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Editorial

The first article for this edition has been written by David Body who is a Trustee of the Thalidomide Trust. The article examines the thalidomide litigation, the setting up and work of the Thalidomide Trust, and the legacy of Thalidomide over nearly 50 years for personal injury lawyers. The experience of that litigation, the eventual settlement of claims, and the experience of thalidomiders being supported over the intervening period offers a case study in how personal injury litigation has had to change radically to meet the needs and expectations of a group of severely injury but highly articulate Claimants.

Our second article from James Plunkett, a Barrister at the Victorian Bar as well as the Inner Temple, is a very relevant assessment of the 1910 decision of *Cavalier v Pope* which restricts the liability of landlords to their tenants and may prove to be particularly relevant in the light of the Grenfell Tower fire. This will surely highlight inadequacies of the law in this area.

Currently there is discussion proceeding regarding significantly altering the system for dealing with lower value clinical negligent cases. It is perhaps, therefore, very useful that we have two articles relating to the position in Wales. In February 2005 the Welsh Assembly Government's Department for Health & Social Services established the Speedy Resolution Scheme to provide an alternative dispute resolution mechanism for clinical negligence cases against NHS Trusts in Wales. The Scheme was set up to deal with straightforward cases valued between £5,000 and £15,000. Accounts of how this scheme has progressed has been given by Anne-Louise Ferguson, Gemma Cooper, and Gareth Rees on behalf of Defendants and Sarah Davies from the patient's prospective.

Simon McCann has prepared an article discussing the present position on holiday sickness claims, particularly in the context of exaggerated claims. It is interesting to note that in the article Simon makes reference to the *Gestmin* decision which assesses how account must be taken of fallible memories. This is developed further in an article from Professor Penny Cooper. As she states, the assessment of the credibility of competing witnesses is crucial to the proper consideration of evidence in the case. Her article discusses consideration given by psychologists to what goes on in the Court room and how Courts are beginning to take notice of a growing body of peer-reviewed psychological research on witness evidence.

Continuing on the theme of alternative ways of resolving disputes in clinical negligence cases, Dr Jock McKenzie has given an account of his own recent personal experience of alternative dispute resolution in these cases. The cases that he is concerned with are of a higher value than others discussed in the Welsh scheme but nevertheless demonstrates experience of resolving cases without Court intervention.

Our final two articles concern aspects relating to compensation. Jonathan Payne gives us an update on decisions relating to the assessment of damages for loss of congenial employment. We are also grateful to our Spanish colleagues Rebeca Martinez Farinas and Carlos Villacorta Salis who have provided an overview of the Spanish traffic scale as well as giving practical examples. This is perhaps pertinent bearing in mind the civil liability bill proposes to introduce a tariff for certain types of injuries. The aim of this article is to explain the system of compensation for personal injuries incurred in traffic accidents in Spain. This is commonly referred to as the "Scale" ("Baremo" in Spanish).

Colin Ettinger
General Editor

The Legacy of Thalidomide

David Body*

LT Burden of proof; Legal history; Personal injury; Pharmaceuticals; Settlement

Introduction

This article examines the Thalidomide Litigation, the setting up and work of the Thalidomide Trust and the legacy of Thalidomide over nearly 50 years for personal injury lawyers.

The experience of that Litigation, the eventual settlement of claims and the experience of Thalidomiders being supported over the intervening period offers a case study in how personal injury litigation has had to change radically to meet the needs and expectations of a group of severely injured but highly articulate claimants.

Thalidomide

From April 1958 to November 1961, the compound Thalidomide created by the German company Chemie Grunenthal, was marketed in the UK by the Distillers Company primarily under the trade name "Distaval". Its characteristic beneficial effect ensured that it was widely prescribed by GPs as a sedative to both men and women, but very often to pregnant women experiencing morning sickness in the first trimester of pregnancy who might otherwise have been prescribed addictive and toxic barbiturates.[1]

Unusual effects were noted early on by Grunenthal amongst German patients. In 1959, both transient and permanent peripheral neuritis was clinically observed but not warned about. Whilst these effects had been reported by German clinicians, the first journal communication linking phocomelia in children to maternal ingestion of the compound during pregnancy appeared in a letter to *The Lancet*[2] following a series of deliveries at the Women's Hospital in Sydney, Australia in which Dr William McBride suggested a link between thalidomide and birth defects:

> "Congenital abnormalities are present in approximately 1.5% of babies. In recent months I have observed that the incidence of multiple severe abnormalities in babies delivered of women who were given the drug thalidomide (Distaval) during pregnancy as an antiemetic or as a sedative, to be almost 20 per cent."

In Germany, an investigation by the head of the Children's Clinic at Hamburg University, Professor Widukind Lenz into the astonishing increase in the local incidence of phocomelia[3] had begun in March 1961 at much the same time as McBride's suspicions had been aroused in Australia.

Two cases of phocomelia had been presented in October 1960 to the German Paediatric Society; it was then a condition so rare as to be almost unknown in the contemporary medical textbooks.

Lenz began to investigate after being consulted about two cases in a single extended family. He examined the records for births in the Hamburg area and discovered that amongst the 6,420 babies born between September 1960 and October 1961 there had been 8 cases of phocomelia; he used this figure to estimate that this might mean that in the full set of births over the previous two years, there would be up to 50 children born around Hamburg with phocomelia.

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[1] In this section I have drawn heavily upon "Suffer the Children" by the Sunday Times Insight Team—P. Knightley, H. Evans, E. Potter and M. Wallace (1979) Tomes Newspapers Ltd.

[2] *The Lancet*, 16 December 1961.

[3] A rare congenital deformity in which the hands or feet are attached close to the trunk, the limbs being grossly underdeveloped or absent.

He then examined the birth records for the 212,000 deliveries for the same area for the period 1930–1955, during which time only one child with phocomelia was born.

Lenz then contacted and questioned as many of the mothers of the injured children as he could and by 15 November had established an association between 14 of the injured children and Thalidomide ingestion by the mother. On 16 November 1961, he wrote to the manufacturer, Grunenthal advocating removal of the product from sale or prescription.

Grunenthal were resistant and questioned his evidence but after a meeting at the Health Ministry in Hamburg agreed to attach to all containers of Contergan (Thalidomide's German brand) the warning:

> "Not to be taken by pregnant women."

At a subsequent meeting, Grunenthal's management discussed a letter from Distillers summarising Dr McBride's findings which were to be published in *The Lancet*. On 26 November 1961, the Sunday newspaper *Welt am Sonntag* reported Lenz's suspicions. Grunenthal immediately decided to withdraw Thalidomide "until scientific questions have been answered".

On 27 November 1961, Grunenthal contacted its agents all over the world to confirm withdrawal. Letters confirming the withdrawal in the UK of Distaval (the British brand) were sent to the *British Medical Journal* and *The Lancet* and appeared in the issues for the week ending 2 December 1961.

On 16 December 1961, Dr McBride's letter put the withdrawal into context.

Litigation

Europe and North America

Litigation about Thalidomide and its effects took place in Europe and North America within a few years of the drug being withdrawn. Settlement of claims in West Germany in 1970, involved no admission of liability by Grunenthal.[4] At least one jury verdict was recorded in the US[5] out of the 17 recorded and nine suspected US cases of thalidomide embryopathy.[6] Of 120 known or suspected Canadian cases at least 36 are known to have settled, in part because some were issued in New Jersey and then had to be repatriated to Quebec when jurisdiction for the claims was refused. All Canadian victims able to prove maternal ingestion of the drug are eligible for Canadian Government disability benefits.[7]

England and Wales

On 23 July 1962, 28 MP's asked the Secretary of State for Health, Enoch Powell to set up a Public Inquiry into Thalidomide and its effects He refused this request.

It is not clear whether this was because he accepted the explanation put forward by Distillers, that:

> "… before being put on the British market, the drug was subjected in Britain with great thoroughness to all the tests which any pharmacologist would have applied in the circumstances at that time and was given extensive clinical tests with no sign of danger"[8]

or whether he was worried that parents might sue the NHS doctors who had prescribed Distaval.[9]

[4] A position maintained in 2017 but still vigorously contested by European Thalidomiders.
[5] *McCarrick v Richardson-Merrell* (1971): Award $2.5million ($1.5M compensatory; $1M punitive).
[6] A. Bernstein "Formed by Thalidomide" [1997] *Columbia Law Review* Vol.97 2158.
[7] Thalidomide Victims Association of Canada.
[8] "Thalidomide Tests showed no sign of danger" *The Times* August 1962.
[9] At a meeting with a group of parents in January 1963, Powell had remarked "I hope you're not going to sue for damages. No one can sue the Government", P. Knightley, H. Evans, E. Potter and M. Wallace, "Suffer the Children" (Tomes Newspapers Ltd, 1979), p.143.

By August 1962, it was clear that if the parents wanted any forensic examination of the cause of their childrens' injuries they would have to sue.

The decision to do so was taken on 19 August 1962 when four parents of Thalidomide children met to start a support group which was then publicised so that other families got in touch. Once 22 families had joined, the group formally constituted itself the Society for the Aid of Thalidomide Children. To assist in publicity and in fund raising, it approached Lady Hoare wife of the then Lord Mayor of London to become its President. This she did, looking to fund raising rather than legal action as the Society's aim.

The decision not to hold a Public Inquiry, the distaste for the litigation approach and the widespread assumption that all care had been taken by the drug's manufacturers put those families who wanted to litigate into a quandary.

A further difficulty arose when deciding representation. The only solicitors' firm with whom the Society's founding families had had contact (for debt collection and commercial transactions) did not specialise in PI work at all. The Law Society then operated a strict rule of not referring clients to firms with particular expertise. It also administered the Legal Aid scheme and decided early on that it would only pay for one firm to represent the generic interests of all Thalidomide plaintiffs.

The first firm instructed, Kimber Bull, became the plaintiffs' solicitors dealing with the generic aspects of the claim, rather than the one specialist PI practice[10] which had become involved in advising other parents on individual claims. Because of this the crucial generic decisions were taken by Kimber Bull and their counsel alone.

The claims

Claims were issued in November 1962 against both the manufacturer/distributor, Distillers and the prescribing chemist, Boots but the focus was chiefly on Distillers.[11]

The principal allegations were that:

- when Thalidomide was being developed and marketed, the manufacturer ought to have known that the drugs administered during pregnancy could damage the foetus and therefore ought to have been tested on pregnant animals; and
- that from September 1960 Distillers knew that Thalidomide caused a serious and sometimes permanent condition, peripheral neuritis, yet failed to withdraw the drug or at least warn of this side effect.

Distillers maintained the position they had adopted from the outset in submissions to the Department of Health and in the Press, that Thalidomide was a valuable drug which had been submitted to all "the standard tests". However, tests had not been done on pregnant animals because no one then thought that drugs might be dangerous to the developing foetus and if a drug did little or no harm to a pregnant mother, it was assumed that it would do correspondingly little or no damage to her embryo.

Furthermore, even if there had been such testing, this would not have revealed Thalidomide's potential to damage the foetus.

The evidence to support the claims

Suing drug companies has never been straightforward. It is easier now than it was in 1962 but the difficulty of finding and affording authoritative experts to counter the expertise that a drug company can readily muster so as to achieve equality of arms, has never been easy.

[10] Thompsons.
[11] The claim against Boots was discontinued in 1966.

Similarly, the available Legal Aid budget for any generic drug claim has never been able to match the sums spent by defendants, even so, the resources made available to the plaintiffs' lawyers in this case were very limited indeed.

By the time that the case was approaching, trial numbers of potential expert witnesses had been approached to give evidence on causation but there appears to have been only one expert who had supported the case from the outset, Dr Montagu Phillips (Consultant Pharmacologist and Chemical Engineer). Disclosure began in 1964 but legal aid for a review report by Dr Phillips was only granted in April 1966.

There seems to have been only a limited degree of liaison with the US and Canadian lawyers pursuing claims at the same time.

It may be that some experts were ill at ease in being seen to confront a powerful defendant manufacturer or that they were cautious about criticising pre-marketing testing protocols. Nevertheless, the failure to identify a wider group of experts to give evidence made it more difficult to make a judgment about the merits of the case when an offer to settle came from Distillers in October 1967, four months before the case was due to go to trial.

The settlement proposals and the advice to settle

Distillers offered the plaintiffs 40% of the eventually determined quantum. Counsel Desmond Ackner QC advised that this offer be accepted.

A number of factors may have led to this conclusion:

- the restrictive rules on Legal Aid funding which was then assessed on parental means and thus excluded large numbers of potential child claimants;
- the limitations on disclosure required of the defendant;
- the limited amount of expert evidence that the Law Society was prepared to pay for and the extent to which this governed the numbers of experts prepared to report for the claimants;
- the "trial by ambush" rules of the time which meant that witness statements and expert reports were not exchanged before trial, which in turn made it almost impossible for any expert to know the factual basis of the allegations on which the case was based and to anticipate how his/her evidence might be treated, what an opposing expert might say and who an opposing expert might even be;
- the absence of any decided law on whether a child injured in utero by maternal ingestion of a drug had any cause of action at all; and
- the strictness of the application of the law of contempt of court at that time which meant that the entire litigation was conducted within a media blackout.

Assuming that there was evidence that could be relied upon to link the ingestion of Thalidomide during pregnancy to the childrens' injuries, could those injuries have been avoided by laboratory testing of the drug in suitable animals for evidence of teratogenic effect?

The "Insight" team had access to an Opinion written by Ackner which concluded that in 1958, testing animals in this way was not the industry practice and that consequently, the "but for" test of causation could not be met. The Insight Team writing a decade later thought that such evidence could have been found with more extensive investigation but Ackner concluded that even if there had been a recognised practice of testing in 1958:

> "Tests on animals do not necessarily show what will be the results when the same drugs are used on humans. But for over two years humans had in fact been testing themselves in Germany. It must follow from the nature of the drug and the circumstances in which it would be taken and in particular that it would be obtained over the counter, that a very large number of pregnant women in Germany

> must have taken the drug in the two year period prior to the defendants marketing it. The defendants were therefore in a position to say, even if animal testing was a wise procedure, in fact better and more reliable 'tests' had been carried out. They were able to say, 'the proof of the pudding is in the eating' … We are firmly of the opinion that the proposals showing that the drug should have been used on pregnant animals before it was marketed merely by reason of the fact that it was likely to be taken by pregnant women is a proposition which has little if any , prospect of success. We would not therefore rate the prospects as even approaching forty per cent."[12]

Whilst the Insight team's argument a decade later was that the evidence as to causation was far stronger than limited investigation had revealed, the 62 Thalidomide families in 1967 unsurprisingly agreed to settle at 40% of the overall value of the claim, in view of this unequivocal advice from Counsel.

Quantum

In order to fix the 100% figure of which Distillers would pay 40%, a quantum trial took place before Hinchcliffe J in July 1969 using the facts from the circumstances of two plaintiffs, David Jones (who had been born without limbs) and Richard Satherley (who had been born without arms).[13]

Recognising that they were fixing damages for the whole group, the plaintiff's legal team instructed an actuary, John Prevett to prepare evidence about the childrens' likely life expectancy, using that evidence to calculate schedules of future costs of care and loss of earnings, taking into account the effect of inflation—a process now familiar to all PI lawyers.

John Wilmers QC for Distillers resisted this novel approach successfully before Hinchliffe J:

> "Actuarial estimates … referred to average incomes and not to the two children under discussion—who might for all the Court knew, be the sort of people who, even if they had been born normal, would never have tried to earn an average living. As for inflation, the Government had undertaken to control it, so that to allow for its effects would be to ignore Government policy … the effects of income tax should be regarded as reducing the notional income which Distillers was being asked to replace. But no allowance should be made for the inroads of taxation on investment income from the compensation because … the children might spend it all at once, thus avoiding tax altogether."[14]

Surprisingly, this decision was not appealed. The effect was to reduce a notional lifetime award for a limbless child from 40% of £106,000 (as calculated by John Prevett) to a (40% discounted) lump sum of £9,600.

John Prevett subsequently wrote an article for the *Modern Law Review*[15] in which he set out what he thought were judicial misconceptions about actuarial evidence. The figures from the trial used as examples in the article look very low indeed by today's standards; inflation in the mid to late 1970's had exactly the effect that he had sought to allow for in his original calculations.

Extending the cohort

One of the reasons for not appealing was that a further larger cohort of Thalidomide claimants (another 126 families, many not legally aided) was by then waiting to join the Litigation to take advantage of the agreed settlement.

Another was that after the quantum judgment, "without prejudice" negotiations with Distillers had begun.

[12] P. Knightley, H. Evans, E. Potter and M. Wallace, "Suffer the Children" (Tomes Newspapers Ltd, 1979), pp.155 and 157.
[13] *S v Distillers Co (Biochemicals) Ltd* [1970] 1 W.L.R. 114.
[14] P. Knightley, H. Evans, E. Potter and M. Wallace, "Suffer the Children" (Tomes Newspapers Ltd, 1979), p.161.
[15] J. Prevett, "Actuarial assessment of Damages" [1972] Modern Law Review Vol.35, 140–155 and 257–267.

Distillers approach had always been that they would, after negotiation, arrive at a 40% figure to compensate *all* injured children which would then be paid into a charitable Trust from which all of those children would draw according to need.

Between September 1969 and November 1971, negotiations continued attempting to reconcile the application of the quantum judgment to the circumstances of the original 62 cases and the "need" to further discount any agreed sums payable to the additional 126 families, many of whose claims were by then statute barred. A figure emerged from negotiations—£3.25 million, payable over 10 years—provided that all families accepted the offer and that all families instruct Kimber Bull.

Client meetings were held, where James Miskin QC (who had replaced Desmond Ackner QC who had by then been made a High Court Judge) explained and strongly advocated the proposed settlement.

David Mason's decision not to accept the settlement

Despite James Miskin's advocacy there were six families who would not sign up to the proposed Scheme because they did not think that the award was enough. Their refusal provoked Kimber Bull to apply to have them removed as their childrens' Next Friends.

Hinchcliffe J made such order on 22 March 1972. David Mason appealed to the Court of Appeal on behalf of his daughter, Louise but Lord Denning felt that it had not been established that Distillers settlement proposal was so clearly beneficial to all claimants that Mason was being unreasonable in refusing it. Each parent had to consider the position of his/her own child before deciding whether or not to sign up to the scheme.

The support of the Sunday Times

This decision led to an impasse; there was no consensus for settlement and without consensus, Distillers would not settle.

David Mason sought to break it by telling his daughter's story and explaining the inadequacy of the proposed settlement to the *Daily Mail*. The *Daily Mail* was then warned about possible contempt by the Attorney-General after a complaint by Kimber Bull.

The *Sunday Times*, which had been preparing a lengthy article about the evidence that might have been called had there been a trial, decided to focus on David Mason's successful appeal and the inadequacy of the compensation being offered. They looked at what fair compensation should be and used John Prevett's articles to demonstrate that the quantum findings by Hinchcliffe J had been based on a mechanism of calculation that was by then outmoded and unfair.

On 24 September 1972, the *Sunday Times* published a three-page article "Our Thalidomide Children: A cause for national shame". An accompanying Editorial, described the plight of the Thalidomide children and concluded that it "shamed society, shamed the law and shamed Distillers".

Despite being threatened with proceedings for contempt, the *Sunday Times* returned to the story on 1 October 1972 emphasising the moral rather than the legal ground of its complaint and giving space to numbers of letters from the parents of Thalidomide children describing the effects of the children's injuries. An article about calculation of damages using actuarial evidence by Professor Harry Street emphasised that the campaign was about the inadequacy of the law of tort as a whole, when faced with this unprecedented example of maximum severity injury.

Distillers than sought an injunction against the *Sunday Times* from printing any further article. At the Divisional court hearing on 7–9 November 1972 the *Sunday Times* argued for a legal balance of interests to be observed between the administration of justice and the right of the pubic to be informed. The application for the injunction was upheld on 17 November 1972.

The focus then shifted to Parliament where the campaign was led by Jack Ashley MP. He was able to persuade Harold Wilson, then Leader of the Opposition to use one of the limited number of Opposition debates, for a motion calling upon Distillers to face up to its moral responsibilities and upon the Government to create a Trust Fund for the injured children.

Ashley's speech reached a rare eloquence:

> "Adolescence is a time for living and laughing, for learning and loving. But what kind of adolescence will a ten year old boy look forward to when he has no arms, no legs, one eye, no pelvic girdle and is only three feet tall? How can an eleven year old girl look forward to laughing and loving when she has no hand to be held and legs to dance on?
>
> Yet, the powerful Distillers Company has had no compunction in fighting these children for the last ten years."

Immediately before the debate, Distillers had responded to the increasing publicity with an offer increased to £5 million but Jack Ashley made it clear in his speech that the children needed £20 million, "on any realistic assessment". It is not clear where that figure came from but it overshadowed Distillers' proposed increase.

Coincidentally, Sir Keith Joseph, the Health Secretary announced an additional £3million to improve services for all congenitally disabled children and promised consideration of a Trust Fund for the Thalidomide children at the end of the Litigation. Whilst the Family Fund was set up within months, the Government took no step to help resolve the Thalidomide Litigation.

One very specific consequence which flowed from this debate, was the announcement in December 1972[16] of a Royal Commission on Civil Liability and Compensation for Personal Injury which reported in March 1978.[17]

In addition, the Lord Chancellor ordered an examination of the law on ante natal injury by the Law Commission and the Scottish Law Commission. The Law Commission reported in August 1974 and annexed a draft Congenital Disabilities (Civil Liability) Bill to its report[18] which was enacted in 1976.[19]

The settlement of proceedings

Jack Ashley's Parliamentary speech led to a much wider public debate. In particular, the increasing publicity about the moral case began to trouble Distillers' shareholders. A suggestion from three small shareholders[20] that a fund of £20 million be offered was rejected by the Distillers Chairman, Sir Alexander McDonald. A small Shareholders' Committee was subsequently formed to continue to lobby Distillers institutional investors.

In those pre-digital days a 32 volume list of Shareholders cost £1400 and postage to contact them £8,000.[21] A grant from the Rowntree Trust met these costs.

Legal and General Assurance Society owned 3.5million shares and commented:

> "The moral claim of the Thalidomide parents makes a strong appeal to our sympathies and we as shareholders, would support a more generous settlement. Apart from this we feel that the continued failure to reach a settlement must be prejudicial to the interests of the company and its shareholders."

Other major insurers and Local Authority investors followed suit. Eventually a major chain of supermarkets announced a boycott of Distillers products. The US consumer advocate, Ralph Nader wrote

[16] *Hansard*: 19.12.72: Vol.848.
[17] Cmnd.7054.
[18] Law Com.No.60: *Report on injuries to unborn children*, Cmnd.5709.
[19] See discussion below about this statute and its interplay with the Consumer Protection Act 1987.
[20] R. and S. Broad and T. Lynes.
[21] P. Knightley, H. Evans, E. Potter and M. Wallace, "Suffer the Children" (Tomes Newspapers Ltd, 1979), p.198.

a letter to the Chairman of Distillers describing its attitude as "singularly offensive to the free expression of conscience and duty by your world wide constituency of consumers".[22]

David Mason read this and decided to meet Ralph Nader in January 1973. At a press conference in which Mason participated, Nader threatened a US boycott of Distillers products. Distillers shares fell £11million in one day and a further £35 million in the nine subsequent days.

On 5 January 1973, Distillers announced an offer of £20 million, made up of 10 annual payments of £2 million which brought the proceedings to an end.[23]

This combination of Litigation, active support from the claimants' families, Parliamentary lobbying, lobbying of the defendant's institutional shareholders and above all, the mobilising of media support set a standard of campaigning for compensation that has never been equalled in the UK.

The Thalidomide Trust

Establishing and maintaining the value of the Trust

The Thalidomide Trust was constituted on 10 August 1973 to meet the needs of persons:

> "whose disabilities were caused by the fact that during pregnancy their mothers had taken a preparation manufactured by the Distillers Company (Biochemicals) Limited in the United Kingdom containing the drug known as Thalidomide."

From the first, the Trust met those needs as generously as it could from the resources that it had had available. Those who had been children when the Litigation began were by now adolescents. Central to the process of ensuring fairness from the first between beneficiaries had been establishing a comparative benchmark which defines their severity of impairment against the level of impairment/damage of other thalidomider beneficiaries.

At the end of the Litigation each child had been examined and physically assessed at exhaustive length and a so called "6 (iv)(b)" numeric designation assigned by clinicians acting on behalf of the claimants and Distillers.[24] The Trust had to decide how to allocate funds to meet idiosyncratic needs, whether adaptations to homes or cars or to the cost of domestic or institutional care support.

Now, when applicants are admitted as new beneficiaries of the Trust,[25] a "6(iv)(b)" categorisation is arrived at by reviewing all of those existing beneficiaries with a similar array of injuries and assigning an appropriate comparative number to them.

One early problem—which persisted until 2004—was that whilst the Trust was charitable, its payments to beneficiaries were taxable. In October 1974, this tax charge at 48% reduced the value of the Trust by an estimated £5 million. Further campaigning, produced a payment by the Government of £5million as a tax offset.[26] This applied a sticking plaster to the problem.

For its first 20 years, the Trust was able to operate successfully with funds provided by the 1973 settlement, during which time the children it supported had become adults living independent lives, had married, were having children and demonstrating a physical and social adaptability that many had originally thought might be beyond them. However, by 1993, it had become apparent (as John Prevett had forecast) that the inflation of the late 1970's and early 1980's had undermined the long-term adequacy of the fund.

[22] P. Knightley, H. Evans, E. Potter and M. Wallace, "Suffer the Children" (Tomes Newspapers Ltd, 1979), p.201.

[23] The issue of freedom of comment, appealed by the *Sunday Times* to the House of Lords after Distillers' successful injunction application, went on. After losing there, the newspaper applied to invoke the European Convention on Human Rights at the ECtHR (there was no direct route in those pre-Human Rights Act days). The case was declared admissible. After a hearing in December 1975, the court found in favour of the *Sunday Times* on 29 July 1977; the journalists and Editor's art.10 rights to free speech having been breached (see conclusion below).

[24] This designation immortalises para.6(iv)(b) of the Offer by Distillers dated 26 April 1973 which brought the Litigation to an end.

[25] The Trust took over assessment of possible new claims in 2006. In the 10 years from 2008 until 2017, 36 new beneficiaries have been accepted by the Thalidomide Trust.

[26] D. Mason, "Thalidomide—My Fight" p.145.

A new campaign group, Thalidomide Action Group (UK) was set up by a small number of beneficiaries, whose aim was to restore the adequacy of compensation for Thalidomiders.

This campaign culminated in a negotiation during 1996 between the then Trustees and Guinness Plc (which had acquired Distillers in 1995) who covenanted until 2009 to pay further monies annually to the Thalidomide Trust. The Trust then applied for a renewal of the tax offset contribution from the Treasury, but the Government suggested only a grant to meet arising beneficiary needs. In 2000, Diageo Plc (formed through a merger between Grand Metropolitan and Guinness Plc) extended that covenant to 2022.

On 15 July 2004, the Paymaster General Dawn Primarolo finally announced legislation to make payments from the Thalidomide Trust to victims of Thalidomide tax-free, solving the problem identified 30 years before.

The Diageo Covenant

The operation of the Diageo Covenant involves a triennial actuarial review of needs which can take into account changing circumstances (e.g. the continuing number of applications for support from "new" applicants, something wholly unanticipated in 1973). Every six years there is a comprehensive formal review of the Covenant which looks at the numbers of beneficiaries and the resources available to support their needs but takes into account the changing nature of those needs as the cohort ages. For example, many beneficiaries are now having to make significant adaptations to their homes or move to single-story properties because of their deteriorating health and mobility.

The Health Grant

On 15 January 2010, the Department of Health announced a further contribution to the Trust towards beneficiaries' growing health needs involving a £20 million, three-year pilot scheme to enable Thalidomiders to cover the growing costs of meeting their additional health needs. In 2013, this Health Grant scheme was renewed until 2022.

Many of the needs now catered for by the Trust are not needs anticipated when the Trust was set up, which is unsurprising over a 50-year period. What is entirely creditable is that Diageo has recognised the continuing obligations of the Distillers' business towards the Trust's beneficiaries and has increased support whenever it can be shown to be necessary.

In the same way, Government has met its own obligations towards Thalidomiders with tax offsets and the introduction of annual payments to meet their ongoing health and wellbeing needs.

In helping bring about the Diageo Covenant, the Health Grant and the tax free status of payments to beneficiaries by the Trust, the Trust's National Advisory Council,[27] which represents beneficiary interests has proved itself to be a very formidable lobbying group indeed, whether with Diageo or with Government Departments, as well as at the European Parliament, lobbying internationally for all Thalidomiders' interests.

The current scheme of support[28]

The Charity supports 468 beneficiaries at present. It derives its funds from the principal trust fund which provides funds to make annual individual grants, as well as the annual Health Grant which is paid to the Trust by the four health departments of the UK; these sums are then distributed to beneficiaries.

[27] 12 beneficiaries elected by the beneficiary community to provide guidance to the trustees on fulfilling the Trust's charitable objectives.

[28] Parts of this section are adapted (with permission) from a narrative attached to the Trust's annual return to the Charity Commission, 2015–2016 which was prepared by the Trust' Finance Director, Jenny Tunbridge and its CEO, Deborah Jack.

In addition to making payments to beneficiaries the Trust also provides them with a range of support and advocacy services.

The Trustees, staff and National Advisory Council work together in a series of sub committees to manage the Trust's work and to focus on the best ways to support beneficiaries' changing needs.

Although the Trust is very much focussed on the needs of its small group of beneficiaries, it also raises awareness of the Thalidomide disaster and the changing needs of Thalidomide survivors by sharing research and learning with other Thalidomide organisations, with the broader disability community and by developing increasing links with physiotherapists, occupational therapists and clinicians with particular interest in the needs of Thalidomide survivors.

Holistic Needs Assessment and other support

A rolling programme of Holistic Needs Assessments has been instituted for all of the Trust's beneficiaries, intended to update the Trust about individual circumstances and identify unmet needs particularly amongst those beneficiaries less often in contact.

The Trust also provides ongoing, personalised support to its beneficiaries in a wide range of areas including advice on benefits (specifically the transition from DLA to PIP), mobility and health—and on navigating the health service.

It has a particular role in safeguarding those beneficiaries who are vulnerable to financial exploitation and supporting those who lack capacity, working in partnership with court-appointed Deputies.

From time to time, the Trust has funded private referrals for individuals for an initial consultation with a Specialist Consultant and associated testing to the point of diagnosis. Thalidomiders tend to have atypical orthopaedic problems rarely seen by clinicians.

Research

The Trust completed and published the results of the first survey of beneficiaries' health and wellbeing in 2016. "Changing Lives—The Health and Wellbeing of Thalidomide Survivors in Middle Age" is a significant piece of work that makes an important contribution to the international body of knowledge around the lifetime impact of Thalidomide but also to the wider disability community.

Conclusion: The Thalidomide legacy for personal injury lawyers

The Thalidomide Trust

The Thalidomide Trust was set up in 1973 with funds whose value was eroded by inflation over its first two decades so as to diminish its capacity to meet the needs of more than 400 people. Campaigning by beneficiaries since 1993 has restored sufficient funds to meet beneficiaries present needs and seems likely to be able to do so for the foreseeable future.

The Trust has also fulfilled the difficult role of providing needs based support to its beneficiaries, adapting to changing needs as they have got older.

The mechanism of Holistic Needs Assessment registers those changing needs in an increasingly sophisticated way and provides a regular update of each beneficiary's immediate and medium-term needs. It is a programme capable of being copied successfully elsewhere in long term healthcare support of groups of disabled claimants.

Awards of damages or agreed schemes of compensation for those seriously injured by drugs or other medical products are few in number and tend to be managed on a case by case basis. Whilst there is now

probably little support for a comprehensive no fault scheme like the New Zealand Accident Compensation Commission, properly funded, independently managed Trusts have had some success.[29]

In view of the difficulties inherent in making successful claims against the pharmaceutical industry over the last 40 years and the increasing resources committed to litigation to prevent reputational damage, perhaps the time has come to establish an independent Trust with annual funding from the industry and Government to support drug/medical products injured patients. This could apply some of the lessons learned by the Thalidomide Trust in supporting beneficiaries since 1973.

The Pearson Commission

The Thalidomide disaster was one of the reasons for setting up the Royal Commission on Personal Injury.

The litigation arising from Thalidomide in the UK and in other European jurisdictions demonstrated that both civil and common law lacked the means to deal adequately with the claims.

The Royal Commission's report examined the subject in all aspects and made findings (particularly on calculation of future losses and periodic payments) which set the broad terms for Personal Injury litigation to the present day. Whilst some of the findings about no fault schemes betray a wistful post War consensus attitude read at 30 years distance, the real impact of the report was to concentrate minds amongst practitioners and judges about how PI cases should be prepared, presented and determined.

These changes in attitude underpinned the development of "cards on the table" litigation following *Wilsher v Essex AHA*,[30] which together with decisions such as *Naylor v Preston HA*[31] and the *The Ikarian Reefer*[32] changed fundamentally the conduct of claims, revealing earlier and in all detail the strengths and weaknesses in parties' evidence.

Judges became more adept at trying complex PI cases and less intimidated by contests involving developed Schedules of Damages in which future losses and allowance for inflation were intrinsic. None of this evolution would have been possible without the Pearson Commission's report. Lord Woolf's reforms, formalised this shift in emphasis.

Legal Aid evened up the inequality in resources between plaintiffs and defendants, until the rise in the cost of Legal Aid in the early 1990s gave politicians the excuse to substitute Legal Expenses Insurance and Conditional Fee Agreements, which compelled Claimant practitioners to focus on costs orders (seemingly) to the exclusion of all else.

Despite all of this positive change, pharmaceutical claims remain a problem for claimants. Whilst there have been settlements of claims for where multi party actions have been issued, no pharmaceutical claim has gone to Trial where a claimant has succeeded. As in the 1960's, success in such a product claim is more likely in one of the US jurisdictions. Then as now, success in US pharmaceutical litigation rests on the manufacturer's fear of the civil jury. Ironically, at the time when the Thalidomide claims were being litigated, a civil jury in a PI claim was still a theoretical possibility.

A 21st century civil jury in a pharmaceutical claim in England and Wales seems a vanishingly unlikely possibility but the use of expert Assessors is possible but rarely employed.

Judges in marine claims are used to sitting with Master Mariner Assessors but judges trying pharmaceutical actions never seem to think that a statistician or pharmacologist might offer any useful insight. Most judges are numerate but few have a professional background in statistics and probably fewer still have any experience in epidemiology, but it is in these two fields that these claims are won and lost.

[29] Aside from the Thalidomide Trust, the MacFarlane Trust, the Skipton Trust and the vCJD Trust, have worked mostly effectively, if occasionally slowly.

[30] *Wilsher v Essex AHA* (1987) Q.B. 730.

[31] *Naylor v Preston AHA* (1987) 2 All E.R. 353.

[32] *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer) (No.1)* (1993) 2 Lloyds Rep. 68.

If the common sense of a jury is not a sufficient basis to decide a case perhaps independent assessor expertise might be worth a try?

The Congenital Disabilities Act 1976

The Congenital Disability (Civil Liability) Act 1976 was intended by the Law Commission to define terms for claims for ante natal injury. Unfortunately, this well-meant statute has proved to be a significant hurdle both by itself and in its interplay with the Product Liability Directive.[33]

Christopher Johnston QC, writing in this journal in 2012, highlighted the problems caused by the interplay of this statute with the Directive[34] and concluded that:

> "The goal of simple low cost redress to babies injured in utero has proven to be a chimera of the worst kind; a betrayal of Thalidomide sufferers who may have thought that others caused lifelong damage by a product, like themselves, would in the future not have to engage in lengthy trench warfare to achieve redress."

This statute needs to be repealed.

The Product Liability Directive and the Consumer Protection Act 1987

One outcome of Thalidomide was the European Product Liability Directive and its domestic expression the Consumer Protection Act 1987. Claims have been few in the UK and interpretation of the Directive/Act has been sparse, both in the UK and in other EU Member States, because manufacturers have worked hard either to avoid cases coming before the courts or when in court have defended them vigorously.

So hard have defendant lawyers worked to keep cases out of court, that it was not until 2000 that an extensive judicial examination of the meaning of "defect" took place. In *A v National Blood Authority*[35] where Burton J identified the salient features of the notion of "defect" so that a product is "defective":

> "when it does not provide the safety which a person is entitled to expect taking all circumstances into account." (art.6)

In the Directive's Sixth Recital, "defectiveness" is determined not by a product's "fitness for use but to the lack of safety which the public at large is entitled to expect"; a product is not considered defective for the sole reason that a better product is subsequently put into use.

Burton J indicated that the test was one of "legitimate expectation of safety" for any given product, objectively interpreted by the court. It is a question of strict but not absolute liability and it is the safety of "persons generally" or "the public at large".

Remedies for consumers from this legislation have proved not to be as straightforward as promised when the legislation was introduced because there was little guidance for lawyers as to whether the underpinning principle really is the strict liability it appears to be.

Furthermore, a great deal of court time and an immense amount of manufacturer's money has been spent in asserting that in order to succeed, claimants must be able to prove the exact mechanism of causation which has caused injury. Recent developments suggest that both European and domestic courts are anxious to simplify this remedy so far as both "defect" and causation are concerned.

Boston Scientific Medzintechnik GmbH v AOK Sachsen-Anhalt Die Gesundheitkasse[36] and its clarifying interpretation of the meaning of "defect" tip the scales a little more in the claimants' favour. The CJEU

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

[34] C. Johnston QC, "A personal (and selective) introduction to product liability law" (2012) J.P.I.L. 1.

[35] *A v National Blood Authority* [2001] 3 All E.R. 289.

[36] *Boston Scientific Medzintechnik GmbH v AOK Sachsen-Anhalt Die Gesundheitkasse* (C-503/13) EU:C:2015:148.

relied upon the Product Liability Directive art.2 and its intended "fair apportionment of risks", to decide that the safety which a person is entitled to expect—so far as implantable medical devices and (arguably) ingestible pharmaceutical products are concerned—is found lacking:

> "where the risks jeopardising the safety of a product's user have an abnormal unreasonable character exceeding the normal risks inherent in its use."[37]

Decisions in the Court of Appeal, *Ide v ATB Sales*[38] and *Baker v KTM Sportmotorcycle UK Ltd*[39] stress that "it is not necessary to show how a defect is caused, it is sufficient to find that there is a defect" even though "the precise mechanism by which that defect arose is not proven".

This favourable case law[40] has been a long time coming and there is still a lot to define before the Directive becomes the consumer remedy it should be. Whilst Brexit does not threaten the consumer remedy—the Consumer Protection Act 1987 and the case law (both EU and domestic) since 1987 will stay in place, after Brexit, EU and England and Wales interpretation may diverge as we cease to be bound by CJEU; particularly if our judiciary see this legislation in a less purposive and more common law light.

If the Thalidomide Trial was to take place today, this case law would help claimants but there would be two other hurdles to overcome, first, the Directive's Development Risks Defence—could you have identified a sufficiently widespread standard of testing on pregnant animals to rebut the presumption that you were relying on hindsight? Desmond Ackner QC thought that evidence was lacking to prove causation on a common law "but for" basis. The *Sunday Times* Insight team later thought that you could prove that it was the standard. Much might depend upon the degree of disclosure you had managed to achieve.

The second hurdle would be in overcoming the "Byzantine" qualifying tests in the Congenital Disabilities (Civil Liability) Act 1976, identified by Christopher Johnston's article.[41]

Professor Richard Goldberg has no doubt of the impact that Thalidomide has had and continues to have on this area of the law:

> "The piecemeal developments in product liability reform, culminating in the introduction of strict liability within Europe, have their origins in the thalidomide disaster, and in many ways thalidomide continues to fuel the pressure for the reform of product liability, especially for the victims of alleged medicinal product-induced injury."[42]

Freedom to comment

Last, but by no means least, the freedom of expression that lawyers and journalists now enjoy to comment on litigation stems from the decision of the European Court of Human Rights [43] in favour of the *Sunday Times*, that:

> "In the present case, the families of numerous victims of the tragedy had a vital interest in knowing all the underlying facts and the various possible solutions. The case had been stagnant for several years and it was at the very least, far from certain that the parents' actions would have gone on to Trial. There had also been no Public Inquiry. Furthermore , whilst it was true that had the article appeared at the intended time, the company [Distillers] would have felt obliged to develop in public their arguments on the facts of this case, this might have served the public purpose of putting a brake

[37] *Boston Scientific Medzintechnik GmbH v AOK Sachsen-Anhalt Die Gesundheitkasse* (2015) 3 C.M.L.R. 173 (CJEU).
[38] *Ide v ATB Sales* (2008) EWCA Civ 424.
[39] *Baker v KTM Sportmotorcycle UK Ltd* (2017) EWCA Civ 378.
[40] *Wilkes v De Puy International Ltd* (2016) EWHC 3096 (QB); *Gee v De Puy International Ltd* [2018] EWHC 1208 (QB): seem to be striking out in a new (post Brexit?) direction notwithstanding Boston Scientific.
[41] C. Johnston QC, "harming babies in the womb: The remarkable lacunae" [2012] J.P.I.L 1, 1–12.
[42] Professor R. Goldberg, *Medicinal Product Liability and Regulation* (Hart Publishing, 2013).
[43] *The Sunday Times v UK* (A/30) (1979–1980) 2 E.H.R.R. 245.

> on speculative and unenlightened discussion. For all these reasons, the Court concluded that the interference did not correspond to a social need sufficiently pressing to outweigh the public interest in freedom of expression with in the meaning of the Convention. There had accordingly been a violation of the right to freedom of expression."

You might want to think about that next time you sit down to draft a press release about next week's trial or inquest.[44]

[44] Professor Caroline Glendinning, (the longest serving Thalidomide Trustee), Sir Robert Nelson (Chair), Deborah Jack (Executive Director) and Rosaleen Moriarty-Simmonds (Beneficiary) all read this article in draft at various stages and offered valuable advice. The opinions expressed are all my own.

Cavalier v Pope: Another Victim of the Grenfell Tower fire?

James Plunkett*

Defective premises; Duty of care; Fire; Landlords' duties; Personal injury

Introduction

It is now more than a year since a devastating fire tore through North Kensington's Grenfell Tower block, tragically killing 72, and injuring 70 others. The fire appears to have started relatively innocuously in a faulty fridge-freezer on the fourth floor of the Tower, but soon became out of control, and ultimately engulfed the entire building in flames, upon spreading to the Tower's recently installed cladding, which turned out to be highly combustible. The 24-story public housing tower, which opened in 1974 and underwent major renovations (including the installation of the cladding) between 2012 and 2016, is now due to be demolished. With many asking how such a tragedy could have occurred, a public inquiry into the circumstances surrounding the fire is currently underway.[1]

In the meantime, a number of organisations involved with the renovation and management of the tower have been subjected to considerable criticism. Perhaps the foremost of these has been the owners of the Tower, Kensington and Chelsea LBC. In particular, they have been criticised for, inter alia, failing to install fire sprinklers, failing to construct a second fire escape, allowing the contractors who undertook the 2012–2016 renovations to use combustible cladding rather than a (more expensive) fireproof alternative, and failing to address concerns about residents' safety in the event of a fire, concerns that had apparently been expressed as early as 2013.[2]

Given the magnitude of the losses, the legal ramifications of the disaster are likely to be considerable. Changes to building regulations seem inevitable, and corporate manslaughter charges are also apparently being discussed.[3] A claim against the manufacturers of the cladding is also underway in the US, following investor claims that the price plunge in the manufacturer's share values in the aftermath of the fire was the result of misleading statements about the safety of their products.[4] Likely of most interest to readers of this Journal, however, is that, despite the establishment of a relief fund for victims, personal injury litigation is also likely to be forthcoming, both by injured tenants/lessees and their visitors.[5]

As the inquiry into the circumstances surrounding the fire is ongoing, the number of potential defendants and causes of action likely to be pursued is not yet clear. However, if and when such litigation is pursued, one would expect it to include a claim against Kensington and Chelsea LBC, in their capacity as the landlord of the building, for (allegedly) negligently allowing the premises to be in a defective state. Assuming such an action is pursued, lessees will likely have few obstacles to recovery for any personal injury or property damage suffered, given that the law imposes a number of relevant warranties into tenancy agreements, including that furnished homes[6] and "common parts" in high rise blocks[7] are generally

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[1] See *https://www.grenfelltowerinquiry.org.uk/* [Accessed 5 July 2018].

[2] See any of the various media reports in the aftermath of the fire.

[3] See, e.g. *http://www.independent.co.uk/news/uk/crime/grenfell-tower-fire-latest-met-police-manslaughter-charges-jailed-deaths-killed-companies-cladding-a7955021.html* [Accessed 5 July 2018].

[4] See *https://www.courthousenews.com/wp-content/uploads/2017/07/Grenfell.pdf* [Accessed 5 July 2018].

[5] For the rest of the article, the terms tenant and lessee will be used synonymously. Consistent with the Occupiers Liability Act 1957, the term "visitor" will be used to refer to "invitees" and "licensees"—or, in more modern terms, *guests* of the lessee.

[6] *Collins v Hopkins* [1923] 2 K.B. 617.

[7] *Liverpool CC v Irwin* [1977] A.C. 239.

safe and fit for occupation; accordingly, if it can be shown that the premises were in some way defective, a breach of the warranties, and therefore recovery, will likely follow. Of course, with such implied terms being contractual in nature, they will only benefit tenants.[8] Visitors, on the other hand, will have to rely on an alternative cause of action, most likely based on a breach of the Occupiers Liability Act 1957[9] or Defective Premises Act 1972,[10] or common law negligence. However, such claims offer considerably less protection than that provided to tenants by the implied warranties, as, in addition to needing to show the premises were defective, visitors must *also* show that such defects were due to the negligence of the landlord. Further, even *if* negligence can be shown, and it can be established that Kensington and Chelsea LBC *did* fail to act in a way expected of a reasonable landlord, recovery proceedings may *still* fail due to the continued existence of *Cavalier v Pope*,[11] the early 20th century case which held that landlords owe no duty of care to tenants or their guests in relation to injuries that arise from the defective state of their premises. Although the rule has since been heavily abrogated by statute, remnants of the rule remain, and those remnants could be directly relevant to any claim against Kensington and Chelsea LBC arising from the disaster.[12] Now therefore seems like an appropriate time to examine the rule, and to ask whether and in what circumstances (if any) it can continue to be justified.

Cavalier v Pope: Then and now

The facts of *Cavalier v Pope* are relatively straightforward. Mr Cavalier rented an unfurnished home from Mr Pope, and subsequently moved in with his wife. The house was in poor condition, and both Mr Cavalier and his wife repeatedly complained about the state of the kitchen floor. After the Cavaliers eventually threatened to leave the premises, Mr Pope agreed to repair the floor. Before the repairs were carried out, however, Mrs Cavalier fell through the kitchen floor and suffered various injuries as a result. Both Mr and Mrs Cavalier sued. At first instance both Mr and Mrs Cavalier were successful, Phillmore J finding for them on the basis of Mr Pope's failure to repair the floor as promised.[13] That Mrs Cavalier was not privy to the contract was overcome by reliance on *Nelson v Liverpool Brewery Co*,[14] an obscure Divisional Court decision that held that a landlord was responsible for injuries caused to third parties by the dilapidated state of a property if a contract to repair was enforceable by the tenant. Mr Pope appealed the verdict in favour of Mrs Cavalier to the Court of Appeal. The appeal was upheld on the basis that *Nelson* did not apply on the facts. Mrs Cavalier appealed to the House of Lords. The House of Lords, in five extremely brief speeches, unanimously rejected Mrs Cavalier's appeal. Insofar as there was any tortious duty imposed on a landlord to provide safe premises, considerable reliance was placed on the words of Erle CJ, in *Robbins v Jones*:[15]

> "A landlord who lets a house in a dangerous state is not liable to the tenant's customers or guests for accidents happening during the term: for, fraud apart, there is no law against letting a tumble-down house; and the tenant's remedy is upon his contract, if any."

As fraud was not able to be established, the claim based on the breach of a tortious duty therefore failed. Their Lordships also agreed that *Nelson* did not apply on the facts, meaning that, just as in the Court of Appeal, Mrs Cavalier's claim for breach of contract failed for want of privity. Given that privity of contract

[8] Assuming that the Contracts (Rights of Third Parties) Act 1999 does not apply.

[9] OLA 1957. For more on the history of the OLA 1957 see, S. H. Bailey, "Occupiers' liability: the enactment of 'common law' principles" in T. T Arvind and J. Steele (eds), *Tort law and the legislature: common law, statute and the dynamics of legal change* (Hart, 2013), 195–198.

[10] DPA 1972.

[11] *Cavalier v Pope* [1906] A.C. 428.

[12] Of course, other causes of action and other defendants will almost certainly be pursued. What such claims might look like and whether or not they might succeed are not, however, the focus of this article.

[13] *Cavalier v Pope* [1905] 2 K.B. 761 CA at 761, Collins MR noting the decision of the trial judge.

[14] *Nelson v Liverpool Brewery Co* (1877) 2 C.P.D. 311.

[15] *Robbins v Jones* (143 E.R. 768; (1863) 15 C.B. N.S. 221 at 240.

was, at the time, a well-established requirement for the existence of a contract,[16] *Cavalier v Pope*'s principal significance was the establishment of the rule that a landlord owed no tortious duty to their tenants or their guests in relation to injuries that arise due to any defects in the state of the premises.[17]

Cavalier v Pope was later held, in *Bottomley v Bannister*,[18] to extend to defects negligently created by the landlord. According to Scrutton LJ:

> "[I]t is at present well established English law that, in the absence of express contract, a landlord of an unfurnished house is not liable to his tenant … for defects in the house or land rendering it dangerous or unfit for occupation, *even if he has constructed the defects himself or is aware of their existence*."[19]

It is debatable whether this was ever an accurate proposition of the law, considering that the previous cases were only concerned with defects created by someone *other* than the landlord. Notwithstanding this, it was Scrutton LJ's view of the law that prevailed and that the court ultimately held was binding, which, on the facts of the case, led to a finding for the defendant. The court was nevertheless clearly conscious of the potential unfairness of the rule, two of the Lord Justices seemingly even encouraging review of the law by the legislature.[20]

At this point, eagle-eyed readers may have noticed that *Bottomley* was handed down at almost precisely the same time as the House of Lords delivered their speeches in *Donoghue v Stevenson*,[21] including Lord Atkin's famous neighbor dictum; in fact, *Bottomley* was handed down only six months prior to *Donoghue v Stevenson*. Given the now ubiquitous nature of the dictum, modern readers would be forgiven for assuming that it would have necessarily rendered both *Cavalier v Pope* and its extension in *Bottomley v Bannister* obsolete: after all, landlords ought surely to consider visitors to a leased premises:

> "persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."[22]

However, the immediate impact of the neighbor dictum was modest, and far from providing "a general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances",[23] it instead tended to be seen as confined to cases against manufacturers for personal injuries caused by defective chattels.[24] Accordingly, in *Otto v Bolton*,[25] *Davis v Foots*[26] and *Travers v Gloucester Corp*,[27] it was held that *Cavalier v Pope* remained good law.

Dissatisfaction with the law was nevertheless palpable. In both *Otto v Bolton* and *Travers*, the law was only upheld with "great regret",[28] and in *Greene v Chelsea BC*[29] Denning LJ commented that "*Cavalier v Pope* is a relic … [an] outworn fallacy".[30] Academic commentary was similarly critical: Professor Winfield,

[16] See, e.g. *Tweddle v Atkinson* 121 E.R. 762; (1861) 1 B. & S. 393.
[17] The rule is often described as an "immunity". For more on the background to the case, see R. Baker and J. Garton, "Cavalier v Pope (1906)" in C. Mitchell and P. Mitchell (eds), *Landmark Cases in the Law of Tort* (Hart, 2010).
[18] *Bottomley v Bannister* [1932] 1 K.B. 458.
[19] *Bottomley v Bannister* [1932] 1 K.B. 458 at 468 (emphasis added).
[20] See, in particular, *Bottomley v Bannister* [1932] 1 K.B. 458 at 469 (Scrutton LJ) and 474 (Greer LJ).
[21] *Donoghue v Stevenson* [1932] A.C. 562 HL.
[22] *Donoghue v Stevenson* [1932] A.C. 562 HL at 581 (Lord Atkin).
[23] *Donoghue v Stevenson* [1932] A.C. 562 HL at 581.
[24] The author of the headnote, e.g. believed the case only applied to distributers of "food, medicine or the like". See also the discussion in Plunkett, *The Duty of Care in Negligence* (Hart, 2018), 36–39.
[25] *Otto v Bolton* [1936] 2 K.B. 46.
[26] *Davis v Foots* [1940] 1 K.B. 116 CA.
[27] *Travers v Gloucester Corp* [1947] K.B. 71.
[28] *Travers v Gloucester Corp* [1947] K.B. 71 at 91 (Lewis J); *Otto v Bolton* [1936] 2 K.B. 46 at 58 (Atkinson J).
[29] *Greene v Chelsea BC* [1954] 2 Q.B. 127 CA.
[30] *Greene v Chelsea BC* [1954] 2 Q.B. 127 CA at 138.

for example, noted in 1945 that "the law is not satisfactory on this point".[31] Eventually critics' voices were heard, and in 1957 Parliament passed the OLA 1957, which, in s.4, established a duty in respect of damage to person or property (whether tenant or visitor) arising from a default of the landlord to carry out repairs required by the lease. The protection offered by s.4, whilst certainly an improvement, was nevertheless limited, extending to neither inherent defects nor defects the landlord had not agreed to repair. Accordingly, in 1972, following the Law Commission report into the *Civil Liability of Vendors and Lessors for Defective Premises*,[32] the protection offered to both tenants and visitors was further extended by the DPA 1972. In particular, s.3 provided that the existence of a lease no longer created an immunity for defects created by negligent construction or maintenance, whilst s.4(1) provided that:

> "Where premises are let under a tenancy which puts on the landlord an obligation to the tenant for the maintenance or repair of the premises, the landlord owes to all persons who might reasonably be expected to be affected by defects in the state of the premises a duty to take such care as is reasonable in all the circumstances to see that they are reasonably safe from personal injury or from damage to their property caused by a relevant defect."

Yet, whilst the Defective Premises Act 1972 ss.3 and 4 heavily abrogated the rule in *Cavalier v Pope*, they did not abolish it entirely (as was recommended by the LRC).[33] In particular, the statutory provisions were subject to two significant limitations.

The first limitation was that the DPA 1972 s.3 did not apply to defects created prior to the commencement of the Act (being 1 January 1974), including those negligently created by the landlord. Insofar as such defects were concerned, *Cavalier v Pope* and *Bottomley* continued to apply. Fortunately for lessees' visitors, the subsequent development of the common law appears to have rendered this limitation no-more. In particular, after *Anns v Merton LBC*[34] was decided in 1978, it would have been downright absurd if a local authority could be liable for failing to detect a builder's negligence, whilst the builder him or herself was immune (at least, where the builder was also the landlord).[35] Accordingly, in *Rimer v Liverpool CC*,[36] it was held that *Cavalier v Pope* could no longer confer an immunity on those who negligently built or constructed a home, simply because they also happened to be the landlord.[37] Notwithstanding that *Anns* was subsequently overruled by a unanimous House of Lords in *Murphy v Brentwood DC*,[38] there seems little doubt that that the *Rimer* qualification continues to apply. Indeed, *Anns* aside, outside of cases involving armed conflict,[39] there appears to be *no* modern case in England and Wales where a duty has been denied, notwithstanding that the defendant's carelessness has directly[40] led to the plaintiff suffering physical harm. Recognising an exception for negligent builder/landlords would therefore go against the overwhelming weight of modern authority. Accordingly, notwithstanding that it was never explicitly stated in *Rimer*, it is difficult to escape the conclusion that *Bottomley* has now been consigned to the scrapheap of legal history, and that the first limitation of the DPA 1972 is no more.

The second limitation of the DPA 1972 was that the definition of "defect" was restricted to:

> "a defect in the state of the premises existing at or after the material time and arising from, or continuing because of, an act or omission by the landlord which constitutes or would if he had had

[31] Winfield, *Cases on the Law of Tort*, 3rd edn (Sweet & Maxwell, 1945), 543.
[32] Law Com No.40 1970.
[33] See [45]-[46].
[34] *Anns v Merton LBC* [1978] A.C. 728 HL.
[35] This was certainly the conclusion of Lord Wilberforce in *Anns v Merton LBC* [1978] A.C. 728 HL at 758.
[36] *Rimer v Liverpool CC* [1985] 1 Q.B. 1 CA.
[37] *Rimer v Liverpool CC* [1985] 1 Q.B. 1 CA at 13.
[38] *Murphy v Brentwood DC* [1991] 1 A.C. 398 HL.
[39] See, e.g. *Mulcahy v Ministry of Defence* [1996] Q.B. 732 CA; *Smith v Ministry of Defence* [2013] UKSC 41; [2014] A.C. 52 HL.
[40] That is, not the result of an omission, which is discussed further below.

> notice of the defect, have constituted a failure by him to carry out his obligation to the tenant for the maintenance or repair of the premises."[41]

In other words, it did not extend to defects (in the ordinary sense) that did not arise from a failure to "carry out maintenance or repair of the premises". The clearest example of such defects are those created by the design or construction of the premises, such as a negligently designed staircase or negligently installed electrical cabling. It would also appear to apply to defects created by third parties, such as contractors. Accordingly, insofar as the common law was concerned, a landlord continued to enjoy immunity for injuries suffered by visitors arising from the landlord's negligent failure to remedy (or even warn of) defects created by others. That this was indeed the case was (relatively) recently affirmed by the Court of Appeal in *Alker v Collingwood Housing Association*,[42] where Laws LJ held:

> "A house may offer many hazards: a very steep stairway with no railings; a hidden step; some other hazard inside or outside the house of the kind often found perhaps in particular older properties. I do not think it can be said that the Act requires a landlord … to make safe any dangerous feature."[43]

To date, this position has not been subject to further challenge. The second limitation therefore remains. The present situation, then, is that *Cavalier v Pope* continues to provide an immunity to landlords for negligently failing to remedy or warn of defects that were created by a third party (whether negligently or otherwise).

Time for change?

It is now more than 110 years since *Cavalier v Pope* was decided and much has changed during that time. Indeed, the law of tort, and in particular the law of negligence, has evolved profoundly, and as long ago as 1954, *Cavalier v Pope* was already being described as a "relic". Despite this, the case continues to have precedential value, even if to a lesser extent than it did originally. Whilst the gradual abrogation of the rule has meant that, more recently, its remnants are only rarely of any particular concern, as discussed above, the devastating effects of the Grenfell Tower disaster, and the likelihood that those remnants may affect the ability of those visitors injured in the fire to recover damages, may force *Cavalier v Pope* back into the spotlight, and ultimately require the courts to ask themselves whether or not the case ought to finally be laid to rest, as the High Court of Australia did in 1997.[44]

It is doubtful that many would defend the blanket immunity initially conferred on landlords by *Cavalier v Pope*, which is surely unjustifiable in the current social and legal climate. However, the same cannot necessarily be said for the *present* form of the rule, which merely confers an immunity on landlords who *omit* to address defects created by a third party. After all, outside of cases involving assumptions of responsibility and certain special classes of relationship, the default position of the common law of England and Wales is that negligent omissions do not attract liability;[45] that is, there is typically no duty to take positive steps to prevent harm to another ("the omission rule"). As explained by Lord Hoffmann in *Stovin v Wise*:[46]

> "It is one thing for the law to say that a person who undertakes some activity shall take reasonable care not to cause damage to others. It is another thing for the law to require that a person who is doing

[41] DPA 1972 s.4(3).
[42] *Alker v Collingwood Housing Assoc* [2007] EWCA Civ 343; [2007] 1 W.L.R. 2230 CA.
[43] *Alker v Collingwood Housing Assoc* [2007] EWCA Civ 343; [2007] 1 W.L.R. 2230 CA at 2236. See also *Rimer v Liverpool CC* [1985] 1 Q.B. 1 CA at 10.
[44] *Northern Sandblasting Pty Ltd v Harris* (1997) 188 C.L.R. 313. For further commentary on the Australian position see, T. Cockburn, "Duty of Care of Landlords of Residential Premises" (2001) 20 UTasLR 205.
[45] See Plunkett, *The Duty of Care in Negligence* (Hart, 2018), 141 and 147.
[46] *Stovin v Wise* [1996] A.C. 923.

> nothing in particular shall take steps to prevent another from suffering harm from the acts of third parties … Except in special cases … English law does not reward someone who voluntarily confers a benefit on another. So there must be some special reason why he must put his hand in his pocket."[47]

For this reason, a child drowning in shallow water has no cause of action against a champion swimmer who happens to be passing by, yet simply watches the child drown. Accordingly, when considering whether the remnants of *Cavalier v Pope* are justifiable, the issue is not so much whether there should be a departure from the general rule that negligently inflicted personal injury gives rise to liability, but whether there should be a departure from the general rule that negligent omissions do *not* give rise to liability. As Lord Hoffmann explained, such a departure will only occur when there is some "special reason" why it should.

One potentially "special reason" why it might be said a landlord owes a duty to take positive steps to prevent visitors to their leased premises suffering injury, is that the landlord/visitor relationship is analogous to a number of those relationships that *already* provide exceptions to the omissions rule, including the relationships between teacher and student,[48] employer and employee,[49] prison guard and prisoner,[50] all of which already impose a duty on the former to take positive steps to protect the latter. Whilst the various exceptions "do not fit into any neat pattern … [and] seem not to derive from or be reduceable to a single principle",[51] they can perhaps be broadly described as concerning relationships where one party has a high degree of control over which risks the other party will be exposed to, as a result of their position of authority; and given that landlords *also* have a high degree of control (and where the tenant has no contractual right to repair or no knowledge of the relevant risk, *ultimate* control) over which risks visitors to their premises will be exposed to, it could be said that they, too, ought to have a duty to take positive steps to address those risks. Yet, notwithstanding the clear vulnerability of visitors to negligent omissions of landlords, unlike the teacher/student, etc, relationships, the landlord/visitor relationship is *not* one where one party has authority over the other. So, for example, whereas a teacher has the power to direct a student where to go and what to do when there, and so what risks the latter will be exposed to, a landlord has no such power over visitors to their premises. This is a significant distinction: *directing* someone to expose themselves to a risk created by another (e.g. a teacher's direction to play with a bully, or a guard's decision to place a depressed prisoner in a cell alone and with a rope) is not the same as *failing to prevent* someone from exposing themselves to a risk created by another. This is not, of course, to deny that a duty *can* exist, just that the argument based on analogy with the existing relationship-based exceptions is not compelling, as the features of the relationships are simply too different.

As an alternative, it might therefore be said that, even if the landlord/visitor relationship does not *in itself* justify an exception to the omissions rule, an exception could nevertheless be justified on the basis that a landlord, by renting out a premises in full knowledge that people other than the lessee will almost certainly visit the property, has thereby implicitly assumed a responsibility to those visitors that the premises will be safe. Such use of the concept of assumption of responsibility is not new. In *White v Jones*,[52] for example, Lord Nolan suggested that the concept could be used to explain the duty owed by the driver of a motor vehicle to other road users (not to directly cause them physical injury).[53] Such usage of the concept is, however, best avoided, as not only is it inconsistent with more recent authority,[54] but, more importantly, it also robs the concept of any utility whatsoever.[55] After all, in what sense can a landlord

[47] *Stovin v Wise* [1996] A.C. 923 at 943. Almost identical comments are made by Lord Nicholls at 930.
[48] See e.g. *Bradford-Smart v West Sussex CC* [2002] EWCA Civ 7.
[49] See e.g. the comments of Lord Toulson in *Michael v Chief Constable of South Wales Police* [2015] UKSC 2; [2015] A.C. 1732 HL at [100].
[50] See e.g. *Ellis v Home Office* [1953] 2 Q.B. 135; [1953] 3 W.L.R. 105; [1953] 2 All E.R. 149; *Kirkham v Chief Constable of Greater Manchester* [1990] 2 Q.B. 283.
[51] T. Honore, "Are Omissions Less Culpable?" in P. Cane and J. Stapleton (eds), *Essays for Patrick Atiyah* (OUP, 1991), 47.
[52] *White v Jones* [1995] 2 A.C. 207 HL.
[53] *White v Jones* [1995] 2 A.C. 207 HL at 293–94.
[54] *Customs and Excise Commissioners v Barclays Bank plc* [2006] UKHL 28; [2007] 1 A.C. 181.
[55] Plunkett, *The Duty of Care in Negligence* (Hart, 2018), 133–138.

be said to have assumed a legal obligation towards a person he or she most likely doesn't even know exists, let alone a specific obligation to take care to ensure that the premises they are visiting is free from defects and safe for use by visitors? Such an argument conflates factual considerations (whether an undertaking was given) with normative considerations (whether the law *should* impose an obligation to be careful even in the absence of an undertaking), and so is, again, not a compelling reason to overcome the omissions rule.

But what about the oft-cited argument of Erle CJ in *Robbins v Jones*, quoted above, that "there is no law against letting a tumble-down house"? After all, if a potential lessee wants to rent a dilapidated house, why should the law of tort prevent (or at least hinder) such a transaction from taking place? Shouldn't the law of tort allow a landlord to transfer responsibility for the management of a risk (i.e. the defect in the property) to a consenting tenant? Prima facie, the answer appears to be yes, however, prior committing to such a position, two pre-conditions must surely first be met. First, the landlord must *actually* communicate the existence of any defects, and so the risks arising from them, to the lessee—if the tenant does not know they are taking over responsibility for the management of a risk, responsibility for it can hardly be said to have been transferred to them. Secondly, the tenant must have the *ability* to assume responsibility for the management of the risk. So, for example, where the defect is in a common area of an apartment building, tenants are unlikely to have the authority (nor possibly the resources) to address such a defect (for example, the absence of fire sprinklers or a safe fire escape): any power to actually address the risk is likely to rest solely with the landlord.[56] Absent these two conditions, Erle LJ's argument loses much of its appeal, as the landlord, by renting the premises without addressing the defect, has made the choice to expose others to a risk of injury they would not have otherwise been exposed to. In such circumstances, the landlord is not like the champion swimmer walking past the drowning child, as whereas the latter has merely *encountered* a risk he played no role in creating, the former has taken a risk that posed no risk of injury to visitors (i.e. the risk of injury from the defect prior to the premises being rented) and turned it into a risk that *did* pose a risk of injury to visitors. It is suggested that this provides a sufficiently "special reason" why the omissions rule, and so the *Cavalier v Pope* immunity, ought *not* to apply.[57]

So far, so good. But what about where the abovementioned conditions *are* met? That is, where the landlord *does* communicate the existence of a defect within a private residence (i.e. non-communal area) to the lessee and the lessee freely agrees to lease the property anyway. On the one hand, shouldn't landlords be entitled to transfer responsibility for managing the risk of injury from a defect to a willing party? On the other, if a landlord chooses to rent out premises whilst negligently failing to address risks posed from defects within that premises, why shouldn't they be liable for any damage that follows? It is suggested that, in these circumstances, *no* duty should be imposed and the landlord ought to be free to transfer responsibility for the management of defects to a willing tenant. After all, if I *sell* a tumble-down house with easily remediable defects that I have negligently chosen to ignore, and a subsequent visitor to the house suffers injury due to one of those defects, notwithstanding that I had the *ability* (or *power*) to address the risk of injury by not selling the house or fixing the defect before sale, I am under no legal *obligation* to do so, as the law deems responsibility for the management of the risk to have passed to the new occupier upon sale. So why should it matter whether occupancy of the premises has passed via leasehold or freehold? I have the *ability* to address the defects in both cases, so why should that ability alone only create an *obligation* to do so in the case of the lease? That the negligent landlord has a *greater* ability to address the defects than the negligent vendor (perhaps via a clause in the lease agreement) is immaterial: as the

[56] Indeed, the landlord would continue to be the occupier of such a space and so liable for omissions under the OLA 1957.

[57] It might also be argued here that another special reason is that the landlord is the *only* person with the ability to remedy the defect. This is a "proximity" type argument. However, aside from the fact this may not necessarily be true (such as where the defect was created by a third party or only discovered after the lease had commenced), the swimmer's non-liability to the drowning child does not depend on whether he is walking past by himself, or alongside a crowd of other champion swimmers—the fact someone is the only person who can remedy a risk is not a sufficient reason for imposing liability on them for failing to do so.

champion swimmer example illustrates, a legal obligation to do something must depend on more than the mere ability to do something.

To illustrate this point further, imagine that, in *Donoghue v Stevenson*, Mr Minghella (the proprietor of the café where the ginger beer was purchased by Mrs Donoghue's friend) *knew* that there was a decomposing snail in the ginger beer. We can probably happily agree that he would have owed a duty to Mrs Donoghue if he had nevertheless chosen to sell the ginger beer to her friend without any warning. However, it is suggested that no duty would have existed if Mr Minghella *had* warned the friend of the presence of the snail, and the friend agreed to purchase the ginger beer notwithstanding; responsibility for the management of the risk of injury from consuming the ginger beer had been passed to the friend, and that Mr Minghella could (or ought to have) foreseen that the friend might nevertheless provide it to Mrs Donoghue is immaterial. To hold otherwise would have profound consequences: vendors of both real and personal property would suddenly have an obligation to refuse to sell defective property to willing purchasers where it was foreseeable that the would-be consumers may use those goods in a way that would injure third parties. Again, in such circumstances, it is suggested that a duty of care ought to therefore not arise.

More difficult is the situation where the landlord learns of the existence of a defect only *during* the term of the lease (and negligently omits to do anything about it). Again, the landlord may have the *ability* to address the risk, but on what basis should they be under a legal *obligation* to do so? What is, in Hoffmann's language, the "special reason"? The landlord has *not* made any conscious decision to expose others to the risk (as they did not know of its existence at the commencement of the lease), they have simply come into knowledge that a risk of injury to someone else exists. It is suggested that in such circumstances, the landlord is in no materially different position to the swimmer walking past the drowning child: they have not created the risk, they have not worsened the risk, they are not preventing someone else from addressing the risk; they have merely failed to do anything about it notwithstanding the ability to do so.[58]

At this point it might be said that the above difficulties could be overcome entirely with a contractual indemnity in the lease agreement. That way a landlord could indeed transfer the *financial* risk of claims by visitors to the tenant without difficulty, the cost of the indemnity likely being reflected in a reduction in the lease fee. The difficulty with such a "solution", however, is that, not only would such an indemnity frequently have no practical value (persons renting defective homes for discounted prices will presumably only rarely have sufficient funds to honour an indemnity clause), but it operates on the assumption that that the landlord is still a wrongdoer on the basis of his or her mere *ability* to address a risk, when it is argued above that, at least where tenants freely accept responsibility for the management of defects, no legal wrong has been committed.

Conclusion

The consequences of the Grenfell Tower disaster are still being felt. No doubt they will continue to be felt for many years to come. Given the magnitude of the losses suffered in the disaster, litigation by victims seems inevitable. Whilst lessees will likely encounter few obstacles to recovery, the same may not be true of non-lessee visitors who have suffered personal injury or property damage. In particular, they may encounter difficulties as a result the rule in *Cavalier v Pope*, which, despite now being over a century old, and the subject of much historic criticism, continues to act as a limit on the liability of landlords for injuries caused by their defective premises.

[58] It may be objected here that the landlord is different to the swimmer as the former will benefit (in the form of rent) by ignoring the risk whereas the latter will not. But this is not necessarily true. Not only may the landlord not be receiving a benefit at all (e.g. the tenant is behind on his rent but refuses to leave), but it would imply that the swimmer's liability depended on who was drowning—he would not be responsible for omitting to save the drowning child but would be responsible for failing to save his biggest swimming rival who happened to be suffering from a cramp.

It has been suggested that, despite the rule being so heavily abrogated, its present form *still* goes too far, and offers too much protection to landlords; in particular, where a landlord knows or should know of the existence of a defect prior to entering into a lease, and enters into that lease *without* communicating the existence of the risk to the tenant, a duty should be owed and no protection afforded. However, it has also been suggested that abolishing the rule entirely, as has been done in Australia, would go too far the other way, as, at least within certain circumstances, the rule sits comfortably with established principles of common law negligence as they relate to liability for omissions, and so continues to have a role to play. In particular, it has been argued that the immunity ought to remain where a landlord communicates the existence of a defect to the tenant and tenant agrees to the lease notwithstanding, or where the defect is only discovered during the lease. Whilst such a rule is arguably not a descendant of *Cavalier v Pope* at all, but, instead, a mere application of the omission rule, it nevertheless appears to be justifiable. In some sense then, even if to an exceptionally limited extent, *Cavalier v Pope* should live on.

Putting Things Right in NHS Wales

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Clinical negligence; Complaints; NHS; Patients' rights; Personal injury; Redress schemes; Wales

Background

The NHS Complaints procedure was replaced in Wales by Regulations introduced by the National Health Service Redress (Wales) Measure 2008.[1] There have been considerable improvements for patients and their families but the good management of complaints and concerns is still a work in progress. Health Boards and Trusts in Wales continue to invest significant resources into improving the outcomes for all the patients in their care but, inevitably for some, there are cases in which the standard of care falls short. These cases require comprehensive and rapid investigation to provide answers and improve the outcomes in future.

Following a report by the Auditor General in 2001 "Clinical Negligence in the NHS in Wales" there were concerns about the level of legal costs and expert fees arising from such claims, and their impact on NHS services. In February 2005, the Welsh Assembly Government's Department for Health and Social Services established the Speedy Resolution Scheme[2] (the Scheme) to provide an alternative dispute resolution mechanism for clinical negligence claims against NHS Trusts in Wales.

The Scheme was set up to deal with straightforward cases valued between £5,000 and £15,000 for which, legal aid funding still existed. There were timescales for completion of different stages in the resolution of a dispute. It was anticipated that claims would be concluded within 61 weeks of admission to the Scheme. Important features of the Scheme were: set timescales; joint instruction of medical experts and Counsel; and fixed fees for solicitors, medical experts and counsel. A significant degree of cooperation and collaboration between the legal advisors for the parties was essential. The primary objective of the Scheme was to provide a quick, proportionate and fair resolution of straightforward, low value clinical negligence claims.

The scheme had some limited success, although fewer cases were entered into the scheme than had been anticipated. The choice and instruction of the single experts took some negotiation and there was often considerable disagreement which delayed the process. A limited number of experts were agreeable to working for the fairly low capped fee. However, considerable savings in terms of time to resolution of a claim for the patient and restriction of costs generally were demonstrated to be the major benefits. The scheme, which had remained as a pilot, continued until it was overtaken by the Putting Things Right Regulations.[3]

The NHS Redress (Wales) Measure 2008,[4] the first such measure following the devolution of power to Wales in 2007, received Royal assent on 9 July 2008. However, it would not be enacted until secondary

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[1] National Health Service Redress (Wales) Measure 2008 (WSI 2008/1).

[2] See *http://www.wales.nhs.uk/sites3/Documents/932/WAG%20evaluation%20-%20final%20report%20distribution%20copy%20YES%20-%20July%202008.pdf* [accessed 5 July 2018].

[3] National Health Service (Concerns, Complaints and Redress Arrangements) (Wales) Regulations 2011 (WSI 2011/704).

[4] See *https://www.legislation.gov.uk/mwa/2008/1/contents* [accessed 5 July 2018].

legislation, the NHS (Concerns, Complaints and Redress Arrangements) (Wales) Regulations 2011 (the Putting Things Right Regulations)[5]) had been developed following consultation. The Regulations came into force on 1 April 2010.

The Project Board appointment by Welsh Government brought together clinicians, senior health service executives, third sector representatives from the Community Health Councils and Action against Medical Accidents ("AvMA"), claimant and defendant clinical negligence lawyers and risk managers. The aim was to look at how to develop and encourage a culture in NHS Wales which treats concerns and dissatisfaction about quality and safety of healthcare as an opportunity to put things right and learn lessons. Key to this was to promote an open culture so that the healthcare organisations react appropriately to concerns once raised, but also encourage and support staff to anticipate and report early.

Three working groups were set up to consider the legal aspect, advocacy and assistance provision and the investigations and process aspects. These groups submitted final reports containing 34 recommendations to the Project Board in November 2008. A number of the recommendations were not adopted by Welsh Government. Lively discussions took place within stakeholder groups; for example, the issue of the appropriate level of capped costs for legal advice engaged the Legal Advice Working Group for a number of meetings; as did the proposed limit to the level of compensation. Concerns were also expressed throughout the project's progress about the independence of the Health Body's investigations. Although the second tier independent complaints investigation procedure under the old process was dispensed with, the role for the Public Services Ombudsman for Wales has increased.

Following the commencement of the Regulations, the Health Bodies in Wales had only a relatively short time to set up appropriately staffed teams to undertake the investigations and coordinate the responses. A Senior Investigations Manager was appointed to lead each team and extensive training on both the law and investigation techniques was undertaken. Once launched, with printed leaflets and posters throughout each hospital, Putting Things Right lead to a six-fold increase in concerns, both formal and informal, which proved very difficult for Health Bodies to manage in the early days leading to delays and investigations which were not as thorough as required.

Operation of Putting Things Right

The following paragraphs offer a detailed outline of the workings of Putting Things Right ("PTR").

PTR was established in April 2011. Under PTR, the term "concern" is used to mean "any complaint, claim or reported patient safety incident about NHS treatment or services"[6] being handled under the arrangements.

The fundamental principles of PTR are to "investigate once, investigate well"[7] and to put the person raising the concern, often the patient or their family, at the centre of the investigation, as well as the principle of being open. Whilst the statutory duty of candour which applies in England is not yet applicable in Wales, the PTR Regulations do include a duty to be open where harm may have occurred, as follows:

> "where a concern is notified by a member of the staff of the responsible body, the responsible body must, where its initial investigation determines that there has been moderate or severe harm or death, advise the patient to whom the concern relates, or his or her representative, of the notification of the concern and involve the patient or his or her representative, in the investigation of the concern."[8]

[5] See *http://www.wales.nhs.uk/sites3/Documents/932/The%20NHS%20Concerns%2C%20Complaints%20and%20Redress%20Arrangements%20Wales%20Regulations%202011%20Inc%20SI%20Number.pdf* [accessed 5 July 2018].
[6] National Health Service (Concerns, Complaints and Redress Arrangements) (Wales) Regulations 2011 (WSI 2011/704) reg.2(1).
[7] Putting Things Right Guidance on dealing with concerns about the NHS from 1 April 2011 Vol.3 para.6.52.
[8] National Health Service (Concerns, Complaints and Redress Arrangements) (Wales) Regulations 2011 (WSI 2011/704) reg.12(7).

A wide range of people can raise a concern, including patients, their representatives and relatives, staff members and anyone else affected or likely to be affected by the actions, errors or decisions of the Health Body. Where a third party raises a concern, an investigation will be undertaken but consent will be required from the patient involved in order to consider and disclose sensitive personal data, unless the patient lacks capacity or is a child, in which case the usual legal principles apply.

A concern may be raised in writing or verbally with the relevant Health Body. Where the concern is raised verbally, a record should be kept by the Health Body and sent to the person who notified the concern.

A concern may be raised in relation to any service, decision and/or care and treatment provided by a Health Body in Wales.

A concern may not be raised in respect of:[9]

- Any concern which has already been investigated by the Public Services Ombudsman for Wales.
- Any concern which is raised and resolved on the same day (termed as "on the spot"), unless the patient is dissatisfied with the response and requests a full investigation.
- Any concern which was raised and investigated under the Health Body's former complaints procedures, i.e. pre-April 2011.
- Any concern relating to a Health Body's failure to comply with a Freedom of Information ("FOI") Act request.
- Any concern in respect of which court proceedings have been issued. If a concern is being investigated at such time that court proceedings are issued, the investigation must cease.
- Any concern relating to a decision regarding individual patient funding treatment requests.
- Any concern relating to the contract of any Primary Care provider or employee, or any issue relating to disciplinary proceedings.

Whilst not specifically precluded by the Regulations or Guidance, it is not advisable for concerns to be investigated under PTR if the patient has already commenced a civil claim. Under the NHS Complaints procedure the investigation of a complaint would cease on the instigation of a legal claim which often left the complainant without an explanation for what may have gone wrong, whether or not compensation was won. In respect of the PTR process it is preferable for the patient to await the Health Body's response to their concern before instructing solicitors in respect of any civil claim. If solicitors are involved earlier, there is no preclusion to the continuation of the investigation and correspondence via the solicitor if preferred, until the determination of whether there is or may be a qualifying liability. At this point the solicitor may decide to remove the matter from the ambit of the Regulations, so increasing the costs to be incurred and received, but in many cases the matter will continue within the Regulations.

The Regulations place a time limit of 12 months[10] within which to raise a concern, from the date of the incident or date of knowledge. Health Bodies do, however, have discretion to investigate concerns raised within 12 months and 3 years, depending on whether there is good reason for any delay. The Regulations specifically preclude Health Bodies from investigating concerns where the limitation period for a civil claim has expired. A concern can be withdrawn at any time by the person raising the concern.

Investigation: Part 5 of the Regulations

All concerns must be managed and investigated in the most appropriate, efficient and effective way as outlined in reg.23. An initial assessment will be undertaken by the Health Body to grade the concern and determine the parameters of the investigation before appointing an investigator.

[9] National Health Service (Concerns, Complaints and Redress Arrangements) (Wales) Regulations 2011 (WSI 2011/704) reg.14(1).
[10] National Health Service (Concerns, Complaints and Redress Arrangements) (Wales) Regulations 2011 (WSI 2011/704) reg.15.

All concerns must be acknowledged, in writing, by the Health Body within two working days of first receipt.[11] A single point of contact should be identified for use throughout the handling of the concern. It is good practice, although not mandated, for the Health Body to contact the person raising the concern by telephone or email to discuss the concern and attempt to agree terms of reference for the investigation. The complainant must be given information at this stage about timescale, their expectations for the investigation, the availability of advocacy and support and any specific needs. One of the fundamental principles of PTR is that the complainant is put at the centre of the investigation. The complainant should be kept updated throughout the investigation by their preferred method of communication. This has been one of the areas which has generated a significant number of complaints because the time to investigate has been longer than that communicated or the communications have not been frequent enough.

It is a requirement placed on Welsh Health Bodies (Health Boards and Trusts in Wales but not primary care practitioners) where the concern notified includes an allegation that harm has or may have been caused, the Health Body must consider:[12]

- the likelihood of any qualifying liability arising; and
- the duty to consider Redress in accordance with reg.25.

Regulation 24 response

The duty to consider qualifying liability is only triggered if the concern includes an allegation of harm. In many cases, it will be clear that no harm is alleged, e.g. complaints concerning car parking, moving a patient between hospitals unexpectedly or quality of hospital food. In these cases, there is no requirement to consider qualifying liability and a final, reg.24 response should be sent responding to the concern with an explanation and apology if appropriate.

Equally, there will be concerns where the Health Body has determined that, if liability were established, the financial threshold would exceed the limit for Redress as set out in reg.29. These concerns would also be dealt with under regs 33 and 24. An exercise should therefore be undertaken at the outset to determine whether harm is alleged and the likely value of any compensation, as this will inform whether the investigation ought to encompass consideration of qualifying liability and Redress. If the financial threshold is likely to exceed £25,000 then the concern will be investigated under reg.23 and a reg.24 response provided but the Health Body will not come to any formal conclusion as to Qualifying Liability, although acknowledgement of clinical error may be made. The investigation should however comprise of a thorough examination of the circumstances of the concern to include a timeline of events and, where appropriate, an investigation report and action plan. The complainant should then be directed to solicitors if he/she wishes to pursue a claim.

Alternatively, if harm is alleged and damages would fall under £25,000, but the Health Board concludes that there is unlikely to be a qualifying liability, a reg.24 final response should be sent.

The reg.24 response should comply with the content requirement at para.6.76 of the Guidance and should be sent within 30 days, but if this is not possible then the response should be sent within six months and the complainant informed of the reasons for the delay.

Redress: Part 6 of the Regulations

Part 6 of the Regulations relates to Redress. If, following an investigation, the Health Body concludes that there *is or may be* a qualifying liability, the matter will pass into Pt 6 of the Regulations. A qualifying

[11] National Health Service (Concerns, Complaints and Redress Arrangements) (Wales) Regulations 2011 (WSI 2011/704) reg.22.
[12] National Health Service (Concerns, Complaints and Redress Arrangements) (Wales) Regulations 2011 (WSI 2011/704) reg.23(1)(i).

liability will exist where the investigation determines that a patient has suffered harm as a direct consequence of a breach of duty of care in accordance with the usual *Bolam* criteria.

Regulation 26 response

If the Health Body cannot fully complete its investigations as to causation, an interim response under reg.26 should be sent, prior to the further investigations being undertaken. This response should comply with the content requirements at para.6.82 of the Guidance.

Once the matter has passed into Pt 6, this triggers a number of entitlements for the complainant, including suspension of the limitation period for bringing a civil claim and a right to free legal advice as outlined below.

Limitation

Where a Health Body has accepted that there is or may be a qualifying liability, i.e. where a reg.26/33 response has been sent, limitation is suspended.[13] At this time, limitation is suspended retrospectively, from the point at which the concern was received by the Health Body. The suspension to the limitation period remains in place for nine months after the Health Body has made a financial offer of Redress or has communicated that no financial offer will be made.

This allows time for any further investigations to be undertaken and for patients and their representatives to consider any response and/or offer made without the concern that limitation will expire for any civil claim they may bring if the matter does not settle under the Regulations.

It is important to note, however, that the limitation period is not suspended until such time that the Health Body has accepted that there is or may be a qualifying liability and therefore the limitation period will continue to run unless such an admission of liability is made.

Access to free legal advice

Where the Health Body has accepted that there is or may be a qualifying liability, the patient is entitled to free legal advice,[14] the cost of which will be borne by the Health Body. This advice is available in relation to the following:[15]

- the joint instruction of clinical experts, including clarification of issues arising from their reports;
- any offer of Redress made in accordance with Pt 6 of the Regulations;
- any refusal to make an offer; and
- any settlement that is proposed.

Legal advice should only be provided by recognised firms of solicitors with known expertise in clinical negligence and who are accredited by the Law Society or are a member of the Action against Medical Accidents Clinical Negligence Panel.[16]

Costs are fixed for work done by solicitors and these costs are outlined in Appendix O of the Putting Things Right Guidance.

[13] National Health Service (Concerns, Complaints and Redress Arrangements) (Wales) Regulations 2011 (WSI 2011/704) reg.30.
[14] National Health Service (Concerns, Complaints and Redress Arrangements) (Wales) Regulations 2011 (WSI 2011/704) reg.32.
[15] Putting Things Right Guidance on dealing with concerns about the NHS from 1 April 2011 Vol.3 Appendix O.
[16] National Health Service (Concerns, Complaints and Redress Arrangements) (Wales) Regulations 2011 (WSI 2011/704) reg.32(2).

Further causation investigations

It may be possible for the Health Body to obtain further causation evidence from a clinician internal to the organisation or NHS Wales. If not, an independent expert should be appointed on a joint basis with the complainant. The cost of this expert evidence will be borne by the Health Body.

Regulation 33 response

Once this further evidence has been obtained and the Health Body has concluded the position as to Qualifying Liability, the position will be set out in a reg.33 response. In some instances, it will be possible to proceed straight to a reg.33 response if the Health Body is able to fully investigate both breach of duty and causation without delay.

Redress

Where a Health Body has concluded that there has been a qualifying liability, it is under an obligation to consider Redress as outlined in reg.25. The Health Body cannot offer Redress if no qualifying liability has been found. Whereas in civil cases settlements may be reached without admissions of liability, this avenue is not available under the Regulations.

Redress can take a number of forms[17] including financial compensation, the offer of remedial treatment, an explanation of the treatment provided, a written apology and a report on the action which has been taken to prevent similar concerns arising. As noted above, financial compensation is generally limited to £25,000, although the Health Body does have discretion to make offers of settlement outside the provisions of the Regulations if, following its investigations, it transpires that a matter which was initially believed to be worth less than £25,000 is in fact worth more than £25,000.[18] This discretion should be used in limited cases and not where the value of the matter significantly exceeds the financial threshold.

When it comes to valuing damages, Health Bodies do so by accessing the Judicial College Guidelines, relevant case law and experience of similar claims, or by seeking advice from clinical negligence solicitors at NHS Wales Legal and Risk Services. The valuation of damages under the Regulations is based on the same principles as in a civil claim and no reduction to damages is applied as a consequence of the matter being dealt with under the Regulations. Originally a tariff system was prepared to assist with the valuation of less serious injury because the JC Guidelines have less information about such cases but updating and checking the content became unsustainable and it was abandoned.

Between 2012 and 2013 there were 107 concerns which resulted in payments. In the last financial year in which results are known, this figure had risen to 208 with an average payment of damages and solicitors fixed costs where incurred, of £8,166.

Concerns regarding primary care services

A concern about primary care services can be raised either direct with the primary care practitioner, e.g. a GP or dentist, or with the Health Body. The Health Body will then decide who should investigate the concern.[19] The issue of Qualifying Liability will not be considered unless the primary care practitioner is employed within a Health Board managed practice. This is because primary care practitioners are not subject to NHS indemnity but are "insured" via their medical defence organisation, who would not be willing to be bound by the outcome of any investigation in which they had no direct involvement but which found liability on their behalf.

[17] Putting Things Right Guidance on dealing with concerns about the NHS from 1 April 2011 Vol.3 para.7.3.
[18] National Health Service (Concerns, Complaints and Redress Arrangements) (Wales) Regulations 2011 (WSI 2011/704) reg.29(3).
[19] National Health Service (Concerns, Complaints and Redress Arrangements) (Wales) Regulations 2011 (WSI 2011/704) reg.19(1).

Benefits of Putting Things Right

It was widely agreed that the old system for the investigation of complaints made against Health Bodies in Wales was unsatisfactory and in need of an overhaul. Putting Things Right has given Health Bodies the opportunity to streamline the investigation of all concerns raised by patients, their families and staff. The legislation is unique to Wales and promotes a welcome culture of transparency, efficiency and learning.

Putting Things Right was designed to ensure that the patient and their actual experience remained at the heart of the investigation throughout. The investigation, incorporating as it does a prospect of financial redress in the course of the process, which is time limited to prevent unnecessary delays which were common in the past, sets out to be comprehensive.

Putting Things Right is an alternative mechanism to the civil court system and has contributed to enhanced access to justice in very low value cases, particularly in light of the recent changes to funding arrangements. It offers patients a consistent and unified process for complaints, meaning that where a patient is unhappy with care spanning different Health Bodies in Wales, the whole patient journey will be considered.

Putting Things Right has also led to improvements in patient safety. The importance of the whole of NHS Wales learning from the errors or near misses was a central tenet of the process. The investigation itself is undertaken within the clinical department where the treatment took place and the individuals involved are expected to be involved and to review any lay or expert evidence which identifies a concern in the way the treatment is provided. The patient is entitled to a copy of any action plan prepared in response to the identified error and details of any changes made and lessons learnt as a result of the investigation.[20] The patient or their family is also entitled to ask to go back to see for themselves that revised processes have been put in place although it is not known how often this is taken up.

Challenges faced by Health Bodies

In 2014, an independent review of Putting Thing Right was commissioned by the Welsh Government. "The Gift of Complaints" *The Evans' Report*,[21] identified 109 recommendations with a view to improving the management of concerns, although some of these were very similar to each other. Themes within the report included delays, poor quality investigations and a lack of consistency across NHS Wales. In response, the Welsh Government undertook initiatives to improve the management of the process, including setting up a number of task and finish groups to look at different areas of concern in the Report. The work of these groups was reported back to the Listening and Learning Group whose members include both government and health service representatives, and which continues to monitor progress. There have been significant improvements across all the Health Bodies in Wales.

Although the Redress provisions apply only to lower value claims below £25,000, the investigations are not necessarily straightforward in these, nor in those cases in which the Helath Board will not consider a qualifying liability due to its potential value, but must, under the provisions investigate the circumstances, provide a chronlogy of events and offer an explanation. Health Bodies have made considerable effort to train investigators on the process of assessment of whether liability is established and how to quantify claims but this has been hampered by those trained staff leaving their specific job in which investigating complaints is only a part, to move elsewhere, leaving a department without a trained investigator. Whilst provision is made in the Regulations for free legal advice for complainants funded by the Health Body, no such provision exists for Health Bodies, although support is provided by NWSSP Legal & Risk Services.

[20] National Health Service (Concerns, Complaints and Redress Arrangements) (Wales) Regulations 2011 (WSI 2011/704) reg.26(1).
[21] See *http://gov.wales/docs/dhss/publications/140702complaintsen.pdf* [accessed 5 July 2018].

The role of NWSSP Legal and Risk Services

NWSSP Legal & Risk Services solicitors provide legal advice on both liability and quantum to the Health Bodies and, offer training sessions throughout the NHS in Wales to all staff involved to promote awareness and facilitate understanding. Legal and Risk Services have also worked with the Welsh Government following publication of the Evans' Review to consider both the legislation and how it is being applied across Wales, with a view to refreshing the Regulations.

Feedback from NHS Wales has been excellent, in terms of training and support provided and there is tangible evidence that the input is improving the management of cases across NHS Wales. In the last four years, the number of clinical negligence claims intimated and issued in court, valued under £25,000, has decreased for each Welsh Health Body. Legal and Risk Services continue to work hard to innovate and develop ways of assisting the learning and responsiveness of Health Bodies to ensure that PTR is a success.

Looking forward

In Wales, Health Bodies make payments in respect of clinical negligence claims from their own budgets but may be reimbursed in a risk sharing arrangement which has been in existence since the early 1990s, administered by the Welsh Risk Pool Service. Reimbursement is predicated on provision of satisfactory evidence of lessons having been learned from errors identified. On 1 April 2018, the adminstration of the Redress payments will be transferrred from Welsh Government to Welsh Risk Pool in order to facilitate the same level of scrutiny of the learning in these settlements.

The Department of Health and Social Care has recently published a response to its consultation on introducing fixed recoverable costs in lower value clinical negligence claims. It is recognised that at least 60% of clinical negligence cases fall into the lower value bracket but the costs of pursuing such claims have been described as disproportionate and unacceptable, contributing to the rising overall costs of clinical negligence in the UK. A Civil Justice Council Group has been convened in which NHS Wales will be represented by lawyers from NWSSP Legal and Risk Services because it has been acknowledged that Putting Things Right has played a part in reducing the costs in Wales. It will be important that the principles behind the introduction of Putting Things Right; openness and transparency, the central involvement of the person raising the concern, and the comprehensive investigation undertaken promptly, should not be lost.

Are the Welsh NHS Redress Arrangements "putting things right" for Patients in Wales?

Sarah Davies
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Clinical negligence; Complaints; NHS; Patients' rights; Personal injury; Redress schemes; Wales

Background

20 years on from devolution, there are four different health services operating in the UK. There are, of course, varied opinions in relation to the differences that now exist between the NHS in Wales and elsewhere. Critics suggest that the Welsh NHS is underperforming in comparison to other areas of the UK, particularly in areas such as waiting lists and access to cancer treatments that are available in England, such that Welsh patients have more reason to be unhappy with their NHS compared with the rest of the UK.

However, the Welsh Government has attempted to lead the way as far as innovation is concerned. The Welsh NHS has attracted many positive headlines since health powers were devolved and have received praise for innovations such as the introduction of free prescriptions in 2007 and, more recently, the introduction of the "opt out" organ donation scheme in December 2015 and the "flying doctors" service in April 2015, which is a pioneering emergency medical care service providing treatment usually only available in hospitals, which involves transporting doctors by helicopter or 4x4 vehicles to the remotest parts of the country. As a result of such innovation, the NHS in Wales has the potential to be the envy of is English, Irish and Scottish counterparts.

The NHS Redress measure was passed in 2008 and represents a landmark of Welsh legal history as the first "made in Wales" piece of legislation to be passed under the new law-making arrangements. The then Welsh Health Minister, Edwina Hart, introduced Regulations to the measure in 2011[1] and the intention was that the NHS should do as much as it could to put right mistakes and to learn lessons to prevent such errors happening again.[2]

The NHS (Concerns, Complaints and Redress Arrangements) (Wales) came into force in April 2011. Referred to more simply as the "Putting Things Right" Scheme, the aim of the Regulations was to put in place a new process for dealing with complaints or "concerns" as they are commonly called, in the NHS in Wales, whilst at the same time introducing a new way of dealing with low value claims where the NHS was found to be at fault and was found to have caused a patient harm.

The Regulations apply in whole to Welsh NHS hospitals but only in part to primary care providers like GP practices, such that GPs only need to implement the first part of the Regulations dealing with the investigation of a concern and not to the part that deals with compensation or any other form of redress.

[1] National Health Service (Concerns, Complaints and Redress Arrangements) (Wales) (WSI 2011/704).
[2] E. Hart, "Explanatory memorandum to the National Health Service (Concerns, Complaints and Redress Arrangements) (Wales) Regulations 2011 1st edn" at *http:// www.cynulliad.cymru/Laid%20Documents/SUB-LD840 2%20-%20The%20National%20Health%20Service%20 (Concerns, %20Complaints%20and%20Redress%20 Arrangements)%20(Wales)%20Regulations%2020-07022011-209573/sub-ld8402-em-e-Cymraeg.pdf* [Accessed 6 July 2018].

The most important aim of Putting Things Right was for concerns to be investigated once and investigated well, involving the patient or patient's family in the investigation and adopting an open and honest approach throughout.

The Scheme intended concerns to be investigated by teams of highly trained people within the NHS itself, who would also then look at whether lessons could and should be learned going forward. If the NHS was found to be at fault and it was deemed that harm had been caused to a patient as a result, then the Scheme provided for compensation to be offered in low value claims, up to £25,000, to the patient or patient's family. The result then being that a person would not have to bring a separate civil action and the concern could be resolved locally.

In the consultation process that followed the first draft of the Regulations, many expressed real concerns that the culture within the NHS was such as to prevent an open and honest investigation of a concern. Many were sceptical as to whether the NHS would properly scrutinise itself and accept fault willingly, even where there was an indication to do so, and whether sufficient resources would be dedicated to the task in hand to ensure that concerns would be thoroughly investigated within the timeframe provided for within the regulations.

Seven years on, those sceptics may well feel that their own reservations about how well Putting Things Right would work in practice were well founded, despite the Welsh Government's good intentions to introduce an effective complaints handling process.

What is Putting Things Right?

In accordance with the Regulations, a concern should be notified to the NHS within 12 months of the incident or date of knowledge of the incident, although the NHS has discretion to extend that timeframe to up to three years (reg.15). The NHS should acknowledge the complaint within two days and offer to discuss with the person raising the concern how it will be investigated. The NHS then has to investigate the concern in an appropriate manner thoroughly, speedily and efficiently. If the concern raised an allegation that harm has or may have been caused to a patient that places an obligation on the NHS to consider whether a qualifying liability does or may exist (reg.23).

A qualifying liability is defined as:

> "a liability in tort owed in respect of, or consequent upon, personal injury or loss arising out of or in connection with breach of duty of care owed to any person in connection with the diagnosis of illness, or in the care or treatment of any patient:
> (a) in consequences of any act or omission by a health care professional; and
> (b) which arises in connection with the provision of qualifying services."

If the NHS, following their own investigation, determines that a qualifying liability does or *may* exist then the case moves into a consideration of whether redress should be offered under Pt 6 of the Regulations.

In terms of timescales, the Regulations state that the NHS should investigate and provide an interim response within 30 days, setting out the nature of the investigation undertaken with any medical opinions obtained or relevant medical records. If appropriate, the response should contain an apology and set out what action has been taken as a result of the outcome of the investigation. If it is not possible to provide a response within 30 days then the person raising the concern should be kept updated and a response should be provided within 6 months.

If the NHS determines, during the course of the initial investigation, that there is or may be a qualifying liability then they should produce an interim report within 30 days and notify the person bringing the concern of their right to independent legal advice, the fixed fee for which will be met by the NHS. The person raising the concern can obtain legal advice on any offer of redress made or on the instruction of

joint, independent experts. The limitation period in respect of bringing a civil claim is also suspended when the concern enters Pt 6 of the Regulations.

If the NHS determines that redress is appropriate then it can make an offer of compensation, provide an explanation, offer a written apology or give a report on the action which has or will be taken to prevent similar cases arising again (reg.27).

Putting Things Right in Practice post 2011

Whilst there were undoubtedly some good outcomes from NHS Redress in the few years after its introduction, it was the experience of many patients and their families who instructed Hugh James to advise on their NHS Redress concerns that the scheme was not working in the way that it had been intended.

Delays

The first considerable problem that many patients faced was incredibly lengthy delays in the responses to their concern. Despite the Regulations stating that complaints should be responded to, at least by way of an interim response within 30 days, in our experience this was rarely the case. In fact, that was more the exception than the rule. Regrettably, we dealt with numerous cases where concerns were not responded to for over a year and, even on some occasions, upwards of 18 months. In our experience, these delays were experienced across all of the Health Boards and NHS Trusts in Wales. It can be wholly appreciated that the carrying out of a detailed investigation would take time but the sorts of delays that many people were experiencing is somewhat more difficult to understand. It was unfortunately the case that the significant delays were not being avoided even in cases involving vulnerable people such as children or elderly patients. In fact, even cases involving fatalities seemed to not attract any urgency.

Lack of openness

The other systemic problem that Hugh James' clients faced when responses were eventually received was a seeming lack of openness and transparency, both of which it was intended would be at the heart of the scheme. Medical records were almost never provided with the complaint response, despite this being provided for in the Regulations, so there was no way to verify or check the information that was being given in the response. Unfortunately, there were some cases that proceeded outside of the Redress arrangements as civil claims where it did become apparent that the information that had been given in the complaint response was not accurate. There were many cases where the NHS seemed to accept that the standard of care was lacking but then they did not go on to mention the issue of qualifying liability or whether that had even been considered. That often meant having to write back to the Health Board or Trust to ask them to consider qualifying liability, which resulted in a further very lengthy delay waiting for a response. In fact, the experience at Hugh James was that writing back to a Health Board querying anything in the letter of response or asking for a point to be re-looked at or reconsidered, often meant waiting longer that we had waited for the initial concern response. The same was true if the response was issued and it did not address all of the issues that had been raised in the concern. A further response was not swift, as one might have expected on the basis that by this point the full investigation had already been undertaken, but rather any further response seemed to take as long or longer than the initial response.

In responses received, there was seemingly also reluctance on the part of the NHS to accept when there *may* be a qualifying liability, thereby triggering Pt 6 of the Regulations as above. It is the triggering of Pt 6 that entitles the patient to receive independent legal advice and, if appropriate, the right to obtain independent expert evidence, and, in Hugh James' experience, it seemed as though the Health Board would try and delay even referring to the term qualifying liability almost until such time as they were

absolutely sure that they had to admit that there was one. There seemed to be every effort made to avoid the case going into Pt 6 of the Regulations, thereby avoiding triggering the patient's entitlement to legal advice and avoiding any argument that the case might be suitable for the instruction of an independent medical expert.

Lack of patient involvement

The seeming lack of openness and honesty in some complaints responses understandably caused patients to be frustrated and disheartened by the whole process, with patients feeling that the NHS was closing ranks or seeking to cover up their mistakes. That feeling of distrust of the process was probably not helped by the fact that there was, from Hugh James' point of view, a total lack involvement of the patient (or the patient's representative if the concern had been submitted by an advocate or solicitor) in the process, again something that the Regulations had specifically provided for. In Hugh James's experience, it was quite often the case that, after the concern had been notified, nothing much would be heard from the NHS until the response was issued. That may well be a year or even 18 months or more down the line. Often, it was difficult to obtain even an update on the response and what was being done by way of investigation. Letters were routinely not answered and it was sometimes difficult to get an understanding even by phone as to what was happening or why. The most a patient could expect to hear during the time that the concern was being investigated were sporadic letters apologising for the delay but usually not giving any clear date by which the response might be received.

Lack of sufficient investigations into quantum

Another common problem that Hugh James client's experienced was a lack of investigation into or, sometimes, even an understanding by the concerns teams at the various Health Boards and Trusts, of quantum. If the NHS determined that a qualifying liability existed and that, as a result, redress in the form of compensation should be offered, the amount of compensation that should be given should then have been assessed in the same way that it would be in a civil claim or by the court. In Hugh James's experience, however, the NHS was not carrying out a detailed or, in fact in a significant number of cases, any investigation in relation to quantum. Offers of redress were being made in relation to general damages and patients were not being asked to provide details of any financial losses that had been incurred and they were not being asked whether there were any on-going problems or any on-going losses.

Patients were being offered a low amount of compensation under redress but were then, in accordance with the Regulations being advised to seek independent legal advice on the offer. Hugh James was often managing to recover far greater awards of damages than the first amount offered by the NHS, once quantum had been looked at properly, although it should be noted that the fixed fees provided for under the Regulations did not allow for the solicitor advising the person bringing the concern to investigate and gather information on quantum themselves. The reality was such though that, in order to properly advise clients on the value of their claims, Hugh James were undertaking quantum investigations, which sometimes involved taking witness statements on care and gathering information from employers on loss of earnings.

Given the experience of Hugh James in relation to the NHS' own lack of investigation into quantum, it seems overwhelmingly likely that there will be patients and families who have accepted offers of redress without seeking independent legal advice and therefore without a proper investigation into the value of the claim having been carried out by anyone. It is a requirement under the scheme that the person bringing the concern has to sign a waiver upon acceptance of an offer of redress, waiving their rights to bring a civil claim in the future and thereby waiving their rights to any further compensation if the case has in fact been under-settled.

Lack of independent expert opinion

As alluded to above, it was Hugh James experience that the NHS would actively seek to keep the case out of Pt 6 of the Regulations, one of the outcomes of which would be to deny the person bringing the concern the right to have their case looked at and commented on by an independent expert, either in relation to breach of duty or causation or both. If the case was not in Pt 6 of the Regulations, the NHS could decide to seek comments from their own internal clinicians on whether a qualifying liability might exist or they could decide to unilaterally instruct an external independent expert to comment on that. If the instruction was not a joint instruction with the patient, the NHS did not have to share the report of the expert with the patient. As the patient was often not updated as to the investigation that had been carried out, it might well be the case that experts have commented on patient's cases and those patients have not even been aware that this has happened.

If the NHS had sought comments from their own clinicians, Hugh James has faced uphill battles to even have sight of those comments. This has proved to be the case where the injured person was a patient lacking capacity or a child, such that any settlement needed to be approved by the court who would normally want to see that some medical evidence had been obtained.

Hugh James has unfortunately also had experience of the NHS obtaining independent expert evidence and then trying to disregard the opinion of the expert in favour of its own internal clinicians' comments, something which was presumably never in the minds of those who introduce the Regulations and sought to introduce accountability and the taking of responsibility.

The role of the ombudsman

At Hugh James we have had to utilise the Public Service Ombudsman for Wales's office numerous times over the past several years to move concerns on when the NHS has not responded after a year or more or when the NHS have refused to admit that there is or may be a qualifying liability or when there has been a refusal to offer redress. There have been many examples where the ombudsman's office has ordered the NHS to pay a sum of money to the person bringing the concern just by way of apology for the length of time that it has taken to deal with the complaint. On some occasions, it was not until the ombudsman became involved that the concern was moved on at all. On all occasions, the Health Board or Trust was put on notice that the matter would be escalated to the Ombudsman in the event of a continued lack of response but the threat of that did not seem to help with producing a response. It was only when the Ombudsman became involved that responses were eventually received.

2014 Review

In 2014, the Welsh Government commissioned an independent review into the way the NHS in Wales was dealing with complaints and concerns under the 2011 Regulations. This review was undertaken by Keith Evans, the former Chief Executive and Managing Director of Panasonic UK and Ireland.

The result was a report entitled "A Review of Concerns (Complaints) Handling in NHS Wales" subtitled "Using the gift of complaints" which was published in June 2014.[3] The report was based on a 12-week review led by Evans and supported by the Chief Executive of Aneurin Bevan Health Board. The perhaps unusual subtitle alludes to the fact that Evans felt that the NHS should see a complaint as a gift because they can be a rich source of material which can and should be used to improve services and complaints can be used to promote learning within an organisation.

Broadly, the purpose of the review was:

[3] K. Evans, "A Review of concerns (complaints) handling in NHS Wales" at *http://www.wales.nhs.uk/sitesplus/863/opendoc/245221* (Accessed 6 July 2018].

- to determine what was working well in Putting Things Right and what needed improving;
- to consider if there was sufficiently clear leadership, accountability and openness within the process;
- to identify how the NHS in Wales could learn from other service industries; and
- to identify how the NHS could demonstrate its learning from patient feedback.

The report acknowledged that the aim of Putting Things Right "to help put an end to lengthy litigation processes and overdue complaint handling by investigating once, with quality, preventing repeat issues and learning and applying improvement" had "only to a certain extent" been achieved. It found that generally Putting Things Right had been well received as guidance but that there remained concerns as to how it had been implemented and the variation and inconsistency in place across Wales.

The report identified that adequate resources had not been made available to enable Putting Things Right to be managed effective on a local or national level and, whilst the scheme had positively encouraged patients and families to bring concerns to light, those increased numbers of concerns had not been matched by increased numbers of people to appropriately deal with them. It was also considered that there was no consistency of approach between the seven health boards and three NHS trusts in Wales and that many of them had taken it upon themselves to implement Putting Things Right in their own way.

It could be that, because of the way the Health Boards in Wales are organised, that it would be difficult for ideas and good practice, even if they are developed, to filter out to the other organisations.

The Evans Review identified a number of constantly emerging themes from patients or families that were dissatisfied with the process including that there was no receiving of a simple apology, timeliness and keeping complainants updated about delays, a lack of clinical involvement in the process, a lack of openness and honesty and little evidence of learning. These were all common problems that Hugh James had been experiencing with the scheme since 2011 and none of these generic problems that were identified by the review came as a much of a surprise to majority of firms that deal with Redress cases. The result of the review was the making of in excess of 100 recommendations for improvements to the Putting Things Right process. The recommendations cut across a number of themes, including culture and leadership, infrastructure, responsiveness and learning but the strong message from the report is that the NHS is missing the opportunity to learn valuable lessons.

The review determined that the vast majority of difficulties that Hugh James and our clients had experienced with the Putting Things Right scheme since its introduction were in fact systemic problems across the board. It also arguably highlighted that the anticipated problems that were identified by many following the consultation process had in fact been well founded.

Are complaints really a gift?

Following the events at Mid Staffordshire NHS Foundation Trust, the report of Sir Robert Francis QC revealed, what was described as, shocking care. The report found that the failings on the part of the Trust were systemic and deep rooted and that there had been a failure on the part of the board to take any adequate action to deal with problems. Although the poor care dated back to 2006, concerns only started being raised in 2007 when the Healthcare Commission became concerned that Stafford Hospital had an unusual high death rate. Dissatisfied with the hospital's explanation for the apparently high mortality rate, the HCC told a team of investigators to get to the bottom of what was happening at the hospital. There were subsequently five separate enquiries into the events in Stafford Hospital, culminating in Francis' report in 2013. The report identified that the NHS had not put patient safety and wellbeing at the forefront of its work. It defended trusts rather than holding them to account on behalf of patients and preferred to explain away concerns such as those about high mortality rates rather than get to the root of the problem.

More recently and closer to home in Wales came the Tawel Fan scandal at Betsi Cadwaladr University Health Board, which saw the Health Board put into special measures. Tawel Fan Ward for elderly people with mental health problems at Glan Clwyd Hospital in Denbighshire was closed in 2013 following an investigation that uncovered what was described as institutional abuse. In 2015, a review by health expert Donna Ockenden said that relatives had described circumstances in which patients had been kept like animals in a zoo and that that, along with a string of other allegations, were found to have been true. The initial complaints were thought to be limited to 25 or so patients but more recently that figure has quadrupled and it now looks like more than 100 patients were affected.

Both the Mid Staffs scandal and the Tawel Fan scandal highlight the need for the NHS to heed patient's complaints promptly and reflect on them and consider whether lessons can be learned. The fact that we do not have a quick and thorough investigation into concerns that are raised by patients means that opportunities are being missed to directly improve the NHS for its users. It is important to understand that this is not all about people making complaints and receiving compensation or redress when harm has been caused. NHS complaints and the way they are handled goes directly to the issue of patient safety.

Ultimately, the NHS has to move away from being shut down and defensive when it comes to receiving complaints. By seeing the complaint as a "gift" and taking responsibility the NHS can analyse what has gone wrong and, not only seek to put it right for the patient who has raised the concern, but also take steps to try and ensure the same thing does not happen again.

Can things improve?

Despite the extensive review and the highlighting of many areas in which the Regulations were not being implemented as intended, Hugh James has not seen a significant difference in the way that Putting Things Right is working in practice over the past three or four years. There are still considerable delays and the Regulations are still not being adhered to but the situation continues to be tolerated. By far the biggest flaw with the Regulations, which was anticipated at the outset, is that they fail to provide for any level of independent scrutiny which would address operational issues such as failing to adhere to timescales and also whether the Regulations are being applied with the interests of the patient in mind. Notwithstanding the problems that have been encountered with the scheme to date, there is still the potential for the people of Wales to be better off compared with their counterparts in the rest of the UK as a result of the unique Putting Things Right process.

There are a number of ways that the NHS could seek to improve the way in which concerns are dealt with. One problem appears to be due to a lack of resources having been allocated to dealing with an almost inevitable increasing number of complaints. Despite the good intention behind the introduction of Putting Things Right, adequate resources have not been made available to allow the Regulations to be implemented in the way that was intended. Given the increasing pressure on the NHS it is unlikely that we will see additional resources being made available.

Another potential solution might be to increase the role of the Community Health Councils ("CHC") in the process. The CHC offers an independent complaints advocacy service for patients in Wales but there is a lack of awareness of its existence amongst the general population. CHCs do not get involved in the vast majority of complaints that are reported to the NHS but their existence could be more widely publicised in hospitals and GP surgeries, which might result in an increase of patients utilising the advocacy services on offer. Patients may then become more empowered to make robust challenges to refusals by the NHS to investigate the issue as to whether or not there may be a qualifying liability or to make challenges and ask questions on offers of redress when quantum has not been properly investigated.

Due to the way the NHS in Wales is organised with seven Health Boards and three NHS Trusts, it may be the case that it is difficult for innovation to spread across the NHS as a whole. There would appear to

be scope to improve the way Putting Things Right is implemented if a more consistent approach was taken by all of those dealing with concerns at the various organisations.

Looking forward

There has been a drive by the Government in Westminster in the last year or so to introduce fixed recoverable costs in lower value clinical negligence claims in England and Wales.[4] The proposed scheme, they say, would aim to improve the efficiency and cost-effectiveness of clinical negligence claims by supporting quicker and more cost effective resolution for all parties and greater opportunities for early learning of lessons from harmful incidents to inform safer clinical practice, as well as promoting access to justice. Given that we had the Putting Things Right scheme in Wales since 2011, the aims of which are not dissimilar, it would certainly have been helpful if the scheme in Wales could have been used as a blueprint of sorts for a similar scheme in England. If the Regulations had been properly implemented and the scheme was working in the way that had been intended by the Welsh Government then one could envisage the NHS in England being keen to put in place something similar over the border. However, there would appear to be a long way to go before the scheme in Wales is such that it would be the envy of any other country.

[4] Fixed recoverable cost for clinical negligence claims at *https://www.gov.uk/government/consultations/fixed-recoverable-costs-for-clinical-negligence-claims* [Accessed 6 July 2018].

Holiday Sickness Claims: A Word of Caution

Simon McCann*

Food poisoning; Foreign package holidays; Fraudulent claims; Holiday claims; Law firms; Personal injury; Solicitors Regulation Authority

Abstract

A discussion of the present position on holiday sickness claims, and how best to advise clients as to the possible consequences of false or exaggerated claims.

On 6 September 2017, the Solicitors Regulation Authority ("SRA") issued a "Warning Notice" to those acting in personal injury cases, and particularly holiday sickness claims.[1] Such Warning Notices are not commonplace; in 2017 only five were issued, and to date in 2018 there have been only two.

The Warning Notice stated that it had been issued because of the SRA's concern that some firms dealing with claims for holiday sickness were failing to consider properly, if at all, the merits of their client's cases. Reference was also made to improper links with claims management companies, the payment of referral fees, and even the pursuit of claims without proper instructions from claimants. A dozen firms were said to be under investigation.

At about the same time in late 2017, the Association of British Travel Agents ("ABTA") submitted evidence to the Ministry of Justice to the effect that there had been an increase in holiday sickness claims by more than 500% since 2013, with the proportion of claims made to ABTA members related to gastric illness accounting for 90% of all claims submitted, as against a historically stable average of 65%.[2]

The fuel for this astonishing rise in claims numbers was identified as being the amendments made to the Legal Aid, Sentencing and Punishment of Offenders Act ("LASPO") in 2012/13. Claims arising from accidents or illnesses abroad were specifically excluded from the fixed recoverable costs regime that LASPO ushered in. In the minds of tour operators, there was a causative link between the reduction in costs for motor and casualty claims, and the diversion of attention to the travel sector.

The Ministry of Justice appears to have been persuaded by those arguments, and noted the huge rise in the number of claims being brought before the courts, when, on 13 April 2018, it announced "New curbs on bogus holiday sickness claims", and the "closing [of] a loophole".[3] A fixed costs regime for holiday sickness claims was announced, the Justice Minister being quoted as saying:

> "Claiming compensation for being sick on holiday, when you haven't been, is fraud … This damages the travel industry and risks driving up costs for holidaymakers. This behaviour also tarnishes the reputation of British people abroad. That is why we are introducing measures to crack down on those who engage in this dishonest practice."[4]

Quite how the effect of fixing costs would deter the determined fraudster was not made clear.

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[1] See *https://www.sra.org.uk/solicitors/code-of-conduct/guidance/warning-notices/Holiday-sickness-claims--Warning-notice.page* [accessed 6 July 2018].

[2] See *https://abta.com/assets/uploads/general/ABTA_submission_-_MOJ_Call_for_Evidence_13112017.pdf* [accessed 6 July 2018].

[3] See *https://www.gov.uk/government/news/new-curbs-on-bogus-holiday-sickness-claims* [accessed 6 July 2018].

[4] See *https://www.gov.uk/government/news/new-curbs-on-bogus-holiday-sickness-claims* [accessed 6 July 2018].

The anatomy of a holiday sickness claim

Against this background, it would now appear to be an opportune moment for the lawyer who may have been dealing with holiday sickness claims, or who may be contemplating doing so, to undertake a re-analysis of the legal position, and to give proper consideration as to how to identify unmeritorious claims. The SRA have warned that solicitors must not pursue claims which are false or clearly unsustainable.

The general presentation by a claimant in a holiday sickness claim is that they fell ill by reason of having been exposed to a food-based pathogen by the defendant tour operator (or the hotel delivering services on their behalf). The provisions of the Package Travel, Package Holidays and Package Tours Regulations 1992[5] mean that the tour operator can be held liable in the UK for a breach of duty by their suppliers of services abroad, particularly when combined with the provisions of the Supply of Goods and Services Act 1982, requiring goods and services to be of "satisfactory quality".

On 25 January 2017, the Court of Appeal handed down its decision in *Wood v TUI Travel Plc (t/a First Choice)*,[6] which clarified that food stuffs provided by a tour operator as part of the provision of an "all-inclusive" holiday were goods for the purposes of the Supply of Goods and Services Act 1982, such that if the food was contaminated, it was not of satisfactory quality and the defendant would be in breach of contract. However, the Court of Appeal did provide, albeit obiter, warnings about the difficulties faced by a claimant in proving their case. Per Burnett LJ:

> "Underlying this appeal was a concern that package tour operators should not become the guarantor of the quality of food and drink the world over when it is provided as part of the holiday which they have contracted to provide. Mr Aldous spoke of First Choice being potentially liable for every upset stomach which occurred during one of their holidays and the term 'strict liability' was mentioned. That is not what the finding of the judge or the conclusion that he applied the correct legal approach dictates. The judge was satisfied on the evidence that Mr and Mrs Wood suffered illness as a result of the contamination of the food or drink they had consumed. Such illness can be caused by any number of other factors. Poor personal hygiene is an example but equally bugs can be picked up in the sea or a swimming pool. In a claim for damages of this sort, the claimant must prove that food or drink provided was the cause of their troubles and that the food was not 'satisfactory'. It is well-known that some people react adversely to new food or different water and develop upset stomachs. Neither would be unsatisfactory for the purposes of the 1982 Act. That is an accepted hazard of travel. *Proving that an episode of this sort was caused by food which was unfit is far from easy. It would not be enough to invite a court to draw an inference from the fact that someone was sick. Contamination must be proved; and it might be difficult to prove that food (or drink) was not of satisfactory quality in this sense in the absence of evidence of others who had consumed the food being similarly afflicted. Additionally, other potential causes of the illness would have to be considered such as a vomiting virus.*
>
> The evidence deployed in the trial below shows that the hotel was applying standards of hygiene and monitoring of their food which were designed to minimise the chances that food was dangerous. The application of high standards in a given establishment, when capable of being demonstrated by evidence, would inevitably lead to some caution before attributing illness to contaminated food in the absence of clear evidence to the contrary."[7] (emphasis added)

Agreeing with these remarks, Sir Brian Leveson, President of the Queen's Bench Division, said this:

[5] Package Travel, Package Holidays and Package Tours Regulations 1992 (SI 1992/3288).
[6] *Wood v TUI Travel Plc (t/a First Choice)* [2017] EWCA Civ 11.
[7] *Wood v TUI Travel Plc (t/a First Choice)* [2017] EWCA Civ 11 at [29]–[30].

> "… I agree that it will always be difficult (indeed, very difficult) to prove that an illness is a consequence of food or drink which was not of a satisfactory quality, unless there is cogent evidence that others have been similarly affected and alternative explanations would have to be excluded."[8]

Following *Wood*, cases are being heard throughout the land in which it is taken as read that a claimant must first prove that they fell ill at all, and then that they must then prove that they fell ill by virtue of eating contaminated food provided by the hotel. Whether a complaint was made to the hotel or the defendant's representative at the time is often a factor relevant to both of these points, as is whether there is a record of others falling ill at the same time. The court will often also hear evidence as to where else other than the all-inclusive resort the claimant may have eaten, it being a good point for the defendant if it can show that food or drink was taken on an excursion or trip. Finally, other causes of the illness have to be excluded (such as "idiopathic travellers' diarrhoea").

The competing points being litigated, put simply, are these:

A claimant asserts that:

- they fell ill;
- this was caused by food poisoning rather than any other sort of illness; and
- the illness was caused by his eating food provided by the hotel.

For a defendant:

- there is no objective evidence of illness or complaint (and therefore the claimant may not have been ill at all);
- there is no objective evidence of food poisoning to others;
- there is no objective evidence that the claimant did not eat elsewhere; and
- critically, there is no objective evidence that this was, in fact, food poisoning.

Evidence in holiday sickness claims

Many holiday sickness claims fail simply because the claimant cannot meet the *Wood*-criteria and demonstrate that their genuine illness was the fault of the hotel. However, a number of cases are dismissed at trial because the evidence of the claimant put before the court is not what he or she actually remembers, but is in fact a lively reflection of what the claimant's solicitor would like the evidence to be. The claimant's genuine complaint can be lost in a haze of unsatisfactory case preparation and a form of extreme confirmation bias. This often arises from a perceived need to meet what many appear to consider a "shopping list" methodology taken from *Wood*, and has led to some claimants being placed in difficulties at trial. Statements, which should be in the witness' own words,[9] are relied upon which have been produced by following a long list of often leading questions: "was the chicken ever served pink?", "did you ever see flies around the food?" etc. In effect, the evidence is tailored to fulfil the requirements of a successful claim. There is then a danger that by taking evidence in this way from a putative claimant and his family, identikit answers are produced, and when exposed this can lead to a forceful submission that the claimant is not a witness of truth. This can easily be avoided by the use of closed questions when interviewing a witness, and putting the evidence down, for better or worse.

However, even with the careful use of language when taking a witness statement, the lawyer must be alive to the "*Gestmin* effect" of false memory. Here it is appropriate to set out the observations of Leggatt J in *Gestmin SGPS SA v Credit Suisse (UK) Ltd*:

> "While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the

[8] *Wood v TUI Travel Plc (t/a First Choice)* [2017] EWCA Civ 11 at [34].
[9] CPR 32 PD 18.1.

unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.

Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory)."[10]

The prudent lawyer should, therefore, challenge the evidence presented to them, and consider the following main tests postulated by Lord Bingham when seeking to ascertain whether a witness is one of truth and/or is reliable. Consider:

"(1) the consistency of the witness's evidence with what is agreed, or clearly shown by other evidence, to have occurred;
(2) the internal consistency of the witness's evidence;
(3) consistency with what the witness has said or deposed on other occasions;
(4) the credit of the witness in relation to matters not germane to the litigation;
(5) the demeanour of the witness."[11]

Holiday sickness claims and fundamental dishonesty

Whether it is poor drafting, poor recollection or dishonesty that causes a claimant to be disbelieved, those who can be shown not to have been ill or to have lied about the circumstances of their holiday are at risk of findings of Fundamental Dishonesty, with their QOCS protection being disapplied, and possibly committal proceedings to follow. Much recent press coverage has been given over to the dire consequences for those who bring spurious claims, including one case in which a costs order was made in the sum of £15,000 against the claimants.[12] Prison sentences have been given to the most egregiously dishonest claimants.[13]

The medical experts who give evidence in holiday sickness cases, and who do not bear in mind their duties to the court under CPR 35, can also find that their professional reputation is tarnished, if not potentially ruined.[14]

As the SRA noted in its Warning Notice, it is entirely appropriate that genuine claims for holiday sickness are pursued; however, a lawyer is under a duty to undertake a proper assessment of the evidence before a claim is submitted, and as it proceeds. The SRA reminded lawyers that they "should not bring

[10] *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) at [16]-[17].
[11] T. Bingham, "The Judge as Juror: The Judicial Determination of Factual Issues" *Current Legal Problems* 38.
[12] See *http://www.dailymail.co.uk/news/article-5513789/Posing-pool-Benidorm-sickness-bug-scammers.html* [accessed 6 July 2018].
[13] See *http://www.dailymail.co.uk/news/article-4977574/Couple-jailed-making-fake-holiday-sickness-claims.html* [accessed 6 July 2018].
[14] See *https://www.insurancetimes.co.uk/doctor-faces-probe-over-holiday-sickness-claims-/1425945.article* [accessed 6 July 2018].

cases, or continue with them, where there is a serious concern about the honesty or reliability of the evidence".[15]

The risk factors to consider when analysing a holiday sickness claim and, in effect, "vetting" it, are these (per the SRA):

- the claim is made some time after the alleged incident;
- there was no report of the claim to the hotel;
- there was no extensive sickness amongst others in the same accommodation …;
- the claim comes from or involves people generating claims in the resort;
- the client's contemporaneous report of the holiday was positive; and
- the client drank or ate excessively.

The careful lawyer can avoid the dangers for his or herself, and their client, not simply by "turning a blind eye", but by engaging with each case and objectively assessing whether the claim can properly be pursued. This includes challenging the evidence of the claimant and any witnesses, rather than simply accepting it come what may.

Disclosure is another area fraught with potential difficulties. The claimant and his or her lawyer have a duty to preserve evidence and to disclose it, whether it is to the advantage or the detriment of the case. In holiday sickness claims, this usually includes photographs, social media posts and tweets. It is wholly wrong to invite a client to delete or amend photographic evidence or posts, and clients must be advised that they have a duty to disclose where relevant to an issue in the case.

It is also incumbent on the claimant's lawyer to warn their client of the consequences of making a false statement of truth; there is a risk of the costs protection being lost (under CPR 44.16), or of the client facing a prison sentence if contempt proceedings are brought. The consequences of turning a blind eye to the dubious claim could hardly be more serious, not just for the claimant but for the lawyer. The SRA concluded its Warning Notice in this way:

> "We are concerned that firms are failing in their duties to act in accordance with the Principles and Outcomes of the Code by:
>
> - failing to ensure that they do not accept cases from introducers who are cold calling
> - entering into improper referral arrangements
> - bringing a claim acting without first investigating whether it is valid
> - failing to objectively assess and investigate adverse evidence
> - submitting false or dubious claims in the hope of a settlement without further investigation by the defendant
> - failing to properly identify clients and confirm client instructions
> - seeking unreasonable costs for a limited amount of work contrary to their fiduciary and regulatory duties—either from the client or the defendant
>
> Firms who conduct cases which demonstrate one or more of these features may face regulatory action for breach of our Principles."[16]

[15] See *https://www.sra.org.uk/solicitors/code-of-conduct/guidance/warning-notices/Holiday-sickness-claims--Warning-notice.page* [accessed 6 July 2018].

[16] See *https://www.sra.org.uk/solicitors/code-of-conduct/guidance/warning-notices/Holiday-sickness-claims--Warning-notice.page* [accessed 6 July 2018].

Loss of Congenial Employment ("LOCE")

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LT Loss of congenial employment; Personal injury claims

For some "congeniality" and "employment" are incongruous. However, for the vast majority, the loss of a profession, a position or a role is a real sense of loss. Their employment gives them a sense of purpose and an ability to provide for themselves and their families. It is therefore unsurprising that the courts have been driven to recognise this importance.

In 1967, the courts eventually recognised the importance of this head of loss. In *Morris v Johnson Mathey*,[1] Edmund Davies LJ spoke of "The joy of a craftsman in his craft was beyond a price". However, the court has attempted to put a price on this joy albeit with some inconsistency and without firm guidance as to why such a figure is appropriate.

It should be understood that this is a distinct head of general damage. The concepts of amenity and profession should not be conflated. Given that it is an item of general loss the actual amount of the loss is open to submission. Defendants invariably argue either that the employment could not have been that enjoyable (and hence not an appreciable loss) or that this head of loss is subsumed by PSLA. In *Heil v Rankin* the point was not resolved.[2] It is therefore to be treated as a distinct head of loss.

Typically, the court was asked to make an award for LOCE for the uniformed professions. Theirs was seen as a vocation. However, if there was any logical distinction to do this in the modern landscape of litigation it has now been confined to the history books. Foskett J observed in *Pratt v Smith*:[3]

> "… why should any form of employment be excluded provided that it can be demonstrated that the loss of that employment really means something to the person who as a result of someone else's negligence, loses the ability to continue with it?"

The award came to prominence in *Hale v London Underground Ltd*.[4] Since then the majority of awards have been between £5,000 and £7,000. This bracket was acknowledged by Andrews J in *Davison v Leitch*.[5] Mrs Davison was an equities trader. As a result of clinical negligence she was unable to continue with her career in the City. The court noted the evidence which had been adduced of why Mrs Davison liked her career so much and how she thrived in a macho cut-throat environment (hence highlighting why this head of loss should be carefully considered and expressed in any case). The court noted that the range of awards were demonstrated by *Evans v Virgin Atlantic Airways*[6] (an award of £10,000 for a beauty therapist engaged by Virgin but deployed elsewhere on medical grounds) and *Dudney v Guaranteed Asphalt Ltd*[7] (an award of £5,000 to a skilled lead roofer). The court awarded Mrs Davison an award at the upper end of the range at £6,500 for her total exclusion from her previous working environment (Mr Dudney was able to start his own business managing a similar enterprise).

There are also awards at very competing ends of the spectrum. In *Appleton v El Safty*,[8] Christopher Clarke J awarded Mr El Safty (a professional footballer) £25,000 for the loss of that most congenial of

[1] *Morris v Johnson Mathey* [1967] 112 S.J. 32.
[2] *Heil v Rankin* [2001] Q.B. 272.
[3] *Pratt v Smith* [2002] All E.R. (D.) 322 (Dec).
[4] *Hale v London Underground Ltd* [1993] P.I.Q.R. Q30.
[5] *Davison v Leitch* [2013] EWHC 3092 (QB).
[6] *Evans v Virgin Atlantic Airways* [2011] EWHC 1805 (QB).
[7] *Dudney v Guaranteed Asphalt Ltd* [2013] EWHC 2515 (QB).
[8] *Appleton v El Safty* [2007] EWHC 631 (QB).

employments. In *Kennedy v London Ambulance Service NHS Trust*,[9] the court awarded only £2,500 to a lady who had worked for the ambulance service for 13 years and "plainly found her work fulfilling".

In *Willbye v Gibbons*,[10] complaint was made that the court at first instance had made an award of £15,000 to a 12 year old girl for the loss of enjoyment of a future role as a Nursery Nurse (which of course by that date she had not yet commenced). Upon appeal the Court of Appeal noted that such an award was possible within sensible limits:

> "The appellant is being compensated for being unable to pursue a career she thought she would have enjoyed. She never actually embarked on that career, although she probably had the ability to obtain the qualifications required, and in financial terms she has been fully reimbursed, so this is really an award for a particular disappointment, which may or may not be prolonged."

The court substituted an award of £5,000. However, practitioners should bear in mind that awards are not solely for those who have had and lost a position which they enjoyed. This approach has been further developed in the case of *Hanks v Ministry of Defence*,[11] where Mr Hanks (having joined the RAF at school) was precluded from pursuing his career flying fast jets with the Royal Navy. In recognition of this fact the court awarded him £9,000. The court had some evidence to support this and this was good enough to justify the award at [43]:

> "At school he had joined the RAF section of CCF. When he joined the Royal Navy in 1997 he had set his heart on becoming a Sea Harrier pilot. It is clear that he was rated during his training very highly. The NAAB report of September 2002 concluded 'during his time in the Royal Navy, Hanks has ably demonstrated he has excellent all round qualities and an abundance of potential. He is an officer that the Service can ill afford to lose'. I accept his evidence that he was very much looking forward to sixteen years flying with the Royal Navy and thereafter working as a pilot in the civil aviation field. I take into account *Willbye v Gibson* [2003] EWCA Civ 372. In my judgment the proper award for loss of congenial employment is £9,000."

Whilst the award to Mr Hanks was on the high side the rationale for awarding £25,000 for the loss of football career compared with £9,000 for the loss of flying a fast jet is difficult to understand.

If you are going to make such a claim make sure you have the evidential substance to back up what will otherwise be regarded as an unsubstantiated afterthought. In *McCrae v Chase International Express Ltd*,[12] claim was made for an award for LOCE for a motorcycle courier. The court was distinctly underwhelmed by the evidence adduced in support of the LOCE claim. Kennedy LJ noted:

> "The evidence as to the congeniality of the employment was sparse indeed. In the particulars of claim the claimant asserted thus: 'The claimant very much enjoyed riding his motor cycle (it was a hobby of his) and therefore found his work as a motor cycle courier extremely satisfying.'"

The court awarded nothing. It is therefore of importance that if such a claim is made it shines through in witness evidence. It should not merely be pleaded. Further, emphasis needs to be placed upon why award should be a distinct head of loss. Indeed, the court made an interesting distinction between employment and everyday fulfilment in *McCrae*, Kennedy LJ said at [22]:

> "The award can only be made to compensate a claimant for the loss of congenial employment, as the head of damages indicates. Any award for interference with the satisfaction which a claimant

[9] *Kennedy v London Ambulance Service NHS Trust* [2016] EWHC 3145 (QB).
[10] *Willbye v Gibbons* [2003] EWCA Civ 372.
[11] *Hanks v Ministry of Defence* [2007] EWHC 966 (QB).
[12] *McCrae v Chase International Express Ltd* [2003] EWCA Civ 505.

gets, for example, out of the use of a motorcycle in his ordinary social life has to be compensated for under the head of pain, suffering and loss of amenities."

Why should there be a division of the enjoyment of work and pleasure? Surely, if it is something done for fun then to lose that in an everyday setting is far worse. This is particularly apparent if the court does not in fact attach sufficient weight to the congeniality lost in an award for PSLA.

Therefore, it is important to consider where loss of congeniality falls, whether it be in the employment or social context. Both should be claimed, one as an element of PSLA (which in some cases may be a substantial element of a "general" award) the other as a distinct award related to work.

Where the court has made an award these do vary quite considerably. The court has entertained awards for LOCE in the following recent cases and for the following loss of employment status:

Case	Role	Award
Giles v Chambers [2017] EWHC 1661 (QB)	part-time fitness instructor	£5,000
Hancock v DHL Supply Chain Ltd [2017] C.L.Y. 1671	HGV driver	£5,000
TF v East Lancs NHS Trust, unreported, 22 March 2017	role unspecified	£10,000
Hayden v Maidstone and Tunbridge Wells NHS Trust [2016] EWHC 3276 (QB)	cardiac physiologist	£10,000
Kennedy v London Ambulance Service NHS Trust [2016] EWHC 3145 (QB)	ambulance responder	£2,500
Murphy v Ministry of Defence [2016] EWHC 3 (QB)	soldier	£10,000
Hubbard v Tissiman, unreported, 2015	loss of sports career	£10,000
Seers v Creighton & Sons Ltd [2015] EWHC 959 (QB)	skilled craftsman	£5,000

These are eight authorities from the last two years. 50% of those cases attracted an award of £10,000. It is perhaps becoming more the "norm" that this is the expected level of damages. Indeed, why should we be fixated on a value which was set 24 years ago?

If those values above represent the loss of a vocation or professional/calling then they all attracted an award of £10,000. Given that there are no guidelines I can see little sense in arguing for less. At the very least the bracket should realistically be £7,000-£10,000 in money today.

However, in reality one wonders how the court arrives at a figure for LOCE having considered the evidence. Having examined both awards at first instance and on appeal these merit almost universally only one or two paragraphs of what is otherwise a lengthy judgment. This shows me that when the court makes an award for LOCE it is very much on a broad approach and one might argue on a "gut feel". Some claims for LOCE look more persuasive than others. It may well be that those with a higher award reflect the added care (and evidence) presented in support. However, practitioners should be under no illusion as to what the court does expect if such an award is claimed and this is very much an evidence-led approach rather than a passing reference.

The court reflects on case law comparators when consideration is given to non-monetary awards. However, for every LOCE claim there may be a number of cases both in favour and against that level of award. This should be borne in mind. It may well be that where such an award is realistic the overall level of damages far outweighs the award for LOCE. However, even in a case where substantial damages are recoverable a difference of £5,000 is a large one for the lay client. In addition, practitioners should also be alive to arguments of context in terms of earnings: in *Noble v Owens*,[13] the court awarded £5,000 to a builder and motor mechanic who "enjoyed his work". The band of suggested award (even in 2008) was

[13] *Noble v Owens* [2008] EWHC 359 (QB).

£5,000-£10,000 and the agreed award of £5,000 was seen by the court as the correct one in view of the substantial award for future loss of earnings.

The award should be pleaded and provided that there is enough evidence in place and it clearly shows that careful consideration has been given to why this head of loss is claimed (and why it is distinct from PSLA and for what reasons) it is possible to persuade the court of an award of £10,000. This should in my view be a standard award in the litigation undertaken today. After all, £10,000 does not buy you as much as it used to. Barely an issue fee these days!

Overview of the Spanish Traffic Scale and Practical Examples

Rebeca Martínez Fariñas

Carlos Villacorta Salís

Compensation; Compulsory insurance; Death; Personal injury; Road traffic accidents; Spain; Spinal cord

Many fellow lawyers exercising their profession in the UK could encounter a case in which a client has suffered a traffic accident during a holiday in Spain and, upon returning to their home country, they seek advice on how to claim the corresponding compensation.

The aim of this article is to explain the system of compensation for personal injuries incurred in traffic accidents in Spain, in accordance with Spanish Law, which is commonly referred to as the "Scale" ("Baremo" in Spanish).

What is the Scale?

The Scale is a legal system for the valuation of injuries and losses to people as a result of a traffic accident, which first came into effect in Spain in 1995.[1]

In the last two decades, road safety has improved considerably in this country, following the modernisation of infrastructure, the implementation of new technologies in vehicles, the launch of awareness-raising campaigns which have profoundly altered people's behaviour, and the tightening of traffic regulations (speed limits, points-based driving licences, the penalty system etc).

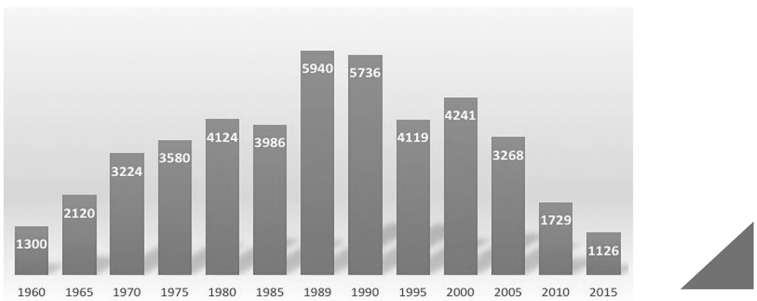

Figure 1: Evolution of the number of deaths on inter-city roads 1960–2015[2]

[1] Traffic Scale outlined in the Appendix to Law 30/1995, of 8 November, on the Regulation and Supervision of Private Insurance, subsequently amended and expanded by means of Royal Legislative Decree 8/2004 of 29 October, which definitively defined the Law on Civil Liability and Insurance in the Circulation of Motor Vehicles, in force until 2015, when the system was completely overhauled by means of the approval of the Law on the Reform of the System for the Valuation of Injuries and Losses Caused to People in Traffic Accidents (Law 35/2015, of 22 September, which came into effect on 1 of January 2016).

[2] *Source: in-house, based on the annual reports of the Spanish Traffic Department*.

Those efforts mean that Spain now boasts the fifth best road safety in the world.[3]

However, during the 1980s and 90s, the number of deaths each year in traffic accidents systematically exceeded 4,000, rising as high as 6,000 (on inter-city roads alone) in 1989. Those figures were socially unacceptable.

The number of accidents had an enormous impact on the social and economic reality of the country. At the public level, the phenomenon of judicial inflation arose, due to the successive increase in the valuation of compensation by judges, using disparate criteria which, far from promoting the amicable resolution of conflicts, led to an increase in litigiousness, with the consequent court delays due to the accumulation of cases and the additional harm to victims. At the private level, insurance companies faced serious solvency problems in the motor vehicles segment, because the provisions of the insurance entities, calculated on the basis of the premiums accrued in the year in which the accident occurred, were insufficient to meet the cost of the final compensation paid in the year of settlement.

In this framework, the Medical and Legal Services of the insurance company Mapfre drew up an internal scale to guide its agents in the settlement of claims involving bodily injuries. Subsequently, the Spanish Section of the International Insurance Law Association ("SEAIDA"), activated and subsidised by the insurance sector, created a Working Group to draw up a scale along the same lines, and, on 5 of March 1991, a Ministerial Order was introduced, the immediate precursor of the scale of 1995.

Thus, the insurance sector finally managed to bring to bear its decisive influence on the content of legal regulation, under the pretext of the security and stabilisation of the system. The transition from a judicial system to a legal definition entailed the constitutional acceptance of an exception to the general principle of damages law, that of comprehensive reparation.

The scenario outlined above evolved with the passing of time, as the number of deaths, serious and minor injuries fell to less than one third of the peak reached in the 1980s and 90s. At the start of the 21st century, the obsolescence of that Scale was accepted by all the agents involved, including the UNESPA[4] (Insurance Business Association) and the Office of the Attorney General, which openly described the compensation granted in application of that legal text as "insufficient in every regard".[5]

The arduous task carried out by a Commission of Experts for the Reform of the Scale, gave rise to the text, Law 35/2015, in 2015, in an attempt to reconcile the damages and losses suffered by the victims of motor vehicle accidents with the current social and economic reality.

Guiding principles and structure of the Scale

The ultimate aim of this system is to achieve fair and equitable reparation for traffic accidents, by standardising the amounts of compensation, in order to ensure a uniform response to identical situations, thereby providing victims and insurance entities with certitude as regards the viability of claims.

The principle of comprehensive reparation of the damages and losses caused, which should place the victim in a position which is as close as possible to the one he or she would have been in if the accident had not occurred, is, necessarily, affected by the imposition of an obligatory valuation system. However, in 2000, the Constitutional Court had already attested to the constitutionality of that obligatory nature in the sphere of traffic accidents.[6]

Thus, the scale is structured as follows: a first section which explains how it works, followed by three large tables referring to the amounts of compensation for death, permanent consequences and temporary

[3] Overview of Road Safety 2015, press release from the office of institutional relations and communications of the Ministry of the *Interior* at *http://www.dgt.es/es/prensa/notas-de-prensa/2016/20160104-nuevo-minimo-historico-numero-victimas-mortales-accidente-desde-1960.shtml* [accessed 6 July 2018].

[4] Spanish Association of Insurance and Reinsurance Entities.

[5] *2009 Report of the Office of the Attorney General Vol.I Ch.IV, on Proposals for Legislative Reforms, Substantive Criminal Reforms No.XVI* p.1055.

[6] Sentence of the Constitutional Court 181/2000 of 29 June (Official State Gazette No.180 of 28 July 2000).

injuries. Within each one of those tables, three sub-tables make it possible to identify the basic personal loss, the specific personal loss, and the financial loss:

Table 1 Compensation for death

Basic personal loss	Compensation is paid to the widowed spouse, the ascendants and descendants, the siblings and close relatives (new concept), with a fixed amount depending on the closeness and the ages of the *aggrieved party* and the decease.
Specific personal loss	Additional compensation is paid for *specific circumstances*, such as the death of an only child, or both parents in an accident, or a pregnant woman with the loss of the foetus, or the aggrieved party has a prior physical or mental disability or one resulting from the accident.
Personal financial loss	*Actual loss*: Compensation is paid for both general expenses (travel, accommodation and other reasonable costs incurred as a result of the death, with a minimum of €400 per aggrieved party, without the need for proof), and the specific costs of transfer of the deceased, repatriation, burial and funeral.
	Loss of revenue:[7] A series of tables likewise determine the net losses incurred by those who financially depended on the victim's income. It is presumed that such losses are incurred by the spouse, minor children and those up to the age of 30 years (save evidence to the contrary), but also the children in other circumstances, parents, siblings, grandparents, grandchildren and other close relatives who can accredit financial dependency.
	The actuarial calculation of the loss of revenue takes into account factors such as the age of the aggrieved party, the deceased's income level, or the duration of the marriage in the case of spouses.

Table 2 Compensation for permanent injuries or consequences (medical scale)

Basic personal loss	Compensation is payable for *physical or intellectual deficiencies or those of the organs or senses*, and the aesthetic damage deriving from an injury which remains after the healing process.
	Those who suffer the injuries are considered *aggrieved parties*, but also the relatives of victims with serious injuries.
	This second table, also called the "medical scale", contains a list of all the consequences, with their classification, description and measurement, expressed in ranges of points.
	Each consequence is given a score within its range depending on its intensity and seriousness. In the case of more than one concurrent consequence, the weighting formula known as the Balthathar formula will be applicable, a result expressed in points being obtained, which, once multiplied by the value of each point (which is different depending on the victim's age), makes it possible to obtain the financial quantification of the consequences.
	The *aesthetic damage* is considered separately, and it consists of any alteration which worsens the person's image, classified as extremely significant, very significant, significant, medium, moderate and slight, depending on factors such as the degree or normal visibility of the damage, the degree to which it attracts attention, the emotional reaction it provokes, and the possibility that it will affect the victim's interpersonal relations.
Specific personal loss	When a consequence derives from a *specific non-material loss*, it will be compensated separately, in the following cases: • Complementary non-material losses due to physical or mental damage or damage to the organs or senses. • Complementary non-material losses due to aesthetic damage. • Non-material loss due to loss of quality of life caused by the consequences (very serious, serious, moderate or slight). • Non-material loss due to loss of quality of life of relatives of seriously injured victims. • Loss of foetus as a result of the accident.
Personal financial loss	Compensation is payable for the foreseeable costs of *future care*, which are paid directly to the public health services.
	Compensation is paid directly to the aggrieved party for *prostheses*, orthoses, necessary replacements, rehabilitation treatment at home or in a clinic, as well as the *financial loss due to the increase in mobility costs* (costs related to the loss of personal autonomy, such as the adaptation of the home and/or vehicle, or the assistance of a third party, measured by the number of hours of care necessary).

[7] It is also laudable that the principle of double presumption has been legally consecrated; it is presumed that losses have been incurred by those who are classified as such, though evidence to the contrary is accepted; and those who are not classified as such are not presumed to have incurred losses, but likewise that supposition may be overturned if the existence of the loss can be demonstrated.

Table 3 Compensation for temporary injuries[8]

Basic personal loss	Temporary injuries are considered to be those suffered by the victim from the time of the accident to the end of the healing process or the stabilisation of the injury and its conversion into a consequence (for which compensation is payable in accordance with Table 2). Compensation of €30 per day will be paid for that basic personal loss.
Specific personal loss	Personal loss due to temporary loss of quality of life: compensation is paid for the non-material damage suffered by the victim due to the limitations on his or her personal autonomy or development as a result of the injuries suffered or their treatment (includes compensation for basic loss): Due to temporary loss of quality of life: • Very serious: €100 a day. • Serious: €75 a day. • Moderate: €52 a day.
	Surgical interventions: each one of them will be compensated with an amount of between €400 and €1600, depending on the characteristics of the operation, the complexity of the surgical technique and the type of anaesthesia.
Personal financial loss	*Non-material damage*: Health care costs are covered, as well as various others (all those which are necessary and reasonable, generated by the injury, in the essential activities of the normal life of the injured person, such as the increase in mobility costs, travel by relatives in order to take care of the injured person if his/her medical or personal situation requires it, and, in general, the costs necessary to ensure the care of the injured person or minor or particularly vulnerable relatives who the injured person took care of).
	Loss of revenue: Compensation will be paid for the loss of revenue which can be accredited.

Practical cases

We will now consider some examples of compensation, putting into practice the first table in the case of death, and the second and third tables in the case of serious injuries. Finally, we will consider a third case related to the classic concept of neck pains (whiplash injuries).

Example of compensation for death (application of Table 1)

Case: A 45-year-old male, married for 16 years, with two children aged 10 and 15 years (the latter with a 33% disability), with annual income of €50,000, dies in a traffic accident. His parents are still alive, as is his father-in-law, with whom he had a close relationship because he lived with the deceased's family. He also had a 35-year-old sister.

Aggrieved parties	**Basic personal loss (€)**	**Specific personal loss (€)**	**Financial loss (€)**	**Total (€)**
Widowed spouse, age 45	91,000.00	0	157,750.00	248,750.00
10-year-old child	90,000.00	0	159,412.00	249,412.00
15-year-old child (33% disability)	80,000,00	+ 25% 20,000.00	162,655.00	262,655.00
Father (victim >30 years)	40,000.00	0	400	40,400.00
Mother (victim >30 years)	40,000.00	0	400	40,400.00
Sister (>30 years) (the only one in this category)	15,000.00	+ 25% 3,750.00	400	19,150.00
Father-in-law, close relative (the only one in this category)	10,000.00	+ 25% 2,500.00	400	12,900.00

[8] Source: in-house.

Example of compensation for serious injury (application of Tables 2 and 3)

Case: A 55-year-old man, single and without children, with annual income of €40,000, suffers a serious traffic accident on 1 January 2016, with consolidation on 31 December 2016, following hospitalisation for three months, including ten days in a coma, and a long period of rehabilitation following the amputation of one leg at the hip.

Temporary incapacity			
Specific personal loss:	**Days off work**	**Value (€/day)**	**Compensation (€)**
Very serious loss of quality of life (includes basic personal loss): 01/01/2016–31/03/2016	90	0	9,000.00
Serious loss of quality of life (includes basic personal loss): 01/02/2016–01/04/2016–31/12/2016	275	275	20,625.00
Surgical intervention 1			1,500.00
Surgical intervention 2			1,100.00
Financial loss:			
Health care expenses	85,500.00		
Other costs subject to compensation	15,000.00		
Loss of revenue	10,000.00		
Permanent injuries or consequences			
Basic personal loss:			
Permanent injuries: 63 points			€136,638.51
Aesthetic damage as a result of the consequences: 37 points			€58,569.82
Specific personal loss			
Complementary non-material losses due to aesthetic damage in excess of 36 points			€11,000.00
Non-material loss due to serious loss of quality of life as a result of the consequences			€50,000.00
Personal financial loss			
Actual loss			€25,000.00
• Prostheses and orthoses			
• Technical assistance			€15,000.00
• Adaptation of home			€95,000.00
• Increase in mobility costs			€18,000.00
• Assistance of a third party (1 hour/day)			€1,573,58.00
Loss of revenue Inability to do his/her job or professional activity (total incapacity)			€108,500.00

Example of compensation for minor spinal column injury (application of Tables 2 and 3)

There is a specific article dedicated to minor spinal column injuries (whiplash injuries), because it is a pathology subject to a high degree of fraud due to the simulation or aggravation of the consequences of a traffic accident, and a considerable business has been built up around it in Spain. That fraud is committed by the victims, and also sometimes by professionals in the legal and health-care sectors (traumatologists,

evaluators of personal injuries, rehabilitation clinics, ambulances etc).[9] In addition, this type of injury is increasingly frequent, due to the lessening of the consequences of serious accidents and improvements in safety systems.

The difficulty of this pathology lies in its diagnosis, especially when it is based solely on the victim's reporting of the pain endured, and it is not susceptible to objective verification by means of complementary medical tests. In that case, it will be compensated as a temporary injury (Table 3), provided that the nature of the accident could have caused the alleged injury, and the causation is based on the following criteria:

- Exclusion: There is no other cause which could fully explain the pathology.
- Chronological: The symptoms must appear within a medically explainable time. That is, the symptoms must manifest themselves within 72 hours after the accident or the victim must have received medical attention within that time.
- Topographical: There is a relation between the area of the body affected by the accident and the injury suffered, unless there is some other pathogenic explanation.
- Intensity: the injury suffered is proportional to the mechanism which caused it, taking into account the intensity of the accident and other variables which affect the likelihood of its existence.

In addition, the consequences deriving from a minor whiplash injury will only be liable to compensation if a conclusive medical report accredits the existence of that pathology after the temporary injury period. Those consequences may consist of chronic post-traumatic pain, an associated cervical syndrome or an aggravation of a previous arthrosis, and they will be valued in a range from 1 to 5 points depending on the seriousness.

Having said that, let's look at an example of a compensation calculation for a minor spinal column injury:

Case

A 35-year-old woman with annual income of €40,000 suffers a traffic accident (rear-end collision), which causes a minor spinal column injury leading to a period of 40 days of temporary incapacity, 10 of them with a moderate loss of quality of life, finally ending with satisfactory healing without consequences.

Recoverable losses	
Basic personal loss: 30 days — €30/day	€900.00
Specific personal loss Moderate temporary loss of quality of life for 10 days — €52/day	€520.00
Financial loss	€600.00
Health care costs	€35.00
Recoverable costs (collar)	€1,594.07
Loss of revenue	
Total	*€3,649.07*

[9] M. A. Larrosaamante, "Rear-end collisions. Special reference to biomechanical expertise and its judicial valuation" [2015] *Journal of Civil Liability, Traffic and Insurance*, Year 51 No.5 at 7.

Obligatory insurance and direct legal action against the insurance company

All owners of motor vehicles which are normally used in Spain are obliged to take out and keep up to date an insurance contract for each vehicle they own, covering their civil liability up to the limits of the obligatory insurance. Thus, drivers of motor vehicles are, by virtue of the risk created by driving those vehicles, liable for the damage caused to people or property as a result of driving.

In the case of personal injuries, they will only be absolved from liability if they can prove that the injuries were due exclusively to the fault of the injured person or to force majeure unrelated to the driving or the functioning of the vehicle; force majeure does not include defects of the vehicle or the breakage or failure of any of its parts or mechanisms.

The injured party, or their heirs in the case of death, may take direct legal action against the insurer in order to demand fulfilment of the obligation to pay compensation, without prejudice to the insurer's right to claim the amounts paid out to a third party from the insured party if the injury or loss is due to wilful misconduct on the part of the insured. Direct action is immune from the exceptions which may correspond to the insurer against the insured. The insurer may, however, oppose the exclusive fault of the aggrieved party and the personal exceptions it has against that party. For the purposes of the exercise of direct action, the insured party will be obliged to inform the aggrieved third party or his/her heirs of the existence of the insurance contract and its content.[10]

The extrapolation of the scale to other types of compensation

The principle of comprehensive reparation mentioned above, though it is not explicitly stated in any legal precept, has been universally recognised by centuries-old jurisprudence, in accordance likewise with a firmly-rooted doctrinal tradition in Spain.

With the introduction of the scale, in both its old and new versions (which, it should be noted, proclaim the comprehensive reparation of the loss to then immediately confound it by means of hermetic and incomplete compensation tables), we have nonetheless witnessed the constitutionalisation of a flagrant example of an exception to that principle, which is without precedent and, moreover, obligatory.

That system was created as an exception for motor vehicle traffic in a very specific context, and it is a real privilege for those liable (in essence, for their insurers, who were able to leverage their immense power of influence). Therefore, its transfer to any other area of liability is not justified.

Notwithstanding that, in recent times we have witnessed a general trend towards the extensive and analogous judicial application of the scale for the valuation of bodily injuries caused in cases not related to motor vehicle traffic.[11] And that despite the fact that the Civil Code stipulates that exceptional laws will not be applied to cases or at times which are different from those expressly included in those laws,[12] and though it is known that that system necessarily means only partial reparation.

That is because the motivation of compensation constitutes a constitutional requirement, and the scale is thus a tempting reference, given the absence of any other accepted judicial valuation technique.

Thus, we can find sentences in which the judge uses the traffic scale as a basis to determine the amount of compensation in a wide variety of cases, such as accidents at work, medical negligence, the quantification of the non-material damage in cases of deaths considered a crime, or plane crashes.

Though it is true that part of legal doctrine believes that we are moving towards a general law for the valuation of bodily injuries, Spanish legislation and jurisprudence are still a long way from that position; it is therefore pernicious for judges to apply exceptional regulations in the knowledge that it prevents

[10] Article 76 of Law 50/80, of 8 October (Official State Gazette No.250 of 17 October 1980), on Insurance Contracts, in Section Eight, on Civil Liability Insurance.

[11] The First Chamber of the Supreme Court considers that the non-binding nature of the scale for other spheres does not however mean it cannot be applied as a criterion to establish the amount of compensation (Sentence 27-11- 2006 in action 5382/99).

[12] Civil Code art.4.2.

comprehensive reparation,[13] sometimes applying corrective criteria or percentage increases which are supposedly adapted to the circumstances of the specific case,[14] though not always understandable or based on solid legal grounds.

Conclusion

The practical nature of the scale as a system for the valuation of the loss is undeniable. Its focus on specific damages and losses also has the virtue of making it possible to know what, precisely, compensation is paid for and to what extent, and what it is not paid for. However, despite the improvements introduced by the most recent legislative reform, it still needs to be perfected to a great degree, as the result of natural evolution and the work of the Monitoring Committee of the Valuation System, whose creation was envisaged in Law 35/2015, in additional provision number one thereof, in order to advance through a system of consultations regarding the achievements made and to resolve the defects, the main one of which is that it does not result in the comprehensive reparation which it itself proclaims.

Another question is its extension and application to cases other than those of personal losses deriving from traffic accidents, which can only be condemned given its lack of legal grounds and rigour, as it contravenes the Civil Code and the general principles of law relating to damages, and because it results in compensation for the losses suffered by the victim which is intentionally incomplete and biased.

[13] M. Crespo Mariano, "Conservation and progress in the new traffic scale: reasons why compensation is or is not paid" in *Damages, Liability and Insurance, Practical Dossier* (Francis Lefebvre).

[14] G. Pomar Fernando, M. García Ignacio, *Non-material Damage and its Quantification* (Bosch: Wolters Kluwer, 2015), p.323.

Psychological Research and Witness Evidence in the Civil Courts of England and Wales[1]

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Credibility; Personal injury; Psychology and law; Reliability; Witnesses

Personal injury lawyers would no doubt agree with HH Judge Gosnell when he said that:

> "In many cases the assessment of the credibility of competing witnesses is crucial to the proper consideration of the evidence in the case. This is particularly true of allegations of sexual abuse which, by their nature, are unlikely to be capable of independent verification either by a witness or a recording in a document."[2]

When advocacy books address the topic of testing the credibility of a witness, they tend to rely heavily on anecdotes and the emphasis is usually on craft rather science. However, psychologists are turning their attention to the courtroom, and the courts are beginning to take notice of a growing body of peer-reviewed psychological research on witness evidence.

Witness lying and deceit

Spotting signs that a witness is lying is a challenge for trial lawyers and fact-finders. Lawyers do not always see eye to eye (no pun intended) on the value of non-verbal "cues", and neither do academics.

In *R. v NS*,[3] the Supreme Court of Canada ("SCC") ruled that permitting the witness to wear the niqab while testifying could create a serious risk to trial fairness. Snook, McCardle, Fahmy and House, responded with a 2017 article, "Assessing Truthfulness on the Witness Stand: Eradicating Deeply Rooted Pseudoscientific Beliefs about Credibility Assessment by Triers of Fact".[4] The authors reviewed psychological research on detecting deception and concluded:

> "… most cues to deception are too faint for reliable detection, most facial expressions and other non-verbal cues are unrelated to deception, legal professionals (and others) are unable to accurately detect deception beyond chance levels, and that training people to use non-verbal cues to improve their deception detection is unviable."

Snook believes that the SCC's conclusions are "diminished significantly" by the research evidence because the use of non-verbal communication for witness credibility assessment is largely unsupported by scientific research. However, Denault and Jupe (2018) responded with "Detecting Deceit During Trials: Limits in the Implementation of Lie Detection Research—A Comment on Snook, McCardle, Fahmy and

[1] A version of this article first appeared in Gordon Exall's *Civil Litigation Brief*.

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[2] *CD v Catholic Child Welfare Society (Diocese of Middlesbrough)* [2016] EWHC 3335 (QB) at [26].

[3] *R. v NS* [2012] S.C.C. 72.

[4] Snook, McCardle, Fahmy and House, "Assessing Truthfulness on the Witness Stand: Eradicating Deeply Rooted Pseudoscientific Beliefs about Credibility Assessment by Triers of Fact" [2017].

House".[5] They contend that Snook (i) did not consider the distinctive characteristics of a trial and (ii) did not consider additional research on non-verbal communication and deception detection. Denault and Jupe conclude that psychological research shows that fact finders should not underestimate the value of a witness's non-verbal communication.

Witness memory

Psychological research on witness memory has recently received significant attention from judges in England and Wales. In *Gestmin SGPS SA v Credit Suisse (UK) Ltd*, Leggatt J (as he then was, now Leggatt LJ) made this observation which has gone on to strike a chord with many:[6]

> "While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony."

Leggatt J's judgment in *Gestmin* has caught the attention of at least one Justice of the United Kingdom Supreme Court; in *R. (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs*, Lord Kerr in his dissenting judgment cited with approval the observations of Leggatt J in *Gestmin*:[7]

> "… paras 15-22 have much to commend them … para 22 appears to me to be especially apt:
>
> > '… the best approach for a judge to adopt … is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose—though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.'"

A quick search for *Gestmin* and Leggatt J on BAILII reveals a long list of cases where the observations in *Gestmin* on the unreliability of memory evidence have commended themselves to other judges. As Leggatt J himself notes in *Blue v Ashley*:[8]

> "In some of these cases they were also supported by the evidence of psychologists or psychiatrists who were expert witnesses: see e.g. *AB v Catholic Child Welfare Society* [2016] EWHC 3334 (QB) at [23]-[24], and related cases. My observations have also been specifically endorsed by two academic psychologists in a published paper: see Howe and Knott, 'The fallibility of memory in judicial processes: Lessons from the past and their modern consequences' (2015) *Memory*, 23, 633 at 651-3. In the introduction to that paper the authors also summarised succinctly the scientific reasons why memory does not provide a veridical representation of events as experienced. They explained:
>
> > '… what gets *encoded* into memory is determined by what a person attends to, what they already have stored in memory, their expectations, needs and emotional state. This information is

[5] Denault and Jupe, "Detecting Deceit During Trials: Limits in the Implementation of Lie Detection Research—A Comment on Snook, McCardle, Fahmy and House" [2018]. If you would like to request a copy of Denault and Jupe's 2018 publication, please contact L. Jupe directly at *louise.jupe@port.ac.uk*.

[6] *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) at [16].

[7] *R. (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2018] UKSC 3 at [103].

[8] *Blue v Ashley* [2017] EWHC 1928 (Comm) at [68]–[69].

> subsequently integrated (*consolidated*) with other information that has already been stored in a person's long-term, autobiographical memory. What gets *retrieved* later from that memory is determined by that same multitude of factors that contributed to encoding as well as what drives the recollection of the event. Specifically, what gets retold about an experience depends on whom one is talking to and what the purpose is of remembering that particular event (e.g., telling a friend, relaying an experience to a therapist, telling the police about an event). Moreover, what gets remembered is reconstructed from the remnants of what was originally stored; that is, what we remember is constructed from whatever remains in memory following any forgetting or interference from new experiences that may have occurred across the interval between storing and retrieving a particular experience. Because the contents of our memories for experiences involve the active manipulation (during encoding), integration with pre-existing information (during consolidation), and reconstruction (during retrieval) of that information, memory is, by definition, fallible at best and unreliable at worst.'
>
> In addition to the points that I noted in the *Gestmin* case, two other findings of psychological research seem to me of assistance in the present case. First, numerous experiments have shown that, when new information is encoded which is related to the self, subsequent memory for that information is improved compared with the encoding of other information. Second, there is a powerful tendency for people to remember past events concerning themselves in a self-enhancing light."(Footnoting D. Schacter, "How the Mind Forgets and Remembers: The Seven Sins of Memory" [2001])

Elizabeth Loftus is a psychologist who has conducted ground-breaking research on witness memory. Professor Loftus's TED talk, '*How reliable is your memory?*' is fascinating viewing.[9] In *Cusack v Holdsworth* Mr Registrar Briggs observed:[10]

> "Memory is an active process, subject to individual interpretation or construction. Each witness will have produced their witness statements many months ago, will have been asked to read or re-read their statement and review documents before giving evidence in court. There is high level commentary that reveals that this process reinforces a memory, even if the memory was false to begin with, and may cause a witness's memory to be based not on the original experience of events but on the material which has been read and re-read. This is supported by the recent research undertaken by Elizabeth Loftus, professor of law and cognitive science at the University of California which reveals the malleability of memory by showing that witness testimony can, after the fact, be shaped and altered."

Psychological research which is valid and relevant to witness evidence is always likely to spark interest from judges and lawyers and is potentially of assistance to fact-finders. However, despite the fact that lie detection has been the subject of extensive research since the 1960's[11] there is very little research specifically about witness deception in the courtroom. Although there is extensive research-based practice guidance on questioning vulnerable witnesses,[12] there is nothing equivalent in relation to questioning (supposedly) "robust" adult witnesses in court. The English trial system draws heavily on witness evidence yet has only just begun to explore how psychological research could help the civil courts obtain and evaluate evidence from witnesses.

[9] Professor E. Loftus, "How reliable is your memory?" TED talk.
[10] *Cusack v Holdsworth* [2016] EWHC 3084 (Ch) at [25].
[11] Denault and Jupe, "Detecting Deceit During Trials: Limits in the Implementation of Lie Detection Research—A Comment on Snook, McCardle, Fahmy and House" [2018].
[12] See, e.g. the evidence-based guide Achieving Best Evidence in Criminal Proceedings, MoJ, 2011 and *https://www.theadvocatesgateway.org* [accessed 6 July 2018].

Alternative Dispute Resolution Methods in Clinical Negligence: A Personal Experience a Decade On

Dr Jock Mackenzie*

Alternative dispute resolution; Clinical negligence; Indemnity basis; Mediation; Part 36 offers; Personal injury claims

In 2005, APIL kindly invited me to write an article on my personal experiences of the role of Alternative Dispute Resolution ("ADR") in clinical negligence claims. I therefore wrote about five recently concluded cases, all of which had involved different forms of ADR at different stages of the cases, and I think they served as an interesting reflection of some of the pros and cons of ADR in clinical negligence claims generally at that time. The ADR methods utilised involved traditional negotiation anteceded by Pt 36 offers in one case, round table meetings ("RTM")/joint settlement meetings ("JSM") both before and after service of proceedings in two cases and mediation in two cases, one successful and one unsuccessful. It has, somewhat scarily, been well over a decade since I wrote that article and since it was published in JPIL, and I have now been invited back by APIL to look at how things may have changed in ADR in the current world of clinical negligence.

There is no doubt that the clinical negligence landscape has changed hugely in this last decade or so, in particular politically, and, although this is not the appropriate article within which to discuss those changes in any detail, there is also no doubt that some of the politics has had either a direct or an indirect impact on the effect of ADR in clinical negligence work. There have also been various substantive CPR rule changes and some pertinent case law decisions within this period which have had an additional impact, for example to the effect of Pt 36.

Looking at five of my most recent concluded cases now, none of which went to trial, I am immediately aware that mediation was not used in any of them; and, indeed, I have not had a case mediated for many years. Two of the cases concluded at or shortly after an RTM/JSM and three of them concluded after the use of Pt 36 offers with or without subsequent traditional negotiation.

I shall come on to the cases later but, by way of background, the starting point for a discussion on ADR is that the courts consider, as per the CPR, that litigation should be a last resort, ideally with cases settling prior to, and therefore with the avoidance of, the commencement of court proceedings. This is set out expressly and unequivocally in the Pre-Action Protocol for the Resolution of Clinical Disputes, which has a whole section specifically entitled Alternative Dispute Resolution in which it is stated at para.5.1: "Litigation should be a last resort. As part of this Protocol, the parties should consider whether negotiation or some other form of alternative dispute resolution ('ADR') might enable them to resolve their dispute without commencing proceedings". It does not get much clearer than that!

There are a number of mechanisms contained within the CPR aimed at encouraging parties to engage in ADR, in whatever form. For example, CPR r.26.4 permits a party, when filing its completed Directions Questionnaire, to make a written request for proceedings to be stayed whilst the parties try to settle the case by ADR, such a stay being for a month by default but with an extension being permissible. Costs can, of course, also be used to "encourage" ADR: the higher court fees relatively recently introduced can act as a deterrent to the issuing of proceedings, Costs Budgets have a phase dedicated to ADR and the judiciary can, and will, penalise on costs parties who unreasonably fail to engage in mediation or ADR generally. The standard model form of a directions order in clinical negligence cases in the Royal Courts

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of Justice has at its para.2 a standard direction on ADR, in which it is stated: "2) At all stages the parties must consider settling this litigation by any means of Alternative Dispute Resolution (including round table conferences, early neutral evaluation, mediation and arbitration)."

The Pre-Action Protocol at para.5.2 also lists the possible forms of ADR, namely discussion and negotiation (which may or may not involve Pt 36 Offers), mediation, arbitration, early neutral evaluation and Ombudsman schemes. The reference to arbitration is interesting, as I have yet to have a clinical negligence case that was arbitrated and my experience is that, thus far, it is used very sparingly. NHS Resolution ("NHSR"), in its earlier embodiment as the NHS Litigation Authority ("NHS Litigation Authority"), started a mediation scheme in December 2016 in confluence with Trust Mediation, Centre for Effective Dispute Resolution ("CEDR") and Costs Alternative Dispute Resolution. However, in October 2017, Helen Vernon, the Chief Executive of NHSR, conceded to the Commons Public Accounts Committee that the Scheme was not (yet) working (and, although she blamed Claimant lawyers for not taking it up, following NHSR's response to a Freedom of Information request made by APIL her assertion has been demonstrated to have no sound evidential basis).

Whilst mediation is a particular form of ADR proffered by NHSR, as indicated above it is only one of a number of forms and, as mentioned already, none of the five cases I refer to below utilised mediation. In my experience, the higher value cases are more likely to involve a RTM/JSM than mediation: both of my cases involving an RTM/JSM were multimillion pound cases in which, by the time of settlement, liability had been admitted and judgment entered, so ultimately only quantum was in dispute.

The first case involving an RTM was a multimillion pound case involving a child with a severe brain injury. Liability was admitted in full in the Letter of Response after the Pre-Action Protocol had completed pre-issue, following which proceedings were issued, Judgment was entered and the parties turned their attention to quantification. An RTM was arranged at the request of the legal team representing the defendant (an NHS Trust) and it took place after formal service of both the Schedule of Loss and Damage and the Counter-Schedule, both served with their attendant factual witness statements and quantum expert reports. There was insufficient time before the RTM for the experts' discussions to take place, although some Pt 35 Questions had been asked of some of the defendant's experts and appropriately replied to. Leading Counsel for both parties were present at the RTM, as were their solicitors; my client's parents were present and a representative of the NHSLA also. No offers or other attempts at settlement had been made by either party prior to the RTM. After a meeting that lasted for about four hours, in which each party had their own room but with frequent sojourns by one set of lawyers into the other's room, and following some informal offers from both sides during what was an amicably conducted meeting, agreement satisfactory to both sides was reached. The court ultimately approved the settlement a few weeks later.

The second case involving an RTM was a case against a private consultant that was fiercely contested on both liability and quantum. The claim was denied in the Pre-Action Protocol correspondence and in the Defence. After exchange of liability factual witness and expert evidence but prior to various Pt 35 Questions of the defendant's experts having been answered in full (the delay being due to an objection by the defendant), and whilst liability remained in dispute, the defendant made a Pt 36 Offer. This was rejected by the claimant. However, a short while later, a 90% liability-only offer was then made by the defendant, which was also rejected by the claimant, who countered with a 95% liability-only offer. This was not accepted by the defendant and liability then proceeded to the preparation for, what transpired were going to be, very lengthy, time-consuming and expensive liability expert discussions. However, shortly before those discussions took place, and after the Agendas had been prepared although not agreed, the defendant (albeit out of time) accepted the claimant's 95% liability-only offer, following which judgment was entered a few months before trial.

Quantum was just as fiercely fought as liability had been, in part because of the nature of the quantum case involving considerable financial documentation: unsurprisingly, disclosure was an early issue.

Nevertheless, it was apparent that there was a desire on both sides to see if an early compromise could be achieved. Shortly before a further quantum-only Case Management Conference ("CMC") was due, an RTM took place. This again involved Leading Counsel and the parties' solicitors on both sides. The RTM was a fairly tetchy affair that lasted a full day and, rather frustratingly but perhaps not surprisingly, the case did not settle on that day. However, sufficient dialogue had been opened up between the parties during the RTM such that negotiations continued for the subsequent few days, eventually resulting in an offer being made to the claimant that was acceptable (and which was approximately a little more than three times over the level of the defendant's original offer).

Experienced and specialist Counsel and solicitors were present at the RTM for both sides in both cases. Settlement was achieved either on the day or shortly thereafter, so in both cases it was ultimately a successful process. In the second case, the claimant was not present personally but instead sent a close friend; in the first case, the claimant's parents were present throughout. In neither case was the offending clinician present. In both cases there was reasonable co-operation between the parties throughout the process, both with respect to the organisation of the meeting and then the conduct at the meeting, which was probably a relevant factor in being able to reach amicable settlement, even when there had been quite hostile preceding correspondence in the second case. I suspect mediation would ultimately have been successful in the first case, too, albeit it almost certainly would have been more expensive than an RTM. However, I doubt settlement would have been reached in the second case on the day even with a mediator, simply because of the nature of the case, and the extra cost would have been very considerable indeed. In each case, especially as there was a genuine desire by all the involved parties to try to reach agreement, I struggle to see the benefit of a mediator over the involvement of specialist and experienced Counsel and solicitors.

As stated above, the other three cases also did not involve mediation and settled by way of Pt 36 Offers and negotiation. In the first of the remaining three cases, which was another multimillion pound case against a private consultant involving a brain-injured adult, liability, although denied during the Pre-Action Protocol process, was admitted after service of the Particulars of Claim and in lieu of a Defence, and Judgment was entered shortly thereafter. Quantum factual evidence and a full quota of quantum expert opinions was then obtained by the claimant, with a conference with Leading and Junior Counsel and the experts taking place in preparation for service of the claimant's Schedule of Loss and Damage and supporting factual witness and expert evidence. Some of the defendant's quantum experts had also been to visit and assess the claimant at home, as had been the case with a couple of Single Joint Experts. Shortly before the Schedule was due to be served, the defendant made a very competitive and well-judged formal Pt 36 Offer. It transpired that this was the only offer that was necessary in the case, as, following detailed and careful analysis by the claimant's legal team, the offer was accepted, ultimately with the settlement being approved by the court.

This case perhaps demonstrates the importance of a well-thought out and well-pitched Pt 36 Offer relatively early and how it can, on occasion, obviate the need for any more time-consuming or expensive methods of ADR. There is no doubt that not inconsiderable, although necessary, quantum work on both sides had already taken place by the time of the defendant's offer: necessary so as to enable the parties to be able to quantify the claim with any degree of accuracy. However, notwithstanding that, the timing of the offer was such that it still saved the defendant potentially very considerable costs indeed. It seems to me that the defendant solicitors sensibly made an offer as soon as they reasonably could and, when they made that offer, they made it at such a level that it was just too competitive for the claimant to risk not accepting. After this case, it did leave me wondering why more defendants do not do similarly, given how quickly that case was ultimately disposed of once the appropriate level of offer had been made. This case is a good example of how, even in the very high value cases, RTMs are not necessary (and they are

expensive, even without a mediator) and settlement can be achieved quickly and effectively by the making of a carefully thought out Pt 36 Offer.

The remaining two cases were both cases against the NHS and were also both of more modest value than the above cases, albeit they were still six figure sum cases. The first of these two cases was another case in which liability was admitted in the Defence and Judgment was entered soon thereafter. The defendant made an early Pt 36 Offer at the same time as the Defence in which they admitted liability; however, the offer was deemed too low and was formally rejected by the claimant. After service some months later of the Schedule of Loss and Damage and supporting factual witness and expert evidence, the claimant made a Pt 36 Offer over three times the value of the defendant's earlier offer, which led the defendant to counter with a further Pt 36 Offer which was nearly two and a half times higher than their earlier offer. After a short period of informal negotiation, the case concluded for (perhaps predictably) nearly two and three-quarters times the defendant's original offer.

The final case was a case in which liability remained in dispute throughout and, perhaps unusually, it was heading to a full liability and quantum trial only six weeks away before any form of attempted settlement was made by either party. The claimant made the opening gambit by way of a Pt 36 Offer, which culminated in a formal counter-offer a short while later, at 65% of the claimant's opening offer. After ongoing telephone negotiations over the next few days between the solicitors, agreement was reached at nearly 80% of the claimant's opening offer, and trial was averted with less than a month to spare.

Both of these cases only involved Pt 36 Offers and consequential informal negotiations to fine-tune the eventual settlement figure. The last case went close to the wire probably because liability was hard-fought and remained in dispute throughout, although I was still surprised that a relatively modestly-valued case, which settled for 80% of the claimant's opening offer, had not had an earlier offer made by the defendant, as without one the defendant had no costs protection and was on significant costs risk up until just over four weeks before trial. Nevertheless, common-sense ultimately prevailed and the case settled quickly once the initial offer had been made.

So, do these case suggest anything has changed since 2005? In some respects no, not much has changed, in that traditional negotiation and judicious use of Pt 36 offers remain very important and are arguably the mainstay of ADR. There also remain the usual reasons for seeking to settle cases through ADR generally rather than having a trial: savings on costs; greater flexibility; choice of the extent of client involvement on both sides; lack of formality; potential reduction in the need for proof of some of the evidence; time factor and the potential for a quicker process to conclusion; vicissitudes of the trial process; and, ultimately, avoidance of the stresses associated with an adversarial contested trial. However, what probably has changed is that there is now a greater onus on the mandatory need for the parties to engage in ADR as early as possible and on the need for recognition by the parties of both the potentially onerous costs sanctions against them for failing to do so and the costs savings that can be made if early settlement can be reached, including importantly the potential to avoid Costs Budgeting.

Having said all that, notwithstanding that a party may now have to justify why mediation reasonably is not suitable in any given case, my personal experience is that another significant change is that mediation in fact appears to be one of the least favoured methods of ADR by claimants. This may in part explain NHSR's experience of poor uptake with its own mediation Scheme: certainly, many of my clients have been resistant to mediation even when entirely content to utilise all, or almost all, other forms of ADR. I am conscious that NHSR and other defendant representatives sometimes argue that mediation has a high success rate: that may be so but, suffice it to say, all five of my cases described here settled by a form of ADR other than mediation and I do not believe mediation would have achieved a better outcome in any of them, so I cannot say that my experience favours mediation as being any better than any other form of ADR. Indeed, in this day and age of experienced specialist clinical negligence solicitors and Counsel, and with the parties having to have one, now rather large, eye squarely on the issues of costs, budgets and

proportionality, I think that mediation has now become less attractive than it used to be and I tend to prefer to utilise other methods, as it seems do my clients. My experience in my other cases is that defendants generally still remain quite slow to engage with ADR early on, especially pre-commencement of proceedings, however hard I have tried to encourage such engagement and whether with respect to liability, quantum or both. I also have found on the odd occasion that the defendant appears to be paying only lip-service to proposed ADR, perhaps hoping that the impression of ADR engagement will avoid costs sanctions.

The cases described above, whilst obviously only a small snapshot, do seem to show a fairly mixed and inconsistent attitude to, and engagement of, ADR and attempts at settlement by defendants. Notwithstanding there was a reasonable degree of proactivity by some of the defendants, my feeling is that all the cases could, and should, have settled earlier than they in fact did. It does not help that, in my experience, there is often a lack of early liability concessions by defendants (or, indeed, even apologies), in particular pre-commencement, which is often frustrating for claimants and which can lead to a degree of early entrenchment between the parties that discourages early settlement. Nevertheless, more than ever now parties need to protect themselves on costs, including by highlighting to the court any lack of engagement with ADR by the opposition at various stages of a case, so it will likely be wise on the majority of cases for both parties to engage with ADR ever earlier, however entrenched they may feel.

With the inevitable advent of fixed costs and in an era of increasing proportionality, it remains to be seen the full extent to which the courts will go to penalise, by way of indemnity costs or other similar costs penalties, the failure to engage with ADR early and realistically how early in a case the courts will expect such engagement and in what form(s) that might be. But, notwithstanding some uncertainty, and whilst parties still cannot be forced into ADR, there is no doubt that there is an increasingly strong drive to encourage parties to use ADR in whatever form appropriate and as early as reasonably practicable to try to ensure, as said at the beginning of this article, that litigation really does become a last resort.

Case and Comment: Liability

Clay v Tui UK Ltd

(CA (Civ Div); Kitchin LJ, Hamblen LJ, Moylan LJ; 23 May 2018; [2018] EWCA Civ 1177)

Liability—personal injury—falls from height—holiday accidents—tour operators—foreseeability—causation—intervening events—remoteness—Package Travel, Package Holidays and Package Tours Regulations 1992

Causation; Falls from height; Foreseeability; Holiday claims; Intervening events; Personal injury; Tour operators

In July 2011, the claimant Philip Clay, together with his family including his wife, their two sons (then aged 11 and 14), and his parents, went on a package holiday to the hotel Guayarmina Princess, Tenerife. He and his wife and children were staying in one room and his parents were staying next door. Both rooms were two stories up and each had its own balcony, accessible from the room via a sliding door.

At around midnight on 20 July 2011, Philip Clay returned from dinner with his family and settled his children in bed for the night. At about 1am, he and his wife joined his parents on their balcony for a drink. Before leaving, they told their elder child where they were going and left the door to the balcony of Room 358 closed, but not locked, in case the children needed them.

After joining his parents on their balcony, Philip Clay went back into their room to use the bathroom. Upon returning to the balcony, he closed the door in order to prevent insects entering the room. The family described hearing a "clicking" sound as the door closed and realised that it had inadvertently locked, trapping them on the balcony. For 30 minutes they tried, unsuccessfully, to attract attention, after which Philip Clay decided to step across from his parents' balcony to the balcony of his room. In doing so, he stood on an ornamental ledge which gave way. He fell to the terrace below and fractured his skull.

The claimant brought a claim against the respondent relying on the Package Travel, Package Holidays and Package Tours Regulations 1992.[1] HH Judge Seys Llewellyn QC found that the lock on the sliding door was defective and that that was a breach of local standards for which the tour company was liable. However, he concluded that Philip Clay's act, in trying to step across to his own balcony, was so unexpected and/or foolhardy as to be a novus actus interveniens. In reaching that decision, he commented that Mr Clay and his wife and parents were careful people (Philip Clay had health and safety experience and his wife was a nurse), but that at the relevant time, they were in no direct danger and had no way of knowing whether it was safe to stand on the ledge. The judge dismissed the case and the claimant appealed.

The appeal court held that determining whether there had been a novus actus interveniens required a judgment to be made as to whether the sole effective cause of the injury suffered was the novus actus interveniens rather than the prior wrongdoing, and that the wrongdoing, whilst it might still be a "but for" cause and therefore a cause in fact, had been eclipsed so that it was not an effective or contributory cause in law. They accepted that where the line was to be drawn was not capable of precise definition, although various considerations might commonly be relevant.[2] In this case they held that the judge could not be

[1] Package Travel, Package Holidays and Package Tours Regulations 1992 (SI 1992/3288).
[2] *Spencer v Wincanton Holdings Ltd (Wincanton Logistics Ltd)* [2009] EWCA Civ 1404 applied.

criticised for failing expressly to address the issue of reasonable foreseeability when dealing with causation. Furthermore, he had not failed to follow the approach in *Sayers v Harlow Urban DC*.[3]

HH Judge Seys Llewellyn QC had contrasted the fact that there was no danger, emergency or threat from being trapped on the balcony with the obvious risk of life threatening injury involved standing on the ledge. He weighed "the degree of inconvenience to which the plaintiff had been subjected with the risks" taken "in order to try and do something about it" and had thereby balanced "the risk taken against the consequences of the breach of duty".[4] Finally, the judge had had appropriate regard to the degree of unreasonableness required for the claimant's conduct to amount to a novus actus interveniens. That was inherent in the balancing act he carried out.

They were satisfied that the judge plainly regarded the claimant's "strikingly new and independent act" as being a highly unreasonable action. He also recognised the need to consider whether the novus actus interveniens eclipsed the prior wrongdoing and found that the claimant's actions rendered the locking out as "part of the history and the background" to the accident.

It was argued that the judge erred in finding that the defect in the locking mechanism was not causative of the accident. The Court of Appeal did not agree. Although the judge's reasoning in relation to the issue of causation was condensed, they found the core of his reasoning was clear; the great and obvious danger involved in standing on the ledge so far outweighed the inconvenience faced by the family that voluntarily running into that danger was a new and independent act which eclipsed the prior breach of duty.

They held that the judge had had full regard to the evidence of the family and to their knowledge and experience of health and safety and was entitled to find that there was no emergency. Philip Clay's conduct was not reasonably foreseeable. It was unreasonable to a high degree given that he and his family were faced with inconvenience rather than danger and the obvious risk of life threatening injury involved. The conduct was voluntary, considered and deliberate. There was no necessity for Philip Clay to take any risk, but he nevertheless chose to expose himself to real danger and to an obvious risk of death or serious personal injury. In their view a finding that there was a novus actus interveniens was clearly justified.

Dissenting Moylan LJ held that the defect in the lock remained a causative factor because Philip Clay's response to being trapped was not of the degree of unreasonableness required to make it an intervening event.

The appeal was dismissed.

Comment

The central issue in this appeal was causation, and whether or not the trial judge had fallen into error in finding that the defect with the locking mechanism of the balcony door was not the cause of the accident. The appeal therefore involved a review of causation from first principles. As is so often the way, the trial judge had not been referred to any of the authorities relied upon by the appellant in the appeal, but instead, as a judge experienced in personal injury litigation and with leading counsel appearing before him, he had been left to reach his decision on causation without detailed consideration of authority or the law.

In the appeal, the first principles relied upon can be summarised thus: first the defendant is liable for a consequence of a kind which is reasonably foreseeable, unless the damage was caused by a novus actus interveniens or unreasonable conduct of the claimant, even if it was reasonably foreseeable.[5] If the consequence of the breach is not reasonably foreseeable then it will be too remote. In the circumstances it was argued that the starting point in this case should have been a finding as to whether it was reasonably foreseeable that the claimant would try to escape from the confines of the balcony as a result of the

[3] *Sayers v Harlow Urban DC* [1958] 1 W.L.R. 623.
[4] *Sayers v Harlow Urban DC* [1958] 1 W.L.R. 623 applied.
[5] *Simmons v British Steel Plc* [2004 UKHL 20.

defendant's breach of duty in providing a defective door lock (not whether he would attempt to do so by crossing between the balconies). Such an action was likely to involve risk of injury.

Secondly, if it is reasonably foreseeable that the claimant would try to escape from the balcony, then novus actus interveniens needs to be considered and this requires a judgment as to whether, on the particular facts, the sole effective cause of the damage is an act (the novus actus) which eclipses the prior wrongdoing. Where the line is to be drawn is not capable of precise definition.[6] Broadly speaking, the more foreseeable the act, the less likely it is to be a novus actus, and the more unreasonable the conduct, the more it is likely to be seen as a novus actus. An important case relied upon in the appeal was *Sayers v Harlow UDC*,[7] which concerned a woman locked in a public lavatory as a result of the council's breach of duty. Having failed to attract anyone's attention for 10–15 minutes she tried to climb out over the toilet door and slipped on the toilet roll holder and injured herself in the process. The trial judge had dismissed the case on the basis that the damage was too remote, but the Court of Appeal reversed the trial judge's decision and found the defendant council liable subject to a 25% finding of contributory negligence. A further, even older, case of note was *Adams v Lancashire and Yorkshire Railway Co*,[8] where Montague-Smith J said:

> "… if the negligence of a railway company puts a passenger in an alternative danger, that is to say, if he will be in danger by remaining still, and in danger if he attempts to escape, any injury that he may sustain in so doing is a consequence of the company's negligence; but if he is only suffering some inconvenience, and, to avoid that, he voluntarily runs into danger, and injury ensues, that cannot be said to be the result of the company's negligence."

Hence the substance of the appeal in the present case boiled down to whether the trial judge had properly considered the *foreseeability* of what the claimant did, and whether he had properly weighed the degree of inconvenience to which the claimant had been subjected with the risks of trying to escape. In *Sayers*, the claimant had not been considered to be engaging in a hazardous enterprise or doing something unreasonable in attempting to escape from the toilet. This is in contrast to the claimant in the present case who was deemed to have been running a considerable risk of harm whilst the inconvenience of being locked on the balcony was only modest. The majority of the Court of Appeal considered the trial judge to have properly considered the legal test of causation and remoteness. It was noted that although the claimant and his family had made some attempts to attract the attention of passers-by, they had not shouted loudly to seek assistance as they did not want to disturb people in other rooms given the lateness. There was no necessity for the claimant to take the risk he did, and his actions constituted a strikingly new and independent act such that it could not be said the locking out was a sufficiently proximate cause.

In contrast, Moylan LJ, giving the dissenting judgment, considered that if the trial judge had addressed the foreseeability question expressly and clearly, he would have concluded that it was reasonably foreseeable that the claimant may injure himself in trying to escape from the balcony. When determining whether the claimant's actions were so unexpected and foolhardy as to constitute a novus actus, the judge did not undertake a sufficiently broad evaluation of the facts such that he either applied the wrong test or reached a flawed evaluation. Had he conducted a broad evaluation he would have concluded that the claimant's actions did not eclipse the causative effect of the defective lock.

In conclusion, this appeal has not advanced our understanding of the principles applicable to causation, and the law cannot be said to have been extended in any way. The case was determined very much on its own facts. It is hard not to conclude that Moylan LJ was inclined to prefer his conclusion on the facts over those of the trial judge who heard all of the witnesses over several days. That said, the decision could have gone either way depending upon the constitution of the appeal court and how reasonable or otherwise the

[6] *Spencer v Wincanton Holdings Ltd* [2009] EWCA Civ 1404 at [45].
[7] *Sayers v Harlow Urban DC* [1958] 1 W.L.R. 623.
[8] *Adams v Lancashire and Yorkshire Railway Co* (1868–1869) L.R. 4 C.P. 739.

respective Lord Justices considered the claimant's actions to be. Given that an appeal such as this will only be allowed if the trial judge has made an error of law or his decision is plainly wrong, however, it is not surprising that the trial judge was upheld. There is a considerable hurdle for an appellant who cannot clearly demonstrate an error of law and who thinks that the conclusion on the facts ought to have been different.

Practice points

- The Court of Appeal may be sympathetic to a trial judge who has not adopted an overly-legalistic approach to questions of causation.
- The bar for proving a novus actus interveniens is high, and it is a very fact sensitive issue.
- What amounts to a decision that is "plainly wrong" is a question which gives litigators much difficulty in predicting the outcome of appeals as it is has a considerable element of subjectivity.
- It is important to show a failure to comply with local standards of care in the country in question. Ornamental cornices of the kind found in this case were typical of the region and the claimant was unable to prove otherwise which meant liability depended on more tenuously linking the fall to the door lock.
- Be very careful on balconies, particularly when on holiday abroad. There have been so many reported cases involving holidaymakers falling from balconies that they must be seen as a major hazard.

Nathan Tavares QC

X v Kuoni Travel Ltd

(CA (Civ Div); Sir Terence Etherton MR, Longmore LJ, Asplin LJ; 26 April 2018; [2018] EWCA Civ 938)

Personal injury—contractual liability—foreign package holidays—holiday claims—rape—sexual assault—vicarious liability—Package Travel, Package Holiday and Package Tour Regulations 1992—Directive 90/314 art.4(6), art.5(2), art.5

LT Contractual liability; Foreign package holidays; Holiday claims; Rape

The claimant, Mrs X, had booked along with her husband an all-inclusive package holiday from the defendant, Kuoni Travel Ltd. This included accommodation at the Club Bentota Hotel in Sri Lanka between 8 and 23 of July 2010.

During the course of that holiday, on the 17 July 2010, Mrs X was sexually assaulted and raped. That occurred whilst on the grounds of the hotel and it was accepted that the assailant was a Mr Nannayakkara who was an employee of the hotel.

On the evening of 16 July 2010, the claimant and her husband had dinner in the hotel, followed by drinks in the hotel bar. The drinks they had were with another couple they had met at the hotel. At around 2.00am on the morning 17 July 2010 the group made their way to the claimant's hotel room. Whilst sitting outside the room, the claimant's husband spoke briefly with Mr Nannayakkara (the Employee) who asked for and was given a drink and a cigarette.

Sometime later, after an argument with her husband related to noise coming from another room, the claimant packed a suitcase and left the hotel room. Her intention was to go to reception, complain about the noise, and obtain an alternative room.

During the course of walking through the hotel to reception she was approached by the Employee who offered to show her a quicker route to reception. She agreed to follow him and was subsequently sexually assaulted and raped in the hotel engineering room. She was able to escape from the Employee after she was allowed to leave the room to obtain money to enable her to leave the hotel with the Employee. She was accompanied by the Employee and bumped in to her husband who had been looking for her. The Employee left the scene and the claimant along with her husband reported the incident to the hotel management.

The claimant alleged that the Employee was a security guard, but the court found as a fact that he was an electrician employed by the hotel.

The holiday was a package holiday within the meaning of the Package Travel, Package Holiday and Package Tour Regulations 1992[1] (the 1992 Regulations) and the hotel was a supplier within the meaning of the 1992 Regulations.

By the time of the trial the basis for liability had narrowed to be that the sexual assault carried out by an employee of the Hotel whilst on duty, amounted to the improper performance of a contractual obligation owed by the defendant to the claimant pursuant to reg.15 of the 1992 Regulations which provides:

> "(1) The other party to the contract is liable to the consumer for the proper performance of the obligations under the contract, irrespective of whether such obligations are to be performed by that other party or by other suppliers of services but this shall not affect any remedy or right of action which that other party may have against those other suppliers of services.
>
> (2) The other party to the contract is liable to the consumer for any damage caused to him by the failure to perform the contract or the improper performance of the contract unless the failure or the improper performance is due neither to any fault of that other party nor to that of another supplier of services, because—
>
> a) The failures which occur in the performance of the contract are attributable to the consumer;
>
> b) such failures are attributable to a third party unconnected with the provision of the services contracted for, and are unforeseeable or unavoidable; or,
>
> c) such failures are due to—
>
> (i) unusual and unforeseeable circumstances beyond the control of the party by whom the exception is pleaded, the consequences of which could not have been avoided even if all due care had been exercised; or
>
> (ii) an event which the other party to the contract or the supplier of services, even with all due care, could not foresee or forestall."

It was common ground that the contract between the parties was caught by the 1992 Regulations. The claimant's case was that:

- the accommodation and services of those at the hotel connected with that accommodation were provided as a part of the holiday purchased from the defendant and all employees had to discharge their obligations with reasonable skill and care;
- there was no distinction to be drawn between front or back of house staff;
- the claimant was entitled to walk from her room to reception without being assaulted by an employee;

[1] Package Travel, Package Holiday and Package Tour Regulations 1992 (SI 1992/3288).

- a violent attack by a uniformed employee in the middle of the night was a clear breach of the hotel's obligations to the claimant; and
- That there had been a failure to perform, or an improper performance, of the contract caused by the lack of reasonable care and skill on the part of the supplier (the hotel) for which the defendant was responsible.

The case failed with HH Judge McKenna finding:[2]

(a) "To my mind it cannot sensibly be said that the actions of the Employee formed any part of the contractual services which the Defendant agreed to provide with reasonable care and skill. The Employee was not the Defendant's supplier, that was the Hotel, and the Employee, when he lured the Claimant into the engineering room, was not discharging any of the duties he was employed to do."

(b) "As it seems to me, what the claimant is seeking to argue is that which was argued and rejected by the Court of Appeal in *Hone v Going Places Leisure Travel Ltd*,[3] namely an absolute obligation that the Defendant warrants the safety of all its clients at all times."

It had also been submitted to HH Judge McKenna that following the Supreme Court decision in *Mohamud v Wm Morrison Supermarkets Plc*[4] that English law would impose a liability on an employer in circumstances where an on duty employee committed a violent criminal assault. He distinguished this case from *Mohamud* on the basis that there was no close connection between Employee's duties as an electrician and the attack so as to make it just for the hotel or indeed the defendant to be held liable for the attack.

The claimant appealed.

The Court of Appeal held[5] that it was necessary to look at the express terms of the contract to establish what were the relevant contractual obligations. Clause 5.10(b) of the contract imposed on the defendant a primary and personal contractual obligation for the provision of itself, its agents and suppliers of the "holiday arrangements" booked by the appellant to a reasonable standard.[6] The expression "holiday arrangements" had to be interpreted in the usual way, objectively, having regard to the terms of the contract as a whole and attributing to the relevant words the meaning which reasonable persons in the position of the parties would have understood them to mean.

HH Judge McKenna concluded that, on its proper interpretation, the expression "holiday arrangements" did not include a member of the hotel's maintenance team, known to be such to the hotel guest, conducting the guest to the hotel's reception, which was no part of the functions for which the employee was employed. He found as a fact that, contrary to the claimant's evidence, she was aware at the material time that Mr Nannayakkara was not a member of the hotel's security team but was a member of the maintenance team. They held that the judge's interpretation of the expression "holiday arrangements" was correct, whether or not, as a matter of applicable law, the hotel was vicariously liable directly to the claimant for Mr Nannayakkara's conduct.

So far as concerned the proper meaning of "holiday arrangements" in cl.5.10(b), the issue of the hotel's vicarious liability was irrelevant. At the time when the contract was made, reasonable persons in the position of the parties would not have understood cl.5.10(b) to mean that the respondent was liable for Mr Nannayakkara's conduct in offering assistance to the claimant. The hotel itself was not liable for Mr Nannayakkara's wrongful conduct because the conduct was insufficiently connected with the acts which he was authorised to do as to be properly regarded as being done in the ordinary course of his employment.

[2] *X v Kuoni Travel Ltd* [2016] EWHC 3090 (QB).
[3] *Hone v Going Places Leisure Travel Ltd* [2001] EWCA Civ 947.
[4] *Mohamud v Wm Morrison Supermarkets Plc* [2016] UKSC 11.
[5] Longmore LJ dissenting.
[6] *Wong Mee Wan v Kwan Kin Travel Services Ltd* [1996] 1 W.L.R. 38 considered.

There was nothing in the regulations which gave a different colour to the meaning of "holiday arrangements" in cl.5.10(b). As demonstrated by reg.15(2)(c)(ii), the purpose of the regulations was not to facilitate a claim against a package tour operator for wrongful conduct by an employee of a supplier, even if that conduct was not part of the role in which he was employed and even if the supplier would have been vicariously liable under either domestic law or the foreign law applicable to the supplier.

They further held that HH Judge McKenna was also right to hold that the defendant was not liable under either the express terms of cl.5.10(b) or reg.15 since Mr Nannayakkara was not a "supplier" within the meaning of those provisions. The hotel was the supplier of any services performed by Mr Nannayakkara. The defendant had no relationship of any kind with Mr Nannayakkara. Its contractual relationship was with the hotel for the provision of accommodation and services.

The Court of Appeal decided that it was not necessary for it to decide whether the hotel was vicariously liable for Mr Nannayakkara's wrongdoing, since the defendant's liability was excluded by the provision in cl.5.10(b). That limitation of liability was intended to reflect reg.15(2)(c)(i) and (ii). They were themselves intended to give effect to art.5.2 of the Directive.[7]

The appeal was dismissed.

Comment

The claimant's case is neatly encapsulated at [31] of the judgement:

> "The appellant's case is, quite simply, that N, when he assaulted her, was undertaking a service under the holiday contract in guiding the appellant within the hotel grounds, and his assault manifestly constituted a failure to provide that service to a reasonable standard or with reasonable care and skill. It is irrelevant, on the appellant's approach, how and by whom services were actually provided: so long as the service in question was one which was to be provided with reasonable care and skill under the contract between Kuoni and the appellant, a failure to provide that service would amount to a breach of the contract. The appellant says that the fundamental error of the Judge, which was (in the words of the appellant's skeleton argument) 'illogical and flawed as a matter of law', was to focus on whether N was or was not Kuoni's supplier."

The appeal is summarised at [28]:

> "There are three principal issues which arise on this appeal under the contract: (1) whether the conduct of N formed part of 'the holiday arrangements' in clause 5.10(b) for which Kuoni accepted responsibility under the first part of that clause; and (2) if so, whether (a) N or the hotel is to be treated as the 'supplier' of that part of the holiday arrangements; and (b) Kuoni avoided liability to the appellant because of the exclusion of liability under the final part of clause 5.10(b) where any failure of the holiday arrangements or injury resulting from the holiday arrangements was due to "unforeseen circumstances which, even with all due care, [Kuoni] or [its] agents or suppliers could not have anticipated or avoided."

The relevant clause in the contract was 5.10:

> "… under the heading 'OUR COMMITMENT TO YOU FOR YOUR HOLIDAY ARRANGEMENTS', provided:
>
> > '… we will accept responsibility if due to fault on our part, or that of our agents or suppliers, any part of your holiday arrangements booked before your departure from the UK is not as described in the brochure, or not of a reasonable standard, or if you or any member of your party

[7] Directive 90/314 on package travel, package holidays and package tours [1990] OJ L158/59.

> is killed or injured as a result of an activity forming part of those holiday arrangements. We do not accept responsibility if and to the extent that any failure of your holiday arrangements, or death or injury is not caused by any fault of ours, or our agents or suppliers; is caused by you; … or is due to unforeseen circumstances which, even with all due care, we or our agents or suppliers could not have anticipated or avoided.'"

The claimant focussed on a breach of contract claim but where necessary also pleaded s.15(2) (paras 9 and 26) of the Regulations.

The 1992 Regulations were the UK application of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours. In fact, they ended on 30 June 2018 (as did the Directive) and so now we have the Package Travel and Linked Travel Arrangement Regulations 2018 and Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements; in force in all EU states from 1 July 2018. Nevertheless, the implications and application of this judgment will remain very relevant going forward unless and until the Supreme Court to whom a permission to appeal has been lodged, visits the issues.

As with all Directives, it is to reflect the internal market of the EU but as the recitals say, consumer protection is a fundamental tenet of it:

> "Whereas paragraph 36 (b) of the Annex to the Council resolution of 19 May 1981 on a second programme of the European Economic Community for a consumer protection and information policy (4) invites the Commission to study, inter alia, tourism and, if appropriate, to put forward suitable proposals, with due regard for their *significance for consumer protection* and the effects of differences in Member States' legislation on the proper functioning of the common market." (emphasis added)

> "Whereas the organizer and/or retailer party to the contract *should be liable to the consumer for the proper performance of the obligations arising from the contract*; whereas, moreover, the *organizer and/or retailer should be liable for the damage resulting* for the consumer from failure to perform or improper performance of the contract unless the defects in the performance of the contract are attributable neither to any fault of theirs nor to that of another supplier of services."

However, it is noteworthy that even the Directive was only setting a minimum standard:

> "Whereas Member States should be at liberty to adopt, or retain, more stringent provisions relating to package travel for the purpose of protecting the consumer …"

Hone had clarified this was ostensibly a fault based scheme albeit there was absolute liability convened vicariously on the organiser for the fault based actions of its suppliers. Over the lifetime of the Directive and Regulations, the test for that fault principally in the context of the measurement of the conduct and the standards by which the conduct as assessed has been a vexed issue for claimants. After all why should one pay a high British price for an international five star service but when things go wrong find that the organiser may hide behind often lower local standards?

The other shadow hanging over consumer protection but now, in theory at least, cured in the new Directive and Regulations, was what constituted a package? It was generally assumed that the definition of the supplier for whose actions the organiser was held liable, was clear. This case muddied those waters. It was assumed that the liability attached to the organiser automatically on proof of conduct breaching local standards. Here was just such conduct, on the holiday premises themselves and yet the supplier could avoid criticism and hence so too the organiser. Not for the first time in recent court history has EU led consumer protection been relegated in importance by the Court.[8] Of course, no one could be comfortable with an "innocent" party being held responsible for the deliberate and indeed criminal conduct of another;

[8] See Andrews J in the metal on metal hip personal injury litigation *Gee v DePuy* [2018] EWHC 1208 (QB).

but vicarious liability is not a new concept. In the case of assault, the courts have enforced this frequently, whether over-zealous or even out of control employees enforcing their employer's rules on the public as in *Mohamud v WM Morrison Supermarkets*.[9] It has even been extended to reflect ostensible authority and a relationship akin to employment.

Mohamud had used a petrol station kiosk and approached a member of staff with a question. The employee responded in an aggressive manner and demanded that Mohamud leave immediately. As he left the employee assaulted him. Mohamud bought an action against the supermarket, claiming that it was vicariously liable for the assault committed by one of its employees. The trial judge rejected the claim on the basis that there was not a sufficient link between the employee's role and the assault and this was upheld by the Court of Appeal resulting in a further appeal to the Supreme Court. It asked whether there was a sufficient connection between the wrongful conduct and the employer. It decided that whilst it was a gross abuse of his position, it was in connection with the business by which he was employed.

The basic principles of vicarious liability are that the wrongdoer must be an employee; have committed a tort and in the course of employment. Even when the employee's conduct has been expressly prohibited by the employer, if the act itself is authorised then the employer will still be liable.[10] Some say this law was altered simply to reflect the awful nature of abuse by the (then) House of Lords in *Lister,*[11] where a warden sexually abused young boys at the home where he was employed to look after them. It was held in this case that an employer would be vicariously liable for an employee's tort if there was "a close connection with the employment".

The crucial issue here is whether the connection between the work and the tort is sufficiently close or whether the job has merely provided the opportunity to commit the tort. In *Lister*, the warden's job was to take care of the boys and supervise them, so because the abuses occurred when he was in charge of them, it was held to be a close connection. And so the surprise that the court excluded this assault from the holiday arrangements specified in the contract.

But isn't that consumer protection, like employee protection, an essential safeguard intended here under the Directive? Certainly Longmore LJ the dissenting judge considered that guiding guests to the hotel reception was clearly part of the holiday arrangements from Mrs X's perspective, irrespective of the horrible outcome:

> "Kuoni accepts that the holiday arrangements at the four star hotel which they have selected are to be of a reasonable standard. For such a holiday to be a reasonable standard, hotel staff must be helpful to guests when asked for assistance."

Is this unfair? No, because this is at the heart of Mrs X's decision to follow employee and which led her into the assault and so it was argued brought the supplier into being engaged because of its vicarious liability. Whilst this may be said to have been a tortious phrase, it remains a proper description for the liability imposed on the supplier by the Regulations and Directive.

In *Navarro v Moregrand*[12] Denning LJ observed:

> "But the judge inferred from those cases the converse proposition - namely, that if a servant or agent is not acting within his actual or ostensible authority, then he is not acting in the course of his employment. I do not think that that is correct: it is a confusion between the responsibility of a principal in contract and his responsibility in tort. He is only responsible in contract for things done within the actual or ostensible authority of the agent, but he is responsible in tort for all wrongs done by the servant or agent in the course of his employment, whether within his actual or ostensible."

[9] *Mohamud v WM Morrison Supermarkets* [2016] UKSC 11.
[10] *Limpus v London General Omnibus Co* (1862) 1 H and C 526.
[11] *Lister v Hesley Hall* [2001] UKHL 22.
[12] (1951) 2 T.L.R. 674.

It is noteworthy that the claimant abandoned several of its pleaded allegations in relation to the control of the organiser and supplier of the employee. In her Particulars of Claim she alleged that Kuoni, its suppliers, sub-contractors, their agents and/employees were negligent and in breach of contract in:

> "(1) failing to supervise N adequately or at all, (2) failing to ensure that staff were properly trained, (3) employing a violent/ aggressive member of staff, (4) exposing the appellant to a reasonably foreseeable and easily avoided risk of injury, and (5) failing, in all the circumstances, to ensure that the appellant was reasonably safe in her proper use of the facilities of the hotel."

By the time of the trial she did not pursue any of those allegations.

The Judge recorded[13] that it was accepted by the claimant at the trial that Kuoni did not have any supervisory control over the hotel's employees; that the recruitment of N did not breach any local laws or practice; and that there was no basis for suggesting that he should have been identified as a risk prior to the incident in question. The Judge also said[14] that the hotel's employment of N was done with reasonable care; he was a man of good character and there were no previous reports or complaints of a similar nature; and no criticism was made on behalf of the appellant at the trial about N's recruitment or vetting; and so there was nothing to put anyone on notice.[15]

Nevertheless the claimant focussed her argument on the employee undertaking the assault at a time when he was supposed to be helping her; something she considered came within the holiday contract. It may be suggested that when the European Union was contemplating consumer protection it did not have deliberate acts of assault in mind in considering how far the vicarious liability of the organiser should extend. That would explain the available defence of reg.15(2)(c)(i) and (ii); reflected in the organiser's exclusion clause in its contract at cl.5.10(b), "due to unforeseen circumstances which, even with all due care, [Kuoni] or its agents or suppliers could not have anticipated or avoided".

It almost goes without saying that it is to be hoped that the circumstances of this claim are never repeated. However, of concern as a principle that may be derived from the majority view here is it seems to exclude liability for the organiser for the tortious acts of the employee of the supplier unless it can be proven that the supplier itself was primarily liable. That cannot be what was intended though and seems to reflect the main reason that Lord Justice Longmore was dissenting from the majority view. He recognised that the contracting party will often use other persons, especially employees to undertake his contractual obligations but the liability remains that of the contracting party:[16]

> "It must, moreover, be remembered that the whole point of the Directive and the regulation which implemented the Directive is that the holiday-maker whose holiday has been ruined should have a remedy against his contractual opposite and that it should be left to the tour operator to sort out the consequences of the ruined holiday with those with whom it has itself contracted who can then sort things out further down the line whether with their own employees or their independent contractor."[17]

It is to be hoped that clarification is forthcoming from the Supreme Court where it is thought the claimant is seeking permission to appeal.

Practice Point

- The consumer contract should be studied for any inconsistency with the Regulations.

[13] At [17].
[14] At [45].
[15] At [43].
[16] At [21].
[17] At [22].

- The actual actions of the offending person must be considered carefully for any potential inconsistency with the liability of the supplier.
- Advice on local law, where applicable, should be taken to consider liability.

Mark Harvey

Heeds v Chief Constable of Cleveland

(QBD; Jeremy Baker J; 18 April 2018; [2018] EWHC 810 (QB))

Liability—personal injury—health and safety at work—accidents at work—police stations—police equipment—risk assessment—doors—suitability—Workplace (Health, Safety and Welfare) Regulations 1992—Provision and Use of Work Equipment Regulations 1998

LT Accidents at work; Causation; Doors; Personal injury; Police officers; Suitability

On 1 February 2011, police officer Diane Heeds was in the custody suite at Middlesbrough police station.[1] As she was waiting for the electronically-operated door to be opened to allow her to leave the custody suite, she had trapped her thumb in the latch. Her case was that a colleague had told her that she had to push the latch; that she had done so by placing her thumb on it; and that thereafter, the latch had been released electronically, trapping her thumb.

She brought proceedings against the defendants[2] for negligence and breach of statutory duty under the Workplace (Health, Safety and Welfare) Regulations 1992 (the Workplace Regulations)[3] and the Provision and Use of Work Equipment Regulations 1998 (the Equipment Regulations).[4]

At trial, HH Judge Belcher found that the officer had not been instructed to push the latch. On the basis of the expert evidence, she found that there was no fault in the design or operation of the door; that the potential for harm was not obvious; and that had any risk been identified, it would not have justified any mitigation measures. She held that the Workplace Regulations applied to the exclusion of the Equipment Regulations and, relying on her finding that the door was not defective, she held that it was "suitably constructed" within the meaning of the Workplace Regulations reg.18(1).[5] On that basis, she found neither defendant liable.

Nevertheless, she went on to hold that, had the Equipment Regulations applied, the chief constable would have been liable under reg.4(1).[6] In reaching that conclusion, she applied the test in *Hide v*

[1] The chief constable was responsible for the operations at the station, and Tascor Services Ltd was responsible for the maintenance of the building.
[2] First defendant he Chief Constable of Cleveland, and second defendant Tascor Services Ltd.
[3] Workplace (Health, Safety and Welfare) Regulations 1992 (SI 1992/3004).
[4] Provision and Use of Work Equipment Regulations 1998 (SI 1998/2306).
[5] Workplace Regulations reg.18(1) "Doors and gates shall be suitably constructed (including being fitted with any necessary safety devices). (2) Without prejudice to the generality of paragraph (1), doors and gates shall not comply with that paragraph unless—(a) any sliding door or gate has a device to prevent it coming off its track during use; (b) any upward opening door or gate has a device to prevent it falling back; (c) any powered door or gate has suitable and effective features to prevent it causing injury by trapping any person; (d) where necessary for reasons of health or safety, any powered door or gate can be operated manually unless it opens automatically if the power fails; and (e) any door or gate which is capable of opening by being pushed from either side is of such a construction as to provide, when closed, a clear view of the space close to both sides."
[6] Workplace Regulations reg.4(1) "Every employer shall ensure that every workplace, modification, extension or conversion which is under his control and where any of his employees works complies with any requirement of these Regulations which—(a) applies to that workplace or, as the case may be, to the workplace which contains that modification, extension or conversion; and (b) is in force in respect of the workplace, modification, extension or conversion. (2) Subject to paragraph (4), every person who has, to any extent, control of a workplace, modification, extension or conversion shall ensure that such workplace, modification, extension or conversion complies with any requirement of these Regulations which—(a) applies to that workplace or, as the case may be, to the workplace which contains that modification, extension or conversion; (b) is in force in respect of the workplace, modification, extension, or conversion; and (c) relates to matters within that person's control. (3) Any reference in this regulation to a person having control of any workplace, modification, extension or conversion is a reference to a person having control of the workplace, modification,

Steeplechase Co (Cheltenham) Ltd[7] and rejected the defendants' submission that *Yorkshire Traction Co Ltd v Searby*[8] required her, when determining the suitability of the equipment for the purposes of reg.4(1), to assess the degree of risk it presented. The claimant appealed.[9]

Baker J held that the Workplace Regulations did apply to the exclusion of the Equipment Regulations. Where different sets of Regulations applied to the same set of circumstances, the court had to construe them, so far as possible, with a view to avoiding their overlapping application.[10] While HH Judge Belcher might have gone too far in considering herself bound by *Mason*, her overall approach was correct. She had carefully analysed the relevant factors and was entitled to conclude that the door was governed by the Workplace Regulations: although it was a specialist door serving a particular function, it was still just a door.

He then considered the correct approach to reg.18(1). The judge confirmed that the *Hide* test did not apply to reg.18(1) as it was concerned only with the Equipment Regulations reg.4(1).[11] Although it was not easy to discern a precise formulation of the proper test under reg.18(1), it was clear to him that the Workplace Regulations imposed a significantly higher degree of liability than did the common law.[12] Although foreseeability was relevant, the assessment was described in terms of a real or material risk of injury.

He concluded that essentially, what was required was a qualitative assessment such as that set out in *Palmer*, taking account of all the relevant circumstances including the seriousness of any potential injury and the extent of the alleged unsuitability. He recognised that the risks arising from a user acting carelessly or inattentively also had to be taken into account, and it would be no defence to say that although an accident had been caused by a known source of danger, it had happened in a way that could not have been foreseen.[13]

Baker J confirmed that HH Judge Belcher was right in her conclusion on reg.18(1). She thoroughly rehearsed the evidence, and although many of her findings had been made in the context of the negligence claim, some were relevant to reg.18(1). She had been right to conclude that neither defendant was in breach of reg.18(1). She had taken the proper approach and taken proper account of the relevant findings. Of particular significance were her findings that there was no fault with the door, the potential for harm would not have been obvious, and even if a risk had been identified, no mitigation measures would have been required. Both the likelihood and the severity of the hazard posed by any alleged defect in construction were of fundamental importance in the reg.18(1) assessment.

By the time of the adjourned appeal hearing, negotiations had taken place between those representing the claimant and the first defendant. The judge was asked to approve a consent order whereby judgment for the claimant against the first defendant was ordered in the sum of £175,000.00 together with costs of the action and the appeal, leaving the 1st defendant to pursue his cross-appeal against the second defendant. As a result, by consent, the claimant's appeal against the first defendant succeeded and the first defendant's cross-appeal against the second defendant was dismissed.

extension or conversion in connection with the carrying on by him of a trade, business or other undertaking (whether for profit or not). (4) Paragraph (2) shall not impose any requirement upon a self-employed person in respect of his own work or the work of any partner of his in the undertaking. (5) Every person who is deemed to be the occupier of a factory by virtue of section 175(5) of the Factories Act 1961 shall ensure that the premises which are so deemed to be a factory comply with these Regulations."

[7] *Hide v Steeplechase Co (Cheltenham) Ltd* [2013] EWCA Civ 545.

[8] *Yorkshire Traction Co Ltd v Searby* [2003] EWCA Civ 1856.

[9] The first defendant sought to cross-appeal, on the basis that the judge was wrong to differentiate between the position of the first and second defendants, such that if the first defendant was in breach of reg.4(1), so too was the second defendant. The second defendant adopted the first defendant's grounds of appeal relating to the non-application of the Equipment Regulations.

[10] *Mason v Satelcom Ltd* [2008] EWCA Civ 494 followed.

[11] *Hide v Steeplechase Co (Cheltenham) Ltd* [2013] EWCA Civ 545 considered.

[12] *Palmer v Marks and Spencer Plc* [2001] EWCA Civ 1528 and *Cruz v Chief Constable of Lancashire* [2016] EWCA Civ 402 followed, *Yorkshire Traction Co Ltd v Searby* [2003] EWCA Civ 1856 considered.

[13] *Hughes v Lord Advocate* [1963] A.C. 837 followed.

Comment

The first thought here should have been about the need to prevent accidents or injury in the first place. The simple application of a guard around the latch area or pinch point area would have prevented this accident.

The reliance upon the case of *Mason v Satelcom* where there are overlapping regulations by the judge below, HH Judge Belcher, was correct. What is curious though is the conclusion that once she accepted she should follow the approach in *Mason* that "… it seems to me in (sic) inevitable that I must find that the Door is governed by the Workplace Regulations" and that the door was a "specialist door serving a particular function within the undertaking, it was nevertheless a door".

Longmore LJ in *Mason* expressed a view that it was important to avoid the overlap of regulations and:

> "Dangers of work equipment should be dealt with under the Equipment Regulations; dangers in construction work should be dealt with under the Construction Regulations and dangers in the workplace should be dealt with under the Workplace Regulations."

Likewise, Ward said LJ "… Each has its own area of application".

What seems to have gone missing in the consideration of whether the Workplace Health Safety and Welfare Regulations 1992 were of more direct application than the Provision and Use of Work Equipment Regulations 1998 was what it was that caused the accident.

The accident was not caused by the use of a door, but by the operation of a remote mechanism that allowed the locking mechanism to pivot forward thereby creating a dangerous area or pinch point. The Work Equipment Regulations reg.11(1) makes specific provision for safety measures in such circumstances.

Factually this accident was caused by the remote operating mechanism and the dangerous area thereby created was something the Work Equipment Regulations dealt specifically with.

The fact that the claimant then loses her case due to a finding that there was not fault with the door under reg.18(1)[14] makes the failure to apply the Regulations correctly even more troublesome.

The Regulations must always be approached on the basis that they implement European Directives[15] and therefore the underlying purpose must be given priority, which is to protect the worker. It is with the effectiveness of that purpose in mind that certain regulations focus on specific risks and those specific regulations must be given priority in order to give effect to that purpose.

Practice points

- *Mason* properly focused on the factual question of what the cause of the accident was and, in turn, what regulations applied to that thing or circumstance.
- The focus on the door, which was not relevant in a causative sense, was simply wrong.
- Practitioners should always focus on what caused the accident (Longmore LJ referred to this as the danger) and where there is an overlap of regulations which was intended to apply to that danger.

Brett Dixon

[14] See above.

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

Jennings v TUI UK Ltd (T/A Thomson Cruises)

(QBD (Admlty; Jervis Kay QC Admiralty Registrar; 22 January 2018; [2018] EWHC 82 (Admlty))

Personal injury—liability—negligence—causation—duty of care—holiday claims—package holidays—Package Travel, Package Holidays and Package Tours Regulations 1992—tour operators—Contracts of Carriage—Agents—Cruise Ships—Athens Convention 1974 art.1(8)

LT Carriers' liabilities; Causation; Contracts of carriage; Cruise ships; Duty of care; Holiday claims; Package holidays; Tripping and slipping

Philip Jennings and his wife had been passengers on a seven day "Iberian Escapade Cruise" on the MV Thomson Dream. The ship docked in Malaga where Mr and Mrs Jennings were to disembark at the end of the cruise. There was a structure on the quay with a fixed walkway to allow passengers to walk from the ship into the cruise terminal. It was raining and the surface of the walkway was wet. Philip Jennings slipped on the walkway fell and was injured.

The claimant brought a claim pursuant to the Athens Convention 1974 or alternatively pursuant to the Package Travel, Package Holidays and Package Tours Regulations 1992 (the Regulations).[1] The claimant's case was that crew members had tracked water onto the walkway when transferring the luggage from the ship to the terminal.

The defendant denied liability asserting that luggage was taken off the ship by a different route and that no crew had passed through the passenger disembarkation port. The defendant also asserted that the injury had occurred outside the package contracted for, on the claimant's pleaded case that the package period was from the departure of the vessel at Malaga to its return there.

The court held that there was no evidence that water was present on the walkway because of the crew's actions. Further, even if the crew had been using the same walkways as the passengers, there was no reason why they would have needed to go out in the rain. No other explanation been advanced for the presence of the water.

It was also held that the Athens Convention did not apply. According to art.1(8) of the Convention, "carriage" covered the period during which the passengers and their luggage were on board the ship or in the course of embarkation or disembarkation. The period during which the passenger was "in a marine terminal … on a quay or in or on any other port installation" was not covered. The walkway was installed in the port and was not part of the ship; therefore, it fell within the definition of "port installation".

Having regard to the scope and context of the Convention and the wording of art.1(8), whilst it was generally intended to include disembarkation, that did not apply once the passenger had left the ship and reached spaces or equipment not under its control. Since carriage was over once the claimant had stepped onto the walkway, his fall did not occur during "carriage" and the Convention did not apply.

However, the Regulations did apply. Although the defendant was technically correct as far as the claimant's pleaded case was concerned, the court decided that it would be wrong to decide the case upon that technicality. It was clear from the booking documents that the package holiday contract included the flights to and from the airport as well as the cruise itself. Therefore, the incident occurred during the period governed by the Regulations.

Considering duty of care the court noted that there was no express term in the holiday contract that the cruise ship would comply with all local safety standards and regulations. Such a term would only be

[1] Package Travel, Package Holidays and Package Tours Regulations 1992 (SI 1992/3288).

implied if necessary to give practical effect to the terms of the contract as a whole, and if the term was reasonable. However, no case had been put forward for the necessity of implying such a term.

In addition, the defendant was under no duty to warn the claimant of a potential hazard, given that his fall had occurred after he left the ship in an area over which the defendant had no control; and that the prevailing weather conditions, and therefore the risk of water being present on the walkway, were obvious to all. There was also considerable doubt as to whether walkways, being part of the port installation, were facilities within the scope of the contract between the claimant and defendant. In any event, the water did not represent a serious risk and a large number of passengers had negotiated the walkway safely.

This left the question of whether there was there a failure by a supplier for whom the defendant was responsible. Under reg.15, the defendant was liable to the claimant for the proper performance of its obligations under the contract even if those obligations were to be performed by suppliers of services. The standard of care to be applied to the services provided by a foreign supplier were those applicable in the relevant country. It was for the claimant to adduce evidence of those local standards and to prove that they had been breached.[2] However, the claimant had neither pleaded the relevant local standards to be observed by a port operative in Spain, nor adduced any evidence as to those standards. Given the findings that the defendant did not cause water to be on the walkway and had no responsibility for its condition, the defendant had not allowed a hazard to develop so as to reverse the burden of proof.

Judgment was entered for the defendant.

Comment

This High Court decision usefully clarifies or reinforces existing guidance on a number of issues relating to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974 and the Package Travel, Package Holidays and Package Tours Regulations 1992.

The Athens Convention

The major issue in this case was whether the claimant was "in the course of carriage" at the time his injury occurred so as to bring him within the Athens Convention. Article 3(1) states:

> "The carrier shall be liable for the damage suffered as a result of death or personal injury to a passenger … if the incident which caused the damage so suffered occurred in the course of the carriage and was due to the fault or neglect of the carrier or of his servants or agents acting within the scope of employment."

The term "carriage" is defined in art.1(8), which states:

> "… the period during which the passenger and/or his cabin luggage are on board the ship or in the course of embarkation or disembarkation, and the period during which the passenger and his cabin luggage are transported by water from land to the ship or vice-versa, if the cost of such transport is included in the fare or if the vessel used for this purpose of auxiliary transport has been put at the disposal of the passenger by the carrier."

Whilst it is clear from this that carriage includes both embarkation and disembarkation, neither term is defined within the Convention though art.1(8) does go on to say that carriage "does not include the period during which [the passenger] is in a marine terminal or station or on a quay or in or on any other port installation".

[2] *Lougheed v On The Beach Ltd* [2014] EWCA Civ 1538 followed.

Counsel for the claimant argued that disembarkation is not complete until the passenger is safely on shore, noting that this could be inferred from the wording of the Convention and was also supported by the Court of Appeal decision in *Collins v Lawrence*[3]—the only authority on the issue. The claimant in *Collins* had been on a fishing trip. When it was over, the boat was winched up the shingle beach and the claimant stepped from the boat onto a platform at the top of freestanding steps, the bottom two steps of which were buried in the shingle. The claimant descended the steps but then slipped when he stepped on a plywood board that had been placed at the foot of the steps and which was wet due to the weather conditions. The trial judge held that the Athens Convention applied because the claimant's disembarkation was not complete until he was established safely on the shingle beach and the Court of Appeal upheld this conclusion.

However, the judge in *Jennings* was correct to conclude that *Collins* is not authority for the proposition that disembarkation ends when someone safely reaches shore, as had been contended. This was the decision on the facts of *Collins* but was not the legal principle to emerge from it. Hamblen LJ noted that:

> "[T]he steps, including the board, were part of the disembarkation equipment. As such, disembarkation was not complete until the claimant stepped off that equipment. That did not occur until he reached the shingle beach. In a case such as the present, the process of disembarkation covers the whole period of moving from the vessel to a safe position on the shore and whilst a person is still using equipment which facilitates disembarkation, such as the steps and board in this case, he is still in the process of disembarking."[4]

The key for the Court of Appeal, as the judge in *Jennings* noted, was that the claimant had been using disembarkation equipment at the time he slipped.

The judge in *Jennings* was also correct to conclude that *Collins* could be distinguished on the facts. He explained that the Convention makes clear that "once the passenger is in a position where he or she has reached the port terminal or is on the quay or in or on any other port installation the period of carriage will have ceased".[5] This was the case in *Jennings* where all of the relevant structures were on the quay. The first part he noted "was a moving walkway situated on and over the quay itself", and the later part where the claimant fell was "fixed on pillars rising out of the quay".[6] This was different from *Collins* where "there was no question of the claimant being in or on a port installation" and the word "quay" could not "cover disembarkation onto a shingle beach".[7] Instead, the claimant in *Collins* was "still on or in the area of disembarkation equipment provided by the vessel when he slipped".[8]

Leading on from this, it seems clear that there are two distinct types of cases. The first concerns passengers like Collins who are injured when they are using disembarkation equipment which clearly cannot be said to be part of a "marine terminal or station", "a quay" or a "port installation". These cases will depend on the interpretation of the term "disembarkation", where there may still be some room for argument. *Collins* suggests that a passenger will be disembarking for as long as they are using disembarking equipment.

Whilst it could have been argued that the claimant in *Jennings* was also using "disembarkation equipment", the judge stressed that the important point was that the equipment he was using was "not under the control of the ship".[9] However, the issue of "control" was not considered in *Collins* because it was not relevant on the facts. Instead, Hamben LJ noted that the use of disembarkation equipment is key

[3] *Collins v Lawrence* [2017] EWCA Civ 2268.
[4] *Jennings v TUI UK Ltd (T/A Thomson Cruises)* [2018] EWHC 82 (Admlty) at [17]–[18].
[5] *Jennings v TUI UK Ltd (T/A Thomson Cruises)* [2018] EWHC 82 (Admlty) at [20].
[6] *Jennings v TUI UK Ltd (T/A Thomson Cruises)* [2018] EWHC 82 (Admlty) at [21].
[7] *Jennings v TUI UK Ltd (T/A Thomson Cruises)* [2018] EWHC 82 (Admlty) at [22].
[8] *Jennings v TUI UK Ltd (T/A Thomson Cruises)* [2018] EWHC 82 (Admlty) at [22].
[9] *Jennings v TUI UK Ltd (T/A Thomson Cruises)* [2018] EWHC 82 (Admlty) at [20].

because this reflects the "natural meaning of the word disembarkation".[10] He also noted that it "makes sense for the carrier to be responsible for overseeing the way in which people leave a vessel. It was the carrier's decision to use these steps and if they were not safe then some alternative method of disembarkation should have been found".[11] The Supreme Court has not yet ruled on the issue though, at the very least, is likely to agree with the Court of Appeal in *Collins* that the construction of disembarkation under the Warsaw and Montreal Conventions on carriage by air will be of limited use because "care must be taken in drawing analogies from other instruments which were negotiated at different time for different purposes".[12]

The second group of cases, like *Jennings,* will depend on whether it can be said that the claimant was "in a marine terminal", "on a quay" or "in or on any other port installation" at the time of the death or personal injury because, if so, then the Athens Convention will clearly not apply. These cases will turn on the definition of the terms "marine terminal or station", "quay" or "port installation", which like "disembarkation" are not defined within the Convention.

Pointing to the increasing use of modern port terminal facilities with walkways as opposed to the traditional use of a gangway from the ship to the quayside, defendants have described the clarification of the term "port installation" within *Jennings* as being extremely helpful.[13] However, the judge did not in fact give a clear definition. Counsel for the defendant had noted that the term "installation" is defined in the Shorter *Oxford English Dictionary* as "an apparatus, system etc that has been installed for service and use" but the judge did not comment on this definition and decided that the relevant walkways were "all structures on the quay". It may well have been obvious on the facts of *Jennings* that the walkway should fall within the art.1(8) exception but there is likely to be room for argument on this in future cases with different factual scenarios. Of course, if a claim does not fall within the exception, then it will turn on the definition disembarkation.

Package Travel Regulations 1992

In accordance with art.14, the Athens Convention provides an exclusive remedy for personal injury. However, as the Convention did not apply in *Jennings*, it was open to the court to consider liability under the Package Travel Regulations, regs 15(1) and (2) of which state:

> "(1) The other party to the contract is liable to the consumer for the proper performance of the obligations under the contract, irrespective of whether such obligations are to be performed by that other party or by other suppliers of services … (2) The other party to the contract is liable to the consumer for any damage caused to him by the failure to perform the contract or the improper performance of the contract unless the failure or the improper performance is due neither to any fault of that other party nor to that of another supplier of services …"

Four main issues arose in relation to this aspect of the claim. First, the claimant had sought to imply an obligation under the contract that the cruise ship "would be of a reasonable standard, reasonably safe and would comply with all local safety standards and regulations". As the injury occurred off the cruise ship, this would not have helped the claimant but the judge refused to accede to this request in any event. This was not because the claimant's arguments on the point were considered to be weak but because no submissions had been put forward as to why such a term should be implied at all. As such, *Jennings* is a useful reminder that parties wishing to imply such a term must be explicit as to why this is necessary to give practical effect to the terms of the contract as a whole.

[10] *Jennings v TUI UK Ltd (T/A Thomson Cruises)* [2018] EWHC 82 (Admlty) at [21].
[11] *Jennings v TUI UK Ltd (T/A Thomson Cruises)* [2018] EWHC 82 (Admlty) at [21].
[12] *Jennings v TUI UK Ltd (T/A Thomson Cruises)* [2018] EWHC 82 (Admlty) at [13].
[13] UK P&I Club, "Key ruling on the definition of 'carriage' under the Athens Convention" (Legal Update, February 2018).

The second issue concerned whether the defendant should have warned the claimant about the hazard created by water on the walkway. This argument could only have succeeded if the walkway fell within the scope of the facilities provided under the holiday contract, which the judge doubted. Nevertheless, he also considered that the broader circumstances meant that a duty to warn would not have arisen in any event. First, it was relevant to consider whether any warning as to the possibility of damp conditions would have added to the claimant's safety. This was not the case on the facts, as the "weather conditions were obvious to all and it must have been equally obvious to anyone, including the claimant, that there might be water or dampness in the harbour installations leading to the terminal".[14] Secondly, it was relevant to consider if the hazard was obvious and/or constituted a serious risk. Again, this was not the case on the facts. Given that neither the claimant nor his wife had seen the water, there was no basis for considering that the hazard was either obvious or that the defendant should have been aware of it. In addition, the risk could not be considered serious given that a large number of passengers had negotiated the walkway safely. In any event, though there may be cases where a tour operator is under a duty to issue a warning in respect of an obvious and serious danger, such cases are limited. In highlighting this, the judge pointed to a section from *Saggerson on Travel Law and Litigation*, which states:

> "The need for such warnings as part of the proper performance of the holiday contract is likely to be limited to circumstances where the hazard is serious and the risk of significant injury is manifest to the hotelier or tour operator but may not be so obvious to the visitor. Based on the facts of *Jones v Sunworld* and *Martens v Thomson*, it is very doubtful that the courts would regard as realistic any contention that a hotelier should warn consumers about routine pavement trip hazards on the public road outside the hotel."[15]

The third issue to arise concerned the supplier. Where a claim is pursued for any failure by a foreign supplier, it is well established that the standard of care to be applied is the standard applicable in the relevant country.[16] Leading on from this, *Jennings* is a useful reminder that it is for the claimant to adduce evidence of those local standards to have any chance of success—a point established in *Lougheed v On the Beach Ltd*.[17] The fact that Jennings had failed to do this was fatal to his claim.

Finally, *Jennings* is also useful in relation res ipsa loquitor. Counsel for the claimant argued that there was prima facie negligence by the defendant in allowing the hazard to develop so that the burden of proof transferred to the defendant to show that it had implemented a reasonable system to combat it. The judge found that this conclusion was not justified on the facts, as there was no evidence that the defendant had allowed the hazard to develop. Further, drawing on *Lougheed* for a second time, he stressed that for a change in the evidential burden to be contemplated there would first need to be evidence that the party responsible for ensuring safety on the walkway at least knew of the hazard, which again was not the case on the facts.

Practice points

Athens Convention

- Where a claimant is injured when using disembarkation equipment which clearly cannot be said to be part of a marine terminal or station, quay or port installation, it will be important to explain why the claimant is still "in the course of carriage" with reference to arguments, such as: the carrier had decided to use this particular equipment (*Collins*); the equipment

[14] *Jennings v TUI UK Ltd (T/A Thomson Cruises)* [2018] EWHC 82 (Admlty) at [31](e)(ii).
[15] M. Chapman QC, S. Prager and M. Harding, *Saggerson on Travel Law and Litigation*, 6th edn (Wildy, Simmons & Hill, 2017).
[16] *Wilson v Best Travel Ltd* [1993] 1 All E.R. 353 and *Codd v Thomson Tour Operations Ltd*, unreported, 7 July 2000.
[17] *Lougheed v On the Beach Ltd* [2014] EWCA Civ 1538.

was under the control of the carrier (*Jennings*) and the carrier is responsible for overseeing the way in which passengers leave the vessel (*Collins*).
- Where it is arguable that the claimant was in a marine terminal or station, on a quay or in or on any other port installation at the time of injury, it will be necessary to focus on the definition of these terms in order to avoid falling within the art.1(8) exception.

Package Travel Regulations

- If seeking to imply a term into a holiday contract, it is important to explain why such a term is necessary to give practical effect to the terms of the contract as a whole (and is reasonable).
- In arguing that the defendant had a duty to warn, it is important to explain: why the risk was serious; how the risk of significant injury was manifest to the tour operator but not so obvious to the claimant and how a warning would have added to the claimant's safety.
- Where attempting to hold a defendant liable for a foreign supplier, it is vital to adduce evidence of local standards as these will dictate the standard of care applied.
- In seeking to argue that the burden of proof should shift to the defendant it will, at the very least, be necessary to adduce evidence that the defendant was aware of the hazard.

Annette Morris

C v G

(IHCS; The Lord Justice Clerk (Lady Dorrian); Lady Clark of Calton; Lord Malcolm; 28 November 2017; [2017] CSIH 72; 2017 S.L.T. 1311)

Personal injury—liability—civil evidence—civil proceedings—sexual assault—rape—consent—balance of probabilities

Balance of probabilities; Civil evidence; Consent; Damages; Intoxication; Rape; Scotland; Sexual assault

In January 2011, the pursuer was 24 years old, and was in full employment. She lived alone with her four year old daughter. On the afternoon of Saturday 1 January 2011, she visited her parents for a family lunch and left their home at about 7.00pm, leaving her daughter with them. She had made arrangements with a friend, Rachel Carrigan, to go out in Bathgate that evening.

They had a couple of drinks in the James Young, a bar in Bathgate then joined others in the Glenmavis Tavern, where they met a number of friends from school. The second defender was also there. He was someone she had known from school but had not seen for two years or so. She had a recollection of him placing two drinks in front of her on the bar. She remembered taking one, although she was unsure whether she in fact drank it. She was unable to remember anything else of significance from that time until the following morning.

In fact, although she had no recollection of it, she left the Glenmavis Tavern in due course, and went on to a nightclub. Her next recollection was the following morning when she awoke to find herself in a house which she did not recognise. She was naked, she was in a lot of pain. Her thighs were sore, as was her right-hand side generally. She felt sore internally, in her vagina. At that time, she did not know what

had happened. Later she telephoned the police who advised her either to remain where she was or to go home where they would make contact with her. She chose the second option.

Subsequently Rachel Carrigan told her that she had left the nightclub with two men. Those men were the defenders. Although she knew the second defender, she had no recollection of meeting the first defender, and to her knowledge had never met him before. DNA evidence had been obtained from vaginal swabs taken from her confirming that sexual intercourse had taken place.

A full police investigation took place but no criminal prosecution resulted. The pursuer raised an action of damages against the two defenders on the basis that they had each committed the common law wrongs of sexual assault and rape against her that night in a flat to which the parties had returned after having met up on the night out.

The men maintained that the sexual intercourse which had taken place had been consensual. Quantum was agreed and the issues before the court were whether, by reason of excessive consumption of alcohol, the pursuer had been incapable of consenting at the material time, and whether each of the defenders had a legitimate belief, whether reasonable or honest, that the pursuer had been consenting.

The pursuer offered to prove that at the time when sexual intercourse took place, she was incapable of giving free agreement because of the effect of alcohol, that both men were aware that she was so incapable, and that neither of them had had a reasonable belief that she had consented to sexual intercourse.

Lord Armstrong held that the matter had to be determined having regard to the prevailing facts and circumstances but the essential distinction to be drawn was that between intoxication which, on the one hand, resulted in a lack of capacity to make free agreement, and that, on the other, which resulted merely in a loss of inhibition such as to alter the choices which a person might otherwise make when sober, but being insufficient to deprive that person of the capacity to consent.

The issue was not whether either of the defenders could prove that he had a belief of consent at the relevant time but whether the pursuer could successfully prove that he did not, and that there was no basis on which such a belief could have been held.

The Lord Ordinary confirmed that notwithstanding the nature of the allegation made, the standard of proof to be satisfied was that of the balance of probabilities. In determining the issues arising in the present case, it was appropriate that the evidence should be carefully examined and scrutinised.[1]

He held that the pursuer could be accepted as a credible and reliable witness. In the whole circumstances of the case and having regard to the whole evidence on the matter, neither of the accounts by the defenders as to her condition at the relevant time were accepted. The judge considered the forensic findings on the pursuer's blood alcohol level, the eye witness evidence, as well as the evidence of a consultant psychiatrist. On the basis of that evidence, during the period in which she was in the flat with the defenders, she had lacked the level of cognitive functioning necessary to make reasoned decisions. Consequently, had lacked the ability to give meaningful consent by free agreement.

Lord Armstrong found neither defender credible or reliable in relation to whether they had a reasonable or honest belief that the pursuer had been consenting to sexual activity. At various points during the evening, she had been apparently able to function normally to the extent necessary to use her phone or handle the contents of her purse. However, the scenario of her engaging in a sexual act in a manner which appeared consistent with consent, though clearly intoxicated, would not have been consistent with her presentation at the time of the sexual activity concerned.

She had proved that her impaired cognitive functioning and general condition of intoxication was so obvious and manifest that the defenders had to have been aware that she was not capable of meaningful consent. Neither of them could have had reasonable belief that she was.

The fact that the pursuer had, according to the defenders, not said the word "no" in relation to the events at the flat could never be determinative in a case like the present. The current state of the law was such

[1] *Mullan v Anderson* 1993 S.L.T. 835, considered.

that its value was that it sent a clear signal that anyone dealing with someone who was intoxicated was put on notice that that person might not be able to give consent no matter what she said or did and in that regard.[2]

The judge found on the balance of probabilities that both defenders culpably ignored what, on the evidence, were clear indicators that the pursuer was not capable of meaningful consent, and instead deliberately took advantage of the situation in order to sexually assault her.

He therefore found that in the early hours of Sunday 2 January 2011, at the flat in Greig Crescent, Armadale, both defenders took advantage of the pursuer when she was vulnerable through an excessive intake of alcohol and, because her cognitive functioning and decision-making processes were so impaired, was incapable of giving meaningful consent; and that they each raped her. The pursuer having proved her case, was awarded the agreed sum of £100,000.[3] The defenders appealed.

On appeal, the two defenders accepted that sexual intercourse had taken place but maintained that it was consensual. They argued that the Lord Armstrong had erred in his treatment of the witness who inhabited the flat upstairs from the one in which events were said to have occurred and whether, by failing to give adequate weight to CCTV evidence in which C could be seen walking unaided, Lord Armstrong had erred in his assessment of the extent to which her degree of intoxication would have been apparent to them and in his conclusion that they did not have an honest or reasonable belief in her consent.

The court held that Lord Armstrong had considered the issue of C's level of intoxication under reference to the CCTV evidence, the eye witness evidence, C's likely consumption during the evening, and the expert evidence. Taking all the evidence together, he could not be considered to have given insufficient weight to the CCTV evidence which provided only snapshots during the course of the evening and which had generally depicted C as intoxicated.

There was no room to differentiate between X and Y as to their likely degree of knowledge regarding C's condition and presentation where both had spent time in her company during the course of the night and her progressive intoxication, spoken to by several witnesses, had to have been apparent to them both.

Lord Armstrong's conclusion that the evidence of the inhabitant of the flat upstairs was confused and that he could not, on a balance of probability, ascribe that which the witness heard to the central events in question, was open to him on the evidence. However, had Lord Armstrong erred in his treatment of the evidence of the upstairs inhabitant, the appeal would have nevertheless been refused. Even if what the witness heard could be attributed to the events in question, it would have made no difference to the outcome standing Lord Armstrong's acceptance of the evidence, including the expert evidence, as to C's condition and his conclusion as to the awareness by X and Y thereof.

The appeal was dismissed.

Comment

The last 12 months have seen the hashtag #MeToo take central stage in the ongoing debate about how society treats victims and survivors of rape, sexual assault, harassment, and violence.

Campaigners have been increasingly vocal in their support for a change in societal culture around sexual harassment, assault, and rape.

At the same time, there have been further high-profile rape acquittals in the criminal courts involving sports personalities, most notably in Ireland in March 2018 where two Ireland international rugby players were found not guilty of raping a woman in 2016 at a party at one of the player's homes. Reports of that trial state that the complainant, a 21 year old woman, who was 19 at the time of the alleged rape, was cross-examined for eight days by barristers at the trial. Angry demonstrations followed and the hashtag

[2] Scottish Law Commission: Report on Rape and Other Sexual Offences (December 2007).
[3] *C v G* [2017] CSOH 5.

#IBelieveHer was trending on Twitter as part of the collective dismay at the criminal justice systems treatment of sexual assault complainants.

The latest official Scottish figures from Criminal Proceedings in Scotland 2016–2017[4] show that the conviction rate for rape and attempted rape in Scotland has fallen to its lowest level in eight years, with 39% of those prosecuted in criminal proceedings for such offences being found guilty, down from 49% the previous year and that the dip has occurred despite a 16% rise in court proceedings for such offences being brought through the courts. This is despite Scottish law changes from April 2017 in criminal proceedings which mean that judges are now required to direct juries in certain sexual offence cases on how to consider evidence and specifically to explain why a victim may not physically resist their attacker, nor report an offence immediately.

Rape Crisis Scotland have called for the requirement of "corroboration" (meaning evidence has to come from at least two sources) to be removed in Scottish law in this area.[5]

Rape myths continue to be prevalent within society, particular when an alleged victim has been drinking alcohol or the alleged offence took place during the context of a night out, or party, with men known to her.

Of course, in *C v G* there was no criminal prosecution at all as the prosecuting authorities refused to prosecute and so Denise Clair (who waived her anonymity), chose to pursue a case through the civil courts in Scotland for damages against David Goodwillie and David Robertson (former Dundee United players).

The appeal court was clear in reiterating that in terms of consent in such cases, it is the pursuer/claimant who must establish that the statutory definition had been met, i.e. that there was absence of reasonable belief in consent on behalf of the defenders. They placed great weight on the expert evidence as to the level of respondent's blood alcohol readings estimated at the material time, such evidence placing C in the "severe/potentially fatal" category of intoxication in terms of her capacity to consent to intercourse. They emphasised that the circumstances in which an appellate court can interfere with findings of primary fact made at first instance are very restricted and a finding of fact would have to be "plainly wrong", i.e. the trial judge's decision cannot be explained or justified on the basis of the material before them.[6] In this case the Lord Ordinary at first instance had been entitled to make the findings of fact that he did.

Consent is an extremely complex area of both English/Welsh and Scottish law, with different legal frameworks and standards applying in both civil and criminal contexts,[7] and recent criticism of the way the CICA has applied the issue of consent in child sexual exploitation/CSE cases has also been documented as their guidance changed in October 2017 to try and recognise the realities of child grooming and sexual exploitation.[8]

In this case, the pursuer was successful but very real issues around the interpretation and possible reform of the law of consent in both civil and criminal contexts remain. As long as societal attitudes around "victim blaming" for sexual offences remain, victims of such offences will feel extremely reluctant to report and come forward whilst conviction rates remain so abysmally low.

Practice points

- This case re-iterates that appellant courts are going to be very cautious about interfering in a trial judge's findings of fact made at first instance where that judge has had the benefit of

[4] See *http://www.gov.scot/Publications/2018/02/7427/1* [accessed 9 July 2018].
[5] See *http://www.bbc.co.uk/news/uk-scotland-43210970* [accessed 9 July 2018].
[6] See *C v G* [2017] CSOH 5 at [22].
[7] See R. Scorer, "A controversial defence" [May 2017] *APIL PI Focus Issue* at *https://www.apil.org.uk/files/members/pdf/pi_focus/3403.pdf* [accessed 9 July 2018].
[8] See K. Harrison, "Time to Act—Victims denied compensation" [2018] *New Law Journal* at *https://www.newlawjournal.co.uk/issuearticles/7785* [accessed 9 July 2018].

hearing all the live witness evidence and considering the words said as well as the demeanour and presentation of those witnesses testifying at court.

- The apparent level of intoxication of the pursuer/respondent in this civil case seems to have been a key factor in the findings of fact made around the capacity of the pursuer to consent to intercourse. In cases where the pursuer/claimant is intoxicated at a lower level and the evidence is effectively to decide between the pursuer's version of events as opposed to the defender/defendant's version when considering the issue of consent in particular, it is likely that there will be greater uncertainty in civil cases as to outcome than in this one where the high level of intoxication seemed to be clear.

Kim Harrison

Goldscheider v Royal Opera House Covent Garden Foundation

(QBD; Nicola Davies J; 28 March 2018; [2018] EWHC 687 (QB)

Liability—personal injury: health and safety at work: breach of statutory duty—Control of Noise at Work Regulations 2005—hearing impairment—causation—musical instruments—noise—risk assessment

LT Breach of statutory duty; Contributory negligence; Employers' powers and duties; Health and safety management; Hearing impairment; Music industry; Noise

Christopher Goldscheider was a viola player. He was a professional musician employed by the defendant, the Royal Opera House Covent Garden Foundation. The defendant's orchestra played in a pit, half-covered by a stage. The defendant had duties under the Control of Noise at Work Regulations 2005.[1] It had provided Mr Goldscheider with custom 9dB earplugs, and 28dB earplugs were available in the orchestra pit. They caused difficulties in hearing other players, so players were told to wear them at their discretion.

In the afternoon of Friday 31 August 2012 and all day on Saturday 1 September 2012, the orchestra (including the claimant) were in the orchestra pit rehearsing Richard Wagner's "Die Walküre". The conductor planned a particular pit configuration for artistic reasons. The violas were immediately in front of the brass section; the claimant was immediately in front of the principal trumpet. The defendant's risk assessment anticipated that noise would exceed the upper exposure action values ("EAV") in the Regulations. The claimant wore his 9db earplugs intermittently.

Mr Goldscheider and the adjacent viola player complained about the noise at lunchtime. Noise dosemeters were attached to his shoulder for the afternoon; they did not provide live readings. After the afternoon rehearsal he felt ear pain and dizziness. He was unable to return to work and was diagnosed with high frequency hearing loss.

He claimed that the defendant had breached its duty regarding risk assessment, elimination/control of noise exposure, hearing protection, and training, which had caused him to suffer acoustic shock. The defendant's expert's view was that the claimant had begun to suffer from Meniere's disease, not acoustic shock. There was a trial on the issues of breach of duty and causation of injury.

A series of breaches of the 2005 Regulations were alleged and the judge found a number of breaches were established. There was a breach of reg.5(3)(a). The defendant's risk assessment identified noise levels expected to exceed the prescribed EAV. That was a general statement which took no account of

[1] Control of Noise at Work Regulations 2005 (SI 2005/1643).

the requirements in reg.5(3) to consider the level, type and duration of exposure including peak sound pressure. The readings showed peaks above 120dB. Consideration of level, type and duration would have better informed the decision as to reasonably practicable steps. The assessment was for a performance, not a rehearsal, and did not account for repetition of loud passages.

Given the expectation of high noise levels, the judge held that it would have been reasonable to monitor levels at the first rehearsals of different parts of the opera to gauge the level and type of exposure. The assessment did not recognise that the employer was under a duty to ensure the pit was designated a hearing protection zone under reg.7(3)(a); that duty was not subject to reasonable practicability. The failure to do so and to impose mandatory requirements for hearing protection breached reg.5(1).

The defendant had breached its reg.6(1) duty to ensure that risk from the exposure of his employees to noise was either eliminated at source or, where not reasonably practicable, reduced to as low a level as is reasonably practicable. The defendant could not eliminate the risk from exposure to noise at source, as it emanated from instruments, but conceded that it was possible to perform at a lower sound level. There was no evidence it had contemplated that course. The afternoon rehearsal could have been monitored using handheld noise meters with live readings; that was not done.

Regulation 6(2)[2] was also breached as the defendant was required to reduce noise exposure by appropriate measures, excluding personal hearing protectors and failed to do so. Protectors were instead the only measure it had used. The employer's assertion that the layout maximised space was "wishful thinking". No steps were taken to reduce noise after the problem had been brought to the defendant's attention. Its primary layout consideration was artistic. Though laudable, difficulties arose where artistic requirements, coupled with deference to artistic aims of leading conductors, resulted in risks to employees and impacted on health and safety obligations. The defendant could not compromise the standard of care.

The defendant's instructions to players about earplugs did not reflect the stringent requirements of reg.7(3)(a)–7.3(c). They had breached the mandatory requirement to designate the pit as a hearing protection zone. The Regulations did not distinguish between a factory and an opera house. At the time of the incident, a Regulations breach provided a basis for a civil claim.

The defendant also breached reg.10(1), requiring training. It was not enough to leave employees to judge for themselves. They had not informed the players of the mandatory requirement for hearing protection when noise was likely to exceed the upper EAV.

On the issue of causation, the judge noted that the noise level at rehearsal caused hearing difficulties and similar symptoms to two adjacent viola players. She held that was beyond coincidence. The other player had continuously worn 28dB earplugs, reflecting the high noise level. There was a clear causal link between the defendant's breaches and the high level of noise: inadequate risk assessment and failure to monitor a cramped pit, even after complaints, against the background of a failure to designate a hearing protection zone.

The claimant wore earplugs during parts of the rehearsal; that was not contrary to the defendant's advice, which left it up to him. He was not liable in the absence of appropriate instruction. Had the defendant complied with its duties he would not have been exposed to the noise level.

Injury causing acoustic shock, namely an index exposure to sound of short duration but at high intensity, was consistent with the evidence. The judge concluded that the contention that the claimant developed Meniere's disease at the rehearsal stretched coincidence too far. His symptoms were accepted as genuine. High frequency hearing loss and hyperacusis were not criteria of Meniere's disease. The rehearsal noise levels were within the range that could cause acoustic shock. The claimant's exposure resulted in acoustic shock, leading to his ongoing symptoms.

[2] Control of Noise at Work Regulations 2005 (SI 2005/1643) reg.6(2) "If any employee is likely to be exposed to noise at or above an upper exposure action value, the employer shall reduce exposure to as low a level as is reasonably practicable by establishing and implementing a programme of organisational and technical measures, excluding the provision of personal hearing protectors, which is appropriate to the activity."

Judgment was entered for the claimant on the preliminary issue with damages to be assessed.

Comment

This case raises no issue of principle but it is nonetheless an interesting development in the growing jurisprudence concerning hearing-related injuries. The conclusions reached in it underscore the extraordinarily stringent nature of the Regulations. It seems likely that hearing injury claims will constitute a growth area in the garden of personal injury litigation.

One of the most interesting features of the case concerns the judge's conclusions in relation to contributory negligence.[3] Although Davies J found the contributory negligence doctrine to be inapplicable because the claimant's fault was not causally relevant (i.e. the injury would have been sustained even if the claimant had left the rehearsal at lunchtime), her Ladyship held that the claimant had failed to take sufficient care for his own safety in not absenting himself from the rehearsal's afternoon session. That conclusion is rather surprising for three reasons.

In the first place, it is plainly asking a lot of the claimant to have exempted himself from the afternoon session. The claimant naturally would have felt obliged to continue the rehearsal. Indeed, Davies J herself emphasised the significance of the claimant's sense of duty in this connection. She said:

> "I accept that it would be the ethos amongst the professional musicians employed to play in the orchestra to be precisely that, professionals. As such, a musician would not easily leave a rehearsal and would attempt to deal with any difficulties that arose."[4]

It is well established that a claimant's competing obligations are often highly relevant when it comes to the issue of whether the claimant is guilty of contributory negligence.[5]

Secondly, it does not seem that any of the other members of the orchestra exempted themselves from the rehearsal. This is important because in determining whether the claimant took reasonable care for their own safety or interests, it may be relevant to ask whether other persons situated in the same position as the claimant behaved in a like manner. If the claimant acted in much the same way as similarly situated persons, that will tend to suggest that what the claimant did was not unreasonable. Thus, in *Casson v Spotmix Ltd (in liquidation)*, the claimant employee suffered injury to his hand while cleaning a machine. Sir Terence Etherton MR said:[6]

> "[T]he fact that every other employee charged with the task of cleaning the machine did exactly what the claimant did is strongly supportive of the conclusion that the extent to which the claimant's conduct could be criticised fell considerably short of that which could properly be categorised as amounting to contributory negligence."

Webb Resolutions Ltd v E.Surv Ltd[7] involved a claim by a lender against surveyors. In considering whether the lender was guilty of contributory negligence, Coulson J said:

[3] A practical perspective on the law of contributory negligence is offered in J. Goudkamp and D. Nolan: *Contributory Negligence: Principles and Practice* (Oxford: Oxford University Press, 2018) (forthcoming).

[4] *Goldscheider v Royal Opera House Covent Garden Foundation* [2018] EWHC 687 (QB) at [234].

[5] Lord Reed's remarks in *Gilfillan v Barbour* 2003 S.L.T. 1127 (OH) at [40], although about the apportionment of responsibility than about the question of whether the claimant was guilty of contributory fault, are apposite.

[6] *Casson v Spotmix Ltd (in liquidation)* [2017] EWCA Civ 1994 at [15]. See also *Webb Resolutions Ltd v E.Surv Ltd* [2012] EWHC 3653 (TCC); [2013] P.N.L.R. 15 at [71] (Coulson J); *Paratus AMC Ltd v Countrywide Surveyors Ltd* [2011] EWHC 3307 (Ch); [2012] P.N.L.R. 12 at [79]–[80] (HH Judge Keyser); *Barclays Bank Plc v Christie Owen & Davies Ltd* [2016] EWHC 2351 (Ch); [2017] P.N.L.R. 8 at [232] (Richard Spearman QC) ("if a practice was accepted by a significant section of the banking market at the relevant time, it should not be held to fail to meet the standard of a reasonably competent bank unless plainly illogical").

[7] *Webb Resolutions Ltd v E.Surv Ltd* [2012] EWHC 3653 (TCC); [2013] P.N.L.R. 15.

> "In general terms, the approach is to see what was happening elsewhere in the lending market because, if the claimant was doing what its competitors were doing, negligence was unlikely, unless it could be shown that it was irrational or illogical."[8]

Thirdly, and perhaps most significantly, it is well established that a claimant will rarely be found to have failed to take sufficient care for their own safety where the defendant was obliged to prevent the careless conduct concerned. This understanding applies a fortiori where the defendant, as was the case in relation to the Royal Opera House, was obliged by legislation or regulation to take precautions to prevent carelessness of the kind in question. In such circumstances, the claimant's carelessness will tend merely to establish that the defendant failed to comply with his or her duty. As Goddard LJ said in *Hutchinson v London & North Eastern Railway Co*:[9]

> "It is only too common to find in cases where the plaintiff alleges that a defendant employer has been guilty of a breach of a statutory duty, that a plea of contributory negligence has been set up. In such a case I always direct myself to be exceedingly chary of finding contributory negligence where the contributory negligence alleged was the very thing which the statutory duty of the employer was designed to prevent."

Although these remarks were made prior to the introduction of the apportionment legislation, the courts have remained faithful to the principle,[10] which appears to be at least partially rooted in the idea that findings of contributory negligence in such cases might undermine the objectives of the legislation imposing the duty on the defendant. By parity of reasoning, the courts ought to be wary of finding contributory negligence where the defendant owed a common law duty that obliged him or her to prevent the very conduct that is said to amount to contributory negligence, although authority that is directly on point is harder to find.

In view of foregoing, the correctness of Davies J's conclusion that the claimant had failed to take reasonable care for his own safety is open to some doubt.

Practice points

- The Control of Noise at Work Regulations 2005 are extraordinarily stringent.
- Acoustic shock can cause injury from exposure to sound of quite short duration if it is of high intensity.
- Consideration should be given to competing obligations and duties owed by the claimant whenever it is alleged that a claimant was partially at fault for his or her injury. The existence of such obligations makes it less likely that the claimant's conduct amounts to contributory negligence.

  In asking whether the claimant is guilty of contributory negligence, it will often be relevant to consider how other similarly situated persons conducted themselves.

[8] *Webb Resolutions Ltd v E.Surv Ltd* [2012] EWHC 3653 (TCC); [2013] P.N.L.R. 15 at [71]. See also *Paratus AMC Ltd v Countrywide Surveyors Ltd* [2011] EWHC 3307 (Ch); [2012] P.N.L.R. 12 at [79]–[80] (HH Judge Keyser); *Barclays Bank Plc v Christie Owen & Davies Ltd* [2016] EWHC 2351 (Ch); [2017] P.N.L.R. 8 at [232] (Richard Spearman QC) ("if a practice was accepted by a significant section of the banking market at the relevant time, it should not be held to fail to meet the standard of a reasonably competent bank unless plainly illogical").

[9] *Hutchinson v London & North Eastern Railway Co* [1942] 1 K.B. 481 CA at 488.

[10] See, e.g. *Staveley Iron & Chemical Co Ltd v Jones* [1956] A.C. 627 HL at 648 (Lord Tucker) ("In Factory Act cases the purpose of imposing the absolute obligation is to protect the workman 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"). See also *Ashbridge v Christian Salvensen Plc* 2006 S.L.T. 697 (OH) at [25] (Lord Glennie).

- If the defendant was obliged to prevent the claimant from engaging in the carelessness concerned that fact in principle suggests that the claimant should not be found guilty of contributory negligence.

Dr James Goudkamp

Case and Comment: Quantum Damages

Dryden v Johnson Matthey Plc

(SC; Lady Hale PSC, Lord Wilson JSC, Lord Reed JSC, Lady Black JSC, Lord Lloyd-Jones JSC; 21 March 2018; [2018] UKSC 18)

Damages—actionable personal injury—health and safety at work—employers' liability—torts—allergens—economic loss—employment handicap—hazardous substances—loss of earnings

Allergens; Compensation; Economic loss; Employers' liability; Hazardous substances; Implied terms; Personal injury

The three claimants worked for Johnson Matthey Plc, in factories making catalytic converters. Platinum salts are used in the production process. In breach of its duty under the health and safety regulations and at common law, the company failed to ensure that the factories were properly cleaned and, as a result, the claimants were exposed to platinum salts, which led them to develop platinum salt sensitisation. Platinum salt sensitisation is, in itself, an asymptomatic condition. However, further exposure to chlorinated platinum salts is likely to cause someone with platinum salt sensitisation to develop an allergic reaction involving physical symptoms such as running eyes or nose, skin irritation, and bronchial problems.

When the claimants' sensitisation was detected, through routine screening by means of a skin test, they were no longer permitted by the company to work in areas where they might be further exposed to platinum salts and develop allergic symptoms. One took up a different role with the company which he claimed was at a significantly reduced rate of pay. The other two had their employment terminated. Each claimant asserted that he had suffered financially as a result of his sensitisation to platinum salts, being unable to take work in any environment (whether with Johnson Matthey or with any other employer) where further exposure might occur.

Did the platinum salt sensitisation which each of the claimants had developed qualify as an actionable personal injury? If so they had viable claims against the company for damages for personal injuries caused by the company's negligence and/or breach of statutory duty. Alternatively, if the platinum salt sensitisation was not properly categorised as an actionable personal injury, could they recover damages for economic loss under an implied contractual term and/or in negligence?

Following a trial of the question of liability, before Jay J the claimants lost at first instance. Jay J concluded[1] that they had sustained no actionable personal injury and that their claim was for pure economic loss, for which they were not entitled to recover in tort. He also rejected their alternative claim in contract. That had been put on the basis that there was an implied term in the claimants' contracts of employment which obliged the company to provide and maintain a safe place and system of work, and to take reasonable care for their safety, and that they were entitled to damages for pure financial loss for breach of that implied term. Jay J, however, considered that the company's implied contractual duty was to protect employees from personal injury, not from economic or financial loss in the absence of personal injury.

The Court of Appeal dismissed the claimants' appeals.[2] Sales LJ, with whom the other members of the court agreed, endorsed Jay J's view that the claimants had suffered no actionable personal injury and were

[1] *Greenway v Johnson Matthey Plc* [2014] EWHC 3957 (QB).
[2] *Greenway v Johnson Matthey Plc* [2016] EWCA Civ 408; [2016] 1 W.L.R. 4487.

claiming for pure economic loss. He saw the physiological change of platinum salt sensitisation as "not harmful in itself in any relevant sense" and concluded that it was not converted into actionable injury by the resulting removal of the claimants from their jobs, with detrimental financial consequences.

As for the alternative claim for damages for economic loss under an implied contractual term and/or in negligence, there is no general duty of care in tort to protect against pure economic loss, and Sales LJ did not consider that a duty of care arose here from the particular circumstances of the case. His reasoning in relation to this was closely tied in with his reasoning in relation to the claim based on contract. That contractual claim failed because Sales LJ was in agreement with Jay J that there was no implied term in the claimants' contracts of employment to the effect that the employer would protect them from pure economic loss, whether on the basis of this being a standard implied term in employment contracts or on the basis of features particular to the employment of the claimants. In Sales LJ's view, the claimants could not succeed in a tortious claim for pure economic loss when the employer assumed no such responsibility in the employment contract.

The three claimants appealed again. Relying on *Cartledge v E Jopling & Sons Ltd*[3] the claimants argued that sensitisation constituted a physical change amounting to material damage and was thus an actionable personal injury. The employer relied on *Grieves v FT Everard & Sons Ltd*[4] to argue that it was not. It submitted that somebody who had merely acquired a new antibody could not be said to have been injured, and that the changes in the employees' bodies did not amount to physical damage or an impediment.

To the question "was sensitisation to platinum salts an actionable personal injury?" the Supreme Court's answer was yes. The concept of actionable personal injury was broad enough to include the damage suffered by the employees. Although the concept was not defined in the authorities, personal injury had been seen as including a physical change which made the sufferer appreciably worse off in respect of their health or capability; an impairment; and an injury to the sufferer's physical capacity to enjoy life.

Platinum salt sensitisation could not be classed merely as the development of a benign antibody. The antibody produced was likely to react to further exposure to platinum salts so as to produce allergic symptoms, and it was common ground that a platinum salts allergy amounted to an actionable personal injury. The development of a platinum salts allergy had two stages: sensitisation and allergy. Employees who worked around platinum salts had a "safety net" in that they could not develop an allergy without first being sensitised. When they became sensitised through their employer's negligence or breach of statutory duty, they lost that safety net and, with it, their capacity to work around platinum salts. That left them worse off.

In the course of argument, it became clear that the employer was not arguing that sensitisation could never amount to actionable injury. There was therefore no dispute that the physiological changes involved in sensitivity could constitute sufficient damage to be actionable in negligence or breach of statutory duty. The physiological changes to the employees' bodies were harmful, and *Cartledge* established that the absence of symptoms did not prevent a condition amounting to an actionable injury.[5]

Whether any given individual had suffered material damage was a question of fact that had to be determined in the light of the applicable legal principles. Given that the employees would be likely to experience symptoms upon further exposure to platinum salts, their bodily capacity for work had been impaired and they were therefore significantly worse off. The damage they had suffered was therefore more than negligible. Once sensitisation was identified as an actionable injury in its own right, the argument that the employees were really claiming only for pure economic loss fell away.

The decision in *Grieves* was distinguished. That case concerned the development of pleural plaques as a result of exposure to asbestos fibres, and a distinction could be drawn between pleural plaques and

[3] *Cartledge v E Jopling & Sons Ltd* [1963] A.C. 758.
[4] *Grieves v FT Everard & Sons Ltd* [2007] UKHL 39.
[5] *Cartledge v E Jopling & Sons Ltd* [1963] A.C. 758 followed.

sensitisation to platinum salts. Pleural plaques were nothing more than a marker of exposure to asbestos dust; they were symptomless in themselves and neither led nor contributed to any condition that would produce symptoms, even if the sufferer were to be exposed to further asbestos dust. Sensitisation to platinum salts constituted a change in the individual's physiological make-up which meant that further exposure carried the risk of an allergic reaction and meant that sensitised individuals had to make changes to their everyday lives to avoid further exposure. The appeal was allowed.

Comment

This is a very important case on a narrow point but takes a considerable step forward in the vexed area of allergic reaction. Just as *McGhee v National Coal Board*[6] represented a high-water mark for claimants in industrial disease cases, dealing as it did with dermatitis derived from working in clouds of abrasive brick dust, so the unanimous Supreme Court decision in *Dryden* makes a major advance in another difficult medical area of "sensitization" from hazardous substances, which may be a precursor to full blown allergies.

In the past courts have sometimes struggled with medical imponderables: Weil's Disease in *Tremain v Pike*;[7] frostbite in *Bradford v Robinson Rentals*;[8] the allergic reaction to an anti-tetanus injection in *Robinson v Post Office*;[9] and the New Zealand case of a simple cut on the hand from a wire rope which led to an "unknown virus" entering the wound and causing brain damage in *Stephenson v Waite Tileman Ltd*.[10] Allergies have been a particularly problematic issue in medical diagnosis, as they are so many and various, but when an allergen comes into contact with the triggered antibody response, then substances such as histamine can be released, causing swelling, inflammation and itching, and in more extreme responses anaphylactic shock.

Lady Black modestly notes that her analysis of the initial stage of "sensitization" is in a simplified form, although as the daughter of two doctors she cuts through the medical issues authoritatively. She notes that the person sensitised to platinum salts will have a particular type of antibody in their immune system, and that if exposure continues "the medical evidence is that most (but not all) people will develop physical symptoms relating to one or more of the eyes, nose, chest and skin".[11]

Once the "skin prick test" had been applied to the three claimants, and they were found to have been sensitised, the working environment necessarily had to be changed to avoid further exposure to platinum salts. They were prohibited from working in the "red zones" at their workplace. In passing one might ask how having such an obvious breach leading to exposure in a "red zone" was even remotely acceptable.

The legal analysis in the case was essentially to determine whether *Rothwell v Chemical & Insulating Co Ltd*[12] or *Cartledge v E Jopling & Sons Ltd*[13] would be determinative. Lady Black points out two critical distinctions with the leading case of *Rothwell*. First, any further exposure to asbestos would not "materially worsen" the pleural plaques, but any further exposure to platinum salts would be likely to increase the degree of sensitisation which might result in asymptomatic conditions then becoming symptomatic. Secondly, while pleural plaques in *Rothwell* would not turn into any other injury attributable to asbestos, sensitisation to platinum salts which was asymptomatic might turn into symptomatic sensitisation amounting to an allergy.[14]

The contrast with *Cartledge* was that, when steel dressers contracted pneumoconiosis, substantial injury could occur without the sufferer being aware of the disease. There is clearly a factual spectrum in these

[6] *McGhee v National Coal Board* [1973] 1 W.L.R. 1; [1972] 3 All E.R. 1008.
[7] *Tremain v Pike* [1969] 1 W.L.R. 1556; [1969] 3 All E.R. 1303.
[8] *Bradford v Robinson Rentals Ltd* [1967] 1 W.L.R. 337; [1967] 1 All E.R. 267.
[9] *Robinson v Post Office* [1974] 1 W.L.R. 1176; [1974] 2 All E.R. 737.
[10] *Stephenson v Waite Tileman Ltd* [1973] 1 NZLR 153.
[11] *Dryden v Johnson Matthey Plc* [2018] UKSC 18 at [7].
[12] *Rothwell v Chemical & Insulating Co Ltd* [2007] UKHL 39; [2008] 1 A.C. 281.
[13] *Cartledge v E Jopling & Sons Ltd* [1963] A.C. 758.
[14] *Dryden v Johnson Matthey Plc* [2018] UKSC 18 at [8].

cases. But Lady Black cites Lord Pearce on there being "no case that seeks to define the borders of actionable personal injury".[15] The conclusion in *Cartledge*, noted by Lady Black, was therefore that "Although symptomless, and not causing any present physical inconvenience, the physical injury to the lungs of the steel dressers was held to constitute actionable damage".[16] The inhalation of silica particles "had damaged the lung tissue, causing minute scars and reducing the efficiency of the lung tissue".[17]

While the Court of Appeal in *Dryden* came to the view that, in the words of Sales LJ, the claimants had suffered "no physical injury", the Supreme Court has a wider view. Summarising the arguments used on behalf of the claimants, the "platinum salt sensitisation constituted a physical change to their bodies which amounted to material damage in that they were worse off than they would have been but for their employer's breach of duty".[18] This meant they were now no longer fit to work in the "red zones". Lady Black suggests a "two stage" approach: "first comes sensitisation, next comes allergy". And when the workers had been sensitised they "lost this safety net" and therefore their capacity to work around platinum salts.[19]

The conclusion is that *Dryden* can be clearly distinguished from *Rothwell*. While the pleural plaques in *Rothwell* were "nothing more than a marker of exposure to asbestos" but crucially were "not leading to or contributing to any condition which would produce symptoms", here in *Dryden* there was "'a change to … physiological make-up which means that further exposure now carries with it the risk of an allergic reaction".[20] And that physiological change was clear liability in negligence.

Arguments as to any alternative remedial trajectory were therefore "unnecessary",[21] although no doubt at some stage there will be a return match on the issue of recovery for pure financial loss.

Practice points

- The defendant's attempt to classify "sensitization" as just the development of another benign antibody was emphatically rejected in this important Supreme Court decision on the development of allergies.
- Sensitivity should properly be viewed as having two stages: first comes sensitisation, next comes allergy.
- The physiological changes of sensitisation "may not be as obviously harmful as the loss of a limb or asthma or dermatitis, but harmful they undoubtedly are".[22] They therefore form the basis of liability.

Julian Fulbrook

[15] *Cartledge v E Jopling & Sons Ltd* [1963] A.C. 758 at 778.
[16] *Dryden v Johnson Matthey Plc* [2018] UKSC 18 at [16].
[17] *Dryden v Johnson Matthey Plc* [2018] UKSC 18 at [21].
[18] *Dryden v Johnson Matthey Plc* [2018] UKSC 18 at [31].
[19] *Dryden v Johnson Matthey Plc* [2018] UKSC 18 at [37].
[20] *Dryden v Johnson Matthey Plc* [2018] UKSC 18 at [47].
[21] *Dryden v Johnson Matthey Plc* [2018] UKSC 18 at [49].
[22] *Dryden v Johnson Matthey Plc* [2018] UKSC 18 at [40].

Bruma (A Protected Party) v Hassan

(QBD; Judge Curran QC; 18 December 2017; [2017] EWHC 3209 (QB))

Personal injury—damages—negligence —road traffic accidents—pedestrians—speed—standard of care—contributory negligence

Contributory negligence; Dangerous driving; Indemnity basis; Pedestrians; Road traffic accidents

Just before 6.00am on 1 November 2012, the claimant Mrs Mihaela Bruma, suffered catastrophic injuries when she was struck by a vehicle being driven by the defendant. Mrs Bruma had just alighted from another vehicle. She had stepped onto the pavement at a bus stop with the intention of crossing the road on foot to get to an underground station. There was a pelican crossing further down the road, but she did not use it. As she reached the centre of the four-lane road she was struck by the defendant's vehicle. The court was required to determine liability.

At the time of the accident it was dark and there was light rain. The experts agreed that the street lighting provided a good standard of illumination and that the probable range of speed of the defendant's vehicle was between 20mph and 30mph. The defendant had suggested that the claimant was running across the road, but the experts agreed that it was unlikely that she was running at the moment of impact.

The judge emphasised that the burden of proof was on the claimant to show that the defendant's negligence was a material cause of the accident. He accepted that there was no burden on the defendant to prove that he was not negligent. Even so his evidence was part of the whole evidence of the case. The defendant's candour in his answers to the police immediately after the accident demonstrated truthfulness. However, his evidence at the hearing, years after the accident, was inconsistent and unreliable.

On the balance of probabilities, the judge found that the defendant was travelling at about 30 mph when he first became aware of the claimant's presence. He attempted to brake and may have reduced his speed to some extent by the moment of impact. He did not swerve and struck the claimant head-on.

The judge further found, on the balance of probabilities, the claimant had been walking, and not running, across the road from the moment she stepped across the pavement until she was struck by the defendant's vehicle. The maximum speed at which the defendant should have been travelling was around 20mph as he had been driving on a wet road in the month of November whilst it was dark, with other traffic and pedestrians in sight. Making allowances for the degree of "glare" caused by dipped headlights on an oncoming vehicle, the momentary obstruction of view and the smear effect of intermittent wipers in conditions of drizzle, even though the claimant had wearing dark clothing on her upper body she would have been visible to the defendant for about 2.5 seconds before the impact.

The judge held that if the defendant had been driving at a significantly lower speed and keeping a more alert lookout it would have been probable that the accident could have been avoided. The degree of fault on the defendant's part did not amount to dangerous or reckless driving, but it fell below the standard to be expected of a reasonably competent motorist in the conditions which prevailed at the time. The claimant had succeeded in establishing primary liability.

Turning to contributory negligence the judge noted that the claimant accepted that she should have seen the defendant's vehicle approaching. The proper approach was to set out the matters which were significant in terms of relative blameworthiness.[1] These were the factors that gave rise to some blame on the claimant's part:

[1] *Eagle v Chambers (No.1)* [2003] EWCA Civ 1107 applied *Sabir v Osei-Kwabena* [2015] EWCA Civ 1213 considered.

- she had put herself needlessly at risk by walking across a four-lane road and not making use of the pedestrian crossing;
- she had misjudged the presence and approach of the defendant's car, and its speed in particular;
- she was wearing dark clothing on the upper body when crossing a road in the hours of darkness;
- she failed to wait until the person who had given her a lift had driven out of sight before attempting to cross; and
- failed to stop at the centre line but attempted to complete her crossing and so walked into the path of the defendant's car.

In the circumstances, the judge concluded that the appropriate division of responsibility was 80% on the defendant's side with contributory negligence of 20% on the claimant's part. Judgment was given on that basis.

Comment

This is an interesting decision for a couple of reasons, only one of which is apparent in the main decision on liability. The post-trial costs hearing provides additional food for thought. While the judgment goes, rightly, into great detail about the circumstances surrounding Mrs Bruma's accident, in reality it does not diverge significantly from other decisions made in the higher courts over the past 15 years. This in itself makes the defendant's actions relating to the costs order all the more unreasonable.

The Law Reform (Contributory Negligence) Act 1945 s.1(1) requires the court to consider "the claimant's share in the responsibility for the damage" but a car can do so much more damage to a person than a person can do to a car. "The potential destructive disparity between the parties can readily be taken into account as an aspect of blameworthiness." Here, the court found Mr Hassan was primarily liable for the collision:

> "The degree of fault on the part of Mr Hassan may not have been very great, in that it did not amount to … dangerous or reckless driving but it did 'fall below the standard to be expected of a reasonably competent motorist in the conditions which prevailed at the time. He should have kept a more alert lookout in the conditions prevailing at the time and it is probable that the accident could have been avoided had he done so. He should also have been driving at a lower speed."

Contribution and "causal potency"

The court should take into account not only the relative blameworthiness of each party but also the destructive disparity of their actions: a car is a dangerous weapon and its driver has the power to cause greater destruction than the actions of a pedestrian. While it was unwise to cross when she did, Mrs Bruma ought not to have been struck by the defendant's car: it would have been relatively easy for Mr Hassan to avoid her. It was not as if she had suddenly emerged into the road, creating a situation of urgency. She had not deliberately placed herself in a dangerous position on the road: there was nothing unusual in her behaviour.

However, she had put herself needlessly at risk by choosing not to use the pedestrian crossing and she had mis-judged the presence and speed of Mr Hassan's car. She was also wearing dark clothing at night and had failed to stop at the centre line, attempting to complete her crossing instead.

Nevertheless, Mr Hassan had been driving at maximum permitted speed, despite the conditions being dark and wet in a builtup area. He should have kept a better lookout for pedestrians: there was nothing to

prevent Mr Hassan from taking avoiding action (such as a swerve) but he failed to do so. And his failure to do so was more causally potent than Mrs Bruma's actions or inactions.

All these aspects of the decision are in line with other recent pedestrian liability decisions. Consider *Eagle v Chambers*[2] in which an emotional and distressed woman was walking in the road when hit by a car. She was found to be 40% at fault. The factors which justified that level of culpability included her behaviour. Other drivers and passers-by had tried to encourage her to get off the road, she *had* put herself needlessly at risk by walking in the road and she had been doing so for some time.

Nevertheless, she was clearly visible to drivers. Several had already driven around her to avoid a collision. There was no evidence that she had been drinking alcohol and the court found that she was not "weaving" or moving suddenly in different directions on the road.

Meanwhile Chambers was driving along a wide, straight, well-lit road, with very little traffic and nothing to obstruct his view. There were also many pedestrians walking back to their cars from a performance nearby. That being so, the driver ought to have kept a look-out for pedestrians in the road. There was nothing to prevent him from taking avoiding action (as others had done before him) but he failed to avoid a collision: he did not brake or swerve.

Not only should he have seen her earlier, but the driver's failure to do so was causative of the collision. He was driving at or just above the permitted speed limit when it was obvious that he should have been proceeding more cautiously given the conditions around him on the busy sea front. When breath tested after the accident, he was found to be four micrograms below the legal alcohol limit which would have been sufficient to impair his driving abilities.

Even where the driver has little chance to react to a pedestrian in the road, the conditions must be taken into account. In *Jackson v Murray*[3] a 13 year old girl was originally held to be 90% contributorily negligent for the accident which left her catastrophically injured. She had stepped out from behind a school minibus into path of the defender's car. The lower court had found that the car was being driven too fast and that the driver had made no allowance for the darkness or the fact that it was a school bus with a possibility of children crossing the road in front of him. His failure to keep a proper lookout and his speed meant that he could not have stopped in time, even if he had seen the pursuer in time.

Regard was given in the Supreme Court[4] to the fact that she was 13 years old and would not necessarily have the same level of judgment and self-control as would be expected of an adult. Assessing whether it was safe to cross in poor light conditions where the car has its headlights on is "far from easy, even for an adult and even more so for a 13-year old". Her behaviour was not "an act off reckless folly": she was merely negligent. The Supreme Court placed greater stress on the actions of the defender because he was driving at excessive speed and had not modified his speed to take into account the potential danger presented by the minibus: he was "culpable to a substantial degree". Liability was re-apportioned as 50:50.

The Supreme Court's re-apportionment took into account not only the relative blameworthiness of each party but also the causative potency of their actions: (1) a car is a dangerous weapon and so the causative potency of the drive must be greater than that of a pedestrian; and (2) the collision would not have taken place at all had the driver's speed not been excessive.

In *Lunt v Khalifa*,[5] the claimant was found one third contributory negligent when he stepped into the road in front of the car. In contrast to Mrs Bruma who had already crossed two lanes before the collision, this claimant, who had drunk around four pints of beer, had only travelled two paces into the road before he was struck: he had walked out straight in front of the vehicle.

The court found that the driver had failed to keep a proper look out: as in *Bruma*, this was a wide, restricted road which had shops on one side and a tube station on the other: drivers would be expected to

[2] *Eagle v Chambers (No.1)* [2003] EWCA Civ 1107.
[3] *Jackson v Murray* [2012] CSOH 100.
[4] *Jackson v Murray* [2015] UKSC 5.
[5] *Lunt v Khalifa* [2002] EWCA Civ 801.

keep a sharp lookout for pedestrians in the area, particularly at the junction where there was the tube station. The driver had been driving at 25mph in a 30mph zone: there was no evidence that he had braked or taken evasive action before the collision.

The claimant's apparent inebriation was not given undue influence: Latham LJ quoted Stuart-Smith LJ in *Liddell v Middleton*:[6]

> "It is not the fact that a plaintiff has consumed too much alcohol which matters, it is what he does. If he steps in front of a car travelling at 30mph at a time when the driver has no opportunity to avoid an accident, that is a very dangerous and unwise thing to do. The explanation of his conduct may be that he was drunk: but the fact of drunkenness does not, in my judgment, make the conduct any more or less dangerous and it does not in these circumstances increase the blameworthiness of it."

So, while the claimant "created the dangerous situation by stepping out as he did" when the defendant's vehicle was so close, the court imposed a high burden on drivers to reflect the fact that the car is a dangerous weapon and should be handled accordingly: its causal potency is great. The claimant was found to be only one third contributorily negligent.

Again, in *Sabir v Osei-Kwabena*,[7] the claimant had crossed a busy road from behind a parked car. She was walking and would have been in the defendant's view from a distance of about 70m. He failed to keep a proper lookout: she misjudged the time available to her to cross the road by a small margin. The car had "clipped" her. But she had not created a "sudden emergency" from which there was no time for the driver to react, and the "causal potency" of the driver's failure to keep a lookout or avoid the collision as he drove at the maximum permitted speed (if he had driven only slightly slower, the collision could have been avoided altogether) was much greater than hers, not least because he was driving a car and she was a pedestrian. *Bruma* is in line with the court's finding in *Sabir*: that the claimant was 25% contributorily negligent.

Finally, it is worth contrasting *Bruma* with the decision in *Belka v Prosperini*[8] where the claimant's risky behaviour increased his level of contributory negligence to two thirds. While *Bruma* walked and had not deliberately placed herself in danger, *Belka* was drunk and had taken the risky decision to run across a dual carriageway in the early hours of the morning as the defendant's taxi approached. The defendant had been driving within the speed limit, had braked and swerved but was unable to avoid a collision. While the court found that the driver had not kept a good enough lookout, (he had only seen Belka's friend who had remained on the traffic refuge in the road centre while *Belka* attempted to cross) the claimant had deliberately taken a risk in trying to cross the road in front of the taxi. This had "contributed more immediately to the accident than anything the driver did or failed to do".

Costs issues

When considered within the context of these recent decisions, the defendant's behaviour subsequent to the *Bruma* decision in December 2017 is surprising. One month after the High Court found 80% in her favour, the defendant applied for a stay. The defendant indicated that he would consent to an order for an interim payment on account of damages in the sum of £105,000 but sought the stay of that order pending its application to the Court of Appeal for permission to appeal.[9] The defendant pleaded a serious risk of injustice if permission to appeal was granted and the appeal was subsequently successful. HH Judge Curran QC was having none of it. Given that his finding at trial "in relation to the defendant's speed alone" was confirmed by the provisions of the Highway Code, the weather conditions and the defendant's own

[6] *Liddell v Middleton* [1996] P.I.Q.R. P36.
[7] *Sabir v Osei-Kwabena* [2015] EWCA Civ 1213.
[8] *Belka v Prosperini* [2011] EWCA Civ 623.
[9] *Bruma v Hassan* [2018] EWHC 248 (QB).

admission at the scene, he held that there was no strength in any appeal against that finding or any of the other findings of fact.

In any event, "the normal rule is that an appeal shall not operate as a stay of any order or decision of a lower court" unless there is a risk of serious injustice (at [2] and [5]).

Even a cursory examination of the case law set out above suggests that any such appeal would be bound to fail. In the meantime, the claimant had suffered injustice. She had waited five years for a determination of her claim and had relied upon publicly funded care and the care and attention provided by her "devoted husband" with no funds and during which time no offers to settle had been made by the defendant. She had made a reasonable Pt 36 offer which had been rejected in November 2016 and which she had then significantly bettered at trial. The only attempt by the defendant to seek a compromise had been participation in a round-table meeting between the parties' counsel "but that was all that could be said" of the defendant's attempt to settle.

The claimant argued that the defendant had behaved unreasonably and on that basis, she was entitled to indemnity costs from November 2016 until the liability trial a year later. The court agreed: indemnity costs from November 2016 were awarded and the appropriate rate of interest was four per cent above base rate.

Practice points

Liability

- Even where the defendant is driving within the permitted speed limit, it may be too fast for the conditions. The pedestrian's case for a lower level of contributory negligence can be boosted by an examination of the conditions and nature of the road: whether there were likely to be pedestrians in the road due to shops, transport hubs or crowds leaving an event (as in *Eagle v Chambers* for example). The driver must take the conditions into account and should adjust the vehicle's speed/trajectory accordingly.
- Look critically at the causal potency of each party's actions. For example, in *Jackson v Murray* even though the 13 year old pedestrian stepped out from behind the school bus into the driver's path, had the driver been travelling at 40mph instead of 50mph, the pedestrian would have escaped the accident entirely: the driver's excessive speed was "causally significant" and its effect was "potent".
- A pedestrian who is inebriated may not automatically be assumed to be completely at fault (*Lunt v Khalifa*).

Costs

- Failure to make offers to settle will leave the losing party open to a liability for indemnity costs. 4% above base rate is the appropriate rate of interest payable under CPRr.36.17(4)(c) on indemnity costs ordered against the defendants in these circumstances.
- An appeal should not be used as an attempt to operate as a stay unless the party seeking the stay can show serious injustice.

Helen Blundell

Irving v Morgan Sindall Plc

(QBD; Turner J; 15 May 2018; [2018] EWHC 1147 (QB))

Damages—road traffic accidents—car hire—consumer credit hire agreements—hire charges—hired vehicles—impecuniosity—insurance claims

LT Car hire; Consumer hire agreements; Hire charges; Impecuniosity; Insurance claims; Repayments; Road traffic accidents

On 18 November 2015, the claimant, Miss Katherine Ann Irving, had an accident in which her Ford Ka was written off. In addition, Miss Irving suffered a whiplash injury from which she had made a full recovery within four weeks. The other driver was entirely to blame and admitted liability.

Miss Irving needed a vehicle to commute to work and hired a replacement on credit while awaiting a cheque from the insurer to buy another car. The insurer took over four months to make the necessary interim payment and the hire charges reached £20,000. General damages were agreed at £700 but the credit hire charge issue went to trial.

Miss Irving had modest financial resources. There were three hiring contracts with the credit hire company for the replacement car. The broad effect of these was to defer the time for her to pay until her damages claim was concluded, but subject to that she was liable to pay off the debt regardless of the outcome of the claim.

In cross-examination Miss Irving stated that the hire company had told her when she signed the agreements that the hire charges would be covered by the third-party insurer. She said that her lawyers told her that she was in a no-win-no-fee situation, and that she never thought she would have to pay any hire charges.

The trial judge HH Judge Saffman concluded that for the charges to be recoverable from the insurer he would have to be satisfied that the appellant was obliged to pay them, but that on her evidence, the only evidence he had, she was not obliged and thus the credit hire charge could not be recovered.

The claimant appealed. The defendant relied on *Giles v Thompson*[1] and authorities cited therein to submit that those decisions precluded the recovery of a contingent debt as opposed to a gift.

The judge held that so far as contingent liability was concerned it was uncertain what was the jurisprudential basis for the HH Judge Saffman's conclusion. Turner J proceeded on the basis that Miss Irving's liability to pay the charges was, whether by operation of a collateral agreement or otherwise, contingent upon her recovering damages against the other driver, and that if she failed to recover, she would have no personal liability to pay. He held that there was no evidential basis for HH Judge Saffman to decide that the hire was "free". There was nothing in the authorities cited in *Giles* to support the defendant's case.[2]

Turner J decided that in fact, the contrary appeared to be the case. Furthermore, the issue had been addressed specifically in *Giles* where Lord Mustill stated that it was not an absolute rule that a claim for special damage could only succeed to the extent of losses sustained and liabilities incurred, for example, the proceeds of insurance and charitable benevolence were disregarded. He added that a defendant was

[1] *Giles v Thompson* [1994] 1 A.C. 142.
[2] *Giles v Thompson* [1994] 1 A.C. 142 considered.

not relieved of liability if the claimant's liability to pay charges to a third party was contingent on their recovery against the defendant and cited the authorities put forward by the defendant.[3]

The judge held that there was no double recovery in this appeal; on no interpretation of the assurances given to the claimant could she have gained the impression that she could keep any sums recovered in respect of hire charges for herself. In an approach consistent with preceding authorities, *Wakeling v Harrington*[4] held that a liability owing from A to B could exist even though B had agreed not to enforce it directly against A.[5] HH Judge Saffman was wrong to conclude that the assurances given to the claimant, even at their highest, compromised her claim for credit hire charges against the defendant.

The appeal was allowed.

Comment

A credit hire agreement is an agreement between a third party and a credit hire company or organisation which supplies a replacement vehicle when the third party's own vehicle is damaged by way of an accident. The vehicle is provided on a credit basis with the third party not being liable to pay hire charges until the claim is settled. In practice the credit hire organisation will seek to recover direct from the fault insurer. A credit hire agreement is not regulated under the terms of the Consumer Credit Act 1974 and instead normal contractual principles of offer and acceptance apply though the decisive factor is whether the third party was fully made aware of, and or read and understood the terms and condition of hire.

This case is important as it may well put an end to the issue of whether verbal assurances that the hirer would not be obliged to meet the cost of hire override the written hire terms and agreement. While some commentators may think that this case will sound the death knell of such arguments, I suspect the credit hire battle will continue as it has done for many years.

In this regard it is perhaps apposite, if not ironic, that as Turner J said in his opening paragraph of his judgement:

> "This month marks the silver anniversary of the decision of the House of Lords in *Giles v Thompson* [1994] 1 A.C. 142. This landmark case represented the first major battle in the continuing war of attrition between credit hire companies and motor insurers. The present appeal demonstrates that neither side has lost its appetite for combat over the last twenty five years."

He went on to outline the two central issues to the appeal:

- "Can a claimant recover credit hire charges against a defendant even when she has been assured by the credit hire company that she will never have to pay the outstanding sums out of her own pocket?"
- "How badly off does a claimant have to be to satisfy the test of impecuniosity?"

As with many credit hire cases, the facts of the case are straightforward, and similarly, in many respects, the insurer did themselves no favours in taking over four months to pay the pre-accident value of Ms Irving's car of some £775. In this period, hire charges in excess of £20,000 were incurred.

Did Katherine Irving then have a contingent liability to pay hire charges when she had been assured by the credit hire company that she would not have to pay them and that they would be recovered from the fault insurer? In fact, she thought it was a "no win, no fee" arrangement and that she would not have to pay anything. Indeed, she did not have the means to pay charges of that magnitude. At first instance, HH

[3] *Harlow & Jones Ltd v Panex (International) Ltd* [1967] 2 Lloyd's Rep. 509, *Cosemar SA v Marimarna Shipping Co (The Mathew)* [1990] 2 Lloyd's Rep. 323, *Donnelly v Joyce* [1974] Q.B. 454 and *McAll v Brooks* [1984] R.T.R. 99 considered.

[4] *Wakeling v Harrington* [2007] EWHC 1184 (Ch).

[5] *Wakeling v Harrington* [2007] EWHC 1184 (Ch) applied.

Judge Saffman relied heavily on Ms Irving's oral evidence under cross examination. But as Turner J says at [11] of his judgment, Saffman HH Judge:

> "… did not identify the jurisprudential basis upon which he had concluded that the evidence of the claimant had impacted on the terms of the written contract which it appeared to contradict. As a result, there is some degree of speculation in the claimant's skeleton argument on this appeal as to what the potential legal effect (if any) of the assurance given to the claimant might be."

Turner J was not going to repeat the mistake and went on to provide analysis of the authorities starting with *Giles v Thompson* and concluded with *Wakeling v Harrington*. It is worth quoting the appropriate in full:

> "23. More recently, in *Wakeling v Harrington* [2007] EWHC 1184 (Ch) Mann J observed:
>
> 'A liability owing from A to B can exist notwithstanding that B has agreed not to enforce it directly against A. A non-recourse loan is a good example of that. As Prof Goode observes in his book on *Consumer Credit Law and Practice* (at para.11.73):
>
> "Whilst an obligation to repay is an essential characteristic of a loan, the manner in which the obligation is to be discharged may be restricted. In particular, it is not necessary that the borrower should incur a personal obligation to repay out of his own monies. It suffices that payment is to be made from a designated fund or from the proceeds of a specified asset. So an undertaking by B to repay an advance with such money (if any) as has come into his hands from T makes B a borrower despite the fact that his repayment liability is limited to the sums received from T."'"

That dealt with the defendant's arguments in respect of Katherine Irving having no contingent liability to pay the hire charges incurred. Matters then turned to the issue of impecuniosity.

Ms Irving had established the need to hire as public transport would have taken her three times as long to get to work. She was also described as being employed on a modest (in the extreme) basic wage of £472pm which, with overtime, might rise to some £700pm. She had savings of about £250, a credit card with a £500 limit and an overdraft on a Graduate Bank account in excess of £700. Taking into account the probable length of time required to for her car to have been inspected by her insurers, a valuation agreed and for Ms Irving to have found a suitable replacement vehicle of about a month, the claimant would have incurred "up front" open market hire charges of around £700. The claimant's modest means did not allow her to replace her vehicle and hire a vehicle at spot rates. As Turner J pointed out:

> "I cannot ignore the fact that by reducing her capital to the bare minimum and increasing her debt, the claimant would have been exposing herself to the risk of a serious financial challenge in the event that even a modest but unexpected financial reverse might have afflicted her before her claim was satisfied."

Turner J was satisfied that Saffman HH Judge, "experienced as he is, was wrong" and the appeal was allowed.

Practice points

Notwithstanding this decision, it will be a rare case for an appellate court to interfere with findings of impecuniosity reached at first instance.

- Paper evidence such as the rental agreement or contract is more important that oral evidence.

- Impecuniosity does not mean penury.
- Contrary to some commentator's views, I do not think we have seen the end of "credit hire wars".

David Fisher

Wright v Satellite Information Services Ltd

(QBD; Yip J; 11 April 2018; [2018] EWHC 812 (QB))

Personal injury—damages—care expenses—allegations of fundamental dishonesty—interpretation of the evidence—Criminal Justice and Courts Act 2015 s.57

LT Care expenses; Dishonesty; Measure of damages; Personal injury claims; Schedule of expenses and losses

The claim arose from an accident at work. Edward Wright, who was then aged 66, had sustained injuries affecting his right lower limb, including a tibial fracture. He was unable to return to work. His employers admitted liability, but quantum remained in issue.

The defendant's case was that the claimant was far less disabled than he claimed and that he had dishonestly exaggerated his claim. Mr Wright made a claim for, among other things, the cost of future care. The amount claimed, based on the report of a care expert, was in excess of £73,000. The judge allowed just £2,100 to cover the provision of some care following future surgery. That apart, he concluded that there was no true continuing care need.

The judge rejected the defendant's submission that, for the purposes of the Criminal Justice and Courts Act 2015 s.57, Mr Wright had been fundamentally dishonest in relation to his claim. HH Judge Pearce therefore refused to dismiss the claim and gave judgment in the claimant's favour in the sum of £119,165.02 and the defendant was ordered to pay 75% of the claimant's costs.

The defendant appealed and argued that the judge, having found that the claimant's claim for the cost of care was not established, had been wrong not to find that he had been dishonest in his presentation of that element of the claim and that such dishonesty was "fundamental" to the integrity of the claim within the meaning of s.57.

Yip J held that an analysis of the evidence as a whole revealed that HH Judge Pearce had been entitled to conclude that Mr Wright had not been dishonest. The initial statements of Mr Wright and his wife related to the early months after the accident, when he undoubtedly had a need for support from his wife. The judge made an allowance for past care to cover that. In his subsequent statements, Mr Wright did not labour the point as far as care was concerned, saying merely that he continued to require his wife's help with certain activities. He had been broadly consistent in what he had said in relation to any need for ongoing assistance.

HH Judge Pearce accepted that Mr Wright's wife might occasionally do tasks, and be present to provide support, for him. That accorded with what Mr Wright had said. The rejection of the care claim as pleaded seemed to have flowed from a proper analysis of what was actually being done for Mr Wright and the conclusion that that did not properly sound in damages. The judge concluded that "it [was] almost impossible … to value such occasional assistance".

It was clear that in finding that Mr Wright had not established his claim for future care, the judge was not bound to find that he had acted dishonestly merely by presenting such a claim. The reason for the

judge's rejection of that element of the claim was not that he found the respondent's evidence to be untruthful, but rather that a proper interpretation of that evidence did not support the assessment of the care expert, whose report formed the basis of the claim for future care costs.

The appeal was dismissed.

Comment

What constitutes "fundamental dishonesty" is not defined in the Criminal Justice and Courts Act 2015 though the Supreme Court[1] says that although judges and juries should recognise what it means, it can be an imprecise word. A number of judgements have endeavoured to establish a practical meaning of the term "fundamental dishonesty". The Court of Appeal in *Howlett v Davies*[2] supported the approach of HH Judge Moloney QC in an unreported case of *Gosling v Hailo*[3] on the meaning of "fundamental dishonesty" in the QOCS context of the term. Part of that guidance is an explicit distinction between dishonesty relating to issues that are "fundamental" and those that are merely "incidental" to the claim. It is in this context that this is an interesting case, especially as it comes on the back of *London Organising Committee of the Olympic and Paralympic Games v Sinfield*.[4]

In *Sinfield* Knowles J said:

> "A claimant should be found to be fundamentally dishonest within the meaning of s.57(1)(b) if the defendant proves on a balance of probabilities that the claimant has acted dishonestly in relation to the primary claim and/or a related claim (as defined in s.57(8)), and that he has thus substantially affected the presentation of his case, either in respects of liability or quantum, in a way which potentially adversely affected the defendant in a significant way, judged in the context of the particular facts and circumstances of the litigation. Dishonesty is to be judged according to the test set out by the Supreme Court in *Ivey v Genting Casinos Limited (t/a Crockfords Club*)."

Sinfield revolved around an essentially fabricated claim for gardening services which constituted the largest head of special damages. Whether something is "substantial" need not necessarily be influenced by an arbitrary and sizeable monetary amount or percentage of the value of the claim. The gardening claim represented some 28% of the whole claim. As the special damages claim was substantial and as the largest head of loss had been supported by false invoices and dishonest witness statements, it was difficult to argue that it was peripheral to the claim overall. Therefore, the claim was "fundamentally dishonest". Once there is such a finding, it requires more than a loss or reduction in damages for the claimant to suffer "substantial injustice" which is the second limb of the Criminal Justice and Courts Act s.57.

It was due to similarities and parallels between *Sinfield* and this case that HH Judge Yipp gave permission to appeal. It was not disputed that there would be no substantial injustice were Wright's claim dismissed for fundamental dishonesty; the issue was simply whether he had been fundamentally dishonest.

It is interesting to note that the same defendant solicitors acted in both *Wright* and *Sinfield*. A significant part of Wright's claim, supported by expert care report and statements, was in respect of care. He had signed the statement of truth on the schedule of loss. Surveillance evidence demonstrated that the claimant could do more than was alleged. At trial and under cross examination Wright admitted that he had no ongoing need for care. So, was this "fundamentally dishonest"? It is important to note the dates of the evidence on which the issue of "fundamental dishonesty" hung. The accident occurred in early 2014. There were undated and unsigned statements from the claimant and his wife that dealt with the early

[1] *Ivey v Genting Casinos (UK) Ltd (t/a Crockfords)* [2017] UKSC 67.
[2] *Howlett v Davies* [2017] EWCA Civ 1696.
[3] *Gosling v Hailo*, unreported, 29 April 2014.
[4] *London Organising Committee of the Olympic and Paralympic Games v Sinfield* [2018] EWHC 51 (QB).

months after the accident. The care evidence, which was much criticised both at trial and appeal, was dated May 2015.

There were schedules of loss dated September 2015 and May 2015 (note, this appears to be a typographical error in the judgment). In statements provided by Wright dated February and April 2016 he simply stated that his wife still provided assistance, especially with washing, and that he was unable to assist with domestic chores that he did pre-accident. In short, these statements painted a very different picture to that of the expert care report and schedule of loss. Although Mr Wright signed the statement of truth on the schedule, at trial he said that the schedule was analogous to a set of accounts prepared by an accountant. He signed the schedule based on the professional expertise of the drafter.

HH Judge Yipp made some pertinent comments as to the importance of schedules that are worth repeating:

> "It seems to me that the importance of the schedule of loss is frequently overlooked. This is, or should be, the document that draws together the presentation of the claim. It ought to be presented in an accessible and easy to follow format. The fact that the schedule of loss is required to be supported by a statement of truth highlights the need for it to be readily understandable by the claimant. It also sets out the claim for the defendant and for the trial judge who will come to the case afresh and ought to be able to follow the case from the schedule. This means that it should not simply be a series of calculations. It needs to be supported by sufficient narrative to explain the case being presented by the claimant."

HH Judge Yipp also noted some disparity between schedule and care report and commented that Mr Wright would have no knowledge as to appropriate hourly rate. At cross examination, the claimant provided answers as to his care needs readily.

In conclusion, this case is very different to *Sinfield*. HH Judge Yipp emphasised that the trial judge focussed on inconsistencies in evidence that might support dishonesty and that essentially the appellant was challenging the trial judge's findings of fact.

Practice points

- A full and forensic examination is required for arguments of fundamental dishonesty to succeed.
- For fundamental dishonesty to apply the dishonesty needs to be more than an incidental element of the claim: it must be fundamental to it.
- What is "fundamental" as opposed to "incidental" will hinge on the facts of the case.
- Schedules and counter-schedules are important documents which should clearly and understandably set out the basis of claim and not simply be a series of calculations.
- Schedules and counter-schedules must be easily understandable by the client who will be signing the statement truth.
- Sloppiness by claimant's solicitors may not only undermine the client's claim, it may also have costs consequences.

David Fisher

Rodrigues de Andrade v Salvador

(CJEU (Grand Chamber); 29 November 2017; C-514/16)

Damages—indemnity—motor vehicles—compulsory motor insurance—off road accidents—use of vehicles—accident on farm—insured agricultural tractor—tractor stationary with engine running to drive a spray pump—Directive 72/166 art.3(1)

LT Accidents; Agricultural machinery; Compulsory insurance; EU law; Motor insurance; Tractors

Mr and Mrs Rodrigues de Andrade owned an agricultural holding in Sabrosa in Portugal. The wife of Mr Salavador, Mrs Maria Alves, was employed by them as a part time agricultural worker. She was under their direction and control.

On 18 March 2006, Mrs Alves was applying herbicide to the vines in the vineyard. The land sloped and was terraced. The herbicide was contained in a drum with a spraying device attached. That drum was mounted on the rear of a tractor. The tractor was stationary on a flat track but with the engine running. This was required in order to power the spray pump for the herbicide.

The weight of the tractor, the vibrations produced by the engine and by the spray pump and the movement, including by Mrs Alves, of the herbicide hose leading from the drum, together with the heavy rainfall that day, caused a landslip which carried the tractor away. The tractor in question fell down the terraces and overturned, reaching four workers who were applying herbicide to the vines below. Mrs Alves was hit and crushed by the tractor and died as a result.

The tractor was registered in the name of the farm manager's wife who had insured it with CA Seguros to cover "tractors and agricultural machines". Mrs Rodrigues de Andrada had taken out an insurance policy to cover occupational accidents. That insurer had paid compensation to Mr Salvador, Mrs Alves widower, for the losses resulting from the accident that caused her death.

Mr Salvador had sought an order to determine whether CA Seguros should be obliged to cover the claim. The court at first instance granted this, and the insurer appealed. This in turn was referred to the ECJ to answer the following questions:

(1) "Does the obligation, laid down in Article 3(1) of [the First Directive], to have insurance … apply to the use of vehicles, in any place, be it public or private, solely in cases in which the vehicles are moving, or also in cases in which they are stationary but with the engine running?"

(2) "Does the aforementioned concept of use of vehicles, within the meaning of Article 3(1) of [the First Directive], encompass an agricultural tractor, which was stationary on a flat mud track on a farm and was being used, as was usual, in the performance of agricultural work (herbicide spraying in a vineyard), with the engine running to drive the pump in the drum containing the herbicide, and which, in those circumstances, as the result of a landslip caused by the combination of the following factors: the weight of the tractor, the vibration produced by the tractor's engine and by the spraying device mounted on the back of the tractor, heavy rain ,fell downwards hitting four workers who were carrying out the same task on the lower terraces, causing the death of a worker who was supporting the hose that was being used for spraying?"

(3) "If questions 1 and 2 are answered in the affirmative, does this interpretation of the concept of 'use of vehicles' in Article 3(1) of [the First Directive] preclude a rule of national law

> (Article 4(4) of [Decreto-Lei No 291/2007 que aprova o regime do sistema do seguro obrigatório de responsabilidade civil automóvel (Decree-Law No.291/2007 concerning the system of compulsory motor vehicle insurance against civil liability) of 21 August 2007 ('Decree-Law No 291/2007')]) which excludes the obligation to have insurance laid down in Article 3(1) [of that directive] in cases in which vehicles are used for purely agricultural or industrial purposes?"

The questions essentially asked whether use of a vehicle includes a circumstance where a stationary tractor only being used to provide power to a piece of equipment is within "use of a vehicle". The tractor itself was held to meet the definition of vehicle within art.1(1) of the First Directive.[1] The definition was said to be unconnected with the use which was made or may be made of the vehicle in question. The fact that it may, in certain circumstances, be used as an agricultural machine was not relevant to the concept of vehicle.[2] It was also based on the file from the referring court that a tractor normally based within the territory of a Member State and not subject to any derogation.

The court confirmed that the purpose of the Directives is, first, to ensure the free movement of vehicles normally based in the territory of the EU and of persons travelling in those vehicles and, secondly, to guarantee that the victims of accidents caused by those vehicles receive comparable treatment irrespective of where in the EU the accident occurred. The development of the EU legislation has been for the purpose of protecting victims of accidents caused by those vehicles and that protection is not limited to public roads as long as the use of the vehicle is consistent with the normal function of the vehicle.[3]

The scope of the concept of "use of a vehicle" did not, therefore, depend on the characteristics of the terrain on which the motor vehicle is used. Nor was there anything in the compulsory insurance directives that would limit the scope of insurance in those circumstances.

Importantly, the concept covers the use of a vehicle where it would be normally intended to serve as a means of transport. The fact that the vehicle was stationary does not preclude it from falling within scope. In addition, whether the engine was running at the time is not conclusive. However, in the case of vehicles used as transport and also intended to be used to carry out work it is necessary to determine whether at the time of the accident it was being used principally as a means of transport. Where it is being used principally in connection with the work then it is not within scope.

The court accordingly concluded that the answer to the first and second questions was that art.3(1) of the First Directive must be interpreted as meaning that the concept of "use of vehicles", referred to in that provision, did not cover a situation in which an agricultural tractor has been involved in an accident when its principal function, at the time of that accident, was not to serve as a means of transport but to generate, as a machine for carrying out work, the motive power necessary to drive the pump of a herbicide sprayer.

The national law provision in question three was not one for the court to determine as it was a hypothetical question and, accordingly, inadmissible. The issue of costs was for the national court to determine.

Comment

The case of *Vnuk* heralded a dramatic change in the approach taken to motor claims. The simple fact is that the UK in choosing the wording in the Road Traffic Act 1988[4] did not comply with its obligations under European law and continues not to do so.

[1] 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 OJ L103/1. Superseded by 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.

[2] *Vnuk v Zavarovalnica Triglav dd* (C-162/13) EU:C:2014:2146 at [38] applied.

[3] *Vnuk v Zavarovalnica Triglav dd* (C-162/13) EU:C:2014:2146 applied.

[4] Road Traffic Act 1988 Pt VI.

Applied properly, the case of *Vnuk* makes it clear that the compulsory requirement for a motor insurance policy applies where a motor vehicle is in normal use within the territory of a Member State. This case alters the trajectory of that case in two important ways:

First, the CJEU chose to identify the need to ensure the free movement of vehicles throughout the EU as the first aim of the motor insurance directives and only after that the need to provide a means of redress for those citizens injured whilst using or as a consequence of the use of a vehicle within the member state. This is an important departure. The identification of an economic driver (as the free movement of vehicles is closely linked to the free movement of goods and people) could well mean that the continued membership of the single market in any form will also require the continued application of the Motor Insurance Directives.

Secondly, there are limits on the extent of *Vnuk*. The focus is on whether or not the vehicle is being used in some way that is related to its use as a means of transportation. This does not mean that a passenger must be in the vehicle, just that the use is in some way related to that.[5] The difference introduced by this case will tell primarily in the arena where workers are involved in the use of a vehicle. *Rodrigues* required the court to consider whether the vehicle being considered was a dual-use vehicle. If the vehicle has two defined and distinctive uses then there is a possibility that *Vnuk* will not apply to extend the motor insurance cover to the vehicle at the time the accident or incident takes place. In this case, the tractor stopped being used in a way related to its use as a means of transportation when it began to be used solely as means of providing motive force to the herbicide spray pump. If this accident had happened in the UK it would have been for the employer's liability not the motor insurer to indemnify any award of damages to the injured worker.

Practice points

- Territory means just that; derogations based upon on whether a vehicle is on the road or not are derogations not present in the Directive.
- Use is related to use as a means of transportation.

Brett Dixon

[5] See *R&S Pilling (t/a Phoenix Engineering) v UK Insurance Ltd* [2017] EWCA Civ 259 as an example of this approach; note though permission to appeal to the Supreme Court has been granted in that case.

Case and Comment: Procedure

Gavin Edmondson Solicitors Ltd v Haven Insurance Co Ltd

(SC; Lady Hale PSC, Lord Kerr JSC, Lord Wilson JSC, Lord Sumption JSC, Lord Briggs JSC; 18 April 2018; [2018] UKSC 21)

Personal injury—civil procedure—legal advice and funding—conditional fee agreements—fees—insurance companies—liens—personal injury claims—pre-action protocols—settlement—solicitors' remuneration—Cancellation of Contracts Made in a Consumer's Home or Place of Work etc. Regulations 2008

LT Client relationship management; Conditional fee agreements; Equitable liens; Fees; Insurance companies; Personal injury claims; Settlement; Solicitors' remuneration

Gavin Edmondson Solicitors Ltd ("Edmondson") had entered into conditional fee agreements ("CFAs") to represent six clients in personal injury claims against Haven Insurance Company Ltd ("Haven"). Edmondson notified the claims via the online Road Traffic Accident Portal ("the Portal"), in accordance with the Pre-action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ("the Protocol").

Under the scheme, solicitors lodge the details of the claim on the Portal, insurers respond by admitting or denying liability, and then, if liability is admitted, the amount of the damages are negotiated, with recourse to a court hearing if the amount cannot be agreed. Under the Protocol, the insurer is expected to pay the solicitor's fixed costs and charges direct to the solicitors.

In this case, however, shortly after the claims were logged on the Portal, Haven made settlement offers direct to the claimants, on terms which did not include any amount for the solicitors' costs. Haven told the claimants that they could pay the claimants more, and more quickly, by that route, than by going through the Portal. All the individuals eventually accepted these offers and cancelled their CFAs with Edmondson. This practice by Haven was repeated in many other cases, which were not before the court.

The result was that Edmondson had been deprived of their costs. Edmondson therefore brought a claim in order to recover their fees, disbursements and success fees from the insurer Haven. Edmondson sought equitable intervention by the court, claiming that Haven had wrongfully prevented them from establishing a lien on the settlement sums for their costs. The CFAs incorporated a Law Society document which provided that a client who won the claim would pay Edmondson's charges, disbursements and a success fee, which it could claim from its opponent.

However, each client also received a client care letter which indicated that if the client won, Edmondson would be able to recover their fees, disbursements and success fee from the opponent and had the right to take recovery action in the client's name. Each CFA was subject to the Cancellation of Contracts made in a Consumer's Home or Place of Work etc. Regulations 2008,[1] meaning that each client had the right to cancel his retainer within a seven-day period. In the case of two of the clients, the insurer Haven made the offer to compromise within that seven-day period.

Edmondson's claim was dismissed at first instance. The Court of Appeal[2] allowed their appeal, holding that, even though the claimants did not have a contractual liability for the firm's charges, which meant

[1] Cancellation of Contracts made in a Consumer's Home or Place of Work etc. Regulations 2008 (SI 2008/1816).
[2] *Gavin Edmondson Solicitors Ltd v Haven Insurance Co Ltd* [2015] EWCA Civ 1230.

that the traditional equitable lien claim failed, the remedy could be modernised to allow the solicitors to recover from the insurers their fixed costs that should have been paid under the Protocol.

The Supreme Court held that in its traditional form, the solicitor's equitable lien was a means whereby equity provided a form of security for the recovery by solicitors of their agreed charges for the successful conduct of litigation, out of the fruits of that litigation. It promoted access to justice and enabled solicitors to offer litigation services on credit to clients who, although they had a meritorious case, lacked the financial resources to pay up front for its pursuit. There had to be something in the nature of a fund over which the equitable lien could operate. The requirement for a fund might be satisfied not just by a judgment debt or arbitration award, but also by a debt arising from a settlement agreement. Provided that the debt had arisen in part from the solicitor's activities, there was no reason in principle why formal proceedings must first have been issued. For equity to intervene, there also had to be something sufficiently affecting the conscience of the payer, either in the form of collusion to cheat the solicitor, or notice or knowledge of the solicitor's claim against, or interest in, the fund.[3]

They further held that the client care letters did not destroy the clients' basic liability for the solicitor's charges expressly declared in the CFAs and the Law Society's standard terms. It merely limited the recourse from which the solicitors could satisfy that liability to the amount of its recoveries from the defendant. In each of the six cases, there existed a sufficient contractual entitlement of the solicitors against its clients to form the basis of a claim to an equitable lien over the agreed settlement debts payable by the insurer.

In addition the settlement debts owed their creation, to a significant extent, to the solicitors' services provided to the clients under the CFAs. The lodging of the claims onto the portal was enough to trigger the solicitors' entitlement to their basic charges, disbursements and success fees under the CFAs if the claims had a successful outcome. Once a defendant or his insurer was notified that a claimant in a road traffic accident case had retained solicitors under a CFA and that the solicitors were proceeding under the protocol, they had the requisite notice and knowledge to make a subsequent payment of settlement monies direct to the claimant unconscionable, as an interference with the solicitors' interest in the fruits of the litigation.

The conclusion that the clients had a contractual liability to pay the solicitors' charges meant that it was not strictly necessary to determine whether the Court of Appeal had been correct to extend the principle of the traditional equitable lien. However, the court pointed out that there were insuperable obstacles in the way of extending the principle. The Protocol was voluntary rather than contractual in nature and a breach of the Protocol created no legal or equitable rights of any kind. As for suing in the name of the client, that was a form of contractual subrogation. The solicitor could be in no better position than the client, as against the insurer. In this case, the clients had contracted with the insurer to receive settlement sums which did not include a costs element. Any attempt by the solicitors to stand in their shoes by way of subrogation would be met by an unanswerable defence from the insurer. One of the settled principles upon which the equitable lien worked was that the client had a responsibility for the solicitor's charges. Where there was no such responsibility, they found it hard to see how the payment of charges to the solicitor, rather than to the client, would be justified. There was no general principle that equity would protect solicitors from any unconscionable interference with their expectations in relation to recovery of their charges.

The appeal was dismissed.

[3] *Khans Solicitors v Chifuntwe* [2013] EWCA Civ 481; [2014] 1 W.L.R. 1185 approved.

Comment

The last few years has seen many costs and funding disputes. It speaks volumes that in the 21st century our costs system and recoverability in particular stem from the Statute of Westminster Act 1275. So it should not really come as a surprise that when the court was discussing the solicitor's equitable lien, the root of this decision, it dipped into a case from 1779:[4]

> "In its traditional form it is the means whereby equity provides a form of security for the recovery by solicitors of their agreed charges for the successful conduct of litigation, out of the fruits of that litigation."[5]

In *Welsh*, the claimant obtained judgment for £20 together with costs in a civil claim for assault. He then compromised the claim with a direct payment by the defendant of £10. There was no collusion to defeat the solicitor's right to payment of his bill. Lord Briggs used this case and the judgment there of Lord Mansfield to set the case and the lien in context:

> "An attorney has a lien on the money recovered by his client, for his bill of costs; if the money come to his hands, he may retain to the amount of his bill. He may stop it in transit if he can lay hold of it. If he apply to the Court, they will prevent its being paid over till his demand is satisfied. I am inclined to go still farther, and to hold that, if the attorney give notice to the defendant not to pay till his bill should be discharged, a payment by the defendant after such notice would be in his own wrong, and like paying a debt which has been assigned, after notice. But I think we cannot go beyond those limits."

Briggs went on to say:

> "There having been no notice in that case, the solicitor's claim against the defendant failed. It is implicit in Lord Mansfield's reasoning that, if there had been notice to the defendant, he would have had to pay a second time, up to the amount of the solicitor's bill. The typically terse judgment may be said to have dealt with legal and equitable lien without clearly distinguishing between the two, but the analogy of an assigned debt shows that Lord Mansfield recognised that the solicitor had an interest in the judgment debt which the court would protect, provided that notice of that interest had been given to the debtor before payment to the judgment creditor. An interest dependent upon notice is typical of an equitable interest."[6]

Following a history lesson examining eight cases from 1795 through the 1800s to 1968 Lord Briggs landed upon the 2013 case *Khans Solicitors v Chifuntwe*,[7] which had recently reviewed the case law on liens. In that case the Home Office had paid costs directly to a litigant in person who had previously instructed solicitors in a Judicial Review. It had been put on notice of the lien:

> "the court will intervene to protect a solicitor's claim on funds recovered or due to be recovered by a client or former client if (a) the paying party is colluding with the client to cheat the solicitor of his fees, or (b) the paying party is on notice that the other party's solicitor has a claim on the funds for outstanding fees."

This was key because the court found that Haven was clearly on notice that this claimant would be seeking costs payment. Haven knew this because this was Claims Portal litigation where the claim had been notified by the claimant's firm.

[4] *Welsh v Hole* 99 E.R. 155; (1779) 1 Doug. K.B. 238; *Gavin Edmondson Solicitors Ltd v Haven Insurance Co Ltd* [2018] UKSC 21 at [30].
[5] *Gavin Edmondson Solicitors Ltd v Haven Insurance Co Ltd* [2018] UKSC 21 at [1].
[6] *Gavin Edmondson Solicitors Ltd v Haven Insurance Co Ltd* [2018] UKSC 21 at [30].
[7] *Khans Solicitors v Chifuntwe* [2013] EWCA Civ 481; [2014] 1 W.L.R. 1185.

However, in the context of the Portal litigation the court then wanted to consider whether the claimant did have a liability to pay its solicitors' costs under their CFAs.

The Court of Appeal had considered that the CFA Lite used here (limiting the charges only to those recovered from the opponent) had defeated that obligation to pay. Ironic perhaps because the CFA Lite was the Lord Chancellor's Department's attempt in June 2003 to abrogate the indemnity principle rather that abolish it as everyone else from judges to lawyers generally agreed was now appropriate:

> "'CFA lite' is a CFA that allows solicitors and their clients to contract on the basis that the client will not be liable for the costs as the solicitor will accept those payable by the other party.
>
> An amendment to the Civil Procedure Rules 1998 also takes effect on this date to ensure that these agreements are not caught by the indemnity principle.
>
> In essence, these regulations legitimise what are commonly known as 'speccing' or Thai Trading arrangements.
>
> The only exception to this should be where damages are paid, but costs (which are ordered or deemed to be ordered) are irrecoverable for some reason.
>
> In this case, the client must have been advised if they are to be liable for costs if the order/agreement is unenforceable."[8]

Lord Briggs reflected that this solicitor and client retainer (client care letter and CFA combined) did provide for a client liability on costs:

> "… the client care letter did not destroy the basic liability of the client for Edmondson's charges expressly declared in the CFA and Law Society's standard terms. It merely limited the recourse from which Edmondson could satisfy that liability to the amount of its recoveries from the defendant … [the letter and the CFA] are shot through with clear assertions of the client's responsibility for the firm's charges in the event of a win in the litigation, which is defined to include a settlement of the claim under which there is an agreement to pay the claimant damages."[9]

So the Supreme Court disagreed with the Court of Appeal and determined the claimant was liable to his solicitors for costs and this the lien was established. It also disagreed with the first instance judge who considered that Haven could not have known of this liability because it did not know of the CFA.

Historically the obligation to disclose the existence of a CFA only arose where the receiving party was expecting to recover its additional liabilities. For post LASPO funding arrangements with no recoverable additional liabilities the notice fell away. However, Lord Briggs understood the Portal and the procedure by which the claimant's solicitor completed the Claims Notification Form and lodged this as notice of the claim. This was sufficient for the insurer to recognise the claimant's costs liability, although in at least one of the cases there was evidence of telephone conversations with express notice.

What Haven was trying to do had been witnessed in the early part of the 21st century. In 2008, Irish insurers Quinn Direct were reported to be bypassing solicitors to settle directly with their clients.[10] The quaint rule forbidding writing to a litigating party direct when it is known to have instructed solicitors is of course only a Solicitors' Code of Conduct rule and therefore not binding on insurers.

It seems a shame after so much effort to protect the solicitor's costs claims that the next few months sees fundamental changes to the costs rules that will lead to many of these sorts of claims falling into the Small Claims jurisdiction where no costs may be recovered.

[8] Law Society Litigation Update 6 June 2003.
[9] *Gavin Edmondson Solicitors Ltd v Haven Insurance Co Ltd* [2018] UKSC 21 at [40].
[10] *The Guardian*, 17 February 2008.

Practice points

- Enforceable and understandable retainers with our clients remain an important step.
- Register claims on the Portal without unreasonable delay.
- Ensure claimants understand the true nature of their contractual obligations.

Mark Harvey

Farah v Abdullahi

(QBD; Master Davison; 20 April 2018; [2018] EWHC 738 (QB))

Personal injury—procedure—road traffic accidents—compulsory insurance—untraced drivers—non-disclosure—permission to issue—service by alternative permitted method—setting aside—EU Law—Directive 2009/103—Road Traffic Act 1988 s.151—CPR r.6.15

Compulsory insurance; EU law; Insurers; Road traffic accidents; Service by alternative permitted method; Uninsured drivers; Unknown persons; Untraced drivers

In the early hours of the morning on 6 September 2014, the claimant was a pedestrian on Harlesden High Street, London, NW10. He was in a group. There was some kind of fracas or disturbance. The first defendant, Ahmed Abdullahi, driving a Ford Focus insured by the second defendant[1] drove directly at him. The claimant attempted to jump out of the way.

In seeking to evade the Ford Focus he jumped (or possibly a glancing blow from the Ford Focus propelled him) into the path of a Mercedes A Class driven by someone who has not been identified. The Mercedes was insured by the fourth defendant.[2] The claimant's head impacted the windscreen and he lay sprawled across the bonnet. The Mercedes accelerated, then braked, throwing him off the bonnet and on to the ground.

As he was lying on the ground injured, the first defendant, who had now turned his car around, drove back towards him, struck him and pushed him along the road some 33m. The claimant was effectively caught underneath the front wheels of the Ford Focus. A charge of attempted murder against the first defendant resulted in two hung juries. He was eventually convicted of dangerous driving and other motoring offences and sentenced to a term of imprisonment. The claimant suffered catastrophic injuries.

The insurers of the two vehicles concerned each sought to place responsibility for the claimant's injuries on the other. The insurer of the Ford Focus maintained that the claimant's traumatic brain injury was exclusively caused by his being thrown from the bonnet of the Mercedes. The insurer of the Mercedes maintained that the two drivers committed "concurrent torts" and that the claimant would be able to enforce all of his claim for damages against the insurer of the Ford Focus.

A Claim Form was issued and had to be served within four months. The third defendant was unidentified and was not named.[3] The fourth defendant insurer obtained a declaration from the court that it was entitled to avoid the policy for material non-disclosure. When the insurer's solicitors refused to accept service on

[1] Probus Insurance Co Europe DAC.
[2] EUI Ltd.
[3] The third defendant sued as "The person unknown driving vehicle registration number V168DLU who collided with the claimant on 6 September 2014".

behalf of the unidentified driver, the claimant applied without notice for an order under CPR r.6.15[4] that the insurer accept service of the proceedings on the unidentified driver's behalf.

That application was supported by an explanation of the effect of *Cameron v Hussain*,[5] in which it was held that there was no procedural bar to issuing proceedings against an unidentified driver. However, the application did not refer to the declaration obtained by the insurer. The master granted the application. The insurer applied to set aside the master's order. The insurer's position was that, since it had avoided the policy, it was not liable under the Road Traffic Act 1988 s.151[6] to meet the claim and the ratio in *Cameron* did not apply.

The court did not agree and held that *Cameron* did apply. Section 151 provided that insurers had to meet judgments in respect of insured third-party liabilities even if the insurer was not liable to its insured as a matter of contract, such as where the driver was a friend or partner of the insured but was not named on the policy. The effect of s.151 could be avoided by s.152(2) if the policy had been obtained by misrepresentation or failure to disclose material facts. However, s.152(2) had been held incompatible with Directive 2009/103.[7]

The court further held that in any event, the ratio in *Cameron* did not rest on the existence of a s.151 liability. If a claimant's entitlement to proceed against an unidentified driver were to depend on the insurer's s.151 liability being incontrovertibly established, that would draw an arbitrary distinction between cases where the claimant's rights rested on s.151 and those where his rights rested on the Motor Insurers Bureau's Uninsured Drivers Agreement, or art.75 of the MIB's articles of association. Both routes offered a remedy of value and formed part of an overall scheme intended to meet the UK's obligations under the Directive. Moreover, given the three-month time limit in s.152(2) in which an insurer had to commence an action for a declaration, and since a road traffic accident victim could not know if there were matters that might lead to the avoidance of the insurance covering the vehicle that injured him, neither he nor the court could be confident, at the time the claim was issued, that s.151 would be engaged.

In this case, in the light of authorities such as *Fidelidade*,[8] the claim against the unidentified driver was capable of conferring a real benefit on the claimant. Moreover, the insurer would still have to indemnify the claimant, notwithstanding its avoidance of the policy, because the MIB would be liable to satisfy any judgment in the claimant's favour, and that liability would fall to be met by the insurer pursuant to art.75. Therefore, the principles set out in *Cameron* were engaged and the claimant was prima facie entitled to proceed against the unidentified driver.[9]

The court confirmed that the court's permission does not have to be obtained before proceedings could be issued against an unnamed defendant. There is no express rule to that effect. Additionally, both CPR PD 7A 4.1(3) and CPR PD 16 2.6(a) implied that proceedings might be issued against an unnamed party in an appropriate case. Common law jurisdictions had a long tradition of permitting claims against unnamed parties where appropriate.[10] Even if permission had been required, it was implicit in the master's order that it had been given, albeit retrospectively.

Alternative service was appropriate in this case. Although the principal aim of alternative service was to bring the proceedings to the defendant's attention, which could not be achieved in the case of an unnamed defendant, not every aim of the procedural rules was attainable. There had to be flexibility in their application in order for justice to be done. Justice was better served by service on the insurer than by

[4] Service of the Claim Form by an alternative method or at an alternative place.
[5] *Cameron v Hussain* [2017] EWCA Civ 366.
[6] Duty of insurers or persons giving security to satisfy judgment against persons insured or secured against third-party risks.
[7] 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. *Fidelidade-Companhia de Seguros SA v Caisse Suisse de Compensation* (C-287/16) EU:C:2017:575 followed, *RoadPeace v Secretary of State for Transport* [2017] EWHC 2725 (Admin) applied.
[8] *Fidelidade-Companhia de Seguros SA v Caisse Suisse de Compensation* (C-287/16) EU:C:2017:575
[9] *Cameron v Hussain* [2017] EWCA Civ 366 followed.
[10] *Bloomsbury Publishing Group Plc v News Group Newspapers Ltd (Continuation of Injunction)* [2003] EWHC 1205 (Ch) applied.

dispensing with service altogether. In both this case and in *Cameron*, the insurer had a direct and relevant interest in the claim against the unknown driver and was subrogated to the defence of that claim. That was a good reason, within the meaning of r.6.15, to authorise alternative service.

The court held that the declaration obtained by the insurer as to avoidance of the policy was plainly material and should have been referred to by the claimant when applying for the order for alternative service. However, the non-disclosure was innocent and the claimant had obtained no particular advantage from it. The master's order was not set aside on the ground of non-disclosure. The application was refused.

Comment

Introduction

The judgment on this interim application deals with a number of practical, and important, points about how best to proceed with a claim against an unknown driver where the vehicle involved in the accident has been identified.

These practical points include the following:

- when can a claimant properly pursue a claim against an unidentified driver with a view to enforcement of any judgment against the insurer of the vehicle;
- when might a claimant be able to utilise the Uninsured Drivers' Agreement rather than the Untraced Drivers' Agreement (if there is no insurance cover for the vehicle);
- the procedure for issuing proceedings against an unidentified defendant;
- how to serve an unidentified defendant (at least where there is an insurer involved); and
- the proper approach to disclosure of information on applications the court is asked to rule on without a hearing.

It is worth considering these aspects of the judgment in turn.

Unknown defendant?

The decision is a reminder of the important ruling in *Cameron v Hussain*[11] and the ability of a claimant where a vehicle, though not the driver, has been identified to proceed against an unknown party.

It is surely sensible to allow the claimant to proceed against an unknown defendant when there is insurance cover in place on the vehicle and under the terms of the Road Traffic Act 1988 s.151 the insurer must indemnify (subject to a declaration under s.152) any driver of that vehicle.

This decision suggests such a claim will not be defeated even where the relevant insurer obtains a declaration under s.152, not least because even if the MIB is also involved, whilst the MIB will have to meet the claim, the insurer would ultimately have to foot the bill under art.75.

Uninsured or Untraced Drivers' Agreement?

If there is no insurance cover on the vehicle then, provided the vehicle is identified, if there is insurance cover it would seem possible to proceed under the Uninsured Drivers' Agreement rather than the Untraced Drivers' Agreement.

[11] *Cameron v Hussain* [2017] EWCA Civ 366.

How to issue?

No permission is required to issue proceedings against an unknown party as all that will be necessary, applying *Cameron*, is to establish that such proceedings are capable of conferring a real benefit on the claimant. It would seem the test for concluding otherwise is not dissimilar to the test for a defendant seeking summary judgment.

To sufficiently identify an unknown party for the purpose of the claim form and statements of case it is appropriate to use a generic description, such as that adopted in this case and in *Cameron*.

The judgment in this case confirms, for the avoidance of doubt, it is not necessary for the claimant to seek permission from the court to issue against an unidentified party.

How to serve?

There is the obvious problem for a claimant that if a defendant is unidentified, service, not least because there will be no address, will present difficulties.

There are various options for a claimant faced with this problem. The judgment suggests that whilst it would not usually be appropriate simply to dispense with service it will usually be proper, on the basis there is "good reason" to do so, for the court to make an order under Pt 6.15(1), making an order for what at one time would have been called substituted service.

Moreover, the obvious candidate as a suitable address for service will be the insurer, or potential insurer, of the motor vehicle being used by the unidentified party (or if there is no such insurance the MIB).

Part 6.15 is a very useful provision, especially when used proactively, and, as the judge recognised, likely to be regarded more sympathetically by the court than an application to dispense with service under Pt 6.16.

Procedure?

Where a party applies, at a relatively late stage, for an order of this kind it is sensible, as the claimant did, to ask that the matter be dealt with on the papers or, if that is not considered appropriate, for an immediate order to be made extending the relevant deadline pending determination of the application

Care is required, however, when applying for an order if there will be no hearing. In particular, a party must ensure that there is no material non-disclosure.

When making an application that the court is asked to deal with in the absence of a hearing it is safest to expressly confirm service is not required, perhaps by inserting "N/A" in box 9. More importantly the applicant must set out all relevant circumstances in the supporting evidence, so the court can decide whether an order without a hearing is appropriate.

If there is non-disclosure the court needs to take a pragmatic approach. There seems little point simply requiring a party to reapply, on the basis of all relevant information, as that would be contrary to the overriding objective if court concludes an order would be appropriate in any event.

Whenever making an application it is prudent to look carefully at the terms of the relevant rule. For example, Pt 6.15 requires an order setting out relevant time limits. Ensuring this information is given to the court, ideally in the form of a draft order, will help to facilitate compliance with the rule. If that is not done, however, it would seem the worst that will happen is just for there to be a further order correcting the deficit.

Practice points

In summary a number of useful practice points can be drawn from the judgment in this case.

- Where the claimant is involved in a road traffic accident with a vehicle that cannot be identified it is likely the claimant will need to rely on the Untraced Drivers' Agreement. Where the vehicle can be identified, even though the driver cannot, the claimant should be able to issue proceedings, against an unknown defendant, and rely on either the relevant policy of insurance on the vehicle (which may include reliance on the Road Traffic Act s.151) or the Uninsured Drivers' Agreement.
- There are no procedural restrictions on issuing proceedings, where this is appropriate, against an unknown defendant and the terms of the CPR can also be utilised to allow service of such proceedings.
- Care is required to ensure disclosure of all relevant information whenever making an application that the court is requested to deal with on the papers, and hence without a hearing, as well as always checking the terms of any rule relied on, so the order made does reflect the terms, and requirements, of that rule.

John McQuater

Williams v Secretary of State for Business, Energy & Industrial Strategy

(CA (Civ Div); Lewison LJ, Hamblen LJ, Coulson LJ; 20 April 2018; [2018] EWCA Civ 852)

Personal injury—civil procedure—costs—pre-action protocols—unreasonable failure to follow—fixed costs—CPR Pts 36, 44, 45 and 47

Employers' liability claims; Fixed costs; Part 36 offers; Personal injury claims; Pre-action protocols; Settlement; Unreasonable conduct

Between 1977 and 1991, the claimant was employed by the National Coal Board.[1] Between 1991 and 1993, and again between 1997 and 2008, the claimant was employed by British Tissues. The claimant was diagnosed with NIHL. On 19 December 2013, his solicitors sent a letter of claim to British Tissues. A similar letter was sent to the defendant on 6 February 2014.

At no time did the claimant seek to pursue this claim by reference to the EL/PL Protocol, and its related Claims Portal, which is the usual vehicle for NIHL claims worth less than £25,000. In their response dated 14 February 2014, the defendant's solicitors noted this and said:

> "If this claim is not submitted through the Claims Portal and the claim is ultimately settled against our Client alone, the Defendant will seek an order from the Court for fixed costs to be applied under CPR Part 45.24."

On 20 March 2014, the claimant's solicitors noted that comment but went on to say:

> "… however as we have previously advised you we are pursuing a claim against British Tissues who have confirmed that they're on cover."

The claim against British Tissues was later dropped. Before the commencement of proceedings the claim against the defendant, was settled on 23 December 2014 when the claimant accepted a CPR Pt 36 of £2,500.

[1] Whose liabilities have now devolved to the first defendant.

On the issue of recoverable costs, a judge ruled that the claim should have been brought under the Pre-Action Protocol for Low Value Personal Injury (Employer's Liability and Public Liability) Claims (the protocol). Consequently, he held that, pursuant to CPR r.45.24, the claimant was only entitled to the fixed costs and disbursements specified in that protocol. However, a second judge ruled that the first judge had been wrong in his interpretation of r.45.24, and instead ordered a provisional assessment of costs pursuant to CPR r.47.1. He indicated, however, that one result of that assessment might be that the claimant was limited to those same fixed costs.

The defendant appealed and argued that the second judge had erred in concluding that the fixed costs regime envisaged by the protocol did not directly apply in a case where the claim itself was settled before proceedings were started. It also argued that, even if r.45.24 did not apply, the conduct provisions in CPR Pt 44 applied to the case and could lead to the same result, namely that the claimant was entitled to recover only his fixed costs and disbursements in accordance with the protocol.

The Court of Appeal held that the claimant's solicitors had not used the protocol because, at the time of the claim letters, there were claims against two potential defendants. All the new-style pre-action protocols were expressly designed to apply where there was only one defendant. It was not hard to envisage the practical difficulties that would arise from any qualification to the provision, and it was inappropriate to start reading important qualifications into the plain words of the protocol.

They reaffirmed that the Pt 36 regime was a self-contained procedural code for the making, and acceptance, of settlement offers. In this case, the offer was made under Pt 36, so r.36.13(1)[2] and r.36.13(3)[3] applied. The protocol had not been used at any time, so r.36.20[4] did not apply, and would not have applied anyway because r.45.29A(1)[5] did not apply to disease claims. Therefore, the starting point under Pt 36 was that the claimant was prima facie entitled to its costs assessed in accordance with the usual rules (i.e. not by reference to fixed costs).

Rule 45.24[6] dealt with the costs consequences where the claim was either not made or not continued under the protocol, and it assumed the existence of proceedings and a judgment. It was part of a wider scheme and was consistent with the principal function of the CPR; to govern the conduct of proceedings once they had commenced. The first judge's approach involved significant rewriting of r.45.24, but the sub-rules could not be interpreted as if additional words had been added. Nor could it be said that r.45.24 should be redrafted because of what was said to be a failure by the Civil Procedure Rules Committee to follow a policy set out in various documents by the Ministry of Justice. Accordingly, the absence of proceedings and a judgment meant that r.45.24 did not apply in this case, and that route to fixed costs was not open to the defendant.

The court concluded that taken together, paras 2.1, 3.1 and the warning at para.7.59 of the protocol comprised a clear indication that, if a claim should have been started under the protocol but was not, and it was unreasonable that the claim was not so started, then by the operation of the Pt 44 conduct provisions, the claimant should be limited to the fixed costs that would have been recoverable under the protocol.[7] Accordingly, in a case not covered by r.45.24, a defendant could rely on the Pt 44 conduct provisions to argue that only the protocol fixed costs should apply. Such a submission should be raised as soon as possible in the proceedings. It would usually follow that a claimant who, on that premise, had incurred a higher level of costs because he or she had unreasonably failed to follow the protocol, would be restricted under Pt 44 to the fixed costs and disbursements encompassed by that protocol.

[2] "… where a Part 36 offer is accepted within the relevant period the claimant will be entitled to the costs of the proceedings (including their recoverable pre-action costs) up to the date on which notice of acceptance was served on the offeror."

[3] "Except where the recoverable costs are fixed by these Rules, costs under paragraphs(1) and (2) are to be assessed on the standard basis if the amount of costs is not agreed."

[4] "… This rule applies where a claim no longer continues under the RTA or EL/PL Protocol pursuant to rule 45.29A(1)."

[5] "45.29A(2) This section does not apply to a disease claim which is started under the EL/PL Protocol."

[6] Failure to comply or electing not to continue with the relevant Protocol—costs consequences.

[7] *O'Beirne v Hudson* [2010] EWCA Civ 52 applied.

The first ground of appeal was dismissed. Neither the protocol nor r.45.24 provided a mechanism which automatically applied the fixed costs regime where a claim had not been started under the protocol and/or had not been the subject of a claim and a judgment. The second ground of appeal was allowed. Where the protocol should have been used, and its non-use was unreasonable, then, pursuant to the Pt 44 conduct provisions, the claimant would usually be entitled to recover the fixed costs and disbursement permitted by the protocol.

Comment

In his 2009 Final Report,[8] Jackson LJ proposed a scheme of fixed costs for personal injury claims under £25,000. The Ministry of Justice subsequently consulted on Jackson LJ's proposals before announcing in February 2012 its intention to implement a system of fixed recoverable costs for road traffic, employers' liability and public liability cases valued at up to £25,000. This fixed costs regime was brought into effect through a series of amendments to the Civil Procedure Rules implemented in April and July 2013.

The scope of the fixed costs regime is set out in two Pre-Action Protocols, one for road traffic claims and another for both EL and PL claims. The Protocols were intended to set out a framework for the speedy and efficient resolution of relevant claims through the operation of an online Portal. The Protocols identify certain types of case that are excluded from the ambit of the fixed costs regime, such as clinical negligence cases and abuse claims. Other claims fall outside of the Protocols by virtue of a specific aspect of the claim, for example, if there are multiple defendants or if the claimant is bankrupt or a protected party.

Claims that commence under the Protocol and are dealt with through the Portal can then be removed from that procedure for a variety of reasons. These reasons include liability being in dispute or the failure of a party to comply with certain time limits. Those claims then continue outside the Portal but remain subject to fixed recoverable costs.

The first time the design and operation of this new fixed recoverable costs regime was subject to any significant review by the Court of Appeal was in *Qader v Esure Services Ltd*.[9] The case involved conjoined appeals arising out of RTA cases where the claimants were seeking damages of less than £25,000. The cases had started within the Portal but had then come out after the defendants had denied liability and raised allegations of fraud. Such cases involving fraud allegations would generally be allocated to the multi-track if court proceedings were issued.[10] The issue was whether such cases remain subject to fixed costs after they had exited the portal.

The problem arose because the drafting of CPR Pt 45.29A clearly provided that all cases which started under the RTA Protocol but then came out of the Portal would remain subject to fixed recoverable costs. This potentially meant that cases which went on to be allocated to the multi-track could still remain subject to fixed costs. The Court of Appeal concluded that this was a drafting error. This result was not what the Rule Committee had intended, nor was it in line with the Government's intentions. The court felt able to add in additional wording to the CPR so that the application of fixed costs only continued until such time as the case is allocated to the multi-track. It follows from this that low value cases which come out of the Portal and which are concluded prior to allocation remain subject to fixed costs. It also means that cases that come out of the Portal because it is apparent that the value is over £25,000 also remain subject to fixed costs until such time as court proceedings have been issues and the case had been allocated to the multi-track.

The current case sees the Court of Appeal again being asked to consider the framework of the fixed recoverable costs regime. On this occasion the issues arose in the context of a disease claim, but they are matters of general application to all fast track cases to which the Protocols might apply. A low value case

[8] "Review of Civil Litigation Costs: Final Report" December 2009.
[9] *Qader v Esure Services Ltd* [2016] EWCA Civ 1109; [2017] 1 W.L.R. 1924.
[10] See *Kearsley v Klarfeld* [2005] EWCA Civ 1510.

was pursued on behalf of a claimant outside of the Portal on the basis that the claim was considered to fall outside of the scope of the relevant Protocol. The claimant's basis for maintaining that the Protocol did not apply—more than one defendant in a disease case—turned out to be unfounded. The matter should really only ever have been pursued against one defendant. When the case settled for £2,500 without the need for court proceedings, the issue arose as to whether fixed costs applied. The claimants argued that costs should be assessed on the standard basis because the matter was dealt with outside the Protocol. The defendants argued that fixed costs should apply as the matter should properly have been dealt with under the Protocol.

In this case, issues were again raised in the Court of Appeal about the drafting of the fixed recoverable costs regime contained within the CPR. In particular, attention was drawn to the absence of any specific provision to deal with cases that settle pre-proceedings outside the Portal but which should properly have been conducted within it. There is provision at r.45.24 for costs consequences for a failure to comply or electing not to continue with the relevant Protocol, but that provision quite clearly applies only to cases where court proceedings have been issued. The Court of Appeal was unwilling to accept a drafting error or to re-write the rule so that the costs penalties set out at r.45.24 could be extended to also cover unissued cases.

However, the absence of provision within the CPR for the specific circumstances that had arisen did not prevent the Court of Appeal from finding that fixed costs should still apply. Coulson LJ considered the conduct provisions contained within CPR Pt 44 to provide a complete answer to this situation. He declared that the correct position should be that a party who unreasonably brings a claim outside of the relevant Protocol should usually be permitted to recover only those fixed costs that would have applied under that Protocol.

Practice points

- Where a case is deemed to have been unreasonably brought outside of a relevant Protocol, the claimant will usually be entitled to no more than the fixed costs that would have applied under that Protocol.
- Where a case starts in the Portal under the relevant Protocol but is then is taken out of the Portal because the value is deemed to be in excess of £25,000, fixed costs will still apply until such time as the case is allocated to the multi-track.
- Where a case is started outside of the Portal but settles for less than £25,000, the application of fixed costs is likely to turn on the reasonableness of the decision to pursue the matter outside of the Portal.

Richard Geraghty

Corstorphine[1] v Liverpool City Council

(CA (Civ Div); Sir Geoffrey Vos C, Hamblen LJ; 26 February 2018; [2018] EWCA Civ 270)

Civil procedure—personal injury claims—costs—qualified one-way costs shifting—additional claims—costs orders—CPR r.44.13, r.44.14(1), r.44.17, r.48.2, r.48.2(1)(A)(I)(AA)

LT Additional claims; Costs orders; Personal injury claims; Qualified one-way costs shifting

Jacob Corstorphine had suffered serious personal injury on an allegedly dangerous tyre swing in a playground for which the local authority was responsible. In August 2012, he entered into a conditional fee agreement ("CFA") with solicitors to cover his intended personal injury claim against the local authority, and an after the event ("ATE") insurance policy providing cover against any order for him to pay the local authority's costs. The claimant issued his claim against the local authority in November 2012.

On 1 April 2013, the QOCS regime came into effect. In October 2013, the local authority issued a Pt 20 claim against the company that had designed and manufactured the tyre swing, and the company from which the swing had been purchased. Those Pt 20 defendants were joined to the primary claim as second and third defendants. The primary and additional claims were tried together. The judge dismissed both claims.

In relation to costs, he held that there was no issue as to the costs position between the claimant and local authority because the claimant clearly had a pre-commencement funding agreement ("PCFA") within the meaning of r.48.2, which encompassed the claims brought against the second and third defendants because it related to "the matter that is the subject of the proceedings in which the costs order is to be made". He concluded that the QOCS regime was disapplied against all the defendants pursuant to CPR 44.17 and ordered the claimant to pay all the costs of the primary claim. He held that the second and third defendants' costs of the additional claim should be paid by the local authority, but that the local authority could add them to its costs of the primary claim because the claims were based upon interconnected facts and issues. The claimant appealed.

The Court of Appeal held that the purpose of the QOCS regime was to protect personal injury claimants from adverse costs orders. Originally that protection was provided by legal aid. Later it was provided by the complicated regime of CFAs and ATE policies. Now it was provided by the QOCS regime. The effect of QOCS was that orders for costs made against a claimant in a personal injury action might be enforced only to the extent that the amount did not exceed any damages and interest awarded to the claimant.[2]

A claimant who lost on liability (or discontinued) would not therefore have to pay the successful defendant's costs, although there were exceptions for claims which were fundamentally dishonest or had been struck out. Rule 44.17 was a transitional provision, which provided that QOCS did not apply where the claimant had entered into a PCFA, which was a conditional fee agreement or after the event insurance policy entered into before 1 April 2013.[3]

The court then turned to the second and third defendants' costs of primary claim. They noted that the proceedings involving claims against the additional parties were commenced after the QOCS regime came into effect. There was no CFA or ATE policy which applied to the claims against the second and third

[1] Jacob Corstorphine (a Child by his Mother and Litigation Friend Laura Ellis).
[2] CPR 44.14(1).
[3] *Catalano v Espley-Tyas Development Group Ltd* [2017] EWCA Civ 1132 followed.

defendants. So unless the QOCS regime applied, the claimant would have no protection against adverse costs orders in respect of their claims.

The essential issue concerned the meaning to be given to "the matter that is the subject of the proceedings in which the costs order is to be made" within r.48.2(1)(a)(i)(aa). They confirmed that the "matter that is the subject of the proceedings" meant the underlying dispute.[4] They pointed out that at the time of the inception of QOCS the claimant had no vested rights or expectations in respect of claims against the second or third defendants. His sole rights and expectations concerned the claim against the local authority, which alone was the subject matter of the PCFAs.

At the time of the PCFAs the "underlying dispute" was the claim against the local authority, which was the only existing claim at that time. Similarly, it alone was the subject of the retainer. In those circumstances, the correct construction of r.48.2 was that the relevant "matter" in this case was the claim for damages for personal injury against the local authority. It followed that the judge should have concluded that the QOCS regime applied to the claims made against the second and third defendants.

The consequence of concluding that the QOCS regime applied to the claims against the second and third defendants was that the claimant was entitled to QOCS protection in respect of adverse costs orders in respect of those claims. The judge had failed to take that factor into account, and his decision to add the defendants' costs of the additional claim to the local authority's costs was set aside.

The court held that it was fair, just and proportionate to vary the costs order made in favour of the local authority so as to exclude any costs of the second and third defendants which the local authority had been ordered to pay. The appeal was allowed.

Comment

Qualified One-Way Costs Shifting ("QOCS") was introduced in 2013 on the recommendation of Sir Rupert Jackson. A simple concept; namely that the successful defendant to a personal injury claim would not be able to recover their costs from the losing claimant. It was an essential part of the bargain that saw recoverable additional liabilities abolished. He set out four factors that pointed him towards recommending one-way costs shifting, the second and third being:

> "Personal injuries litigation is the paradigm instance of litigation in which the parties are in an asymmetric relationship.
>
> The principle objective of recoverable ATE insurance premiums is to protect claimants against adverse costs orders.[5]
>
> I therefore propose that claimants in personal injury cases, whether or not legally aided, be given a broadly similar degree of protection against adverse costs."

The definition and scope of QOCS was much debated in the Civil Justice Council and the Civil Procedure Rules Committee where the unfortunate phrase "Fundamental dishonesty" appeared without warning. It was inevitable of course that the insurers would not settle for what they were given and would continue to seek judicial restriction of the use of the rule. This case trespassed onto one of the "snagging list" of issues of the unintended consequences of LASPO; namely the straddling of litigation over the 1 April 2013 pre- and post-LASPO boundary.

Here the accident in 2010 resulted in a pre-LASPO CFA and the issue of proceedings against the first defendant in 2012. The CFA sought a success fee and ATE premium from the defendant as they were taken out pre-LASPO. The claimant needed the ATE policy as he remained at risk of paying the defendant's costs.

[4] *Plevin v Paragon Personal Finance Ltd* [2017] UKSC 23 followed.
[5] *Review of Civil Litigation Costs: Final Report Sir Rupert Jackson*, December 2009, 1.3 Ch.19.

Of course the litigation continued in the post LASPO era. Thus when the defendant issued Pt 20 proceedings against two other parties they became joined in 2013 to pre 2013 litigation.

Later in 2015, the claimant lost. On the face of it, the court's costs order was the historically inevitable one, namely that the claimant pay each defendant's costs whilst the first defendant could recover its outlay having joined in the others, from the claimant.

To determine the appeal the court went back to the original contractual retainer between the claimant and his lawyer, the CFA. It was clear that this only provided for litigation against the first defendant. This in turn reflected the claimant lawyer's original case plan of pursuing the first defendant alone. Therefore the underlying dispute was the claim as between the original parties and thus the "matter" described in CPR48.2 (1) (a)(i):

> "(1) A pre-commencement funding arrangement is—
> (a) in relation to proceedings other than insolvency-related proceedings, publication and privacy proceedings or a mesothelioma claim—
> (i) a funding arrangement as defined by rule 43.2(1)(k)(i) where—
> (aa) the agreement was entered into before 1 April 2013 specifically for the purposes of the provision to the person by whom the success fee is payable of advocacy or *litigation services in relation to the matter that is the subject of the proceedings* in which the costs order is to be made; or …" (emphasis added)

Hamblen LJ said:

> "… in my judgment the correct construction of CPR 48.2 is that the relevant 'matter' in the present case was the claim for damages for personal injury against the Respondent. In terms of CPR 48.2(1)(a)(i), that was the 'matter' which was the 'subject of the proceedings' and in relation to which 'advocacy or litigation services were to be provided'. It was 'specifically' for the 'purposes of the provision' of such services that the PCFA was entered into. In terms of CPR 48.2(2)(a)(ii) it was 'proceedings' in relation to that claim that the ATE policy was taken out and which are the sole subject-matter of that policy."

Thus whilst the claimant was liable to meet the first defendant's costs (for which he had the benefit of the ATE policy that he had purchased for just this event) the order that the first defendant was entitled to recover its costs incurred suing the other defendants as part of its own costs claim fell away. Hamblen LJ went on:

> "In a case in which the QOCS regime applied to the main claim but not to the third party proceedings, a successful defendant would not be able to enforce its costs order against the claimant and so the costs of the third party proceedings would lie where they fell. It would be surprising if a different result was to follow in a case such as the present where, although the QOCS regime does not apply to the claim against the defendant, it does apply to the claim against the additional parties."

Had the court been looking at a case wholly after April 2013, the first defendant could still not have looked to recover its costs against the claimant by reason of QOCS. However, the other defendants would not have been able to use QOCS to expect their liability as the Court of Appeal had previously clarified in *Wagenaar*[6] which dealt with the applicability of the QOCS regime to third parties. The Court of Appeal ruled that the QOCS provisions only applied to protect claimants who were bringing a claim which included a claim for damages for personal injuries (or the other claims specified in CPR 44.13(1)(b) and (c)) and did not apply to the whole of an action in which such a claim featured.

[6] *Wagenaar v Weekend Travel Ltd (t/a Ski Weekend)* [2014] EWCA Civ 1105; [2015] 1 W.L.R. 1968.

Practice points

- A pre 2013 CFA will not provide QOCS protection against the named or intended defendant. Parties joining personal injury litigation after 2013 will be facing a claimant with the benefit of QOCS.
- Part 20 defendants can only look to the first defendant (Pt 20 claimant) for its costs if they win.

Mark Harvey

Various Claimants v Wm Morrison Supermarket Plc

(QBD; Langstaff J; 1 December 2017; [2018] EWHC 1123 (QB))

Civil procedure—costs—issues—employers' liability—data breach—vicarious liability—misuse of private information—breach of confidence—Data Protection Act 1998

LT Costs; Issues; Proportionality

During an audit in 2012, KPMG had requested a copy of the defendant (Morrisons) payroll data. Andrew Skelton, a Senior IT Auditor in Morrisons' employment was recruited to assist with the exercise. On 18 November 2013, Skelton, aggrieved following a disciplinary procedure, downloaded the payroll data to a USB stick. On 16 December, from his work computer, Skelton attempted to use software capable of disguising the individual identity of a computer which had accessed the internet.

On 12 January 2014, from his home computer, Skelton posted a file containing the personal details of around 100,000 employees on a file sharing website. Links to the site were then posted elsewhere. On 13 March, a CD containing a copy of the information was sent anonymously to three newspapers, one of which notified Morrisons of the incident. Morrisons immediately took steps to remove the data and links to the website. Skelton was later convicted of offences under the Computer Misuse Act 1990 and the Data Protection Act 1998.

Compensation was claimed by 95,518 employees of Morrisons whose data was disclosed by the actions of Skelton on 12 January and 13 March 2014, both for breach of statutory duty[1] and at common law (the tort of misuse of private information, and equitable claim for breach of confidence). The claims were put on the basis that Morrisons had both primary liability for their own acts or omissions, and secondary (vicarious) liability for the actions of one of their employees harming his fellow workers.

Broadly viewed, there were two main aspects to the claim: direct liability, and vicarious liability. At the trial on liability Langstaff J held that the employer was vicariously liable for the actions of the employee Andrew Skelton. While the disclosure had taken place outside working hours and from the employee's personal computer, adopting the broad and evaluative approach in *Mohamud v William Morrison Supermarkets Plc*[2] there was a sufficient connection between the position in which he had been employed and his wrongful conduct to make it right for the employer to be liable. Judgment was entered for the claimants.[3]

[1] Under the Data Protection Act 1998 s.4(4).
[2] *Mohamud v Wm Morrison Supermarkets Plc* [2016] UKSC 11.
[3] *Various Claimants v Wm Morrison Supermarkets Plc* [2017] EWHC 3113 (QB).

The result of the case was that the claimants succeeded in obtaining that which they had set out to obtain: a finding of liability in their favour against Morrisons. The judge had no doubt that on the claim taken as a whole the claimants were the victors, nor was it contended otherwise.[4]

On costs the judge held that the defendant should only pay the claimants 40% of their costs. While the claimants won overall, they lost on the issues of direct liability. Although there was a degree of overlap between the direct liability and vicarious liability claims, the former occupied the bulk of the time at trial and beforehand. Significantly, the parties had identified 14 issues on which the resolution of the claim depended; 13 related to the direct liability claims, whereas only one related to the vicarious liability claim. Had the trial been confined to the claim of vicarious liability, it would have been concluded in less than half the time that it was.

The judge commented that the claimants had had the indulgence of pursuing, at unnecessary length, claims which were tenuous. The defendant should not in justice be required to pay for that. Rather, it should be subject to a costs order which reflected the fact that it succeeded in resisting those claims.

Comment

One of the innovations of the Woolf reforms was the provision[5] for issues-based and percentage costs orders. The subject case illustrates the operation of such orders. The idea underpinning the reform concerned was that the simple "loser pays" rule often failed to do justice in cases in which the victor had lost on the majority of the issues in contention. The hope was that by providing for issues-based and percentage costs orders, litigants would be more circumspect than it was felt that they often had been previously about running weak arguments. By the threat of reduced costs recovery where the victor had failed on some of the issues, the aim was to reduce the number of arguments that litigants advanced and, thereby, the cost of litigation and the burden on the courts.

Shortly after the CPR came into effect, their architect, Lord Woolf referred judicially to the provision for issues-based costs orders as representing "[t]he most significant change of emphasis of the new Rules".[6] However, it is now clear that this change in procedure instituted by the CPR yielded a whimper rather than a bang. That is because the courts have generally been reluctant to invoke the jurisdiction to make issues-based and percentage costs orders. The Court of Appeal in *English v Emery Reimbold and Strick Ltd*,[7] from which Langstaff J quoted,[8] made it plain that the jurisdiction should be exercised relatively sparingly. The reason for this conservative approach is clear, namely, that a debate regarding whether an issues-based or percentage cost order should be made simply adds to the issues in dispute and causes more costs to be incurred. The power to order costs on an issues or percentage basis threatens to be counterproductive unless exercised only when it is possible to do so relatively speedily and inexpensively. As the Court of Appeal said in *English*, "in most cases" the right conclusion will be "that an 'issues based' order ought not to be made".[9]

Furthermore, it seems doubtful that legal representatives would often modify their approach by the possibility that an issue-based or percentage costs order would be made. It seems unlikely that legal representatives would be inclined to jettison at an early stage lines of argument that may potentially yield fruit by the risk that, if they do not adopt a more selective approach, costs recovery ultimately may be diminished. It would generally require a courageous lawyer to proceed in such a way. That is partly because arguments unless raised at a relatively early stage in proceedings risk being lost forever because of the

[4] This decision subject to appeal: but neither party has asked for this determination in respect of costs to await the decision(s) on appeal.
[5] CPR 44.2, 44.4.
[6] *AEI Rediffusion Music Ltd v Phonographic Performance Ltd* [1999] 1 W.L.R. 1507 at 1522–1523.
[7] *English v Emery Reimbold and Strick Ltd* [2002] EWCA Civ 605; [2002] 1 W.L.R. 2409 at [115].
[8] *Various Claimants v Wm Morrison Supermarkets Plc* [2017] EWHC 3113 (QB); [2018] I.R.L.R. 200 at [5].
[9] *English v Emery Reimbold and Strick Ltd* [2002] EWCA Civ 605; [2002] 1 W.L.R. 2409 at [115].

more restrictive climate that the CPR encouraged in relation to applications for permission to amend statements of case.

The overarching point to take away from the foregoing analysis is that the jurisdiction to make issues-based and percentage costs orders can probably be regarded as being a largely failed experiment, along with many, if not most, of the other innovations of the CPR that were aimed at achieving a degree of proportionality between the costs of proceedings and the issues at stake. It will be in only relatively unusual cases that scope exists usefully to invoke the jurisdiction to depart from the ordinary rule as to costs, such as in *Various Claimants v Wm Morrison Supermarkets Plc*. The case is relatively atypical in that the issues regarding direct liability were readily capable of being segregated from the question of whether Morrisons was vicariously liable.

One oddity in Langstaff J's reasons is that he seemed to consider that a different approach is called for as regards issues-based and percentage costs orders depending on whether the case could be classified as a commercial case or personal injury case.[10] Although one can appreciate that the context of a case may sometimes be relevant to the question of costs, it is not at all clear that personal injury cases should be handled differently from commercial cases when it comes to issues-based or percentage costs orders. Langstaff J left this rather curious suggestion in his reasons unexplained.

One final point to make in relation to *Various Claimants v Wm Morrison Supermarkets Plc* is that it demonstrates that the distinction between issues-based costs orders and percentage costs orders is probably largely illusory in practice. Langstaff J made a percentage costs order. However, he did so in large part by reference to the number and significance of the issues on which the Claimants succeeded and failed respectively. Accordingly, although the distinction between issues-based costs orders and percentage costs orders is clear at a conceptual level, one suspect that, in reality, it largely does not exist.

Practice points

- The starting rule remains that the successful party should be entitled to the costs incurred in the proceedings. The discretion to depart from the starting rule is broad-based.
- However, the courts will deviate from the starting rule relatively rarely and there is limited scope for making issues-based costs orders. The major concern here is that invoking the jurisdiction to make such orders will be disproportionate and simply cause costs to escalate.
- Generally speaking, an issues-based costs order will be made only where the issues on which the victor lost can be neatly separated from those in relation to which he or she succeeded. Extensive overlap between the issues on which the victor won and lost (which will generally be the norm) will usually exclude the possibility of an issues-based costs order. That is because work done by the victor in relation to the issues on which he or she failed will generally need to have been incurred anyway in connection with the issues on which the victor prevailed.
- In deciding what order to make about costs, the judge will consider all of the relevant factors. Those factors include not only the issues on which the victor won and lost but also the conduct of the parties not only at the trial but in connection with preparations for it.
- The question of costs is quintessentially a matter for the first instance judge, and appellate courts will usually be loath to interfere with the judge's orders in this regard.

Dr James Goudkamp

[10] *Various Claimants v Wm Morrison Supermarkets Plc* [2017] EWHC 3113 (QB); [2018] I.R.L.R. 200 at [7].

Cumulative Index

This index has been prepared using Sweet & Maxwell's Legal Taxonomy.