standard of living, rather than the superior standard of living which the richest accident victims might have expected if they had not been injured. To some extent these things are already happening. Successive decisions of the Supreme Court of Canada have limited the scope for large awards of non-pecuniary loss. The same trend is observable in the Judicial College guidelines in this country. In New South Wales liability, thresholds and caps on awards for loss of earnings were adopted for motor accidents by legislation enacted in 1999, and extended to other personal injury claims in 2002. The British Government's current proposals appear to envisage a rather similar system of thresholds and caps for whiplash injuries. It is, I think, significant and indicative of the direction of travel that the New South Wales legislation followed large and unpopular increases in insurance premiums, but it is also right to point out that it was accompanied by other measures making altogether more generous statutory provision for certain categories of victim than anything that has so far been contemplated in the UK. The statutory damages scheme for motor accidents extends in New South Wales to personal injuries occurring without fault. Moreover, since 2006 there has been a generous statutory scheme for compensating those suffering from personal injuries involving long-term care. Looking after the principal losers may be the price to be paid for limiting the generality of accident claims.

What all of this means is that the officers of this association can rest easy in their seats. It is likely to be needed for a considerable time to come.

Bolam: Going, going … gone

John-Paul Swoboda[*]

Bolam test; Clinical negligence; Informed consent; Medical advice

This article argues that the *Bolam* test, used to determine breach of duty in clinical negligence cases, should be relegated to legal history. The first section of this article considers the history of the *Bolam* test, the second section the arguments for and against the continued application of the *Bolam* test, and the third section the ways in which the *Bolam* test has been diluted and, in the case of disclosure of risk, overruled.

The birth of the *Bolam* test to the height of its application

A medical practitioner owes a duty "to exercise reasonable skill and care in his treatment of his patient". In *Lanphier v Philpos*,[1] a clinical negligence case, Tindal CJ summarised the duty owed when directing the jury in these terms:

> "Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case, nor does a surgeon undertake that he will perform a cure; nor does he undertake to use the highest possible degree of skill."

This passage highlights a key element, which informs the standard of care owed by medical professionals and other professionals such as solicitors and barristers involved in litigation; success is not guaranteed. In was in this context that McNair J gave his famous direction to the jury in *Bolam v Friern Hospital Management Committee*[2] where he stated:

> "I must tell you what in law we mean by 'negligence' … In the realm of diagnosis and treatment there is ample scope for genuine difference of opinion and one man clearly is not negligent merely because his conclusion differs from that of other professional men … The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure no doctor of ordinary skill would be guilty of, if acting with ordinary care … he is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art … Putting it the other way round, a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take the contrary view."

Upon reading the full text of McNair J's summing up to the jury this author obtained the impression that he believed the surgeon should not be found to be negligent. One wonders whether this affected the language or tone when he gave his direction to the jury on the applicable standard in breach of duty.

Whatever the context and history, McNair J's direction to the jury is the basis of judgment by peers which we have come to know as the *Bolam* test. The House of Lords in *Maynard v West Midlands RHA*[3] cemented the *Bolam* test into English law. Lord Scarman, whose judgment was unanimously approved by the other members of the house stated:

[*] 12 King's Bench Walk.

[1] *Lanphier v Philpos* 173 E.R. 581; (1838) 8 Car. & P. 475.
[2] *Bolam v Friern Hospital Management Committee* [1957] 1 W.L.R 582.
[3] *Maynard v West Midlands RHA* [1984] 1 W.L.R. 634.

> "Differences of opinion and practice exist, and will always exist, in the medical as in other professions. There is seldom only one answer exclusive of all others to problems of professional judgment. A Court may prefer one body of opinion to the other, but that is no basis for a conclusion of negligence."

It is of note that Lord Scarman, in this quote, grouped the medical profession together with other professions which highlights the fact there is nothing special about the medical profession when considering whether they should enjoy their own legal test in relation to breach of duty.

The *Bolam* test was most widely applied following the House of Lords decision in *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital*[4] where it was found to be applicable to determine the question of whether there had been sufficient disclosure of the risks of surgery. As Lord Bridge, with whom the majority agreed, put it:

> "… a decision what degree of disclosure of risks is best calculated to assist a particular patient to make a rational choice as to whether or not to undergo a particular treatment must primarily be a matter of clinical judgment … the issue whether non-disclosure in a particular case should be condemned as a breach of the doctor's duty of care is an issue to be decided primarily on the basis of expert medical evidence, applying the Bolam test."

Lord Diplock had this to say about the breath of the *Bolam* test:

> "My Lords, no convincing reason has in my view been advanced before your Lordships that would justify treating the Bolam test as doing anything less than laying down a principle of English law that is comprehensive and applicable to every aspect of the duty of care owed by a doctor to his patient in the exercise of his healing functions as respects that patient."

Reasons to question the continued application of the *Bolam* test

The *Bolam* test is underpinned by the following principle; that responsible medical professionals are in a better position than the court to judge whether a particular decision was acceptable. Lord Diplock put it in this way in *Sidaway*:

> "… the court is not tempted to put itself in the surgeon's shoes; it has to rely upon and evaluate expert evidence, remembering that it is no part of its task of evaluation to give effect to any preference it may have for one responsible body of professional opinion over another, provided it is satisfied by the expert evidence that both qualify as responsible bodies of medical opinion."

There is good reason for the court not to defer its judgment to doctors contrary to the position suggested by Lord Diplock in the quote above. That is because the question for the court is whether the medical professional has performed his/her work with reasonable care and skill and a judge cannot properly answer this question without considering the actions and/or omissions of the medical expert on trial.

The *Bolam* test is more nuanced than the court avoiding a decision of their own on whether the medical professional on trial exercised reasonable skill and care, when one takes into account *Bolitho v City & Hackney HA*[5] and the limited exceptions to judgment by peers created in that case (as discussed below). However, the deleterious effects of the "nuanced *Bolam* test" are still manifold. The *Bolam* test unnecessarily restricts the judgment of the court as to whether reasonable skill and care has been exercised by only allowing a court to reject a medical opinion where certain limited conditions, as specified in *Bolitho* are met. It loads the scales in favour of medical professionals on trial as they need only find a respectable medical professional espousing a reasonable or logical opinion to support their actions or omissions to

[4] *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] A.C. 871; [1985] 2 W.L.R. 480.
[5] *Bolitho v City & Hackney HA* [1997] 3 W.L.R. 1151.

provide themselves with a complete defence, irrespective of whether the judge considers the medical professional to have exercised reasonable care and skill. It encourages parties to seek expert opinion from experts known to hold eccentric positions or positions at the extremes given the known difficulty of overcoming the *Bolam* test. It can infantilise the role of the judge in clinical negligence trials by asking them to decide only whether all the breach experts condemn the actions or omissions of the medical professional and not whether the medical professional exercised reasonable care and skill. It promulgates the belief (whether true or not) that doctors/clinicians avoid findings of liability because they stick together and look out for one another and thereby undermines the perception that the court is an impartial adjudicator.

The logic which appeared to be behind McNair's J direction and subsequent judgments in favour of the *Bolam* test is that there may be one or more "perfectly proper standard" which can be applied by a medical professional. Whilst this is undoubtedly true of some decisions/procedures it is a non-sequitur to conclude that this means that a fellow medical professional should decide whether the standards adopted by the clinician in question was proper. A professional judge should be able to determine whether there are multiple acceptable practices for a particular situation and whether the adoption of one particular practice fulfilled the duty to exercise reasonable care and skill, or not.

Context is everything and this is particularly true in the development of the *Bolam* test. At the time of the *Bolam* test a jury, not a judge, decided on a medical professional's liability. It is easy to understand why a jury of 12 lay people of differing intellectual ability may be told to decide the case on a simplified and restrictive basis; the jury might be thought to be less likely to make a mistake, and less likely to be split, if they had only to judge whether the defendant's actions were supported by a responsible doctor rather than to judge whether the doctor in question exercised reasonable skill and care which would necessarily require consideration of the medical and scientific context. There is no good reason why a professional judge should be unable to assess evidence to decide whether a medical professional exercised reasonable skill and care.

Further in both *Bolam* and subsequent cases medicine is described as an art. This, in my view, reflects the fact that in the 1950s there was much less scientific research which guided medicine. Rather the practice of medicine in the 1950s was, to a greater extent, empirical and practice based so that medical professionals had to make judgment calls rather than make evidence-based decisions. There has been an incredible development in medicine and a strong movement towards "evidence based medicine" as described in the article "Evidence based medicine. A new approach to teaching the practice of medicine".[6] Clinical decision making is now guided by epidemiological studies, meta analyses, systematic reviews, and randomised controlled trials. In other words, it will now be a much rarer situation where a medical professional has to make a decision on the basis of "clinical judgment" alone; it is much more likely that there will be an evidence base on which the court can consider the medical professional's actions. The great development of evidence based medicine has found form in other respects, notably the National Institute of Clinical Excellence ("NICE") Guidelines. These guidelines represent responsible and reasonable practice and undermine the need for a rule which requires judgment by peers.

It has sometimes been argued that the rider in the *Bolam* test that any medical opinion in support of a medical practitioner needs to be responsible, respectable, and reasonable provides sufficient safeguard against the court delegating its role to medical professionals. That is not what has happened in practice. One need look only as far as the judgment of Lord Browne-Wilkinson, with which there was unanimous agreement, in *Bolitho v City & Hackney HA* to see the fallacy of that argument. Lord Browne-Wilkinson stated:

> "I emphasise that in my view it will very seldom be right for a judge to reach the conclusion that views genuinely held by a competent medical expert are unreasonable."

[6] "Evidence based medicine. A new approach to teaching the practice of medicine" [1992] J.A.M.A. 268: 2420-5.

It is also sometimes argued that the *Bolam* test prevents the practice of defensive medicine and unmeritorious litigation. But there is no evidence in support of this proposition and there is no reason to believe that decisions made by judges on an analysis of whether the medical professional exercised reasonable care and skill would result in greater success for claimants than is currently the case. Indeed, judges may be less generous than some medical practitioners as to what amounts to acceptable medical practice.

There is also no good reason for divergence as to the appropriate test to judge the standard of care owed as between difference professions. The medical profession is not the only profession where success is not guaranteed; the same is true of litigation solicitors and barrister, and investment advisors. Yet it is only with regard to medical professionals that the court should not be "tempted to put itself in the surgeon's shoes". When assessing whether a professional other than a medical professional is in breach of the duty of reasonable care and skill, the court will decide whether the professional has fulfilled his duty rather than delegating the role to a responsible professional. There is no distinction of substance between a doctor and any other professional to justify the divergence between professions as implicitly recognised by Lord Scarman in *Maynard*.

Erosion/evolution of the *Bolam* test

In recent years, there has been a noticeable shift in the court's approach to the *Bolam* test. This shift is in relation to: (a) tone and language; (b) a willingness to think outside the *Bolam* constrictions; and (c) the over-ruling of *Bolam* in relation to disclosure of risk.

A change in tone

C v North Cumbria University Hospitals NHS Trust[7] provides a striking example of the different tone taken in more recent cases as to the *Bolam* test. Green J provided a detailed analysis of the *Bolam* test to determine whether there had been a breach of duty by the midwife in administering a second dose of a drug to induce labour. In his analysis, gone were the suggestions that the court should not put itself in the medical practitioner's shoes (*Sidaway)* and gone were the suggestions that a court's preference for one medical opinion over another was irrelevant (*Maynard*). Instead, Green J spoke of the "substantial weight" which a medical opinion would attract if it supported the act or omission of the medical practitioner in question, even if there were contrary evidence condemning the act or omission. Green J emphasised:

> "The Court … must not however delegate the task of deciding the issue to the expert. It is ultimately an issue that the Court, taking account of that expert evidence, must decide for itself."

He also set out in detail how a court should consider whether the opinion of a medical expert in support is responsible/competent/respectable and logical/reasonable. This is a far cry from Lord Browne-Wilkinson's assessment that it will be "very seldom … views genuinely held by a competent medical expert are unreasonable" *(Bolitho)*.

If future courts approach the *Bolam* test in the manner set out in *C* it is much more likely that the medical opinion proffered in support of and against an action or omission will be judged independently. As Green J stated, the court will not, and should not, delegate its role as decision maker. However, the change of tone can only go so far when the *Bolam* test remains as the law as decided by the House of Lords in *Maynard* and *Sidaway*. A softening in the tone or language, is no substitute for the application of the correct legal test; whether reasonable skill and care has been applied.

[7] *C v North Cumbria University Hospitals NHS Trust* [2014] EWHC 61 (QB).

Pure diagnosis cases

A category of claim, pure diagnosis cases, have been argued to fall outside the *Bolam* test. In *Penney, v East Kent HA*,[8] the claim centred on the interpretation of cervical smear tests. The claimant had undergone testing to detect existing or potential cervical cancer. The slides were examined by "cytology screeners" who were medical professionals and therefore their judgements were subject to the *Bolam* test. The screeners were required to diagnose the cells on the slide on the following scale "negative" (no indication of cancerous cells), to glandular neoplasia (severe glandular cell changes showing possible carcinoma). The hospital screeners gave a diagnosis of "negative", the diagnosis associated with no indication of cancerous cells. In fact, the cells were cancerous and the claimant developed invasive cervical cancer.

When the judge had heard the expert evidence, he formed the view that the indications on the slides had not been unequivocally negative and this would have been apparent to a reasonable screener. The judge at first instance found that the question as to the abnormality of the cells was a question of fact which did not give rise to a consideration of the *Bolam* test. However, he also considered whether the defendant's expert opinion could withstand logical analysis (the *Bolitho* exception) and concluded it could not. Accordingly, the judge found, if he was wrong as to whether the presence or absence of abnormality was a question of fact, then the opinion of the defendant's breach expert fell within the scope of the *Bolitho* exception. The Court of Appeal upheld the first instance judge's decision.

In *Muller v King's College Hospital NHS Foundation Trust* ,[9] the claimant had a wound on the sole of his foot. In November 2011, a histopathologist examined a biopsy and diagnosed a non-malignant ulcer. In July 2012, a biopsy revealed malignant melanoma, necessitating a second extensive operation to remove the tumour. At trial the judge had to determine whether the histopathologist's failure to diagnose the melanoma in November 2011 was a breach of her duty to exercise reasonable skill and care.

In this context Kerr J stated the following:

> "In a case involving advice, treatment or both, opposed expert opinions may in a sense both be 'right', in that each represents a respectable body of professional opinion. The same is not true of a pure diagnosis case such as the present, where there is no weighing of risks and benefits, only misreporting which may or may not be negligent. The experts expressing opposing views on that issue cannot both be right. And the issue is, par excellence a matter for the decision of the court, which should not, as a matter of constitutional propriety, be delegated to the experts."

Kerr J made it clear that he did not consider the *Bolam* test to be appropriate in a pure diagnosis case as he stated: "I regard Penney as authority permitting the court to choose between competing expert opinion on the issue the court has to decide …" Such an approach is the antithesis of *Bolam* approach. However in the very next paragraph Kerr J stated he was *"bound by the law as it currently stands, to approach that issue by reference to a possible invocation of the Bolitho* exception". In other words, despite rejecting the logical application of the *Bolam* test to a "pure diagnosis" case Kerr J felt bound to adopt it, though he was able to avoid a strict application via the application of the *Bolitho* exception to *Bolam*.

It remains unclear whether the *Bolam* test does apply to so-called "pure diagnosis" cases. In the event that the *Bolam* test remains applicable to "pure diagnosis" cases it is surely undesirable that there is an added layer of legal doctrine and thereby complexity (i.e. the application of the *Bolam* and *Bolitho* test) where the determination of whether reasonable care and skill was exercised is all that is needed to decide the issue of breach of duty.

[8] *Penney v East Kent HA* [2000] Lloyd's Rep. Med. 41; [2000] P.N.L.R. 323.
[9] *Muller v King's College Hospital NHS Foundation Trust* [2017] EWHC 128 (QB).

Informed consent

Bolam has been found to have no place at all in cases of informed consent/ disclosure of risk. In the celebrated ruling of *Montgomery v Lanarkshire Health Board*[10] the Supreme Court found the duty on the medical profession in relation to disclosure of risks of any given medical procedure was to:

> "Take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any alternative or variant treatments. The test of materiality is whether, in the circumstances of the particular case, a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it."

All trace of the *Bolam* test is now vanquished from informed consent. The *Montgomery* test requires the doctor to take reasonable care to ensure the patient is aware of material risks. Material risks are identified not by reference to whether a group of doctors believe a risk should or should not be discussed but by whether a reasonable person in the patient's position would consider the risk significant, or if the doctor knows (or should know) that the patient would consider the risk significant.

The Supreme Court, endorsing the decision of the Court of Appeal in *Pearce v United Bristol Healthcare NHS Trust*[11] has wrested control, of whether risks of treatment should be disclosed, from doctors and returned such control to judges. As the Supreme Court explained the treating doctor's role in identifying the risks are judgements subject to professional skill and judgment to which *Bolam* might apply. However, once potential risks are identified it is not a matter of medical judgment as to whether a risk should be disclosed and therefore *Bolam* cannot apply. Whether risks should be disclosed to a patient is, according to the Supreme Court, a legal question to be determined by a judge taking into account the circumstances of the patient.

At the heart of the decision to give judges control over which risks should be disclosed is the proposition that a patient is a person with rights who should be provided with sufficient information to make an informed choice. The old paternalistic view that patients are simply passive recipients of care incapable of understanding and making decisions in relation to their medical care is gone. The new view is that in an era of human rights and where patients are to be viewed as consumers there is no room for a legal test which allows the medical profession to justify a restrictive approach to disclosure of risk.

It is right to acknowledge that decisions concerning disclosure of risk are of a different nature when compared to decisions relating to diagnosis and treatment as the former involves no medical assessment or medical decision. However, the existence of a distinction between cases of informed consent and other clinical negligence cases does not provide a reason for the continued application of the *Bolam* test.

Conclusion

The common law has never sat still and there is no reason to believe that the *Bolam* test is cryogenically frozen into the law. Equally it is only right to acknowledge that the *Bolam* test is, in fact, ossified into legal orthodoxy. How long the *Bolam* test remains the touchstone for breach of duty in clinical negligence cases is likely to be determined by the appetite of lawyers and judges to challenge and change the status quo. That is only likely to occur on "the right facts", that is to say a case, or cases, where the result of the application of the *Bolam* test would give rise to a manifestly unfair outcome.

The deep ossification of the *Bolam* test in the common law augurs against any imminent change to the law. However, there has already been change; a change of tone where the court has reasserted its position as the decision-maker, growing scepticism about the application of the *Bolam* test in so-called

[10] *Montgomery v Lanarkshire Health Board* [2015] UKSC 11.
[11] *Pearce v United Bristol Healthcare NHS Trust* [1999] E.C.C. 167; [1999] P.I.Q.R P53.

"pure-diagnosis" cases, and whole-sale rejection of *Bolam* in relation to disclosure of risk. The continued evolution of the common law is inevitable, and it is this author's hope that the common law is able to return from what was intended to be a simplified test for breach of duty in clinical negligence cases for juries, to the proper test of "reasonable skill and care" which needs no gloss or oversimplification when professional judges are considering breach of duty in clinical negligence cases. The need for change is not a mere legal nicety; the *Bolam* test has serious deleterious effects as discussed in this article.

In the long-term as medical science evolves so that it becomes more interactive, more evidence based, more regulated and more accurate, and as the medical profession becomes ever more specialised, the *Bolam* test, from an era where medicine was an art and juries made decisions in clinical negligence cases, will look ever more anachronistic.

LIABILITY

Safety in Healthcare: The Pharmacy Legislative Framework and Patient Safety

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Accidents; Health care; Patients; Pharmaceuticals; Pharmacovigilance; Regulation; Safety

The evolution of the concept of "accident"

In the introduction to the book "Just Culture", Sidney Dekker[1] explains how the term "accident" is a relatively modern concept. He describes how, up until the scientific revolution of the 17th century, people believed that misfortune was underpinned by religious or superstitious influences, and that humans were powerless to intervene. By the 20th century, this view had matured, tending to see accidents as "meaningless coincidences of space and time", somewhat less judgemental than the religious view, but equally unhelpfully, human intervention was seen as impossible. A modern view sees accidents simply as failures to effectively manage risk. Safety scientists view accidents as entirely normal properties of complex sociotechnical systems.[2] It is from such a systems perspective that the authors consider the impact the current pharmacy legislative framework may have on patient safety, a key target of all healthcare organisations in the light of the recognition that healthcare-induced injury is one of the leading causes of death worldwide.[3]

Healthcare: A system of (complex sociotechnical) systems

A system can be defined as a set of interrelated (coupled) entities united in a joint purpose.[4] Entities include physical objects, technology, processes and relationships, as well as organisational constraints and indeed the legal and regulatory framework that underpins professional behaviour. When entities are tightly linked and inter-dependent (a relationship known as "coupling") changes can cascade rapidly through the system, causing a ripple effect that may only be felt at a distance from the point of change. Systems can be small (micro; perhaps a worker using a tool or technology), medium (meso; a healthcare example might be a surgical team) or large (macro; perhaps a hospital, or indeed the NHS as a whole[5]). Larger systems (certainly those seen in healthcare) tend to be sociotechnical in nature, reflecting the fact that a key feature of the system is the people within it (and their relationships with other entities, which increasingly include technological elements). It can also be appreciated that such large systems subsume many meso- and micro-systems, and the relationships between these need to be considered. In such complex systems, there

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1 S. Dekker, *Just Culture* (2012).

2 C. Perrow, *Normal accidents* (New York: Basic Books, 1984); S. D. Sagan, *The limits of safety: Organizations, accidents and nuclear weapons* (Princeton NJ: Princeton University Press, 1993).

3 Institute of Medicine, "To err is human. Building a safer health system" [1999] National Academy Press, Washington DC; D. Berwick, *A promise to learn—a commitment to act* (National Advisory Group on the Safety of Patients in England, 2013) at *https://www.gov.uk/government/publications/berwick-review-into-patient-safety* [accessed 17 January 2018]; R. Francis, *Report of the Mid Staffordshire NHS Foundation Trust Public Enquiry* (London: HMSO, 2013).

4 J. Dul, R. Bruder, P. Buckle, P. Carayon, P. Falzon, W. S. Marras, J. R. Wilson and B. Van der Doelen, "A strategy for human factors/ergonomics: developing the discipline and profession" [2012] *Ergonomics* 55, 4, 377–395.

5 S. Hignett, A. Lang, L. Pickup, C. Ives, M. Fray, C. McKeown, S. Tapley, M. Woodward and P. Bowie, "More Holes than Cheese. What prevents the delivery of effective, high quality, and safe healthcare in England?" [2018] *Ergonomics* 61, 1, 5–14.

are so many interactions between entities, with relationships often tightly coupled, that outcomes can be difficult to predict, a concept known as emergence. Safety is one such emergent property, making safety management highly complex.

Given the relationship between system performance and safety, the authors define safety (including patient safety) using this systems language: "[Safety is] the level of system performance required to keep the incidence of harm (and risk) as low as reasonably practicable." There are obvious issues (particularly from a legal perspective) with this definition, particularly in relation to defining an acceptably low level of risk. However, in terms of proactively improving patient safety, this is a far more usable definition than that those most commonly used in healthcare. While the term "safety" is frequently used in healthcare, it is infrequently defined, and where definitions exist, there is a lack of standardisation, which causes confusion. A common feature of such definitions is "prevention of medical error". This is problematic in two ways, first, because prevention of error is unachievable in complex sociotechnical systems, and focussing on error prevention inhibits resources from being used more effectively to develop resilient systems that can accommodate this inevitable error without compromising safety. Secondly, identifying error allocates blame, meaning that individual system "actors" bear the brunt of responsibility for adverse outcomes which are inevitably systems issues, with multiple interacting contributory factors. Increasingly often in healthcare, attribution of blame has attracted civil and indeed criminal proceedings, and the authors would contend that this trend of criminalising errors actively undermines the opportunity for genuine improvement of patient safety.

Just Culture and the "high reliability" dream

Functioning of complex sociotechnical systems needs effective safety management,[6] and this requires hazard identification, accurate risk estimation and active control measures. Reason[7] believes this is best supported by cultures which are: (i) *open to reporting;* (ii) *just;* and (iii) promote *learning* (and using this learning to visibly improve safety performance[8]). The safety performance pinnacle is considered to be the "high reliability organisation" ("HRO").[9] Weick and Sutcliffe[10] describe HRO characteristics as follows:

- Such organisations are pre-occupied with failure, constantly searching for small signals that may predict failure. They gather, analyse and review this data, linking it to outcomes, and establish critical monitoring measures for their own operational context.
- They reward open reporting, and use the date they collect to proactively manage future risk.
- They show reluctance to simplify interpretation of their data, socialising workers at all levels of the organisation to be curious about safety.
- HROs are sensitive to operations, meaning staff have good situational awareness.
- HROs are resilient. Errors occur, but are not disabling, and such organisations achieve this because they take a systems approach to safety management.

Interestingly, despite the risks involved (and the financial and personal costs associated with medical injury), healthcare organisations have not traditionally viewed themselves as HROs, and although there have been suggestions that adopting HRO frameworks might usefully support enhanced patient safety,

[6] S. Wilke, A. Majumdar and W.Y. Ochieng, "Airport surface operations: a holistic framework for operations modelling and risk management" [2014] *Safety Science* 63: 18–33.

[7] J. Reason, *Managing the risk of organisational accidents* (Aldershot: Ashgate, 1997).

[8] C. Burns, K. Mearns and P. McGeorge, "Explicit and implicit trust within safety culture" [2006] *Risk Analysis* 26(5): 1139–1150.

[9] A. Hopkins, "The problem of defining higher reliability organisations" 2017 *Working Paper 51*; National Research Centre for OHS Regulation at *http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.461.7777&rep=rep1&type=pdf* [accessed 17 January 2018]; J. C. Le Coze, "Viva la diversité! High reliability organisation (HRO) and resilience engineering (RE)" [2016] *Safety Science* at *http://dx.doi.org/10.1016/j.ssci.2016.04.006* [accessed 17 January 2018].

[10] K. Weick and K. Sutcliffe, *Managing the unexpected: assuring high performance in an age of complexity* (San Francisco: Jossey-Bass, 2001).

there are significant barriers to achieving this. Perhaps the greatest of these is the absence of truly *Just Culture*, which is dependent upon open reporting.

Just culture

Leape[11] asserted "the greatest impediment to error prevention is … punish[ing] people for making mistakes" calling for non-punitive cultures. However, this fails to acknowledge some errors warrant individual accountability.[12] *Just Culture* recognises this, representing "a collective understanding of where the line is drawn between blameless and blameworthy actions". It reflects the systems thinking described above, recognising error is also an emergent property, but including room for individual accountability.[13] It is important to be clear that *Just Culture* does not mean no blame but rather fair blame. There is plenty of evidence in the medical literature to indicate that not all medical injury is the result of "normal accidents" of healthcare delivery, including significant UK cases, such as Harold Shipman[14] and Beverly Allitt.[15] This seems relatively straightforward and desirable, but the problems lie in implementation. "Drawing the line" is highly subjective, biased by the role of the decision-maker and, in healthcare, by medical hierarchy.[16] Delivering *Just Culture* is as complex as the system it serves.

The complexity of *Just Culture* resides in the flawed assumption that there is one "true story" in the narrative of an adverse event. The term "Just Culture" (note the upper case) is often used as shorthand to describe the structures in place within an organisation designed to deliver just culture. Such structures often include decision-making tools such as the "decision tree" used by the UK NHS.[17] This comprises four tests:

- **Deliberate harm test:**

  Was there "a conscious and deliberate breach of duty" and did this breach result in patient harm?

- **Physical and mental health test:**

  Was there any underlying health condition, and did this impact care in anyway? If yes, the contribution of this to the "harm" must be established.

- **Foresight test:**

  Were standard operating procedures/policies followed? Could the effects of any such violation have been reasonably predicted?

- **Substitution test:**

  Would a similarly qualified/experienced practitioner in the same circumstances have followed a similar course of action?

[11] L. L. Leape, "Errors in medicine" [2009] *Clinica Chimica Acta* 404(1): 2–5.

[12] S. Petschonek, J. Burlison, C. Cross, K. Martin, J. Laver, R. S. Landis and J. M. Hoffman, "Development of the Just Culture Assessment Tool (JCAT): measuring the perceptions of healthcare professionals in hospitals" [2013] *Journal of Patient Safety* 9(4): 190–197; S. Dekker and T. B. Hugh, "A just culture after Mid Staffordshire" [2014] *BMJ Quality & Safety* 23: 356–358.

[13] C. Burns, K. Mearns and P. McGeorge, "Explicit and implicit trust within safety culture" [2006] *Risk Analysis* 26(5): 1139–1150; R. M. Wachter and P. J. Provonost, "Balancing 'no blame' with accountability in patient safety" [2009] *New England Journal of Medicine* 31(14): 1401–1406.

[14] J. Smith, "The Shipman Enquiry. The final report" (2005) at *http://webarchive.nationalarchives.gov.uk/20090808160144/http://www.the-shipman-inquiry.org.uk/finalreport.asp* [accessed 17 January 2018].

[15] Department of Health, *The Allitt Inquiry (Clothier Report)* (Stationery Office Books, 1994).

[16] S. Dekker, *Just culture: balancing safety and accountability* 2nd edn (Farnham: Ashgate, 2012); B. J. Weiner, C. Hobgood and M. A. Lewis, "The meaning of justice in safety incident reporting" [2008] *Social Science and Medicine* 66: 403–413; T. von Thaden, M. Hoppes, Y. Li, N. Johnson and A. Schriver, "The perception of just culture across disciplines in healthcare" Proceedings of the Human Factors and Ergonomics Society 50th Annual Meeting 2006; San Francisco, HFES.

[17] P. G. Boysen, "Just culture: a foundation for balanced accountability and patient safety" [2013] *Oschner Journal* 13(3): 400–406.

The problem is that each of these tests requires someone to make a judgement call, and such a "judgement" is simply a social construction, no more than somebody's attribution. Here there are many similarities with the legal system: this "somebody" has both the power to decide what category an act falls into, and also to attach sanctions, sanctions which may have severe impact for the person being judged. The reason that there is not one "true story" of any event is that all those involved have a different perspective and understanding of the event. Rasmussen[18] captured this problem eloquently:

> "If we find ourselves asking 'how could they have been so negligent, so reckless, so irresponsible?', then this is not because the people in question were behaving bizarrely, it is because we have chosen the wrong frame of reference for understanding their behaviour."

This quote also succinctly captures the essence of truly just cultures: the idea is not to judge individuals for apparent safety failings, but to try and understand the context, what it was about the working environment that made it seem reasonable to those involved to undertake the course of action they selected. If it made sense to this worker, then it is likely to make sense to others working under similar conditions. Often the person empowered with "drawing the line" has no understanding of the pressures under which the work was being carried out, what Dekker15 refers to as the "messy, conflicted details of [the worker's] responsibilities". There are numerous potential flaws in all of the above tests, but there are three that are particularly worthy of highlighting. The first of these is hindsight bias. There is a wealth of evidence in the literature to indicate that the outcome significantly influences the opinion of those judging others' behaviour. The more serious the outcome, the more likely it is that the behaviour will be judged in a negative light. This makes the substitution test unreliable. Secondly, it is highly likely that the foresight test will reveal deviations and even violations of policies and procedures, and these are often then considered to be the root cause of the incident. This notion that following standard operating procedures leads to good outcomes, while deviations and violations underpin poor outcomes is simply not true. In recent years, there has been a shift, often referred to as a move from Safety I to Safety II.[19] Safety I involves analysis of comparatively rare adverse events. Safety II turns this around, acknowledging that most of the time healthcare outcomes are good. By exploring normal work in this way, the factors that underpin success can be identified. These sorts of studies reveal that procedural deviations and violations are part of normal work, and often reflect the adjustments that staff need to make on a day-to-day basis to deliver successful outcomes. This allows the weak points in the system to be identified, facilitating intelligent system re-design. The third issue is that patient harm is not necessarily a good marker of the safety status of a system. There can be endemic weaknesses in a healthcare system that sometimes lead to patient harm. All of these factors make achieving *Just Culture* very difficult, and innocent mistakes can be "constructed" to appear as negligent or wilful acts. How effectively *Just Culture* operates within an organisation is influenced by a combination of the legal and regulatory framework governing professional behaviour and the expectations of society and both of these can be particularly negative with respect to healthcare, particularly in relation to pharmacy practice.

Pharmacy regulatory framework

In general, healthcare "wrongs" are dealt with (in the UK) under a tort system, so civil liability rather than criminal liability. Legal action through this route may be pursued for a number of reasons, but one important aspect is that assigning blame (whether to an organisation or an individual) allows the release of financial compensation. Significantly though, the "zero tolerance" message contained within the Francis Report[20]

[18] Cited in S. Dekker, *Just culture: balancing safety and accountability*, 2nd edn (Farnham: Ashgate, 2012).

[19] J. Braithwaite, R. L. Wears and E. Hollnagel, "Resilient healthcare: turning patient safety on its head" [2015] *International Journal for Quality in Health Care* 1–3 at *https://academic.oup.com/intqhc/article/27/5/418/2357417* [accessed 17 January 2018].

[20] R. Francis, *Report of the Mid Staffordshire NHS Foundation Trust Public Enquiry* (London: HMSO, 2013).

has led to an increasing trend for criminal proceedings, and there have been changes in the legislation to support this. The Criminal Justice and Courts Act 2015 ss.20–25 set out a framework for a crime of "wilful neglect of a patient". This charge can be levied against an individual or a corporate body such as the NHS. Sanctions can include remedial orders and fines as well as the reputational damage for the organisation. The increasing penalties for such offences means that an organisation may feel it is "better" for an individual to be blamed for an adverse outcome. Even if this is not the case, the new legislation emphasise personal responsibility and, even in the case of corporate charges, there is a focus on individual liability, of identifying those considered "most guilty" in the case of extreme poor care.

In addition to the healthcare regulatory framework, there are additional concerns for practising pharmacists. Currently, the larger part of their work involves the supply of pharmaceutics, involving the process of dispensing. Dispensing is dealt with under a different regulatory framework: Medicines Act 1968 (partially repealed by the Human Medicines Regulations 2012[21]). Offences against ss.64 and 85 of this legislation are absolute offences, and due diligence is not considered a defence. Section 85 is concerned with the packaging and labelling of pharmaceutics, while s.64 concerns the medicinal product being of the nature or quality demanded by the purchaser. Essentially, this legislation means that an act which is recognised by all concerned as an innocent error made by an individual pharmacist can still be treated as a criminal offence. While prosecutions under this Act have been rare, they have occurred and, because the prosecutions have been a response to patient fatality, the initial charges in some of the cases were actually gross negligence manslaughter, rather the charges specified within the legislation. On appeal, these charges were generally reduced to offences against ss.64 and 85. One of the outcomes of these prosecutions was clarification of s.85. The legislation refers to the offence occurring "in the course of a business carried on by him", and this is now interpreted as meaning the retail pharmacy company, not the individual pharmacist.

The impact of legislation on Just Culture

The outcomes of criminalisation of healthcare errors are drastic. For the individual, these may include loss of liberty, financial penalties, fear, grief, guilt, depression, loss of job and even suicide. The impact is enormous, and Dekker refers to these staff as "the second victim" of the adverse event. There is evidence to indicate that many of the emotional responses are normal in the wake of any adverse event (including those not prosecuted), and recovery requires peer support which, in the event of a prosecution, is usually denied to the accused as colleagues are usually required to maintain a distance until after the trial. While these outcomes are tragic, the effect of prosecution can be even more severe with respect to future patient safety. The trial itself becomes rather less about "the truth" and more about trying to minimise what Dekker refers to as "the spiralling negative consequences of a trial". The events become a powerful driver of behaviour to all in the organisation or profession. Practice becomes much more defensive, rather than concentrating on delivering a high quality service, practitioners become much more focussed on limiting their own personal liability. Furthermore, staff are very unlikely to voluntarily report incidents and near-misses as they have seen that the behaviour considered to contribute to such performance failings may be punished. Without open reporting, there are no data on which to build a proactive risk management strategy.

Two of the high profile cases which resulted in pharmacist prosecutions are testament to this. The cases of Elizabeth Lee and Martin White show alarming similarity. Both "errors" involved selection of propranolol instead of prednisolone. Contributory factors included:

[21] Human Medicines Regulations 2012 (SI 2012/1916).

- shelves in both pharmacies arranged according to the World Health Organisation[22] recommendation that "drugs are arranged in alphabetical order of generic names"; and
- packages for both medicines were similar in appearance.

It was acknowledged that both pharmacists had impeccable records and both made errors that "any competent pharmacist could (and in all probability would) unintentionally make a number of times throughout their professional career". Both were punished rather than learning from the cases to (according to RPS President Martin Astbury[23]) put "measures in place so that one simple mistake can't lead to such devastating harm to patients and their families". Furthermore, it was suggested that awareness of these outcomes leads to a fear of the legislation which can be seen to have a significant impact on pharmacist behaviour.[24] Fear of the legislation may lead to pharmacists having reduced confidence in their ability to take sole responsibility for patient outcomes, which may undermine the enhanced future role envisaged for pharmacists.

The relationship between Just Culture and human factors/ergonomics: A mechanism for delivering improved patient safety

Just Culture is largely concerned with achieving the resilience and sensitivity to operations that are such an important feature of HROs. This supports a proactive risk management strategy. HROs generally implement such strategies by using a human factors/ergonomics approach. Human Factors is synonymous with the term "ergonomics", hence the abbreviation HFE. HFE approaches are useful because they share three fundamental characteristics. They:

- take a systems approach, as described at the beginning of this paper;
- are design-driven to support good performance and prevent poor outcomes rather than promoting safety by demanding behavioural modification of the actors within the system, processes, equipment etc;
- focus on dual outcomes of optimising system performance and improving human wellbeing.

In the UK, there have been initiatives to introduce HFE since 1990 after a change in legislation in 1986 when Crown Immunity from prosecution under the Health and Safety Act 1974[25] was removed. HFE input was used in 1980s–2000s for building design,[26] occupational health[27] and systems approaches to embed HFE as part of the organisational culture.[28]

In 2013, a Concordat was signed by 16 health care agencies in England (including professional regulators, inspection agencies and education providers) stating that "a wider understanding of Human Factors principles and practices will contribute significantly to improving the quality (effectiveness, experience and safety) of care for patients".[29] One of the initiatives to implement the Concordat was a series of HFE taster workshops in collaboration with the UK professional body for HFE (Chartered Institute of Ergonomics & Human Factors ("CIEHF")) to a wide range of NHS staff.

HFE can address many safety issues: it offers validated tools for modelling, re-designing and testing systems. While some of these require expert professional input, many are usable for less experienced

[22] See *http://apps.who.int/medicinedocs/en/d/Js7919e/7.10.3.html#Js7919e.7.10.3* [accessed 17 January 2018].

[23] See *https://www.chemistanddruggist.co.uk/news/lawyer-pharmacists-sentencing-shocking-and-wrong* [accessed 17 January 2018].

[24] H. Vosper and S. Hignett, "A review of Human Factors and patient safety education in pharmacy curricula: a UK undergraduate perspective with lessons for pharmacy education" [2017] *American Journal of Pharmacy Education* at *http://www.ajpe.org/doi/pdf/10.5688/ajpe6184* [accessed 17 January 2018].

[25] I. Seccombe, "Sickness Absence and Health at Work in the NHS" [1995] *Health Manpower Management* 21 (5): 6–11.

[26] P. Hilliar, "The DHSS Ergonomics Data Bank and the Design of Spaces in Hospitals" [1981] *Applied Ergonomics* 12 (4): 209–216.

[27] L. M. Straker, "Work-Associated Back Problems: Collaborative Solutions" [1990] *Occupational Medicine* 40: 75–79.

[28] S. Hignett, "Embedding Ergonomics in Hospital Culture: Top-down and Bottom-up Strategies" [2001] *Applied Ergonomics* 32:61–69.

[29] National Quality Board, "*Human Factors in Healthcare. A Concordat* (2013) at *http://www.england.nhs.uk/wp-content/uploads/2013/11/nqb-hum-factconcord.pdf*.

personnel.[30] Furthermore there are tools which allow staff to explore the “normal” working environment, allowing a Safety-II approach to be used to underpin risk management. The focus on the working environment, rather than the individual system actors, makes it much more likely that staff will feel safe in offering information that is useful to the organisation in terms of delivering safe and effective practice, including appropriate disclosure, making it less likely that legal action will be seen as a reasonable route to take.

[30] H. Vosper, S. Hignett and P. Bowie, “Twelve tips for embedding Human Factors and Ergonomics principles in healthcare education” [2017] *Medical Teacher* at *http://www.tandfonline.com/doi/full/10.1080/0142159X.2017.1387240* [accessed 17 January 2018].

LIABILITY

Contributory Negligence in Pedestrian Road Traffic Accidents[1]

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Children; Contributory negligence; Pedestrians; Road traffic accidents

Abstract

Contributory negligence is especially prevalent in personal injury claims arising out of pedestrian road traffic accidents. The level at which contributory negligence is assessed can have a huge impact on damages and costs; yet it is very hard to predict. An understanding of the principles, and a working knowledge of how they have been applied in particular types of road traffic scenarios, is essential to making the most reliable estimation possible.

Introduction

Contributory negligence merits special consideration in pedestrian road traffic accidents ("RTAs") for at least three reasons.

First, although contributory negligence is not unique to pedestrian RTAs it is perhaps uniquely ubiquitous in pedestrian RTA litigation. Why? Because in the overwhelming majority of cases it is arguable that there is something the pedestrian could reasonably have done to avoid the accident. (For instance, if it is right that the driver should have seen the pedestrian enter the road it is usually also right, or at least arguably right, that the pedestrian should have seen the vehicle.)

Secondly, there are some issues which are peculiar to Pedestrian RTAs (e.g. must a pedestrian use a designated crossing if there is one?).

Thirdly, there are some issues that arise in other areas of negligence but which arise most acutely in pedestrian RTAs (e.g. culpability of children).

Unfortunately, because the assessment of contributory negligence is ultra-fact-sensitive it is often difficult to predict the likely apportionment. Judges themselves struggle with apportionment. Look no further than the leading case of *Jackson v Murray*[2] where contribution was assessed at 90% at first instance, 70% on appeal and 50% on further appeal to the SC (but only by a bare majority).

My view is that the best that can be done is to identify such general principles and rules as there are and have a working knowledge of the decided cases to see how the courts apportioned liability on similar facts in the past. The decided cases give some insight into future cases and are useful tools to assist with advice and negotiation.

General principles

The juridical basis for contributory negligence in its modern form, i.e. in which it results in an apportionment of liability rather than as a complete defence to the claim, is the Law Reform (Contributory Negligence) Act 1945 s.1(1):

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[2] *Jackson v Murray* [2015] UKSC 5.

> "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 an extent as the court thinks just and equitable having regard to the claimant's share of the responsibility for the damage."

In *Jackson v Murray*, the Supreme Court reviewed the proper approach to the Law Reform (Contributory Negligence) Act 1945 s.1(1) and confirmed that causative potency and blameworthiness are the two key factors in the assessment of contributory negligence. Some factors may be relevant both to causative potency and blameworthiness.

There is no demonstrably correct way of assessing contributory negligence, it is always fact specific such that the outcomes of previous cases are of moderate relevance only, and there is always room for reasonable disagreement within certain parameters.

Relative causative potency: Pedestrians v vehicles

Vehicles are potentially potent weapons; pedestrians moving at normal speeds are typically not because they rarely pose much danger to motorists. This is important in the assessment of contributory negligence. In *Baker v Willoughby*,[3] D and P[4] both had full view of each other for at least 200 yards prior to the collision. Either could have avoided the accident by taking evasive action, but neither did. Contributory negligence was limited to 25%. Lord Reid famously said this:

> "A pedestrian has to look to both sides as well as forwards. He is going at perhaps three miles an hour and at that speed he is rarely a danger to anyone else. The motorist has not got to look sideways though he may have to observe over a wide angle ahead: and if he is going at a considerable speed he must not relax his observation, for the consequences may be disastrous and it sometimes happens, though I do not say in this case, that he sees that the pedestrian is not looking his way and takes a chance that the pedestrian will not stop and that he can safely pass behind him. In my opinion it is quite possible that the motorist may be very much more to blame than the pedestrian and in the present case I can see no reason to disagree with the trial judge's assessment. I would therefore restore the trial judge on this issue."

This was echoed and developed in *Eagle v Chambers (No.1)*.[5] Hale LJ (as she was) said:

> "The potential 'destructive disparity' between the parties can readily be taken into account as an aspect of blameworthiness … It is rare indeed for a pedestrian to be found more responsible than a driver unless the pedestrian has suddenly moved into the path of an oncoming vehicle. That is not this case. The Court has consistently imposed upon the drivers of cars a high burden to reflect the fact that the car is potentially a dangerous weapon."

It can be said with some confidence that where P is established in the road and is run down it is unusual for P to be apportioned with more blame for the accident than D. But where P walks or runs into the road in a way that gives D little opportunity to avoid the accident, it is not uncommon for contribution to rise well beyond 50%.

Some good examples are as follows.

First, two cases in which P was established in the road:

[3] *Baker v Willoughby* [1970] A.C. 467.

[4] In this paper "P" is a reference to the pedestrian claimant and "D" a reference to the defendant driver.

[5] *Eagle v Chambers (No.1)* [2003] EWCA Civ 1107.

- **Sabir v Nana Osei-Kwabena:**[6]

  P walking across the road. Sees D coming but misjudges his speed. D runs her down. Contribution is assessed at 25%.

- **Vann v Ocidental-Companhia De Seguros SA:**[7]

  P well established in the road and walking across. Does not see D coming and is hit when over halfway across the road. Contribution is assessed at 20%.

Secondly, two cases in which P ran or stepped out into the road giving the driver little time to react:

- **Belka v Prosperini:**[8]

  P runs out in front of a taxi. D could have avoided the accident with a better look out but had little time. Contribution is assessed at two thirds.

- **Ehrari (A Child) v Curry:**[9]

  P, a child of nearly 14 years of age stepped into the road and was visible for just one second before being hit by the defendant's lorry. Primary liability was established because the driver should have been aware of the general possibility of children crossing and should have swerved to avoid the accident. However, contribution was assessed at 70%.

The pavement

It is probably the case that if the accident occurs when P is standing on the pavement there will be no contributory negligence, or at least there would need to be something exceptional or unusual about the circumstances. This is so even if P is standing on the edge of the kerb and not observing the traffic:

- **Chapman v Post Office:**[10]

  P standing on kerb of bus stop when hit by wing mirror of a passing van. 50:50 at first instance. On appeal it was held that in standing on the kerb, even if she leaned out, or had her back turned to the oncoming traffic, or went an inch or two into the roadway, she was not negligent. Lord Denning said:

  > "I see no reason why a person standing on the kerb is guilty of negligence at all; even if she leans out or has her back turned to the oncoming traffic. Even if she went an inch or two out into the roadway, I cannot see that would amount to negligence in the slightest. The very fact a van driver hit with his wing mirror a lady standing legitimately on the kerbside means that he is at fault and she is not."

- **Osei-Antwi v South East London & Kent Bus Co Ltd:**[11]

  P was standing on the corner of the pavement at the entrance to a bus depot. A bus made a tight left turn into the depot. The rear of the bus went over the pavement and hit P. The trial judge assessed contribution at one third. The Court of Appeal reversed this and held that there was no contributory negligence. It declined to say whether or not there is a rule of law

[6] *Sabir v Nana Osei-Kwabena* [2015] EWCA Civ 1213.
[7] *Vann v Ocidental-Companhia De Seguros SA* [2015] EWCA Civ 572.
[8] *Belka v Prosperini* [2011] EWCA Civ 623.
[9] *Ehrari (A Child) v Curry* [2007] EWCA Civ 120.
[10] *Chapman v Post Office* [1982] R.T.R. 165.
[11] *Osei-Antwi v South East London & Kent Bus Co Ltd* [2010] EWCA Civ 132.

that there can *never* be contributory negligence if standing on the pavement. The case was decided on the basis that on this occasion there was nothing to alert P to the danger that the bus was about to run her over. The front and middle of the bus passed her by safety and she was standing where she was entitled to be.

- **Whyte v Bluebird Buses Ltd:**[12]

  Chapman followed. Boy at bus stop jostling around with friend. Standing with feet on kerb, but upper part of body is leaning into the road. Bus pulls into stop, close to kerb but not overhanging it. The boy is hit: "the pursuer, wholly on the pavement, is entitled not to be struck by a vehicle. There is no room for any contributory negligence …"

There might, arguably, be some circumstances in which the court would take a different view, particularly if it is a case in which for some reason the vehicle was entitled to be on the pavement. For instance, where a driveway crosses a pavement and the vehicle is therefore entitled to drive over the pavement. [13] P would have precedence over the vehicle, but precedence alone is not always enough to preclude contributory negligence (see the discussion of Zebra crossings alone).

Traffic lights

If an accident is caused by a driver running a red light it is unlikely that the pedestrian will be found to have contributed to the accident regardless of whether he/she looked or not before crossing:

- **Tremayne v Hill:**[14]

  Traffic to P's right had a red signal. D drove through the red signal and hit P who was crossing the road shortly ahead of the lights. The Court of Appeal held: a pedestrian is entitled to rely on the traffic lights. Would be wrong to criticise a pedestrian for doing so and requiring him to look. 100% recovery whether or not P looked in direction of oncoming car.

However, the law is asymmetrical in that traffic lights are not conclusive against P where the accident occurs with the lights in D's favour. Some examples:

- **Fitzgerald v Lane:**[15]

  P walks onto a pelican crossing with the lights red for pedestrians and green for cars. Liability was established with 50% contribution. In essence the driver was not keeping an adequate lookout.

- **Goddard v Greenwood:**[16]

  Two Ps were running across a pedestrian crossing. A lorry was waiting at the traffic lights on the inside lane which showed red for vehicles. As the lights turned green D approaches in the outside lane and D proceeds through the green light. On approach, however, D's view was obscured by the lorry and he did not see Ps who emerged in front of the lorry and one P was run down. The judge held that the defendant was under no obligation to have stopped or slowed down and was not in breach of duty. The Court of Appeal reversed the decision:

[12] *Whyte v Bluebird Buses Ltd* [2015] CSOH 56.
[13] I am grateful to Bethany Sanders, Associate Solicitor at Leigh Day, who thought of this example.
[14] *Tremayne v Hill* [1987] R.T.R. 131.
[15] *Fitzgerald v Lane* [1989] A.C. 328.
[16] *Goddard v Greenwood* [2002] EWCA Civ 1590; [2003] R.T.R. 10.

D should have slowed down and been more careful as his view had been obscured. However, contribution was assessed at 80%.

- **Watson v Skuse:**[17]

  D is driving a large lorry and waiting at a red traffic light. P begins crossing against a red man. D begins driving forwards when the lights turn green in his favour and runs down P. P crossed right in front of the lorry instead of between designated crossing lines. As a result, D could not easily see him at point that he set off. However, if D had looked left before setting off he would have seen the pedestrian beginning to cross. Liability was established but contribution was assessed at 80%.

- **Redhill v Rider Holding:**[18]

  P stepped off a pedestrian crossing in front of a bus even though he had a red light. He was hit by a bus at fairly low speed. At first instance contributory negligence was assessed at 30%. On appeal, the Court of Appeal substituted 50%. P's action in stepping into the road when the crossing lights were against him and the bus was so close was more than a misjudgement or simple failure to look out, and it followed that P had been seriously blameworthy, since his lack of care had made a collision with the bus inevitable. However, serious injury was caused not by initial impact but by being crushed by the wheel of the bus. As such, the causative potency of D's negligence was high so 50:50.

Zebra crossings

By the Zebra, Pelican and Puffin Pedestrian Crossings Regulations and General Directions 1997 reg.25,[19] Ps in essence have precedence at Zebra crossings. There is an old criminal case *Scott v Clint*,[20] which suggests that drivers have an absolute and strict liability duty to stop at Zebra crossings. But it would be wrong to equate the position in criminal law with the position in negligence. The cases make clear that pedestrians must take care when using a zebra crossing and courts are more than willing to make a liability split:

- **Clifford v Drymond:**[21]

  A pedestrian stepping on to a zebra pedestrian crossing had a duty to satisfy himself that it was reasonable to step on to the crossing at that moment. Contributory negligence was assessed at 20%.

- **Maynard v Rogers:**[22]

  D drove towards a pedestrian crossing at a reasonable speed. P, who had not shown any signs of wanting to cross the road, stepped onto the crossing without looking in the direction of the car. On P's claim for damages, she relied on the Pedestrian Crossing Regulations

[17] *Watson v Skuse* [2001] EWCA Civ 1158.
[18] *Redhill v Rider Holding* [2012] EWCA Civ 628; [2013] R.T.R. 5.
[19] Zebra, Pelican and Puffin Pedestrian Crossings Regulations and General Directions 1997 (SI 1997/2400) 25—Precedence of pedestrians over vehicles at Zebra crossings (1) Every pedestrian, if he is on the carriageway within the limits of a Zebra crossing, which is not for the time being controlled by a constable in uniform or traffic warden, before any part of a vehicle has entered those limits, shall have precedence within those limits over that vehicle and the driver of the vehicle shall accord such precedence to any such pedestrian. (2) Where there is a refuge for pedestrians or central reservation on a Zebra crossing, the parts of the crossing situated on each side of the refuge for pedestrians or central reservation shall, for the purposes of this regulation, be treated as separate crossings.
[20] *Scott v Clint*, *The Times*, 28 October 1960, Div Court.
[21] *Clifford v Drymond* [1976] R.T.R. 134.
[22] *Maynard v Rogers* [1970] R.T.R. 392.

1954 reg.4[23] and averred that D had been negligent. Liability was established on the basis that D should have sounded his horn. Contributory negligence was assessed at two thirds.

Failing to use crossings

The position appears to be that there is no requirement as such for pedestrians to use designated crossings and in principle it is not negligent to fail to do so. However, there is a duty to cross the road in a safe way and the courts seem pretty ready to find that this duty has been breached where an available crossing has not been used. Further, if a P walks past a crossing and then immediately crosses this may take D by surprise and result in a finding that D was not to blame:

- **Tremayne v Hill:**[24]

  "A pedestrian does not have any duty in law to cross a junction only at a light-controlled pedestrian crossing. He is entitled to cross wherever he likes providing he takes reasonable care for his own safety."

- **Snow v Giddins:**[25]

  The Court of Appeal held that "a person who elected not to use a crossing took upon himself a higher standard of care". A pedestrian crossed the road not far from a marked crossing. Just over the centre line, he was struck by a motorcyclist. Whilst not negligent for failing to use the crossing, he was negligent for taking on the risk that he would be stuck halfway across the road without the safety of a central refuge. Contributory negligence was assessed at 25%.

- **White v Chapman:**[26]

  P was crossing in an urban area. She went to the middle of the road where there was no refuge and was hit by D as she crossed the remainder of the road. There was a pelican crossing about 35m down the road. It was held that she was not negligent for failing to use the crossing, but was negligent for crossing the road without ensuring that she could get to the other side without being marooned in the middle. Contributory negligence was assessed at 20%.

- **Adams v Gibson:**[27]

  In contrast to the above cases, P *was* found to be contributory negligent in part for not using a pedestrian crossing. He entered the road metres from the crossing without looking to his right and was hit. He was found one third to blame for the accident. However, *Tremayne* and *Snow* were not apparently referred to and it does not appear to have been argued that there was no duty to use the crossing. That said, my own view is that the apportionment was about right in any event.

[23] Pedestrian Crossing Regulations 1954 (SI 1954/370).
[24] *Tremayne v Hill* [1987] R.T.R. 131 per Ormond LJ at 134H.
[25] *Snow v Giddins* (1969) 113 S.J. 229.
[26] *White v Chapman* , unreported, 15 May 2001, Queens Bench Division.
[27] *Adams v Gibson* [2016] EWHC 3209 (QB).

- **Scott v Gavigan:**[28]

  P was drunk and walking south down a pavement. D was a moped rider driving north on the other side of the road. P walked a few metres past a traffic island in the middle of the road. When he got past it he suddenly ran across the road towards the moped. P failed to establish primary liability. It was not foreseeable that he would cross the in those circumstances so the driver was not required to take further precautions. A relevant factor in making P's actions unforeseeable was that P had crossed shortly after walking past a traffic island.

Alcohol

The case law reveals two principles. The first principle is, try not to lie in the road in a drunken stupor; you might get run over and there will be contributory negligence. The second is that while being drunk may well make you do stupid things, it is what you do, not the fact that you do it because you are drunk, that is relevant in the assessment of blameworthiness.

- **Green v Bannister:**[29]

  D was reversing down a cul-de-sac at night time; 35 yards along the road. She was looking over her right shoulder but did not look left or in the nearside mirror. She ran over P who was lying in the road in a drunken stupor. At first instance, contributory negligence was assessed at 60%. This assessment was upheld upon appeal.

- **Liddell v Middleton:**[30]

  P and his wife were waiting in the middle of the road to cross when traffic cleared. P's wife ran across and made it to pavement. P paused and then walked across and was hit by D. P was drunk. Contributory negligence was assessed at 25% at first instance. The Court of Appeal substituted 50% contributory negligence, but rejected the submission that P's drunkenness was relevant to his blameworthiness.

- **Lunt v Khelifa:**[31]

  P stepped out in front of car at a junction. P was drunk. D was negligent in that he should have been aware of pedestrians in the area, there was no evidence of braking and he was not keeping a proper lookout. Contributory negligence was assessed at one third at first instance and upon appeal. The Court of Appeal expressly followed *Liddell* on the irrelevance of drunkenness on P's part in the assessment of blameworthiness.

- **Lightfoot v Go-Ahead Group Plc:**[32]

  P walked diagonally across the road and tried to flag down a bus on a dark country road. His judgment of speeds and conditions was very substantially impaired by drink. D was reading the bus timetable instead of paying attention to the road ahead in the seconds before the collision. This prevented him from keeping a proper lookout. 40% contributory negligence.

[28] *Scott v Gavigan* [2016] EWCA Civ 544.
[29] *Green v Bannister* [2003] EWCA Civ 1819.
[30] *Liddell v Middleton* [1996] P.I.Q.R. P36.
[31] *Lunt v Khelifa* [2002] EWCA Civ 801.
[32] *Lightfoot v Go-Ahead Group Plc* [2011] EWHC 89 (QB); [2011] R.T.R. 27.

Clothing

If the RTA happens at night and P is not wearing something bright or reflective this may well lead to a finding of contributory negligence if D's ability to see P is thereby impaired, for example if P is out on a dark country road. This seems harsh given how few of us wear reflective clothing when we are pedestrians (it is more common obviously when cycling). The Highway Code provides at para.3:

> "Help other road users to see you. Wear or carry something light-coloured, bright or fluorescent in poor daylight conditions. When it is dark, use reflective materials (e.g. armbands, sashes, waistcoats, jackets, footwear, which can be seen by drivers using headlights up to three times as far away as non-reflective materials."

Some examples:

- **Widdowson v Newgate Meat Corp:**[33]

  P was wearing dark clothes when walking on or near a dual carriageway at night time. Contributory negligence was assessed at 50% partly on the basis of the dark clothing.

- **Buck v Ainslie:**[34]

  The claim actually failed but if liability had been established, the Court of Session of session said it would have found 70% contributory negligence on the basis that P was walking in the roadway, in a rural setting, in dark clothing during the hours of darkness.

Children

Typically, the law applies an objective standard of care that does not have regard to the individual characteristics, abilities and qualities of the person who owes the duty. So if a driver has an accident because, although doing his best he just isn't very skilful (e.g. a learner), the law applies the same standard of care to him as anyone else.[35] However, age is a well established exception: the law does have regard to the personal characteristic of age when assessing contributory negligence.

The leading statement of principle is *Gough v Thorne*.[36] Salmon LJ summed up the approach thus:

> "The question as to whether the Plaintiff can be said to have been guilty of contributory negligence depends on whether any ordinary child of thirteen and a half can be expected to have done any more than this child did. I say 'any ordinary child'. I do not mean a paragon of prudence; nor do I mean a scatter-brained child; but the ordinary girl of thirteen and a half."

In *Gough*, Lord Denning noted that "a very young child cannot be guilty of contributory negligence". He went on to note that:

> "An older child may be [contributorily negligent] but it depends on the circumstances. A judge should only find a child guilty of contributory negligence if he or she is of such an age as reasonably to be expected to take precautions for his or her own safety: and then, he or she is only be found guilty if blame should be attached to him or her … He or she is not to be found guilty unless he or she is blameworthy."

The law does has not set any fixed rule as to the age at which contributory negligence begins. It is assessed on a case by case basis. Generally speaking the assessment is simply done by the trial judge

[33] *Widdowson v Newgate Meat Corp and Scullion and Enaas* [1998] P.I.Q.R. P138.
[34] *Buck v Ainslie* [2017] CSOH 73.
[35] *Nettleship v Weston* [1971] 2 Q.B. 691.
[36] *Gough v Thorne* [1966] 1 W.L.R. 1387.

doing his or her best. To be frank, there are some astonishing decisions, astonishing because they are, in my view, so appallingly bad. Recent research calls into question whether this is really the right approach. There is now a significant body of scientific literature which provides very cogent basis for understanding the (very significant) limitations that children have in perceiving and avoiding road traffic dangers when compared to adults. There seems little doubt that parties and judges would therefore be assisted (at least in some cases) by expert evidence.[37]

These two Scottish cases are perhaps the most astonishing of all:

- **Harvey v Cairns:**[38]

  A six-year old girl ran in front of a truck that was driving too fast and was killed. Contributory negligence was assessed at two thirds.

- **McKinnell v White:**[39]

  A five-year old boy who let go of his brother's hand and ran in front of a car was deemed to be 50% contributorily negligent.

The issue is not, however, an historical Scottish one. Consider also these two recent English cases:

- **Toropdar v D:**[40]

  P, a 10-year old, ran out from behind a bus into D's path. D had been driving within the speed limit but too fast in the circumstances and otherwise insufficiently carefully. Contributory negligence was assessed at one third.

- **AB v Main:**[41]

  P, eight-years old, darted into the road whilst playing with a friend to retrieve a bottle. Held that an ordinary child of the P's age could reasonably be expected to have sufficient knowledge and experience of crossing roads to know of the importance of checking for oncoming traffic before crossing. However, children of that age were liable to become distracted by things which would not distract an adult in a similar situation. A 20% reduction in damages for contributory negligence was appropriate to reflect the strong likelihood that the claimant would have acted differently had he not been so young. There had been limited opportunity for the driver to avoid the accident.

While it may be very surprising that contributory negligence was found against an eight-year old, it is clear that age was a paramount factor in keeping the level of contribution down. In a similar case, a 13 -year old fared much worse:

- **Paramasivan v Wicks:**[42]

  P, a 13-year old, unexpectedly ran into the path of D's car. W had little opportunity to avoid the accident, but not keeping good enough look-out so didn't. 13 was old enough to understand roads. P had created the hazard by doing something entirely unexpected and careless. W's only fault had been failing to respond as he should have done in the briefest

[37] See the outstanding article on this matter M. Stockwell, "Out of Step" [November 2016] A.P.I.L. PI Focus Vol.26 Issue No.9.
[38] *Harvey v Cairns* [1989] S.L.T. 107.
[39] *McKinnell v White* [1971] S.L.T. (Notes) 61.
[40] *Toropdar v D* [2009] EWHC 2997.
[41] *AB v Main* [2015] EWHC 3183 (QB).
[42] *Paramasivan v Wicks* [2013] EWCA Civ 262.

of moments. In those circumstances, P was 75% contributorily negligent and W's liability was 25%.

Impairment and disability

So far as primary liability is concerned, the law imposes the same standard of care even to those with severe physical or mental disability. Thus, in *Dunnage v Randall*,[43] a schizophrenic person set fire to himself with petrol. He died and his nephew was badly burned. The Court of Appeal held that for the purposes of liability in negligence, the standard of care owed by an adult who was physically or mentally impaired at the time of the event in question was that of a reasonable person who did not have the impaired adult's personal characteristics.

However, the position appears to be different in the context of contributory negligence and it would be absurd if it were otherwise. A person with a mobility impairment such that he/she was unable to run would be negligent for failing to run out of harm's way as an able-bodied person would, despite being unable to run. The law recognises this:

- **Gaffney v Dublin United Tramways:**[44]

  P is deaf and does not hear D approach. D assumes P will hear and get out of the way. P is run down. There is no contributory negligence.

- **Daly v Liverpool Corp:**[45]

  P is elderly and infirm. She does her best to avoid D's approaching car. Her best is not very good and she is run down. No contributory negligence.

It seems clear that the position is the same if the impairment is a mental one rather than a physical one. Ultimately it is about blameworthiness: if P is unable or finds it harder to avoid harm's way because of a mental impairment then, and it is a matter of degree, he is not blameworthy and there should be no, or at least less, contributory negligence.[46]

Conclusion

Contributory fault is familiar: it is raised in a huge proportion of Pedestrian RTA cases. But it is also frustrating. It can be extremely difficult to accurately predict the apportionment (if any) a court will make. The best that can be done is to try and identify such general principles/rules as there are and to see how they have been applied in the decided cases. This at least allows the advisor to make an educated a predication. In summary, I basically hope this paper helps you guess better.

Appendix: Table of cases relating to child claimants[47]

CASE NAME	AGE	DATE	COURT	CONTRIB?	FACTS
Prudence v Lewis[48]	2.9	1966	QB	No	Ran out onto a crossing whilst mum dealt with other children. Child under three: no contrib.

[43] *Dunnage v Randall* [2015] EWCA Civ 673; [2016] Q.B. 639.
[44] *Gaffney v Dublin United Tramways* [1916] 2 Ir. Rep. 472.
[45] *Daly v Liverpool Corp* [1939] 2 All E.R. 149.
[46] See by analogy the cases such as *Reeves v Commissioner of the Police of the Metropolis* [2000] 1 A.C. 360; [1999] 3 W.L.R. 363, where detainees have committed suicide and the degree of contributory negligence is assessed by reference to, among other things, the extent to which the suicide was caused by mental illness rather than free will.
[47] An earlier version of this table was produced by my colleague Patricia Hitchcock QC.
[48] *Prudence v Lewis*.

CASE NAME	AGE	DATE	COURT	CONTRIB?	FACTS
M (a Child) v Rollinson[49]	5	2003	QB	No	Walked in front of an ice cream van in a residential area while dad paid for ice cream. Hit by car travelling at 15 mph.
McKinnell v White[50]	5	1971	Ct of Session	50%	A five-year old boy who let go of his brother's hand and ran in front of a car. 50% contribution, apparently because children of five living in an urban area know about road dangers.
Harvey v Cairns[51]	6	1989	Ct of Session	66%	A six-year old girl ran in front of a truck that was driving too fast and was killed. She was on the way to the park with her brother. Contributory negligence was assessed at two thirds.
Jones v Lawrence[52]	7	1969	QB	No	Ran out into the path of a motorbike. Held that although the boy had been taught and understood road safety, his conduct was normal for a boy of his age. He was on his way to the funfair. Normal for a child of that age to forget the perils of crossing the road.
Rehman v Brady[53]	7	2012	QB	No	A seven-year old was out with her family. Mum crossed the road and she lagged behind. Mum turned and beckoned her across the road. She was already crossing. Neither saw D approach. No contrib: age clearly a big factor.
Andrews v Farnborough[54]	8	1966	CA	No	Eight-year old girl. If she stepped off kerb into the side of car that killed her (judge's finding was that she had stayed on kerb) she was too young in any event to be contributory negligent.
AB (by his mother and next friend CD) v Lisa Main[55]	8.8	2015	Yes	20	Playing on the grass verge of a road with a friend. Turned and ran at a medium pace into the road without looking.
Morales v Eccleston[56]	11	1991	CA	75	C playing football on pavement. Ball went into road and C followed it without looking in either direction. Was only visible for 2–3 seconds but D not keeping a good enough look out.
Melleney v Wainwright[57]	11	1997	CA	33%	C's friends cross road before D passed. C was hit attempting to join friends on other side of road. Was 60mph road and driver had slowed to 30mph. D should have slowed further and sounded his horn. "I do not think it can be overstated that when motorists are driving near to a group of young children and especially young boys, a very high standard of caution indeed is required … The risk of him doing something silly in order to re-join them ought to have been foreseen as a very high risk."

[49] *M (a Child) v Rollinson* [2003] 2 Q.R. 14.
[50] *McKinnell v White* 1971 S.L.T. (Notes) 61.
[51] *Harvey v Cairns* 1989 S.L.T. 107.
[52] *Jones v Lawrence* [1969] 3 All E.R. 267.
[53] *Rehman v Brady* [2012] EWHC 78 (QB).
[54] *Andrews v Farnborough*.
[55] *AB (by his mother and next friend CD) v Lisa Main* [2015] EWHC 3183 (QB).
[56] *Morales v Eccleston* [1991] R.T.R. 151.
[57] *Melleney v Wainwright* , unreported, 3 December 1997.

CASE NAME	AGE	DATE	COURT	CONTRIB?	FACTS
Honnor v Lewis[58]	11.9	2005	QB	20%	C crossing road to school. D said travelling well within speed limit and did not see C till last minute but driver behind him had seen C. D should have been aware of school, slowed down, sounded horn and seen C, but C stepped out without looking.
Willbye v Gibbons[59]	12	2003	CA	75	D saw group of boys jostling around the pavement. He hooted his horn. Stopped for a car to pass. Saw a child moving between parked cars and then poised to cross road and looking at his direction. D accelerated quickly to 25 mph. D should have paid more attention: he did not see C actually cross but should have and should have accelerated less rapidly.
Armstrong v Cottrell[60]	12	1993	CA	33	D in offside of 3-lane; C and friends hovering at kerb, then advanced to middle lane and hesitated, then darted out at the last minute into his path. D slowed but did not sound her horn. First instance found for D. CA said D should have slowed enough to avert accident and sounded horn.
Willbye v Gibbons[61]	12	2003	CA	75%	C was "poised" as if about to run into road from right when D saw her while stationary behind parked cars to allow oncoming traffic to pass. D pulled out and accelerated to about 25mph over 20–25 yards and hit C. First instance found for D. CA said no proper look out as had two secs to see C from when she started to move until she ran into the side of his car, also D accelerating too fast as aware that children in area, and should have sounded horn.
Gough v Thorne[62]	13	1966	CA	No	Lorry stopped for P and waved her across road. She did not check for other traffic and was struck.
Paramasivan v Wicks[63]	13	2013	CA	75%	P, a 13-year old, ran into the path of D's car. D had little opportunity to avoid the accident, but not keeping good enough look-out so didn't.
Probert v Moore[64]	13	2012	QB	No	C walking in dark clothes at night on a narrow, single lane, country 60mph road with back to traffic and wearing headphones at 5pm in December. D was doing 50mph, had pulled close to nearside to avoid oncoming traffic and hit C. D on right side of road because of vegetation and bend and her decision to walk home without bright clothes or torch was ill-advised but not culpable; she had previously climbed onto verge to avoid a car but did not hear D.
Ehrari v Curry[65]	13	2006	QB	70%	C walked out from behind a high parked vehicle. D's passenger saw C a fraction of a second before impact, D did not. Ct held he could have sounded his horn but primarily C's fault.

[58] *Honnor v Lewis* [2005] EWHC 747 (QB).
[59] *Willbye v Gibbons* [2003] EWCA Civ 372.
[60] *Armstrong v Cottrell* [1993] P.I.Q.R. P109.
[61] *Willbye v Gibbons* [2003] EWCA Civ 372.
[62] *Gough v Thorne* [1966] 1 W.L.R. 1387.
[63] *Paramasivan v Wicks* [2013] EWCA Civ 262.
[64] *Probert v Moore* [2012] EWHC 2324 (QB).
[65] *Ehrari v Curry* [2006] EWHC 1319 (QB).

CASE NAME	AGE	DATE	COURT	CONTRIB?	FACTS
Gough v Thorne[66]	13.5	1966	CA	No	Lorry stopped and waved her and her brothers (17 and ten) across, putting R hand out. D drove past lorry at speed and hit them. Judge held C 1/3 contrib but CA said Q was whether an ordinary child of 13 could be expected to do more than she did: "only if blame should be attached to him or her" per Lord Denning MR at 399H
Grant v Dick[67]	14	2003	QB	40	10 school girls crossing dual carriageway. Some had crossed. Others were beckoning remainder to do so. D did not slow down although he had seen them nor sound his horn. C ran in front of D's car.
Rainford v Lawrenson[68]	14	2014	QBD	50%	P was crossing road with sister to get to bus. Her older sister saw car approaching and stepped back. P did not.
Rowe v Clark[69]	14.66	1998	CA	50%	Boys hurrying back to school. D had seen x 2 boys cross the road, three remained on pavement. Did not keep close eye on them. C crossed the road onto D's side and was hit. D should have anticipated them crossing and slowed to a low speed because it was a clear danger zone.
Foskett v Mistry[70]	16.5	1984	CA	75%	Boy ran down the side of a parkland slope into road. D should have glanced at parkland and sounded horn.

[66] *Gough v Thorne* [1966] 1 W.L.R. 1387.
[67] *Grant v Dick* [2003] EWHC 441 (QB).
[68] *Rainford v Lawrenson* [2014] EWHC 1188 (QB).
[69] *Rowe v Clark*.
[70] *Foskett v Mistry* [1984] R.T.R. 1 CA.

LIABILITY

Winners and Losers in the Court of Appeal: An Empirical Study of Personal Injury Cases (2002–2016)[1]

Per Laleng

Appeals; Bias; Court of Appeal; Funding arrangements; Judges; Occupiers' liability; Personal injury

This article reports findings from an empirical study of 458 personal injury ("PI") cases decided by the Court of Appeal over 15 years. The study used conventional statistical software, *SPSS Statistics*, and two machine learning platforms, *Data Robot* and IBM's *Watson*, to analyse the dataset. The analysis reveals a general pro-defendant bias within the Court of Appeal. Although neither claimants nor defendants reverse first instance decisions more than 50% of the time, defendant appellants reverse more often (47.3%) than their claimant counterparts (39.5%); defendants also successfully resist more appeals and are 20% more likely than claimants to obtain a favourable outcome in appeals overall. These findings are broadly consistent with findings from other studies.

However, within a subset of cases involving judges with greater experience of deciding PI appeals, there is a shift, albeit slight, in favour of claimants. The study tested a variety of factors which could potentially explain favourable outcomes in general and this pro-claimant shift in particular. Those factors included the identity of the appellant, the type of case, the type of advocate, the legal issues at stake, and the identities of the appeal judges. Controlling for the various factors, the study found that at least one appeal judge within the subset delivered pro-claimant decisions at statistically significant levels. None of the other factors contributed to favourable outcomes at statistically significant levels.

Since a number of potentially pro-claimant judges retired over the period of the study, it might be anticipated that the general pro-defendant bias will intensify. Such a trend is evident over the last four years of the study: favourable outcomes for claimants fell from an average of 48% (2002–2011) to 37.9% (2012–2016) with an absolute low of 26.3% in 2016. Although claimants win less than defendants, this dramatic fall in the success rate for claimants is only partly explained by the increasing proportion of claimant-initiated appeals over the last four years. Although that proportion rose from an average of 47.1% to 50% over the two intervals, the number of appeals dwindled from 34.2 to 23.2 per annum over the same timeframe. On the other hand, pro-defendant intensification may help explain why the number of decided PI appeals is falling despite the increased proportion of such work in the High Court.

Whatever the reasons behind the pro-defendant bias, if claimants' legal advisors have the (accurate) impression of an intensification of that bias, that impression may well serve as a powerful disincentive on them to initiate or resist appeals. And if the average reversal rate for any appellant remains or falls significantly below 50%, it is possible that the availability of litigation funding for appeals will be compromised. The combined effect could lead to further reductions in the number of appeals alongside an entrenchment of pro-defendant rights within tort law. In the alternative, as the doors to litigation and in particular appeals close, litigants might consider using machine learning technology to obtain more accurate information about the prospects of success and litigation risk in order to compromise appeals on

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a probabilistic rather than all-or-nothing basis. One possible consequence of this approach, however, is that novel claims would never be litigated unless litigation funders reassess their requirements of litigants that the prospects of success should exceed 50%. It could also potentially leave more individual claimants under- rather than over-compensated.

Introduction

"… he had an impression, but some of his impressions are illusions."[2]

Tort lawyers reading recently reported PI appeal cases may have been struck by any number of conflicting impressions. Two such impressions are that claimant victories are rare in cases involving occupiers' liability; in other types of case, some judges habitually deliver pro-claimant decisions. These impressions raise many inter-related questions: is there a significant pro-defendant bias in some types of case or even generally; are some judges unusually partial towards one category of litigant over another; can any unusual patterns be detected statistically; more broadly, are there factors which act as predictors of the likely outcome in cases; if so, what are they? Or, conscious of Kahneman's cautionary words, are our impressions here as elsewhere simply products of cognitive illusions: confirmation or availability biases which cause the interested observer to see patterns where none in fact exist?

This article begins to answer some of these questions via quantitative analysis of a large sample of PI cases decided by the Court of Appeal between January 2002 and December 2016. The study confirms that both impressions are broadly accurate: there is a pro-defendant bias in occupiers' liability cases, a bias which is particularly pronounced when the defendant is a public body. Further, the pro-defendant bias can be generalised across most types of PI cases. However, an analysis of a subset of cases decided by the appeal judges with the greatest experience of deciding PI-related appeals reveals a slightly more favourable picture for claimants. Within this subset, some judges appear to deliver pro-claimant decisions at statistically significant levels or close thereto. Given that a number of these experienced (and arguably more pro-claimant) judges have left the Court of Appeal, a possible inference might be that the general pro-defendant bias of the Court of Appeal will intensify as new personnel are drawn from the less experienced (and arguably more pro-defendant) ranks. The study provides some evidence in support of this conclusion. Other findings will be of interest. First, the reversal rate for most types of case was less than 50% irrespective of which side launched the appeal. This finding could have implications for the legal funding of appeals. Secondly, there is no statistically significant advantage gained by employing Queen's Counsel ("QC") in PI appeals. However, if junior counsel is acting for a claimant who is facing a defendant represented by a QC, then such claimants had the greatest chance of a successful outcome, particularly in front of the more experienced judges. Thirdly, and tangentially, the number of PI cases heard by the Court of Appeal is on the decline despite the fact that the proportion of such cases is on the increase in the High Court. It is speculated that this may be a function of the pro-defendant intensification of the Court of Appeal's decisions.

Quantitative analysis of appellate decisions and party bias

Other studies

With the exception of Goudkamp and Nolan's empirical study of contributory negligence in the Court of Appeal,[3] recent UK scholarship using quantitative methods to analyse that court's decisions is scant. There is some older empirical scholarship both within and outside the UK that has considered party bias in the

[2] D. Kahneman, *Thinking Fast and Slow* (Allen Lane, 2011), 30.
[3] J. Goudkamp and D. Nolan, "Contributory Negligence in the Court of Appeal: an empirical study" (2017) *Legal Studies* 1.

appellate courts. As Robertson has pointed out,[4] so-called "quant-studies" are widespread in the US where empirical analyses of what courts do and why they do it have a long tradition. Some US-based journals like *Jurimetrics* and more recently, the *Journal of Empirical Legal Studies*, regularly publish quant-studies about a wide range of legal problems.[5] In the UK, Burton Atkins studied a large number of Court of Appeal cases decided between 1953 and 1985 with a view to testing Galanter's "party capability thesis".[6] The party capability thesis claims that the *Haves* generally fare better than the *Have-nots* in litigation.[7] In theory, the *Haves* are the resource-rich repeat players such as large companies and state bodies; the *Have-nots* are resource-poor and often one-off players, more often than not individuals. The Atkins study was interested in the question whether there was any statistically significant difference between the *Haves* and *Have-nots* in terms of successful reversal rates on appeal, and further whether there was any difference in this regard between reported and unreported decisions. He reached two conclusions: the *Haves* enjoyed a more favourable reversal rate than the *Have-nots* and this success rate was even more pronounced in unreported decisions. The differences were statistically significant. He therefore argued that unreported cases should be made available to all litigants as it might better inform strategic decisions about proceeding with appeals. Since the Atkins study was published, more cases are now reported. Outside the context of the Court of Appeal, there has been some empirical work considering the House of Lords and Supreme Court most recently by Alan Paterson.[8] He reports the results of a quantitative analysis of the Law Lords' voting behaviour, with a particular interest in the voting relationships between them.

Outside the UK, there are several empirical studies that consider the possibility of party advantage. Peter McCormick applied party capability theory to appellate success the Supreme Court of Canada between 1949 and 1992. He concluded that in the long run, in the 4,000 cases analysed, the "underdog" tended to lose.[9] Stewart and Stuhmcke analysed Australian High Court negligence cases between 2000 and 2010.[10] They concluded that the pattern of High Court decisions was consistent with a move in favour of defendants even before the implementation of Australian tort reform following the Ipp Panel.[11] This implied that Australian tort reform—in part a response to the Australian version of the so-called compensation culture—was unnecessary. In the US, there have been many quant-studies ranging across a wide variety of topics related to the current study. By way of example, Eisenberg and Clermont's 2014 essay on "Plaintiphobia",[12] reported finding an anti-claimant effect resulting from the US Supreme Court's summary judgment cases.[13] That essay built on similar studies that report pro-defendant biases in other US courts.[14] Eisenberg and Clermont's statistical approach can be traced back to the 1960s when Nagel advocated the adoption of quantitative techniques to test empirical generalisations in legal research.[15] Nagel also used correlation tools to predict case outcomes in a variety of types of cases.[16] In 1980, he

[4] D. Roberston, "Appellate Courts" in P. Cane and H. M. Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP, 2010), 573.

[5] For a general history of legal empirical research in the US and UK see M. Adler and J. Simon, "Stepwise Progression: The Past, Present, and Possible Future of Empirical Legal Research in the United States and the United Kingdom" (2014) 41(2) *Journal of Law and Society* 173.

[6] M. Galanter, "Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change" (1974) 9(1) *Law & Society Review* 95.

[7] B. M. Atkins, "Selective Reporting and the communication of legal rights in England" (1992) 76 (2) *Judicature* 58.

[8] A. Paterson, *Final Judgment: The Law Lords and the Supreme Court* (Hart, 2013). This came 20 years after his first study: A. Paterson, *The Law Lords* (Macmillan, 1982). Paterson also notes the existence of other empirical studies of judicial attitudes, particularly related to the House of Lords: D. Robertson, *Judicial Discretion in the House of Lords* (Clarendon Press, 1998); C. Hanretty, "The Decisions and Ideal Points of British Law Lords" (2013) 43 *Journal of Political Science* 703.

[9] P. McCormick, "Party Capability Theory and Appellate Success in the Supreme Court of Canada, 1949–1992" (1993) 27(3) *Canadian Journal of Political Science* 523.

[10] P. Stewart and A. Stuhmcke, "High Court Negligence cases 2000–2010" (2014) Sydney L.R. 585.

[11] D. Ipp, *Review of the Law of Negligence: Final Report* (Commonwealth of Australia, 2002).

[12] T. Eisenberg and K. M. Clermont, "Plaintiphobia in the Supreme Court" (2014) 100 Cornell L. Rev. 193.

[13] *Celotex Corp v Catrett* 477 U.S. 317 (1986); *Anderson v Liberty Lobby Inc* 477 U.S. 242 (1986); *Matsushita Elec Indus Co v Zenith Radio Corp* 475 U.S. 574 (1986); and *Bell At Corp v Twombly* 550 U.S. (2007).

[14] K. M. Clermont and T. Eisenberg, "Appeal from jury or Judge: Defendants Advantage" (2001) 3 Am. L. Econ. Rev 125; K. M. Clermont and T. Eisenberg, "Anti-Plaintiff Bias in the Federal Appellate Courts" (2000) 84 Judicature 128.

[15] S. S. Nagel, "Testing Empirical Generalisations in Legal Research" (1963) 15(4) *Journal of Legal Education* 365. This article provides a useful template for any researcher wishing to adopt quantitative methods in legal research.

[16] S. S. Nagel, "Applying Correlation Analysis to Case Prediction" (1964) Tex. L. Rev. 1006; S. S. Nagel, "Predicting Court Cases Quantitatively" (1965) 63 Mich. L. Rev. 1411; S. S. Nagel, "Judicial Prediction and Analysis from Empirical Probability Tables" (1966) 41 Ind. L.J. 403.

demonstrated the usefulness of statistics for legal policy analysis.[17] One aspect of the 1980 study related to predicting outcomes in personal injury cases. But that study was limited to predicting the likely level of damages as a function of medical expenses: a correlation which seems quite obvious: the higher the medical expenses the more likely it is that someone is seriously injured; the more seriously injured, the higher the likely level of damages. Other studies have attempted to use quantitative analysis to predict the outcome of decisions with varying degrees of success.[18] The most recent example of this was undertaken by Aletras and others who used machine learning to predict the outcome of judicial decisions of the European Court of Human Rights.[19] They claim a 79% accuracy rate. There is also a tangentially-related descriptive study of winners and losers in US defamation litigation conducted by Franklin in the late 1970s.[20] One of the findings of that study was that plaintiffs succeeded rarely (5–12% of the time) and "suffered adverse final judgments in 60 percent of their appeals".[21]

How is this study different and who might benefit from considering its findings?

Although other studies have used quantitative methods to analyse Court of Appeal decisions, this study differs from others in terms of scope, object of analysis and boldness of its claims. The Atkins study used all available cases (3,167) lodged with the Supreme Court library. His study captured the entire population of cases. It was broad in scope both in terms of number and appellate subject-matter. The instant study does not claim to capture the entire population of PI cases decided by Court of Appeal though it captures most of the reported decisions. Furthermore, unlike the Atkins study which focused primarily on reversal rates, the present study identifies which party obtained the substantively favourable outcome irrespective of who appealed. Like the Atkins study and the Goudkamp and Nolan study,[22] the object of analysis in the instant study is decisions of the Court of Appeal rather than other courts in the judicial hierarchy. However, our reasons for focusing on the Court of Appeal may well differ. Aside from the fact that there is no published empirical study relating to contemporary Court of Appeal decisions outside the specific area of contributory negligence, an assumption of this study is that the Court of Appeal is theoretically subject to the doctrine of precedent in a way that the Supreme Court is not. As such, the legal rules should in theory play an important part in determining outcomes in the Court of Appeal compared with the Supreme Court. Of course, some legal rules and doctrines could be described as partisan. For example, in the law of negligence, the rules surrounding the imposition of a duty of care in novel scenarios (the cases building on *Caparo*[23]) are arguably pro-defendant; whereas some of the recent rules relating to causation (e.g. *Fairchild*[24] and *Bailey*[25]) are arguably pro-claimant. One might therefore expect to observe favourable outcomes for defendants in novel duty cases and favourable outcomes for claimants in cases turning on causation. But if factors other than partisan rules correlate with particular outcomes, this would be a surprising observation especially if one such factor is the presence of a particular judge on the appellate panel. This may be less surprising in the Supreme Court where there is a relative freedom to fashion the law, but it would be expected less in a court which is theoretically more restrained by legal doctrine.

[17] S. S. Nagel, "Some Statistical Considerations in Legal Policy Analysis" (1980) 13 Conn. L. Rev. 17.

[18] W.F. Grünbaum and A. Newhouse, "Quantitative Analysis of Judicial Decisions: Some problems in prediction" (1965) 3 Hous. L. Rev 201; T.W. Ruger, "The Supreme Court Forecasting project: Legal and Political Science Approaches to Predicting Supreme Court Decision making" (2004) 104 Colum. L. Rev. 1150 a study in which a statistical model correctly predicted the US Supreme Court's affirmation/reversal rate 75% of the time compared to a 59.1% success rate by "legal specialists".

[19] N. Aletras and others, "Predicting judicial decisions of the European Court of Human Rights: a Natural Language Processing perspective" (2016) Peer J Comput. Sci. 2 at e93; see *https://peerj.com/articles/cs-93/* [accessed 17 January 2018].

[20] M. A. Franklin, "Winners and Losers and Why: A Study of Defamation Litigation" (1980) Am. B. Found. Res. J. 455.

[21] M. A. Franklin, "Winners and Losers and Why: A Study of Defamation Litigation" (1980) Am. B. Found. Res. J. 498.

[22] J. Goudkamp and D. Nolan, "Contributory Negligence in the Court of Appeal: an empirical study" (2017) *Legal Studies* 1.

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

[24] *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22 and subsequent cases developing the material increase in risk doctrine.

[25] *Bailey v Ministry of Defence* [2008] EWCA Civ 883 and subsequent cases.

The use of quantitative methods and in particular machine learning and/or artificial intelligence is gaining increasing traction in our era of Big Data. It is spreading to the law.[26] Although this article does not claim that quantitative methods can be used to predict the likely outcome in all PI cases, it demonstrates a healthy prediction rate which could inform lawyers' and litigation funders' decisions about the prospects of success in individual cases. This information could encourage settlements based on litigation risk which could be calculated quite precisely because an algorithm can generate a precise probability of success. The article also draws attention to the factors which may act as the strongest predictors of likely outcome. Insofar as prediction is the lawyer's business,[27] then anything that sheds light on what a court might do given certain variables is going to be helpful to the practising lawyer, the student of law and others. To the extent that this study reveals that factors other than legal rules may lead to party bias in some cases, this study may also act as a useful reminder to judges of their humanity and the need for them to be alert to the potential operation of unconscious cognitive biases in their decision-making.

Clarifying the meaning of party bias

Many practitioners have an intuitive practical sense of the general distinction between claimants and defendants as groups of litigants. Firms of solicitors and barristers often make their names representing one category or the other. Institutions such as the Association of British Insurers and the Association of Personal Injury Lawyers are conventionally thought of as respectively defendant and claimant organisations. In the cases analysed in the study, claimants are invariably individuals who have been injured as a result of another' negligence. Unless they have been especially unlucky in life or are fraudsters, they are probably one-off players. They may not be resource-poor given the availability of conditional fee arrangements, but they are probably risk averse: they probably need their damages more quickly than defendants are prepared to pay them; and they may be inclined to accept settlement offers that undervalue their claim.[28] When claimants succeed in court, the tenets of corrective justice are arguably achieved as a defendant is required to remedy the injury wrongfully caused. The named defendant is also often an individual. When the defendant is not an individual but rather a corporate body, the defendant is usually sued because of some individual's wrongdoing and because they invariably have a deeper pocket than the immediate wrongdoer. However, in both cases a proven wrongdoer is very rarely found to be personally liable.[29] This is because any liability is normally discharged by a liability insurer or by the corporate body itself.[30] A finding of liability therefore has the distributional consequence of spreading the cost of the claimant's loss widely even if a condition precedent of that loss-spreading is the defendant's wrongful conduct. The wrongful conduct does not, however, have any personal consequences for the individual wrongdoer apart from the ignominy of being branded a tortfeasor in a court of law. Whether tort liability has a deterrent effect on behaviour is a moot point. At best, the deterrent effect is marginal.[31] This study assumes that most, if not all, judges are aware of these facts despite the (ideological) language of individualism and personal responsibility that features so prominently in the law of negligence. Thus, for the purposes of

[26] For a recent advertorial, see "Why Lawyers Care About Machine Learning" by Conduent Legal and Compliance Solutions at *http://www.lexology.com/library/detail.aspx?g=6808ad70-f5b6-4e4e-af62-60f165090f7d* [accessed 17 January 2018]. Or the Information Commissioner's March 2017 publication "Big data, artificial intelligence and data protection" at *https://ico.org.uk/media/for-organisations/ documents/ 2013559/big-data-ai-ml-and-data-protection.pdf* [accessed 17 January 2018]. See also R. Susskind, *Tomorrow's Lawyers: An Introduction to your Future* (2017, OUP) and R. Susskind and D. Susskind, *The Future of the Professions: How Technology will transform the Work of Human Experts* (2017, OUP).

[27] R.C. Lawlor, "Foundations of Logical Legal Decision Making" (1963) 4 MULL Mod Uses Log L98.

[28] See further H. Genn, "Understanding Civil Justice" 50 C.L.P. 155; H. Genn, *Hard Bargaining: Out of Court Settlement in Personal Injury Actions* (1987, OUP).

[29] S. Hedley, "Making sense of negligence" (2016) *Legal Studies* 1.

[30] Hedley quotes the usual statistic of 94% derived from the Pearson Commission's report (*Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* Cmnd.7054 1978 vol.2 para.509) and makes the point that although this statistic is old, "no serious observer imagines that it would be *lower* today" see below.

[31] There is some evidence of a deterrent effect of medical malpractice liability in the US: Z. Zabinski and B.S. Black, "The Deterrent Effect of Tort Law: Evidence from Medical Malpractice Reform" (2015) *Northwestern University Law School, Law and Economics Research Paper No.13-09* at *http://dx.doi.org/10.2139/ssrn.2161362* [accessed 17 January 2018].

this discussion, a pro-defendant bias is taken to mean a pro-institution decision, or at the very least an anti-claimant decision; it could also be seen as a pro-Have or anti-Have-not decision in the Galanter sense. Conversely, a pro-claimant decision can be seen as a (sympathetic) decision favouring the individual or the "underdog" against some larger collective better able to absorb the individual's loss.

Methodology

Sampling

The sample was drawn from cases reported on *Westlaw*. The first search term was "injur!".[32] This search term was chosen for two reasons. First, it would capture most individuals who had suffered harm in the form of PI. This group of harmed individuals stood as a proxy for the claimant category. Secondly, as demonstrated in Figure 1 below, PI claims constitute an increasing proportion of the workload of the High Court of the Royal Courts of Justice, which in turn feeds into the stream of appeals. The initial search was filtered to Court of Appeal (Civil Division) decisions in tort law between 1 January 2002 and 31 December 2016. I chose the start date for two reasons. First, one of the judges that had sparked an initial interest in the study was promoted to the Court of Appeal in 2002. Secondly, to extend the range beyond 2002 risked skewing the sample and therefore the results of the analysis because the number of reported appeals in PI cases has reduced fairly dramatically over the years. Figure 2 demonstrates this downward trend. The trend runs in the opposite direction to the trend observed in Figure 1. So, whilst the High Court is seeing an increasing proportion of PI cases in its workload, the Court of Appeal is seeing a decreasing number of PI-related appeals. The end date also provides a full year's worth of data and the 15-year overall time-frame ensures that we have a broad cross-section of cases in the sample.

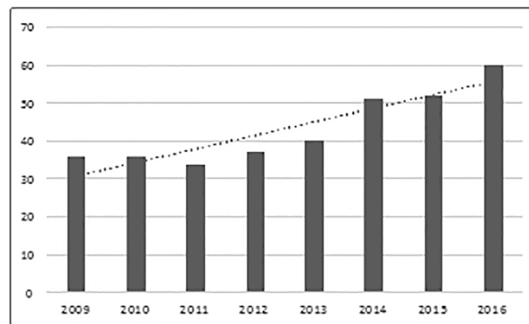

Figure 1: Annual relative frequency of PI and clinical negligence claims commenced in the High Court of the Royal Courts of Justice 2009–2016, with trend line[33]

[32] By using an exclamation mark, all cases which include a word with "injur" in its root should be caught by the search term.
[33] See *https://data.gov.uk/dataset/civil-justice-statistics* [accessed 17 January 2018].

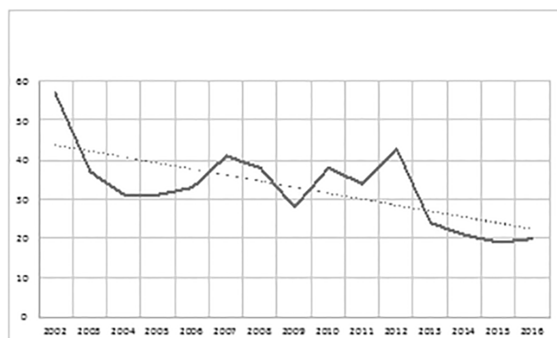

Figure 2: Annual number of appeals in sampled PI cases with trend line

I manually screened the results to determine whether individual cases should be excluded from the final sample. Screening involved reading the summary *Westlaw* report of every case and where necessary the official judgment. The target cases were appeals in cases involving negligently inflicted PI which resulted in a clear win for either the claimant or the defendant. The reason for targeting non-intentional tort cases is that liability in such cases is normally discharged by proxies for the defendant category: an insurer or a corporate body. This is not invariably the position in intentional tort cases. Similarly, cases not involving PI as the gist of the action could dilute the claimant category. Cases involving intentional torts, carriage by air, economic loss cases (including Part 20 claims for contributions), procedural and/or costs appeals were therefore excluded unless these issues were subsidiary to a main PI-related issue. Five cases were removed from the sample because it was not easy to identify a clear winner from the contents of the official report.[34] A further category of case was also removed: road traffic accidents between two or more cars. In this type of case, it is often a matter of chance which party issues proceedings first, particularly where both parties are injured. In this situation, the distinction between a claimant and defendant becomes largely meaningless. This sort of case accounted for approximately 10% of the final sample.

There are 458 cases in the final sample. They were classified into categorical variables: which party appealed, the type of case, what broad legal issues were involved on appeal, the nature of the injury, the type of advocate representing each party, the identity of the judges on the appellate panel, the identity of any dissenting judge, whether the appeal resulted in a reversal, and whether the outcome was favourable for the claimant or defendant. There are 16 categories for type of case (reflected in Table 3 below), 14 for type of legal issue,[35] and five for type of legal representation.[36] Except for type of injury, all this information was coded and recorded in *Excel* and input into *SPSS Statistics*. Data was also input into two machine learning platforms: some early data collected for this study was input into *Data Robot*[37] and the final sample was input into *IBM Watson*.[38] Both platforms aim to identify the factors which can act as predictors or drivers of measured outcomes.

[34] Those five cases were: *McDonald v Department for Communities and Local Government* [2013] EWCA Civ 1346, *AC v Devon CC* [2013] EWCA Civ 418, *Brown v Richmond upon Thames LBC* [2012] EWCA Civ 1384, *Goodwin v Bennetts UK Ltd* [2008] EWCA Civ 1374 and *Clark v Devon CC* [2005] EWCA Civ 266.

[35] Duty of care, breach of common law duty, breach of statutory duty, causation, remoteness, contributory negligence, illegality, limitation, vicarious liability, damages, procedural issues, evidence/factual issue, burden/standard of proof, other defences. There were up to four legal issue variables included per case. Most cases had one or two issues only. Just under 10% of cases had three or more legal issues and only six cases had four or more legal issues.

[36] Neither side with QC, both sides with QC, winning side only with QC, losing side only with QC, no legal representation.

[37] See *https://www.datarobot.com/* [accessed 17 January 2018].

[38] See *https://www.ibm.com/watson/* [accessed 17 January 2018].

Selection bias

Some limitations about this type of exploratory study ought to be acknowledged. Those limitations can be classified under the heading of potential bias. For example, Clermont and Eisenberg have cautioned against only using win rates as an object of analysis. Their caution stems from the operation of the selection effect bias. This bias entails inter alia that observed cases are unlikely to reflect the "mass of underlying disputes"[39] because of the much larger number of cases that settle. This bias is undeniable if the researcher's concern is to understand the legal system as a whole. However, the more limited scope of this study was to focus on how Court of Appeal judges vote in the cases they decide. The main reason for focusing on voting behaviour rather than, for example, content analysis of judicial opinions, is summarised in Goldman's legal realist hunch that:

> "… votes in specific cases—what judges actually do—are more important in revealing their attitudes and values than are the rationalisations they provide in their written opinions telling us why they voted as they did."[40]

This focus also takes seriously Herman Oliphant's claim from 1928 that "not the judges' opinions, but which way they decide cases will be the dominant subject matter of any truly scientific study of law".[41]

A selection bias was also suggested by Atkins.[42] He adverted to the selection bias caused by reported cases. His finding that the pro-defendant bias was even more acute in unreported cases implies a distorting effect caused by the absence of those unreported cases if they cannot be included in the sample. However, many more cases are reported now than was in the case in 1992. Therefore, a significant bias caused by unreported cases is now less likely. Additionally, as is generally recommended in the literature,[43] the coding adopted has not been subjected to a reliability check by another coder.

Analysis

Reversal and favourable outcome rates: defendant advantage

We have seen that earlier studies confirm a pro-defendant bias in different areas of law and across jurisdictions. This is so whether we look at reversal or outcome rates. The distinction between the two is that the reversal rate measures how frequently appellants overturn a lower court's decision whereas the favourable outcome rate includes how often any party successfully appeals (i.e. reverses) or resists the other side's appeal. For the purposes of the analysis, the reversal rate included 23 cases of partial successes. However, when measuring favourable outcomes, the analysis only included clear wins for either party.[44] Although we are mainly interested in the favourable outcome rate, the study confirms a defendant advantage in terms of reversal rates too. However, the reversal rate across the board would not look promising to a litigation funder. Crucially, neither claimants nor defendants reverse more than 50% of the time: claimant appellants reversed the lower court's decision in 39.5% of their appeals,[45] defendant appellants reversed

[39] K.M. Clermont and T. Eisenberg, "Do Case Outcomes Really Reveal Anything about the Legal System? Win Rates and Removal Jurisdiction" (1998) 83 Cornell L. Rev. 581.

[40] S. Goldman, "Behavioural Approaches to Judicial Decision-Making: Towards a Theory of Judicial Voting Behaviour" (1971) 11 Jurimetrics J. 142.

[41] H. Oliphant, "A Return to Stare Decisis" (1928) 14 *American Bar Association Journal* 159 quoted in H. Gillman, "What's Law got to Do with It? Judicial Behaviouralists Test the 'Legal Model' of Judicial Decision Making" (2001) 26(2) *Law & Social Inquiry* 465 at 469.

[42] B.M. Atkins, "Selective Reporting and the communication of legal rights in England" (1992) 76 (2) *Judicature* 58.

[43] Epstein, L. and Martin, A.D. An introduction to Empirical Legal Research (2014, OUP) 114

[44] It is recognised that appeals exist in which a loss may nevertheless count as a win as far as an individual party is concerned. e.g. a party (usually a repeat player) may wish to clarify the law for strategic reasons whilst losing a particular appeal. However, it is suggested that this is not a common phenomenon in PI cases in the Court of Appeal.

[45] Of the 219 claimant appellant cases with no cross appeal, the claimant reversed 74 times (33.8%) and was partially successful in another 9 cases (37.9%). If the cross appeals are included (of which there were 19), the claimant reversed another 11 times resulting in total reversal rate of 94/238 or

47.3% of theirs.[46] There is some variability between types of case, but the combined reversal rate is only 44.3%.[47] This implies that over the long term any appellant is more likely to lose than win their own appeal. Given that litigation funders usually require a probability of success of more than 50% as a precondition for continued funding, it may strike some as surprising that so many PI cases reach the Court of Appeal in the first place. This insight may also explain why the overall number of appeals is falling. That said, the 44.3% reversal rate in the sample is substantially higher than the average 35% reversal rate identified by Atkins between 1952 and 1983.[48] The elevated reversal rate in the sample is borne out by official statistics. *Judicial Statistics*[49] state an average reversal rate of 39.5% for appeals from the Queen's Bench Division ("QBD") of the High Court and 46.5% for appeals from the County Court between 2008 and 2016. If the figures are combined to take into account that there are more appeals from the County Court than the High Court, then as demonstrated in Table 1 below, the combined average reversal rate is 43.9% although it slumped to a low of 33.1% in 2015.

Year	Allowed	Dismissed	Total	Reversal Rate
2008	109	142	251	43.4
2009	92	99	191	48.2
2010	132	123	255	51.8
2011	110	129	239	46.0
2012	108	136	244	44.3
2013	96	122	218	44.0
2014	82	121	203	40.4
2015	53	107	160	33.1
2016	52	85	137	38.0
Total	834	1064	1898	43.9

Table 1: Outcome of appeals from County Court and QBD of the High Court to the Court of Appeal (Civil Division) 2008–2016[50]

The reversal rate drawn from *Judicial Statistics* includes all appeals from both the QBD[51] and County Court[52] and therefore encompass more than just PI cases. Nevertheless, the combined data evidences a declining reversal rate which is mirrored in the sample data. The closeness of the average reversal rate, its downward trend and the fact that a large majority of the population of PI cases was captured during sampling implies that the final sample is reasonably representative of the population of cases.

What happens when we focus on outcomes instead? Logically, the favourable outcome rate is higher than the reversal rate because it includes those cases where a party has successfully resisted an appeal. The defendant advantage persists, but defendants can now claim that their chances of a favourable outcome in the long run are over 50%. As noted in Table 2 below, claimants had favourable outcomes in 45.4% of their cases including cross-appeals whereas defendants were successful in the other 54.6%. When cross-appeals are excluded, there is a commensurate drop in success rates, particularly for claimants, where the success rate falls to a mere 37.4%. The defendant success rate also fails to reach 50%, although at 49.1% defendants are about a third more likely than claimants to emerge as the winner. This difference

39.4%. There was a "score-draw" in two cross appeals: *Phethean-Hubble v Coles* [2012] EWCA Civ 349 and *Dziennik v CTO Gesellschaft fur Containertransport MBH and Co* [2006] EWCA Civ 1456.

[46] Of the 220 defendant appellant cases with no cross-appeal, the defendants reversed 95 times (43.2%) and were partially successful in another 12 cases (48.7%). If the 19 cross appeals are included, defendants reversed another six times resulting in a total reversal rate of 111/239 or 47.3%.

[47] This figure includes cross appeals. If cross appeals are removed from the analysis, the reversal rate falls to 39.3%.

[48] The 1990 Atkins study found an average reversal rate of 35% between 1952 and 1983. Quoted in D. Roberston, "Appellate Courts" in P. Cane and H.M. Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP, 2010), 578.

[49] Table 3.9 of the additional tables in *Judicial Statistics Quarterly* published on 2 June 2016 accessible via *https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-january-to-march-2016-and-the-royal-courts-of-justice-2015* [accessed 17 January 2018].

[50] Source: *Judicial Statistic*. See *https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-january-to-march-2017* [accessed 17 January 2018].

[51] Excluding Administrative, Family or Admiralty law cases.

[52] Excluding Family and Admiralty law cases.

has not been tested for statistical significance on the basis that the samples may not be truly independent. However, the general message seems to be that prospects of success are generally better for respondents than appellants, but claimants' chances improve significantly when there is a cross-appeal, particularly where it involves contributory negligence.

		Appellant			Total
		Claimant	Defendant	Cross-Appeal	
Winner	Claimant	82 (37.4%)	112 (50.9%)	14 (73.7%)	208 (45.4%)
	Defendant	137 (62.6%)	108 (49.1%)	5 (26.3%)	250 (54.6%)
		219	220	19	458

Table 2: Successful outcome rate as a function of identity of the appellant, including cross-appeals

As Table 3 below demonstrates, there is some variability in success rate depending on the category of case, yet claimants only have a more than evens chance of a favourable outcome in three categories: claimant cyclists (66.7%), public liability ("PL") non-occupiers' cases involving public body defendants (61.5%) and in clinical negligence cases (52.9%). Conversely, claimants were least successful in occupiers' liability ("OLA") cases against public bodies (26.7%), although their success rate increased markedly (to 41.7%) against private defendants in OLA cases.

Type of Case	No. Cases		Relative Frequency (%)	Favourable outcome (Claimant)	Claimant Success Rate (%)
Employers' Liability	**175**		**38.2**	82	46.9
Road Traffic *	**84**		**18.3**		
Pedestrian		32	7.0	16	50.0
Motorcycle/moped		25	5.5	10	40.0
Passenger		18	3.9	7	38.9
Cyclist		9	2.0	6	66.7
Other: Private Defendants	**55**		**12.0**		
Occupiers' Liability (OLA)		24	5.2	10	41.7
Public liability (non-OLA)		31	6.8	14	45.2
Other: Public Bodies	**121**		**26.4**		
Clinical Negligence		51	11.1	27	52.9
Social Services		19	4.1	6	31.6
Highways Act		16	3.5	7	43.8
Occupiers' Liability		15	3.3	4	26.7
Public Liability (non-OLA)		13	2.8	8	61.5
Emergency Services		7	1.5	3	42.9
Miscellaneous	**23**		**5.0**		
Animals		10	2.2	3	30.0
Holiday claims		11	2.4	5	45.5
Unclassified		2	0.4	0	0
Total	**458**		100.0	**208**	**45.4**

Table 3: Categories of non-intentional PI cases appealed between 1 January 2002 and 31 December 2016 with relative frequencies, favourable outcomes and success rate for claimants[53]

One effect of using multiple categories is that the individual sample sizes become quite small. This is particularly relevant to claimants' successes in the cyclist and PL (non-OLA) categories and their failures

[53] Collisions between cars have been excluded for the reasons explained above.

in OLA cases against public bodies. Nevertheless, the picture presented by Table 3 is clearly one of a general pro-defendant advantage. These findings also confirm the impression that since 2002 at least, public body defendants seem to have benefitted from strong legal protection in OLA cases compared with other types of case. Whether that protection has become stronger since *Tomlinson v Congleton BC*[54] (the case involving a teenage boy who dived into shallow water in a former quarry, broke his neck and attempted to sue the Council owner occupier) remains an open question.

Explaining the bias statistically

The question then arises whether it is possible to identify any factors which may explain the pro-defendant bias. This is where quantitative research methods become especially useful. A central aim of much quantitative research is to uncover statistical relationships between independent and dependent variables. The independent variables are the potential causes of the dependent (or proposed outcome) variable. In this study, the overall winner variable was the dependent variable requiring an explanation by the other potentially explanatory independent variables. All the variables in this study are nominal categorical variables, i.e. variables that fall into distinct categories where order is unimportant. The appropriate statistical test for independence of association between categorical independent and dependent variables is the Chi-square test. So, by way of example, running that test in SPSS[55] on Type of Case (as per Table 3) and Overall Winner reveals no statistically significant relationship between them. The test could be run on all the variables in turn, but machine learning platforms speed up this process considerably.[56] Both *Data Robot* and *Watson* revealed surprising candidates as potential drivers of outcomes. Although both platforms indicated that the identity of the appellant was a driver of the likely outcome, they also implied that the identity of the judges hearing the appeals was of greater significance in some cases. *Watson* suggested that the combination of the second and most senior judges (in that order) on an appellate panel was the strongest driver of outcome, with a predictive strength of 63%. *Data Robot*, which processed an incomplete sample of cases, suggested similar drivers of the overall winner: the second most senior judge, followed by the most senior and finally the junior judge were more important drivers of the winner category than the identity of the appellant, the type of case, the nature of legal representation or the legal issues at stake in the appeal. In reality, it is a combination of factors which will produce a particular outcome. But *Data Robot* claims to be capable of discovering the best algorithm for predicting outcomes based on all the variables used in a dataset. Whilst I had access to the *Data Robot* platform, I ran *Data Robot's* final algorithm on a fresh sample of 49 cases. *Data Robot's* algorithm predicted the correct outcome in 35 of them. This is a success rate of 71.4%, which although not as impressive as the 79% success rate claimed by Aletras, it is probably better than many lawyers' best guess in cases that go to appeal; it is almost certainly more precise. This level of predictive accuracy may help explain why elite law firms are turning to artificial intelligence, including machine learning, to improve efficiency even if the final decision on whether to litigate or pursue an appeal is probably still made by a human being.

The machine learning platforms suggested that the identity of the appellant was a predictor of outcomes. Quite simply, being a claimant or a defendant was associated with a particular outcome. *SPSS Statistics* confirmed a statistically significant association between identity of appellant and outcome ($p = 0.01$);[57] and we can simply look at Table 2 to observe big differences in success rates depending on who is appealing. However, this does not tell us why being a claimant or defendant appellant should make a difference to the outcome. This is where statistical analysis can help untangle which factors are likely to be playing

[54] *Tomlinson v Congleton BC* [2003] UKHL 47.
[55] Accessed via the cross-tabs function within descriptive statistics.
[56] For a technical overview of machine learning, see R. Genuer, "Random Forests: some methodological insights" (2008: INRIA Saclay) RR No.6729.
[57] Put very crudely, there is a about a 1% chance that the observed outcomes would happen by chance.

meaningful roles in the outcome. The appropriate test to use in this context is binary logistic regression.[58] This test allows the researcher to test whether particular variables are associated with a particular outcome at statistically significant levels whilst controlling for other variables. Regression tests revealed no statistically significant relationship between the type of case, legal representation or main legal issue and outcome (although if the main issue related to quantum of damage, it came close to statistical significance). Given the number of judges in the sample, the regression analysis could not test for an association between judges and outcome although the Chi-square test revealed a statistically significant relationship between the most senior judge on the panel and the outcome ($p = 0.04$).

In summary, according to *SPSS* the variables which were most significantly associated with particular outcomes were whether the appellant was a claimant or a defendant and the identity of the most senior judge on the appellate panel. When the appellant was the defendant, and not controlling for any other factor, that appellant was 4.68 more likely to obtain a favourable outcome than a claimant appellant. To test whether the presence of a particular judge on the appellate panel is associated with a particular outcome, the data set was restructured[59] so that there was a separate record for each judge's vote. The result of the Chi-square test as applied to the whole sample revealed a statistically significant association ($p = 0.05$). However, a majority of the 133 judges in the sample had sat on five or less panels.[60] This renders the Chi-square test unreliable. It would be possible to run the test on all judges with experience of more than five PI panels, but a more accurate picture of individual voting behaviour is arguably obtained by considering judges with experience of more panels. For that reason, a subset of more experienced judges in this type of case was taken. Of the 133 judges, 20 had sat on 20 or more panels and between them, they were responsible for 624 votes, or 47.3% of all the votes cast. Table 4 below sets out those judges' pro-claimant and pro-defendant votes.

Judge	Panels	Pro Claimant vote		Pro-Defendant vote	
		No.	%	No.	%
1	25	10	40.0	15	60.0
4	27	8	29.6	19	70.4
5	28	12	42.9	16	57.1
9	50	22	44.0	28	56.0
31	20	8	40.0	12	60.0
32	34	9	26.5	25	73.5
33	27	19	70.4	8	29.6
38	60	40	66.7	20	33.3
39	24	12	50.0	12	50.0
40	37	26	70.3	11	29.7
43	50	30	60.0	20	40.0
47	30	20	66.7	10	33.3
53	20	10	50.0	10	50.0
62	34	15	44.1	19	55.9
68	27	14	51.9	13	48.1
69	22	13	59.1	9	40.9
72	37	16	43.2	21	56.8
75	24	12	50.0	12	50.0
83	24	6	25.0	18	75.0
91	24	9	37.5	15	62.5
	624	311	49.8	313	50.2

Table 4: Observed pro-claimant and pro-defendant votes of all judges sitting on 20 or more appellate panels taking into account dissenting votes

[58] Accessed via *Analyze* > *Regression* > *Binary Logistic* in SPSS.
[59] Via the restructure data wizard in SPSS.
[60] Just over 60% of the judges had sat on five or less panels.

The Chi-square test statistic on this subset of judges confirmed a strong statistically significant relationship between the identity of the judge and the outcome ($p < 0.001$), an even stronger association between judges and outcome than had been the case across the full sample. And this despite the fact that all the other variables were now in most cases being counted more than once following restructuring of the dataset.

Although a Chi-square test can only alert a researcher to there being an issue that should be investigated further, and cannot by itself indicate the direction of any relationship, each individual judge has a voting record which could be indicative of their personal tendency. What Table 4 reveals is that there are a number of judges in this subset who delivered pro-claimant decisions at a much higher rate than the average (e.g. Judges 33, 38, 40, 43, 47 and 69). Conversely, there are also some high pro-defendant rates (e.g. Judges 1, 4, 31, 83, 91 and especially 32). Overall the claimants' success rate in the subset of cases was slightly higher at 46.1%[61] than the 45.4% success rate in the full sample. Although this is a very small difference (and probably cannot be tested for statistical significance as it would violate one of the assumptions of the z-test), one potential explanation for the difference could be that a number of the more experienced judges are more pro-claimant in their voting behaviour than the less experienced judges. This point seems to be supported by the increased proportion of pro-claimant votes amongst the more experienced judges (49.8% of the votes cast). Given that inexperience of appellate panels logically entails smaller sample sizes, the study did not test that hypothesis directly; but it tested whether there is any statistically significant relationship between the identity of the more experienced judges and outcome whilst controlling for other factors. It did this using logistic regression.[62]

The results of the logistic regression revealed that at least one appellate judge delivered pro-claimant decisions at levels that were statistically significant. This finding may in part explain why the claimant success rate overall has improved slightly in front of the more experienced judges. The regression test applied to the judges and outcome whilst controlling for identity of appellant continued to demonstrate a statistical relevance of being a claimant or defendant. However, the presence of Judge 40 on an appellate panel was associated with a 184% increase in obtaining a pro-claimant outcome ($p = 0.037$). Two other judges (33 and 38) came close to delivering pro-claimant decisions at statistically significant rates (with respective p values of 0.052 and 0.055). When adding in and controlling for the type of case, the presence of Judge 40 on the bench continued to be associated with pro-claimant outcomes ($p = 0.036$). Judge 33 remained close to statistical significance ($p = 0.056$) and Judge 47 was pulled into the picture ($p = 0.051$) being associated with a 189% increased likelihood of a pro-claimant outcome. When adding in and controlling for the type of legal representation, only Judge 40 remained pro-claimant at statistically significant levels ($p = 0.034$) with the chances of a pro-claimant outcome increasing to 200%. Finally, when adding in and controlling for the main legal issue, Judge 40's pro-claimant stance was no longer statistically significant although it remained close ($p = 0.07$); but the presence of Judge 33 on an appellate panel was now associated with a 283% increase in pro-claimant decisions ($p = 0.021$). Judge 47 was close to being pro-claimant at statistically significant levels ($p = 0.055$) with a 200% increase in the chance of a pro-claimant outcome. Once all the variables were included, the identity of the appellant ceased to be associated with a particular outcome at statistically significant levels but the type of case and main legal issue could be so associated: if the cases involved either OLA claims against private defendants or claims under the Highways Act then the odds generally strongly favour defendants whereas if the main legal issue involves breach of statutory duty, causation, damages or a factual/evidential issue then the odds

[61] The 46.1% figure relates to the proportion of cases won rather than the 49.8% figure set out in Table 4 which represents the proportion of pro-claimant votes cast.

[62] The logistic regression test was run on an increasing range of variables. Because all the variables except the judges would often be counted more than once in the restructured dataset, if there was any sign of a statistically significant relationship between particular judges and outcome, then that significance would be an underestimate. Conversely, any sign of a statistically significant relationship between any other variable and outcome should be diluted due to the multi-level effect of double or sometimes treble counting of those other variables.

swing in the claimants' favour. But once again, it is difficult to be precise in this context due to double counting of these variables.

Five of the six initially earmarked pro-claimant judges retired from the Court of Appeal before the end of 2016: one in 2010, two in 2011 and another two in 2013. If there is an association between particular experienced judges on appellate panels and pro-claimant outcomes, then if a number of the pro-claimant judges have left the court, it might be expected that pro-claimant will have reduced commensurably. Such a trend appears to be confirmed by the study. Figure 3 below sets out the proportion of claimant appellants between 2002 and 2016 in comparison with the overall success rate for claimants over the same timeframe. The proportion of claimant appellants reached peaks of 57.9% in 2014 and 2016. Those peaks also seem to be inversely proportional to pro-claimant outcomes at 31.6% and 26.3% respectively. Conversely in 2005 and 2015, when the proportion of claimant appellants fell to about 30%, their overall success rate was at least 50%. In only two years did claimants have favourable outcomes in excess of 50% (55.2% in 2005 and 57.1% in 2010).

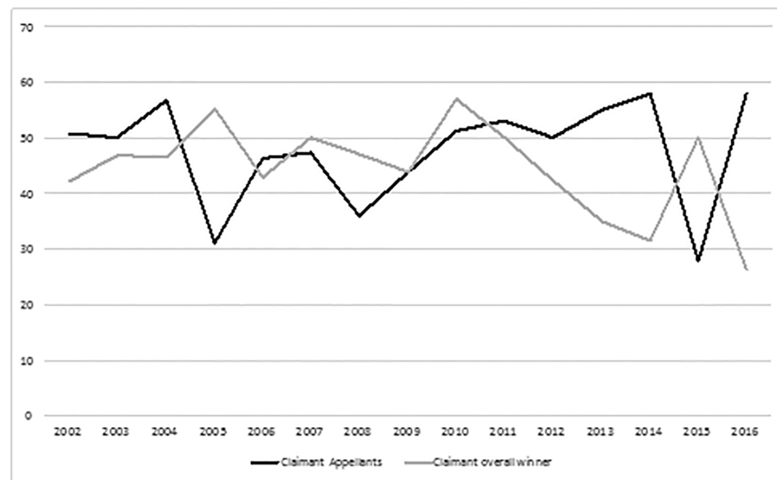

Figure 3: Proportions of claimant appellants compared with proportionate overall success for claimants 2002–16

If we consider the cases decided since the end of 2011 until the end of 2016, some 116 cases, the favourable outcome rate for claimants dropped to 37.9% on average with a low of 26.3% in 2016. Over that timeframe, claimants were appellants 50% of the time. This is a significant drop in success rate compared with the previous ten years when the average favourable outcome rate for claimants was 48%. As claimants were appellants in 47.1% of the cases between 2002 and the end of 2011, there seems to be a negative relationship between being a claimant appellant and favourable outcomes. But the size of the fall in the favourable outcome rate for claimants is much larger than the proportionate increase in claimant-initiated appeals. As demonstrated in Figure 2 earlier, the number of appeals has fallen significantly in recent years. These observations tend to confirm the argument presented here that factors other than the identity of the appellant per se are strong drivers of outcomes. Whether the anti-claimant trend will continue remains to be seen as personnel in the Court of Appeal continues to change. But given that the new personnel are drawn from a pool of judges that, on average, is slightly more pro-defendant than the more experienced pro-claimant judges they replace, then unless greater experience of appellate panels in PI cases augments an individual judge's pro-claimant leanings it is likely that the pro-defendant bias will further intensify.

Just as Edwards and Elliott[63] have cautioned against the use of numbers to prove unfounded judicial bias, it could be suggested that factors other than party leanings of judges explain the distribution of decisions. It is not denied that there are other factors at play, but this study suggests that some obvious contenders are not statistically significant. One of the points relied on by Edwards and Elliott was the notion that defendants tend to take more "arguable" points on appeal. Whether this is a claim predicated on the idea that defendants have better lawyers, or whether it is simply another version of Galanter's capability theory is not entirely clear. But the argument runs something like this: because repeat players in this type of litigation tend to be defendants, they have a greater influence on which types of case are appealed (those being the ones they feel more confident in winning and which in turn they win); these favourable decisions then become "embedded in the substance of legal rights".[64] The logic of this argument, then, is that it is the law, the legal rights or rules, which determine any bias. However, this explanation would not account for any *pro-claimant* bias observed in some judges. And if there is an observed pro-claimant bias which is independent of legal rights, then there is reason to think that whatever explains the pro-claimant bias in some judges—be they cognitive, cultural or personal biases, some of which are unavoidable—also explains any observed pro-defendant biases. Furthermore, and by way of example, quantitative analysis of the sample cases did not reveal any statistically significant association between the quality of legal representation and outcomes. A very crude measure of the quality of legal representation is whether a party employed a QC or not. Using that measure, Table 5 below sets out the number of favourable outcomes in the full sample as a function of the quality of legal representation. Although that Table reveals that claimants have proportionately more positive outcomes when represented by junior counsel facing a defendant represented by a QC, there are only 27 cases in that category from which to draw any meaningful conclusions.

Representation	Outcome		Total
	Pro Claimant	Pro Defendant	
Neither party with QC	83 (41.9%)	115 (58.1%)	198
Both parties with QC	68 (46.9%)	77 (53.1%)	145
Winning party only with QC	29 (46.0%)	34 (54.0%)	63
Losing party only with QC	27 (52.9%)	24 (47.1%)	51
No legal representation	1 (100%)	0 (0.0%)	1
			458

Table 5: Pro-claimant and pro-defendant outcomes as a function of the quality of legal representation in whole sample

However, when we analyse the subset of cases and count *votes* rather than favourable outcomes, then the distribution within the "losing party only with QC" category becomes very different. Table 6 below shows that when junior counsel represents claimants against defendants who are represented by a QC, the claimant share of the votes reaches 67.6%. The equivalent proportion of votes, taking into account dissents and absent judges for that category of case within the full sample is only 50.4%.[65]

[63] H.T. Edwards and L. Elliott, "Beware of Numbers (and Unsupported Claims of Judicial Bias)" (2002) 80(3) Wash ULQ 723.
[64] B.M. Atkins, "Selective Reporting and the communication of legal rights in England" (1992) 76 (2) *Judicature* 58 at 61.
[65] 67 of the 133 votes cast.

Representation	Votes		Total
	Pro Claimant	Pro Defendant	
Neither party with QC	123 (47.9%)	134 (52.1%)	257
Both parties with QC	95 (44.8%)	117 (55.2%)	212
Winning party only with QC	44 (50.6%)	43 (49.4%)	87
Losing party only with QC	46 (67.6%)	22 (32.4%)	68
No legal representation	0 (0.0%)	0 (0.0%)	0
			624

Table 6: Pro-claimant and Pro-defendant votes taking into account any dissenting votes

The logistic regression test implied no significant relationship between the type of legal representation and outcome. Nevertheless, the Table reveals that in the subset cases claimants seem to benefit from unequal playing fields in front of the more experienced judges. If some judges are by inclination pro-claimant, then this makes sense because such judges may feel that the odds are even more unfairly stacked against risk averse, one-off litigants facing a resource-rich defendant able to employ the services of a highly-paid silk. In this situation, the pro-claimant/underdog or anti-institutional bias arguably becomes especially marked and may therefore provide a partial explanation for this striking observation.

Future research and concluding remarks

With the help of quantitative methods, this article has begun to answer some of the questions raised by the distribution of outcomes in PI decisions delivered by the Court of Appeal. But the research also leads to new questions which could be amenable to quantitative analysis. For example, have public bodies received better legal protection since the House of Lords decision in *Tomlinson v Congleton BC*?[66] Is the Court of Appeal in fact becoming increasingly pro-defendant as predicted here, or are the last four years an aberration? Is the pattern of outcomes different when potentially pro-claimant judges sit on the same panel as potentially pro-defendant judges or if judges have to explain their decision by giving a reasoned judgment? Does a judge's experience of sitting on PI appeals make any difference to their voting record over time? What other factors might be relevant predictors of outcome: the type of injury, the type of claimant (in terms of their race, gender, age or profession) or a more specific category of defendant beyond the public-private dichotomy used here? Additional factual variables could easily be crunched by machine learning platforms such as *Data Robot* and *Watson* to reveal hitherto unobserved patterns. And if the accuracy of prediction rates begins to exceed 80% based on just a few variables, then the more interesting question becomes when and why does the computer get it "wrong"; are novel cases the casualties of machine learning because the algorithm will be unfamiliar with the novel variables? Perhaps it is in these instances that the added value of the human lawyer comes to the fore. There are other questions which are less prone to quantitative analysis such as what does it really mean to be pro-claimant or pro-defendant? Is this a function of judicial attitudes towards risk and its distribution and allocation in society? Do judicial attitudes about the so-called "compensation culture" have an impact on outcomes? Could cognitive biases (to which all humans, including judges, are subject) account for some of the observed party biases? Can fluctuating judicial attitudes about judicial comity explain fluctuations in the reversal rate? Or is the return to the historic norm of 35% simply a function of current legal policy to keep disputes out of the court room? Some of these sorts of questions could be analysed statistically if judges would be prepared to answer survey questions. But judicial willingness to participate might be found wanting if researchers told judges (as they ethically should) that the survey was testing for amongst other things the possibility of judicial bias.

[66] *Tomlinson v Congleton BC* [2003] UKHL 47.

Quantitative analysis can go a long way towards distinguishing between justified and unjustified impressions about the winners and losers in the Court of Appeal. This article has also suggested potential practical uses for machine learning in the business of assessing and settling cases. The study echoes earlier findings demonstrating a general pro-defendant bias at appellate level. Defendant appellants have better reversal and outcome rates than claimants and are approximately 20% more likely to have a successful outcome irrespective of who appeals. Although neither claimants nor defendants can claim a reversal rate exceeding 50%—a matter which will be of interest to litigation funders and others—until recently the average reversal rate of 44.3% has nevertheless been higher than it has been historically (35%). However, as Table 1 demonstrates, the reversal rate over the last two years of the study (35.5%) fell back towards the historical average. Whether this low reversal rate represents a return to an historical norm and/or an unstated policy to discourage litigants from using courts, or is only a temporary correction remains to be seen.

Despite the observed pro-defendant bias, it also appears that over the period of the study, some judges with greater experience of determining PI appeals may have been delivering pro-claimant decisions at statistically significant rates. This finding may act as a reminder to practitioners of the adage to "know thy bench" before embarking on submissions let alone proceeding with a case. However, when controlling for the identity of the appellant, type of case, the main legal issue and the type of legal representation, only one judge of the twenty analysed fell into this category. Of course, this is an observation that could be put down to chance: you might expect to see such a distribution of decisions 5% of the time. And having one pro-claimant judge in the Court of Appeal is scant consolation for claimants who now experience successful outcomes less than 40% of the time. However, the fact that the mere presence of particular judges on an appellate panel might be associated with significantly increased chances of success for either party merits further investigation even if there are other things going on.

Capital Accommodation Claims and the Discount Rate: Is it Time for a "Conscious Uncoupling"?

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Discount rate; Measure of damages; Personal injury; Special accommodation; Valuation

QUANTUM / DAMAGES

Introduction

Applying the principle of the law of unintended consequences, it should come as no real surprise that in *JR v Sheffield Teaching Hospitals NHS Foundation Trust*[1] a High Court Judge should make a finding that there is no loss for a claimant, required by his injury to purchase a more expensive property, in the light of the change in the discount rate from 2.5% to -0.75%.

That outcome, which I would suggest is untenable, is the product of the mechanical application of the test set out back in 1989 for the calculation of loss relating to the capital cost of suitable accommodation. It throws into stark relief the question of whether *Roberts v Johnstone*[2] should continue to apply and, if not, what test or tests should replace it.

The claimant very sensibly appealed the decision at first instance in *JR* and the case was due to be heard by the Court of Appeal in October 2017 when, two days before the hearing, it was compromised. As the approval judgment from the Court of Appeal[3] makes clear, the compromise was something very close to a capitulation by the NHSLA since it settled the capital cost of accommodation claim for a property costing £900,000 for the sum of £800,000. The ready inference to draw is that the NHSLA preferred to avoid a precedent overturning *JR* and recognising the existence of a real (and substantial) loss to the claimant.

The Personal Injuries Bar Association ("PIBA") intervened in the *JR* appeal and, to that end, I produced a skeleton argument. This article largely mirrors the PIBA skeleton but should be taken as representing only my own thoughts in relation to the thorny issue of accommodation claims.

The problem

When a claimant needs to purchase a more expensive property as a result of an injury caused by the defendant's breach of duty (special accommodation), the question arises as to what is the nature and extent of the claimant's loss? In the ordinary case, where the claimant purchases an item, such as a wheelchair, it is deemed to be valueless after, say, five or seven years. So the loss is straightforward to calculate: it is the full cost of the wheelchair every five or seven years. Even when the chattel has a residual value, such as vehicle, no difficulty is presented. If the car is to be replaced after five years, its residual value will be, say, 33% of the cost of the car, prior to its being adapted. Provided credit is given for this residual value, calculation of the loss relating to the car is straightforward.

The position in relation to property, on the other hand, is the reverse. The property market, certainly over the last 20-plus years, has shown strong growth. The capital asset required—the more expensive property—rather than reduce in value in a predictable fashion over time has historically risen at different

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[1] *JR v Sheffield Teaching Hospitals NHS Foundation Trust* [2017] EWHC 1245 (QB); [2017] 1 W.L.R. 4847.

[2] *Roberts v Johnstone* [1989] Q.B. 878.

[3] *JR v Sheffield Teaching Hospitals NHS Foundation Trust* [2017] EWCA Civ 2077.

levels at different times but generally well over the rate of inflation measured by the Retail Price Index. How then to assess loss?

The Court of Appeal's solution in *Roberts v Johnstone*

In *Roberts v Johnstone*, the Court of Appeal provided the solution that litigants were obliged to adopt. It linked the loss to the discount rate. More specifically, it proceeded on the basis that a claimant, required to put his damages into a more expensive property, would thereby secure (only) a means of keeping track of RPI. The property was deemed to increase in value exactly in line with RPI. The discount rate is intended to reflect the investment return that a prudent investor can expect to make year on year; a positive discount rate representing the amount over RPI that the claimant can expect to obtain by such investment. In *Roberts v Johnstone*, the Court of Appeal assessed the loss to the claimant as being caused by the claimant's inability to invest his damages as he would otherwise do—thereby obtaining a return of the discount rate over RPI. Given the property would increase in line with RPI, the loss to the claimant was measured by the discount rate, year on year. The claim was, therefore, one of loss of use of capital. It led to the well known formula for calculating the total loss of:

[Increased capital cost] x discount rate% x life multiplier

Issues to be addressed

I address, in turn: (1) the correct legal test to apply; (2) whether a claimant, who requires special (and more expensive accommodation),[4] has incurred a loss and, if so, what is the status of *Roberts v Johnstone*; and (3) routes by which the court can quantify or measure such loss.

The correct legal test to apply

It is well established at the highest level that the task of the court in assessing damages for personal injuries is to arrive at a figure, whether lump sum or PPO,[5] which represents as nearly as possible full compensation for the injury which the claimant has suffered; the purpose of the award is to put the claimant in the same position, financially, as if he had not been injured.[6]

In the context of a claim for damages, as here, to meet a need arising from the claimant's injury, the appropriate question for the court is: "what is required to meet the claimant's reasonable needs?"[7]

In a case such as *JR*, it is to be assumed that the claimant has established by evidence that he requires special accommodation to meet his reasonable needs. This is key. The claimant is entitled to recover sufficient damages to meet his established need for special accommodation.

So the court's obligation is to see that the damages to which it holds the claimant is entitled are sufficient to enable the claimant to be provided, at no extra cost to himself, with that special accommodation. Otherwise, the claimant will not have been provided with enough damages to meet his reasonable needs.

The principle of restitution means that the court should strive not to provide any element of betterment for the claimant. Sometimes this cannot be avoided: see, for instance, *Harbutt's Plasticine v Wayne Tank and Plump Co*[8] and the other cases referred to at fn.15 to 4.11 of the Law Commission's Report "Damages

[4] Invariably level access accommodation that is larger than would otherwise be required. A broad range of seriously injured claimants have such a need, not least those who by virtue or traumatic brain injury and/or spinal cord injury are wheelchair dependent but also, e.g. claimants with lower limb amputations.

[5] A periodical payments order pursuant to the Damages Act 1996 s.2.

[6] It suffices to refer to *Livingstone v Rawyards Coal Co* (1880) 5 App. Cas. 25 per Lord Blackburn at 39 and *Wells v Wells* [1999] 1 A.C. 345 per Lord Lloyd at 364.

[7] See *Sowden v Lodge* [2004] EWCA Civ 1370; [2005] 1 W.L.R. 2129 per Longmore LJ at [94] and also per Pill LJ at [11]ff.

[8] *Harbutt's Plasticine v Wayne Tank and Plump Co* [1970] 1 Q.B. 447.

for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits"[9] and *McGregor on Damages* at 2-007.[10] If the claimant obtains an incidental benefit in respect of unavoidable betterment, it should be ignored in the assessment of damages.[11]

This is because the court must address the issue from the point of view of the claimant, rather than that of the tortfeasor. As put by Lord Hope in *Longden v British Coal Corp*:[12]

> "The principle is that the plaintiff must be compensated, but no more than compensated for his loss. As Dixon CJ indicated in the High Court of Australia in *National Insurance Co of New Zealand Ltd v Espagne* (1961) 105 C.L.R. 569 at 572 not much assistance is to be found in contemplating the supposed injustice to the wrongdoer. The concern of the court is to see that the victim is properly compensated. There must, of course, be no element of double recovery for the same tort."

The observation in *Roberts v Johnstone* that "the object of the calculation is to avoid leaving in the hands of the plaintiff's estate a capital asset not eroded by the passage of time"[13] is, at best, an incomplete statement of the law. The object is accurately to provide such damages as enable the claimant to meet his reasonable needs; this may, for the reasons set out above, involve leaving the claimant or his estate with a betterment (often referred to in this context as a windfall).

I would also call into question the appropriateness of relying on the observation of Lord Woolf in *Heil v Rankin*,[14] a case of non-pecuniary damages, to the effect that awards of damages must be at a level which does not result in an injustice to the defendant.[15] The court's task, in the case of pecuniary damage, is to determine the amount of damages that meet the claimant's reasonable needs; once that calculation is done, there is, as Lord Lloyd put it in *Wells*[16] "no room for a judicial scaling down".

There is, however, room for a defendant to contend that the claimant has failed to mitigate his loss. Just such an argument was run in *Wells* in the context of the discount rate.[17] So if the defendant proves that the claimant should have taken steps to reduce the cost associated with meeting his need for special accommodation, he will not be entitled to recover the amount claimed but the lesser amount that would equally have met his reasonable need.

Has the claimant incurred a loss?

Where a claimant is living in rental accommodation and requires special, more expensive accommodation as a result of his injury, it is self-evident that he will incur a loss (being the difference between the rental cost of the special accommodation and of the pre-accident rental accommodation). The position is just the same where the claimant is, prior to the accident, living in his own home and needs special accommodation at increased capital cost as a result of the accident.

Even where the claimant is wealthy and has ready access to his own funds so as to purchase the special accommodation, there remains a loss. If, as in *Roberts v Johnstone*, the court assumes that the new property will increase in line with RPI, it nevertheless remains the position that the claimant has put his own monies into a larger property to meet his own accident-related needs. But for the accident, had the claimant been so minded as to invest this private capital in property, he would have been in a position to rent out the

[9] Law Commission, "Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits" (1999).
[10] *McGregor on Damages*, 19th edn, 2-007.
[11] And see the summary of the law given by Lord Hope in *Lagden v O'Connor* [2003] UKHL 64; [2004] 1 A.C. 1067 at [34].
[12] *Longden v British Coal Corp* [1998] A.C. 653.
[13] *Roberts v Johnstone* [1989] Q.B. 878 per Stocker LJ at 893B.
[14] *Heil v Rankin* [2001] Q.B. 272.
[15] An observation implicitly approved, but without argument, obiter by Tomlinson LJ in *Manna v Central Manchester University Hospitals NHS Foundation Trust* [2017] EWCA Civ 12 at [19]. And see the illuminating analysis of Warby J on this point in *A v University Hospitals of Morecambe Bay NHS Foundation Trust* [2015] EWHC 366 (QB) at [9]–[16].
[16] *Wells v Wells* [1999] 1 A.C. 345 at 364.
[17] The HL rejected the defendant's contention that the claimant failed to mitigate her loss by not investing in equities: see *Wells v Wells* [1999] 1 A.C. 345 at 366–367.

property and so produce an income; a step he cannot now take as he needs the larger property to live in. In that way, the claimant's capital would be taken to increase in line with RPI *and* the claimant would benefit from rental income. A similar loss (of capital increase and income) would arise if the claimant had to withdraw funds from investments other than property. Whether viewed as a loss of investment return or loss of use of his capital, the claimant suffers a loss.

Experience tells that the vast majority of claimants are anyway not in a position to afford by independent means to purchase the special accommodation. They are, relative to the costs of special accommodation, impecunious. In *Lagden v O'Connor*,[18] the House of Lords elected not to follow the rule laid down in *The Liesbosch*[19] and held that the claimant's impecuniosity should be taken into account when assessing damages. At [61], Lord Hope held that:

> "The wrongdoer must take his victim as he finds him … This rule applies to the economic state of the victim as it applies to his physical and mental vulnerability. It requires the wrongdoer to bear the consequences if it was reasonably foreseeable that the injured party would have to borrow money or incur some other kind of expenditure to mitigate his damages."

An impecunious claimant, who needs to borrow funds in order to fund the purchase of the special accommodation, clearly suffers a loss. The loss is not extinguished if the claimant, in fact, borrows from other damages awarded in respect of different heads of loss; that would impermissibly involve setting off one head of loss against another, a novel and wholly unprincipled approach. It may as well be said that the claimant has no claim for a wheelchair because he can afford to purchase one with his award of damages for loss of earnings.

Nor can the loss be ignored by the court because, by virtue of the change in the discount rate, the claimant will recover more than he would otherwise have done. That is a reflection of the new discount rate more accurately reflecting the cost or loss to the claimant.[20]

The court's assessment of a "lost years" claim is also irrelevant to the assessment of damages relating to the cost of special accommodation. The heads of loss are distinct and it would be entirely unprincipled to permit assessment of one head to determine assessment of another. It would also lead to arbitrary outcomes as between claimants; the amount to be recovered for special accommodation then presumably being greater for a claimant without a "lost years" claim than one with such a claim.[21]

A rigid adherence to the *Roberts v Johnstone* formula produces the absurd result of there being no loss. This is the product of applying the negative discount rate as the measure of annual loss of use of monies when the claimant has, in fact, either lost the benefit of rental income on the capital or needs to incur borrowing costs. I would contend that *Roberts v Johnstone* no longer applies. Even though the House of Lords held in *Wells* that the annual multiplicand should be calculated by reference to the discount rate, both sides had accepted that the correct approach was that adopted by the Court of Appeal in *Roberts v Johnstone*.[22] So the House of Lords did not itself determine that *Roberts v Johnstone* formed the correct (or only) basis for assessing damages relating to the purchase of special accommodation.

Accordingly, the Court of Appeal can distinguish *Roberts v Johnstone*, there being ample grounds for doing so, not least that:

- The different social conditions that now apply: the cost of a mortgage had changed substantially, the investment potential of money (as determined by the discount rate) has

[18] *Lagden v O'Connor* [2003] UKHL 64; [2004] 1 A.C. 1067.
[19] *The Liesbosch* [1933] A.C. 449.
[20] The NHSLA rather ambitiously argued that the claimant had done well by the new discount rate and that (somehow) this was relevant to the court's assessment as to whether he had sustained a loss in relation to the capital cost of accommodation.
[21] The NHSLA tried also its luck with this argument.
[22] See *Roberts v Johnstone* [1989] Q.B. 878 at 380F in the judgment of Lord Lloyd.

changed from the time in *Wells* and so has the relative cost of a suitable property and a claimant's ability to purchase one out of interim damages.

- The formula does not work to produce a just result when the discount rate is negative.
- PPOs are now available, which limit the scope for obtaining a substantial lump sum interim payment with which to purchase special accommodation, and provide an alternative route to compensation for special accommodation.
- The balance between the capital cost of special accommodation and PSLA awards is now markedly different.[23]
- Impecuniosity is a factor that the court can now take into account when assessing damages.

I would argue that the court should distinguish *Roberts v Johnstone* given it fails to provide the claimant with such damages as meet his reasonable needs. The problems with the *Roberts v Johnstone* formula were recognised prior to the change in the discount rate.[24] In particular, it produced real hardship to claimants with short life expectancies.[25] Even using the 2.5% discount rate, a claimant with a life expectancy of 10 years had a multiplier of 8.86 and so could only recover 22.15% (2.5% x 8.86) of the increased capital cost. What the change in the discount rate has done is to render the approach taken in *Roberts v Johnstone* unworkable; it has forced the court's hand.

The problem will not disappear if and when the discount rate is revised again. There can be no knowing at this point in time to what level the discount rate will move; the only steer the Government has been prepared to give being that it *may* be between 0% and 1% and that this was only an indication of the direction of travel of the discount rate. If, say, the discount rate is changed to 0.5%, then a rigid application for a female aged 50 with no reduction in life expectancy would give a figure of 17.45% (life multiplier of 34.9 x discount rate of 0.5%) for a lifelong need for special accommodation. That claimant would be left having to find the remaining 82.55% of the increased capital cost from other damages.

Routes by which the court can quantify the claimant's damages

PPO to fund interest-only mortgage

A claimant, facing the need to access capital to fund the special accommodation, could, in principle, obtain a commercial mortgage to do so. If the interest payments were met by the defendant for so long as the claimant lives, then the claimant would have obtained restitution with a high degree of accuracy. A PPO award can provide this, not least when the court can select an appropriate index of inflation.[26] In this context, it may be appropriate to apply the Index of Private Housing Rental Prices.[27]

The possibility of funding accommodation by a PPO was first proposed in 2008.[28] The proposal was adopted by the Civil Justice Council in its 2010 report on accommodation claims.[29] Nevertheless, to the best of my knowledge, there has never been a case yet when such a PPO has been agreed between parties (let alone ordered by the court). One factor behind this is essentially a practical one: it has proven hard to find a mortgage lender willing to provide such a product.

[23] Damages for PSLA will not exceed £354,260 (per Judicial College guidelines) and special accommodation is needed by claimants with a wide range of PSLA awards, from around £100,000 upwards. Special accommodation close to London can be expected to cost around £1m, sometimes more; the lowest figures, in some parts of the UK, are somewhere around £450,000; and, as a rough guide, a typical cost for special accommodation would be £750,000.

[24] See the Law Commission report of November 1999 and the Civil Justice Council report of 2010.

[25] Such as mature spinal cord injury clients. The 2017 paper "Long term survival after traumatic spinal cord injury: a 70-year British study" Spinal Cord (2017) 1–8 gives life expectancy figures for a 60 year old male paraplegic of 14.8 years and a 60 year old male with C1-4 tetraplegia, Frankel A-C, of 8.4 years (as compared to the general population with a life expectancy of 22.6 years. The figures for females are only slightly higher.

[26] See *Thompstone v Tameside and Glossop Acute Services NHS Trust* [2008] EWCA Civ 5; [2008] 1 W.L.R. 2207.

[27] An experimental index published by the ONS since 2011.

[28] See R. Weir, "Accommodating periodical payments orders into housing claims" [2008] *Journal of Personal Injury Law* 146–153.

[29] See at 5.1ff.

A PPO takes the issue of the claimant's life expectancy out of the equation. It enables the claimant to obtain special accommodation even where he has a short life expectancy and avoids the need for the defendant to pay for any capital element at all. A strong steer from the Court of Appeal as to the merits of utilising PPOs in this context may encourage litigants to focus harder on this possible solution; no doubt, if one mortgage lender provides a suitable product, others will then follow.

It is right to note that in a case of a long predicted life expectancy and where the claimant does indeed live out his life expectancy, the defendant may very well pay in excess of the capital sum needed to purchase the property outright. In such a case, it would surely be open to the defendant to elect to offer to pay the claimant the full capital sum instead of making a PPO. That would be a matter for the insurer. The fact that the overall sum may, over a number of years, exceed the capital cost is not, of itself, a factor against the making of a PPO—it is part of the quid pro quo of any PPO under which the amount of the claimant's damages are linked to the period of his life.

Payment of a loan to meet the extra capital cost with charge over claimant's property

The Law Commission considered this to be the best option for reform.[30] It has the great advantage over the *Roberts v Johnstone* approach[31] that the claimant is provided with the funds to purchase his special accommodation. So the claimant's actual need for special accommodation is met. It meets the problem by recognising, as the Law Commission noted at 4.10, that the claimant's loss is a capital expense and not an annual loss.[32]

The Law Commission highlighted the practical issues that come with imposing a charge on the claimant's property at 4.14. As part of that analysis, the Law Commission proposed at 4.14(iv) that the amount to be repaid to the defendant (on the claimant's death) should reflect changes in the market value of the property. If that is right, then the defendant would have to accept the possibility of being repaid a lower amount in the future than the amount of capital loaned.[33]

Whilst the logic of such an approach is clear, it is questionable whether the claimant's estate should be held to such an arrangement: the claimant may elect to conduct considerable improvements on the property and it would be expensive to calculate (and potentially litigate) the costs associated with such changes, which should plainly be discounted. I would favour repayment simply of the capital sum loaned (and regardless of the value of the property at the date of the claimant's death); alternatively, payment of the capital sum loaned plus interest on the loan at a suitable index of inflation over the duration of the loan.[34]

I would not accept that the complexities associated with the loan/charge scheme are such as to make it virtually unworkable in practice: the conclusion reached by the Law Commission at 4.15. No doubt, as with PPOs, a standard form or model order would, within a short space of time, become adopted and approved by the court. This scheme would provide a measure of damages to a high degree of accuracy which delivers a practical solution to the claimant and avoids any argument about windfall. Its benefits to claimants and defendants alike, especially in low life expectancy claims, are obvious.

Rental arrangements

In a minority of cases, claimants welcome renting a property for life. Cases have been approved under which the rental costs have been paid by way of a PPO.[35] I have settled one case in which the defendant

[30] At 4.13.
[31] Pre-discount rate change to a negative figure.
[32] Unless the alternative solution of a PPO is employed in which case the loss can be approached as an annual loss whilst continuing to meet the actual need by providing the claimant with the means to borrow the necessary funds so as to purchase the special accommodation.
[33] This is a real possibility, not least in a case where the claimant dies after a short number of years.
[34] Such as RPI.
[35] See, e.g. *JM v Aylward* (2015) Lawtel, a settlement approved by Owen J.

insurer purchased a property in which the elderly tetraplegic claimant is living (on a peppercorn rent) for life, the claimant keeping his pre-accident owned home and being free to rent it out if he chooses.[36]

I recognise that the vast majority of claimants prefer to own their own home. The arrangement under which an insurer purchases a home and rents it out to the claimant for life does provide the claimant with security for life. It can be an attractive option to both claimant and defendant in cases of short life expectancy, not least where the claimant is so brain damaged as not to comprehend the loss of independence felt by many who rent, rather than own.

The Supreme Court of Ireland was attracted to the idea of assessing the loss by reference to the cost of renting a suitable property, whether or not the claimant chose to rent, in *Barry (a minor) v National Maternity Hospital*.[37]

Capital sum to meet mortgage interest costs

Logically, the lump sum corollary to the PPO award is a sum representing the annual cost of interest on the mortgage providing the capital sum multiplied by the claimant's life expectancy. Whereas the *Roberts v Johnstone* formula is fixed on the (discount rate x capital sum) as the annual cost, here the award more accurately reflects the actual annual cost to the claimant of borrowing the needed capital.

The difficulty with this approach is that, where the claimant's life expectancy is short, it will still not provide the claimant with damages such as to meet his reasonable needs, by enabling him to move into special accommodation without additional cost. For this reason, I do not see this as providing an ideal solution. It also makes calculation of the lump sum dependent on assessment of life expectancy.[38]

In the case of a very long life expectancy, this approach will give rise to an award of capital exceeding the capital cost of the special accommodation. In such a situation, the claimant would be failing to mitigate his loss if he did not accept the lesser sum of the full capital cost.

If such an approach were to be adopted, it is contended that there should be a single rate fixed by the court to be applied to every case in the interests of certainty and predictability. No doubt there would be a test case at which evidence could be adduced of mortgage interest rates before such a rate was set. If market conditions then changed sufficiently, it would be open to a party in the future to apply for a change to the rate fixed by the court.

Capital sum less PSLA

In *JR* the claimant promoted, as a secondary case, quantifying damages by reference to a lump sum, representing the additional capital sum, less the amount recovered for PSLA. Such an approach is unprincipled and arbitrary in the extreme. As set out above, the amount awarded for PSLA simply cannot be set off against the claim for damages in this way. PSLA are awarded for loss of a different kind and the courts should not endorse their being applied across to the quantification of a different head of loss. Further, it would lead to the greatest level of unfairness between claimants: a below-knee amputee's accommodation cost would be discounted by around £100,000 whereas the more seriously injured tetraplegic or cerebral palsy/catastrophic brain injury client would face a reduction of up to £300,000 plus.[39]

[36] And under which the defendant insurer agreed to extend the tenancy to the later of the death of the claimant and his wife.
[37] *Barry (a minor) v National Maternity Hospital* [2016] IESC 41.
[38] An inexact science and an assessment that is fairly bound to be wrong in any individual case.
[39] The Judicial College guidelines recommend awards of £85,910 to £116,620 for a below-knee amputation and the maximum severity award is £354,260.

Capital sum simpliciter

The claimant needs such damages as will enable him to fund the purchase of special accommodation. The two options that deliver this without providing any[40] element of betterment are the PPO and the loan/charge arrangements.[41] These options, therefore, produce a more accurate assessment of damages than payment over the capital sum to the claimant.

The court can order that the defendant meet the special accommodation cost by a PPO; it is charged by s.2(1)(b) to consider the making of a PPO when awarding any damages for future pecuniary loss. It is not obvious that the court has the power, as such, to order that there be a loan of monies coupled with a charge against the property to be purchased and numerous ancillary clauses.[42]

A solution does, however, present itself to the court. If the defendant offers a suitable PPO and/or a loan/charge arrangement, the issue will be put before the court as to whether a claimant, who refuses such offers, has mitigated his loss. If the court considers that any such offer is one that the claimant should reasonably accept, then the claimant's claim will be so limited. Any such offer, to be effective, should be one which is open for acceptance, in effect, post judgment on the basis that the court makes such a finding on mitigation.

If, on the other hand, the defendant fails to make any such offer to the claimant (or the court anyway finds that it is not appropriate to make a PPO), then the question arises as to how the court can compensate the claimant so as to meet his undoubted claim for special accommodation. The default position is payment of the entire capital sum, there being no other way in which the court can provide the claimant with the funds to purchase the special accommodation.

Once the court establishes that accommodation claims should be resolved by payment of the full capital sum, subject to arguments about mitigation, it is envisaged that defence insurers[43] will rapidly react and embrace the PPO and loan-charge schemes.[44] The prospect then opens up of a just solution being available to address the conundrum that is the claim for accommodation costs.

The problem, highlighted by *JR*, with the *Roberts v Johnstone* formula is that it weds the claim relating to the capital cost of accommodation to the discount rate. Adopting Gwyneth Paltrow's much mocked phrase, it is surely time for a conscious uncoupling of the two.

[40] Or any significant.

[41] Neither will enable the claimant to obtain the property if the claimant is entitled only to recover a proportion of his damages but this is a feature of every case of partial recovery. In *Sowden v Lodge* [2004] EWCA Civ 1370; [2005] 1 W.L.R. 2129, the Court of Appeal held that the effect of contributory negligence on how a claimant would actually spend his damages was irrelevant to the court's task of assessing damages.

[42] The court could, however, make an order for payment of the capital sum over to the claimant if the claimant/his deputy had provided an undertaking to the court to repay the monies after the death of the claimant, to put a charge on the property and so on.

[43] And other professional defendants such as governmental bodies, including NHS Resolution.

[44] Practical difficulties may arise at the outset and require litigating but it is envisaged that the courts will shortly provide clarity for future cases.

Discount Rate and Investment Advice: Will Claimants be able to Recover the Cost of Investment Advice when the Discount Rate Increases and the Claimant is Expected to Take Some Risk on Investment?

Sabrina Hartshorn

Discount rate; Investment advice; Measure of damages; Personal injury claims; Risk

QUANTUM / DAMAGES

Since 2004, personal injury lawyers have known that fees were not recoverable for investment advice concerning an award made to claimants (be they patients or not) following the decisions in *Page v Plymouth Hospital NHS Trust*[1] and *Eagle v Chambers (No.2)*.[2] This article explores why those decisions were made and considers the impact any change of discount rate is likely to have on the need for investment advice and the recovery of fees for that advice.

The setting of the discount rate

To understand the decisions made in *Page v Plymouth Hospital NHS Trust* and *Eagle v Chambers (No.2)*, it is important to consider the court's approach to assessment of awards and the tools a court has at its disposal to make that assessment. It is well established that the victims of a tort are entitled to be compensated as nearly as possible in full for all pecuniary loss. In attempting to achieve this aim where a lump sum is awarded, the multiplicand/multiplier approach is used applying the discount rate in place at the time of assessment of the award. The discount rate was set by the House of Lords in *Wells v Wells*[3] at 3%, the net average return of Index Linked Government Stock ("ILGS"). The assumption by the House of Lords was that at the time of the decision, ILGS was the most accurate way of calculating the value of loss which claimants suffered in real terms. Investment in ILGS was considered a prudent form of investment and a single rate provided the courts with a degree of certainty when facilitating settlements and avoided the need for expert evidence at trial. The guideline rate of 3% was reduced to 2.5% by Lord Irvine, the then Lord Chancellor in June 2001, even though the three-year average yield on ILGS up to June 2001 was 2.61% and after an adjustment for taxation, the discount rate was likely to fall between 2% and 2.5%. The reasons given by Lord Irvine on 27 July 2001 for choosing 2.5% were as follows:

- The real rate of return to be expected from ILGS tended to be higher the lower the rate of inflation is assumed to be. Inflation at the time had been kept close to or below the 2.5% target and looked likely to continue for the foreseeable future.
- The rate of return in 2001 on ILGS was distorted so as to produce an artificially low figure given the continuing high demand for the stock but scarcity of its supply.
- The Court of Protection continued to invest in multi-asset portfolios and no family of patients had chosen to invest in ILGS since *Wells v Wells* despite this option.

[1] *Page v Plymouth Hospital NHS Trust* [2004] EWHC 1154 (QB).
[2] *Eagle v Chambers (No.2)* [2004] EWCA Civ 1033.
[3] *Wells v Wells* [1999] 1 A.C. 345.

- Claimants receiving large awards were unlikely to invest solely or primarily in ILGS. Financial experts responding to the consultation process suggested a mixed portfolio was usually more suitable to fulfil objectives sought by investment of the damages.
- It remained possible under the Damages Act 1996 s.1(2) for the courts to adopt a different discount rate in a particular case if there were exceptional circumstances which justified a departure from the fixed rate of 2.5%.

The discount rate remained at 2.5% until 27 February 2017 when the Rt Hon Liz Truss MP, the then Lord Chancellor, announced a new discount rate of -0.75% applying the same principles as laid down in *Wells v Wells*. She stated that this was the "only acceptable rate" she could set. On reading the statement, it is clear that she means setting the discount rate using ILGS was the only legally acceptable mechanism she could use given that she had considered the mixed portfolio approach and found it wanting. With an eye on the markets in February 2017, she believed that the ILGS approach ensured that there was no question about the availability of the money when the investor required repayment of the capital and there being no question of loss due to inflation. The mixed portfolio approach runs counter to these principles.

On 7 September 2017, the Lord Chancellor and Justice Secretary, the Rt Hon David Lidington MP announced plans to lay draft legislation before Parliament to change the way in which the personal injury discount rate is set. The announcement stated on the evidence currently available, the Government would expect that if a single rate were set today under the new approach as set out in the draft legislation, the real rate might fall within the range of 0% to 1% but more of this later.

Recovery of fees for investment advice: Non-patients

In *Page v Plymouth Hospital NHS Trust*, the question of whether a claimant who was not a patient should be entitled to claim the fees that he or she would incur for investment advice on receipt of the damages was considered. An analysis of the case law prior to *Wells v Wells* was made. Davis J considered the court's aim when arriving at an appropriate award was to calculate a lump sum for future economic loss for the rest of the claimant's life and this was achieved by calculation of the award using the multiplicand/multiplier approach. The setting of the discount rate incorporated a risk of investment albeit a prudent one. Davis J rejected the claim for investment advice fees stating that the reasoning of the House of Lords in *Wells v Wells* and the reasoning provided by Lord Irvine in July 2001 on the setting of the appropriate discount rate anticipated that there would be investment costs arising in respect of investment advice sought by the claimant. Those costs were effectively within the "territory" of the applicable discount rate. It should be noted that Lord Irvine did not specifically state that investment costs were taken into account when setting the appropriate discount rate.

Recovery of fees for investment advice: Patients

In the Court of Appeal decision of *Eagle v Chambers (No.2)*, it was argued that fees for investment advice should be recovered where the claimant was a patient under the protection of the court and had no choice about how the funds were to be invested. The Court of Appeal decided, with Buxton LJ dissenting on this issue, that there should be no distinction between a patient and a non-patient when dealing with recovery of fees for investment advice. Waller LJ provided the reasoning behind the inability to recover fees for investment advice. At [95] of the judgment, he stated:

> "A Defendant must pay by way of compensation damages assessed on the basis that the return on the money will be by way of investment in gilts even though the practice is to gain a higher return by investing more broadly. To order the Defendant to pay the costs of taking the advice so as to enable the investment to be made more broadly so as to enable the Claimant to recover more that

> which he would have recovered if investments had been maintained in gilts is to make the Defendant lose both on the swings and roundabouts, and to provide the Claimant with a head of damage which flows from a decision as to how to invest and not from the accident. A Claimant is entitled to use his money as he likes, but if he wishes to increase the sum awarded and awarded on the most advantageous basis to the Claimant, he must set off the fees charged against the gains made and not recover the fees from the Defendants. All that is as true of a Claimant who is a patient as it is of a Claimant who is not a patient."

However, Buxton LJ believed that a patient was in a very different position to that of a claimant able to make choices regarding his/her own investments. He was of the opinion that the tortfeasor should pay for panel broker's fees just as its pays the Court of Protection fees; they are a foreseeable and inevitable cost which is imposed by the tortfeasor. He stated that:

> "when a tortfeasor renders his victim a patient, he not only, as in any case of serious injury, imposes on the Claimant the wholly unreal world of a single lump sum to provide for the whole of the rest of his life; but also deprives the Claimant of the normal power to decide how that lump sum should be managed."

It is clear that historically the cost of any investment advice was perceived as arising out of the administration of the compensation received and not the Defendant's negligence. Following the decisions in *Page v Plymouth Hospital NHS Trust* and *Eagle v Chambers (No.2)*, any attempt to claim investment advice as a separate head of damage has been viewed as an impermissible attack on the discount rate.

2004 onwards: The status quo

Since 2004, despite Buxton LJ's dissenting judgment in *Eagle v Chambers (No.2)*, there have been no further decisions directly dealing with recovery of fees for investment advice. As the years have passed and the economic climate has changed, there has been a greater call for reviewing the discount rate to ensure that those in receipt of lump sum awards were being provided with 100% compensation for their loss. During this time court decisions have centred on the use of a different and more appropriate discount rate relying upon the exceptional circumstances caveat in Damages Act 1996 s.1(2). In the case of *Robert Harries (A Child by his mother and litigation friend, Sharon Sally Harries) v Dr Alan David Stevenson*,[4] Morgan J was asked to consider the applicability of a different discount rate to a lump sum for future loss to ensure that 100% compensation was provided to the claimant where a periodical payment order was unlikely to be made. It was clear from Morgan J's judgment that any change in the economic climate cannot be seen as justification for applying the Damages Act 1996 s.1(2) and setting a different discount rate. Such argument was seen as a direct challenge to the Lord Chancellor's prescribed rate.

The future

Following the publication of the draft legislation on a new method of setting the discount rate published in September 2017, it is clear that the Government believes investment in ILGS to be very low risk, so low risk that basing the discount rate on the rate of return in ILGS would mean a tendency to overcompensate the claimant. The Government is of the opinion that most claimants invest in low risk diverse portfolios, not very low risk investments such as ILGS. The draft legislation inserts a new section ("A1") to the Damages Act 1996 with an accompanying schedule. The new section allows for a review of the rate every three years and the accompanying schedule sets out the factors the Lord Chancellor must take into account when determining the appropriate discount rate. In calculating the rate, the Lord Chancellor

[4] *Harries v Stevenson* [2012] EWHC 3447 (QB).

will make certain assumptions.[5] They include that a claimant receives proper investment advice, invests in a diversified portfolio of investments and has a low-risk investment profile. This means the claimant is to be assumed to be willing to take more than a very low risk with his or her investments but less risk than would ordinarily be taken by a prudent and properly advised individual investor with different investment aims. The intention is that the level of risk assumed in the setting of the discount rate will therefore be higher than is assumed under the present law.

With the understanding by the Government that a claimant will expose himself to a higher level of risk, the need for investment advice will become crucial. Recovery of a fee for that investment advice, however, is likely to remain a cost a claimant will still have to meet and not the defendant if the legislation is passed in its current form. In para.5 of the draft Schedule which accompanies s.A1, it states that the Lord Chancellor must have regard to the following:

(a) "the actual returns that are available to investors;
(b) the actual investments made by investors of relevant damages; and
(c) make such allowances for taxation, inflation and investment management costs as the Lord Chancellor thinks appropriate."

Whilst the Lord Chancellor must have regard to these matters above, this does not limit the factors which may inform the Lord Chancellor when making the rate determination (para.6) but the Lord Chancellor must give reasons for his decisions made in respect of taxation, inflation and investment management costs (para.7).

It would appear that despite the greater need for investment advice given an assumption that claimants will take a higher level of risk on investment, the associated costs of that advice will be taken into account when setting the appropriate discount rate. If the draft legislation is passed in its current form, there will no avenue for argument for recovery of investment advice as any such claim will be seen as a direct challenge to the discount rate, such rate to be determined by the Lord Chancellor and the "panel members" not the courts despite the allowance made in the Damages Act 1996 s.1(2).

[5] Damages Act 1996 Sch.A1 para.4.

Costs Budgeting: A Mid-Term Report

Master Roberts*

Costs budgets; Detailed assessment; Personal injury claims

Introduction

It has become accepted wisdom that the only way to control costs is to do so in advance. There are two ways of doing this: by a general scheme of fixed recoverable costs or by imposing a costs budget for each individual case.

In his "Review of Civil Litigation Costs: Supplemental Report, Fixed Recoverable Costs", published in July 2017, Sir Rupert Jackson recommended that all fast track cases be subject to fixed recoverable costs and that an intermediate track be introduced for monetary claims with a value of up to £100,000 and which can be tried in three days or less, with no more than two expert witnesses giving oral evidence on each side. The intermediate track would have streamlined procedures and a grid of fixed recoverable costs. Personal injury actions with a value greater than £100,000 or with a trial longer than three days or involving oral evidence from more than two expert witnesses on each side would remain on the multi-track and subject to costs budgeting.

Jackson LJ recognised that the complexity of clinical negligence cases is such that they are usually unsuited to either the fast track or the proposed intermediate track.[1] He recommended that the Department of Health and the Civil Justice Council set up a working party with both claimant and defendant lawyers to develop a bespoke process for clinical negligence cases up to £25,000.

Clinical negligence cases with a value above £25,000 will continue to be assigned to the multi-track and to be subject to costs budgeting.

I would suggest that costs budgeting is more likely to result in reasonable and proportionate costs, and as a consequence access to justice, than fixed recoverable costs. The latter by their nature operate in a mechanical and non-case sensitive manner. Two claims may have the same value but one may have significantly more complex factual medical and legal issues. Costs budgeting enables the court in its discretion to allow greater costs in the more complex claim. As Carr J said in *Merrix v Heart of England NHS Foundation Trust*:[2]

> "It goes without saying that the costs budgeting regime … is far more refined than a fixed cost regime."

In *Stocker v Stocker*[3] Warby J said:[4]

> "I accept that it is not possible to approach the costs budgeting exercise in a case of this kind [defamation] by assessing a case as relatively modest in scale, and the costs as high, and then simply reducing the costs to match the perceived importance of the case. As I observed in *Yeo*,[5] many would suggest that the costs of litigation in this category become disproportionate at an early stage. There is no avoiding that, in many cases. So I agree that an approach based purely on financial proportionality

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[1] "Review of Civil Litigation Costs: Supplemental Report, Fixed Recoverable Costs" Jackson LJ, p.9.

[2] *Merrix v Heart of England NHS Foundation Trust* [2017] EWHC 346 (QB) at [85].

[3] *Stocker v Stocker* [2015] EWHC 1634.

[4] *Stocker v Stocker* [2015] EWHC 1634 at [57].

[5] *Yeo v Times Newspapers Ltd* [2015] EWHC 209 (QB).

would run the risk of disabling litigants from fairly presenting their cases. I accept also that the 'small' cases such as this, involving relatively few publishees, are not inherently cheaper and can tend to be more expensive than cases over mass media publication. I readily acknowledge the importance of ensuring that the costs budgeting process does not result in a party being unable to recover the costs necessary to assert their rights."

Extension of costs budgeting in claims above £10 million

CPR 3.12(1)(a) provides that costs management applies to all Pt 7 multi-track cases except cases in which the amount claimed, as stated on the claim form, is £10 million or more. However, CPR 3.12(e) provides a general discretion to the court to apply costs budgeting to claims in excess of £10 million, "where the court otherwise orders". The case law shows that no case is too large to be costs budgeted. In *CIP Properties v Galliford Try*,[6] Coulson J, as he then was, held that the discretion of the judge to impose costs budgeting was entirely unfettered. He rejected the claimant's submission that the party seeking budgeting needed to show "special circumstances" to dis-apply the normal rule, saying:[7]

"I take the view that the exercise of the court's discretion under CPR 3.12(1) is unfettered. There is nothing in the CPR to suggest otherwise. The discretion extends to all cases where the claim is for more than … £10 million. In such a case, if there is an application for the filing and exchanging of costs budgets, the court has to weigh up all the particular circumstances of the case, in order to decide whether, in the exercise of its discretion, such budgets should be provided. There is no presumption against ordering costs budgets in claims over £2 million or £10 million, and no additional burden of proof on the party seeking the order."

In *Simpkin v Berkeley Group Holdings*,[8] Foskett J directed that costs budgeting should apply in a claim with a potential value exceeding £10 million, in which a former employee claimed bonus payments consequent upon the termination of his employment. The claimant was anxious for the case to be costs budgeted, in part so that his ATE insurers could know the extent of their potential liability. Foskett J said:[9]

"The claimant would like costs budgeting to be put in place so that potential after the event insurers will know the position. I can see nothing objectionable to that being, at least in part, an objective on his part. If he fails to secure such insurance he will have the reassurance of knowing the limit of his personal liability if his claim should fail. I do not think that the decision to order costs budgeting requires any greater justification than that. It will help to even the playing field between the parties and keep everyone focused on what they are spending on this litigation. The costs said to have been involved in the applications made to me are indicative of where the costs sought to be recovered in this case might go unless properly considered and, where appropriate, restrained."

Costs budgeting has also been used in large scale litigation involving test cases. In *Various Claimants v Sir Robert McAlpine*,[10] the litigation arose from the secret vetting by major construction companies of construction workers. The parties accepted that the combined total costs were likely to be in the region of £100–£150m. Supperstone J, sitting with Chief Master Gordon-Saker and Master Leslie, applied costs budgeting.

[6] *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd* [2014] EWHC 3546 (TCC).
[7] *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd* [2014] EWHC 3546 (TCC) at [27].
[8] *Simpkin v Berkeley Group Holdings* [2016] EWHC 1619 (QB).
[9] *Simpkin v Berkeley Group Holdings* [2016] EWHC 1619 (QB) at [50].
[10] *Various Claimants v McAlpine* [2015] EWHC 3543 (QB). Supperstone J said at [24]: "The parties did not dissent from the suggestion of Master Gordon-Saker that total costs are likely to be in the region of £100m-£150m when adding the costs of the individual claims (incurred and estimated), additional liabilities and VAT."

Napp Pharmaceutical Holdings Ltd v Dr Reddy's Laboratories (UK) Ltd[11] was a patent infringement action in which £100 million was claimed. At the hearing of an application for further information in an equiry as to damages on a cross-undertaking, the question arose whether costs budgeting should be ordered. The decision was deferred until after pleadings had closed and the parties had produced and exchanged costs budgets, as is the normal practice. An argument that costs budgeting impeded the recovery of reasonable costs was roundly rejected by Birss J, who said:[12]

> "I entirely reject the submission that costs budgeting creates a problem whereby reasonable and proportionate costs may not be recovered. As Mr Segan pointed out, budgets can and indeed often are altered during the course of proceedings, precisely in order to accommodate things that happen which were unexpected. That fundamental objection … to costs budgeting is wrong."

Incurred costs

From the very beginning it was always known that incurred costs would raise problems with costs budgeting and many say that incurred costs are the greatest problem facing costs budgeting today.[13] Costs budgeting involves looking into the future and approving a total figure, within a range of reasonable and proportionate costs, for each phase of the litigation. It does not involve making any findings as to hourly rates, level of fee earner or number of hours. In contrast, assessing the incurred costs involves looking backwards and making findings on hourly rates, level of fee earner and the number of hours in respect of specific items of work. It would be conceptually and practically difficult to carry out both functions at the same hearing, and there is the further issue of whether the court has the resources to do so. As was said by Davis LJ in *Harrison v University Hospitals Coventry & Warwickshire NHS Trust*:[14]

> "Costs budgeting, to be performed properly, undoubtedly places a real burden on the parties and court. It would potentially greatly extend that burden if incurred costs were to be subjected to the same degree of preparation and appraisal as budgeted costs."

There is also the issue of legal professional privilege, which a party may be prepared to waive at the conclusion of a case but not at the first case management hearing.

The position as to incurred costs is set out in PD 3E para.7.4 which provides:

> "As part of the costs management process the court may not approve costs incurred before the date of any costs management hearing. The court may, however, record its comments on those costs and will take those costs into account when considering the reasonableness and proportionality of all budgeted costs."

The word "comments" has repeatedly given rise to problems. First, dicta in *Sarpd Oil International Ltd v Addax Energy SA*[15] were taken as suggesting that judicial comments on the incurred costs should be given the same status as an approval of the budgeted costs. This led to the unfortunate consequence of parties challenging the incurred costs at the Costs Case Management Conference ("CCMC") on the basis that they if they did not do so, they would lose this right at the conclusion of the case. The Civil Procedure Rule Committee (SARPD Sub-committee) noted in December 2016 that:

> "The effect of the decision was deemed to undermine the efforts of the Civil Procedure Rule Committee to simplify costs management, to promote agreement and to thus reduce hearing time."

[11] *Napp Pharmaceutical Holdings Ltd v Dr Reddy's Laboratories (UK) Ltd* [2017] EWHC 1433 (Pat).
[12] *Napp Pharmaceutical Holdings Ltd v Dr Reddy's Laboratories (UK) Ltd* [2017] EWHC 1433 (Pat) at [38].
[13] Mr John Mead, Technical Claims Director of the NHSLA, describes incurred costs as "the main problem with costs budgeting". Quoted in Jackson LJ's "Review of Civil Litigation Costs: Supplemental Report" July 2017, p.93 para.3.1.
[14] *Harrison v University Hospitals Coventry & Warwickshire NHS Trust* [2017] EWCA Civ 792 at [53].
[15] *Sarpd Oil International Ltd v Addax Energy SA* [2016] EWCA CIV 120.

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In *Harrison*, Davis LJ said:[16]

> "At all events, the then and current versions of the Rules and Practice Direction clearly sharply distinguish, for these purposes, incurred costs from estimated budgeted costs … I in fact consider, and disagreeing with the obiter remarks of the court in *Sarpd Oil*, that the status quo ante was in any event to the same effect."

In short, incurred costs are subject to assessment without any fetter under CPR 3.18, though any comments made by the budgeting judge will be taken into account. I have long considered that the judge should be very cautious when commenting because Precedent H provides no breakdown of the incurred costs and therefore the judge frequently has no sound basis for commenting on whether the incurred costs are unreasonably high. In *Sir Cliff Richard OBE v BBC & Chief Constable of South Yorkshire Police* ,[17] at the outset of a costs management conference, Chief Master Marsh was invited by the defendant to comment upon the claimant's incurred costs. He declined to do so and said:

> "9. I have indicated that the court should exercise a degree of caution. Here the figures that have been incurred are substantial. In aggregate they amount to £1,167,144.83. The pre-action costs total £526,437.97 and the issue and pleadings costs are £324,611. The difficulty for the court, however, is that, although those figures appear to be substantial in absolute terms, it is quite impossible for the court today to form any meaningful view about whether those costs can properly be characterised as being unreasonable and/or disproportionate, let alone to be significantly or substantially unreasonable and/or disproportionate.
>
> 10. To my mind there is little or no value in the court recording a general comment about incurred costs along the lines that the incurred costs are 'substantial' or they are 'too high'. If the court wishes to record a comment that the incurred costs are 'excessive' or they are 'unreasonable and disproportionate' it will wish to be sure that the comment is made on a sound footing, rather than impression, because commenting is quite unlike the exercise of approving a figure per phase for future costs. The court will also wish to consider the utility of making a comment unless it is specific and well-founded.
>
> 11. There is no significant benefit to be gained in the court making the sort of anodyne comment that [the defendant] proposes. A comment is not a finding of fact, but merely a matter to be taken into account. Making a comment does bear the risk, however, that on a detailed assessment disproportionate weight might be given to it, although the comment is based on limited information."

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Looking forward, in his "Review of Civil Litigation Costs" Jackson LJ says:[18]

> "When the reforms recommended elsewhere in this report have been implemented and have bedded in, consideration should be given to developing (a) a grid of FRC (fixed recoverable costs) for incurred costs in different categories of case and (b) a pre-action procedure for seeking leave to exceed the FRC in that grid."

As Jackson LJ recognised,[19] there are resource implications for judges if applications for pre-action costs budgeting are added to their workload. These resource implications must be addressed first. When costs budgeting was introduced Jackson LJ recommended the appointment of an additional Queen's Bench Master and the carrying out of a pilot.[20] Neither took place. As a consequence, a sizeable backlog of clinical

[16] *Harrison v University Hospitals Coventry & Warwickshire NHS Trust* [2017] EWCA Civ 792 at [53]–[54].
[17] *Sir Cliff Richard v BBC* [2017] EWHC 1291 (Ch).
[18] "Review of Civil Litigation Costs" para.5.3.
[19] "Review of Civil Litigation Costs: Supplemental Report" p.97 para.4.3(ii).
[20] Final report, Jackson LJ pp.243–244.

negligence cases built up. In order to clear this backlog, costs budgeting was suspended in the High Court in clinical negligence cases between October 2015 and January 2016. Further, changes were made to the CPR so that claims made by or on behalf of children are now exempted from costs budgeting and claims in which the claimant has a limited or severely impaired life expectation of five years or less remaining ordinarily have costs management disapplied.

The relationship between CPR 3.18(b) and detailed assessment

Recentlyr, the relationship between CPR 3.18(b) and a detailed assessment at the conclusion of the case has been clarified. In *Merrix v Heart of England NHS Foundation Trust* ,[21] Carr J concluded that where the costs which are claimed on assessment are within the budgeted figure which was approved or agreed for that phase in a costs budget, the court, in applying CPR 3.18, cannot depart from that agreed figure either upwards or downwards without good reason. Carr J reasoned that:[22]

- the words of CPR 3.18(b) were clear and mandatory: the court would not depart from the budget, absent good reason;
- the obvious intention of CPR 3.18(b) was to reduce the scope of and need for detailed assessment; and
- it was important to have certainty regarding costs in the context of access to justice.

She said:[23]

> "Finally, real emphasis needs to be placed on the importance of certainty on costs in the context of access to justice. The desirability of predictability was touched on by the Court of Appeal in *SARPD Oil* … albeit commenting by reference to pre-incurred costs:
>
> > '… In such a case, the party who had put forward the costs budget would have been encouraged by the court to litigate on the understanding and with the legitimate expectation that such costs would be likely to be recovered if he were successful, and good reason would need to exist to justify defeating that expectation.'
>
> Fidelity to the clear words of CPR 3.18, as set out above, will achieve the dual purpose both of reducing the costs of the detailed assessment process and of securing greater predictability on costs exposure/recovery for the parties. Both the receiving and paying party have the benefit of the legitimate expectation. This is a central pillar of access to justice in a world where costs will always be a primary consideration for those contemplating or participating in litigation, and consistent with the overriding objective. The expensive costs of the detailed assessment procedure are reduced and the case is dealt with justly, with both parties knowing from an early stage what their potential costs liability is, absent good reason to depart from the budget."

In *Harrison*, the Court of Appeal affirmed that *Merrix* was correct for the reasons that Carr J gave. As to what amounts to a "good reason", Davis LJ said:[24]

> "Where there is a proposed departure from budget—be it upwards or downwards—the court on a detailed assessment is empowered to sanction such a departure if it is satisfied that there is good reason for doing so. That of course is a significant fetter on the court having an unrestricted discretion: it is deliberately designed to be so. Costs judges should therefore be expected not to adopt a lax or over-indulgent approach to the need to find 'good reason': if only because to do so would tend to

[21] *Merrix v Heart of England NHS Foundation Trust* [2017] EWHC 346 (QB).
[22] *Merrix v Heart of England NHS Foundation Trust* [2017] EWHC 346 (QB) at [67].
[23] *Merrix v Heart of England NHS Foundation Trust* [2017] EWHC 346 (QB) at [88]–[90].
[24] *Harrison v University Hospitals Coventry & Warwickshire NHS Trust* [2017] EWCA Civ 792 at [44].

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> subvert one of the principal purposes of costs budgeting and thence the overriding objective. Moreover, while the context and the wording of CPR 3.18 (b) is different from that of CPR 3.9 relating to relief from sanctions, the robustness and relative rigour of approach to be expected in that context (see *Denton v TH White Limited* [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926) can properly find at least some degree of reflection in the present context … As to what will constitute 'good reason' in any given case I think it much better not to seek to proffer any further, necessarily generalised, guidance or examples. The matter can safely be left to the individual appraisal and evaluation of costs judges by reference to the circumstances of each individual case."

Davis LJ gave guidance as to how proportionality should be approached where costs have been budgeted, saying[25] that even where the estimated costs remained within the budget (and therefore the budget was not going to be departed from without good reason), the court must still look at the totality of the allowed estimated costs and assessed incurred costs in order to consider proportionality and whether a further reduction should be made on a global basis—and if so, the size of that reduction. The Court of Appeal decision in *Harrison* was handed down on 21 June 2017 and the first challenge to the meaning of "good reason" arrived on 4 August 2017. In *RNB v Newham LBC*,[26] when carrying out the detailed assessment, Deputy Master Campbell reduced the incurred costs, finding the hourly rates being claimed too high. The defendant submitted that this reduction in the hourly rate constituted a "good reason" for reducing the budgeted costs. The defendant argued that the rates had not been approved or agreed by anybody until the detailed assessment: as he expressed it, "the budget is a budget not a costs cap", meaning that the rate allowed when the reasonableness of the rates came to be assessed at a detailed assessment hearing needed to be applied equally to the incurred and budgeted costs. An adjustment to the hourly rate, as had happened here, was a "good reason" to depart from the budget since rates had not been addressed at the CCMC and the assessment was thus the only opportunity that a paying party would have to challenge them. The claimant submitted that it was clear from PD 3E para.7.3 that the court sets a figure for each of the phases identified in Precedent H but does not fix an hourly rate or a number of hours to be spent doing the work. That means that so long as a party completed the work to be done for each phase within the amount agreed or approved by the court, that sum was proportionate and must be allowed.

Deputy Master Campbell found that the reduction in the hourly rate for the incurred costs was a "good reason" to depart from the costs allowed in the claimant's last approved budget, saying:[27]

> "If … the hourly rate is a mandatory component in Precedent H which is not and cannot be subject to the rigours of detailed assessment at the CCMC, it makes no sense if it is automatically left untouched when the rates for incurred work are scrutinized at the conventional assessment."

In *Baines v Royal Wolverhampton NHS Trust*,[28] Lumb DJ, sitting as a regional costs judge, reached the opposite conclusion, deciding that a reduction in the hourly rate for incurred costs could not amount to a "good reason" to depart from the budgeted costs. He reasoned that unless there was clear evidence, the judge carrying out the detailed assessment did not know the thought process of the costs managing judge when setting the allowance for each phase. Further, considering hourly rates for budgeted costs at a detailed assessment would impute a risk of double jeopardy.

The court granted the claimant permission to appeal in *RNB v Newham LBC*;[29] it therefore remains to be seen whether a reduction in the hourly rate for incurred costs can amount to a "good reason" to depart from the budgeted costs.

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[25] *Harrison v University Hospitals Coventry & Warwickshire NHS Trust* [2017] EWCA Civ 792 at [52].
[26] *RNB v Newham LBC* , unreported, 4 August 2017.
[27] *RNB v Newham LBC*, [2017] EWHC 815 (Costs), at [23].
[28] *Baines v Royal Wolverhampton NHS Trust* , 18 August 2017.
[29] *RNB v Newham LBC* , unreported, 4 August 2017.

Conclusion

Costs management has been an evolving process, augmented by various rule changes. Whilst there are still significant issues, such as how to deal with incurred costs, the interpretation of "good reason" and proportionality, there is no doubt that costs budgeting is working much better. In his "Review of Civil Litigation Costs: Supplemental Report", Jackson LJ says:[30]

> "I am bound to accept that improvements in costs management (especially in the last one-and-a-half years) have eliminated any need to develop FRC on the scale canvassed in my lecture of January 2016."

Hearings are much shorter and frequently a number of phases of the budgeted costs are agreed, or sometimes the whole budget. The conclusion has to be that costs budgeting is making good progress and has become firmly established.

[30] "Review of Civil Litigation Costs: Supplemental Report" p.97 Ch.6 para.4.4.

Case and Comment: Liability

Armes v Nottinghamshire CC

(SC; Lady Hale JSC, Lord Kerr JSC, Lord Clarke JSC, Lord Reed JSC, Lord Hughes JSC; 18 October 2017; [2017] UKSC 60)

Personal injury—liability—negligence—child abuse—duty of care—foster care—foster carers—local authorities' powers and duties—vicarious liability

Child abuse; Duty of care; Foster carers; Local authorities' powers and duties; Vicarious liability

In February 1985, when she was aged seven, the claimant was taken into the care of the local authority. Statutory care orders followed. Between March 1985 and March 1986, she was fostered by a Mr and Mrs Allison. At trial, the judge found that during that period, she was physically and emotionally abused by Mrs Allison. Between October 1987 and February 1988, she was fostered by a Mr and Mrs Blakely. The judge found that during that period, she was sexually abused by Mr Blakely. In each case, the abuse took place in the foster home in the course of day-to-day care and control of the claimant. Mrs Allison employed grossly excessive violence to discipline her. Mr Blakely molested her when bathing her and when she was alone in her bedroom.

Males J[1] held that the local authority had exercised reasonable care in placing the claimant, as a child in its care, with foster carers. Furthermore, in supervising the placement, the local authority could not be vicariously liable for abuse perpetrated by the foster carers on the child. Nor was it fair, just or reasonable to find that the local authority had a non-delegable duty of care so as to make it legally responsible for the foster carers' actions. That decision was affirmed by the court of appeal.[2]

In the Supreme Court it was accepted that the local authority had not been negligent in the selection or supervision of the foster parents. The issue was whether it was nevertheless liable to the claimant, either on the basis that it was in breach of a non-delegable duty of care, or on the basis that it was vicariously liable for the foster parents' wrongdoing.

The court held that the proposition that a local authority was under a duty to ensure that reasonable care was taken for the safety of children in care, while they were in the care and control of foster parents, was too broad, and the responsibility with which it fixed local authorities was too demanding.[3] Recognising that although there were differences between the position of local authorities and that of parents, the court confirmed that children in care had the same needs as other children. In particular, it might be in their best interests to spend time staying with their parents, grandparents, relatives or friends. That was specifically permitted by the Child Care Act 1980 s.21(2).

They pointed out that if a local authority which reasonably decided that it was in the best interests of a child to allow him to stay with his family or friends was to be held strictly liable for any want of due care on the part of those persons, the law of tort would risk creating a conflict between the local authority's duty towards the child under s.18(1) and its interests in avoiding exposure to such liability. Additionally,

[1] *NA v Nottinghamshire CC* [2014] EWHC 4005 (QB).
[2] *NA v Nottinghamshire CC* [2015] EWCA Civ 1139.
[3] *Carmarthenshire CC v Lewis* [1955] A.C. 549, *Harris v Perry* [2008] EWCA Civ 907 and *Surtees v Kingston upon Thames RLBC* [1991] 2 F.L.R. 559 considered.

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since a non-delegable duty would render the local authority strictly liable for the tortious acts of the child's parents or relatives, if the child was living with them following a decision reasonably taken under s.21(2), the effect of a care order, followed by the placement of the child with his family, would be a form of state insurance for the actions of the child's family members.

Section 21 was relevant in another respect. It required the local authority to "discharge" its duty to provide accommodation and maintenance for a child in its care in whichever of the specified ways it thought fit, including "boarding him out" by placing him with foster carers. The implication of the word "discharge" was that the placement of the child constituted the performance of the local authority's duty to provide accommodation and maintenance. That suggested to the court that the duty of the local authority in this case was not to perform the function in the course of which the claimant was abused (namely, the provision of daily care), but rather to arrange for, and then monitor, its performance.[4]

Section 22 was also relevant. It enabled the Secretary of State to make regulations imposing duties on local authorities in relation to the boarding-out of children. Section 22 implied that the continuing responsibility of the local authority for the care of the child was discharged in relation to the boarding-out of children by means of the prior approval of households where children were boarded out, the subsequent inspection and supervision of the premises, and the removal of children from the premises if their welfare appeared to require it. The statutory regime did not impose on the local authority any other responsibility for the day-to-day care of the child or for ensuring that no harm came to him in the course of that care. The case on non-delegable duty of care failed again.

Vicarious liability required consideration of the factors discussed in *Cox v Ministry of Justice*.[5] In *Cox*, reference was made to five incidents of the relationship between employer and employee which had been identified by Lord Phillips in the *Christian Brothers*[6] case as usually making it fair, just and reasonable to impose vicarious liability, and which could properly give rise to vicarious liability where other relationships had the same incidents and could therefore be treated as akin to employment. They were:

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

The court concluded that those factors pointed towards the imposition of vicarious liability on the local authority for the torts committed by the claimant's foster carers. Her foster parents could not be regarded as carrying on an independent business of their own. The torts committed against the claimant were committed by the foster parents in the course of an activity carried on for the benefit of the local authority.

The local authority's placement of children in their care with foster parents created a relationship of authority and trust between the foster parents and the children. The circumstances where such that close control could not be exercised by the local authority, and so rendered the children particularly vulnerable to abuse.

The local authority exercised powers of approval, inspection, supervision and removal without any parallel in ordinary family life. By virtue of those powers, it exercised a significant degree of control over both what the foster parents did and how they did it, in order to ensure that the children's needs were met.

[4] *Woodland v Swimming Teachers Assoc* [2013] UKSC 66 applied.
[5] *Cox v Ministry of Justice* [2016] UKSC 10.
[6] *Various Claimants v Institute of the Brothers of the Christian Schools* [2012] UKSC 56.

Finally, most foster parents had insufficient means to be able to meet a substantial award of damages. The local authorities which engaged them could more easily compensate the victims of abuse.

The appeal was allowed with Lord Hughes dissenting[7] on vicarious liability.

Comment

It was an accurate assessment rather than hyperbole when Billhar Uppal, the solicitor for the claimant Natasha Armes, described this successful appeal as "a landmark ruling in terms of the liability of foster parents". Her opposite number as solicitor for Nottinghamshire CC confirmed that the impact "cannot be understated".[8]

While a cautionary word must be added about the statutory and regulatory framework underpinning this latest Supreme Court decision, which may be subject to change, this is another very important development for vicarious liability, which in recent years has moved well beyond traditional employment relationships. As predicted by Lord Phillips in his last judgment as President of the Supreme Court, the law in this area "is on the move".[9]

As a ladder out of adversity for many children, fostering and adoption has an unparalleled track record of achievement for so many "looked after children". The alternative trajectory for those in "corporate parenting", of a local authority "home", can be a bleak experience, leading to further damage in young lives. Foster parents can be some of the most impressive people one could ever meet; whereas in many occupations an individual can shut the front door on daily tasks and tribulations, fostering requires the utmost sensitivity in performing an invaluable role within the private family life of the carer. Sadly, on rare occasions, and despite the best efforts of social workers, matters can go awry.

Males J, at first instance, catalogues in extensive detail the horrific childhood of Natasha Armes. The "narrative" he gives over 58 paragraphs in his judgment[10] ranges from sporadic periods living with her mother and sometimes her mother's violent and abusive partner, to a variety of foster placements and a succession of children's homes. Along the way, there is the period with the Allisons and their dysfunctional "family group foster home" of 14 children under the age of 10, where the claimant was repeatedly beaten, and then with the Blakelys, where she was sexually assaulted.

Tomlinson LJ, in the Court of Appeal, indicates that he was "not hitherto aware that fostering arrangements could take the form" of both size and rapid turnover at the Allisons,[11] surely not deserving of the title of "family", but more akin to Dotheboys Hall.[12] Glenys Allison admitted to "reasonable chastisement" with a wooden spoon, although clearly many other implements were used, and this horrifically abusive "home" was subsequently de-registered.

Worse was to come for Natasha Armes in the clutches of Mark Blakely in another "family" where subsequently it was clear that depravity was the norm, and the corroborating evidence heard by Males J on "similar fact evidence" about another young girl assaulted and raped is agonising. It is scarcely a wonder that Natasha Armes then has episodes of stealing, solvent sniffing, self-harming, drinking, being "out of control", enduring a "drug-induced hallucination" that Mr Blakely was still stalking her, and then even assaulting care workers.[13]

[7] His view was that it seemed to follow that if vicarious liability applied to ordinary foster carers, it also had to apply to "family and friends" placements. The prospect of vicarious liability in those circumstances would be apt to inhibit the generally laudable practice of such placements. It would also result in increased litigation of family activity in the courts, which was undesirable.

[8] *Nottingham Post*, 19 October 2017.

[9] *Various Claimants v Institute of the Brothers of Christian Schools* [2012] UKSC 56.

[10] *NA v Nottinghamshire CC* [2014] EWHC 4005 (QB) at [21]–[79].

[11] *NA v Nottinghamshire CC* [2015] EWCA Civ 1139 at [6].

[12] Charles Dickens, *Nicholas Nickelby* (1838) and its portrayal of Wackford Squeers, the brutal headmaster: "I'll flog you to within an inch of your life …"

[13] *NA v Nottinghamshire CC* [2014] EWHC 4005 (QB) at [71].

Even in 2016 she pleaded guilty to a charge of "assault by beating" a social worker and also admitted being in breach of a conditional discharge for a similar offence.[14] Although a heroin addict between the ages of 18 and 21 she stopped taking drugs when she was pregnant with her first child, but unhappily on the sixth day of the trial of her case Males J records that Natasha Armes had once again to be sectioned under the Mental Health Act.[15] No doubt a factor in all this stress was an accurate assumption that, for over 30 years, few believed her allegations of abuse.[16]

Tomlinson LJ in the Court of Appeal sums up some essential points: the social workers "were at all times dealing with a challenging situation"[17] and, in something of an understatement, the claimant "had a very unhappy childhood which has cast a long shadow over her life".[18] However, what was clear on the factual evidence was that, despite a cascade of social workers, no negligence could be attributed to them. In these circumstances, could liability transfer to the local authority? Both the trial judge and the Court of Appeal analyse the potential trajectories of liability on the grounds of a non-delegable duty of care and then on vicarious liability, but reject both those possibilities. The Supreme Court then allow an appeal on vicarious liability.

With respect, there may be another occasion to re-visit liability in such a situation on a non-delegable duty of care, and perhaps by statute, in an endeavour to protect vulnerable children against abuse. Lord Reed in giving the majority judgment in the Supreme Court noted that such tortious liability not based on personal fault is exceptional and lists "well-known examples" such as a duty on employers to ensure a safe system of work, that hospitals have a duty to protect patients, and that schools have a duty to ensure safety.[19]

The roadblock on that path is, of course, the analysis given by Lord Sumption in *Woodland v Swimming Teachers Assoc* as recently as 2013, where he discusses independent contractor cases and then what he sees as three critical characteristics in a second "broad category". Lord Reed notes in respect of these constraints that:

> "It is important to bear in mind Lady Hale's cautionary observation that such judicial statements are not to be treated as if they were statutes, and can never be set in stone."[20]

What can perhaps be characterised as a "marker" (perhaps comparable to one of Lord Bingham's moveable "boundary stones",[21] to be subsequently shifted), is provided by Lady Hale's "addendum" in *Woodland*.

In *Woodland*, she strikingly points out the anomalies between three types of school swimming arrangements, for "Amanda, Belinda and Clara". Most certainly the "man on the underground" would be perplexed to discover that there would be three different legal outcomes to a swimming pool injury in private schools, state schools, and a small faith school.[22] Similarly, a question which, until the Supreme Court in *Armes,* would be equally perplexing: why would abuse of a "looked after child" in a local authority home be recoverable in tort liability, whereas abuse of the same child in a foster home placement be irrecoverable against that local authority?

Much of course depends in a case such as this on the statutory hinterland. Successive legislation has attempted to prioritise the "best interests of the child" but there are still phrases redolent of a Poor Law

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[14] "Assaulted by a picture frame" *Nottingham Post*, 2 May 2016.
[15] *NA v Nottinghamshire CC* [2014] EWHC 4005 (QB) at [79].
[16] "In the eight years of the court case, I never thought anyone believed me", *Nottingham Post*, 19 October 2017.
[17] *NA v Nottinghamshire CC* [2015] EWCA Civ 1139 at [131].
[18] *NA v Nottinghamshire CC* [2015] EWCA Civ 1139 at [212].
[19] *Armes v Nottinghamshire CC* [2017] UKSC 60 at [32].
[20] *Armes v Nottinghamshire CC* [2017] UKSC 60 at [36].
[21] Commenting on "doctrinal boundary stones" with a "strong presentiment" that they would move in psychiatric damage claims; *Attia v British Gas Plc* [1988] Q.B. 304 at 320.
[22] *Woodland v Swimming Teachers Assoc* [2013] UKSC 66 at [30].

past, such as "discharge" and "boarding him out" (sic).[23] The modern perspective on fostering, and a fundamental principle of social work, as Lord Reed points out, is that "children are best placed in a family environment". He notes that there are now extensive safeguarding checks in place, with intensive interviewing, the taking up of references, attendance at pre-approval training, and then subsequent monitoring and inspection.[24] As Peter Garsden, President of the Association of Child Abuse Lawyers, has noted, foster parents are contracted, paid, trained and supervised by local authorities.[25]

In recent years, fostering has been placed on a decidedly more professional basis, but as Lord Reed also emphasises, it is clear that "it was the local authority, not the foster parents, which possessed parental powers in relation to the child".[26] Unfortunately, the legacy of the old "control" test from traditional employment law seems to linger, even though it is clearly no longer determinative, and Males J came to a view that the foster parents for Natasha Armes were "not under the control of the local authority to any material degree".[27]

Tomlinson LJ in the Court of Appeal is stridently dismissive of arguments advanced suggesting that foster parents are "homeworkers" integrated into the organisational structure of the local authority, on the grounds that "the provision of family life is not and by definition cannot be part of the activity of the local authority". He posits that "control retained by the local authority is at a higher or macro level" whereas "Micro management of the day to day family life of foster children … would be inimical to that which fostering sets out to achieve".[28] Black LJ, as she then was, also indicates that she does not consider the relationship between foster parents and a local authority as of the required nature for vicarious liability, in other words "not sufficiently akin to employment".[29]

However, fostering is clearly no longer just in the realm of a local authority merely "arranging" a taxi to drive children to and from school, as in *Myton v Woods (trading as Brentwood Taxis)*.[30] There Lord Denning MR held that the local authority was not liable for the independent contractor, who set down two boys with learning difficulties on the wrong side of a major road, causing one of them to be run over. That was not the fault of the local authority.

By contrast, a looked after child "boarded out" with foster parents remains fully in the care of the local authority, and can be removed forthwith if a visiting social worked considers that their "health, safety or morals" are endangered.[31] Lord Reed comprehensively rejects the supremacy of a notion of "control", pointing out that "more fundamentally, it is important not to exaggerate the extent to which control is necessary in order for the imposition of vicarious liability to be justified" and citing in support *Cox v Ministry of Justice*,[32]*Lister v Hesley Hall*,[33]*Bazley v Curry*,[34] and then noting "recent examples of vicarious liability being imposed in the absence of micro-management" such as *E v English Province of Our Lady of Charity*[35] and of course the *Christian Brothers* case.[36]

Commonwealth cases are necessarily persuasive. Both the trial judge and the Court of Appeal rely on the majority decision in the Canadian case of *KLB v British Columbia*[37] but Lord Reed observes that it "is unfortunate that the Court of Appeal does not appear to have been referred to the case of *S v Att-Gen*,

[23] Child Care Act 1980 s.21(2), Children and Young Persons Act 1969, Boarding-Out of Children Regulations 1955 (SI 1955/1377).
[24] *Armes v Nottinghamshire CC* [2017] UKSC 60 at [11].
[25] "Councils held liable for foster care abuse", *The Times*, 19 October 2017.
[26] *Armes v Nottinghamshire CC* [2017] UKSC 60 at [18].
[27] *NA v Nottinghamshire CC* [2014] EWHC 4005 (QB) at [177].
[28] *NA v Nottinghamshire CC* [2015] EWCA Civ 1139 at [15].
[29] *NA v Nottinghamshire CC* [2015] EWCA Civ 1139 at [45].
[30] *Myton v Woods (trading as Brentwoodmn Taxis)* , The Times, 12 July 1990.
[31] Boarding-Out of Children Regulations 1955 (SI 1955/1377) reg.5.
[32] *Cox v Ministry of Justice* [2016] UKSC 10; [2016] A.C. 600.
[33] *Lister v Hesley Hall* [2001] UKHL 22.
[34] *Bazley v Curry* [1999] 2 S.C.R. 534.
[35] *E v English Province of Our Lady of Charity* [2012] EWCA Civ 938; [2013] Q.B. 722.
[36] *Various Claimants v Institute of the Brothers of the Christian Schools* [2012] UKSC 56. See generally *Armes v Nottinghamshire CC* [2017] UKSC 60 at [64] and [65].
[37] *KLB v British Columbia* [2003] 2 S.C.R. 403.

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where the New Zealand Court of Appeal unanimously reached the opposite conclusion".[38] Vicarious liability was there imposed in very similar circumstances to those of Natasha Armes, "the view being taken that policy considerations supported its imposition".[39] Lord Reed also quotes *verbatim* a very telling passage from this New Zealand case:

> "there is also a considerable cost to society if appropriate mechanisms are not put in place to protect vulnerable children … the victims of abuse commonly experience a range of long-term emotional and behavioural problems, are disproportionately represented both in the criminal justice system and in users of mental health services, often need to receive state benefits because they are unable to take up employment, and are often entitled to compensation from public funds under the criminal injuries compensation scheme. More fundamentally, the problem with the resources argument is that, if it is accepted, the greater the problem, the less likely there is to be a remedy."[40]

This of course also meets the inevitable "floodgates" argument advanced by the defendants in such cases. In addition, costs for local authority homes are approximately treble those of fostering services, for the very simple reason that institutions need to have staffing around the clock.[41] It is obviously very difficult to know just how many historic cases will now be able to proceed as a result of *Armes*.

Evidential issues are always problematic in such cases, although abuse is likely to be rare; in a study by the National Foster Care Association of 177 cases of abuse allegations against foster parents only 6% were considered to have any foundation.[42] This is of course against a background of overwhelming evidence that shows that the vast majority of foster parents working with local authorities provide a superb, loving and stable environment for children. But sadly, there are exceptions, and the *Armes* case illustrates how badly things can go wrong, even when social workers were monitoring in a wholly reasonable manner. One case, launched recently in the wake of *Armes,* is of three sisters taking legal action in Glasgow; while such a precedent is not necessarily binding in Scotland, the Supreme Court's perspective will necessarily be persuasive, particularly as Lord Reed is the pre-eminent Scottish judge.[43]

The thoughtful dissent by Lord Hughes, a partial echo of the family-oriented arguments of Tomlinson LJ, points to the very considerable unofficial fostering which takes place with "family and friends". Astonishingly, a survey in 2010 by the British Association for Adoption and Fostering ("BAAF") estimated that 1 in 10 children had spent time being "looked after by someone other than a parent or close relative for at least four consecutive weeks, yet only a tiny fraction of this number were registered with local authorities". Such obligations were strengthened in 2005 following the report into the death of Victoria Climbie, placed in the care of her great-aunt, although social workers were unaware of this private arrangement.[44] That BAAF report warned that these "invisible children" were at greater risk of being abused, neglected or trafficked into slavery and child prostitution.

Again, it is difficult to estimate the level of abuse, possibly 6% again. On the whole, such arrangements seem benevolent. Lord Hughes indicates there is necessarily a "spectrum of situations in which the children's services of a local authority may concern themselves with the welfare of children and families in their area".[45] These "connected persons" may only loosely be under the purview of the local authority and might be dissuaded from volunteering their services; a concern expressed by Black LJ when discussing a non-delegable duty of care in the Court of Appeal, and which Lord Hughes also considers "would be

[38] *S v Att-Gen* [2003] NZCA 149.
[39] *Armes v Nottinghamshire CC* [2017] UKSC 60 at [66].
[40] *S v Att-Gen* [2003] NZCA 149 at [71]–[72], quoted by Lord Reed at [70], *Armes v Nottinghamshire CC* [2017] UKSC 60.
[41] See also the relative costs, giving a similar 3:1 ratio, indicated in Department for Education, *Living in Children's Residential Homes* (2012, DFE-RR201).
[42] "Foster couples face tide of false abuse claims", *The Independent*, 7 January 1996.
[43] "Siblings sent to live with beasts; battered during day, sexually abused at night", *Daily Record*, 20 November 2017.
[44] "Invisible children at risk from unofficial fostering", *The Independent*, 21 February 2010.
[45] *Armes v Nottinghamshire CC* [2017] UKSC 60 at [80].

apt to inhibit the generally laudable practice of family placements”.[46] He warns that the extension of vicarious liability to fostering will be “fraught with difficulty”.[47] This is essentially the “Canadian argument” in *KLB v British Columbia*, and Lord Reed for the majority in *Armes* engages with this, by pointing out that there is already liability when negligence can be demonstrated.[48] Essentially this becomes a debate between those seeking intervention to prevent harm as opposed to those cherishing the sanctity of family life.

Practice points

- This claim for damages suffered as a consequence of abuse by foster parents has rectified a considerable injustice by developing the concept of vicarious liability.
- Until now a local authority would only be liable if they or their employees could be shown to be negligent. But the Supreme Court has determined that, even where social workers have blamelessly carried out their duties, the relationship with foster parents, who are extensively interviewed and monitored, trained, paid fees and supervised by local authorities is sufficient to establish liability where abuse is proved.
- There is therefore no longer a blanket immunity.
- *Armes* is now one of a series of cases where the traditional shibboleths of “control” and a narrow definition of “business” are giving way to a more nuanced concept of relationships which are “akin to employment”.

Dr Julian Fulbrook

Singh v Cardiff CC

(QBD; Lewis J; 23 June 2017; [2017] EWHC 1499 (QB))

Personal injury—liability—tripping and slipping—negligence—torts—local government—duty of care—footpaths—highway maintenance—powers and duties—occupiers’ liability—Highways Act 1980 s.41—Occupiers’ Liability Act 1957 s.2

Contributory negligence; Duty of care; Highway maintenance; Local authorities' powers and duties; Occupiers' liability; Tripping and slipping; Volenti non fit injuria

Paul Singh, was walking home in the early hours of 10 December 2011 along a path on land between Fishguard Road and Trenchard Drive, Llanishen in Cardiff. The path lead to a footbridge over Llanishen Brook. At some stage, he ceased to be on the path and went down into Llanishen Brook. He claimed that he had slipped.

He remained in the brook overnight and was found the following morning. He sustained severe injuries. Blood samples taken from the claimant after he had been recovered from the brook showed that the level of alcohol in his blood was two-and-a-half times the legal limit for driving.

The claimant sought damages claiming that the injuries were caused: (1) by a breach of a duty owed by the defendant, Cardiff CC, under the Highways Act 1980 (“the 1980 Act”) s.41 to maintain the footpath;

[46] *Armes v Nottinghamshire CC* [2017] UKSC 60 at [89].
[47] *Armes v Nottinghamshire CC* [2017] UKSC 60 at [91].
[48] *Armes v Nottinghamshire CC* [2017] UKSC 60 at [71]–[73].

(2) a breach of the duty owed by the defendant under the Occupier's Liability Act 1957 ("the 1957 Act") s.2; or (3) common law negligence on the part of the defendant. The defendant denied liability. The trial was on the issue of liability.

There were three issues:

- whether the accident had been caused by the defendant's failure to maintain the highway in breach of its duty under the Highways Act 1980 s.41;
- whether the accident had been caused by the defendant's failure to take reasonable care to ensure that the claimant was reasonably safe when using the land adjacent to the footpath for the purposes for which he was permitted to be there in breach of its duty under the Occupiers' Liability Act 1957 s.2;
- whether the defendant owed a duty of care at common law for damage attributable to dangers that it had introduced on the land.

Lewis J held that under s.41 of the 1980 Act, the highway authority for a highway maintainable at public expense was under a duty to maintain the highway. The defendant accepted that the footpath was a highway maintainable at public expense. The duty imposed by s.41 was an absolute duty. The claimant had to establish that there was a breach and that that breach had caused injury of a type which the Act intended to prevent.

The judge concluded that in this case any alleged defect in the highway had not caused the injury that the claimant had suffered. He found that Mr Singh had not tripped over the concrete edging units of the footpath or slipped on the depression in the footpath. He had voluntarily stepped off the footpath onto adjacent ground that was not part of the highway. He had lost his footing on that ground and fallen back and then slid down the steep slope into the brook. Accordingly, his claim for breach of duty imposed under the 1980 Act failed because the injury had not been caused by any alleged defect in the footpath. The injuries had not been caused by any failure by the defendant to maintain the highway.

Lewis J noted that the essential duty in the 1957 Act was in s.2(2). It was a duty to take such care as was reasonable in all the circumstances to see that a visitor would be reasonably safe in using the land for the purposes for which he was invited or permitted to be there.

The defendant owned the land on either side of the footpath and the soil or land upon which the footpath was constructed. The claimant focussed on the land on the side of the footpath (the adjacent land) but the judge decided that it was relevant and helpful to consider the circumstances by which the footpath and the adjacent land came to be used.

On the evidence, the purposes for which persons were invited or permitted to be present on the adjacent land was for purposes reasonably incidental to the use of the footpath. There was no suggestion on the evidence that the persons were invited or permitted to be present on the adjacent land for any other purpose. The claimant's injuries were not the result of any failure by the defendant to take reasonable care to ensure that he was reasonably safe in using the land adjacent to the footpath and there was no breach of the duty imposed by s.2 of the 1958 Act.

On the facts, the judge also held that the highway authority had not created a hazard or introduced a danger by creating a footpath and footbridge. There was no failure to take reasonable care on the defendant's part by constructing the footpath and not preventing persons from going from the footpath adjacent to the land. The defendant had not breached any common law duty of care by constructing the footpath and not placing fencing where the land adjacent to the footpath would lead to a slope in the brook.

Turning to causation the judge held that it was not the creation of the footpath that caused the injury. The claimant chose to leave the footpath and enter onto the adjacent land. Thereafter, he lost his footing and slid down the slope into the brook. It was his decision to do that that caused the injury. The claim based on common negligence also failed.

The claimant had chosen to leave the footpath and step on the adjacent land. He had been drinking and had a blood alcohol level that was two-and-a-half times the legal limit for driving. The likelihood was that it affected his ability to maintain his footing when he chose to step on the adjacent land and contributed to the accident. Had the defendant been found liable, contributory negligence would have been assessed at 70%.

Comment

This case failed on its facts but is nevertheless a useful reminder of the different ways in which local authorities can be held liable for injuries that occur on or near highways for which they are responsible. The judge considered how he would have decided the claims pursued by Mr Singh, had causation not been in issue, under the Highways Act 1980, the Occupiers' Liability Act 1957 and at common law. As such, the judgment provides a helpful analysis of the nature and scope of the duties owed in this context and the available defences.

Highways Act 1980

Local authorities can be liable in their capacity as highway authorities. Under the Highways Act 1980 s.41, highway authorities owe a duty to "maintain" highways maintainable at public expense for which they are responsible. Section 329 states that "maintenance" includes repair and the terms "maintain" and "maintainable" are to be interpreted accordingly. In *Jones v Rhondda Cynon Taff CBC*, the Court of Appeal made it clear that the duty owed under s.41 is absolute, as:

> "the highway has to be maintained in a state of repair that it is reasonably passable for the ordinary traffic of the neighbourhood without danger caused by its physical condition."[1]

The central question in deciding breach is, therefore, whether the highway was dangerous. If it was, then as Lloyd LJ noted in *James v Preseli Pembrokeshire DC*: "the defendant authority concedes that there was a failure to maintain the highway and the plaintiff would be entitled to recover."[2]

However, in deciding whether there is a danger, it is important to focus on the specific danger posed by the highway and not on its general condition. As Lloyd J also noted in *James*:

> "The question in each case is whether the particular spot where the plaintiff tripped or fell was dangerous … But if the particular spot was not dangerous, then it is irrelevant that there were other spots nearby that were dangerous or that the area as a whole was due for resurfacing."

In addition, it is important to appreciate that whilst the duty under s.41 is absolute, this does not mean that liability in this context is strict. The Highways Act 1980 does not itself prescribe a standard of repair but the case law makes clear that the standard is to be objectively assessed. Ralph Gibson LJ noted in *James* that:

> "the standard of care imposed by the law upon highway authorities is not to remove or repair all and any defects arising from a failure to maintain, such as differences in level or gaps between paving stones, which might foreseeably cause a person using the carriageway or footpath to fall and suffer injury, but only those which are properly to be characterised as causing danger to pedestrians."

He went on to say that the test of dangerousness "is one of reasonable foresight of harm to users of the highway" and stressed that "in drawing the inference of dangerousness the court must not set too high a standard". For example, in *Mills v Barnsley BC*, the claimant alleged that she had been injured when she

[1] *Jones v Rhondda Cynon Taff CBC* [2008] EWCA Civ 1497.
[2] *James v Preseli Pembrokeshire DC* [1999] P.I.Q.R. 114.

caught her heel in a small hole in the road.[3] However, her claim was dismissed as "the liability is not to ensure a bowling green which is entirely free from irregularities".

The result is that breach hinges much upon the probability of harm. In *Singh*, the judge concluded that the irregularity of the edging units did not constitute a danger because the footpath was wide and so there was ample room for people to pass and repass over footbridge without stepping onto them. As such, the risk of anyone tripping over the edging units at that point on the footpath and falling down into the brook was very low. Similarly, whilst he considered the uneven surface to be of more concern, he concluded that the depression was not a pothole or hazard capable of tripping someone. Given the location, if someone did fall, they would fall onto the soil adjacent to the area of the footpath containing the depression and not straight into the brook. As such, the risk posed by the depression was relatively low. He considered this assessment to be reinforced by the fact that there was no record of any accident having occurred at this location, or any record of complaint about the state of the footpath, during the time when the depression in the footpath was likely to have been present.

Where a claimant is able to establish a breach of s.41, highway authorities can assert a "special defence" under s.58. This allows highway authorities to escape liability if they can prove that they took "such care as in all the circumstances was reasonably required to secure that the part of the highway to which the action relates was not dangerous to traffic". In deciding this, s.58(2) highlights that the courts should have particular regard to:

- the character of the highway and the traffic reasonably to be expected to use it;
- the standard of maintenance appropriate for a highway of that character and used by such traffic;
- the state of repair in which a reasonable person would have expected to find the highway;
- whether the highway authority knew, or could reasonably have been expected to know, that the condition of the part of the highway to which the action relates was likely to cause danger to users of the highway;
- where the highway authority could not reasonably have been expected to repair that part of the highway before the cause of action arose, what warning notices of its condition had been displayed.

On the facts of *Singh*, the judge noted that the defence would have failed because he was not able to tell whether the defendant knew, or could have been expected to know, the condition of the highway. No evidence was adduced of an applicable inspection regime. Indeed, the footpath had not been inspected by the highways department but had been treated as part of the City of Cardiff Council's park services.

Occupiers' Liability Act 1957

Local authorities may also be held liable under the Occupiers' Liability Act 1957 for accidents that occur on land adjacent to a highway of which they are deemed to be occupier. In *Singh*, the claimant ceased to be on the footpath and came to be on the sloping ground adjacent to it. He submitted that he was permitted to be on that land (and so a visitor) but was not made reasonably safe as the top of the bank should have been fenced off. This would have prevented him from slipping and falling down the slope into the brook.

Section 2 of the 1957 Act provides that occupiers owe their visitors a common duty of care, i.e. 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". In deciding whether the City of Cardiff Council was in breach of duty, the judge first considered the purpose for which Mr Singh was permitted to be on the land adjacent to the footpath and concluded

[3] *Mills v Barnsley BC* [1992] P.I.Q.R. 291.

that this was for purposes reasonably incidental to the use of the footpath. As such, the question was whether the defendant had taken such care as was reasonable in the circumstances to see that persons were reasonably safe in using the adjacent land for that permitted purpose.

In deciding whether occupiers are in breach of duty, the courts have regard to the same factors as in common law negligence: the likelihood of injury; the seriousness of the injury which may occur; the social value of the activity giving rise to the risk and the cost of preventative measures. These factors can inevitably pull in different directions. In *Singh*, two factors pulled in the direction of a breach of duty. The risk of slipping down the bank into the brook posed a risk of serious injury and the cost of fencing which would have prevented that risk from materialising would have been low. Nevertheless, three other factors pulled more strongly in favour of the conclusion that the local authority had discharged its' duty.

First, the probability of harm was low. The footpath was wide and led to the footbridge to enable persons to cross over the brook. The occasions when people would need to leave this footpath would be relatively few. If they did, it was obvious that there was a brook to the left where there was a gradient and a steep slope. The lamppost nearby would have given adequate illumination and, whilst it did not seem that this was working at the time, the judge was satisfied that an adequate system of reporting faults was in place and that the lights had been checked on a periodic basis. Secondly, there was a real social value in allowing people a means of travel to and from the estates on either side of the brook and consequent use of adjacent land for purposes reasonably incidental to the footpath. Finally, as confirmed in cases such as *Tomlinson v Congleton BC*, occupiers are not under a duty to protect, or even to warn, against obvious dangers.[4]

It was clear here that if someone stepped off the footpath that they would be leaving the steadier metalled surface to stand on the ground and that they would need to take care because of the brook. Lewis J concluded that, given the circumstances, it would "set the standard of care at too high a level to require the area of adjacent land to be fenced". The *Singh* case is a useful reminder of the balance courts seek to strike between defendant accountability and personal responsibility.

Common Law negligence

As cases such as *Gorringe v Calderdale MBC* demonstrate, the courts have been very careful about the relationship between the statutory powers held by local authorities and their duties at common law.[5] The presence of a statutory power (as owed under the Highways Act 1980) does not generally create a positive duty on local authorities to act, as there is a concern that doing so would encourage the public to look to local authorities to protect them from their own wrongs. However, there are some exceptions, including where the local authority has created, or failed to abate, a source of danger.

In *Yetkin v Mahmood*, for example, a local authority was held partly liable for an injury that occurred when the claimant was crossing a dual carriageway.[6] She had used the designated crossing, but her view had been obscured by shrubs the local authority had planted in the central reservation and failed to cut back. The claimant in *Singh* failed to establish this potential cause of action because it could not be said that the City of Cardiff Council had created a hazard when they provided a footpath and footbridge but not erected a fence to prevent persons going from the footpath onto the adjacent land. As already stated above, the footpath was wide enough not to need to use the adjacent land and, insofar as the use of the adjacent land was reasonably incidental, there was an area of ground at a gradient before the steep slope into the brook.

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[4] *Tomlinson v Congleton BC* [2003] UKHL 47; [2004] 1 A.C. 46.
[5] *Gorringe v Calderdale MBC* [2004] UKHL 15; [2004] 1 W.L.R. 1057.
[6] *Yetkin v Mahmood* [2010] EWCA Civ 776; [2011] Q.B. 827.

Contributory negligence and volenti non fit injuria

The judge noted in *Singh* that, had the claimant been able to establish liability in the context of the occupiers' liability and common law claim, he would have found him to have been contributorily negligent to the extent of 70%—not only because he chose to leave the footpath but also because he was intoxicated. Whilst he made no mention of it, this defence is also available under the Highways Act 1980. Section 58 of that Act states that the "special defence", discussed above "is without prejudice to any other defence or the application of the law relating to contributory negligence".

The judge went even further in the context of the occupiers' liability claim and stated that he would have applied the volenti non fit injuria defence under s.2(5) of the 1957 Act. That section provides that the "common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor", a question which is to be decided on the same principles applicable to the ordinary law of negligence. This defence requires that the claimant knew the nature and the extent of the risk of harm (Mr Singh was very familiar with the area and knew the adjacent land led to the brook) and voluntarily agreed to it (Mr Singh had chosen to leave the footpath and, whilst the lamppost was not working, there was nearly a full moon and no obstructions to visibility). It is not quite clear why the judge did not raise this defence in the context of the common law claim, though it was not relevant on the facts in the context of the Highways Act claim. In any event, this complete defence is rare in practice, with judges preferring the partial defence of contributory negligence.

Practice points

- Where an injury occurs on or near a highway for which a local authority is responsible, it is important to consider potential liability under the Highways Act 1980, the Occupiers' Liability Act 1957 and at common law.
- In assessing whether a local authority is in breach of the Highways Act 1980 s.41, it is necessary to consider whether the claimant's injury has been caused by a danger on the highway. The presence of a "danger" should be objectively assessed with reference to the reasonable foreseeability of harm. Records of complaints and previous accidents can be a useful indicator of the probability of harm.
- In assessing liability under the Occupiers' Liability Act 1957, it is necessary to consider whether the local authority had taken such care as was reasonable in the circumstances to see that that claimant was reasonably safe in using the land adjacent to the highway for the permitted purpose and with reference to: the likelihood of injury; the seriousness of the injury which may occur; the social value of the activity giving rise to the risk and the cost of preventative measures.
- In assessing whether a local authority is liable at common law, it is necessary to consider whether the local authority has created, or failed to abate, a source of danger.

Annette Morris

Kennedy v Mackenzie

(OHCS; Lord Uist; 6 September 2017; [2017] CSOH 118)

Liability—negligence—fatal accidents—road traffic—prima facie case of negligence—reversed burden of proof—evidence—duties incumbent on expert witnesses

Burden of proof; Death; Negligence; Res ipsa loquitur; Road traffic accidents; Scotland

On 1 August 2013, Vincent Kennedy was the front seat restrained passenger in a Vauxhall Vectra car being driven on the A85 road by the defender, Veronica Mackenzie, who was his partner. She was negotiating a bend when she lost control of the Vectra. She steered the car to the right across the road into the eastbound carriageway and collided with a Honda CRV vehicle. As a result, Vincent Kennedy and a passenger in the Honda were killed.

This action was brought against the defender by Vincent Kennedy's surviving relatives for the loss, damage and injury suffered by them due to his death. They maintain that the accident was caused by the negligence of the defender. The defender estimated that she lost control of her car about 50–60m from the point of impact at a point where the road surface was unusually slippery. Liability was denied.

Her case was that she was driving with due care and attention, and that she was unable to avoid the collision. She averred that the road surface at the point where she lost control had been unusually slippery, the skid resistance of the road had been deficient and the accident had been caused by the condition of the road. The reporting officers had noted no evidence of contaminants on the road surface. Evidence was led that approximately 5,000 cars travelled on the road daily and there had been no accidents at the locus in the six years preceding the accident or the year following it, after which the road had been resurfaced.

The police accident investigator reported that the skid resistance on the road was lower than expected but concluded that the cause of the accident had been driver error, which was supported by a report from a private accident investigator, who further noted that the road had been damp and slippery but having regard to the volume of traffic and the fact that no other accidents had occurred, the most likely cause of the accident had been driver error.

The defender led evidence from other road users that the road had been slippery underfoot and expert evidence that the skid resistance of the road had been severely deficient in the three years preceding the accident, although the expert conceded that low skid resistance was unlikely to be the sole cause of an accident.

In addition, evidence from the defender's collision investigator James Brunton was described as "worthless" by the judge. He found that there was no proper foundation for his opinion saying:

> "It was clear from his evidence that he was prepared to say anything that would be of assistance to the defender. He had, without explanation or justification, changed the terms of his report from an earlier report which he had written. He was not unbiased in his approach to his task.[1] He did not fulfil the duties incumbent on an expert witness. I found him to be a wholly unreliable witness."

The judge also found that it was clear from the evidence that there was no defect in the Vauxhall Vectra or contaminant on the road which could have caused the accident. There had been no accidents at the locus in approximately seven years and several witnesses gave evidence that they had not experienced a

[1] *Liddell v Middleton* [1996] P.I.Q.R. P36 per Stuart Smith LJ at P42–P43; and *Kennedy v Cordia (Services) LLP* [2016] UKSC 6; 2016 S.C. (U.K.S.C.) 59 per Lords Reed and Hodge at [70]–[77], [38]–[61] applied.

loss of traction at the locus. This, indicated to the judge that at the time of the accident, the road was not so slippery as to be the sole cause of the defender's skid.

In those circumstances, the defender had failed to establish that the accident had been caused by something other than her own negligence.

Comment

Here we have an illustration of a defendant in a road traffic claim who, faced with a prima facie case of negligence against them, sought to put forward an alternative explanation for an accident in order to rebut the presumption of their negligence. On this occasion, their attempt failed.

The general rule of evidence is that the party bringing the claim must prove their claim. In a road traffic accident claim, it is generally for the claimant to prove on a balance of probabilities that the accident was caused by the defendant's negligent driving. But there are occasions when the tables are turned and it is for the defendant to discharge the burden of proof, or at least to adduce sufficient evidence to rebut a presumption of negligence.

Perhaps the most common scenario when the burden of proof is reversed is where the defendant has been convicted of a criminal offence in respect of the material accident. For example, in a road traffic accident claim the defendant motorist may have been convicted of careless driving. The effect of the conviction is to shift the legal burden on to the defendant.[2] The defendant's negligence is presumed and they would have to prove on a balance of probabilities that the criminal conviction was erroneous or unrelated to the accident if they are to avoid civil liability.

Then there are those situations where merely from the facts of an accident a court can infer negligence. A claimant can establish a prima facie case of negligence where the established facts of an accident suggest that it could not have occurred without some negligence on the part of the defendant, even if the precise act or omission that caused the accident cannot be established. In such situations, the facts are deemed to speak for themselves or, to express it in its Latin maxim: res ipsa loquitur. It is then for the defendant to adduce evidence to rebut the inference of their negligence if they are to evade liability.

An example of this principle in practice can be found in *Widdowson v Newgate Meat*.[3] This case involved a road traffic accident where a motorist struck a mentally ill pedestrian who was walking in the road at night. The defendant motorist was held to have been negligent even though the claimant pedestrian had no memory of the incident and could not put forward any evidence to explain what happened. The judge was permitted to infer a prima facie case of negligence from the view the defendant would have had of the claimant as he approached him on a long, straight section of road. As the defendant in that case failed to adduce any evidence, he could not rebut the presumption of his liability.

It is important to point out that the burden of proof is not actually reversed in res ipsa cases. As was confirmed by the Privy Council in *Ng Chun Pui v Lee Chuen Tat*,[4] the onus remains on the claimant to prove the case. In these cases, the established facts are such that a prima facie case of negligence can be inferred. The facts of the accident still had to be established. But having established those facts, if the defendant adduces no evidence then there is nothing to rebut the inference of negligence. In that situation—as happened in *Widdowson*—the claimant will succeed in establishing liability. In contrast, if the defendant does put forward evidence, then that must be considered by the court to assess if it is still reasonable to infer negligence from the facts of the accident.

In *Ng Chun Pui*, Lord Griffiths sets out the evidential burden in res ipsa cases in the following terms:

[2] *J W Stupple v Royal Insurance Co Ltd* [1971] 1 Q.B. 50; [1970] 3 All E.R. 230.
[3] *Widdowson v Newgate Meat* [1998] P.I.Q.R. 138.
[4] *Ng Chun Pui v Lee Chuen Tat* [1988] R.T.R. 298.

> "Loosely speaking this may be referred to as a burden on the defendant to show he was not negligent, but that only means that faced with a prima facie case of negligence the defendant will be found negligent unless he produces evidence that is capable of rebutting the prima facie case. Resort to the burden of proof is a poor way to decide a case; it is the duty of the judge to examine all the evidence at the end of the case and decide whether on the facts he finds to have been proved and on the inferences he is prepared to draw he is satisfied that negligence has been established. In so far as resort is had to the burden of proof, the burden remains at the end of the case as it was at the beginning, upon the plaintiff to prove that his injury was caused by the negligence of the defendants."[5]

There is some indication (mainly in the context of medical negligence cases) that the defendant must merely put forward a "plausible" alternative explanation, and they do not need to prove that their explanation is more likely to be correct than any other.[6]

In the current case, where the defender had driven on to the wrong side of the road, the evidence she put forward about the slippery road surface was not considered by the court to be sufficient to discharge the presumption that the collision with a vehicle travelling in the opposite direction was caused by her negligence. In contrast, in *Ng Chun Pui* a bus driver who also drove on to the wrong side of the road was able to rebut a presumption of liability because he adduced evidence that he swerved in the agony of the moment to avoid another motorist. The difference between these two cases being that the defendant in the latter case was able to adduce enough evidence to rebut the presumption of negligence arising from their driving onto the opposite carriageway.

Practice points

- In res ipsa cases where the facts of the accident speak for themselves and an inference of the defendant's negligence can be drawn from those facts, it is for the defendant to adduce sufficient evidence to rebut the prima facie case of negligence against them.
- In such res ipsa cases the burden of proof is not reversed and the defendant does not necessarily need to prove their alternative case on a balance of probabilities, but to escape any liability they do need to adduce sufficient evidence to rebut the presumption of their negligence.
- If there is a relevant criminal conviction, then this will usually reverse the burden of proof and it will be for the defendant to prove their case on a balance of probabilities if they are to avoid any liability.

Richard Geraghty

[5] *Ng Chun Pui v Lee Chuen Tat* [1988] R.T.R. 298 at 301.
[6] See Brooke LJ in *Ratcliffe v Plymouth & Torbay Health Authority* [1988] P.I.Q.R. P170.

Baker v British Gas Services (Commercial) Ltd

(QBD; Amanda Yip QC; 18 September 2017; [2017] EWHC 2302 (QB))

Liability—personal injury—health and safety at work—employers' liability—electrical safety—injury after TUPE transfer—Transfer of Undertakings (Protection of Employment) Regulations 2006

Brain damage; Electrical safety; Electricians; Employers' liability; Personal injury; Transfer of undertakings

Darrell Baker was employed by the first defendant, British Gas Services (Commercial) Ltd, in its "Reactive Maintenance Business". His team provided electrical repairs and maintenance for retail and commercial clients. On 25 July 2012, Mr Baker had been sent to the Coventry Building Society branch in Arena Park, Coventry. He was to carry out some works including the replacement of a number of lamps.

While working at height with one of the lights, he was electrocuted, causing him to suffer a cardiac arrest and to be thrown to the floor below. He struck his head sustaining a severe brain injury. He had no recollection of the accident or the events leading up to it.

It was not in dispute that the Mr Baker sustained a massive electric shock via the casing of the light because the junction box to which it was connected had been mis-wired. The second defendant, J & L Electrics (Lye) Ltd was the electrical contractor responsible for originally fitting the lights in 2004. It was the claimant's primary case that the mis-wiring had been present from then. The claimant sought damages for personal injury. Liability was tried as a preliminary issue.

Before October 2010, the claimant was employed by Connaught Compliance Electrical Services Ltd ("CCES"). Pursuant to an asset purchase of CCES, the employment of the claimant and other electricians was transferred to the first defendant under the Transfer of Undertakings (Protection of Employment) Regulations 2006.[1] On the claimant's primary case that the mis-wiring dated from 2004, he contended that his employer, the first defendant, was also liable to him. He relied particularly on the failure to identify the fault during periodic inspections in 2009 and 2010.

The claimant's secondary case was that, if the mis-wiring did not date from 2004, it was likely to have arisen in the course of maintenance works performed by employees for whom the first defendant was liable. The parties did not agree on the legal position surrounding the first defendant's liability in light of the transfer of the undertaking.

The judge found the electricians involved in the original fitting and testing to be unimpressive in the witness box. She found significant inconsistencies between their statements and their oral evidence relating to their recollection of the job, timings and how testing was carried out. She held that the fitting was carried out at speed and she could not be confident that the inspecting electrician thoroughly tested the circuit in such a way as to exclude the existence of the fault from the outset. In addition, there was no strong evidence pointing to the likelihood of the junction box having been rewired after installation. The ballast in the relevant light fitting was the original one and the light fitting itself had not been moved. On the balance of probabilities, she held that the fault in the wiring arose at the time of installation in 2004 and liability against the second defendant was established.

As far as the second defendant's liability was concerned the experts all agreed that the wiring fault should have been identified by the periodic inspections performed by CCES. They also agreed that the inspections were not carried out thoroughly or diligently. CCES was in breach of its duty towards the

[1] Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246).

claimant. However, pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006, the first defendant transferee was liable for CCES's breach of duty and for the claimant's accident.

The first defendant had sought to argue that while an employee could recover for personal injury sustained before a relevant transfer and caused by the transferor's breach, liability did not arise where the breach occurred before the transfer but injury was sustained after the transfer. The judge held that this represented a fundamental misunderstanding of the Regulations. They were not designed to protect the transferee from unknown liabilities. Tortious liabilities transferred whether they were fully accrued or contingent. The first defendant was liable to the claimant on the basis of the failure to detect and remedy the defect prior to the accident.

The claimant had removed the light fitting from the ceiling while the supply to the light remained live. The majority of the lay and expert witness evidence was that it was reasonable to remove the light fitting so as to check whether there was a plug and socket without first isolating at the distribution board. The accident was not contributed to by any negligence on the part of the claimant. The accident happened because the wiring error had caused the light fitting to be live and that was not foreseeable. There was no deduction for contributory negligence.

The claimant succeeded against both defendants. As the second defendant was responsible for the original wiring error it bore the greater responsibility. Liability was apportioned 75% to the second defendant and 25% to the first defendant.

Comment

Here we have an illustration of the effects of the Transfer of Undertakings (Protection from Employment) Regulations 2006 ("TUPE") in the context of a PI claim. These Regulations make provision for situations where an individual's employment is transferred from one employer to another. Generally, their relevance to personal injury litigation arises where an employee is injured during the course of their employment with one employee but, by the time they come to bring a claim, that employment has transferred to another employer.

Under the TUPE Regulations, whenever there is a relevant transfer, an employee's contract of employment is automatically transferred to the incoming employer. Regulation 4(2) also provides that on the completion of a relevant transfer:

- all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and
- any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.

Previously there was some doubt as to whether the liabilities transferred to the new employer were restricted only to those arising out of a breach of the contract of employment. It was questioned whether the Regulations applied to liabilities in tort. The Court of Appeal clarified these issues in the combined appeals in *Martin v Lancashire CC* and *Bernadone v Pall Mall Services Group Ltd*.[2] It was held that tortious liabilities arising out of the employer/employee relationship where sufficiently connected to the contract of employment to transfer to the new employer. The position was also considered to be the same where the liability arose out of a breach of a statutory duty on the part of an employer. It was also noted that a claim brought by an employee against an employer under the Occupiers Liability Act 1957 involved a liability that could have a sufficient connection with the contract of employment to transfer under the Regulations.

[2] *Martin v Lancashire CC* [2000] 3 All E.R. 544; [2001] I.C.R. 197 and *Bernadone v Pall Mall Services Group Ltd* [1999] I.R.L.R. 617.

What is of particular interest in the current case is that the act or omission that eventually resulted in an accident occurred some years *before* the transfer of undertaking but the injury was not suffered until *after* the transfer. It was suggested on behalf of the new employer to whom the business had transferred, that the Regulations could not transfer over to them a liability that was unknown and did not exist at the time of the transfer. The trial judge disagreed, holding that such tortious liabilities transfer whether they are fully accrued or contingent. They reasoned that it would frustrate the whole purpose of the Regulations if it were held that an employee injured in such circumstances could not recover against the new transferee employer.

Practice points

- Wherever a liability for personal injury arises between an employee and their employer, that liability will pass on to a new employer where there is a transfer of undertaking under the TUPE Regulations.
- If the injury was sustained after the transfer but arose because of an act or omission that occurred before the transfer, any such liability will still transfer to the new employer.
- If the original employer causes harm to their former employee as a result of an act or omission that occurs after a transfer of undertaking, that is unlikely to be a liability that passes to the new employer.

Richard Geraghty

LIABILITY

Williams v Hawkes

(CA (Civ Div); Davis LJ, Hickinbottom LJ; 21 November 2017; [2017] EWCA Civ 1846)

Personal injury—road traffic—liability—causation—animals—abnormal characteristics—dangerous animals—cattle—Animals Act 1971 s.2(2)

LT Abnormal characteristics; Cattle; Causation; Dangerous animals; Road traffic accidents

At about 6.00pm on 17 December 2011, a car driven by the claimant, Mr Martyn Williams, collided with a Charolais steer on a dual carriageway section of the A465 road at Glynneath Bank near Port Talbot. There was no lighting on that section of the road and he was using his headlights. He suffered significant injuries, although fortunately not life-threatening. The steer itself was killed. Mr Williams was not driving too fast. The car was in a proper condition.

In due course he commenced proceedings against the estate of Mr Derfyl Llewellyn Hawkes, a local farmer who had been the owner and keeper of the steer. The claim was framed both in negligence and under the Animals Act 1971 (“the 1971 Act”). There was a trial on liability. No defence of contributory negligence was pursued at trial.

Mr Recorder Lloyd Williams QC found that the steer had been “spooked” by something, causing it to jump over a fence. It had jumped or pushed through other fences and hedges before reaching the road. The Recorder accepted expert evidence that Charolais cattle had a propensity to respond unpredictably to averse stimuli. He accepted that, in addition to the original stimulus, the steer would have continued to be very frightened after jumping the fence, being alone in a strange environment, and it would have been frightened by the lights and noise of cars on the road, leading to wholly unpredictable behaviour.

The recorder held that all the requirements of s.2(2)[1] had been met. In particular, under s.2(2)(b), the judge held that the steer had acted in accordance with the particular characteristic of unpredictability when subject to averse stimuli, and that that characteristic had been causative of the accident. The Recorder dismissed the claim in negligence but he found in favour of the claimant and against the defendant under the 1971 Act. The defendant appealed.

In considering causation, the court held that it was essential to follow the structure of s.2(2). The first point to consider was whether damage had been caused by an animal which did not belong to a dangerous species. Clearly the answer was yes. In relation to s.2(2)(a) it was agreed that the damage was of the relevant kind, because of the size and weight of the steer. In addition, the question of knowledge under s.2(2)(c) was agreed. The farmer had known of the relevant characteristics.

Under s.2(2)(b), no-one had suggested that the likelihood of the damage was due to the characteristics of the animal not normally found in animals of the same species.

Nevertheless, on the expert evidence, the likelihood of damage had been due to characteristics not normally so found except at particular times or in particular circumstances. In other words, the damage had not simply been attributable to the steer's size and weight. The recorder found that the damage was also attributable to the steer behaving in a dangerous way in the particular circumstance of it having been spooked by the averse stimuli, as steers were wont to do in such circumstances.

In respect to the nature of collision the Recorder had apparently thought that the farmer's argument rested on the proposition that the car had collided with the steer rather than the steer colliding with the car. The court pointed out that contrasted with the House of Lords authority of *Mirvahedy v Henley*,[2] where a horse had careered into the side of the claimant's car. They considered it to be highly debatable whether that point could of itself in this case avoid strict liability. For example, if the steer had careered down the road but then been struck by a car when it had temporarily come to a halt it was doubtful that it would have made a difference. The point was in any event met by the judge's finding of fact that the steer had been running in panic on the carriageway at the time of collision.

The farmer relied on *Jaundrill v Gillett*[3] another case of galloping horses on the highway. *Jaundrill* had been decided before *Mirvahedy*, and aspects of it were difficult to align with the approach taken in *Mirvahedy*. *Mirvahedy* lent no endorsement to the approach in *Jaundrill* which was to be treated with great caution and as a decision confined to its own particular facts and circumstances.

They also pointed out that the Court of Appeal in *Jaundrill* had departed from the trial judge's findings of fact on a basis not easy to follow. The suggestion in *Jaundrill* that it was the presence of the horses on the highway that was causative came close to saying that the collision would have happened whether the horses were galloping or not. They found that was a difficult proposition adding that considerable caution should be give before *Jaundrill* was cited as an authority.[4] In any event, this case was distinguishable from *Jaundrill* as it involved a steer with no natural tendency to gallop and which had throughout acted both under the influence of the initial averse stimulus and the further stimuli of travelling through hedges and fences in a strange environment and the lights and noise of traffic.[5]

The court's conclusion was that unlike the horse in *Mirvahedy*, the steer had not been careering across the highway, nor had it crashed into the side of the car, but those were not material differences. The steer

[1] Animals Act 1971 s.2(2) Where damage is caused by an animal which does not belong to a dangerous species, a keeper of the animal is liable for the damage, except as otherwise provided by this Act, if: (a) the damage is of a kind which the animal, unless restrained, was likely to cause or which, if caused by the animal, was likely to be severe; and (b) the likelihood of the damage or of its being severe was due to characteristics of the animal which are not normally found in animals of the same species or are not normally so found except at particular times or in particular circumstances; and (c) those characteristics were known to that keeper or were at any time known to a person who at that time had charge of the animal as that keeper's servant or, where that keeper is the head of a household, were known to another keeper of the animal who is a member of that household and under the age of sixteen.

[2] *Mirvahedy v Henley* [2003] UKHL 16.

[3] *Jaundrill v Gillett*, *The Times*, 30 January 1996.

[4] *Jaundrill v Gillett*, *The Times*, 30 January 1996, doubted.

[5] *Jaundrill v Gillett*, *The Times*, 30 January 1996, distinguished.

had been found running on the road in a panic, acting under the original averse stimulus which had given rise to the escape from the field in the first place and then exacerbated by subsequent averse stimuli such as the lights and noise of the cars. The linked requirements of s.2(2)(a) and s.2(2)(b) were therefore satisfied and the appeal dismissed.[6]

Comment

Where someone has suffered injury or damage as a result of an animal, they can either sue in negligence or under the Animals Act 1971. The 1971 Act imposes strict liability and, though it was intended to modernise and simplify the common law, it has "attracted four decades of judicial and academic criticism".[7] Not only is judicial interpretation of the Act perceived to have stretched liability beyond the boundaries intended by Parliament but the language used in the Act is said to be "marked by linguistic and conceptual obscurity".[8] As such, applying that language has been likened to "fighting through the thickets".[9]

The Act distinguishes between "dangerous" and "non-dangerous" species. Under s.2(1):

> "where any damage is caused by an animal which belongs to a dangerous species, any person who is a keeper of the animal is liable for the damage, except as otherwise provided by [the] Act."[10]

Claims under this section will be extremely rare because, as Lord Walker noted in *Mirvahedy v Henley*, they are "almost entirely limited to incidents in (or following escapes from) zoos or circuses".[11]

Claims more commonly arise under s.2(2), which deals with those animals not belonging to a dangerous species, such as horses, livestock, cats and dogs. This section is convoluted and requires claimants to satisfy four conditions—two of which have two limbs, either of which can be satisfied for liability to arise:

- **The opening words of s.2(2):**

  The relevant damage must have been "caused by an animal which does not belong to a dangerous species".

- **Section 2(2)(a):**

  The damage must be of a kind "which the animal, unless restrained, was likely to cause" *or* "which, if caused by the animal, was likely to be severe".

- **Section 2(2)(b):**

  The likelihood of the damage or of its being severe must be due to characteristics of the animal which "are not normally found in animals of the same species" *or* "are not normally so found except at particular times or in particular circumstances".

- **Section 2(2)(c):**

  The relevant characteristics must have been known to the keeper or to the person who at that time had charge of the animal as that keeper's servant or, where that keeper is the head of a household, must have been known to another keeper of the animal who is a member of that household and under the age of 16.

LIABILITY

[6] *Mirvahedy v Henley* [2003] UKHL 16 followed.
[7] *Turnbull v Warrener* [2012] EWCA Civ 412 per Maurice Kay LJ at [4].
[8] *Williams v Hawkes* [2017] EWCA Civ 1846 per Davis LJ at [4].
[9] *Goldsmith v Patchcott* [2012] EWCA Civ 183 per Jackson LJ at [31].
[10] A dangerous species is defined in s.6(2) as a species "which is not commonly domesticated in the British Islands and whose fully grown animals normally have such characteristics that are likely, unless restrained, to cause severe damage or that any damage they may cause is likely to be severe".
[11] *Mirvahedy v Henley* [2003] UKHL 16 at [135].

The fact that a keeper took reasonable care to prevent his animal from causing harm is, of course, irrelevant but the knowledge requirement outlined in s.2(2)(c) means that liability is less strict under s.2(2) than under s.2(1). Nevertheless, *Williams v Hawkes* demonstrates how judicial interpretation of s.2(2) has been relatively expansive:

- **Section 2(2)(a):**

  Following *Mirvahedy v Henley*, the second limb is easily established where the relevant animal is large and heavy (such as a Charolais steer) because it is inevitable that any damage caused by such an animal is likely to be severe.

- **Section 2(2)(b):**

  Again following *Mirvahedy v Henley*, the second limb of s.2(2)(b) is easily established because the "fact that an animal's behaviour, although not normal behaviour for such animals of that species, was nevertheless normal behaviour for the species in the particular circumstances, does not take the case outside s.2(2)(b)".[12] This means that s.2(2)(b) can be satisfied where an animal (such as a Charolais steer) is not normally unpredictable or dangerous but can become so when in a state of panic or fright. As Maurice Kay LJ noted in *Turnbull v Warrener*, this interpretation has "resulted in [the] virtual emasculation" of the second limb because it is difficult to envisage circumstances in which it would not apply.[13]

Given ss.2(2)(a) and (b) were easily satisfied on the facts, the defendant in *Williams v Hawkes* had tried to appeal on the issue of causation and in doing so sought to resurrect *Jaundrill v Gillett*[14]—an unreported Court of Appeal case that preceded *Mirvahedy*.

In *Jaundrill*, malicious intruders had released horses from a field which then collided with the plaintiff's car as they were galloping down the road. The Court of Appeal found that there must be a causal link between the s.2(2)(b) characteristic in question and the kind of damage suffered but that such a causal link did not exist on the facts. The accident had been caused by the release of the animals onto the road and not by the galloping and panicking of the horses. The defendant in *Williams* sought to follow this line of argument by suggesting that the damage had not been caused by the steer's unpredictable behaviour (the s.2(2)(b) characteristic) but this argument was given short shrift.

Jaundrill could be distinguished on its facts because, unlike horses, steer do not have a natural tendency to gallop. The Charolais steer was clearly reacting to the averse stimuli. Moreover, *Jaundrill* was to be treated with caution and viewed as a decision confined to its own particular facts and circumstances. Not only was the Court of Appeal's reasoning in the case flawed but the defendant in *Mirvahedy* had tried to use the same argument from *Jaundrill* but failed. It had been argued that causation could not be established because it was the presence of the horses on the highway and their size, rather than any characteristics which the horses exhibited, that was causative of the damage sustained. However, as Lord Walker noted:

> "… the essential point is that in order to recover the claimant had to show that the damage which he had suffered was caused, not merely by the horses escaping and being on the main road, but by the characteristics which are capable of finding strict liability under section 2(2)—in short, a frightened horse's propensity to bolt, to continue to flee, and to ignore obstacles in its path."[15]

As such, whilst the Court of Appeal in *Williams* accepted that it was necessary for there to be a causal link between the s.2(2)(b) characteristic in question and the damage suffered, it concluded that such a link

[12] *Mirvahedy v Henley* [2003] UKHL 16 per Lord Nicholls at [47]–[48].
[13] *Turnbull v Warrener* [2012] EWCA Civ 412 at [23].
[14] *Jaundrill v Gillett*, *The Times*, 30 January 1996.
[15] *Mirvahedy v Henley* [2003] UKHL 16 at [161].

could be established on the facts in the same way as in *Mirvahedy*. It could not be said that "but for" the panic and unpredictable behaviour of the Charolais steer that the damage would have happened anyway. The damage was sustained because the Charolais steer was in a state of panic, not just because it happened to be on the road.

Practice points

- Where the relevant animal is large and heavy, it should be possible to satisfy s.2(2)(a) on the basis that any damage caused by the animal was likely to be severe.
- Where an animal is not normally unpredictable or dangerous, it should be possible to satisfy s.2(2)(b) on the basis that the animal has become unpredictable or dangerous due to being in a state of fright or panic.
- There must be a causal link between the s.2(2)(b) characteristic (e.g. the animal behaving unpredictably as a result of fright or panic) and the damage suffered by the claimant.
- As such, for a claim to succeed it will be important to obtain expert evidence to establish that the damage was caused not merely by the relevant animal being in the vicinity of the claimant (e.g. on a road) but by the relevant s.2(2)(b) characteristic.

Annette Morris

Lewington v Motor Insurers' Bureau

(QBD (Comm); Bryan J; 27 October 2017; [2017] EWHC 2848 (Comm))

Personal injury—liability—road traffic accidents—motor vehicles—indemnity—uninsured drivers—EU law—statutory interpretation—Road Traffic Act 1988 s.185—Directive 2009/103 art.1, art.3, art.5, art.10, art.10(2), art.13, art.13(1)

EU law; Personal injury; Statutory interpretation; Uninsured drivers

[1] At about 10.45pm on 23 February 2012, Ms Charli Lewington was driving her Ford Fiesta car on the A120 near Felsted in Essex. The A120 is a dual carriageway with a speed limit of 70 miles per hour. It was dark and the road was unlit. Unknown to Ms Lewington there were two large earth movers or dumper trucks on the road in front of her. They had been stolen from a quarry and were unlit at the rear. They were travelling relatively slowly.[2]

Ms Lewington was following her uncle's vehicle which suddenly swerved to avoid the rear most earth mover. She swerved too, but lost control and went off the road as a result of which she crashed. The crash resulted in Ms Lewington suffering serious injuries which included a fractured neck, spinal injuries and a severed artery in her left arm. The drivers of the earth movers made off and were never traced. Ms Lewington applied to the Motor Insurers Bureau ("MIB"), for compensation under the Untraced Drivers' Agreement 2003.

[1] Meaning of "motor vehicle" and other expressions relating to vehicles.
[2] They had a published maximum speed of 33 miles per hour.

The MIB refused her application on the ground that an earthmover was not a "motor vehicle" for the purposes of s.185(1)(c),[3] and therefore the unidentified drivers had not required insurance to drive them on public roads. Ms Lewington appealed to the arbitrator who highlighted the difference in language between s.185(1)(c), which provided that "motor vehicle" meant "a mechanically propelled vehicle intended or adapted for use on roads", and Directive 2009/103[4]art.1 which provided that "vehicle" meant "any motor vehicle intended for travel on land …".

The arbitrator found that it was not possible to reconcile the wording of s.185 with the Directive but also found that a reasonable man would not consider that the earthmover was "intended or adapted for use on roads". He described the test as whether the reasonable person would have contemplated a subsidiary but still general use (as opposed to an isolated or irregular use) of the earthmover on a road and found that "a reasonable person would not have contemplated the use of the earth mover on a road unless that use had been lawful".

Ms Lewington appealed again and argued that the arbitrator had applied the wrong test. He could, and should, have interpreted the Act in a way compatible with the Directive applying the *Marleasing*[5] principle.[6]

Brian J held that it was possible to apply the *Marleasing* principle to make the definition in s.185 compatible with the Directive. The relevant test was that set out in *Burns v Currell*,[7] namely to look at whether "a reasonable person looking at the vehicle would say that one of its users would be a road user".[8] The judge considered that it was clear that the purpose of s.185 was to provide protection against uninsured drivers in circumstances where one of the users was use on a road. That was the common law test as had been repeatedly applied in subsequent cases.[9] He also held that it was also clear from *Winter v DPP*[10] that any qualification was narrowly construed, given that any carving out would derogate from the purpose of the statutory provision.[11]

Accordingly, the arbitrator had erred in law in saying that it was not possible to reconcile the wording of s.185 with the Directive. It was perfectly possible to do so having regard to the common purpose of the Act and the Directive, namely to ensure that if vehicles were used on roads, there was insurance in place, and if there was not, there was redress through the relevant body for anyone who suffered loss or injury in consequence.

The arbitrator had also erred in his application of the principle in *Burns* because he failed to focus upon the real question, namely whether some general use on the roads was contemplated as one of the users. That was confirmed to be the established test at common law. The judge held that it could be applied in the same manner both at common law and applying the *Marleasing* principle in the context of the Directive.

The judge then turned to the issue of purposive interpretation. He held that the arbitrator had focused upon the difference between "road" and "land" when he should have focused on the purpose of the statutory provision. He found it was consistent with that purpose to find that where someone stole a vehicle, a reasonable person looking at the vehicle would say that one of its users would be a road user so that it

[3] "motor car" means a mechanically propelled vehicle, not being a motor cycle or an invalid carriage, which is constructed itself to carry a load or passengers and the weight of which unladen—(a) if it is constructed solely for the carriage of passengers and their effects, is adapted to carry not more than seven passengers exclusive of the driver and is fitted with tyres of such type as may be specified in regulations made by the Secretary of State, does not exceed 3050 kilograms, (b) if it is constructed or adapted for use for the conveyance of goods or burden of any description, does not exceed 3050 kilograms, or 3500 kilograms if the vehicle carries a container or containers for holding for the purposes of its propulsion any fuel which is wholly gaseous at 17.5 degrees Celsius under a pressure of 1.013 bar or plant and materials for producing such fuel, (c) does not exceed 2540 kilograms in a case not falling within sub-paragraph (a) or (b) above.

[4] Directive 2009/103 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability [2009] OJ L263/11.

[5] *Marleasing SA v La Comercial Internacional de Alimentacion SA* (C-106/89) EU:C:1990:395.

[6] The courts of EU Member States have a duty to interpret national legislation in light of unimplemented EU directives.

[7] *Burns v Currell* [1963] 2 Q.B. 433.

[8] *Burns v Currell* [1963] 2 Q.B. 433 applied.

[9] *Chief Constable of Avon and Somerset v F* [1987] 1 All E.R. 318, *DPP v Saddington* (2001) 165 J.P. 122 and *DPP v King* [2008] EWHC 447 (Admin) applied.

[10] *Winter v DPP* [2002] EWHC 1524 (Admin).

[11] *Winter v DPP* [2002] EWHC 1524 (Admin) applied.

would be covered by the provisions of the Act. It was very much in accordance with the purpose, both at common law, under the statute, and also applying the *Marleasing* principle under the Directive, that there would be cover in such a scenario.

Brian J also held that the arbitrator had erred in law when he said that a reasonable person would not have contemplated the use of the earthmover on a road unless that use had been lawful. An item could be used on a road in circumstances where its use on a road was unlawful.[12] A reasonable person would contemplate what thieves and criminals might do and might use the item to do, such as take it from a quarry and drive it, as part of a theft, on public roads. Such a conclusion was entirely consonant with the purpose of the statute and the Directive.

The decision was that the earthmover was a motor vehicle within the meaning of s.185. As it was being used on the road at the time of the accident, it was required to be insured under the Road Traffic Act 1988 s.145.[13] Consequently the MIB is under a liability to compensate Ms Lewington.

Comment

As Dr Nicholas Bevan said in his comment[14] on the decision in *Vnuk v Zavarovalnica Triglav DD*[15] we cannot take any of our national law provision in this area at face value. Much of our national law provision for guaranteeing the compensatory safeguards of accident victims is unlawful or misleading because it conflicts with the primary source of law derived from the Directives. The problem taints not only our statutory[16] and extra-statutory provision[17] but much of the case law interpreting this domestic law provision. *Vnuk* was “a game changer”.

Following *Vnuk* there should have been a speedy revision of the Road Traffic Act 1988 and both MIB Agreements. That has not happened so a working knowledge of EU law remains an essential requirement for competency in RTA practice.

To some extent we have been here before in *Delaney v Secretary of State for Transport*.[18] As result of that decision, the crime exception under the Uninsured Drivers Agreement 1999 cl.6.1(e)(iii) could no longer be a valid defence to either art.75 Insurers or the MIB. The UK Government amended the Uninsured Drivers’ Agreement to rectify that breach. They have, however, ignored everything else that needs to be changed.

The *Lewington* decision is an important reminder that we still cannot take our national law provisions in this area at face value. Significant parts of UK law, supposedly providing safeguards for accident victims, fail to do so. It continues to conflict with the primary source of law derived from the Directives. Major reform should be inevitable and this was seemingly accepted by the Government some time ago. Change seems to have stalled. With Brexit who knows what will happen?

The important thing to remember is that it is not necessary to wait for reform to remedy the defective domestic law as the courts are obliged to construe our national law, so far as is possible, in conformity with EU law. Sadly in the past, High Court judges often seem to have understood the issues rather better than the Court of Appeal although *Delaney* suggests a change. In my view, Tugendhat J got everything right in *Bristol Alliance Partnership v Williams*[19] only to be overturned by the Court of Appeal.[20]

The *Bristol* case provides a good example of this. In the early hours of 12 December 2008, the car driven by the James Williams collided with the House of Fraser store at Cabot Circus in Bristol. The

[12] *DPP v Saddington* (2001) 165 J.P. 122 and *DPP v King* [2008] EWHC 447 (Admin) applied.
[13] Requirements in respect of policies of insurance.
[14] Dr N. Bevan, “Vnuk v Zavarovalnica Triglav DD” [2014] J.P.I.L. C225.
[15] *Vnuk v Zavarovalnica Triglav DD* (C-162/13) EU:C:2014:2146.
[16] Road Traffic Act 1988 Pt VI and the European Communities (Rights Against Insurers) Regulations 2002 (SI 2002/3061).
[17] The Uninsured Drivers Agreement 1999, the Untraced Drivers Agreement 2003 and the so called art.75 procedure.
[18] *Delaney v Secretary of State for Transport* [2015] EWCA Civ 172.
[19] *Bristol Alliance Partnership v Williams* [2011] EWHC 1657 (QB).
[20] *EUI v Bristol Alliance Partnership Ltd* [2012] EWCA Civ 1267; see also JPIL case comment by N. Bevan in [2013] J.P.I. Law 1, C24–C30.

damage claimed was in excess of £200,000. The property insurer Bristol Alliance Limited Partnership paid the cost of the damage and subsequently claimed by subrogation against Williams. Judgment was entered against Williams for damages to be assessed. The damage caused was the result of a deliberate act by Williams. The question in this litigation was which of two insurers should bear the cost of the damage done to the store.

The property insurer (Bristol) maintained that Williams had caused the damage through his negligence and that under the Road Traffic Act 1988 s.151[21] it intended to enforce against EUI (the RTA insurer) any judgment obtained against him. EUI maintained that Williams had caused the damage deliberately in an attempt to commit suicide. They submitted that if the damage was caused deliberately, Williams was not covered by the policy and so, under s.151(2)(a),[22]s.151 did not apply and therefore Bristol could only recover damages from the Motor Insurers' Bureau. EUI also argued that Directive 72/166[23] and Directive 84/5[24] did not apply as Bristol was not a victim[25] within the meaning of art.2(1) of Directive 84/5.

Tugendhat J held that in order to comply with s.145 of the Act, which required an insurance policy to cover any liability which might be incurred in respect of damage to property arising out of the use of a vehicle, the policy had to be read to include liability against an innocent third party arising out of a deliberate act, but to exclude it so that the insured person could not take the benefit himself where the liability arose out of such an act.[26] That gave effect to the policy of the legislation that innocent third parties should be protected from harm inflicted by dangerous and criminal drivers. He also held that adopting that interpretation of s.151 would achieve by a direct route what was already the indirect effect of the MIB scheme, at least in all but a minority of cases.

In relation to the Motor Insurance Directives, the judge concluded (rightly in my view) that there was nothing to justify a definition of "victim" which excluded third parties who had suffered personal injury or damage to property, but who were also insured, and whose insurers exercised their rights of subrogation. The judge held that such a limitation of the definition appeared to be inconsistent with the principle of subrogation.

In Tugendhat J's view, applying the principle set out in *Marleasing*,[27] Pt VI of the Act[28] had to be interpreted as requiring the user of a motor vehicle to be insured under a policy that satisfied the minimum requirements of the Motor Insurance Directives. Interpreting the policy by reference to the purpose for which it was issued, and having regard to the statements in the policy that it provided the cover required by law, the insurance cover in this case did meet those minimum requirements.[29] Bristol was accordingly entitled to recover from EUI even if the damage to the premises was the result of a deliberate act.

When the case came before the Court of Appeal,[30] the first instance decision was wrongly overturned. Ward LJ admitted that if *Bernaldez*[31] was to be read so as to give a purposive *Marleasing*[32] meaning to ss.151 and 145 of the 1988 Act:

LIABILITY

[21] Duty of insurers or persons giving security to satisfy judgment against persons insured or secured against third-party risks.

[22] "Subsection (1) above applies to judgments relating to a liability with respect to any matter where liability with respect to that matter is required to be covered by a policy of insurance under section 145 of this Act and … (a) it is a liability covered by the terms of the policy or security to which the certificate relates, and the judgment is obtained against any person who is insured by the policy or whose liability is covered by the security, as the case may be …".

[23] Directive 72/166 on the approximation of the laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability [1972] OJ L103/1.

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

[25] Victims of an accident are covered.

[26] *Charlton v Fisher* [2001] EWCA Civ 112 considered.

[27] UK law must be interpreted, so far as possible, to give effect to European Directives in accordance with *Marleasing SA v La Comercial Internacional de Alimentacion SA* (C-106/89) EU:C:1990:395; [1990] E.C.R. I-4135.

[28] Third-Party Liabilities.

[29] *Criminal Proceedings against Bernaldez* (C-129/94) EU:C:1996:143; [1996] E.C.R. I-1829 considered.

[30] *EUI v Bristol Alliance Partnership Ltd* [2012] EWCA Civ 1267; see also JPIL case comment by N. Bevan in [2013] J.P.I. Law 1, C24–C30.

[31] *Criminal Proceedings against Bernaldez* (C-129/94) [1996] E.C.R. I-1829.

[32] *Marleasing SA v La Comercial Internacional de Alimentacion SA* C-106/89 EU:C:1990:395; [1990] E.C.R. I-4135.

> "then the way the Road Traffic Act combined with the MIB scheme has always operated is not compliant with the Directive."

The ruling was considered in at some length in this Journal,[33] and rightly criticised. *Lewington* is the latest reminder of the failings of our law.

Practice points

- Do not take any of the UK law provision in this area at face value.
- In RTA practice a working knowledge of EU law is an essential requirement.
- For many years the MIB have been wrongly denying and rejecting claims by innocent victims run down or injured by drivers of "off road vehicles".
- All "*off road vehicles*" need insurance when being driven on roads or in other public places.
- If such vehicles are uninsured or untraced they should be covered by the MIB agreements.
- The MIB should now be regarded as an "emanation of the state"[34] and direct effect should be applied by courts and tribunals.
- The conditions for a successful outcome on liability under the *Francovich* principles are:
  - — The rule of law infringed was intended to confer rights on individuals.
  - — The breach was sufficiently serious to give rise to liability.
  - — There was a direct causal link between the breach of the obligation and the damage sustained by the injured party.

Nigel Tomkins

[33] See N. Bevan, "Marking the Boundary" [2013] J.P.I. Law 3, 151–161.
[34] See *Farrell v Whitty* (C-356/05) EU:C:2007:229.

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Case and Comment: Quantum Damages

Smith v Lancashire Teaching Hospitals NHS Trust

(CA (Civ Div); (Sir Terence Etherton MR, McCombe LJ, Sir Patrick Elias; 24 November 2017; [2017] EWCA Civ 1916)

Personal injury—human rights—damages—fatal accidents—bereavement—cohabitation—declarations of incompatibility—discrimination—right to respect for private and family life—unmarried couples—ambit test—Fatal Accidents Act 1976 s.1a—Human Rights Act 1998—European Convention on Human Rights 1950 art.14

Bereavement; Cohabitation; Damages; Discrimination; Fatal accident claims; Right to respect for private and family life; Unmarried couples

The claimant had cohabited with a man for over two years before he had died as a result of the first[1] and second[2] defendants' negligence. She had made a dependency claim under the Fatal Accidents Act 1976 ("FAA") s.1, which by amendment had been extended to two-year plus cohabitees, but the bereavement damages provisions in s.1A(2)(a), inserted into the Act at the same time, applied only to spouses and civil partners. The claimant as a two year+ cohabitee was entitled to bring the dependency claim. No claim for bereavement damages was made against those defendants.

The claimant's dependency claim had been compromised and the only issue before the judge had been in relation to the compatibility of s.1A(2)(a) of the Act with the ECHR. Edis J held[3] that there had been no direct infringement of art.8 and that a claim to bereavement damages was not within the ambit of art.8 because there was no sufficiently serious infringement and because the absence of a right to compensation for the appellant's grief was only tenuously linked to respect for the family life which she enjoyed with the deceased and not linked at all to her private life. Because the judge found that the claim was not within the ambit of art.8, he dismissed the art.14 claim.

The Court of Appeal confirmed that the description of the ambit test set out in *Steinfeld v Secretary of State for Education*[4] was binding. A claim was capable of falling within art.14 even though there had been no infringement of art.8 provided that it fell within the ambit of art.8. If a state had brought into existence a positive measure which, even though not required by art.8, was a modality of the exercise of the rights governed by art.8, the state would be in breach of art.14 if the measure had more than a tenuous connection with the core values protected by art.8 and was discriminatory and not justified.[5] Accordingly, it followed that the judge's approach had been incorrect.

They held that he had been wrong to say that the bereavement damages scheme was not within the ambit of art.8 so as to engage art.14 unless the link was sufficiently serious. In addition, there was no authority for the proposition that if a measure did not engage art.8, it would often fall outside its ambit for the same reasons.

QUANTUM/ DAMAGES

[1] Lancashire Teaching Hospitals NHS Trust.
[2] Lancashire Care NHS Foundation Trust.
[3] *Smith v Lancashire Teaching Hospitals NHS Trust* [2016] EWHC 2208 (QB).
[4] *Steinfeld v Secretary of State for Education* [2017] EWCA Civ 81.
[5] *Steinfeld v Secretary of State for Education* [2017] EWCA Civ 81 followed, *R. (on the application of Clift) v Secretary of State for the Home Department* [2006] UKHL 54; [2007] 1 A.C. 484 and *M v Secretary of State for Work and Pensions* [2006] UKHL 11; [2006] 2 A.C. 91 considered.

It had also been wrong for the judge to hold that as the bereavement damages regime did not indicate any disapproval by the state of the way that the claimant and the deceased had chosen to live, the complaint did not achieve the level of serious impact required to put it within the ambit of art.8. Lastly, they held that the judge had been wrong to conclude that the absence of a right to bereavement compensation was only tenuously linked to respect for the family life which the claimant enjoyed with the deceased and not linked at all to her private life.

Their view was that it was apparent from the very fact that bereavement damages were limited to the spouse or civil partner of the deceased that they were specifically intended to reflect the grief that ordinarily flowed from the intimate relationship between husband and wife and civil partners. It inevitably followed that the scheme for bereavement damages was properly regarded as a positive measure, or modality, by which the state had shown respect for family life, a core value of art.8. Accordingly, the scheme for bereavement damages, with its exclusion of unmarried cohabitees, fell within the ambit of art.8.

The claimant was in a long-term relationship in every respect equal to a marriage in terms of love, loyalty and commitment. In the context of bereavement damages under s.1A, the situation of someone like her was sufficiently analogous to that of a surviving spouse or civil partner. That required discrimination to be justified in order to avoid infringement of art.14 in conjunction with art.8.

The court considered that it was plainly material that Parliament had treated cohabitees of over two years as being in a stable and long-term relationship comparable to that of spouses and civil partners for the purposes of dependency damages, and had not provided any justification for the different treatment of such cohabitees under s.1A. It was also relevant to note the decline in popularity of the institution of marriage and the increase in the number of cohabiting couples.

The court recognised that a declaration of incompatibility under s.4 of the 1998 Act should only be made when it was impossible to interpret a provision in such a way as to make it compliant with the ECHR. The interpretive power under s.3 of the 1998 Act was very wide, but the court could not adopt a meaning which was inconsistent with a fundamental feature of the legislation. In this case, the difference between s.1 and s.1A as to the treatment of cohabitees was clear, express and intentional. Furthermore, an extension of s.1A to include cohabitees of over two years would give rise to policy decisions which the court could not make. It was appropriate to make a declaration that s.1A was incompatible with art.14 in conjunction with art.8 in its exclusion of cohabitees of over two years. The appeal was allowed.

Comment

There are occasions when a first instance judgment practically requests to be overturned on appeal. Edis J in a very careful and detailed exposition of an obvious gap in the law of damages repeatedly noted the need for reform. His wide-ranging analysis gave several signpost indicators for urgent intervention, with the learned judge's aspiration that "the outcome of this litigation may provoke some further discussion in Parliament for further legislation which might improve the current state of the law".[6]

The JPIL case commentary, by this author, suggested that, following that judgment, "it is to be hoped that the Law Commission could assist in a swift amendment of such an incongruous variance". The cavalry over the hill has arrived in the shape of the Court of Appeal, but there is still a clear need for Parliamentary action, and no doubt enough issues on European Law for this matter now to command the attention of the Law Commission and the European Court of Human Rights. Sir Terence Etherton MR in giving the unanimous judgment of the Court of Appeal does what Edis J felt he could not do, and granted a "declaration of incompatibility", in accordance with the Human Rights Act s.4, as "the appropriate relief in the present case".[7]

[6] *Smith v Lancashire Teaching Hospitals NHS Trust* [2016] All E.R. (D.) 33 (judgment of Edis J at first instance).
[7] *Smith v Lancashire Teaching Hospitals NHS Trust* [2017] EWCA Civ 1916 (the Court of Appeal judgment) at [100].

There is a narrow technical set of issues in *Smith*, to do with the odd variance in the Fatal Accidents Act 1976, as amended. A draft Bill was prepared by the Government in 2009 to deal with the matter, and then abandoned. But there is a wider societal perspective, in how the courts and Parliament can grapple with the increasing reality of cohabiting couples who do not wish, for whatever reason, to be married. The figures given by Edis J, and echoed in the Court of Appeal, are stark: the designation of "cohabiting couples family" continues to be the fastest growing family type in the UK, now well in excess of three million.[8] Across a range of legal issues what can often be a perfunctory registry office ceremony can be a critical threshold to judicial protection, while the absence of a marriage certificate can be catastrophic.

Jakki Smith, the claimant, most certainly suffered an injustice with this inability to claim bereavement damages. While the then claim of £11,800 (now £12,980) was not perhaps the most important factor when her partner of 16 years died, following hospital negligence on an infection after an operation, this struck her as hurtful and unfair.[9]

The dissonance in the Fatal Accidents Act, between the married individual and the cohabitee, has long been an unhappy feature of the law of damages. The Law Commission in 1999 suggested an overhaul of the law of damages on wrongful death, indicating a wider range of people, including same-sex partners, who should be able to make a claim. In particular, they recommended scrapping the list of dependants who could claim under the Fatal Accidents Act 1976, proposing instead any individual who is "wholly or partly maintained by the deceased immediately before the death".[10] While Lord Campbell's original 1846 Act addressed the scandalous issue of dependants receiving nothing on death, particularly with the upsurge of railway accidents in that Victorian era, the time has surely now come for a comprehensive statute based on modern notions of what is meant by family life. Even the "two years + cohabite" designation seems redolent of Poor Law issues, where it originated, and it is indeed highly arguable that modern tort law should now recognise the interests of, for example, a fiancée when negligence destroys future hopes and prospects. As the claimant noted in a subsequent newspaper interview: "There's no longer a taboo around being unmarried. Attitudes have changed, society has moved on and the law needs to be changed to reflect that."[11]

The Court of Appeal in *Smith* delves boldly into an interpretation of this legislation, needed to give effect to the Human Rights Act 1998. While political opinions on this highly contentious piece of legislation, giving effect to the Convention, are many and various, the Court of Appeal charts some new ground. The Master of the Rolls sets out his thinking in a clear manner and acknowledges that Edis J "handed down a careful, detailed and extensive judgment" when he unhappily dismissed the claim.[12]

The concepts of "analogous to widowhood" and the "ambit test" are necessarily explored again in detail. However, in examining the statement by Lord Bingham in *Clift* in which he attempted again to "distil the essence of the relevant principles",[13] the Master of the Rolls regards the earlier usage of language as "problematic in its reference to 'the core of … a right' and to infringement".[14] Counsel for Ms Smith, Vikram Sachdeva QC, advances the alternative perspective of a "core value", also language used by Lord Bingham, and that is a adopted by the Court of Appeal.[15] Serious attention is also given to the recent Court of Appeal decision in *Steinfield v Secretary of State for Education*,[16] on whether the bar on opposite-sex couples entering civil partnerships is compatible with Convention rights. It is noted that Edis J did not

[8] *Smith v Lancashire Teaching Hospitals NHS Trust* [2016] All E.R. (D.) 33 at [29] per Edis J; *Smith v Lancashire Teaching Hospitals NHS Trust* [2017] EWCA Civ 1916 at [93].
[9] "'Widow' wins legal battle over payout", *The Times*, 29 November 2017.
[10] *Claims for Wrongful Death* Law Commission No.263 (1999).
[11] "Unmarried woman wins legal battle over bereavement damages", *The Guardian*, 28 November 2017.
[12] *Smith v Lancashire Teaching Hospitals NHS Trust* [2017] EWCA Civ 1916 at [14].
[13] *R. (on the application of Clift) v Secretary of State for the Home Department* [2006] UKHL 54 at [13].
[14] *Smith v Lancashire Teaching Hospitals NHS Trust* [2017] EWCA Civ 1916 at [45].
[15] *Smith v Lancashire Teaching Hospitals NHS Trust* [2017] EWCA Civ 1916 at [46].
[16] *Steinfeld v Secretary of State for Education* [2017] EWCA Civ 81.

"have the benefit of seeing" the judgments in that case.[17] The attempt by counsel instructed by the Government Legal Department to minimise *Steinfield* is not accepted, and together these cases must form a powerful set of arguments if matters go further on this very significant "declaration of incompatibility" in *Smith*.

Edis J concluded that "The current law is in need of reform" but that "this does not mean, however, that I have any power to bring about that reform".[18] The Court of Appeal have now authoritatively concluded that Parliament must deal with this issue.

Practice points

- This case explored the clear anomaly that bereavement damages under the Fatal Accidents Act 1976 would not appear to have given rise to a claim by a "cohabite", in contrast to the dependency claim under that Act which would be applicable to a "2 year + cohabite".
- The campaign by the claimant and her legal team in *Smith* has led to a successful declaration, with the prospect of legislative change on the narrow point of the Fatal Accidents Act 1976, but further opening a debate on how British society can adapt to changes in family structures.

Dr Julian Fulbrook

XX v Whittington Hospital NHS Trust

(QBD; Sir Robert Nelson; 18 September 2017; [2017] EWHC 2318 (QB))

Damages—clinical negligence—cancer—pain and suffering—cost of surrogacy—commercial arrangements—public policy

Clinical negligence; Fertility; Measure of damages; Public policy; Surrogacy

When the claimant was 29 years of age she was diagnosed with invasive stage IIB cervical cancer. The diagnosis was late. The delay in the diagnosis caused the claimant anxiety and stress, knowing that she was experiencing considerable pain and discomfort and unusual and troubling symptoms which were discounted whenever she attended hospital. When the correct diagnosis was made she experienced shock and anger, which in part she directed against herself, feeling that she should have been firmer with the hospital staff. Although this was an understandable response, as she recognised herself, she was not in fact in any sense to blame.

She endured surgery and chemo-radiotherapy. She suffered a complete loss of fertility. She had no children and wished to have a family of her own. She underwent an egg harvest which produced 12 eggs which were cryopreserved. She was left with bladder and bowel injuries which caused urinary and bowel urgency and incontinence. She also suffered with impairment of sexual function, premature menopause, anxiety and depression. The Trust admitted liability.

The court was required to determine the quantum of damages. The claimant wished to enter into a commercial surrogacy arrangement in California as such agreements were illegal in the UK and sought damages for the expense of four pregnancies.

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[17] *Smith v Lancashire Teaching Hospitals NHS Trust* [2017] EWCA Civ 1916 at [58].
[18] *Smith v Lancashire Teaching Hospitals NHS Trust* [2017] EWCA Civ 1916 at [112].

The defendant submitted that the court was bound to reject the claim for surrogacy expenses in California, following *Briody v St Helens and Knowsley AHA*,[1] as such an arrangement was contrary to public policy. The claimant argued that public policy considerations had moved on since 2001.

Sir Robert Nelson agreed with the defendant that the claim for Californian surrogacy expenses had to fail. He held that the court was bound by *Briody*.[2] Commercial surrogacy arrangements were still illegal in the UK and thus contrary to public policy.

The situation in relation to a claim for surrogacy in the UK was different. The use of a mother's own eggs had to be contrasted with a claim based on the use of donor eggs. Any claim in respect of donor eggs would have been rejected as not restorative of her loss. The claim for surrogacy in the UK using the claimant's own eggs was limited to the cost of surrogacy for two children as the court was satisfied that she would achieve two live births. £37,000 was granted for each of the surrogacies.

Turning to pain, suffering and loss of amenity, the court considered Chs 6(F), 6(I)(c) and 6(J)(c) of the Judicial College Guidelines. The claimant's case was from the upper middle towards the upper end. Under this head a global award of £160,000 was made.

As there was no proper evidential basis for finding that her expectation of life was reduced no award was made under this head of claim. The judge also held that this was not an appropriate case for the exercise of the court's discretion to award provisional damages regarding psychological injury. On the evidence, any deterioration in the claimant's psychological condition was likely to be temporary and treated successfully in about a year. That meant it could not be properly regarded as "serious" under the test for provisional damages. However, an award was made in respect of the risk of the claimant developing radiation enteritis. Further sums were awarded for future loss of earnings and future cost of treatments and medication.

The total award was £580,618.

Comment

Despite the tragic circumstances of the case, the claim in respect of the cost of commercial surrogacy was never likely to succeed. The judge was plainly bound by the decision of the Court of Appeal in *Briody*. Even if there had been shifts in social attitudes regarding commercial surrogacy arrangements in the intervening years, which is unclear at best, the fact of the matter is that the entering into such arrangements remains unlawful to the present day. And a question would still arise as to the circumstances in which High Court judges can refuse to follow decisions of the Court of Appeal.

It is important to note that the claim in respect of the commercial surrogacy costs was rejected on the basis of the illegality doctrine, rather than on the basis of some other rule, although the judge did not speak in exactly those terms. Given the turmoil in the law of illegality that has occurred over the last few years, it is somewhat surprising that consideration was not given in *XX* to the recent Supreme Court jurisprudence on the subject, which jurisprudence culminated in the landmark decision in *Patel v Mirza*.[3] Arguably, the judge should have been called on to decide whether the cost of commercial surrogacy was compensable in light of the test for illegality that was articulated in *Patel*. Instead, the judge held without more ado that the cost was not compensable because commercial surrogacy is illegal in the UK.

The test governing the illegality doctrine that was enunciated in *Patel* requires the court, if it is satisfied that the claim is tainted by unlawfulness, to weigh all of the competing considerations of public policy and then reach a determination as to the just and fair outcome. The absence of any mention of *Patel* in *XX* arguably suggests that *Patel*, which concerned an action in unjust enrichment, does not in fact apply to tort law. In at least one case, it has been held that *Patel* did not displaced prior authorities in the law of

[1] *Briody v St Helens and Knowsley AHA* [2001] EWCA Civ 1010; [2002] Q.B. 856.
[2] *Briody v St Helens and Knowsley AHA* [2001] EWCA Civ 1010; [2002] Q.B. 856 followed.
[3] *Patel v Mirza* [2016] UKSC 42; [2017] A.C. 467.

torts regarding the illegality doctrine.[4] Implicitly, *XX* lends support to that view. Conversely, there are several decisions in which the *Patel* test has been applied in claims in tort albeit without, it seems, the court being specifically asked to decide whether that test extends to tort.[5] Critics of the decision in *Patel* will contend that this is precisely the uncertainty that they warned it would generate.

One contention that could have been advanced by the claimant in *XX*, but which does not appear to have been pursued, is that the claim was not tainted by illegality at all because what the claimant was planning on doing by going to California and entering into a commercial surrogacy arrangement was lawful in that jurisdiction. In theory, the claimant could have proceeded without committing an offence and it might consequently have been argued that her claim for the commercial surrogacy costs was wholly unaffected by any illegality.

One possible response to this analysis is that the claimant's claim was nonetheless tainted by illegality because the court was being invited to support, by way of an award of damages, conduct that English law prohibits. Even though the claimant had not engaged nor intended to engage in any illegal course of action, the cause of action itself was contaminated by illegality. There is limited authority as to the way in which this issue, had it arisen, should have been determined, with the more common scenario being one in which the claimant seeks damages in respect of the cost of an activity that is lawful in the UK but illegal where the claimant intends to carry it out.

Practice points

- Until such time as commercial surrogacy is legalised in the UK, if that happens, claims in respect of the cost of commercial surrogacy arrangements will fail.
- Conversely, costs that are incurred in connection with non-commercial surrogacy arrangements may be compensable.
- However, costs that are associated with non-commercial surrogacy will, according to *XX* fail, if donor eggs need to be used. No damages will be awarded in respect of the chance that donor eggs might need to be used either.

Dr James Goudkamp

Farrell v Whitty

(CJEU (Grand Chamber); 10 October 2017; C-413/15)

Personal injury—damages—indemnity—road traffic accidents—motor vehicles—use—passengers—compulsory insurance—unidentified or uninsured vehicles—approximation of laws—direct effect—emanations of the state: private law body—Directive 84/5/EEC art.1(4)—Directive 90/232/EEC art.1—reference for a preliminary ruling

Compensation; Direct effect; EU law; Ireland; Motor insurance; Motor Insurers' Bureau; Personal injury; Road traffic accidents; Uninsured drivers

QUANTUM/DAMAGES

[4] *Henderson v Dorset Healthcare University NHS Foundation Trust* [2016] EWHC 3275 (QB); [2017] 1 W.L.R. 2673. An appeal against this decision is pending.
[5] See, e.g. *Tchenguiz v Grant Thornton UK LLP* [2016] EWHC 3727 (Comm).

In January 1996, Elaine Farrell was injured when the van she was travelling in crashed. She was a passenger in the rear of a van which was not fitted with seats. Alan Whitty was the van driver. There was no dispute in respect of his liability for Farrell's injuries. The problem was that Whitty did not have the means to compensate Farrell for her injuries nor did he have insurance to cover passengers travelling in the rear of his van.

The Second Council Directive 84/5[1] required Member States to set up or authorise a body to provide compensation for damage to property or personal injuries caused by unidentified or uninsured vehicles. In Ireland, that body is the Motor Insurers Bureau of Ireland ("MIBI"). The reason that Whitty was not insured was because Ireland had failed properly to transpose the EU Directive which required that all passengers in motor vehicles should be covered by the insurance of a vehicle's driver. In Irish law, drivers of commercial vehicles not fitted with rear seats did not need at that stage to be insured against their own negligent driving.

If the court found that the MIBI was a branch of the state, an "emanation of the state", it alone would be responsible for compensation to Ms Farrell. Otherwise damages would be the responsibility of the state, notably the Department of the Environment and the Attorney General, because of their failure to transpose the Directive properly.

The issue involves important EU legal principles arising from what is known as the doctrine of the "direct effect" of EU directives in domestic law and which are applicable to "vertical disputes" between the individual and the State, but not disputes between private parties.

The Third Council Directive 90/232[2] extended the obligations of bodies such as the MIBI to compensate all passengers travelling in uninsured vehicles. The MIBI had refused Ms Farrell's request for compensation because it argued that liability for her personal injuries was not a liability in respect of which insurance was required under national law. In 2007, in *Farrell v Whitty*,[3] the ECJ held that Ireland had failed to properly transpose the Third Directive into law. Elaine Farrell was paid her compensation.

The issue still in dispute was whether the State or the MIBI was liable for that payment. The key question was what are the boundaries of "the state" for the purposes of applying the doctrine of vertical direct effect? The Supreme Court (Ireland) took the view that that depended on whether the MIBI was, or was not, an "emanation of Ireland".

To decide whether the MIBI was or was not to be deemed to be an emanation of the State and a body against which the provisions of a directive capable of having direct effect can be relied upon, the Supreme Court (Ireland) decided to stay the proceedings and to refer to the court the following questions for a preliminary ruling:

- Is the test in *Foster*[4] on the question of what is an emanation of a Member State to be read on the basis that the elements of the test are to be applied: (a) conjunctively; or (b) disjunctively?
- To the extent that separate matters referred to in *Foster* may, alternatively, be considered to be factors which should properly be taken into account in reaching an overall assessment, is there a fundamental principle underlying the separate factors identified in that decision which a court should apply in reasoning an assessment as to whether a specified body is an emanation of the State?
- Is it sufficient that a broad measure of responsibility has been transferred to a body by a Member State for the ostensible purpose of meeting obligations under European law for that

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

[2] Directive 90/232 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles [1990] OJ L129/33.

[3] *Farrell v Whitty* (C-356/05) EU:C:2007:229; [2007] E.C.R. I-03067.

[4] As set out in *Foster v British Gas Plc* (C-188/89) EU:C:1990:313 at [20].

> body to be an emanation of the Member State or is it necessary, in addition, that such a body additionally have: (a) special powers; or (b) operate under direct control or supervision of the Member State?

The court ruled that the TFEU art.288 must be interpreted as meaning that it does not, in itself, preclude the possibility that provisions of a directive that are capable of having direct effect may be relied on against a body that does not display all the characteristics listed at [20] of the judgment of 12 July 1990, *Foster*, read together with those mentioned at [18] of that judgment.

Provisions of a directive that are capable of having direct effect may be relied on against a private law body on which a Member State has conferred a task in the public interest, such as that inherent in the obligation imposed on the Member States by Second Council Directive 84/5 art.1(4) on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, as amended by the Third Council Directive 90/232, and which, for that purpose, possesses, by statute, special powers, such as the power to oblige insurers carrying on motor vehicle insurance in the territory of the Member State concerned to be members of it and to fund it.

The CJEU having provided its clarification, the substantive matter was returned to the Irish courts for determination.

Comment

Since 2007, as a consequence of the case of *Byrne v Motor Insurers' Bureau*,[5] the understood position had been that the Motor Insurers Bureau ("MIB") was a private and not a state body. That distinction is important for victims of uninsured drivers. If it was, and is, a state body then such a person would be able to bring a claim against the MIB where the European Directives on motor insurance law had been inadequately implemented by UK law.

Member States of the EU are required by their membership to implement EU Directives into their national law. Failing to do so properly, or in a timely fashion, puts them in breach of that obligation. From the perspective of an individual, they will ordinarily enforce their rights by use of the national law provisions. If the Member State has failed to meet their obligation in relation to implementation then they may rely on the Directive as against the Member State or any body that is an "emanation of the state". The simple logic is that the state should not be allowed to rely on its own failures to implement to deny the individual their rights.

As against a private body, the situation is markedly different: the Directive cannot be relied upon. In those circumstances, an individual who loses against the private body has a potential claim against the Member State under the principles in the *Francovich*[6] case for failure to implement the Directive.

The decision that the Irish equivalent of the MIB is an "emanation of the state" will also be of importance in relation to the MIB in this jurisdiction. This will mean, if our courts apply this updated definition to our MIB, that the individual should be able to rely on the Directive directly against the MIB.

This case moves matters forward in relation to how a party identifies whether a body is an "emanation of the state". The three criteria set out in *Foster*[7] of public service, control by the state and special powers need not all be present.[8] On that basis, it is more likely that the MIB in this jurisdiction will be an "emanation of the state".

Such cases where that matters may be relatively rare, but the right will be important. A claimant whose case falls outside the MIB agreement, but believes that they are within the wording of the relevant motor insurance directive will benefit from the ability to argue that point directly against the MIB.

[5] *Byrne v Motor Insurers' Bureau* [2007] EWHC 1268 (QB).
[6] *Francovich v Italy* (C-6/90) EU:C:1991:428.
[7] *Foster v British Gas Plc* (C-188/89) EU:C:1990:313.
[8] *Farrell* at [18].

The final point is one of timing, that practitioners should consider with their clients in such cases. If the UK leaves the EU then this right will fall away at either the time of exit or at such a date set in any transitional agreement.

Practice points

- The criteria for identifying an "emanation of the state" has moved on and will be relevant in all cases where a practitioner seeks to rely directly on the terms of an inadequately implemented Directive.
- It is likely that the MIB would now be an "emanation of the state" but the number of cases in which this will be relevant is likely to be relatively low in number.
- Practitioners should in all such cases consider and advise carefully about timing due to current stated intention of the UK to leave the EU.

Brett Dixon

Roadpeace[1] v Secretary of State for Transport[2]

(QBD (Admin); Ouseley J; 7 November 2017; [2017] EWHC 2725 (Admin))[3]

Road traffic—indemnity—compulsory motor insurance—EU law—uninsured drivers—untraced drivers—Motor Insurers' Bureau—Directive 2009/103 art.1, art.3, art.5, art.7, art.9, art.10, art.13, art.18, art.2

Compulsory insurance; EU law; Motor insurance; Uninsured drivers; Untraced drivers

RoadPeace is a national charity, providing support for road crash victims and seeking to improve road safety. In these proceedings, it challenged various provisions of domestic law, which govern compulsory insurance for motor vehicles and make provision for the payment of compensation in respect of injury and damage caused by uninsured or unidentified drivers. It did so on the grounds that they contravened various provisions of EU law, or did not comply with it sufficiently to give it lawful effect.

Under Directive 2009/103[4] and its predecessors, Member States were obliged to ensure that civil liabilities arising from the use of vehicles were covered by insurance. They were also obliged to ensure that the victims of accidents involving unidentified vehicles could also be compensated. The UK met its obligations under those Directives through the Road Traffic Act 1988 and the Motor Insurers' Bureau. By virtue of s.151,[5] victims of road traffic accidents who had obtained judgment against an insured could require the insurer to pay the sum to them directly, whether or not the insurer would be entitled to avoid the policy.[6]

Under s.143,[7] it was an offence for a person to use a motor vehicle on the road or other public place without a valid insurance policy. However, in *Vnuk v Zavarovalnica Triglav dd*,[8] the ECJ held that the

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[1] Claimant.
[2] Defendant.
[3] Motor Insurer's Bureau (Interested Party).
[4] Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability [2009] OJ L263/11.
[5] Duty of insurers or persons giving security to satisfy judgment against persons insured or secured against third-party risks.
[6] Save for a number of very limited exceptions in s.151(8).
[7] Users of motor vehicles to be insured or secured against third-party risks.
[8] *Vnuk v Zavarovalnica Triglav dd* (C-162/13) EU:C:2014:2146.

protection under art.3[9] for liabilities from "the use of vehicles" extended to the use of a tractor in a farm yard, and it should therefore have been covered by compulsory insurance.

The court was required to determine:

- whether ss.143, 145 and 151 were compatible with the Directive given that they allowed insurance policies to limit insurance, for example to "social, domestic or pleasure use", or exclude cover for "deliberate damage" or "road rage";
- whether the European Communities (Rights against Insurers) Regulations 2002[10] allowed the insurer to raise against the victim any breaches of condition or warranty perpetuated by the policyholder, and if so, whether that qualified the absolute protection required by the Directive;
- whether UK law was compatible with the decision in *Vnuk*, given that s.185[11] only required compulsory insurance for motor vehicles "intended or adapted for use on roads"; and
- whether the meaning of "accident" in reg.2(1)[12] breached the Directive because it was confined to accidents "on a road or other public place in the United Kingdom".

Ouseley J held that there was no incompatibility between a restriction on the scope of the use covered in an insurance contract, including "road rage" and "deliberate damage", and the requirements of the Directive.[13] The judge said that it would be remarkable if, without spelling it out in so many words, the ECJ had decided as far back as *Criminal Proceedings against Bernaldez*,[14] that any use which could be made of a motor vehicle required compulsory insurance. He continued:

> "The structure of the Directive protects third parties where the use is not covered by the terms of the compulsory cover. It would be a more expensive process to obtain insurance, yet quite unnecessary for the achievement of the Directive's purposes, with attendant needless criminalisation; indeed it could create a perverse incentive to avoid insurance at all."[15]

The judge then turned to compatibility of reg.3 with the Directive. Regulation 3 entitles a third party victim of an accident to bring proceedings directly against the insurer which issued the insurance policy relating to the insured vehicle. That insurer is "directly liable to the [victim] to the extent that he is liable to the insured person". The issue was whether that permitted the insurer to raise against the victim any breaches of condition or warranty perpetuated by the policyholder, and if so, whether it was a breach of art.3(1).

Ouseley J recognised that the provisions did not create any conflict with the Directive, unless the defences which could be raised by the insurer in direct proceedings against it were more extensive than those which it would be entitled to raise pursuant to the insurance contract, so as to avoid cover. He held that the provisions did not have that effect. He concluded that it would be a strange result if exclusions or grounds for avoiding the contract which could not be raised as against the third party in proceedings against the insured, could nonetheless be raised in direct proceedings against the insurer. The two forms of claim were intended to proceed on the same footing.

The Secretary of State accepted that *Vnuk* widened the scope of the compulsory insurance obligation, and that amendments to legislation and to the MIB agreements were required. However, the judge held that to set aside any part of the domestic legislation would cause chaos. Nor was the court prepared to

[9] "Each Member State shall, subject to Article 5, take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance …"
[10] European Communities (Rights against Insurers) Regulations 2002 (SI 2002/3061).
[11] Meaning of "motor vehicle" and other expressions relating to vehicles.
[12] Interpretation.
[13] *Bristol Alliance Ltd Partnership v Williams* [2012] EWCA Civ 1267; *Sahin v Havard* [2016] EWCA Civ 1202 followed.
[14] *Criminal Proceedings Against Bernaldez* (C-129/94) EU:C:1996:143.
[15] *Criminal Proceedings Against Bernaldez* (C-129/94) EU:C:1996:143 considered.

read words into the legislation to refer to the Directive. He held that it would go against the principles enunciated in *Vodafone 2 v Revenue and Customs Commissioners*.[16]

The scope of the judgment in *Vnuk* was unclear to the court. He noted that a consultation had taken place and the decision-making process was underway. It was also relevant that the European Commission was considering legislative amendment of the Directive. A recognised remedy was available in the form of *Francovich* damages to those who had a claim which a proper implementation of the Directive would have met.[17] He held that an appropriate form of declaration should therefore be made, and the court confirmed that it would hear further submissions as to whether a timetable should be made for legislative amendment.

The Secretary of state also accepted that the limitation of the definition of "accident" breached the Directive, for reasons additional to *Vnuk*. The judge ruled that a declaration should also be made on that issue. Judgment was entered for claimant in part.

Comment

In *R. (on the application of Glencore Energy UK Ltd) v The Commissioners for Her Majesty's Revenue and Customs*[18], Lord Justice Sales described Judicial Review in the High Court as "ordinarily a remedy of last resort". The percentages of applications which have permission granted and which make it to a final hearing are a useful guide to the chances of success when a judicial review is being contemplated. The odds for a successful outcome are stacked against the applicant: Ruth Dixon's analysis, *Outcomes of Non-IA Judicial Review Cases*,[19] indicates that only around a quarter of the ~2,500 non immigration and asylum ("IA") applications received each year are granted permission to proceed to the next stage and only about a half of the applications granted permission actually make it to a final hearing. Of those, around 40% are "allowed" (i.e. found in favour of the applicant). That's around 125 reviews "allowed" at a substantive hearing out of the original 2,500 applications which are issued each year.

It is also vital to consider the possible relief available: judicial review is a discretionary remedy and that discretion applies not only to whether it is appropriate to grant relief, but the form in which it may be granted.

It is worth bearing these factors in mind when looking at the *RoadPeace* judgment because it was a mixed decision; some points were successful, others were not. The applicant put a number of concerns before the Court, all of which arose from agreements between the Motor Insurers Bureau, MIB, (the Interested Party) and the Secretary of State for Transport, SST, (the defendant). There were also a number of other issues raised in the claim form, about the compatibility of domestic law and of the arrangements between the MIB and SST with EU law, which were not pursued.

One of the issues pursued which was successful was the question of compatibility of UK statute law with Directive 2009/103/EC (the Sixth Directive) as it relates to compulsory insurance and the use of motor vehicles following the CJEU decision in *Vnuk*.

The CJEU handed down the *Vnuk* judgment in September 2014 and the DfT and/or MIB has not amended either the relevant legislation or the MIB agreements since then. There were several remedies available to the applicant which could have been applied by the court. In this instance, the claimant made a number of suggestions as to how the court might act:

[16] *Vodafone 2 v Revenue and Customs Commissioners* [2009] EWCA Civ 446, *Vodafone* followed.
[17] *Vnuk v Zavarovalnica Triglav dd* (C-162/13) EU:C:2014:2146 applied.
[18] [2017] EWCA Civ 1716.
[19] *Outcomes of Non-IA Judicial Review Cases*, Ruth Dixon: *https://mygardenpond.wordpress.com/2015/01/29/outcomes-of-non-ia-judicial-review-cases/*. Ruth Dixon is a researcher at the Blavatnik School of Government and an Associate Member of the Department of Politics and International Relations at the University of Oxford.

a) *Marleasing* style amendments to the relevant legislation, inserting wording to impose an obligation to "cover all liabilities required to be covered by the Sixth Directive" (in *Marleasing* the Advocate General found that "the national court must interpret its national legislation in the light of the wording and the purpose of that provision of the directive");[20]
b) a declaration that the national legislation is compatible with the Directive;
c) a mandatory order that steps be taken to put in place policies or guidance to meet the obligation in *Vnuk* or (d) to set aside the legislation.

The Court found that "the *Marleasing* obligation is a stronger obligation than the 'reading down' obligation in relation to the ECHR" and declined to take this route. The Court had been referred to a number of decisions relating to the compatibility of domestic legislation with the ECHR, but did not find them of assistance. Furthermore, Ouseley J found that such an amendment could not be made "without the courts making decisions and assessing practical repercussions which are very much for the defendant" and "the scope of the judgment in *Vnuk* is unclear" even now. The court also found that as the European Commission is contemplating legislative amendment following *Vnuk*, it may well affect whether legislative change is actually required, although it may seem to be moving very slowly towards that at present.

As for the option of setting aside the legislation, Ouseley J dismissed this, commenting that it he could see no form in which any order could "achieve anything other than chaos".

Never the less, the defendant is unable to "hide behind the agreements and the problem of their amendment" to avoid their legal obligations. Ouseley J was satisfied that a declaration of incompatibility should be granted and asked for further submissions on whether more was needed (such as "some form of timetable for legislative amendment") as he took the view that "a court should not simply leave an issue of legislative incompatibility with Community law to a timetable wholly within the control of the defendant".

A note on "academic" arguments. The House of Lords in *R. v Secretary of State for the Home Department ex parte Wynne*[21] made it clear that "it is well established that this House does not decide hypothetical questions" although of course the Administrative Court will do so, usually as *obiter dicta*. There are exceptions, as the House of Lords subsequently made clear in *R v Secretary of State for the Home Department ex parte Fathi Saleh Salem*:[22] where there is an issue involving a public authority as to a question of public law, their Lordships have a discretion to hear the appeal, even when there is no longer a live issue pending which directly affects the rights and obligations of the parties. This is particularly the case where a large number of similar claims exist.

This was not the case in respect of two issues under consideration in *RoadPeace*. The applicant raised the issue of the exclusions contained in both the Uninsured Driver's Agreement of July 2015 and the 2003 Untraced Driver's Agreement in respect of death, bodily injury or property damage caused by or in the course of an act of terrorism. These exclusions had subsequently been amended by Supplemental Agreement of 2017 which came into effect on 1 March 2017 and removed by the introduction of the new Untraced Driver's Agreement in January 2017. (In fact, victims of the Westminster Bridge terrorist attack which involved the use of a rental vehicle will be subject to the new agreements, as the attack occurred just 21 days after they came into force.) The applicant submitted that the exclusions were unlawful and that although they had been removed, the exclusions remained in place for claims arising before 1 March 2017.

There was, however, no evidence of any relevant injury or damage being caused which would be within the scope of the pre March 2017 agreements and the Court declined to make a declaration, nor would it, in the circumstances consider whether the MIB is an emanation of the State. This, said the judge, appeared

[20] 61989C0106. Opinion of Mr Advocate General Van Gerven delivered on 12 July 1990. *Marleasing SA v La Comercial Internacional de Alimentacion SA* .
[21] [1993] 1 W.L.R. 115.
[22] [1999] 1 A.C. 450.

to be "wholly academic" within the context of these proceedings. About taking such points, Mr Justice Ouseley commented:

> "certainly, whether the MIB is an emanation of the State may be a lively issue, but is one to be pursued where an actual claim depends on it. No point was taken in relation to the standing of RoadPeace to raise the issues which it has raised. But that does not mean that interesting issues, which probably have no practical application should be pursued by it, especially as such issues can be pursued by affected litigants when they do have practical application."

Practice points

- Ensure the potential remedies are viable. The courts are reluctant to intervene where the Government is contemplating or in the process of conducting a consultation which may remedy the defects of which the applicant complains. In APIL's application for Judicial review of the Lord Chancellor's failure to review the discount rate, Mr Justice X made it plain that the Government's proposed consultation should be allowed to run its course before permission would be granted [citation].
- The court will entertain academic points, particularly where the issue may directly affect the rights and obligations of a large number of similar claims.

Helen Blundell

Southern Rock Insurance Co Ltd v Hafeez

(OHCS; Lady Paton; 10 October 2017; [2017] CSOH 127)

Road traffic accidents—insurance policies—damages—indemnity—avoidance—Road Traffic Act 1988 s.152—deliberate or reckless misrepresentation—standard of proof

LT Addresses; Avoidance; Burden of proof; Insurance policies; Misrepresentation; Motor insurance; Scotland

On 25 January 2016, teenager Hussain Hafeez took his older brother's car keys without his knowledge or permission. He then drove his brother Hadar's car from Calder Street, Govanhill, Glasgow and had an accident. He crashed into three parked cars (a Mercedes, an Audi, and a Ferrari). He left the scene of the accident and returned on foot to Calder Street to get help.

His brother, the defender Hadar Hafeez, took a taxi to the scene of the accident. Police officers and vehicle recovery personnel were present. Hadar explained that the car belonged to him and that his brother had taken it without his authority. The police accompanied Hadar home where they interviewed and charged Hussain. Ultimately Hussain pleaded guilty to four charges: taking and driving without consent, driving without insurance, careless driving, and leaving the scene of an accident.

Southern Rock sought to avoid Hadar's insurance policy. The terms of the policy were that he was the only person entitled to drive the car. Southern Rock's ground was that Hadar had misrepresented his home address and where the vehicle was kept in order to influence their judgment in determining whether to agree to insure him and the appropriate level of premium.

The insurance premium based on Dinard Drive, Giffnock, the address given by Hadar, was much lower than it would have been at Calder Street, Govanhill to which the vehicle was registered. Southern Rock alleged that Hadar had deliberately made that representation knowing it was false, alternatively, his misrepresentation was made recklessly. Relying on Road Traffic Act 1988 s.152(2),[1] the insurer claimed that entitled it to avoid the policy and not to indemnify him for any claim arising as a result of the accident.[2]

Evidence was led from the defender's family members that at the time the accident occurred, he had been living at both addresses. He admitted to living at the address given to the insurer two months after the accident.

The judge found that Hadar Hafeez had interrogated computer websites to carry out a comparative search amongst various insurance companies. A consequence of the online processing of questions and answers was that the court had no clear evidence about the precise wording of the contemporaneous questions which appeared on either the comparative website or the chosen insurers website or that they precisely matched each other. There was no evidence or submission that Hadar had experimented with the two addresses to discover which produced the lower premium, and there might have been alterations in the wording on the website following the relevant event.

The judge held that in such circumstances, deliberate or reckless misrepresentation by Hadar regarding his address could only be established if it could be proved that at the time of seeking the insurance, Hadar could not, on any view, claim that the address given by him was his address. The evidence, on a balance of probabilities, at the relevant time was that he lived and slept at both addresses given by him. This meant that the information that his address was that given on the insurance policy could not be categorised as a deliberate or reckless misrepresentation. The insurer had failed to satisfy the onus of proof upon it.

Comment

Although this is, of course, a personal injury journal what is interesting about this decision is that it is one of the few cases that I am aware of where the courts have considered the Consumer Insurance (Disclosure and Representations) Act 2012 which came into force on 6 April 2013. This act abolished the Marine Insurance Act 1906 ss.18–20 and the obligations on consumers to volunteer information as was required when the duty of utmost good faith applied.

In the context of personal injury claims this is relevant because there may be situations in a personal injury claim where an insurer may seek either a declaration that their policy is void or to down grade their status from "contract insurer" or s.151 insurer to art.75 status so as to shift the focus onto another potential tortfeasor. Therefore, I think it worthwhile that PI practitioners have an awareness of the Consumer Insurance Act.

The Act applies to individuals who enter into a contract of insurance for purposes unrelated to the "individual's trade, business or profession". In other words, it applies to personal as opposed to business related insurance. The Act says that the consumer's duty is to "take reasonable care not to make a misrepresentation"—replacing the previous duty to disclose all necessary information.

[1] Road Traffic Act 1988 s.152(2) Subject to subsection (3) below, no sum is payable by an insurer under section 151 of this Act if, in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration—(a) that, apart from any provision contained in the policy or security, he is entitled to avoid [the policy under either of the relevant insurance enactments, or the security] on the ground that it was obtained—(i) by the non-disclosure of a material fact, or (ii) by a representation of fact which was false in some material particular, or (b) if he has avoided the policy [under either of the relevant insurance enactments, or the security] on that ground, that he was entitled so to do apart from any provision contained in [the policy or security] and, for the purposes of this section, "*material*" means of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk and, if so, at what premium and on what conditions.

[2] Road Traffic Act 1988 s.152(3) An insurer who has obtained such a declaration as is mentioned in subsection (2) above in an action does not by reason of that become entitled to the benefit of that subsection as respects any judgment obtained in proceedings commenced before the commencement of that action unless before, or within seven days after, the commencement of that action he has given notice of it to the person who is the plaintiff (or in Scotland pursuer) in those proceedings specifying the relevant insurance enactment or, in the case of a security, the non-disclosure or false representation on which he proposes to rely.

When deciding whether a consumer has taken "reasonable care", the Act requires the courts to consider:

- the type of policy taken out;
- any documentation issued by the insurer;
- how clear the questions asked by the insurer were; and
- whether an agent was involved; e.g. an insurance broker.

"Reasonable care" is determined in light of all the relevant circumstances and as such is an objective test based on what the "reasonable consumer" would disclose. In practice, it will be for the insurer to show that the consumer did not exercise reasonable care.

The Act says that if it is found that the consumer "misrepresented" something and this had an effect on the policy then the way an insurer can respond depends on whether the misrepresentation was deliberate or just careless. If it can be proved that the misrepresentation was deliberate or reckless the insurer can avoid the contract and refuse all claims. Dishonest misrepresentation will always be regarded as showing a lack of reasonable care.

This could arise in circumstances where parents have deliberately insured a car belonging to a young driver in their names so as to obtain a reduced premium. Where the misrepresentation is careless, much will depend on what the insurer would have done had there been no misrepresentation. If the insurer can prove that they would not have entered into the contract on any terms they may avoid the contract but should return the premium paid. If the insurer would have entered into the contract on different terms or at a higher premium, then that is likely to be the remedy applied.

So in *Southern Rock Insurance Ltd v Hafeez,* the court had to consider whether Hafeez had misrepresented his address and, if so, whether that misrepresentation had been reckless or careless. One of the things that the Act takes into account is how clear and how specific the questions asked by the insurer are. In 2012, the ABI issued some guidance as to how certain questions should be framed. Unfortunately, this advice did not extend to the question of what someone's address was. But someone's address (e.g. a place to where they want things sent) may be subtly different to where they live. That is the issue here. When Hafeez took out the insurance he used his uncle's address in Dinard Drive, Giffnock. Although at some point it was accepted that he had lived there, at the time of the claim he was in fact living at a different address in Calder Street, Govanhill which would have attracted a considerably higher premium. Hafeez obtained the tenancy of Calder Street in his name so that his younger brother and sister could also move to Glasgow. His car was registered to the Calder Street address and this was the address held on his bank account, credit cards and so forth.

However, Hafeez did have evidence from his uncle and other family members to the effect that in March 2015, when the policy was taken out, he was living with uncle at Dinard Drive and the court had no reason to doubt that evidence. Further, Hafeez had used well known insurance "aggregator" websites to obtain quotes; having selected a quote, this then took him to a different website and it was only after the accident did he become aware of Southern Rock's involvement. In turn, Southern Rock could not evidence the exact questions asked so the court had no idea as to how clear and how specific the questions asked at proposal were.

It may seem odd that Southern Rock were unable to avoid the policy given that Calder Street was rented in Hafeez's name and it was the address used on other official documentation. However, Southern Rock could not demonstrate that any misrepresentation by Hafeez had been reckless. Indeed, Hafeez had a plausible explanation as to why the Dinard Drive address had been given at proposal, supported by cogent witness evidence. In the circumstances of this case, the court reached the right decision.

In contrast it is worth considering *Tesco Underwriting Ltd v Achunche*[3] where the insurer also sought a declaration to avoid an insurance policy under the Road Traffic Act s.152(2). The defendant policyholder

[3] *Tesco Underwriting Ltd v Achunche* , unreported, 7 July 2016, QBD.

had applied for insurance and made a positive statement that he did not have any motoring convictions when in fact he had been convicted in previous five years for driving without insurance. Tesco Underwriting stated that it would have charged a higher premium had it known of the policyholder's conviction and brought a claim against the policyholder. As *Achunche* had shown little interest in the proceedings and did not attend or give evidence at the hearing, judgment was given for Tesco. While careless misrepresentation would not be sufficient to enable the insurer to avoid its policy, in the absence of the evidence from the policyholder, the court was satisfied that failure to disclose the conviction was a deliberate or reckless omission.

Although this is a Scottish decision from the equivalent of the high court, it can be referred to in English and Wales courts, especially as it relates to interpretation of statute.

Practice points

- Personal Injury practitioners need to be alive to the possibility of an insurer seeking a s.152 declaration. It is always worth asking for positive confirmation that an indemnity is being granted.
- Where an insurer seeks such a declaration on the grounds of non-disclosure and misrepresentation, it is by no means certain that one will be granted.
- The Consumer Insurance (Disclosure and Representation) Act 2012 sets a high bar over which the insurer has to jump before obtaining such a declaration.

David Fisher

Tinsley v Manchester CC

(CA (Civ Div); Etherton LJ, Longmore LJ, Irwin LJ; 1 November 2017; [2017] EWCA Civ 1704)

Personal injury—damages—care costs—double recovery—mental health—detained persons—social welfare—after-care—local authorities' powers and duties

After-care; Care costs; Double recovery; Local authorities' powers and duties; Mental patients; Personal injury

QUANTUM/ DAMAGES

In this case the claimant suffered very serious head injuries in a road traffic accident on 26 May 1998 which left him with an organic personality disorder which in turn led to his being compulsorily detained in hospital under s.3. After being discharged he spent time in a mental health nursing home funded by the relevant authorities under the Mental Health Act 1983 s.117. In the meantime, he brought proceedings against the driver involved in the accident who admitted 90% liability for the accident.

The trial of the quantum of his claim came on before Leveson J (as he then was) and, in a judgment given on 18 February 2005[1] he assessed those damages in a total sum approaching £3.5 million, of which £2,890,257 represented future care. In those proceedings, the judge rejected the defendant's submission that the claimant should not be awarded care costs because the defendant was obliged under s.117 to provide for his future care needs.

[1] *Tinsley v Sarkar* [2005] EWHC 192 (QB).

Following that judgment, the claimant left the nursing home funded by the relevant authorities. Since then he had paid the cost of his accommodation and after-care services. The claimant's deputy opined that the claimant could not sustain the cost of funding his existing care arrangements and sought to require the defendant to provide social care as an after-care service under s.117. The defendant's position was that the claimant could continue to fund his own care using the personal injury award and that it was not under any duty to provide after-care services under s.117. Stephen Davies J[2] decided that that refusal was unlawful.

The local authority appealed and argued that on the true construction of s.117, it was not obliged to provide after-care services if the respondent had been awarded damages for future care. Furthermore, to allow such a claim would offend the principle against double recovery.

The Court of Appeal held that construction of s.117 meant that a refusal to pay for after-care services was effectively the same as providing such services but charging for them. The House of Lords in *R. (on the application of Stennett) v Manchester CC*[3] had made it clear that charging persons such as the respondent was impermissible.[4] In addition, if an application was made to a local authority for after-care services in general, the local authority could not take into account, when considering that application, the fact that a claimant had been awarded personal injury damages which were being administered by the Court of Protection.

The court considered that it would be anomalous if such damages had to be disregarded for mentally ill patients who had not been compulsorily admitted to hospital, but had to be taken into account for patients who had been compulsorily admitted.[5]Section 117 imposed the duty to provide after-care services not merely on local authorities but also on clinical commissioning groups. Those groups could not charge for their services or take patients' means into account when deciding what services to provide. It would be odd if local authorities could decide not to make provision for after-care services by reason of any personal injury award, but could so decide in relation to "what is essentially a health-related form of care and treatment".[6]

Unless there was some specific inhibition on deputies appointed by the Court of Protection arising from the risk of double recovery, the court held that there was no reason why the claimant should not claim the benefit to which he might be entitled under s.117. It was not immoral or low principled to claim a benefit to which Parliament had made clear the claimant was entitled. Furthermore, there was no suggestion that the claimant did not genuinely believe, at the time of his personal injury claim, that he would access private care rather than state care.[7]

The courts would seek to avoid double recovery when they assessed damages against a negligent tortfeasor. Accordingly, if it was clear at trial that a claimant would seek to rely on a local authority's provision of after-care services, he would not be able to recover the cost of providing such services from the tortfeasor.[8] However, it did not follow that if a claimant was awarded damages for his after-care, he was thereafter precluded from making an application to the local authority. The local authority had relied on *Peters v East Midlands Strategic Health Authority*[9] to argue that no claim could be made against it unless it was shown that the claimant's funds were about to run out.

In *Peters*, the court's judgment on that point was obiter and it had not considered the position under s.117, but only the position under the National Assistance Act 1948. In the 1948 Act, the words "otherwise available" were of critical importance. Also, undertakings given in that case were not to protect the local

[2] *Tinsley v Manchester CC* [2016] EWHC 2855 (Admin); (2017) 20 C.C.L. Rep. 50.
[3] *R. (on the application of Stennett) v Manchester CC* [2002] UKHL 34; [2002] 2 A.C. 1127.
[4] *R. (on the application of Stennett) v Manchester CC* [2002] UKHL 34; [2002] 2 A.C. 1127 followed.
[5] *Crofton v NHSLA* [2007] EWCA Civ 71; [2007] 1 W.L.R. 923 followed.
[6] *R. (on the application of Stennett) v Manchester CC* [2002] UKHL 34; [2002] 2 A.C. 1127 considered.
[7] *Welwyn Hatfield Council v Secretary of State for Communities and Local Government* [2011] UKSC 15; [2011] 2 A.C. 304 considered.
[8] *Crofton v NHSLA* [2007] EWCA Civ 71; [2007] 1 W.L.R. 923 considered.
[9] *Peters v East Midlands Strategic Health Authority* [2009] EWCA Civ 145; [2010] Q.B. 48.

authority but the tortfeasor.[10] They held that even if it was the law that a s.117 claimant could only claim against a local authority for after-care services once an award for such services against a tortfeasor had been, or was about to be, exhausted, it would be for the Administrative Court to decide.[11]

The appeal was dismissed.

Comment

The Court of Appeal in this case defined the question before them as:

> "whether a person who has been compulsorily detained in a hospital for mental disorder under Section 3 of the Mental Health Act 1983 and has then been released from detention but still requires aftercare services is entitled to require his local authority to provide such services at any time before he has exhausted the sums reflected in the costs of care awarded to him in a Judgment in his favour against a negligent tortfeasor."

The main themes in this case seem to be: (a) construction of s.117 of the Act; (b) the thorny issue of how to deal with "double recovery"; and (c) use of undertakings by a deputy in relation to future care services.

Construction of s.117

Section 117 of the 1983 Act (as currently in force) provides:

> (1) "This Section applies to persons already detained under Section 3 above … and then cease to be detained and (whether or not immediately after so ceasing) leave hospital.
>
> (2) It shall be the duty of the clinical commissioning group … and of the local social services authority to provide or arrange for the provision of, in cooperation with relevant voluntary agencies, aftercare services for any person to whom this Section applies until such time as the clinical commissioning group or … and the local social services authority are satisfied that the person concerned is no longer in need of such services …
>
> (6) in this section 'aftercare services' in relation to a person means services which are both of the following purposes—
>
> (a) Meeting a need arising from or related to the person's mental disorder; and
>
> (b) Reducing the risk of a deterioration of the person's mental condition (and accordingly reducing the risk of the person requiring admission to a hospital again for treatment for mental disorder)."

The National Health Service and Community Care Act 1990 ("1990 Act") s.47 (as currently in force) provides:

> "47 **assessment of needs for community care services**
>
> (1) Subject to sub-section (5) and (6) below where it appears to a local authority that any person to whom they may provide or arrange the provision [of services under s.117 of the Mental Act Health Act 1983 …] may be in need of such services, the authority
>
> (a) shall carry out an assessment of his needs for those services; and
>
> (b) Having regard to the results of that assessment, shall then decide whether his needs call for the provision by them of any such services."

QUANTUM/ DAMAGES

[10] *Peters v East Midlands Strategic Health Authority* [2009] EWCA Civ 145; [2010] Q.B. 48 considered.

[11] *Reeves Re* [2010] W.T.L.R. 509 considered.

Manchester City Council, amongst other things, sought to argue that the fact that money had been paid by the tortfeasor made all the difference as to whether or not Manchester City Council should be required to provide or arrange for the provision of such services.

The Court of Appeal gave short shrift to this argument. They stated that a refusal to pay for such services is effectively the same as providing such services but charging for them ([12]). They also pointed out that the defendant's argument would not cater for a situation where a case settles for a global and apportioned sum "as happens with great frequency" ([13]).

They also stated that it was relevant that s.117 of the 1983 Act imposed the duty to provide aftercare services not merely on local authorities but also on clinical commissioning groups ("CCGs"). It is accepted that CCGs cannot charge for their services or take patients' needs into account when deciding what services to provide and therefore it would not make sense if local authorities could decide not to make provision for aftercare services by reason of any personal injury award but local authorities could decide to do this.

They therefore concluded at [25] of their judgment that unless there was some specific inhibition on deputies appointed by the Court of Protection arising from the risk of double recovery there would be no reason why the claimant should not now claim the benefit to which he may be entitled under s.117 of the 1983 Act.

Double-recovery

The Court of Appeal was clear in re-stating the well-recognised principle that courts will seek to avoid double recovery by a claimant at the time they assess damages against the negligent tortfeasor. Therefore, if a claimant wants to rely upon a local authority's provision of aftercare services he will not be able to recover the costs of providing such aftercare services privately from the tortfeasor if his intention to rely upon public provision is clear at trial.

However, they were clear to point out that it would not follow from this that if a claimant was awarded damages for his aftercare then he would be precluded from making an application to the local authority. Nor were they satisfied with Manchester City Council's argument that the claimant's funds would need to have run out (or about to run out) for aftercare services before such provision should be provided. This is an important clarification and one that gives further guidance (and no doubt comfort) to deputies.

It is of note in this case that there was some concern that the claimant's funds may have been mismanaged by a previous deputy to the one currently appointed at the time of the case. The Court of Appeal considered whether those concerns entitled Manchester City Council to refuse to consider the claimant's application at all. Of no doubt great interest to deputies was their comment that if a claimant were to make an application straight after judgment then the truth of his evidence that he intended to make private arrangements for his aftercare could be called into question and the case against the tortfeasor might have to be reopened. However short of such an extreme case the local authority should not be able to refuse to provide aftercare services.

It is clear therefore that the guidance to courts remains that a claimant will only be able to recover aftercare services on a private basis if his clear evidence at trial is that he will not be seeking to rely on the local authority's provision of those services. If a claimant by way of his deputy were then to immediately make an application for those services post-trial the truth of his evidence could be called into question.

Undertakings

Finally the court went on to consider the case of *Peters v East Midlands Strategic Health Authority*. In this case, the deputy had offered an undertaking to the court in her capacity as deputy for the claimant that she would: (i) notify the Senior Judge of the Court of Protection of the outcome of the proceedings and supply to him copies of the judgment of the administrative court; and (ii) seek from the Court of

Protection: (a) a limit on the authority of the claimant's deputy whereby no application for public funding of the claimant's care under s.21 of 1948 Act could be made without further order, direction or authority from the Court of Protection; and (b) provision for the defendants to be notified of any application to obtain authority to apply for public funding of the claimant's care under s.21 of the 1948 Act and to be given the opportunity to make representations in relation thereto.

The Court of Appeal noted on that in their view the undertakings made in the *Peters* case were not inserted to protect the local authority but the tortfeasor.

The court then went on to express their concerns as to whether it could be right that by requiring the deputies to give undertakings of this kind as that had the effect of transferring the burden of deciding whether a claimant is entitled to claim local authority provision to the Court of Protection. It made the important point that the job of the Court of Protection is to look after the interests of its patients and not to decide substantive rights against third parties. The court went on to say that indeed it could be said that to decide that a local authority is not obliged to provide aftercare services would not be to promote the interests of the patient ([32]).

Finally, the Court of Appeal seemed to be of the view that few claimants who had been awarded the costs of private care would voluntarily seek local authority care whilst the funds for private care still existed.

Practice points

- The Court of Appeal has stated in clear terms in this case that unless there are concerns that a claimant has misrepresented his or her genuine intention to fund care privately, that funds do not need to be exhausted or about to be exhausted before they can apply for state funding. They caveat that with the clear warning shot to claimants that if their application was to be made shortly after trial the veracity of their original evidence would no doubt be called into question. This sends a clear message to local authorities that their s.117 duties cannot be avoided in cases such as these.
- The use of undertakings in such cases was also called into question as risking decisions that should be being made by the Administrative court being shifted onto the Court of Protection. The Court of Appeal re-iterated the Administrative court as the correct forum for such decisions rather than the Court of Protection whose function is wholly different and is not set up to decide substantive rights against third parties.

Kim Harrison

Casson v Spotmix Ltd (In Liquidation)

(CA (Civ Div); Sir Terence Etherton MR, Ryder LJ, Turner J; 1 December 2017; [2017] EWCA Civ 1994)

Personal injury—damages—accidents at work—momentary inadvertence—contributory negligence—Law Reform (Contributory) Negligence Act 1945

Accidents at work; Common practice; Contributory negligence

Lewis Casson's left hand became trapped in a piece of machinery at work. He had been cleaning a vertical metal surface that was near the moving parts of a conveyor belt when his glove got caught in some rollers.

The employers were in breach of duty in failing to provide adequate training. The claimant was an inexperienced employee whose training and instruction were silent on how to clean the machinery. When injured he was following the same method as his colleagues. The defendants' case on contributory negligence was directed at the claimant's practice of cleaning the surface immediately below the conveyor.

HH Judge Graham Wood QC[1] expressly acknowledged that the authorities were to the effect that mere momentary inadvertence should not normally be taken into account when considering whether an employee has been contributorily negligent. He concluded, however, that the claimant in this case should still bear some level of responsibility for moving his left hand so close to the machinery that it became trapped. The judge reduced the claimant's damages by 10%. He appealed.

The Court of Appeal held that the natural consequence of the judge's finding on contributory negligence was that, all other things being equal, other employees who cleaned the machine were also acting in a way that fell below the standards of a reasonable man. The conveyor was in continuous operation such that no employee had an opportunity to clean the machine when the rollers were not working.

Against that background, they concluded that the judge had erred in placing such heavy reliance on the fact that the claimant under cross-examination had acknowledged "albeit with the application of hindsight and common sense the risk arising from moving his hand close to the machinery".

The fact that all other employees who cleaned the machine had done so in the same manner was strongly supportive of the conclusion that the extent to which the appellant's conduct could be criticised fell considerably short of that which could properly be categorised as amounting to contributory negligence.

Accordingly, notwithstanding the fact that the judge enjoyed the advantage of hearing evidence during the course of a trial which lasted three days they were satisfied that his finding of contributory negligence was wrong.

The appeal was allowed.

Comment

Contributory negligence is a regular battlefield. It is important to remember that in employer's liability cases, the level of any deduction for contributory negligence in a given case will depend not just on its facts, but more importantly on the basis of the claim. In cases based on negligence alone, there is potential scope for higher reductions than in cases based upon negligence due to a breach of statutory duty including breach of regulations.

As Lord Tucker said in *Staveley Iron & Chemical Co Ltd v Jones*:[2]

> "[I]n Factory Act cases the purpose of imposing the absolute obligation is to protect the workmen against those very acts of inattention which are sometimes relied upon as constituting contributory negligence so that too strict a standard would defeat the object of the statute."

Statutory duty is there to protect workers. If a claimant has been injured because of a breach that should be at the forefront of the judge's mind. In *Reeves v Commissioner of Police of the Metropolis*,[3] Lord Hoffmann pointed out that the question to be determined is the relative responsibility of the two parties, not degrees of carelessness. That question has to take into account the policy behind the rule by which the liability is imposed. Regulations are designed, at least in part, to protect the employee from the consequences of his own negligence.

Referring to what Lord Tucker said in *Staveley* Lord Hoffmann said:

[1] Sitting as a Judge of the High Court.
[2] *Staveley Iron & Chemical Co Ltd v Jones* [1956] A.C. 627.
[3] *Reeves v Commissioner of Police of the Metropolis* [2000] 1 A.C. 360.

> "This citation performs the valuable function of reminding us that what section 1 requires the court to apportion is not merely degrees of carelessness but 'responsibility' and that an assessment of responsibility must take into account the policy of the rule, such as the Factories Acts, by which liability is imposed. A person may be responsible although he has not been careless at all, as in the case of breach of an absolute statutory duty. And he may have been careless without being responsible, as in the case of 'acts of inattention' by workmen."

In other words, "responsibility" for the breach lies with the employer whether the employee has been careless or not, as in the case of breach of an absolute statutory duty. What employers call contributory negligence is often no more than inattention or inadvertence and that does not attract any deduction.

In *Dawes v Aldis*,[4] Eady J reminded us of just how hard it can be for a defendant to obtain a finding that on the balance of probabilities there must have been contributory negligence on the part of a claimant. He concluded that he could not reach a decision on the balance of probabilities, so as to be able to draw the inference that there must have been contributory negligence, saying: "It remains, of course, a strong possibility but I cannot elevate it to a probability." A strong possibility is not enough to give rise to a deduction.

The correct approach was confirmed yet again by Lord Nimmo Smith in *McGowan v W & J R Watson Ltd*[5] when he said:

> "The reason for this is that statutory provisions of this kind are intended to protect employees against *inter alia* accidents caused by inattention or inadvertence. The protection does not extend only to employees who are fully alert. A momentary lapse, such as occurred in the present case, falls short of being described as a lack of reasonable care on the part of the pursuer."

On Lewis Casson's appeal, the defence actually conceded, that once Mr Casson had embarked on cleaning the surface in the immediate vicinity of the moving machinery, the fact that his glove came into contact with the rollers was not, of itself, attributable to negligence on his part. It was accepted by counsel for the third defendant that the judgment below had to be interpreted in that way.

The whole of the defendants' case on the issue of contributory negligence was, directed at the practice of the claimant to clean the vertical surface immediately below the conveyor. This was notwithstanding that the defendants were in breach of duty in failing to provide adequate training for the claimant, the claimant was an inexperienced employee whose training and instruction were entirely silent on the method to be deployed when cleaning the conveyor, and the claimant was doing the job in exactly the same way as had been adopted by his fellow employees.

In *Summers v Frost*,[6] an allegation of contributory negligence was raised against the plaintiff who was a maintenance fitter. Lord Keith said:[7]

> "There is no question here of disobedience to orders, or of reckless disregard by a workman of his own safety. At most there was a mere error of judgment by the plaintiff as to how the work on which he was engaged could best be carried out, and possibly only a mere momentary inadvertence. I agree with Morris LJ that what the plaintiff did 'fell short of negligent conduct'."

It seems to me there was absolutely no basis for even alleging contributory negligence in this case. To defend this appeal shows either a disregard for or a lack of understanding of the law. I applaud the claimant's representatives for conceding no discount and appealing what was clearly a wrong decision. Too many

[4] *Dawes v Aldis* [2007] EWHC 1831 (QB).
[5] *McGowan v W & J R Watson Ltd* [2006] CSIH 62.
[6] *Summers v Frost* [1955] A.C. 740.
[7] *Summers v Frost* [1955] A.C. 740 at 778.

would have let it go believing that 10% was not worth the fight. Obtaining full compensation for people who are injured through no fault of their own matters.

Practice points

- Contributory negligence must be pleaded and then proved by the defence.
- Momentary inadvertence does not amount to contributory negligence.
- Statutory provisions are intended to protect employees against accidents caused by inattention or inadvertence.
  The Enterprise and Regulatory Reform Act 2013[8] has not reduced employers' health and safety duties[9] and the court must take into account not just degrees of carelessness but also "responsibility".[10]
- An injured worker may have been careless without being responsible.
- Even a strong possibility that there must have been contributory negligence is not enough to give rise to a deduction. A finding that on the balance of probabilities there must have been contributory negligence by a claimant is required.

Nigel Tomkins

QUANTUM/ DAMAGES

[8] Clause 69 was brought into force on 1 October 2013 by the Enterprise and Regulatory Reform Act 2013 (Commencement No.3, Transitional Provisions and Savings) Order 2013 (SI 2013/2227).

[9] See Viscount Younger's statement on behalf of the Government in the House of Lords on 24 April 2013: "… The codified framework of requirements, responsibilities and duties placed on employers to protect their employees from harm are unchanged, and will remain relevant as evidence of the standards expected of employers in future civil claims for negligence."

[10] *Boyle v Kodak* [1969] 1 W.L.R. 661 per Lord Reid: "Employers are bound to know their statutory duty."

Case and Comment: Procedure

Revill (A Protected Party) v Damiani

(QBD; Dingemans J; 27 October 2017; [2017] EWHC 2630 (QB))

Personal injury claims—procedure—protected parties—discrimination—right to fair trial—settlement—compromise agreements—withdrawal before court approval—CPR R.21.10: ECHR arts.6 and 14

Discount rate; Discrimination; Personal injury claims; Protected parties; Right to fair trial; Settlement; Withdrawal

On 6 April 2015, Mr Revill was riding a Suzuki motorcycle with his partner Ms Jarram on the back. Mr Damiani, who was insured by Zurich Insurance Plc, was driving a Renault motor car in the opposite direction. Mr Damiani crossed over into the wrong carriageway, and there was a collision between the motor cycle and the Renault motor car causing injuries to both Mr Revill and Ms Jarram. Mr Damiani was convicted at Leicester Crown Court of causing serious injury by dangerous driving, and he was sentenced to a term of imprisonment.

Mr Revill suffered a very severe traumatic brain injury and lacked capacity to conduct litigation and his own affairs. As a result, Mr Revill became a protected party. Proceedings were issued in May 2016. Liability for the accident was admitted on Mr Damiani's behalf. A separate claim by Ms Jarram for her losses was compromised.

The quantum of Mr Revill's claim needed to be resolved. After some expert evidence had been obtained on both sides, there was a joint settlement meeting on 24 February 2017 which culminated in the making of a memorandum of agreement dated 24 February 2017. At the conclusion of the meeting, those representing Mr Revill and those representing Mr Damiani agreed the terms of a memorandum. This provided for a lump sum payment for all of Mr Revill's losses, including his future losses.

The discount rate for future losses was agreed at the then rate of 2.5%, with the proviso that if the rate was reduced before the court approved the settlement, there would be a re-calculation in accordance with the new rate. Three days after the meeting, the discount rate was reduced, considerably increasing the sum payable by the defendant. Before the court approved the compromise agreement, the defendant withdrew from it. The claimant challenged his right to do so and applied for an approval hearing.

It was common ground that under CPR r.21.10[1] a compromise agreement made with a protected party was not binding until it was approved by the court, and that, unless the Human Rights Act 1998 led to a different result, the defendant was entitled to withdraw from the compromise agreement.

The claimant sought a declaration that the defendant was bound by the compromise agreement because r.21.10 was incompatible with his rights under ECHR art.14[2] read with art.6[3] or Protocol 1 art.1.

The parties agreed that the claimant's status as a "protected party" was an "other status" for the purposes of art.14, and that his claim fell within art.6. They also agreed that there was a difference in treatment between a claimant with protected party status and one without, in that the latter could compromise a

[1] Compromise etc by or on behalf of a child or protected party.

[2] "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

[3] Right to a fair trial.

claim for damages without having to obtain the court's approval. It was common ground that the difference in treatment pursued the legitimate aim of protecting protected party. The issue was therefore whether the r.21.10 requirement for court approval was a proportionate means of achieving that aim.

The parties' agreement that the claim fell within the ambit of art.6 made it unnecessary to determine whether it also fell within Protocol 1 art.1. However, as the point had been argued, the court briefly expressed a conclusion that the claim did not engage Protocol 1 art.1. The question of whether the claimant had made a binding compromise did not affect his enjoyment of his Protocol 1 art.1 rights. His claim for damages was a chose in action that either remained as such, or would be converted into an entitlement to sums due under the settlement. The law neither affected his peaceful enjoyment of his possessions nor discriminated against him in the enjoyment of them. His complaint was that the CPR discriminated against protected party, and that complaint fell to be addressed under art.14 and art.6.

The judge held that the approach taken by r.21.10 to compromises and court approval was a proportionate means of achieving the legitimate aim of protecting protected party from the other parties, from themselves, and from any lack of skill on the part of their legal representatives. There was a different approach in family proceedings, where the words "subject to the approval of the court" did not prevent a binding agreement being made, but merely suspended the carrying out of its terms until it had been approved.[4] The judge pointed out that the rule-making body for the CPR could have decided to apply such an approach to civil proceedings. However, it had not done so, and that decision was well within its discretionary area of judgment.

Factors in favour of the r.21.10 approach were that it was a long-established and well-known rule, and that permitting all parties to withdraw from a settlement before it was approved maintained a fair balance between them. Additionally, the family proceedings approach required parties to obtain the court's permission to withdraw from a settlement agreement, and that could create uncertainty and generate costs. Further, r.21.10 formed part of a series of rules which obliged the court to provide active case management. The powers of active case management permitted the court to ensure that cases involving protected and unprotected parties were managed in a proportionate and efficient manner, thereby securing the good administration of justice and protecting relevant rights.

The conclusion of the judge was that r.21.10 was not incompatible with ECHR art.14 read with art.6, and the defendant was entitled to withdraw from the compromise agreement. The preliminary issue was determined in favour of defendant.

Comment

Introduction

There have been many ripples, in the pool that is civil litigation, caused by the stone, thrown into those waters, of the Lord Chancellor's discount rate announcement on 27 February 2017.

This judgment, a consequence of that event, is a reminder of an important point about the need for prompt approval of compromises, in claims involving children or protected parties, perhaps a portent of issues that may arise in the future when there are changes to the discount rate, also an indication of the potential significance of human rights legislation across a range of issues as well as a good example of active case management by the court intended to further the overriding objective.

[4] *Smallman v Smallman* [1972] Fam. 25 considered.

Approval

The House of Lords judgment in *Dietz v Lennig Chemicals Ltd*[5] created a potential trap where the parties agree a compromise but at least one of those parties is a child or protected party. That is because the compromise will not be binding unless and until it is approved by the court.

Pending approval there is, accordingly, a risk one or other party will resile from the agreement.

The facts of *Dietz* do, perhaps, justify the decision which was taken to resile from the agreement reached in that case. As Dingemans J explained:

> "In *Dietz* a Defendant sought to withdraw from a compromise of an action brought by a widow and dependent children set out in an exchange of letters. The plaintiff had accepted an offer of £10,000, subject to the approval of the court. The compromise had been approved by the Master but before the order was drawn up it became known that the plaintiff had remarried, which was then material to the issue of quantum. This fact was unknown to the legal representatives at the time of the approval hearing, and when it became known a summons to set aside the compromise was brought. In the House of Lords Lord Morris determined at 181–182 that 'there was no binding agreement made in August … If … a writ had first been issued and if thereafter there had been discussions leading to agreement, such agreement would have lacked validity unless and until approval of the court was given'."

The facts of this case are very different and the terms of the correspondence sent by the defendant's solicitors, which talked of a "legal entitlement to resile", suggest a degree of discomfort, notwithstanding the right to do so, of taking such a stance particularly in circumstances where the agreement reached, and on which the parties metaphorically if not physically shook hands, anticipated precisely what subsequently occurred.

Whilst the same issue, but in reverse, could have occurred if the claimant had not made provision for a change in the discount rate. That situation would have been somewhat different because in such circumstances, the court would have been unlikely to approve what would no longer been a reasonable settlement. This simply reflects the protection afforded by the courts to those without capacity.

There was no delay by the claimant's representatives in seeking approval, to make the settlement binding, and the timing of the Lord Chancellor's announcement could not have been, for this particular claimant, less propitious. Consequently, the willingness of the defendant to give backword only endorses the need for claimants to seek, with alacrity, approval of any such settlement reached. Should such a step be challenged, on the basis it was unnecessary, this case is more than ample justification for having acted accordingly.

Perhaps the defendant had anticipated an early reversal of the discount rate, or the court not being willing to ensure that the case did reach a speedy conclusion if there was no binding agreement, so the potential saving in damages would outweigh the prospect of opprobrium for the approach taken. It is not clear whether that approach worked here but dealing with matters in this way is not without risk to the party who resiles. It is notable that in *Drinkall v Whitwood*,[6] a case referred to in the judgment, the defendant, after agreement but before approval, resiled from a compromise involving an apportionment of liability. The case subsequently went to trial where the claimant recovered in full on liability!

Future issues

The claimant's representatives showed foresight in expressly making provision for there being any change in the discount rate between settlement and approval.

[5] *Dietz v Lennig Chemicals Ltd* [1969] 1 A.C. 170.
[6] *Drinkall v Whitwood* [2003] EWCA Civ 1547.

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If, in the future, there are likely to be more frequent changes to the discount rate, this type of provision may become more commonplace. It is important to remember, however, that the courts will generally apply the discount rate as it stands at the date of any order.[7]

Human rights

Human rights legislation has become part of the fabric of domestic law. The claimant made an understandable, and valiant, attempt to hold on to the agreement reached by application of those principles. Although, in the particular circumstances, this was not enough to save the original agreement the case is a reminder of how pervasive these rights are in the domestic legal system.

In this particular case, applying the jurisprudence that has developed, Dingemans J concluded:

> "In my judgment the approach taken by CPR 21.10 to compromises and court approval was a proportionate means of achieving the legitimate aim of ensuring the protection of protected parties from: other parties; from themselves; and from legal representatives."

Case management

One of the principal changes of the 1999 reforms was to introduce the overriding objective and, as well as enjoining the parties to help further that objective, to bring in active case management by the courts intended to achieve the same end.

Here, recognising all of that, the judge was willing to engage in necessary case management so the claim, absent a binding agreement, would be resolved sooner rather than later.

This, doubtless, did help achieve the overriding objective and, which is perhaps why a further settlement was reached, stymied what may have been the hope of the defendant that, before the matter could reach a hearing, there would be some reversal in the discount rate.

Practice points

A number of practice points can be drawn from this judgment.

- When a settlement is reached in a claim involving a child or protected party it is usually preferable to have that settlement, even if it is just on an issue such as liability, approved by the court sooner rather than later, as otherwise parties are free to withdraw from such agreement.
- In an era when there may be more frequent changes to the discount rate than in the past parties need to think carefully about how this may affect settlements, particularly settlements involving children or protected parties where the rate might vary before approval can be obtained from the court.
- Human rights considerations should be deployed in appropriate circumstances, and will often bolster the furthering of the overriding objective (as those rights have many common aims with the factors identified in CPR Pt 1).
- Parties, and indeed the court, should always consider how active case management can help to further the overriding objective.
- Whilst there may be future changes to the discount rate the court will apply the current rate, as it stands, when dealing with any hearings unless and until that rate changes.

John McQuater

[7] See, e.g. *Marsh v Ministry of Justice* [2017] EWHC 1040 (QB).

Miley v Friends Life Ltd

(QBD; Turner J; 4 October 2017; [2017] EWHC 2415 (QB))

Personal injury—procedure—civil evidence—critical illness insurance—fatigue—expert evidence—covert surveillance—credibility—dishonesty

Covert surveillance; Insurance claims; Insurance policies; Myalgic encephalomyelitis; Personal injury; Video evidence

On 21 March 2006, the claimant, Charles Miley, started work for Piper Jaffray Ltd as Head of Institutional Equity Sales. In this capacity, he became entitled to the cover provided by a group policy under a Permanent Health Insurance Scheme now operated by the defendant. Under the terms of the policy, monies became payable if he became "unable because of illness or injury to perform the Material and Substantial Duties of [his] Employment".

In 2009, Mr Miley stated that he was unable to do his job as a result of chronic fatigue syndrome ("CFS"). His claim under the policy was allowed, but four years later the defendant stopped his payments. They said that he had significantly misrepresented or overstated his symptoms. The claimant appealed but was unsuccessful. He started proceedings to recover the monies he alleged ought to have been paid under the policy subsequent to September 2013. The defendant insurer counterclaimed for the return of all the monies already paid.

At trial, Turner J heard evidence from the claimant, his wife, mother and friends. He also heard from medical experts for both parties. The defendant relied upon a number of specific examples where it alleged that Mr Miley had been caught out telling lies with respect to his condition and income. It also relied on covert surveillance footage showing him, amongst other things, riding a bike, going out in his car, shopping, attending his daughter's nativity play, and going to the pub.

The central issue was whether the claimant's presentation was indicative of genuine fluctuations in the level of his symptoms or of inconsistencies arising from exaggeration. The judge held that in the case of CFS, presentation was paramount. Diagnosis involved the exclusion of all alternative diagnoses and, therefore, attaching the label of CFS to what remained.

The insurer sought to rely upon alleged discrepancies between broad descriptions of what Mr Miley said he could do and specific examples of activity revealed by objective evidence. The judge accepted that such discrepancies were not irrelevant. Nevertheless, he was hesitant to conclude, without more, that the claimant was a fraudster. The insurer also claimed that Mr Miley had lied about other forms of income on his financial review form. However, sums he received under a restricted stock agreement comprised income from investments which he was entitled to ignore when filling in the form. In any event, he had not provided deliberately fraudulent information.

When attacking the claimant's credibility, the insurer listed a number of alleged examples of him being able to do more than he claimed. The judge was not satisfied that those or any other alleged discrepancies sustained the contention that the claimant's evidence was dishonest. Motive was also a consideration. The judge accepted that the claimant was not unduly influenced by the rewards of claiming under the policy so as to give rise to an exaggerated presentation of his condition. A ceiling placed on his benefits under the policy, amounting to 75% of his earnings, operated as a disincentive to giving up on work.

The judge also held that it was improbable that the claimant's witnesses were victims of any persistent deceit on his part. Even the most callid performer would struggle to fool all of those people all of the time.

Although the claimant's wife was not an independent witness, that did not make her a liar. She was genuinely trying to avoid misleading the court even when she was under the clear temptation to advocate her husband's case. As for the other witnesses, the defendant was unable to point to any specific lies. The witnesses were found to be doing their best to help the court notwithstanding their feelings of loyalty to the claimant.

The judge also found that the surveillance evidence, whether taken on its own or in combination with all the other evidence, fell very far short of undermining the claimant's case that he was telling the truth about his levels of disability. There was a lack of unequivocal contradiction between what the surveillance evidence revealed and what the claimant said he had done.

On demeanour, Turner J's view was that judges should exercise some caution when seeking to determine the credibility of a witness wholly or mainly on the basis of an assessment of their demeanour. Here he found that it was advantageous to observe the claimant giving evidence and watching the proceedings. There was nothing in his presentation which appeared to contradict his evidence or that of his witnesses concerning the impact of his illness. His behaviour and appearance in court provided at least some level of support for his case.

Of course, the issue of whether the claimant was lying was inextricably bound up with the issue of which expert's evidence was preferred. Reports were prepared and oral evidence given by experts in two disciplines. Professor Findley and Mr Tandy were the claimant's experts in CFS and functional capacity respectively. The defendant relied on Professor Cleare and Dr Williams in corresponding areas of expertise. The judge found the evidence of Professor Findley on the whole to be more persuasive than that of Professor Cleare. Professor Cleare was hesitant about making prompt concessions where he thought that they might have lent some credence to the claimant's case.

The judge concluded that the claimant had discharged the burden of demonstrating that he suffered from CFS at a level sufficiently debilitating to entitle him to the benefits under the policy. He had not deliberately fabricated or exaggerated the extent of his disability. His subjective assessment of the severity of his condition was not materially worse than the objective truth. He was entitled to judgment in respect of the payments which he had not received since September 2013 up to 26 July 2017 together with interest but not to any declaration in respect of payments thereafter. The defendant's counterclaim failed and judgment was entered for the claimant.

Comment

In this case, the defendant insurance company had concluded that the claimant, despite his appeals to the contrary, had been: (a) untruthful regarding the extent of illness he suffered; and (b) had misrepresented the income he had received whilst receiving payments under the policy. Thus, they stopped making ill-health payments and sought recovery of past payments.

Clearly insurance companies should not be paying out on fraudulent claims, but at the same time it is troubling to see such companies seeking every opportunity to deny legitimate claims (of note, the defendants in this case contended that even if the claimant did not intend to deceive when filling in the claim forms, his answers were inaccurate the consequence of which would be to invalidate the entirety of his claim).

Chronic fatigue syndrome is a prime target for insurers to challenge given the subjectiveness and variability of the symptoms, but public perception is often that insurers seek to wriggle out of claims so readily that there is often little point in taking out insurance in the first place. As an attempt to address some of these concerns, the Insurance Act 2015 came into force in 2016, and has been described as the most significant reform of insurance contract law in the UK for over 100 years. Of most relevance, the pre-contract duty of disclosure has been replaced by a new duty of "fair presentation", and there is no longer only one remedy (of avoidance) for non-disclosure/misrepresentation. However, the impact of this legislation and how it may have affected this case had it been in force at the time is beyond the scope of

this journal. It is also the case that the trial was not per se a personal injury action. It was nevertheless all about the facts regarding the nature and severity of the claimant's condition which is our bread and butter.

At the trial, the judge was presented with a huge volume of material regarding various aspects of the claimant's life and medical history including letters, emails, tax returns, bank and credit card statements, and even his mobile telephone records. The material spanned several years. The insurance company had amassed a considerable number of examples from the material which they thought showed inconsistencies in the claimant's presentation, and this included the video surveillance evidence. In short, however, there were no smoking guns and the judge was not persuaded that the claimant had been fraudulent or deliberately misleading.

Of the video evidence which showed the claimant doing things such as going out in his car, shopping, attending the dentist, and even visiting a pub with a friend (!) he said:

> "I do not consider a fair and objective assessment of the evidence as a whole, as the defendant contends, that the evidence reveals that the claimant has only good days, as opposed to a pattern of good and bad days. In this context I note in particular that any bad days are likely to have been those upon which he did not venture out of the house and were thus not captured on video."

The author's own experience of many cases involving video evidence is that it is rarely determinative of any central issues, and its usefulness is often disproportionate compared to the amount of preparation and court time taken up analysing it with witnesses and experts.

What is clear from the judgment is that the judge was not prepared to rule on every issue of primary fact which had arisen, instead preferring to serve justice and clarity by applying a more generic and textured approach to the evidence. He reassured the parties that:

> "where I have not made express reference to any given issue it is because I have considered it unnecessary to resolve that issue before reaching my central and essential conclusions on the evidence as a whole."

He cited an earlier judgment of his in the case of *Laporte v Commissioner of Police of the Metropolis*[1] in this regard, where he had advocated against overly lengthy judgments which then lead to further problems which he went on to list. The approach taken by the judge was a sensible one, and reminds us that the quantity of evidence is no substitute for quality. The lengths that the insurance company had gone to try and catch the claimant out and avoid his policy (including a counterclaim presumably intended to bankrupt him) did not appear to find favour with the judge.

Practice points

- The judge was impressed with the veracity of the claimant's wife in that she was prepared to make concessions in her evidence when she could just as easily have contrived answers which were more supportive of her husband. By contrast, he was unimpressed with one of the defendant's experts, Professor Cleare, who he found "to be particularly hesitant about making sufficiently prompt concessions, where he may have thought that they may have lent some credence to the claimant's case". It is useful for witnesses, particularly expert witnesses, to know before they give evidence how much credit may be gained by not being too rigid in their answers where it is not appropriate.
- Given the inherently elusive nature of the condition of Chronic Fatigue Syndrome, there need to be concrete incidents of deception before a finding can be made that the claimant is a fraudster.

[1] *Laporte v Commissioner of Police of the Metropolis* [2014] EWHC 3574 (QB); [2015] 3 All E.R. 438.

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- The court will be unimpressed if it is overloaded with evidence and/or written submissions not central to the case as it was in this case. It perhaps belied the weakness of the defendant's position. One wonders how many legitimate claims are unfairly turned down by insurers for claimants less brave and determined than the claimant in this case.

Nathan Tavares

Howlett v Davies

(CA (Civ Div); Lewison LJ, Beatson LJ, Newey LJ; 30 October 2017; [2017] EWCA Civ 1696)

Personal injury—civil procedure—civil evidence—costs orders—credibility—dishonesty—insurance claims—qualified one-way costs shifting—statements of case—fundamental dishonesty—CPR r.44.16

Courts' powers and duties; Credibility; Dishonesty; Insurance claims; Personal injury claims; Qualified one-way costs shifting; Road traffic accidents

Lorna and Justin Howlett (mother and son) brought the proceedings to recover damages for personal injuries and financial loss that they claimed to have suffered as a result of a traffic accident on 27 March 2013. Their case was that they were passengers in a car driven by the first defendant, Ms Penelope Davies, when it struck a parked vehicle and that the collision was caused by negligence on the part of Ms Davies. Penelope Davies was insured by Ageas Insurance Ltd.

The claim was resisted by Ageas whose defence said that it did "not accept the index accident occurred as alleged, or at all" and required the Howletts "to strictly prove" that they "were involved in the index accident", that it was caused by negligence of Ms Davies, that they suffered injury and loss in consequence and that the accident, injury and loss were reasonably foreseeable. The relevant part of the pleading continued:

> "If, which is denied, there was an accident as alleged, [Ageas] will aver that it was a low velocity impact unlikely to cause injury with injury being unforeseeable in any event."

Credibility was expressly stated to be in issue, but no positive case of fraud was asserted. Ageas suggested during the trial that the Howletts had actively sought to deceive the court. It stated that if any element of fraud was found by the court, it would seek appropriate costs orders. The matter was allocated to the fast track and proceeded to a trial before Deputy District Judge Taylor which, in the event, occupied four days. The judge found the claim to be fundamentally dishonest for the purposes of CPR r.44.16(1)[1] and ordered that it should be dismissed with costs. An appeal against that order was dismissed by HH Judge Blair QC. Mrs Howlett appealed again.

The first question for the Court of Appeal was could a trial judge find that qualified one-way costs shifting had been displaced without fraud having been alleged in the defence? Their answer was yes. Statements of case were crucial to the identification of the issues between the parties and what fell to be decided by the court. However, the fact that the opposing party had not pleaded dishonesty would not necessarily bar a judge from finding a witness to have been lying. Judges had to regularly characterise witnesses as having been deliberately untruthful even where there had been no plea of fraud.

[1] "Orders for costs made against the claimant may be enforced to the full extent of such orders with the permission of the court where the claim is found on the balance of probabilities to be fundamentally dishonest."

In addition, where an insurer had denied a claim without putting forward a substantive case of fraud, but had set out the facts from which they would be inviting the judge to draw the inference that the claimant had not in fact suffered the injuries he asserted, it had to be open to the trial judge, assuming that the relevant points had been adequately explored during oral evidence, to state not just that the claimant had not proved their case but that, having regard to matters pleaded in the defence, they had concluded that the alleged accident did not happen or that the claimant was not present.[2] The court said that the key question would be whether the claimant had been given adequate warning of, and a proper opportunity to deal with, the possibility of such a conclusion and the matters leading the judge to it, rather than whether the insurer had positively alleged fraud in its defence.

They also held that an insurer need not necessarily have alleged in its defence that the claim was fundamentally dishonest for qualified one-way costs shifting to be displaced on that ground. Where findings properly made by the trial judge on the substantive claim warranted the conclusion that it was fundamentally dishonest, an insurer could invoke r.44.16(1). This was regardless of whether there was any reference to fundamental dishonesty in its pleadings.

Here, the insurer's defence, while eschewing "a positive case of fraud at this stage", adverted to the possibility of the court finding "elements of fraud to this claim". It expressly stated that it did not accept that the accident had occurred as alleged. The pleading had given the claimant sufficient notice of the points the insurer intended to raise at trial, and the possibility that the judge would conclude as he did. They concluded that the claimant could not fairly suggest that she had been ambushed.

There was an issue about whether the honesty of the claimants' evidence had been adequately explored in oral evidence. The Howletts argued that they had not been cross-examined on the basis that the claim was dishonest. However, the district judge had disagreed with the suggestion that the insurer had not pleaded a case of dishonesty or cross-examined on that basis. He also said that he had made it clear from the outset that he would be considering matters of dishonesty and exaggeration, that the insurer's case had been "put fairly and squarely" and that every opportunity had been given to the claimants to defend themselves. They held that the honesty of the claimants' evidence had been adequately explored in oral evidence.

The court said that where the honesty of a witness was to be challenged, it would always be best if that was explicitly put to them. There could then be no doubt that it was in issue. However, what ultimately mattered was that the witness had had fair notice of a challenge to their honesty and an opportunity to deal with it.[3] It might be that in a particular context a cross-examination which did not use the words "dishonest" or "lying" would give a witness fair warning. That would be a matter for the trial judge to decide. The fact that a party had not alleged fraud in their pleading might not preclude them from suggesting to a witness in cross-examination that they were lying. That must, in fact, be a common occurrence. The district judge was entitled to find that the claim was fundamentally dishonest, and that r.44.16(1) therefore applied. The relevant points had been adequately foreshadowed in the insurer's defence and sufficiently explored during oral evidence.

The appeal was dismissed.

Comment

Stating the obvious, this is an important case which raises a number of issues from personal injury practitioner's perspective:

- How claimant solicitors allow themselves to become victims of fraud.

[2] *Kearsley v Klarfeld* [2005] EWCA Civ 1510 applied.

[3] *Browne v Dunn* (1893) 6 R. 67 followed, *Abbey Forwarding Ltd (In Liquidation) v Hone* [2010] EWHC 2029 (Ch) and *Haringey LBC v Hines* [2010] EWCA Civ 1111; [2011] H.L.R. 6 applied.

- The test and standard for QOCS.
- That QOCS is about costs perhaps more than anything else.

To a large degree these three points are interconnected. Part and parcel of these points is whether or not the defendant should have explicitly pleaded fraud for QOCS not to apply.

In Ageas's defence a number of points were raised which questioned the credibility of the claimant and I think are worth repeating:

- Three months before the accident in question, both claimants were passengers in another vehicle which was involved in another accident involving the first defendant. The Howletts allege that they were injured in that accident as well. Ageas contended that this was stretching coincidence.
- The driver, and first defendant, had not cooperated with Ageas's enquiries.
- Howlett had at least four accidents between 2011 and 2013! Either they were extremely unfortunate or this is beyond coincidence.
- Both claimants and first defendant provided inconsistent and uncorroborated reasons for their journey.
- Penelope Davies had not cooperated with regards to the inspection of her vehicle.
- The location of where the accident is alleged to have taken place is large and such that the presence of a parked large BMW X3 is unlikely to have been obscured.
- Despite the alleged multiple injuries and damage to vehicles, there were no witnesses and the emergency services did not attend.
- Although recommended, the claimants did not take up the offer of physiotherapy.
- The claimants were geographically remote to their solicitor; this is probably not Ageas's strongest point in imputing fraud.
- Most of these points do not, in my opinion, pass the "eye brows test" and I am surprised that this case got as far as it did and that the solicitors representing the claimants did not come off record.

However, against the back drop of the points raised in their defence, why did not Ageas explicitly allege fraud? Their counsel raised four points:

- They lack direct knowledge of the relevant events.
- Lawyers' professional obligations mean that they should allege fraud too readily.
- The case is more likely to be allocated to the multi-track if fraud is alleged.
- A trial judge, concluding that fraud has not been proved, is liable to find for the claimant without necessarily fully considering whether the claimant has proved their case.

This latter point is perhaps the most important. CPR 16.5 and Practice Direction 16 set out the content of a defence in civil proceedings. In particular CPR16.5(2) says:

> "(2) Where the defendant denies an allegation—
> (a) he must state his reasons for doing so; and
> (b) if he intends to put forward a different version of events from that given by the claimant, he must state his own version."

However, Brooke LJ in giving the lead judgement in *Kearsley v Klarfeld*,[4] found that: "So long as a defendant follows the rules set out in CPR 16.5 there is no need for a substantive plea of fraud or fabrication." At [45] he said that it was sufficient that defendants "set out fully the facts from which they

[4] *Kearsley v Klarfeld* [2005] EWCA Civ 1510.

would be inviting the judge to draw the inference that the plaintiff had not in fact suffered the injuries he asserted".

In *Howlett*, Ageas had clearly set out and sign posted that there were issues in respect of the credibility of both claimants. In particular, at [11] of their defence stated:

> "Should the court find any elements of fraud to this claim, the Second Defendant will seek to reduce any damages payable to the Claimants to nil together with appropriate costs orders therein."

It could not have been much clearer that *Ageas* was inviting a finding of fraud and, if so found, that the QOCS shield would not apply. In giving the lead judgement Newey LJ said:[5]

> "Turning to the facts of the present case, Ageas' defence, while eschewing 'a positive case of fraud at this stage', adverted to the possibility of the Court finding 'elements of fraud to this claim'; expressly stated that Ageas did 'not accept the index accident occurred as alleged, or at all', that it was denied that 'there was an accident as alleged', that credibility was in issue and that the Howletts were required to 'strictly prove' the matters specified in paragraph 7; and listed in paragraph 6 various matters casting doubt on the claim, including facts that were stated in terms to be 'beyond mere coincidence and, instead, … indicative of a staged/contrived accident and injury'. In my view, this pleading gave the Howletts sufficient notice of the points that Ageas intended to raise at the trial and the possibility that the judge would arrive at the conclusions he ultimately did. The Howletts cannot, in the circumstances, fairly suggest that they were ambushed."

With both *Kearsley* and now with *Howlett*, we have clear statements that, provided that there is no ambushing of the claimant, fraud does not have to be specifically pleaded in a defence for there to be finding of fraud.

Qualified one way costs shifting, as well as being a "shield", it can also be a "sword". CPR 44.16(1) says:

> "Orders for costs made against the claimant may be enforced to the full extent of such orders with the permission of the court where the claim is found on the balance of probabilities to be fundamentally dishonest."

But what is "fundamentally dishonest"? Newey LJ echoed the definition provided by Moloney J in *Gosling v Hailo*:[6]

> "If on the other hand, the dishonesty went to the root of either the whole of his claim or a substantial part of his claim, then it appears to me that it would be a fundamentally dishonest claim: a claim which depended as to a substantial or important part of itself upon dishonesty."

From a defendant insurer's perspective this is a very important decision in that it provides clear guidance on fundamental dishonesty and pleading requirements.

Practice points

- Do not allow your businesses to become victims of fraud.
- In the right case QOCS can be a sword and not a shield.
- Provided dishonesty is sufficiently sign posted in a defence, fraud does not have to be specifically pleaded.

PROCEDURE

[5] *Howlett v Davies* [2017] EWCA Civ 1696 at [33].
[6] *Gosling v Hailo* , unreported, 29 April 2014.

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- "Fundamental dishonesty" means that a substantial part of the claim is based on dishonesty.

David Fisher

BNM v MGN Ltd

(CA (Civ Div); Sir Terence Etherton MR, Longmore LJ, Irwin LJ; 7 November 2017; [2017] EWCA Civ 1767)

Civil procedure—costs—legal advice and funding—conditional fee agreements—additional liability—success fees—after the event insurance—proportionality—CPR r.44.3(2)—CPR r.44.3(5)—CPR r.48.1

After the event insurance; Assessment; Conditional fee agreements; Costs; Proportionality; Success fees

The defendant MGN publishes a number of newspapers, including the *Sunday People*. The claimant BNM is a primary school teacher and has no public or media profile. Between 2008 and 2011, she had a relationship with a successful premiership footballer. That relationship was known only to a small circle of friends and family. In March 2011, BNM lost her mobile phone, which contained private and personal information, including information linking her with the footballer. An assistant editor of the *Sunday People* was approached by a source who was in contact with another person who claimed to have BNM's phone and who revealed the relationship between BNM and the footballer.

On 23 March 2011, Ms Tracey Kandolah, a freelance journalist who undertook work for MGN, was sent by the assistant editor to BNM's home to enquire about the relationship between BNM and the footballer. This led to a complaint to MGN by BNM's father and, on 3 May 2011, to the return of the phone to BNM. BNM contended that all data, including text messages, personal photographs and videos, had been deleted from the phone before it was returned.

Two years later, BNM instructed solicitors in relation to a proposed claim against MGN. She entered into a conditional fee agreement and purchased after-the-event insurance. Her solicitors also entered into a conditional fee agreement with counsel. The success fees under the CFAs and the ATE premiums increased significantly if proceedings were issued.

BNM issued proceedings without prior notice to the publisher, seeking damages and an injunction to restrain the publisher from using or publishing any confidential information from her phone. The proceedings settled within 12 months, with the publisher undertaking not to disclose confidential information and to pay damages and the claimant's costs, to be assessed on the standard basis.

BNM sought to recover success fees and the ATE insurance premiums. Master Gordon-Saker (sitting as the Senior Costs Judge) who undertook the detailed assessment determined that the success fees and the premiums were subject to the new proportionality rules contained in r.44.3(2) and r.44.3(5) rather than the former ones contained in the old CPR r.44.4(2) and r.44.5(1). He indicated that the test of proportionality in force before 1 April 2013 was not a provision "in relation to funding arrangements" within r.48.1, meaning that r.44.4(2) did not survive beyond that date, except in circumstances set out in r.44.3(7). He considered that the intention was that certain additional liabilities remained recoverable after 1 April 2013, but that the old test of proportionality had not been preserved in relation to those additional liabilities.

The judge rejected the publisher's suggestion that the claimant had issued proceedings prematurely and unnecessarily and therefore should not be allowed the costs attributable to the issue of proceedings. It was common ground that the proceedings were "privacy" proceedings within r.48.2(2)(c) and that the CFAs

and the ATE insurance policy were all "pre-commencement funding arrangements" for the purposes of r.48.2(1)(b).

The claimant appealed against the proportionality decision and the publisher cross-appealed against the finding that it had been reasonable for the claimant to issue proceedings without giving prior notice.

The Court of Appeal held that it would not have been appropriate to include a further exception in the new r.44.3(7) because that provision created exceptions from the new r.44.3(2)(a) and r.44.3(5). Those provisions were not capable of catching "any additional liability incurred under a funding agreement" as defined by the old r.43.2(1)(k) and (o) because such liability no longer fell within the expression "costs" as defined by the new r.44.1(1). That did not include any reference to additional liabilities. The senior costs judge had also been wrong to find that the former proportionality test in the old r.44.4(2) was not a provision "in relation to funding arrangements" within r.48.1.

They confirmed that there was a plain intention to continue the application of the old costs rules which formerly governed funding arrangements, as was apparent from the transitional provisions in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and the wording of the new r.48.1(1). This provided that the provisions of the old CPR Pts 43 to 48, as they were in force immediately before 1 April 2013, would continue to apply to a "pre-commencement funding arrangement".

The court had no doubt that if it had been intended that the new proportionality test was to apply to funding arrangements to which the statutory saving and transitional provisions applied, that would have been made clear in the statutory provisions or the new costs rules. The assessment was remitted to the senior costs judge to reconsider the proportionality of the costs.

On the cross-appeal, they held that the senior costs judge's assessment in relation to the reasonableness of issuing proceedings had been flawed. This was because he failed to take into account, or make it clear that he had taken into account, that:

- the claimant had not taken any steps to make a claim during the two years between the return of her phone and her instruction of solicitors;
- the publisher had not indicated any intention to publish relevant confidential information;
- the claimant had not sought any interlocutory injunction in these proceedings;
- there was no evidence that the appellant feared that the publisher would seek to deal with the confidential information in an unlawful way if she gave notice of an intention to issue proceedings.

That issue was also to be remitted for reconsideration. Both appeal and cross-appeal were allowed.

Comment

It is a common misconception that the recoverability of additional liabilities in conditional fee agreements ended on 1 April 2013 with the coming into force of LAPSO. Aside of course from those arising from pre LASPO arrangements, until 2016 it was still possible to recover additional liabilities in insolvency proceedings and it remains the case now that recoverability continues in cases involving diffuse mesothelioma claims and publication and privacy proceedings. The Conditional Fee Agreements Order 2013 art.6[1] excluded all these from the provisions of LASPOA ss.44 and 46 with its removal of the right of recovery.

These proceedings settled in July 2014 and the defendant agreed to pay damages of £20,000 as well as the claimant's costs to be assessed on the standard basis. Notwithstanding the relatively modest value of the settlement, the claimant was actually seeking costs of £241,817 which included a success fee for her

[1] Conditional Fee Agreements Order 2013 (SI 2013/689).

PROCEDURE

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solicitors of 60%; one of 75% for her counsel together with an after the event insurance premium of £58,000 plus £3,840 IPT.

The Senior Costs Judge (Master Gordon-Sacker) was required to determine whether these substantial additional liabilities were to be subject to the pre-April 2013 proportionality rules then set out at CPR 44.4(2) or to the newer proportionality rules at CPR 44.3(2) and (5).

In the event, Master Gordon-Sacker halved the additional liabilities.[2] It was his view that CPR 48.1[3] preserved the old cost provisions to CFAs but that the old proportionality test was not itself expressly preserved. Therefore, although acknowledging that the CFAs and ATE policy fell under the new rules they would have to be assessed by reference to the new proportionality test. He considered it would be absurd to assess the base costs by reference to the new test but then to assess the additional liabilities by reference to the old test.

Not surprisingly the matter went to the Court of Appeal where many waited for guidance and erroneously, a determination of what proportionality actually meant. In fact, the case was never intended to deal with this latter point. In the event, the Court of Appeal unusually reached a different view to the senior costs judge. The Master of the Rolls considered the definitions as set out under the old rules which specifically included "any additional liability incurred under a funding arrangement" and then looked at the new definition where those words did not appear. He said:

> "(it was) perfectly clear that the reference to 'any additional liability incurred under a funding arrangement' was deliberately omitted from the definition of 'costs' in the new CPR 44.1 (1) because, subject to specific saving and tradition and transitional provisions in the 2012 Act, the recoverability of success fees and ATE insurance premiums in order for costs was abolished [by LASPO] and, where they remain recoverable by virtue of those saving and traditional provisions, they are recoverable in accordance with the old costs rules, including those relating to proportionality, reasonableness and assessment. If it had been intended that the new proportionality test was to apply to funding arrangements to which the statutory saving and transitional provisions applied, that would have been made clear in the statutory provisions or the new cost rules or both and it was not."

In an examination of the vagaries of the draftsman of the rules the court identified that the new rule preserved the pre-April 2013 cost provisions to CFAs as well as the old costs practice direction and yet that was inconsistent with the new proportionality test. It was not influenced by the fact that the old proportionality test was no longer preserved in the new rules as listed at length (five separate rules) in CPR 48 PD 1.4 as it determined that this list was inclusive but not exhaustive.

The court then went on to determine that the combined effect of the new rules at CPR 48 PD 2.1 and 3.2 (preserving recoverability of additional liabilities in mesothelioma and privacy proceedings) was specifically to preserve all the old cost provisions to those proceedings where recoverable CFAs still existed. This meant that the old proportionality test was also preserved.

Clearly this makes sense to the degree of continuing with recoverable additional liability funding arrangements. Many observers were looking on in the hope that they would at last receive guidance or indeed a definition of proportionality. No guidance is available particularly because the court has referred the matter back to the Master for him to review afresh. The defendant was actually successful in its cross appeal that challenged the Costs Judge's decision to regard as reasonable the claimant's decision to issue court proceedings without any prior warning or indeed contact with the defendant. This was something that she had done as part of her pre-issue application for anonymity. The court considered that the Master

[2] *BNM v MGN Ltd* [2016] EWHC B13 (costs).

[3] CPR 48.1(1) The provisions of CPR Pts 43 to 48 relating to funding arrangements, and the attendant provisions of the Costs Practice Direction, will apply in relation to a pre-commencement funding arrangement as they were in force immediately before 1 April 2013, with such modifications (if any) as may be made by a practice direction on or after that date.

(2) A reference in rule 48.2 to a rule is to that rule as it was in force immediately before 1 April 2013.

had not made sufficiently clear how he had reached that decision and they suggested that he would need to review the matter again. As a result, base costs will need to be assessed first of all before proportionality can even be considered in the context of the base costs with additional liabilities.

So the wait for judicial guidance on proportionality goes on but there is clarity relating to the application of proportionality on additional liabilities as a principle, even without judicial guidance on its exact calculation.

Practice points

- The new proportionality rules contained in the CPR r.44.3(2) and r.44.3(5) do not apply on a standard basis of assessment to a "pre-commencement funding arrangement" as defined in CPR r.48.1.
- The former proportionality test contained in the old CPR r.44.4(2) applies.
- Costs orders can include provision for payment of success fees payable under CFAs and premiums payable under after-the-event insurance policies.
- All recoverability of additional liabilities in conditional fee agreements did not end on 1 April 2013 with the coming into force of LAPSO.
- Until 2016 it was still possible to recover additional liabilities in insolvency proceedings.
- Recoverability continues in cases involving diffuse mesothelioma claims and publication and privacy proceedings.

Mark Harvey

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FROM SWEET & MAXWELL

This index has been prepared using Sweet & Maxwell's Legal Taxonomy.

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