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Editorial

For our final edition of the year, we have numerous articles dealing with very relevant issues in the world of personal injury. We start with a piece by Sarah Crowther QC. She argues that the treatment of the Package Travel Regulations 1992 by the courts has narrowed much of their original purpose. The European scheme has been affected by the introduction of traditional common law concepts and this has not served either consumers or the industry well.

The law relating to Vicarious Liability has been the subject of much judicial scrutiny recently. Andrew Bell notes that the pace and extent of change in the area is unusual and perhaps represents the most significant and frenetic period of development since the early foundations of the doctrine were laid during the 17th century.

Harry Trusted comments on the concerns that have grown about the side effects of the antimalarial drug Larium. Many people develop side-effects using this drug and in some cases, they have been severe. The article gives an overview of the use of the drug and considers a particular case where its use was the subject of litigation.

Our first article on quantum relates to the discount rate. Ian Gunn and Victoria Wass challenge the Government's claim that the proposal in the Civil Liability Bill preserves the 100% principle whilst departing from a "risk free" personal injury discount rate. The article explains why a retreat on the principle of a risk free discount rate is also a retreat from the much older principle of full restitution.

"What is a Personal Injury Anyway?" is Robert Weir QC's contribution focusing on three House of Lords/Supreme Court cases which have grappled with the dividing line at common law between "no injury" and "personal injury". He sets out the two-stage test which applies and makes an attempt to extract from these cases a range of points which the court will want to have in mind when seeking to determine in any future case whether a person has suffered a personal injury or not.

In her second article, Victoria Wass comments on the application of the reduction factor in *Swift v Carpenter*. This case is also discussed in the comments section. Dr Wass has been a regular contributor to the Journal regarding this particular aspect of the assessment of loss. Once more, she is able to provide a very useful view on the way in which this feature of the case has been interpreted.

The introduction of Universal Credit will impact the operation of the Compensation Recovery Unit for compensators and claimants alike. The issue of recoverability of benefits within personal injury claims does not appear to have been considered by the Government when creating the Universal Credit regime. Chris Murray considers that there may be unintended consequences within the compensatory framework. His article explains why.

David Marshall deals with the recent decision in *Budana v Leeds Teaching Hospitals NHS Trust*. The Court of Appeal was concerned with the assignment of conditional fee agreements. The article covers the situation that arises where all three parties, client, original solicitors and new solicitors, all want to preserve the rights and liabilities arising under an old conditional fee agreement.

The Serious Injury Guide has now become established as the guidance to be used when conducting high value serious injury cases. Andrew Underwood comments on the structure of the guide and also gives his own views as to the deficiencies as well as the benefits. Andrew has been involved in the construction and implementation of the guide with a number of other practitioners. The guide continues to be kept under constant review and serves as an example as to how parties in litigation should engage in order to ensure that cases are conducted in the best interests of their clients.

Our final two articles concern the impact of technology. Sucheet Amin is concerned with effective communication. His point is that clients cannot make informed decisions in order to allow the case to be progressed without such communication. He contends that unless lawyers can explain to their clients

quickly and easily any given event or situation, proper instructions cannot be received in a timely way. He sets out how technology can assist with this process.

Kurt Rowe gives an account of how technology is transforming the way in which compensators process and settle claims looking at the past, the present, and the future.

Colin Ettinger
General Editor

What's the Point of the Package Travel Regulations?

Sarah Crowther QC*

Contractual liability; EU law; Holiday claims; Package travel; Personal injury claims; Purposive drafting; Tour operators

In this article, it is argued that the treatment of the Package Travel Regulations 1992[1] by the courts has hollowed out much of their original purpose. The repeated attempts to infuse the European scheme with traditional common law concepts has not served either consumers or the industry well. The author wonders whether, if permission to appeal in *X v Kuoni*[2] is granted by the UK Supreme Court, an opportunity might arise for a stock take in respect of the interpretation of this area of the law.[3]

Background to the Package Travel Directive 1990

The origins of the Package Travel Directives start as long ago as 1981 when the EEC put forward a consumer protection policy and invited the Commission to study the tourism industry in order to identify what the effect of differences in Member States' legislation had on the consumers accessing the common market.[4] The Commission proposals, headed "A New Impetus for Consumer Protection Policy" underscored the increasingly important role in the economies of Member States played by tourism and that not only would harmonised rules produce benefits for community citizens but also would attract tourists from outside Europe who wanted guaranteed standards.

Accordingly, the preamble for the original Package Travel Directive, stated that:

> "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 performance of the contract are attributable neither to any fault of theirs nor to that of another supplier of services."

This simple formulation found legislative form in art.5(1), which required Member States to take "the necessary steps to ensure" that the organiser and/or retailer party to the contract is liable to the consumer for the proper performance of the obligations arising from the contract, irrespective of whether such obligations are to be performed by that organiser and/or retailer or by other suppliers of services without prejudice to the right of the organiser and/or retailer to pursue those other suppliers of services.

Article 5(2) specifically provided that, "with regard to the damage resulting for the consumer" that Member States were under an obligation to:

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

[2] *X v Kuoni* [2018] EWCA Civ 938; [2018] 1 W.L.R. 3777.

[3] Following the draft of this article on 31 October 2018 the Supreme Court has given Mrs X permission to appeal the order of the Court of Appeal in this case.

[4] See the preamble to the Package Travel Directive Council Directive 1990/314 on package travel, package holidays and package tours [1990] OJ L158/59.

"ensure that the organizer and/or retailer is/are liable unless such failure to perform or improper performance is attributable neither to any fault of theirs nor to that of another supplier of services, because

(i) The failure in performance is attributable to the consumer;

(ii) The failure is attributable to a third party unconnected with the services contracted for and are unforeseeable or unavoidable;

(iii) That failure is due to force majeure or due to an event which could not have been foreseen or forestalled even with all due care."

It might be thought that these provisions are intended as a comprehensive liability code so far as the parties to a package travel contract are concerned. As well as providing for a presumption of liability where the performance is not met, it sets out the specific situations in which there is a defence, the burden of proving such defence apparently being on the provider of the package contract. Certainly, that seems to have been the understanding of the Minister in his speech laying the Regulations before Parliament on the basis of what Government thought the EU was trying to achieve.[5]

The natural and ordinary meaning of these provisions is that there is an absolute requirement to "ensure" that the contract obligations are properly performed. Insofar as health and safety of the consumer using facilities and premises is concerned, that might be thought to mean that, subject to the three specific statutory defences, that where damage was caused to the consumer during services provided under the package contract, liability was effectively strict. So, where the holidaymaker cuts his foot on a broken tile at the edge of the hotel pool, unless it can be shown that one of the three defences applies, the organiser of the package is liable to his customer.

In *Committeri v Club Mediterranee SA*,[6] the High Court of England and Wales heard evidence that the French implementation of these provisions under the Code de Tourisme art.L211-16 there is strict liability for a tour operator to compensate a consumer under the French provisions which are designed to implement the same provisions of the Package Travel Directive. It is an "obligation of result" as explained by one of the French law experts giving evidence.

In other words, the Package Travel Directive 1990 should be seen as imposing an obligation on Member States to achieve an outcome, namely that consumers should receive compensation for damage where that arises out of the services sold as part of a package holiday, save where the tour operator or retailer can show that one of the exceptions applies. As one of those exceptions is an "event which could not have been foreseen or forestalled even if all due care had been exercised" this suggests a narrow exception for unusual events, in addition to defences where third parties or the claimant themselves has caused the damage.

Apart from being unfamiliar to an English common lawyer, it is suggested that there is nothing intrinsically wrong in this approach.

Implementation and interpretation of the 1990 Package Travel Directive

The suggested interpretation, however, was not the one which has come to prevail in English law. In fact, over time, the divergence from the purposive approach to consumer liability has increased to a point where little remains of the ambition of the original 1990 Package Travel Directive.

The implementation itself was essentially true to the words of the Directive, with the provisions above substantially being "copied out" into the Package Travel, Package Holidays and Package Tours Regulations 1992 reg.15(1) and (2).[7] However, the use of the unfamiliar term "improper performance" and "other party

[5] See *https://api.parliament.uk/historic-hansard/lords/1992/dec/17/package-travel-package-holidays* [accessed 17 October 2018].
[6] *Committeri v Club Mediterranee SA* [2018] EWCA Civ 1889.
[7] Package Travel, Package Holidays and Package Tours Regulations 1992 (SI 1992/3288).

to the contract" was enough of a foot in the door for common lawyers to seek to reintroduce English law concepts of contract law back into the field. It seems that the concept of "obligation of result" is sufficiently alien to the English common lawyer that it has become lost in the transposition.

Tour operator liability at common law

In order to understand how this came about, it is necessary to consider briefly the state of the common law of tour operator liability before the Package Travel Regulations 1992 came into effect.

The leading case is *Wilson v Best Travel*.[8] Although reported after the Package Travel Regulations 1992 had come into force,[9] it is a pre-Regulations decision (decided on 19 April 1991). Mr Wilson was staying in a Greek hotel, when he tripped and fell through some glass patio doors. The tour operator brochure stated that they did "keep an eye on" accommodation they featured. Mr Wilson's claim failed. Phillips J (as he then was) held that the duties arose under the contract and that the only implied duty on a tour operator was not to send customers to an hotel that no reasonable operator would include in a brochure. If a tour operator offered to check standards, then so long as he checked compliance with local safety regulations, that duty would be discharged.

The analysis was purely contractual and based exclusively on what terms might be implied. It is unsurprising that the result is couched therefore in terms of "reasonable" operators and by reference to the local standards.

The Privy Council adopted this approach in its decision of *Wong Mee Wan v Kwan Kin Travel Services Ltd*[10] where a tour group, having missed the scheduled ferry, was taken in a speedboat across a lake in China. The speedboat crashed and the claimant's daughter drowned. Whilst the boat was driven by an employee of the speedboat company and the tour operator employee was negligent in permitting him to drive, the Hong Kong Court of Appeal had held that the tour operator was not liable. The Privy Council allowed the appeal, stating that there was an implied contractual term that reasonable skill and care would be used not only in selecting the providers of services but also in carrying out the services with reasonable skill and care because of the undertakings to that effect in the brochure. It was expressly noted by the Committee that skilful drafting of the terms and conditions would avoid this liability on the part of a tour operator.

However, the Package Travel Regulations were not part of the analysis in *Wong Mee Wan* and this is an entirely common law analysis of the specific contractual terms in that case.

Hone v Going Places: A wrong turning?

In fact, the first time that the Court of Appeal got to consider the proper interpretation of the liability regime under the Package Travel Regulations 1992, was an appeal brought by a child acting through his litigation friend in person. The case itself was heard by a two Judge Court of Appeal and the value of the claim in issue was £3,000. The case was *Codd v Thomson* and it is not formally reported, so it may be that some of the arguments of the valiant litigation friend are lost to the annals of history.[11] The claimant was aged 10 and in Mallorca when he had injured his finger in trying to pull shut a lift door which had jammed. There were no instructions or emergency equipment to assist and the judge found that had the lift been in England and Wales there would have been a breach of UK safety standards. However, it did comply with Spanish legislation and the Court of Appeal held that accordingly, the County Court had been correct to dismiss the claim.

[8] *Wilson v Best Travel* [1993] 1 All E.R. 353.
[9] 1 January 1993.
[10] *Wong Mee Wan v Kwan Kin Travel Services Ltd* [1996] 1 W.L.R. 38; [1995] 4 All E.R. 745.
[11] *Codd v Thomson*, unreported, 20 October 2000. In fairness to the Court of Appeal, many of the arguments are set out and seem to have focussed on the conduct of the trial judge in an argument of apparent bias based on intervention in the cross-examination of the defendant's witness.

It was concluded that an injured person "must prove that the hotel management was negligent" and no suggestion was made that the onus was anywhere other than on the claimant. In particular, no reference seems to have been made to the words of reg.15.

Be that as it may, the case was followed in the High Court the following year in a case where a six year old boy sustained catastrophic brain damage in a swimming pool in Mallorca.[12]

The question of the Regulations was therefore not before the Court of Appeal until the case of *Hone v Going Places*.[13] The facts are memorable. The claimant's return flight from Turkey to Manchester was diverted to Istanbul due to a bomb scare on board. Passengers were disembarked by emergency chute. The claimant's misfortune was that a "large lady" was stuck at the bottom of the chute and he was unable to avoid colliding with her. The claimant's girlfriend then hit the claimant's back, causing him injury.

Mr Hone argued directly that "improper performance" was failure to meet the expectation that the carriage to and from the holiday would be safe.

The tour operator met this head on by arguing that there was no breach of contract unless there was a failure to perform the contract with reasonable skill and care.

The issue was therefore whether the Package Travel Regulations mandated the content of the liability regime, or whether it was merely a mechanism for vicarious liability of a tour operator along established common law principles.

Longmore LJ agreed with the tour operator that the "starting point" must be the contract and that it would be necessary to "imply a term as to the standard of performance"[14] and that the "normal implication" will be that a service would be rendered with reasonable skill and care. It is not clear why this should be so, other than it is the comfortable analysis for an English common lawyer. Just because a contract between the parties is a necessary pre-condition of liability under the Directive, it does not follow that the content of the contract dictates the material scope of that liability. Indeed, reg.15(5) specifically rules out contractual exclusion of liability under reg.15(1) and (2).

He quoted the decision in *Wong Mee Wan* as being a "good example of the approach of the common law" but it is not clear what support relevant to the point in issue in the judgment is derived from this—he recognises that the issue in *Wong* was completely different—it was about what the tour operator had promised the customer on the facts and did not engage reg.15 as it fell outside its terms.

Longmore LJ then grapples with reg.15(2) separately from the remainder of the provisions in reg.15. He concludes that "regulation 15(2) does not give the answer to the question 'what is improper performance'?". However, this part of the reasoning is circular, because there is nothing other than his own conclusion that the common law content is relevant in support of his point.

Later he states:

> "It is significant that the terms of both the preamble and the body of the Directive itself refer to improper performance and must, therefore, envisage that the standard of performance is to be derived from the contract and not from the terms of the Directive itself."

This, too, appears to beg the very question he is being invited to answer: surely art.5 of the Directive can be read as a comprehensive liability code without the need for any recourse to English contractual principles? In which case reference to "improper performance" is simply sui generis.

Finally, Longmore LJ derides the reference in *Hansard* to "strict liability" mentioned above, effectively saying that the minister did not understand what strict liability would mean in this context and was misusing the term when in fact she meant "vicarious liability". This argument flatters neither Parliament nor the Court of Appeal.

[12] *R. (A Child) v Iberotravel Ltd, Trading as Sunworld Ltd)* [2001] C.L.Y. 4453.
[13] *Hone v Going Places* [2001] EWCA Civ 947.
[14] *Hone v Going Places* [2001] EWCA Civ 947 at [12].

It might be thought that the entire case got off on the wrong foot in *Hone*: it does not appear to have been considered that the Warsaw Convention on the Carriage of Passengers by Air applied. It is not clear to the author why this was not a case of strict liability under the Convention in any event. At that point it might have reasonably been observed that the defendant tour operator was at liberty to incorporate Convention defences into its terms and conditions should it have wished:[15] which begs the question why would that be appropriate if the tour operator was not liable in the same way as the carrier would have been, i.e. strictly?

The local standards fallacy

However, with that decision, the door was opened by defendants to a slew of further arguments based on the supposed contractual nature of liability under the Package Travel Regulations.

A heavily used tool in the weaponry, was the "local standards" issue. Taking as a "starting point" the need for a claimant to identify an implied term of the contract, tour operators reminded courts that the standard of performance could only be the same as would be expected of a "local provider" of services and that British standards, where higher, could not be invoked.

Despite, or perhaps because of, the inherent vagueness in the term "local standards" this has become a codified shorthand whereby the courts have been persuaded that it is not permissible to exercise their own judgment about what is reasonable, simply because the events in question occurred outside the territorial boundaries of England and Wales, regardless of how common or garden the factual situation might be. Gradually, the application of the "local standards" issue has widened out from technical regulation into cases where the failure consists of conduct in the provision of services.[16]

This has had the effect of increasing the number of hurdles a claimant faced in establishing liability, together with the costs and complexity. Rather than an outcome focussed liability regime to reassure consumers and incentivise levelling up of standards in the tourism industry, the Package Travel Regulations are now simply a reflection of local practices, no matter how historic or out of step with legitimate expectations of the consumer.

This approach reached its high point in favour of the tour operators in *Lougheed v On the Beach Ltd*.[17] The facts are almost paradigm of the type of litigation about negligence in day-to-day conduct in travel cases. Mrs Lougheed slipped in a patch of water and fell down a flight of polished granite steps, sustaining a fracture dislocation of her right ankle, fracture of the left shoulder and bruising to her body. The tour operator denied liability, on the basis that Mrs Lougheed had not adduced "evidence" of "local standards".

The Court of Appeal relied solely on *Wilson v Best Travel* as authority for the proposition that the duty owed is the common law one of "reasonable skill and care", apparently unaware that this case did not concern the Package Travel Regulations at all. The court then recorded a submission from counsel for the tour operator that it had "never heretofore" been argued "in this field" that "reasonable skill and care" might be found wanting despite there being no specific evidence of a "local standard". That particular submission would surely have come as a surprise to Richards LJ who had previously specifically held in the Court of Appeal decision in *Evans v Kosmar Villa Holidays Ltd*:[18]

> "there was no evidence to support the pleaded claim of non-compliance with local safety regulations, and that way of putting the case was not pursued at trial. In my view, however, it was still open to the claimant to pursuant the claim on the other bases pleaded … and it does not seem to me that

[15] Package Travel, Package Holidays and Package Tours Regulations 1992 (SI 1992/3288) reg.15(3).

[16] See *Holden v First Choice* [2006] EWHC 3775, where the principle was invoked in a slipping case where the allegation was failure to clear up and *Gouldbourn v Balkan Holidays Ltd* [2010] EWCA Civ 372; (2010) 154(11) S.J.L.B. 30 which concerned the standard of ski tuition.

[17] *Lougheed v On the Beach ltd* [2014] EWCA Civ 1538.

[18] *Evans v Kosmar Villa Holidays Ltd* [2007] EWCA Civ 1003; [2008] 1 W.L.R. 297 at [24].

> compliance with local safety regulations is necessarily sufficient to fulfil that duty. That was evidently also the view taken in *Codd*."[19]

Poor Mrs Lougheed. Despite on the facts having sustained very significant injuries directly as a result of the failure of the hotel to take steps to address the foreseeable risks posed by swimming pool water on walking surfaces, which the hotel manager had agreed in evidence were ones which ought to be avoided and where the defendant had adduced no evidence of the steps actually taken to minimise that foreseeable risk, her claim failed because she did not call "expert" evidence of exactly what hotels in Spain actually do about this risk in practice.[20] She could consider herself doubly unlucky, because her application at a case management conference to adduce evidence of this nature failed, presumably because the defendant tour operator had not indicated to the court that it considered it necessary in order for the court to decide the case.

There is now a cottage industry of so-called experts who hold themselves out as competent and experienced across the entire range of misfortune which might befall the English tourist: from possibly defective skylights in Spain, to the co-efficient of friction of cobblestones in Santorini, the need for grip-strips on marble steps in Greece and the placement of wet floor yellow triangles in the Balearics. It is very difficult to see what these individuals are doing other than taking on the role of the court in determining the appropriate standard, especially in those cases which concern conduct rather than the fabric or design of facilities.

It is suggested that this cost and distraction could have been avoided by a more faithful approach by the courts to the interpretation of the Package Travel Directive. A reverse burden on a defendant could be discharged by it adducing evidence of compliance with a lower local standard in those cases where it was truly determinative, i.e. where the risk to the consumer was unforeseeable even if such steps had taken place.

X v Kuoni: What is part of the "holiday arrangements" and who is a "supplier"?

The claimant in *X* was raped by an employee of the hotel where she was staying as part of her package. The tour operator claimed not to be liable for the injuries on the basis that it had contracted only for "holiday arrangements" and that the circumstances in which the employee had opportunistically taken X away to a secluded part of the premises and sexually assaulted her did not amount to "holiday arrangements". This apparently turned on the fact that the employee was wearing "blue overalls" and was part of the hotel maintenance team rather than hotel security. In so finding, the majority referred to *Wong Mee Wan*, the non-package travel decision about the meaning of an individual Hong Kong travel operator's terms and conditions.

Once again, the majority sought to limit liability by reference to the notion of "obligations under the contract". Thus again, this is a further failed opportunity to recognise that the obligation under the contract is simply to provide an hotel where one is not assaulted. This is consistent with the most natural and ordinary interpretation of *Kuoni*'s deliberately open-textured term "holiday arrangements". The real question is not the content of the contract terms, but rather the application of the reg.15 liability scheme to the holiday arrangements which the claimant was in fact promised.

At [41] the majority judgment talks merely about the "intention of Parliament" and what was "reasonably intended". However, this is to ask the wrong question: the Regulations implement the Directive and the intention is that of the EU legislators and to interpret according the purpose of the EU law. At the very least, according to the French interpretation as found by the court in *Committeri*, this is not acte clair. It

[19] The judgment in *Lougheed v On the Beach ltd* [2014] EWCA Civ 1538 cites this passage, without apparently appreciating that it appears to undermine the submission which the court had received.

[20] The court goes on to talk about "quasi-expert evidence" on such topics being adduced in a way which cuts completely across CPR 35 and the author has no doubt, whose admissibility would be strongly objected to by tour operators.

is suggested that actually it is acte clair: the intention was to create a presumption of fault with limited exceptions which a tour operator might be able to prove. Indeed, in cases of deliberate assault on a consumer it might be thought that this was the only sensible interpretation.

In deciding that the meaning of "supplier" in reg.15(1) was limited to those parties which had a direct contractual relationship with the tour operator, not only did the majority completely overlook the Package Travel Directive art.5, but it drove a coach and horses through the legislative intention of the provisions. A tour through the cases mentioned in this article illustrates the point. In *Lougheed*, not only would Mrs Lougheed have had to prove what Spanish hotels generally do to clear away water from surfaces around swimming pools, she would also have had to ensure that the cleaner whose job it ought to have been would not have been sub-contracted through an agency or employed by a different company in the hotel group. In *Wong Mee Wan* itself, the claim would have failed because there was no contractual nexus between the driver of the speedboat and the travel services provider. Mr Hone's case would have been even bleaker: he would have needed to show that the airline employee who failed to warn passengers to wait until the chute was clear before disembarking had a direct contractual relationship with the tour operator.

It does not seem to have struck the Court of Appeal as remarkable that the Package Travel Regulations have been on the statute book for over 25 years and that the Court of Appeal has considered them on many occasions and not once has a defendant tour operator seen fit to argue this point. We have travelled so far away from the original intention of the Regulations, however, that memories appear to have faded and the mindset of common law has taken hold.

Conclusion

The Package Travel and Linked Travel Arrangements come into force in respect of contracts concluded after 1 July 2018. There is no reason to suppose that the new gloss on the obligation created by the new regs 15 and 16, "lack of conformity with the contract" will do anything to reduce the enthusiasm of the common lawyers for detailed textual analysis of standard booking conditions which are never individually negotiated and one suspects, hardly ever read. However, the liability provisions are at risk of becoming a dead letter if the courts fail to address the tectonic drift in interpretation away from the purpose and spirit of the Directives which they implement.

It is hoped that the Supreme Court will recognise that this is an important area of consumer law which has not previously been considered at the highest level and that the opportunity is not lost for a fundamental analysis of what the liability regime in art.5 of the 1990 Directive does.

A Successful Lariam Claim: *XYZ v The Ministry of Defence*

Harry Trusted
Outer Temple Chambers

Causation; Contributory negligence; Epilepsy; Personal injury; Pharmaceuticals; Service personnel

In recent years, concerns have grown about the side-effects of an antimalarial drug called Mefloquine[1] but commonly referred to by its trade name of Lariam which is the name we use in this article. Many people have developed side-effects after using Lariam and in some cases, these have been severe. This article gives an overview of the use of the drug and then considers a particular case with which the author was involved.

The development and use of Lariam

Lariam was developed by the US Army in collaboration with UN agencies and a pharmaceutical company.[2] It was licensed for prophylaxis and treatment of malaria in the mid-1980's. Initial reports indicated that the side effects were relatively mild and transient. Symptoms included nausea, vomiting, and dizziness.[3]

From about 1987 onwards, more serious concerns emerged about Lariam. Following publication of papers raising these issues,[4] the WHO convened an informal consultation in July 1989 which indicated that some patients who had been given Lariam suffered neuropsychiatric disturbances. The WHO published guidelines which included advice that persons operating machinery and requiring fine co-ordination should not take Lariam. In 1990, the WHO published a review of the research.[5] The study looked at 640 patients who reported adverse events following the ingestion of Lariam between 1985 and 1990. 245 of these (38%) reported neurological and psychiatric disorders which included seizures, disturbances in levels of consciousness and (unspecified) major psychiatric symptoms. Nine patients described potentially life-threatening events, five had a major psychiatric disorder, two attempted suicide and three others suffered falls after dizziness or seizure. The time of onset varied between 1 day and 17 weeks after the first prophylactic dose.

It was difficult for the researchers to be confident about the number of users of Lariam over the period of their study. This, of course, had to be established so that the incidence of side-effects could be calculated. Doing their best, the scientists concluded that about 11 per 100,000 users suffered adverse events and 5 per 100,000 suffered serious adverse events. The rate of reported major psychiatric events and seizures was between 1.3 and 1.9 per 100,000 users in the prophylactic group and between 2.4 and 4.2 per 100,000 in the therapeutic group. Allowing for the fact that there is a background risk of developing such symptoms anyway, it was calculated that there was a 4.4 fold higher number of neurological and psychiatric events in Lariam users than would be accounted for by background risk.

A paper was then published by Weinke and others in the American Society of Tropical Medicine and Hygiene 1991. The authors confirmed that patients who took Lariam suffered a heightened incidence of

[1] The full name is Mefloquine Hydrochloride. It is a carbinol antimalarial chemically related to quinine.
[2] Hoffann-La Roche.
[3] De Souza, 1983.
[4] Bernard 1987; Rouvieux 1989.
[5] WHO/MAL/91.106.

psychiatric symptoms (including seizures) and recommended that those with a pre-existing neuropsychiatric illness should not take Lariam. Similar concerns were raised by Bem and others in their 1992 paper.[6]

A study published in 1997 by the Royal Society of Tropical Medicine[7] by Croft reported the results of a double blind trial involving soldiers serving in the British Army in East Africa. The conclusion was that Lariam was no more toxic than chloroquine-proguanil (an alternative anti-malarial). Another 1997 study[8] reached a similar conclusion. Lariam was found to be highly effective in preventing malaria and the authors concluded that Lariam should be used unless contraindicated.

The British Committee on Safety of Medicines in 1996 advised British doctors to warn patients about the incidence of neuropsychiatric adverse effects with Lariam. This overturned previous advice to warn patients about common adverse effects only.

In 2010, the Malaria Journal published an article by Schlagenhauf[9] which considered the position of Lariam as a 21st century chemo-prophylactic agent. The conclusion was that Lariam was an important first line drug but that prescribers should screen medical histories and inform potential users of possible adverse events. It was emphasised that "careful prescribing and observance of contraindications are essential …". The authors stated that Lariam's role in neuropsychiatric adverse events was "… the main area of controversy in the literature regarding the tolerability of mefloquine …".

The topic remains controversial. In 2013, Ritchie published an article in the Journal of the American Academy of Psychiatric Law[10] which concluded that:

> "As evidence is increasingly clear that use of mefloquine is associated with a risk of long-term injury and harm, as well as death of self or others, so long as the drug remains licensed for use, physicians who continue to prescribe it must exercise caution to minimise potential liability. Such care includes implementing careful screening for contraindications and ensuring consideration of alternative medications …"

Support for a basis of the possible mechanisms by which Lariam causes damage was set out in the report of Dr Nevin for the International Journal for Parasitology, Drugs and Drug Resistance.[11]

However, a paper published by Terrell in the Journal of Travel Medicine 2015[12] concluded that where malaria prophylaxis is provided free of charge to employees, Lariam should be the first-choice drug if the only alternative was doxycycline. This study involved soldiers serving with the British Army in Kenya in 2012 and 2013. The authors found that there were fewer reported side effects with Lariam.

Two recent papers of relevance have been published. Bitta and others reviewed the side effects of various anti-malarials.[13] They concluded that "… Mefloquine was associated with impairments in more domains investigated than any other antimalarial drug, probably explaining why it has been commonly mentioned in previous reviews". However, none of the patients in their study reported seizures as a side effect of Lariam or any other anti-malarial drug.

Conversely, in his updating report of January 2017 published online, Dr Nevin identified a distinct neuropsychiatric syndrome associated with Lariam. He concluded that high percentages of those with this syndrome suffered from deliria, dementia and seizures. Dr Nevin concluded that:

> "The association of this specific and severe syndrome class with common symptoms that are considered prodromal, including anxiety, depression, sleep disturbance and abnormal dreams, should reinforce existing regulatory guidance that the drug should be discontinued at their onset …"

[6] Bem [1992] *Journal of Tropical Medicine and Hygiene* 95, 167–179.
[7] Croft, Royal Society of Tropical Medicine (1997) 91, 199–203.
[8] Published in the *Annals of Internal Medicine* Vol.126, 12, 963–972.
[9] Schlagenhauf [2010] *Malaria Journal* 9, 357.
[10] Ritchie [2013] *Journal of the American Academy of Psychiatric Law* 41, 224–235.
[11] Dr Nevin [2014] *International Journal for Parasitology, Drugs and Drug Resistance* 4, 118–125.
[12] Terrell [2015] *Journal of Travel Medicine* Vol.22, issue 6, 383–388.
[13] Bitta, Wellcome Open Research July 2017, 2–13.

Conclusions as to the research evidence

It is not easy for lawyers to synthesise conclusions from the published data. Side effects are comparatively rare and serious side effects are very rare. Nonetheless, since the mid-1990's, doctors in the UK have been directed to prescribe Lariam only to patients who do not have a neuropsychiatric history and only in circumstances where the patients are aware of the need to report side effects immediately. This advice is consistent with the conclusion of Dr Nevin that if a patient is showing adverse reaction, Lariam should be stopped and substituted as soon as possible.

The facts of *XYZ v Ministry of Defence*

I was instructed by the Military Claims team at Bolt Burdon Kemp to represent a young soldier who had lost his army career because of epilepsy. The epilepsy occurred after XYZ had taken Lariam. At the time of settlement, I worked with Ahmed Al-Nahhas and Hannah Swarbrick who both made a substantial contribution to our good outcome.

XYZ was sent to Kenya in 2012 when employed as a soldier by the Ministry of Defence. Before he went to Kenya, he was given Lariam and told to take one tablet per week to prevent malaria. He was not given any other advice or told to discuss any relevant past medical history with a Medical Officer.

The MOD initially denied liability on the basis that XYZ (and all the other men in his unit) had been briefed by a Medical Officer and told to discuss any issues of past history and/or side effects of Lariam after they started to take it. Evidence was then obtained to support XYZ's contention that he was not present at this briefing because he and a small number of others were attending a specialist course.

After XYZ started the Lariam, he noticed that he had broken sleep, disruptive dreams and irritability. These problems persisted after he left Kenya in April 2012. XYZ continued to take the Lariam as instructed and took the final dose at the start of May 2012, by which time he was deployed in Canada.

Whilst in Canada, XYZ suffered an epileptic fit. At the time, he did not associate this with Lariam, partly because by the time of the seizure, he was no longer taking the drug.

About two months after this first epileptic fit, XYZ suffered a second fit. He was told by his treating (army) doctors that Lariam had probably caused the epilepsy. The claimant was subsequently discharged from the army at a very young age. He had lost his army career and brought a claim in respect of that loss.

Following these events, the claimant had found work in civilian life and was earning an income broadly comparable to what he would have achieved in the army. However, he had lost prospects of promotion and a valuable state sector pension. There was, consequently, a large financial claim.

The MOD accepted that:

- They were in breach of duty because XYZ had not received the Lariam briefing which was given to others in his unit.
- That XYZ had suffered an epileptic fit in May 2012.
- That XYZ had been medically downgraded and, ultimately, discharged from the army because of epilepsy.

The points at issue between the parties were:

- Whether the Lariam had caused the epilepsy.
- Whether the second fit (August) 2012 was in fact an epileptic attack.
- Whether XYZ was contributorily negligent because he failed to read the information leaflet and/or complain of side effects when in Kenya and/or consumed alcohol when tired against medical advice.
- Whether XYZ had suffered the financial loss claimed or any such loss.

Did the Lariam cause XYZ's epilepsy?

Dr Brian Toone and Dr Michael Trimble were the respective neuropsychiatrists instructed by the claimant and defendant legal teams. They disagreed about the interpretation of the research evidence and its application to this case. In short summary:

Dr Toone noted that XYZ had not suffered from epilepsy before or since the episode(s) in question. Dr Trimble did not credit the second episode as true epilepsy and felt that the first (only) episode was induced by fatigue and alcohol; however, in Dr Toone's view, the Lariam was correctly identified by army doctors as a unique factor which had not been present on other occasions when XYZ had been tired or used alcohol without having a fit.

Dr Trimble considered that taken as a whole, the research did not identify a statistically viable link between Lariam use and epilepsy. In some studies, it appeared that the incidence of seizures was, if anything, slightly lower for Lariam patients than would be expected as a matter of background risk. Conversely, Dr Toone noted that in many studies, patients who had a relevant neuropsychiatric history (as identified here by Dr Trimble) were at increased risk of side effects from Lariam. In this context, the admission of the breach of duty supported the claim. If it was accepted that XYZ should have been properly briefed, did this not indicate that there was a danger which he could and should have avoided?

Was the second fit an epileptic attack?

This question was not critical to the claim. However, if Dr Trimble was right that only the May 2012 incident was true epilepsy, this perhaps strengthened the view that Lariam was causative (since this occurred shortly after XYZ stopped taking Lariam and he had not had fits before or since).

Contributory negligence

This was not an allegation pursued with vigour by the MOD although it was pleaded. In reality, given the acceptance that XYZ should have been briefed, the argument that he was himself to blame would have been unattractive. There was also a suggestion that even if Lariam was implicated, XYZ would not have suffered the first and/or second fit but for his own drinking while tired. In our view, if XYZ had made out the principal causation case, it is unlikely that this novel argument would have reduced his damages.

Financial losses

There were the usual disputes about quantification. A joint expert considered the likely "but for" career progression and possible earnings and pension. Since XYZ had made a success of civilian life, the majority of the claim related to the lost pension rather than earnings. There was disagreement as to the appropriate discount for uncertainty but the final settlement was substantial and reflected the acceptance of litigation risks on both sides.

Conclusions

It would be unwise to treat any case of this type as offering a "precedent". However, we respectfully offer the following observations:

- Evidence of fact about the circumstances in which Lariam was prescribed and any information given at that time will be of central importance.
- If no information (or the wrong information) was given, a claimant may be able to show (as with XYZ) that s/he probably would not have taken Lariam and/or would have reported side effects earlier.

- The research evidence about causation is complex and will require expert comment and evaluation. The prospects of success in any case will be highly fact-dependent.
- It seems likely that in many of these cases, the parties will be unable to agree. As so often with complex injury claims, a settlement meeting may be the best means of resolving matters for all concerned.

"Double, double toil and trouble": Recent Movements in Vicarious Liability

Andrew J Bell*

Employment; Vicarious liability

"The law of vicarious liability is on the move."[1]

"It has not yet come to a stop."[2]

"I am in blood / Stepped in so far that … / Returning were as tedious as go o'er."[3]

"Something wicked this way comes"

What seems an eternity ago in the law of vicarious liability, Lord Phillips suggested that the doctrine was "on the move".[4] (Albeit that, in the not-yet-so-beloved words of Lord Dyson, delivered in a highly radical decision, the scope of employment is not.[5]) Lord Reed recently wanted to "take stock of where it ha[d] got to",[6] and yet more recently has himself moved it on again.[7] The pace and extent of change in the area is unusual and perhaps represents the most significant and frenetic period of development since the early foundations of the doctrine were laid during the tenure of Lord Holt as Chief Justice of the King's Bench.[8] The aim of this piece is to summarise (and evaluate) the most recent manifestations of change.

Presumably keen to promote as much clarity as they can muster in overturning the apple cart, but surprisingly given the level of upset involved, the Justices of the Supreme Court have given more or less unanimous decisions on vicarious liability. In the three decisions to be discussed here only one dissent was delivered on the vicarious liability issues and collectively those cases have produced just five opinions. For this reason, we are left with relatively little material with which to unpick (and attack) the developing lines of argument.

The changes are nevertheless radical, the results in the cases at times far from obvious, and numerous emerging ideas subject to important criticism. In light of this, there is little to be done but attempt to outline the recent case law, pinpointing what seem to be guiding features for future development and noting the principles, policies and ideas which are its driving forces. The latter include, in particular, enterprise liability (especially in the context of modern commercial disintegration and the gig economy), compensation and insurance, and distributive and social policy ideas. Additionally, an overarching, remedial sense of the liability's purpose seems to be slowly emerging, apparently starting to flip the issue from a prospective question of where liability should fall in respect of particular relational matrixes to a retrospective question of who is going to pay for harm caused.

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[1] *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 A.C. 1 at [19] (Lord Phillips).

[2] *Cox v Ministry of Justice* [2016] UKSC 10; [2016] A.C. 660 at [1] (Lord Reed).

[3] W. Shakespeare, *Macbeth*, III.4, lines 142–144.

[4] *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 A.C. 1 at [19] (Lord Phillips).

[5] *Mohamud v Wm Morrison Supermarkets Plc* [2016] UKSC 11; [2016] A.C. 677 at [56].

[6] *Cox v Ministry of Justice* [2016] UKSC 10; [2016] A.C. 660 at [1] (Lord Reed).

[7] *Armes v Nottinghamshire CC* [2017] UKSC 60; [2018] A.C. 355; [2017] 3 W.L.R. 1000.

[8] 1689–1710. On this early case law, viewed as a canonical set, see e.g. G. Schwartz, "The Hidden and Fundamental Issue of Employer Vicarious Liability" (1996) 69 Southern California L. Rev. 1739, 1746. On the history generally, see, e.g. D. Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford, 1999), 69f., 181ff., 198.

The focus below will be on the Supreme Court decisions of the past three years, with further cases introduced to supplement that outline. Further litigation in the area will soon follow, however, and caution is called for.

"Servants, which do but what they should": Relevant relationships

In the early history of the doctrine of vicarious liability, the question of the relationship between the defendant and the servant actor was often the least discussed aspect of the emerging doctrine.[9] Leaving aside agency cases, vicarious liability came to be a doctrine focused squarely on employment. This is of course now subject to change.

There is no reason to imagine that vicarious liability should of conceptual necessity be limited to employment relationships in any strict sense, and elsewhere the equivalent concept is certainly not.[10] Though in England there were previous instances (e.g. employees of one company lent to another[11]) where the law had already moved beyond strict employment, the key authority for a general expansion beyond that relationship came in *Various Claimants v Catholic Child Welfare Society* ("*CCWS*").[12] Here it was recognised by the Supreme Court that the aspects of the employment relationship which generally justify the imposition of this strict liability can equally be found in relationships beyond employment. With a distinct enterprise liability bent, Lord Phillips outlined five key aspects which can now be analysed to identify a relationship "akin to employment" to which vicarious liability will attach. These were that:

- an employer is more likely to have the means to compensate and can be expected to have insured;
- the employee's activity will be undertaken on the employer's behalf;
- the employee's activity will be part of the employer's enterprise;
- the employer will have created the risk of the tort; and
- to a greater or lesser extent, the employee will be under the control of the employer.[13]

With that the stage is set for the new cases.

Cox

The Supreme Court first came to revisit the relationship question in *Cox v Ministry of Justice*.[14] A catering manager at HMP Swansea was injured whilst supervising a group of prisoners doing paid work in the prison kitchens in unloading a food delivery; one among the group was negligent and dropped a heavy bag on her back. The claimant argued successfully that the Ministry of Justice should be held vicariously liable for the actions of that prisoner on the basis of a relationship akin to employment. In finding liability, the Supreme Court took up the five-point framework from *CCWS*, thereby confirming its application beyond the child abuse context and the particularly strong impetus for remedy felt there.

[9] See, e.g. C. Viner, *A General Abridgment of Law and Equity* vol.15, 1st edn (Aldershot, 1741), 308ff. (s.v. "Master and Servant", where but one short section deals with "Who shall be said a Master to be chargeable". cf. the introduction to the relevant title in H. Gwillim (ed), *A New Abridgment of the Law by Matthew Bacon* vol.4, 5th edn (London, 1798), 555.

[10] France understands a broad liability for auxiliaries encompassing the specific master/servant relationship expressed in the Civil Code: O. Moréteau, "Basic Questions of Tort Law from a French Perspective" in H. Koziol (ed), *Basic Questions of Tort Law from a Comparative Perspective* (Vienna, 2015), 1/179f, 181. Austria and Germany focus broadly on use of another to perform a contractual obligation (Austrian Civil Code§1313a; German Civil Code §278) or an (extra-contractual) task (§1315; §831 respectively): H. Koziol, *Basic Questions of Tort Law from a Germanic Perspective* (Vienna, 2012), 6/102ff., 6/115ff.

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

[12] *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 A.C. 1. The move built in particular on the Court of Appeal decision in *E v English Province of Our Lady of Charity* [2012] EWCA Civ 938; [2013] Q.B. 722.

[13] *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 A.C. 1 at [35].

[14] *Cox v Ministry of Justice* [2016] UKSC 10; [2016] A.C. 660.

However, Lord Reed's judgment, unanimously supported, adapted Lord Phillip's framework somewhat. Whilst the five factors were all relevant in describing relationships to which vicarious liability might fairly and justly attach, the five were not equal. The first and fifth—the defendant's means and her opportunity to insure; the defendant's control over the claimant—were said generally not to be of independent relevance.[15] Focusing on the other three, his Lordship was satisfied that liability should attach—the activity was undertaken on the "employer's" behalf, as part of the activity of the "employer", and the "employer" created the risk of the tort.[16]

In particular, despite the rehabilitative, non-commercial purposes of the prisoner work scheme, the activity was still part of the prison's enterprise and for its benefit insofar as the kitchen work facilitated the running of the prison (the same being true for gardening and laundry work—it is equally part of the concept of contributing to the costs of their own upkeep as prisoners).[17] The element of compulsion involved for the prison, and the tiny incentive payments to the prisoner workers, did not undermine the analogy to employment. The element of compulsion in the duty to provide work was not sufficiently extensive and true wages are not essential, as demonstrated by *CCWS*;[18] equally the compulsion for the prisoners to serve their sentences in the prison and to undertake work for nominal pay made the relationship closer than employment.[19] (Lord Reed did not, though, expressly go so far as McCombe LJ in the Court of Appeal, who had suggested that the fact that prison and prisoner were bound involuntarily (as compared to the voluntary oath of the Brothers in *CCWS*) meant the relationship was even closer than that in *CCWS*[20]).

In any event, *Cox* thus confirmed the expansionary potential of *CCWS*—we are seeing a broad extension in the field of relationships to which liability can attach, not a niche solution to the particular social problem of child abuse (to sit alongside other, potentially niche extensions, such as the borrowed employee example already mentioned).[21] At the same time, it streamlined the enquiry required to reach a conclusion that a relevant relationship exists—unless there is some special reason to give separate weight to control and means, we can happily focus on the core features of risk creation, undertaking on behalf of the "employer" and integration in the activity of the "employer". This core corresponds more closely with the enterprise concept said to underpin the doctrine,[22] and the court emphasised ideas consistent with that conceptual foundation accordingly.[23]

Equally significant is the fact that reference is made to the changing nature of working relationships in the modern economy and the importance of preserving the accepted level of protection for victims where any outmoded, formalised understanding of relationships may lead to gaps given the very diverse structuring of modern working.[24] Prison labour is admittedly not a particularly good example or representative for commercial disintegration or the gig economy;[25] we should always think equally about other (increasingly popular) working models, including, e.g. peer-to-peer services/shared economy activities (think Uber, Lyft, Foodora), or even just the now-ubiquitous unpaid internship. Reacting to these phenomena and the potential for companies to thereby escape regulatory responsibilities or unfairly divest themselves of their operations' risks seems entirely justified and the courts have taken a serviceable opportunity to do so. The legal wrangling over employment status in the gig economy is of course only just beginning.

[15] *Cox v Ministry of Justice* [2016] UKSC 10; [2016] A.C. 660 at [20]f.
[16] *Cox v Ministry of Justice* [2016] UKSC 10; [2016] A.C. 660 at [32].
[17] *Cox v Ministry of Justice* [2016] UKSC 10; [2016] A.C. 660 at [33]f.
[18] *Cox v Ministry of Justice* [2016] UKSC 10; [2016] A.C. 660 at [36]–[38].
[19] *Cox v Ministry of Justice* [2016] UKSC 10; [2016] A.C. 660 at [35].
[20] *Cox v Ministry of Justice* [2014] EWCA Civ 132 at [47]; [2015] Q.B. 107.
[21] See explicitly *Cox v Ministry of Justice* [2016] UKSC 10; [2016] A.C. 660 at [29].
[22] cf. J. Plunkett, "Taking stock of vicarious liability" (2016) 132 L.Q.R. 556, 559, recognising the court as refining the policy focus along enterprise lines in this way, but critical (559ff.) of a failure to confront conceptual limitations of and discrepancies related to enterprise, particularly the requirement of wrongdoing by the servant and applicability to independent contractors (on the latter, see also below).
[23] See especially *Cox v Ministry of Justice* [2016] UKSC 10; [2016] A.C. 660 at [23] and [29].
[24] See especially *Cox v Ministry of Justice* [2016] UKSC 10; [2016] A.C. 660 at [29].
[25] See also A. J. Bell, "Vicarious liability: quasi-employment and close connection" (2016) 32 P.N. 153, 155; M. Lunney, D. Nolan and K. Oliphant, *Tort Law: Text and Materials*, 6th edn (Oxford, 2017), 849 with further references.

Armes

Following the *Cox* decision, the law relating to relevant relationships could be said to be "broadly settled", even if the application in particular situations remained unclear.[26] In October 2017, however, the court returned to the relationship question when asked to rule on the vicarious liability of a local authority for the acts of foster parents.

The proposition represented, of course, another important expansion—both *CCWS* and *Cox* involved straightforward forms of work (teacher, cook), which but for the engagement (under an unusual framework) of the particular workers involved could have been conducted much the same by a standard employee if teaching/running the prison were to continue. Fostering, however, is very different from employed roles which might be said to approximate it most closely—various forms of childcare professional—insofar as the intent is to provide, so far as possible, a "normal family life" rather than simpler care services.[27] Though incredibly demanding and important work, (general, non-foster) "parenting" is not an *employment* task and any alternative child placement would have been a very different creature. The implications of liability here for stretched local authority services in an age of austerity are also clearly significant,[28] as are the implications for parenting and parenting-like relationships more broadly.[29] Equally, with the fight raging to uncover, comprehend and respond to sexual abuse scandals which continue to emerge (and have brought several crucial innovations to the law of vicarious liability), compensatory impulses and distributive justice concerns are prominent.

The facts of the case were simple—the claimant was placed with foster parents in the 1980s and at two separate placements she was abused; the claimant argued, inter alia, that the authority was vicariously liable for those wrongs.[30] Applying the five *CCWS* factors, Lord Reed found that liability could indeed attach (with only Lord Hughes dissenting): the authority had created the risk of abuse by making the placement, the foster parents and authority cooperated in undertaking the activities, and the activity was for the authority's benefit.[31] The foster parents are also much less likely to have the means or insurance required to compensate and the authority retained key control through its power to select, inspect and supervise the foster parents and to remove the child.[32]

Perhaps the central doctrinal focus in the case was the question of integration; whether the foster parents' work was part of the activities of the local authority. This one aspect was vital to the position taken by Lords Reed and Hughes. For the latter, the activities involved in fostering the child split quite clearly between deciding where the child should live/be cared for and actually caring for the child, which made the foster parents more like independent contractors for whom the authority could not be liable.[33] For Lord Reed (and the rest of the majority), there is a "cooperation" between the parents and authority where the lines between their activities are blurred, such that in the circumstances liability could attach. Both of those positions can be thought problematic. The first focuses too much on where tasks lie, rather than on the relationship between the tortfeasors and the authority, which approach mirrors the (unanimous) analysis of non-delegable duties ("NDDs") in the case[34] but departs from the true, more relational question for vicarious liability. The second contradicts the NDD analysis (by suggesting the lines between the tasks

[26] See *Kafagi v JBW Group* [2018] EWCA Civ 1157 at [19] recounting the February 2017 permission to appeal decision of Floyd LJ.

[27] Some comparison is made in *Armes v Nottinghamshire CC* [2017] UKSC 60; [2018] A.C. 355; [2017] 3 W.L.R. 1000 at [65]—to example cases with "parental" figures of different kinds, including the boarding school warden in *Lister v Hesley Hall* [2001] UKHL 22; [2002] 1 A.C. 215 and a "father figure" children's home worker in the seminal Canadian case *Bazley v Curry* [1999] 2 S.C.R. 534. Foster parenting remains a different sort of role from these, however.

[28] See *Armes v Nottinghamshire CC* [2017] UKSC 60; [2018] A.C. 355; [2017] 3 W.L.R. 1000 at [68]ff. (Lord Reed).

[29] See, e.g. Lord Hughes' dissent *Armes v Nottinghamshire CC* [2017] UKSC 60; [2018] A.C. 355; [2017] 3 W.L.R. 1000 at [80]ff. and Lord Reed's counterarguments, [71]ff.

[30] See the facts *Armes v Nottinghamshire CC* [2017] UKSC 60; [2018] A.C. 355; [2017] 3 W.L.R. 1000 at [1]ff.

[31] *Armes v Nottinghamshire CC* [2017] UKSC 60; [2018] A.C. 355; [2017] 3 W.L.R. 1000 at [59]ff.

[32] *Armes v Nottinghamshire CC* [2017] UKSC 60; [2018] A.C. 355; [2017] 3 W.L.R. 1000 at [62]f., [64]ff.

[33] *Armes v Nottinghamshire CC* [2017] UKSC 60; [2018] A.C. 355; [2017] 3 W.L.R. 1000 at [76]ff., [88].

[34] cf. below.

are blurred, where for NDDs they were said to divide clearly[35]) and relies on a very vague and broad idea in "cooperation" (there are many ways in which subordinates cooperate with principals, which need not designate any kind of integration).

What might in fact seem more important is that the status of "foster parent" cannot exist without the statutory scheme (including all of its controls, approvals etc)—to that extent the position of the foster parents is of necessity entirely derivative of/parasitic upon the authority or agency who does approve them under that scheme. This contrasts with independent contractors in the usual sense—a contractor is a contractor before, after and regardless of engagement by any particular principal. Equally, considering the issue from this angle can help illuminate borderline areas of concern to their Lordships—where a child is placed back with her parents, for example, their care would not be entirely derivative of the authority, but recall the independent parental basis for that position. There would naturally be a boundary to be traced with "connected persons"; the question would be the dependence of their basis for care of the child.[36]

Turning to control, the Court of Appeal decision had been questioned as standing in conflict with the approach to control given in *Cox*,[37] insofar as control was pivotal in finding no liability.[38] The lower court did, though, give mostly only indirect relevance to control as bolstering a point essentially as to integration.[39] The Supreme Court, as just discussed, took an unusual line on integration which avoided such reliance, but then equally decided that the case was one where control could be considered independently anyway, with Lord Reed stressing the extent of the control which the authority had. Despite thus confirming that in some circumstances control will have more weight than in *Cox*, his Lordship did not explicitly detail what it was in *Armes* that warranted this.

Remaining with the two factors not generally relevant, we see that means and insurance was equally, but without clarification as to why, considered to warrant being accorded independent treatment and significance in this case, though it is not in most cases. A bigger problem (than this uncertainty of when, and if so why, means acquires this significance in this kind of case) is that Lord Reed's arguments as to means and insurance are based on retrospective considerations; his Lordship thus treats vicarious liability not as a prospective analysis of where responsibility should lie for particular enterprises, but as a gap-filling, palm tree remedial creature. Vicarious liability is namely said to have significance only where the principal tortfeasor *is* missing/not worth suing and the person to be made liable *is able* to compensate; "[t]hose *conditions* are satisfied in the present context".[40]

Whether after the wrongdoing the defendant has sufficient means, though, is surely beside the point. In the words of Lord Reed himself in *Cox*:

> "The mere possession of wealth is not in itself any ground for imposing liability. As for insurance, employers insure themselves because they are liable; they are not liable because they have insured themselves."[41]

The true question must surely be who in relation to the undertaking was in the best position to prepare for and guard against potential harm/liability (retaining the means to cover a liability personally is of course a form of self-insurance). This is consistent with Lord Phillips' framing in *CCWS*: "the employer

[35] cf. below.

[36] cf. Lord Hughes, *Armes v Nottinghamshire CC* [2017] UKSC 60; [2018] A.C. 355; [2017] 3 W.L.R. 1000 at [83]f.

[37] See, e.g. M. Lunney, D. Nolan and K. Oliphant, *Tort Law: Text and Materials*, 6th edn (Oxford, 2017), 850; J. Plunkett, "Taking stock of vicarious liability" (2016) 132 L.Q.R. 556, 560.

[38] See *NA v Nottinghamshire CC* [2015] EWCA Civ 1139; [2016] Q.B. 739.

[39] *NA v Nottinghamshire CC* [2015] EWCA Civ 1139; [2016] Q.B. 739 at [15] (Tomlinson LJ), cf. S. Tofaris, "Vicarious Liability and Non-Delegable Duty for Child Abuse in Foster Care: A Step Too Far?" (2016) 79 M.L.R. 884, 888f.

[40] *Armes v Nottinghamshire CC* [2017] UKSC 60; [2018] A.C. 355; [2017] 3 W.L.R. 1000 at [63]. Emphasis added. cf. *Various Claimants v Barclays Bank* [2018] EWCA Civ 1670 at [50] (Irwin LJ); [2018] I.R.L.R. 947, asserting that the question of means must be considered at the time of trial, rather than the time of the tort. There is no proper explanation provided there for this, only assertions that the latter option would be impractical, cause further litigation and could cause injustice.

[41] *Cox v Ministry of Justice* [2016] UKSC 10; [2016] A.C. 660 at [20]. cf. also, to the extent that emphasis is placed on the low if any weight to be placed on the consideration, Irwin LJ in *Various Claimants v Barclays Bank* [2018] EWCA Civ 1670 at [49].

is more likely to have the means to compensate … and can be *expected to have* insured …";[42] the issue is surely not concretely whether the "employer" *has* money or insurance, but whether the "employer" in this relational matrix was generally the better placed *to have* money and insurance to meet responsibilities related to the activity. Compensatory policy aims certainly stand in the background here, but there is an important red line: though we might all want to see innocent, abused claimants compensated so as to secure some semblance of justice, having money is still not a reason for a defendant to be liable; being the party in the best position to manage and secure against an activity's risks is.

Turning to one of the more central features of the relationship under the *Cox* understanding, meanwhile, another difficulty is raised in terms of the identification of risk and benefit. The only advantage or benefit of the fostering scheme as discussed by his Lordship was the public benefit in the care of the children concerned. This is different in form from the more focused, practical "mission to give Christian teaching" identified as the benefit in *CCWS*.[43] In *Cox*, similarly, Lord Reed himself focused on the "direct and immediate benefit to the prison service itself"[44] in operating the prison kitchens, and thus the prison, through the prisoner workers. There was no discussion there, for example, of public benefit in having functioning, cost-effective prisons and/or rehabilitation programmes. By contrast, the public benefit discussed in *Armes* is not a benefit accruing to the authority itself, on which the risk is now placed, leading to a disjuncture in the economic, enterprise argument. In reality, the benefit to the authority is in fulfilling its duty to operate the child welfare system and have the relevant children cared for. It is in securing that benefit that the risk of abuse by the "subordinate" should be considered to be created if liability is understood to serve to prevent externalities arising and make enterprises bear the costs of their activities.

Overall, it may be said that *Armes* thus entrenches the 3+2-point test for a relationship akin to employment. However, the precise content of some of those factors and what weight they bear in individual cases will need further refinement and clarification as the law progresses. In general, it seems that distributive and compensatory concerns are in the ascendant in practice, though the true relevance of the various relationship features must be kept in mind.

Beyond the Supreme Court

The Supreme Court has thus quite consistently found liability in new contexts, but reassuring proof that the expansion experienced here will not be endless can be found in the recent *Kafagi* decision in the Court of Appeal,[45] handed down in the light of all three of the Supreme Court judgments. In this case, an unsuccessful attempt was made to hold the defendant judicial services company liable for the tortious actions of two bailiffs. In the lower courts (sitting after *CCWS* but before *Cox*), the pivotal question had at times been framed simply as whether or not the tortfeasors were employees (though at limited points mention was made of "akin to employment" status).[46] The grounds of appeal maintained that whether the tortfeasors were more like employees or independent contractors did not resolve the liability question and that the lower courts had erred in not also applying the *CCWS* criteria. Singh LJ dismissed the appeal simply by answering (in the negative) whether the relationship was in any event akin to employment. Particularly important facts included that the first bailiff ran his own company, could turn down the defendant's work and was under no even "vestigial" control (indeed, he independently engaged the second bailiff), himself provided a personal bond of £10,000 under the regulatory framework for his work, and maintained his own insurance.[47] As an application of the criteria, the preponderance of issues related to control and means here is of course curious and problematic given *Cox*; clearly it matters that the tortfeasors

[42] *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 A.C. 1 at [35]. Emphasis added.
[43] *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 A.C. 1 at [56] and [59].
[44] *Cox v Ministry of Justice* [2016] UKSC 10; [2016] A.C. 660 at [34].
[45] *Kafagi v JBW Group* [2018] EWCA Civ 1157.
[46] *Kafagi v JBW Group* [2018] EWCA Civ 1157 at [7]ff., [10]ff.
[47] *Kafagi v JBW Group* [2018] EWCA Civ 1157 at [49]ff. Irwin and Underhill LJJ simply offer agreement.

could be held liable and were secured against the liability, but as with *Armes* there is a risk of straying from the proper channelling of such arguments into an enterprise-driven relational test.

Unfortunately, too, answering the akin to employment question did not provide guidance on the underlying problem of how to approach the relationship enquiry from the start, how to structure the investigation into whether the primary tortfeasor is an employee, akin to an employee, and/or an independent contractor.[48] In the light of insistence (including in the Supreme Court) that the status of independent contractor and a division between service and services contracts remain in place,[49] it is hard to see how the three ideas fit together and approaches can clearly differ. In *Armes*, for example, independence/integration was pivotal: Lord Hughes treats the categories as simple alternatives and asks whether the foster parents were more like employees, like workers akin to employees, or like independent contractors;[50] Lord Reed instead simply turns to the *CCWS*/*Cox* criteria.[51] Their Lordships unsurprisingly come to different conclusions. Analysing the Court of Appeal decision in *Armes*, meanwhile, Tofaris has argued that an inconclusive answer on whether the foster parents are independent contractors must lead to a finding that they are not akin to employees; thus, like Lord Hughes, placing the independent contractor enquiry front and centre.[52]

The question here is thus not simply what the most efficient or elegant way to pose the relationship question is; behind *Kafagi* is a fundamental decision: Does the retention of the concept of an independent contractor for whom no vicarious liability attaches mean that the akin to employment test is limited to extending liability to unusual/irregular relationships, or is it retained only in a reduced extent insofar as certain relationships must now be ceded as akin to employment (effectively reducing "independent contractors" to a partial residual category)? In short, if the position of an independent contractor (as traditionally understood) can now be viewed as akin to employment, how is this resolved?

It is here that the new Court of Appeal decision *Various Claimants v Barclays Bank*[53] enters the fray, affirming in short order a High Court judgment of Davies J regarded by some as demonstrating that "the wall around vicarious liability for independent contractors has been breached".[54] In a situation understood to be one where traditionally the tortfeasor would straightforwardly have been an independent contractor, the court did allow a claim to proceed based on a relationship akin to employment, recognising the akin to employment concept as providing a liability penumbra around the edges of strict employment, which has priority in staking its claim over "independent contractor" status. The new concept does not simply sweep up cases in the grey area between the two traditional categories.

Again the facts of the case are relatively simple. As part of its recruitment process, Barclays required prospective employees to undergo a medical examination with a Dr Bates. The latter was paid a set fee for each examination, conducted those examinations on his own premises, and equally worked for multiple other principals during the relevant period. He entered the results of the examination on a Barclays-headed medical report form. During the examinations, he was alleged to have sexually assaulted 126 victims who sought damages from Barclays on the basis of vicarious liability.[55]

[48] A fact acknowledged by Irwin LJ in *Various Claimants v Barclays Bank* [2018] EWCA Civ 1670 at [47], who equally (at [43]) acknowledged the absence of any other authority on overlap between the independent contractor and akin to employee statuses.

[49] See e.g. *Cox v Ministry of Justice* [2016] UKSC 10; [2016] A.C. 660 at [29]: not where "entirely attributable to the conduct of a recognisably independent business" (Lord Reed); *Kafagi v JBW Group* [2018] EWCA Civ 1157 at [21] (Singh LJ). See also below.

[50] Concluding that they "look … a great deal more like independent contractors …"; see *Armes v Nottinghamshire CC* [2017] UKSC 60; [2018] A.C. 355; [2017] 3 W.L.R. 1000 at [76].

[51] *Kafagi v JBW Group* [2018] EWCA Civ 1157 at [52]ff.

[52] S. Tofaris, "Vicarious Liability and Non-Delegable Duty for Child Abuse in Foster Care: A Step Too Far?" (2016) 79 M.L.R. 884, 888f.

[53] *Kafagi v JBW Group* [2018] EWCA Civ 1157.

[54] A. Silink, "Vicarious liability of a bank for the acts of a contracted doctor" (2018) 34 P.N. 46, 46. J. Plunkett, "Taking stock of vicarious liability" (2016) 132 L.Q.R. 556, 559f. suggested that this might already have been conceptually necessitated by the side-lining of control in *Cox v Ministry of Justice* [2016] UKSC 10; [2016] A.C. 660; control's resurgence in *Armes v Nottinghamshire CC* [2017] UKSC 60; [2018] A.C. 355, *Kafagi v JBW Group* [2018] EWCA Civ 1157 and *Various Claimants v Barclays Bank* [2018] EWCA Civ 1670 complicates that argument. P. Giliker, "Vicarious liability in the UK Supreme Court" (2016) 7 *UK Supreme Court Yearbook* 152, 162f. likewise proceeds on an understanding that "independent contractors" are swept up following *Cox*.

[55] *Various Claimants v Barclays Bank* [2018] EWCA Civ 1670 at [1]ff.

In the High Court, Davies J had maintained that the "developments of the law in respect of vicarious liability have not affected the legal concept of the independent contractor" but "[w]hat the developments do require is a scrutiny of the relationship between the defendant and the tortfeasor".[56] Accordingly, she had framed the relationship question as follows: "Is the relevant relationship one of employment or 'akin to employment'?" and left the independent contractor issue entirely aside.[57] This approach was affirmed by the Court of Appeal (the issue was framed at times in terms of the (in)validity of an "independent contractor test" or "independent contractor defence"[58]), the Supreme Court jurisprudence was said to require an answer (only) to the question of whether the relationship is of or akin to employment.[59] Irwin LJ explicitly noted that vicarious liability can thus be established for independent contractors and linked this to changes in modern service and services structures; again, therefore, a social policy concern related to maintaining appropriate protections in a world where novel or flexible structures increasingly undermine the law's use of more traditional, formal categories can be seen to drive radical expansion in vicarious liability.[60] It might also be useful here to compare recent case law related to the potential responsibility of parent companies in negligence to employees of subsidiaries. Here, too, old formal boundaries in corporate structures are being sidelined and this can be seen as a means to attempt to ensure good regulatory standards in modern commerce.[61] In a globalised and in an increasingly digitised shared economy, companies might otherwise exploit formal distance in their relationships to avoid responsibility for the substantive risks of their activities.[62]

Given these developments, the extent of vicarious liability's expansion in the realm of work relationships would now seem to remain unclear mostly in terms of the test's concrete application on the facts. The akin to employment test of the relationship seems to have settled and, with the seeming collapse of the exclusion of independent contractors, the path for that expansion might look to have been cleared. Given that the latter idea is radical and stands in a degree of tension with expressions in the Supreme Court, however, this should not be stressed too dogmatically until yet higher authority emerges.

"The rest is labour which is not used for you": Scope of employment

With that, we move to the second core element of a vicarious liability claim: proof that the acts complained of were committed within the scope of the employment or employment-like relationship identified at the first stage. Here too, we did have relatively recent authority which presented a major reform of the test to be used, and again triggered by a sexual abuse scandal. *Lister v Hesley Hall*[63] delivered us the test of close connection: if the tort of the employee exhibits a close connection to the role in which she is employed, then it falls within the scope of employment.

Mohamud

At the same time as hearing the appeal in *Cox*, the Supreme Court took an appeal on this test, the case of *Mohamud v Wm Morrison Supermarkets*.[64] The facts were these: The victim entered the defendant's petrol

[56] *Various Claimants v Barclays Bank* [2017] EWHC 1929 (QB) at [43].
[57] *Various Claimants v Barclays Bank* [2017] EWHC 1929 (QB) at [44].
[58] See, e.g. *Various Claimants v Barclays Bank* [2018] EWCA Civ 1670 at [32] and [34].
[59] *Various Claimants v Barclays Bank* [2018] EWCA Civ 1670 at [44]. The court also affirmed the High Court decision on the application of the five factors. In the course of doing so, Irwin LJ described control as "perhaps the most critical factor"; as with *Kafagi v JBW Group* [2018] EWCA Civ 1157, this resurgence of factors to some extent sidelined by the Supreme Court is perhaps unexpected.
[60] *Various Claimants v Barclays Bank* [2018] EWCA Civ 1670 at [45].
[61] e.g. *Chandler v Cape Plc* [2012] EWCA Civ 525; [2012] 1 W.L.R. 3111; *Thompson v Renwick Group* [2014] EWCA Civ 635; [2015] B.C.C. 855.
[62] For a discussion of some of this case law, alongside vicarious liability, in respect of this sort of regulatory issue, see, e.g. T. Thiede and A. J. Bell, "Picking the piper, the payment, and tune—the liability of European textile retailers for the torts of suppliers abroad" (2017) 33 P.N. 25 esp. 36f.
[63] See above.
[64] *Mohamud v Wm Morrison Supermarkets Plc* [2016] UKSC 11; [2016] A.C. 677.

station, asking if there were printing facilities for him to use. The defendant's employee behind the counter responded in the negative, and did so in an abusive fashion. As the victim left the kiosk, the employee followed, partially entered the victim's vehicle and continued to abuse him verbally and physically in an openly racist attack. The claim brought argued that the supermarket should be vicariously liable for these attacks as the assailant's employer, given that the tortfeasor was acting in a "representative capacity" at the time: he was on his shift, at the workplace, in uniform, and dealing with customers.[65]

Despite straightforward, cogent and well-supported dismissals of the claim in the lower courts for a lack of a sufficiently close connection to the employment,[66] despite giving a rough ride to claimant's counsel in the oral hearings, despite rejecting very curtly the "representative capacity" test on which the claim was argued,[67] the Supreme Court allowed the appeal under the close connection test. It was the attacker's job to engage with customers, responding to their requests; this included the victim's. It did not matter that he responded abusively, it was part of his field of activities. The abuse which followed from that was part of the same unbroken sequence of events, with the employee following up on the response and telling the victim not to return. Insofar as this was one sequence, it all fell within the response to the customer, which was within the scope of activities assigned.[68]

The difficulties with the *Mohamud* judgment are extensive. It has been seen first and foremost to attempt to replace the original form of the close connection test with a causal concept.[69] Certainly, the approach identifies an act clearly within the tortfeasor's role as attendant (responding to a customer request) and then sweeps up a myriad of later acts as part of a broad, singular idea of what that act of response was using a causal argument. There is some precedent for that. In *Mattis v Pollock*, for example, Judge LJ described an attack by a doorman as the "virtual culmination of the unpleasant incident which had started within the club, and could not fairly and justly be treated in isolation from earlier events, or as a separate and distinct incident".[70] An unbroken thread has also since been a key feature in applying *Mohamud* in the High Court in *Various Claimants v Wm Morrison*; there the activities importantly formed part of one "careful plan".[71]

The unbroken sequence of events is a fragile concept, however, and breaks easily.[72] An easy example is discussed in *Mohamud* itself, with Lord Toulson distinguishing *Warren v Henlys Ltd*[73] on a problematic basis. In that case, a petrol pump attendant became involved in a dispute with a customer, who then called upon a policeman. Shortly thereafter, that attendant punched the customer, who sued the employer but was unsuccessful: the act was without the scope of employment. For Lord Toulson, this is because the initial response to the customer was broken off by an intervening, purely personal matter involving the police.[74] That is unsustainable, however, insofar as the police officer had left and the punch was a response to the customer's assertion that he would make a complaint to the *employer*.[75] Causal connection alone is too weak to support the findings required and the cases which have established liability here all (other than *Mohamud* itself) entail a further element of responsibility directly relevant to the act complained of. In *Mattis*, the employee was a doorman with a physical, security role inherently linked to confrontation

[65] The facts and grounds of appeal are recounted *Mohamud v Wm Morrison Supermarkets Plc* [2016] UKSC 11; [2016] A.C. 677 at [3]ff., [9].
[66] See esp. *Mohamud v Wm Morrison Supermarkets Plc* [2014] EWCA Civ 116.
[67] See *Mohamud v Wm Morrison Supermarkets Plc* [2016] UKSC 11; [2016] A.C. 677 at [46] (Lord Toulson), [50]ff. (Lord Dyson).
[68] *Mohamud v Wm Morrison Supermarkets Plc* [2016] UKSC 11; [2016] A.C. 677 at [47].
[69] See, e.g. J. Plunkett, "Taking stock of vicarious liability" (2016) 132 L.Q.R. 556, 561.
[70] *Mattis v Pollock (t/a Flamingos Nightclub)* [2003] EWCA Civ 887; [2003] 1 W.L.R. 2158 at [32].
[71] *Various Claimants v Wm Morrison Supermarkets Plc* [2017] EWHC 3113 (QB) at [183]; approved by the Court of Appeal [2018] EWCA civ 2339 at [73].
[72] P. Giliker, "Vicarious liability in the UK Supreme Court" (2016) 7 *UK Supreme Court Yearbook* 152, 159.
[73] *Warren v Henlys Ltd* [1948] 2 All E.R. 935; [1948] W.N. 449.
[74] *Mohamud v Wm Morrison Supermarkets Plc* [2016] UKSC 11; [2016] A.C. 677 at [32].
[75] *Warren v Henlys Ltd* [1948] 2 All E.R. 935; [1948] W.N. 449 at 937.

and the potential for violence.[76] In *Lister*, Lord Millet had equally interpreted *Warren* this way, as Lord Toulson acknowledged.[77] In the more recent *Wm Morrison* case, though it follows *Mohamud* and notes the importance of a singular plan, there is equally an important element of control of the data at issue and sweeping together the elements of a unitary plan must be understood alongside this (cf. also the defendant's interpretation of *Mattis*).[78]*Mohamud* has thus overlooked that the connection must not merely be causally close, but *inherent*.[79]

This apparent attempt to expand liability thus already stands on shaky ground and is hard to explain; the victim had died before the hearings, so even mundane suggestions about favouring a sympathetic claimant do not seem to hold. In delivering his judgment, Lord Toulson does, though, rely heavily on a relatively extensive treatment of the history of the doctrine, with an abnormally large portion of the cases cited predating the 20th century.[80] This is unusual in the area and must have had a significant impact on the underlying thinking (certainly elsewhere Lord Toulson held back from lengthy historical explanations where his Lordship did not feel this added enough to explicating or understanding the issues[81]), though this historical analysis and use of it remains to be properly analysed.

The core part of this aspect of the judgment lies in stressing "the principle of social justice which goes back to Holt" and the close connection question is seen as being whether the connection is close enough "to make it right" for the employer to be held liable under that principle.[82] From Lord Toulson's extracts from reports of *Hern v Nichols* and *Sir Robert Wayland's Case*, he seems to see key expressions of that principle in the following: "for seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in a deceiver should be a loser, than a stranger";[83] "the master at his peril ought to take care what servant he employs; and it is more reasonable that he should suffer for the cheats of his servant than strangers and tradesmen".[84] Thus, liability is seen in terms of a broad balancing exercise in policy and justice between claimant and defendant.

Some subsequent case law has to an extent picked up Lord Toulson's penchant for the historical, with *Bellman v Northampton Recruitment Ltd*,[85] for example, producing extracts from Lord Holt's reported judgments.[86] Liability was there found on appeal, but this does anyway seem to be a stronger case than *Mohamud*; a company director drunkenly attacked a subordinate staff member during a drinking session following on from a company Christmas party; the attack seems to have been part of an agitated discussion where the director attempted to assert his decision-making authority over other staff.[87] Langstaff J equally mused on the origins of the doctrine in *Various Claimants v Wm Morrison*,[88] asserting (demonstrably falsely) that Lord Toulson had "comprehensively set out" the history. Following a lengthy and broad-ranging

[76] Other, similar cases (vital for the Court of Appeal in *Mohamud* but all but ignored by Lord Toulson) which suggest that a similar additional responsibility is necessary include *Fennelly v Connex South Eastern* [2001] I.R.L.R. 390 and *Vasey v Surrey Free Inns* [1996] P.I.Q.R. 373. cf. from Scotland also *Vaickuviene v J Sainsbury* [2013] CSIH 67; 2014 S.C. 147.

[77] *Mohamud v Wm Morrison Supermarkets Plc* [2016] UKSC 11; [2016] A.C. 677 at [32].

[78] *Various Claimants v Wm Morrison* [2017] EWHC 3113 (QB) at [195] (cf. [163] for the defendant's approach to *Mattis v Pollock (t/a Flamingos Nightclub)* [2003] EWCA Civ 887; [2003] 1 W.L.R. 2158); see now [2018] EWCA civ 2339.

[79] e.g. J. Plunkett, "Taking stock of vicarious liability" (2016) 132 L.Q.R. 556, 561.

[80] *Mohamud v Wm Morrison Supermarkets Plc* [2016] UKSC 11; [2016] A.C. 677 at [10]–[26] (covering cases pre-1940; the judgment is only 49 paragraphs long in total).

[81] See, e.g. *AIB Group v Mark Redler & Co Solicitors* [2014] UKSC 58; [2015] A.C. 1503; [2014] 3 W.L.R. 1367, particularly at [47], [56], and [61].

[82] *Mohamud v Wm Morrison Supermarkets Plc* [2016] UKSC 11; [2016] A.C. 677 at [45].

[83] *Hern v Nichols* 91 E.R. 256; (1708) 1 Salk 289, extracted in *Mohamud v Wm Morrison Supermarkets Plc* [2016] UKSC 11; [2016] A.C. 677 at [14].

[84] *Sir Robert Wayland's Case* 91 E.R. 797; (1707) 3 Salk 234, extracted in *Mohamud v Wm Morrison Supermarkets Plc* [2016] UKSC 11; [2016] A.C. 677 at [15].

[85] *Bellmann v Northampton Recruitment Ltd* [2016] EWHC 3104 (QB); [2017] I.C.R. 543.

[86] See *Bellmann v Northampton Recruitment Ltd* [2016] EWHC 3104 (QB) at [48], citing *Turberville v Stamp* 91 E.R. 1072; (1698) 1 Ld. Raym. 264 and *Sir Robert Wayland's case* 91 E.R. 797; (1707) 3 Salk 234.

[87] *Bellmann v Northampton Recruitment Ltd* [2018] EWCA civ 2214 at [25]ff.

[88] *Various Claimants v Wm Morrison Supermarkets Plc* [2017] EWHC 3113 (QB) at [129].

outline of the facts, counsel's arguments, and various precedents, the conclusion follows in very short order:

> "Adopting the broad and evaluative approach encouraged by Lord Toulson in *Mohamud*, I have therefore come to the conclusion that there is a sufficient connection … to make it right for Morrisons to be held liable 'under the principle of social justice which can be traced back to Holt CJ'."[89]

Neither of these recent examples produces a particularly startling or unexpected result, however, and it thus remains to be seen to what extent the green light potentially given to daring judges by *Mohamud* will be exploited.

The Supreme Court itself has not yet considered a further case on the close connection test, meanwhile, but courts in other jurisdictions have not looked on the *Mohamud* approach kindly.[90] Again, therefore, it remains unclear what the future of the decision will be and whether it is simply an anomaly. It can be of some comfort, though, that formally the test has not altered from the *Lister* position—as Lord Dyson has suggested, the features of modern life and commerce which compel innovation in the first stage of the vicarious liability analysis do not compel change here (and *Lister* already facilitates responsiveness here to the pressing social ill of child abuse).[91]

"Tis safer to be that which we destroy": The conceptual place of vicarious liability

That there should be attempts to control the level of involvement vicarious liability has in cases might perhaps seem natural given the aforementioned continuing expansions in the relationships to which the doctrine will apply and the still-unclarified, seemingly expansionary approach to the scope of employment. At the same time, a new age has equally dawned in the realm of non-delegable duties ("NDDs") following the Supreme Court's decision in *Woodland v Essex CC*.[92] The two doctrines are now being placed in conflict.

Turning back to *Armes*, it is important to feed in that the court was there considering both vicarious liability and a NDD, rejecting a claim under the latter doctrine because, ultimately, there was no delegation of a task for which there was a relevant, non-delegable duty.[93] Faced with both doctrines together and the potential for their overlap, Lord Reed spoke explicitly to what he termed the "priority of the issues"; here his Lordship maintained that there was no reason to impose vicarious liability where a direct liability to the defendant exists for the harm caused by the third party (such that NDDs were to be considered first and, by implication, vicarious liability does not arise where a NDD does).[94] Conceptually, there is no basis for that priority proposition. Vicarious liability is a liability for the acts of a subordinate founded principally on the character of the relationship to that subordinate and the concept of enterprise liability. Liability for a NDD is founded on a relationship to the victim in the form of a duty to her so personal as to be non-delegable. Conceptually, those foundations do not cut across one another. Even practically, meanwhile, there are obvious reasons why vicarious liability might have something to offer despite a direct liability pertaining, notably where the primary tortfeasor is liable to the claimant in e.g. deceit and the employer liable to her only in negligence, or even simply where as a matter of evidence it is easier (only possible?)

[89] *Various Claimants v Wm Morrison Supermarkets Plc* [2017] EWHC 3113 (QB) at [194]; see now [2018] EWCA civ 2339.

[90] See the High Court of Australia's decision in *Prince Alfred College v ADC* [2016] H.C.A. 37, declining to adopt the close connection test and critical of the value judgments involved (for commentary, see D. Ryan, "From opportunity to occasion: vicarious liability in the High Court of Australia" (2017) 76 C.L.J. 14; C. Beuermann, "Vicarious liability: a case study in the failure of general principles?" (2017) 33 P.N. 179).

[91] *Mohamud v Wm Morrison Supermarkets Plc* [2016] UKSC 11; [2016] A.C. 677 at [55]f.

[92] *Woodland v Essex CC* [2013] UKSC 66; [2014] A.C. 537.

[93] The authority's duty was (only) to arrange care, the foster parents undertook the (separate, i.e. not delegated) duty to actually provide it (*Armes v Nottinghamshire CC* [2017] UKSC 60; [2018] A.C. 355; [2017] 3 W.L.R. 1000 at [46]ff.) and the authority's duties were analogous to parental duties under the statutory framework and thus as a matter of policy could not extend to ensuring that others take care ([40]ff.).

[94] *Armes v Nottinghamshire CC* [2017] UKSC 60; [2018] A.C. 355; [2017] 3 W.L.R. 1000 at [30] and [50]. For commentary on the following, see generally A. J. Bell, "The liability of local authorities for abuses by foster parents" (2018) 34 P.N. 38; A. Dickenson, "Fostering uncertainty in the law of tort" (2018) 134 L.Q.R. 359; S. Deakin, "Organisational torts: vicarious liability versus non-delegable duty" (2018) 77 C.L.J. 15.

to prove the wrong of a subordinate and a relationship to the defendant, rather than an independent wrong of the defendant.[95]

The argument made is reminiscent of two things. The first is the tendency of many to view vicarious liability as the liability of an *innocent* party where another commits wrongdoing, rather than specifically a liability (*regardless* of fault[96]) for a particular wrong justified by a particular relationship to the person who commits it (and between that relationship and the wrong).[97] Especially once *enterprise* is recognised as the doctrine's heart, whether or not the defendant is guilty or innocent of personal wrongdoing cannot be definitive of vicarious liability. Moreover, liability might well not turn on balancing the interests of two equally blameless parties.[98] It is entirely conceivable that the defendant might, for example, have been careless (or uncaring) in regards to the selection or retention of an unsuitable or dangerous employee for the role and so not be "innocent" in at all the same sense as the claimant, but such failings will likewise never come to be discussed (for the vicarious liability) because they also do not bear on the relationship-based, enterprise foundation.[99] This is recognised to some extent by Irwin LJ in the *Barclays* case, who notes that the defendant is innocent or "at least … assumed innocent for present purposes, since a party may be negligent at the same time as being liable vicariously".[100] With respect, that still slightly misses the mark. There is no "assumption" of innocence, because the defendant's innocence or fault is simply irrelevant for the vicarious liability point. For vicarious liability as English law knows it, the relationship (and the wrong's connection to that) is the driver and focus must be maintained on the defining criteria for that relationship.

The second issue, which directly follows on from this, is again the decidedly remedial sense that Lord Reed seems to exhibit in *Armes*, as discussed above in relation to the question of means and insurance. An impression might be thought to be slowly building of vicarious liability as a creature of almost pure policy used (only) as a bandage where primary liability fails to secure the substantive (monetary) result thought most fair and reasonable on the facts. Again, though, it is the defining criteria for the relationships at issue, not the compensatory policy impulses lurking in the background, which must guide our understanding of vicarious liability and its place—a fact expressly recognised by Lord Phillips in *CCWS*.[101]

"Hell is murky!"

Not least in that latter respect, then, it should be clear that the combination of cases detailed above leaves a slightly unsatisfying framework. The inevitability of an inherent element of imprecision in the tests and high levels of fact sensitivity have been explicitly noted several times, including recently in both *Cox* and *Mohamud*,[102] however, reminding us that we cannot expect too much at this level of abstraction.

[95] In *Various Claimants v Barclays Bank* [2018] EWCA Civ 1670 at [54] Irwin LJ raises similar issues to Lord Reed in relation to the risk creation factor, noting that it is "redundant" to approach the case via vicarious liability where creation of the risk by the "employer" itself amounts to negligence. For the reasons just given, that is simply incorrect. cf. also (and perhaps ironically) e.g. *Woodland v Essex CC* [2013] UKSC 66; [2014] A.C. 537 itself, where Lord Sumption (who did not sit in *Armes v Nottinghamshire CC* [2017] UKSC 60; [2018] A.C. 355; [2017] 3 W.L.R. 1000) acknowledged that a NDD claim had only arisen (such that his Lordship could establish the new NDD approach) because a vicarious liability claim had failed: *Woodland v Essex CC* at [4].

[96] Not, that is, in the decided absence of fault.

[97] See very explicitly e.g. the High Court decision in *Various Claimants v Barclays Bank* [2017] EWHC 1929 (QB) at [45]: "Underlying the concept of vicarious liability is the fact of two innocent parties and a balance having to be weighed" (Davies J).

[98] Pace Davies J (*Various Claimants v Barclays Bank* [2017] EWHC 1929 (QB)); contrast the balancing idea from Holt CJ emphasised by Lord Toulson in [2016] UKSC 11; [2016] A.C. 677 at [83]f.), which does not in fact carry any similar connotation of equal "innocence".

[99] cf. some of the older cases of direct liability of an employer, such as *Wanstall v Pooley* (1841) 6 Cl. & Fin. 910, portrayed by D. Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford, 1999), 183 as an example where the courts resort to direct liability for engaging a drunk worker where vicarious liability could not be established (suggesting exactly the opposite approach to Lord Reed). In other jurisdictions, such ideas can form key determinants for the vicarious liability itself; in German law, proof of care in e.g. selecting and supervising an auxiliary excludes liability (Civil Code §831); in Austria, a defendant is liable for the wrongs of a dangerous auxiliary where she engaged that person in knowledge of that dangerousness (Civil Code §1315).

[100] *Various Claimants v Barclays Bank* [2018] EWCA Civ 1670 at [54].

[101] See *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 A.C. 1 at [34].

[102] *Cox v Ministry of Justice* [2016] UKSC 10; [2016] A.C. 660 at [28], and see also [42] (warning against slavish or mechanical application of criteria); *Mohamud v Wm Morrison Supermarkets Plc* [2016] UKSC 11; [2016] A.C. 677 at [43] and [54].

Focusing on what can be said with certainty, it is clear that the relationships to which vicarious liability can be applied have expanded in number and on a general footing. Good reason for at least some expansion is clear and is grounded by the courts in the changing nature of working relationships and the need for a more substantive approach, rather than a formal focus on "employment", in order to maintain appropriate protections in a more flexible economy. Expansion here is continuing (though not entirely unchecked) through the window offered by akin to employment status. The expansion in liability itself is with us to stay and presents an opportunity to move well beyond the formalistic boundaries of employment. The challenge remaining now is to determine on the facts in individual cases where it should, and predict where it will, stop.

The 3+2-point series of factors to be used in determining whether a relationship is thus akin to employment has apparently settled into place, though this has taken three judgments of the highest authority and its actual application in those cases is not without controversy. The three-part core displays a strong enterprise liability focus, which the courts continue to emphasise as a key policy basis for the doctrine. Some additional guidance on the other two, on the relevance of control and particularly the defendant's means, should still be sought, however, as the cases seems to display some inconsistency here. In respect of the latter, arguments related to compensation and distributive concerns seem to be playing well; though inappropriate doctrinally, this is probably unsurprising given *Armes*' public service and child abuse context. Litigants will certainly be well advised currently to argue fully as to all five factors, regardless of the circumstances.

Though the authority is not quite so high, at present this extension in relationships goes so far as to impose on regions where previously an absence of liability was referable to a clear status as an independent contractor, for whom no liability could arise. Much more academic discussion of the interaction between the three relationship statuses in English law's new and slightly awkward structure will probably follow, but unless and until the Supreme Court intervenes, proof that the defendant is an independent contractor in the traditional sense will clearly not in itself put an end to the liability enquiry. This represents consistency with the modern focus on enterprise liability and, again, the courts ground this in the structuring of modern workforces, whereby the potential exists for undertakings to seal themselves off artificially from the substantive risks of their activity through formal structures of independence. Similar movements are occurring in respect of the liability of parent companies.

Developments as to the scope of employment are less radical in form but in some senses more uncertain in substance. Commercial and social changes do not necessitate a new test, but we are left with an unexpected, controversial and problematic application of the close connection idea from *Lister*. Those of us who are critical might yet hope that *Mohamud* can be sidelined and confined to its facts, but again must wait patiently for new cases to reach the higher courts. It is clearer than ever that the close connection test is not a panacea and courts appear to have a very broad discretion to analyse the parties' relative positions in terms of fairness and justice and in light of the social policy concern (balancing claimant and defendant) seen to have long underpinned the doctrine.

The threat to vicarious liability's status among the other doctrines by which defendants are held liable for harms caused by third parties is a very different creature, meanwhile, and a new departure which must be debated in conceptual terms. The seriousness of the intent behind it remains to be seen, but it might be hoped that this threat can be reduced: for all its difficulties and its foibles, vicarious liability is an independent doctrine, with its own distinctive and independent underpinnings; only a close focus on its features will help us steer a course through (these and the other, aforementioned) turbulent waters.

In short, we are in "stepped in" a river of change where the water has proved deeper and murkier than we might have hoped. If we can keep our footing, however, the relative safety of the far bank might be approached much quicker.

Full Restitution and the Risk-Free Discount Rate[1]

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LT Damages; Discount rate; Investments; Lump sum awards; Personal injury; Restitution; Risk

Introduction

Full restitution, achieved through the medium of a lump sum award of damages, is a fundamental legal principle dating back to at least 1880.[2] The normal measure of damage is *reasonable* compensation and that is what the law seeks to provide at 100%. A requirement to discount future losses in arriving at a lump sum sits awkwardly with the 100% principle if the mechanism used to set the discount rate ("PIDR") requires speculation about future inflation and investment returns. A thorough investigation of the issue by the Law Commission resulted in a 1994 report[3] advocating setting the discount rate by reference to redemption yields on index-linked gilts ("ILGS"): the "risk-free" rate of return. The report also included draft clauses for the Damages Bill, leaving the judiciary to continue to set the PIDR, thereby keeping it under regular review, with the Lord Chancellor as backstop to cover the eventuality that no ILGS remained in issue. By the time the Damages Act 1996 came into force, the Government had tweaked the wording, granting the Lord Chancellor the power to decide the PIDR and giving the court a power to apply a different rate. In fact, no claimant has successfully persuaded the court to apply a different rate, and the bar to doing so is set so high as to be unreachable. During the Third Reading in the House of Lords, Lord Hope described the court's power, which is restated in the Civil Liability Bill, as a "dead-letter", and proposed its removal from the Civil Liability Bill (proposal subsequently withdrawn).[4]

The Government claims that the proposal in the Civil Liability Bill preserves the 100% principle whilst departing from a "risk-free" PIDR. This is a radical proposal, not because it will change the discount rate, but because it will change the methodology for calculating it. In changing the methodology, it changes the fundamental principle which defines the measure of damages. Any threat to the 100% principle has been denied by redefining 100% as including an assumption of some risk. This is misleading. Perhaps it is misunderstood? This paper explains why a retreat on the principle of a risk-free discount rate is also a retreat from the much older principle of full restitution.

The Bill can be summarised in terms of its premise, its purpose and its evidence-base. It is premised on the assertion that a risk-free discount rate delivers over-compensation. It is on the basis of this assertion that the Bill has managed to side-step the issue of full restitution. The Bill's objective is to determine a

[1] We are grateful for the assistance of Annette Morris and Trevor Boyns for sources and advice. We as authors are responsible for our errors.

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[2] *Livingstone v Rawyards Coal Co* (1880) 5 App. Cas. 25; (1880) 7 R. (H.L.) 1.

[3] Structured Settlements and Interim and Provisional Damages (1994) Law Com. 224.

[4] *Hansard*, 27 June 2018, Vol.792 col.190.

new discount rate to reflect presumed claimant investment behaviour and thereby eliminate the element of over-compensation which is presumed to be associated with the current risk-free rate:

> "The Government's stated objective is to reflect claimant investment behaviour and ensure claimants are compensated in full, neither more or less."[5]

The premise (and by implication the purpose) are supported by evidence from a series of consultations and research projects undertaken or sponsored by the Ministry of Justice ("MoJ") between 2010 and 2015.[6] The findings of this research are that claimants are observed to invest part of their lump sum in risky assets. It is from this finding that the promoters of the Bill conclude that claimants are over-compensated by a risk-free discount rate. In practice, they are receiving a higher return from investing their lump sum than the calculation of their damages assumes they will receive.[7] However, as both authors indicated in their evidence to the Justice Committee Inquiry,[8] some care is needed before accepting a conclusion that a risk-free methodology over-compensates claimants. The challenge for the promoters of the Bill is that the empirical evidence is inconclusive as to whether claimants' investment behaviour signifies over-compensation or whether it reflects under-compensation. There is a second challenge, this one at a theoretical level. It is a simple point but its effect is very serious for the Bill: it is impossible for a risk-averse claimant to be required to invest in risk-based assets to meet a stream of fixed injury-related outgoings to receive full financial restitution (100% of her damages). It has been made to appear to be possible only under an "alternative definition"[9] of 100% compensation.

Pre-legislative scrutiny of the Bill was provided by the Justice Committee Inquiry at the request of the Secretary of State:

> "… to help ensure the provisions are technically effective and provide assurance to interested parties that the government is committed to ensuring that compensation remains full, fair and reasonable …"[10]

Concerns were expressed in the evidence before the Committee and in the Inquiry's Report over the premise of over-compensation and its supporting research base:

> "It may seem intuitive that the discount rate should reflect actual investment behaviour. But we conclude that this proposition should not be adopted without some critical reflection."[11]

There was also a request for clarification over the Bill's re-definition of 100% compensation. Both have been ignored (not rebutted) as the Bill, largely in its original form, makes its way through the debates and committee stages of Parliament. This is important because the Bill relies upon the over-compensation of

[5] House of Commons, Debate 7 September 2017 col.13WS.

[6] MoJ 2012 Ministry of Justice, *The Damages Act 1996: The Discount rate: How should it be set? Consultation paper* (CP12/2012). Published in 2017; Ministry of Justice, *Personal Injury Discount Rate Research, Ministry of Justice Analytical Series* (Ipsos Mori Social Research Institute, 2013) at *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/254856/personal-injury-discount-rate-research.pdf* [accessed 17 October 2018]; Ministry of Justice, *The Damages Act 1996: The Discount Rate: Review of the Legal Framework Consultation Paper* (CP3/2013). Published in 2017; P. Cox, R. Cropper, I. Gunn and J. Pollock, *Discount rates: A report for the Ministry of Justice* (2015).

[7] Ministry of Justice, *The Personal Injury Discount Rate How it should be set in future Draft Legislation September* (Cm.9500) para.6-7 at *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/642706/personal-injury-discount-rate-command-paper-web.pdf* [accessed 17 October 2018].

[8] V. Wass, *Published written evidence in House of Commons Justice Committee Pre-legislative scrutiny: draft personal injury discount rate clause IDR 0008* (2017) at *http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Justice/Prelegislative%20scrutiny%20draft%20personal%20injury%20discount%20rate%20legislation/written/71211.html* [accessed 17 October 2018]. Cropper and Gunn, *Published written evidence in House of Commons Justice Committee Pre-legislative scrutiny: draft personal injury discount rate clause IDR0042* (2017) at *https://publications.parliament.uk/pa/cm201719/cmselect/cmjust/374/374.pdf* [accessed 17 October 2018]. R. Cropper and I. Gunn, "The Response of Personal Financial Planning Ltd to Ministry of Justice Consultation: The Discount Rate" [2017].

[9] An "alternative definition" is like an "alternative fact" (as per Kelly-Anne Conway, 22 January 2017). Alternative facts can defy logic and common understanding and have no need of an evidence base.

[10] D. Lidington, "Personal Injury Discount Rate" Letter to Bob Neill Chair of House of Commons Justice Committee, 7 September 2017.

[11] House of Commons Justice Committee, "Pre-legislative scrutiny: draft personal injury discount rate clause Third Report of Session" 2017-19 HC 374 para.37 at *https://publications.parliament.uk/pa/cm201719/cmselect/cmjust/374/374.pdf* [accessed 17 October 2018].

claimants on a risk-free PIDR and, if over-compensation does not follow from the evidence presented, then there is no premise from which to pursue the purpose of the Bill.

This paper presents two types of evidence in relation to the premise of the Bill, the over-compensation of claimants under the alternative definition of full restitution: the first is at an empirical level and the second is at a theoretical level. The ordering reflects the focus of the Inquiry on the empirical evidence collected and presented by one of the promoters of the Bill, the MoJ. The paper is organised as follows: we start with the case law context for the principle of full restitution and its delivery via the assumption of a risk-free discount rate. This is followed by a description of index linked government stock ("ILGS"), the financial instrument that makes the assumption of a risk-free discount rate possible. We evaluate the evidence on claimant investment behaviour presented in support of the Bill before moving to investigate the conceptual basis for the Bill's premise, that it is logically possible that a risk-based discount rate can deliver 100% compensation. In drawing together these evidence streams we conclude that the proposition contained within the Bill, that a risk-based discount rate delivers full restitution, is theoretically untenable and empirically doubtful. There is a choice between full restitution and a retreat from the risk-free assumption. It is not possible to have both.

Restitutio in integrum

The first reference to a discount rate in the valuation of damages is found in *M'kechnie v James Henderson & Son*[12] and the first reference to full restitution as a function of damages appears 22 years later in the now much quoted judgment of Lord Blackburn:

> "Where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation."[13]

The idea that reparation is the corollary of fault and has the purpose of "restoring to whole" has been repeatedly endorsed by the courts to the effect that it is now deeply embedded in the common law. Two appeal cases are of interest. Like the Bill, both were prompted by increasing awards where issues of public policy were raised by the defendant to support a lower award.

In the case of *Lim Poh Choo v Camden and Islington AHA*,[14] a record award of £250,000 was appealed to the House of Lords on the basis of its size. There were four objections: the award was out of line with comparable cases; resulting increases in insurance premiums and taxes were undesirable; the viability for care of the victim under the NHS was ignored; as were the adverse implications for public policy, most especially the financial pressure on the NHS.[15] As in the Bill, the defendants argued that awards were becoming too generous to the claimant and this trend must be moderated to *be fair to both sides*.[16]

The Law Lords rejected each objection: the first on the basis that cases are individual and not necessarily comparable and the rest on the basis that they are a matter for legislators and not for the courts. Legislators were reminded that the principle of law is that compensation is paid at 100%, as stated by Lord Blackburn above, and that:

> "there is no room here for considering the consequences of a high award on the wrongdoer or those who finance him. And if there were room for any consideration, upon what principle, or by what

[12] *M'kechnie v James Henderson & Son* [1858] 20 D. 551.
[13] *Livingstone v Rawyards Coal Co* (1880) 5 App. Cas. 25; (1880) 7 R. (H.L.) 1 at 39.
[14] *Lim Poh Choo v Camden and Islington AHA* [1980] A.C. 174; [1979] 3 W.L.R. 4.
[15] Free treatment and care under the NHS is disregarded under s.2(4) of the Law Reform (Personal Injuries) Act 1948. This is currently the subject of a cross-party review on how to cut costs on clinical negligence claims undertaken by the National Audit Office and the Public Accounts Committee. They are expected to report in September 2018.
[16] *Lim Poh Choo v Camden and Islington AHA* [1980] A.C. 174; [1979] 3 W.L.R. 4 at 5.

> criterion, is the judge to determine the extent to which he is to diminish upon this ground the compensation payable."[17]

Twenty years later, in the three conjoined cases under *Wells v Wells*,[18] there was a similar appeal to the House of Lords, again in response to a ground-breaking level of award. This new quantum threshold had been generated by a reduction in the discount rate from a "conventional" assumed 4–5% to one based on a lower rate of return paid on a new and specific financial instrument, ILGS. This is Government-backed and inflation-proofed making it as close to "risk-free" as it is possible to achieve. It is worth spending some time on the *Wells*' decision because it settled all the key issues that have been challenged by the Bill.

In each of the three cases, lump sums had been valued at first instance using a lower than conventional discount rate based on the current rate of return on ILGS, 3%. These decisions were reversed by the Court of Appeal. They were reversed back again by the House of Lords. All five Law Lords were in agreement on five key points.

First, the 100% principle was reaffirmed. On the principle of full restitution, Lord Steyn states that "as a matter of law the victim of a tort is entitled to be compensated as nearly as possible in full for all pecuniary losses".[19] This applies in the context of the increased award calculated under the new "risk-free" method, "under the present principles of the law governing the assessment of damages which provide that injured persons should receive full compensation plaintiffs are entitled to such increased awards".[20]

Secondly, for the purposes of calculating the award of damages, it is assumed that the investment of the lump sum is made risk-free. For the reason that the risks attached to the lump sum are injury-related and that claimants are more like a closed pension scheme meeting fixed future liabilities than an active investor seeking the best returns, they, like the pension scheme, will be assumed to invest risk-free for the purposes of the quantum of damages. "Plaintiffs have not chosen to invest. The tort and its consequences compel them to do so".[21] From the outside it may look imprudent to invest in ILGS but the claimant's position cannot be compared with that of an ordinary investor: "What the prudent plaintiff needs is an investment which will bring him the income he requires without the risks inherent in the equity market: which brings us back to ILGS."[22] "The plaintiffs say that they are not obliged to bear the extra risk for the benefit of the defendants. Others like them with fixed outgoings at stated intervals take the same view as to prudent investment policy. So the plaintiffs are not alone."[23] "The general practice for a closed pension fund is to invest in ILGS so as to be sure of being able to meet their liabilities as they fall due."[24]

Thirdly, and importantly in the context of the evidence presented to support the Bill, claimants' actual investment behaviour is irrelevant. At the level of principle: "How the plaintiffs will in fact invest their damages if of course irrelevant. That is a question for them it cannot affect the calculation."[25] At the level of practice, and in relation to the investment motivations of claimants' post-settlement, it is not relevant that the Court of Protection invests on behalf of patients in risk-based portfolios because "it may feel obliged to invest in equities so long as the sums available for investment are calculated on the basis of 4-5 per cent return. In spite of the risks it may be the only way of making the money go round".[26]

Fourthly, as indicated above by Lord Lloyd at [367], ILGS is seen as the financial instrument that comes closest to delivering a risk-free investment: "ILGS is tailor-made for investors who want a safe investment

[17] *Lim Poh Choo v Camden and Islington AHA* [1980] A.C. 174; [1979] 3 W.L.R. 4 per Lord Diplock at 6.
[18] *Wells v Wells* [1999] 1 A.C. 345; [1998] 3 W.L.R. 329.
[19] *Wells v Wells* [1999] 1 A.C. 345; [1998] 3 W.L.R. 329 at 382.
[20] *Wells v Wells* [1999] 1 A.C. 345; [1998] 3 W.L.R. 329 at 405 per Lord Hutton.
[21] *Wells v Wells* [1999] 1 A.C. 345; [1998] 3 W.L.R. 329 at 386 per Lord Steyn.
[22] *Wells v Wells* [1999] 1 A.C. 345; [1998] 3 W.L.R. 329 at 367 per Lord Lloyd.
[23] *Wells v Wells* [1999] 1 A.C. 345; [1998] 3 W.L.R. 329 at 368 per Lord Lloyd.
[24] *Wells v Wells* [1999] 1 A.C. 345; [1998] 3 W.L.R. 329 at 368 per Lord Lloyd.
[25] *Wells v Wells* [1999] 1 A.C. 345; [1998] 3 W.L.R. 329 at 365 per Lord Lloyd.
[26] *Wells v Wells* [1999] 1 A.C. 345; [1998] 3 W.L.R. 329 at 368 per Lord Lloyd.

guaranteeing a return based on the market's view of inflationary trends. The virtue of ILGS is that it provides a risk-free investment."[27] He is able to rely upon the Law Commission Report of 1994 in which ILGS are recognised as constituting "the best evidence of the real return on any investment where the risk element is minimal, because they take into account inflation, rather than attempt to predict it as conventional investments do".[28]

Fifthly, and again importantly in the context of the current Bill, the public policy implications arising from the increase in damages occasioned by an assumption of risk-free investment in the calculation of damages are a matter for politicians and not for the courts. The role of the courts is to make and uphold the law. The Law Lords are not ruling out an alternative determination of damages but that "If the law is to be changed it can only be done so by parliamentwhich, unlike the judges, is in a position to balance the many social, financial and economic factors which would have to be considered".[29]

It is clear from the judgment in *Wells* that where the remit of the courts is limited to achieving full restitution, this means the calculation of damages on a risk-free assumption. Only primary legislation, for example in the form of the Bill, can change the methodology of setting the PIDR: "the government does not believe that there is an alternative to primary legislation"[30] because in setting the PIDR the Lord Chancellor and the courts are bound by *Wells*.

The issue with the Bill is not that in usurping the role of the courts it exceeds the role of Parliament. Neither is that full restitution is the only or best principle on which to award damages.[31] Rather, it is that, in seeking to find acceptance for a change in methodology, the Government relies on a claim that claimants are over-compensated by a risk-free discount rate, that they currently receive more than 100%, a sort of "full restitution plus". To establish this claim requires an alternative definition of full compensation, one that replaces the risk-free assumption of *Wells*, with the assumption of risk at a level to be decided by the Lord Chancellor. This new definition of 100% will not be tested in court. It will not be reviewed by the expert panel.[32] When the proposition of over-compensation, and the alternative definition of 100%, was scrutinised in the Justice Committee Inquiry, the foundations looked distinctly shaky.

> "It may be reasonable to change the assumptions upon which the discount rate is currently calculated if they are indeed no longer representative of 'real world' behaviour. However, we do not believe the evidence presented on this point so far is adequate."[33]
>
> "If the government remains convinced [in the absence of such evidence] that it must change the assumptions it makes about how damages will be invested, it should say so."[34]
>
> "We recommend that the Government clarifies what it means by 100% compensation."[35]

Before evaluating the evidence supporting the alternative definition of full restitution, we provide a short description of ILGS. This financial instrument is crucial to the implementation of an assumption of risk-free investment in the *Wells* definition of full restitution.

[27] *Wells v Wells* [1999] 1 A.C. 345; [1998] 3 W.L.R. 329 at 365 per Lord Lloyd.
[28] *Wells v Wells* [1999] 1 A.C. 345; [1998] 3 W.L.R. 329 at 370 per Lord Lloyd.
[29] *Wells v Wells* [1999] 1 A.C. 345; [1998] 3 W.L.R. 329 at 405 per Lord Hutton.
[30] Ministry of Justice, *Published written evidence in House of Commons Justice Committee Pre-legislative scrutiny: draft personal injury discount rate clause IDR0034* (2017) at *http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Justice/Prelegislative%20scrutiny%20draft%20personal%20injury%20discount%20rate%20legislation/written/71288.html* [accessed 17 October 2018].
[31] P. Atiyah, *The Damages Lottery* (Hart Publishing, 1997).
[32] In amendment made during the Bill's passage through the House of Lords, the requirement to appoint a panel of experts was scrapped for the first review of the discount rate, although it is retained for subsequent reviews. The frequency of reviews is now "up to" five years, rather than three years.
[33] House of Commons Justice Committee, "Pre-legislative scrutiny: draft personal injury discount rate clause Third Report of Session" 2017-19 HC 374 para.53.
[34] House of Commons Justice Committee, "Pre-legislative scrutiny: draft personal injury discount rate clause Third Report of Session" 2017-19 HC 374 para.134.
[35] House of Commons Justice Committee, "Pre-legislative scrutiny: draft personal injury discount rate clause Third Report of Session" 2017-19 HC 374 para.24.

Index-linked Government Stock ("ILGS")

The UK was one of the first sovereign issuers of ILGS in 1981. Crucially, ILGS allowed pension funds (and then life insurers) to match their obligations to provide RPI-linked cash flows to members without investment risk. Whilst there are gaps in maturity dates, there remains a commitment to the supply of ILGS which currently stands at around £411bn. That is around 27% of the whole gilt and Treasury Bill portfolio issued by the Debt Management Office ("DMO"), with maturities stretching out to 2068. Investors buy gilts in denominations of £100 nominal or face value: that is the amount that the Government will pay the owner, plus inflation, on maturity of the gilt. In the meantime, owners will receive interest at a fixed rate per £100 of nominal value, plus inflation. Therefore, both the annual interest and the nominal value of the gilts are index-linked to the RPI until maturity.

If investors could purchase gilts at their nominal value, they would receive near-perfect (there is bound to be a time lag) inflation-proofing of their capital and income. However, gilts, including ILGS, are issued by way of an auction to institutions and, invariably, demand outstrips supply which raises the market price. For example, on 24 May 2018, there was an auction of 0.125% Treasury Gilt 2036, with a nominal value of £1.146bn. The interest rate (coupon), paid by the Government, is 0.125% per £100 of nominal gilt (plus inflation) and the gilt matures in 2036. The average accepted price was £134.59 per £100. If held to maturity, this means the investor is certain to lose £34.59 of the £134.59 paid. Allowing for the loss of capital in the yield reduces the interest rate from +0.125% to minus 1.492%, if held until 2036.

Investors tolerate that loss because they are willing to pay for inflation protection (on the rest of the capital and income from it), because regulations force them to own the gilts, or because they intend to sell the gilt long before it matures to recoup more of the price paid and make a profit. In the late 1990s (around the time of *Wells*), investors were willing to suffer even higher capital losses to own ILGS: however, higher coupons softened the blow of lost capital, and redemption yields remained positive until 2012. The trend in redemption yields from 2003 is illustrated at Figure 1 below.

The assumption for the PIDR is that a basket of gilts is purchased and held to maturity. Therefore, the redemption yield, which takes into account the price demanded by the market, and assumes the gilt is held to maturity, is the benchmark for setting the PIDR on a risk-free basis. This is the redemption yield in Figure 1. In this way, ILGS provide a mechanism for meeting pre-determined cash flows, inflation-proofed (as nearly as possible) relative to the RPI. Conceptually they fit neatly with the purpose of a lump sum award for future losses, which itself is the net present value of a series of future cash flows, in which price inflation must be disregarded. Each annual cash flow can be thought of as an individual gilt, maturing to provide a known sum adjusted for inflation on a certain date, effectively with no default risk. There is no other real asset, i.e. one that provides protection against price inflation, which does not expose its owner to investment risk. What makes other real assets, such as equities or property, risky is that their value is a multiple of the income they produce (cash flows). When their cash flows dry up, their capital value drops, and the owner has to adjust spending accordingly, unless there is an alternative source of income. Nominal assets, such as conventional gilts and corporate debt are less risky. Neither offer inflation protection.

An alternative definition of full restitution

In the draft clause, the Government states that its "objective is that the discount rate continues to support a 100% compensation rule so that claimants receive full compensation".[36] In its response to the House of Commons Justice Committee Report, "the Government's view is that the discount rate is intended to

[36] Ministry of Justice, *The Personal Injury Discount Rate How it should be set in future Draft Legislation September* (Cm.9500) para.3.

support, as accurately as it can, the achievement of the overall objective of 100% compensation".[37] The written and oral evidence to the Inquiry from the supporters of the Bill were also certain that 100% was the objective:

> "The objective of 100% compensation is the right one (no less, no more)."[38]

> "As an insurer we agree with the 100% principle."[39]

> "The underlying principle when setting the rate is that of full compensation, which is fully supported by the insurance industry. The principle means that the award should represent 100% of the value of the claim."[40]

In a letter to peers on 24 May 2018 regarding issues raised during the Committee Stage of the Civil Liability Bill, Lord Keen reconfirmed Government policy on the PIDR:

> "Lord McKenzie raised a number of questions regarding the relevance of the interests of defendants in the setting of the rate. He referred, in particular, to the potential influence on the Lord Chancellor of the Government's position as a defendant in high value cases and the comments of Lord Scarman as to the irrelevance of the consequences of a high award on the defendant. He also asked how some claimants being expected to be under-compensated was consistent with the principle in *Wells v Wells*. The Government remains committed to the principle that an award of damages should compensate a claimant fully for all loses suffered as a result of a wrongful injury. The effect of a change in the discount rate on the size of awards of damages payable by defendants is not a relevant factor in the setting of the rate under the present law and will not be so under the new law. The comments of Lord Scarman quoted by Lord McKenzie will remain applicable. The damages payable should provide 100% compensation, neither more nor less."[41]

The trick here is that the definition of 100% compensation in the Bill is not the definition of 100% compensation in *Wells*. Rather it is that:

> "claimants should receive the money that they are expected to need and that the setting of the prescribed discount rate should contribute to this by providing a fair and reasonable estimate of the *return that should be expected to be earned* on a lump sum of damages for future financial loss."[42] (emphasis added)

So claimants will still be awarded what they need (100% compensation) but they will need to invest to get it (take on risk). This is presented as a superior definition of 100% because claimants are observed to invest in risky assets, even when their compensation assumes a risk-free discount rate. On this basis, it has been concluded that risk is not too costly for them. In fact, claimants must value making more than

[37] Ministry of Justice, *Personal Injury Discount Rate. Response to the Report of the Justice Select Committee*. Draft Clause, March 2018 (cm.9567) para.15 at *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/689413/personal-injury-discount-rate-jsc-govt-response-web.pdf* [accessed 17 October 2018].

[38] Medical and Dental Defence Union of Scotland, *Published written evidence in House of Commons Justice Committee Pre-legislative scrutiny: draft personal injury discount rate clause IDR0005* (2017) para.4.2 at *http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Justice/Prelegislative%20scrutiny%20draft%20personal%20injury%20discount%20rate%20legislation/written/71053.html* [accessed 17 October 2018].

[39] Liverpool Victoria (LV) Insurance, *Published written evidence in House of Commons Justice Committee Pre-legislative scrutiny: draft personal injury discount rate clause IDR0006* (2017) para.12 at *http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Justice/Prelegislative%20scrutiny%20draft%20personal%20injury%20discount%20rate%20legislation/written/71117.html* [accessed 17 October 2018].

[40] Association of British Insurers, *Published written evidence in House of Commons Justice Committee Pre-legislative scrutiny: draft personal injury discount rate clause IDR0029* para.4 at *http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Justice/Prelegislative%20scrutiny%20draft%20personal%20injury%20discount%20rate%20legislation/written/71277.html* [accessed 17 October 2018].

[41] See *http://data.parliament.uk/DepositedPapers/files/DEP2018-0531/Signed_letter_Peers_Post_Committee_Civil_Liability_Bill.pdf* [accessed 17 October 2018].

[42] Ministry of Justice, *Personal Injury Discount Rate. Response to the Report of the Justice Select Committee*. Draft Clause, March 2018 (cm.9567) para.19.

they need above failing to make what they need. It is this sense, of claimants earning a "profit", that is the evidence of over-compensation.

At first sight, this might be a compelling argument. However, it has two flaws. The first is empirical and assumes that claimant investment behaviour is being observed from a position of receiving a lump sum on a risk-free basis. The second is theoretical. By definition, risk is costly for a risk-averse claimant. Imposing the cost of this risk on the claimant, where the risk is one that would not have be there in the absence of injury, must deliver less than 100%.

First, we consider the empirical evidence. As Lord Keen observed during the Committee Stage in the House of Lords on 15 May 2018:

> "Our evidence is clear that claimants simply do not invest all their awards in UK index-linked gilts; in other words, claimants do not pay Her Majesty's Government to look after their money."[43]

As explained earlier, the Government pays interest to the owners of gilts, not vice versa. So why do claimants behave in the observed manner?

Empirical evidence: Claimants are observed to invest their lump sum in risk-based portfolios

The empirical flaw was uncovered in the Justice Committee Inquiry which heard a competing explanation for claimants making risk-based investments. This explanation is based on under-compensation as the driver of claimant risk-taking behaviour. Claimants are under-compensated under the current arrangements for the award of a lump sum. Four distinct sources of under-compensation were identified: that the assumed risk-free rate has always exceeded the market risk-free rate; the assumed rate is based on price inflation which is less than the wage inflation to which future losses and expenditures are subject; the claimant bears the cost of longevity risk; and the claimant bears a shortfall on accommodation costs.

The first of these is the historical difference between the assumed risk-free rate of return, the discount rate on which the award was valued, and the realised risk-free rate of return, the actual redemption yield on ILGS. From Figure 1 it is clear that the PIDR has never matched the ILGS redemption yield. The difference between the two is tracked over the period 2003–2018 with the PIDR as a dotted line and the redemption yield on ILGS as a solid curve. The "wedge" (vertical difference) between the two lines is the rate of return above the ILGS rate of return that the claimant needs to achieve to meet the stream of injury-related court-determined future losses/expenditures. Claimants must invest to meet the PIDR. Investment in ILGS would leave them short. Figure 1 shows average redemption yields since 2003 without any allowance for income tax, transaction costs or advice fees. The data is a sample taken from DMO data on 21 July annually between 2003 and 2017 updated 19 June 2018 from the Tradeweb Markets LLC data, which assumed responsibility for publication from the DMO after 21 July 2017.

[43] See *https://hansard.parliament.uk/lords/2018-05-15/debates/8BD4BC09-D8E9-4887-BFBD-20045411B341/CivilLiabilityBill* [accessed 17 October 2018].

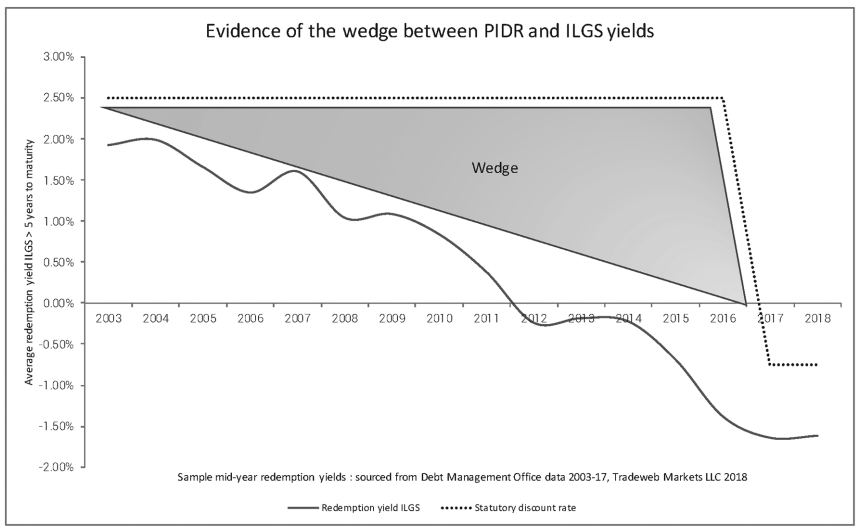

Figure 1: The wedge between the PIDR and ILGS yields

The *fact* of the wedge is important. It provides a competing explanation for the observation that claimants invest in risk-based portfolios. This explanation does not imply over-compensation. On the contrary, the wedge, and the response to the wedge, are indicators of under-compensation. Claimants need to make the ILGS return plus the wedge. To do this they need to invest in risky assets. The trends in Figure 1 describe a proximity between the actual and assumed risk-free rate at around 3% at the time of *Wells*. From here the rates diverge as the return on ILGS declines continuously from 2004 entering negative territory in 2012. The PIDR remained unchanged at 2.5% between 2002 and 2017. The effect of the Lord Chancellor's failure to review and adjust the PIDR was to continuously increase the wedge that the claimant needed to meet through investment.

The second competing explanation is a shortfall on real growth on health care / assistive technology costs. This is a fundamental difficulty whatever model is assumed in setting the PIDR and a key driver of claimants' actual investment behaviour. It is established law that multiplicands may not be adjusted in the expectation of rising living standards through economic growth.[44] Real earnings growth (above inflation), whether of the claimant but for injury, or of the people whose services are now needed, has to be left out of account in a lump sum award. Consistent with this, the discount rate applied in the assessment of their net present value is expressed in real terms, i.e. excluding price inflation, which historically has been measured by reference to the RPI. The outcome of that process is to produce an award capable only of meeting future needs that keep pace with (RPI) inflation. It must therefore follow that the claimant who actually invests in the manner assumed in the model used to set the discount rate will be left behind by everyone who participates in economic growth (whether via labour or capital). To have a chance to keep up, claimants are forced to accept more risk than assumed or accept living standards frozen in time.

[44] *Cookson v Knowles* [1979] A.C. 556; [1978] 2 W.L.R. 978.

The third competing explanation is longevity risk as described by a claimant in the research undertaken by Ipsos Mori for the MoJ in 2010:

> "I have to make the money last … it's my security … I don't want to get to 75 and have my daughter needing to look after me."[45]

A single estimate of life expectancy is necessary for a lump sum award but it is bound to be imprecise: it is an average, around which there can be a wide range of outcomes. There is no provision of a safety margin for the chance of living beyond the age to which a claimant can be compensated. A claimant who wishes to have some reassurance that the money won't be exhausted during their lifetime (and who cannot have periodical payments) has two choices: defer consumption or take risk. The trade-off between risk and opportunity is an ugly one: the only opportunity for claimants is early death.

The fourth competing explanation is the shortfall on accommodation costs. Again quoting from the research commissioned and published by the MoJ:

> "Finding the right house in the right place and converting it is a long process. It's worth it though as it makes a heck of a difference to life … Being comfortable in your own home is very important."[46]

The law does not compensate for the provision of capital assets; only the loss of income from capital. The only theoretically spare capital in an award is the award for pain, suffering and loss of amenity ("PSLA"). Because inflation in property prices has significantly outstripped increases in awards for PSLA, claimants are bound to face a "capital hole". The responses are to forego future consumption (of care, therapies etc) to meet an immediate need and/or to take more risk to try and make good the shortfall.

In terms of interpretation, observed claimant investment behaviour is compatible with both under- and over-compensation. In terms of under-compensation, claimants are juggling a range of different risks in order to minimise their overall risk. Even with the PIDR set at a risk-free rate, claimants have to accept some risk (by investing in real assets other than ILGS, such as equities and property). The impact of the Bill will be to add to their overall risk and intensify this juggling exercise.[47] Those real assets will be included in the assessment of the PIDR, claimants will have to own even more of them than currently assumed. Introducing observed investment behaviour therefore introduces a "feedback loop" which will tend to ratchet up the level of risk that claimants are forced to accept:

> "We only got half of what we knew he needed, therefore we couldn't invest his money in completely safe options, there had to be a modicum of risk that would produce enough money to last a lifetime. It was moderate risk, we didn't go any higher than moderate … Since we got the money we've been through two major stock market crashes, so we've probably wiped off at any one time £800,000 from his portfolio. If we'd have been given enough we could have stuck to low-risk investments."[48]

Over-compensation implies that claimants have an appetite for, or at least a tolerance towards, risk-taking so that when faced with a lump sum that meets their future needs with certainty, they prefer to take a risk to achieve an expected gain in excess of their need.[49] This seems unlikely and the House of Commons Justice Committee[50] expressed concerns asking for "clear and unambiguous evidence … about the way claimants invest their lump sum damages before legislation changes the way the discount rate is calculated"

[45] Claimant with head injuries, RTA Ministry of Justice, *Personal Injury Discount Rate Research, Ministry of Justice Analytical Series* (Ipsos Mori Social Research Institute, 2013), p.42.

[46] Claimant with spinal injuries, RTA Ministry of Justice, *Personal Injury Discount Rate Research, Ministry of Justice Analytical Series* (Ipsos Mori Social Research Institute, 2013), p.42.

[47] This scenario is depicted in Figure 3 below.

[48] Parent/carer of claimant, clinical negligence Ministry of Justice, *Personal Injury Discount Rate Research, Ministry of Justice Analytical Series* (Ipsos Mori Social Research Institute, 2013), p.49.

[49] This scenario is depicted in Figure 4 below.

[50] House of Commons Justice Committee, "Pre-legislative scrutiny: draft personal injury discount rate clause Third Report of Session" 2017-19 HC 374.

(para.53). It recommended "careful and representative research into the way claimants invest their damages [including] the reasons for their choices" (para.134). The Law Society[51] expressed similar concerns in its written submission to the Inquiry with a caution that "changing the framework without wider research risks creating an unfair framework based on assumptions which may not be accurate" (para.9).

Unfortunately, these competing explanations cannot be distinguished empirically. There is no "super" research project that can determine which is correct because we have not (and cannot) observe claimant behaviour in a risk-free environment. Lord Keen is mistaken when he assures the Justice Committee that:

> "the Lord Chancellor, when he comes to fix the rate, will be able to look at a wide body of evidence, as will the expert panel. If that sort of material is submitted, it will clearly be available for consideration."[52]

Instead the choice between the under- and over-compensation explanations must be made at an intellectual level. Which is the more credible: claimants investing to minimise risks and shortfalls elsewhere in the claim (which we know exist) or claimants preferring to take on risk from a position of no-risk in order to make a financial gain (that they might want but don't need)? Again it is helpful to listen to claimants:

> "High risk is not something for people in our position—[you need] the money for house, pain relief and salary not holidays. That's why you don't want high risk—you can't risk these things."[53]

and their advisors:

> "Most of these people have had a really bad deck of cards … They all tend to be aware of how things can go wrong in the blink of an eye and they are not people who are inclined to take risks."[54]

Theoretical evidence base: Is full restitution with a risk-taking requirement possible?

The conceptual case against the Bill is decisive. To prove it we need some undergraduate economics and this starts with Figure 2. The proofs are equally available using maths, though possibly less accessible to readers of this journal. Both provide a rigorous and robust proof without the potential for confusion caused by "warm words" and "alternative definitions". The diagrams illustrate the position of the claimant and her lump sum under different scenarios of risk-taking. The narrative takes the reader through the series of diagrams.

[51] The Law Society of England and Wales, *Published written evidence in House of Commons Justice Committee Pre-legislative scrutiny: draft personal injury discount rate clause IDR0039* (2017) at *http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Justice/Prelegislative%20scrutiny%20draft%20personal%20injury%20discount%20rate%20legislation/written/71323.html* [accessed 17 October 2018].

[52] House of Commons Justice Committee, "Oral Evidence: Pre-legislative scrutiny: draft clause of personal injury discount rate" HC 374 1 November 2017 Q93. The expert panel cannot provide this because it has been removed from setting the initial note (see fn.32 above).

[53] Claimant with spinal injuries, RTA, Ministry of Justice, *Personal Injury Discount Rate Research, Ministry of Justice Analytical Series* (Ipsos Mori Social Research Institute, 2013), p.48.

[54] Claimant solicitor, Ministry of Justice, *Personal Injury Discount Rate Research, Ministry of Justice Analytical Series* (Ipsos Mori Social Research Institute, 2013), p.48.

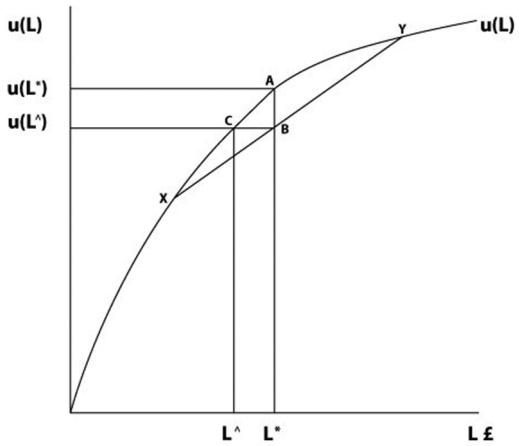

Figure 2: The difference between risk-free and risk-taking assumptions

The curve in Figure 2 depicts the utility function for wealth for a risk-averse individual. Utility can be thought of as benefit, value or satisfaction. The horizontal axis measures wealth which in this context is the lump sum, L. The vertical axis measures the utility gained from the lump sum. The utility function is concave when looked at from below. This property is important in this context but it is not controversial. It shows that utility increases with wealth but at a decreasing rate. It displays what economists call the law of diminishing marginal utility. The intuition is sensible: an additional £100 is more valuable to you when you are a trainee solicitor and rather short of income and wealth compared to when you become a partner. Risk aversion follows from diminishing margin returns and all sides are in agreement that the claimant is risk-averse. As Lord Keen stated in his oral evidence to the Justice Committee: "Of course, they are risk-averse."[55]

In order to track the impact of the Bill on a claimant starting from a position of full restitution (on the risk-free definition), we start the claimant at position A where the lump sum L* assumes a risk-free investment and so comes closest to delivering the court-determined income stream. It delivers utility level u(L*). This is not full restitution in the sense that pre- and post-injury utilities are equalised. Rather it is the utility associated with the lump sum that makes the claimant whole in financial terms. In reality, this means that the claimant can afford the care package that the court determines she needs without the need to invest. The problem with investing is that the claimant is risk-averse and so taking risk imposes a cost.

The Bill proposes that L* is to be achieved through an investment in a risky portfolio. In the language of economics L* is now the expected value from a gamble. The straight line XY in Figure 2 represents all the possible outcomes of this gamble with L* being its expected value, measured as the weighted average. The gamble to achieve L* places the claimant at position B. B represents a lower level of utility than at point A. This is because a risk-averse person prefers L* with certainty over L* with risk. The financial value of this loss in utility is L*- L^.

Starting with Figure 2 and considering scenario presented in the previous section where the PIDR is higher than the market risk free rate, the claimant receives L^ with certainty but this is less than she needs which is L*. This is the position that claimants have faced historically. The individual would start at a certainty point C and decide to invest in a risky portfolio of expected value L*. The claimant might choose to live with risk at B, with a likelihood of achieving L*, rather than live at C, with the certainty of a

[55] House of Commons Justice Committee, "Pre-legislative scrutiny: draft personal injury discount rate clause Third Report of Session" 2017-19 HC 374 Q92.

shortfall. The risk premium is the difference between L* and L^. It is received by the claimant and is used to make up the wedge in Figure 1.

Figure 3 develops Figure 2 to illustrate the case where the claimant is at B, investing to make up the wedge and considers what happens when the Bill is implemented. At B she needs L* but receives L^ and she chooses to invest in risky assets to make up the difference (on average). The effect of the Bill is to reduce the lump sum from L^ to L^^. The possible outcomes of the new gamble to achieve L* are represented on the new line X'Y'. They are all more expensive than before. The claimant is now further from the lump sum needed under a risk-free assumption, L*. In order to achieve an expected value of L*, she needs a larger risk premium and therefore she needs to take on more risk. If she invests with risk in order to achieve return she moves to position D. She is risk-averse and so her utility at D is less than it was at B (pre-Bill) and less again than it would have been under the risk-free assumption at A.

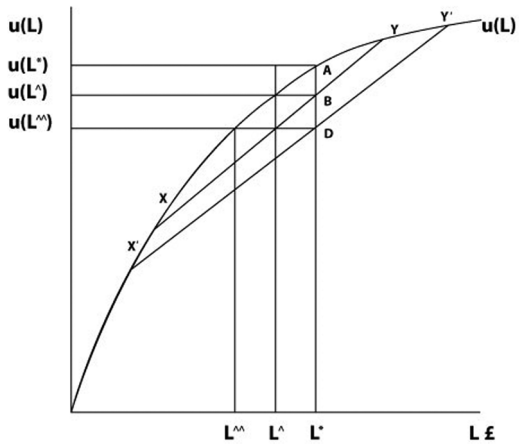

Figure 3: The implementation of the Bill

In Figure 4, we consider the position of the claimant who gets the risk-free PIDR but nevertheless takes a gamble. This is the claimant who is the presumed target of the Bill: the "greedy" or "lucky" claimant who is getting the over-compensation. This claimant moves from A to G as she trades taking on some risk for earning a return. Her expected lump sum L^G exceeds her certain lump sum L*. This is the over-compensation claimed in the Bill. It would not be considered to be over-compensation in economics because the claimant has made a trade, suffered a cost (extra risk) and received a gain (higher return). Note that her utility level is the same at A and G.

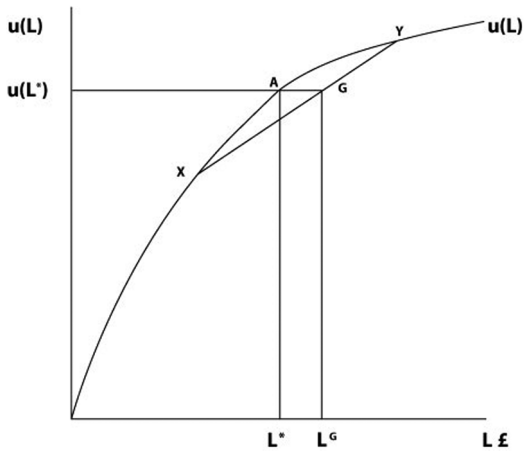

Figure 4: The case of over-compensation

The evidence to the House of Commons Justice Committee, including the evidence provided by claimant testimony,[56] indicates that Figure 3 is the relevant diagram. The claimant is at B, a position of under-compensation on a risk-free assumption. The Bill increases this level of under-compensation to position D. The Government's case for over-compensation at A or B would only be possible if: (i) the claimant is not risk-averse (the utility function is convex from below); or (ii) the lump sum reduces risks that she would otherwise have had to bear, for example risks associated with future earnings or with injury-related care costs. In this case the lump sum would allow the claimant to move from a position below the utility curve to one which is closer or even on it. It would then be legitimate to impose some investment risk in return for reduced risk elsewhere. In terms of (i), it is agreed that claimants are risk-averse. In terms of (ii), there are risks associated with future earnings but these are already accounted for in the Ogden Reduction Factors.[57] There can be no risk gain associated with care costs that would not have arisen in the absence of injury.

Concluding remarks

Theory shows that the proposition of achieving full compensation while requiring risk-bearing is impossible. As a theoretical impossibility it is indisputable and not open to different interpretation of evidence. The Bill and the consultation on the Bill is founded on a statement of intention which at a theoretical level is impossible to achieve. Figure 3 shows that a requirement for the claimant to invest in risky assets to achieve the lump sum needed is under-compensation on the full restitution principle and that the greater the risk required the greater the under-compensation. The difference between L* and L^^ in Figure 3 is the measure of the under-compensation that results from a discount rate based on risk compared to one that is risk-free. If the claimant is risk-averse and if the risks associated with the lump sum are all injury-related, then making the claimant take on risk without paying her to do so, is *by definition*, less than full restitution.

In the context of the above, the research used to support the Bill is superfluous. It is also ambiguous in its interpretation and does not provide the support that is claimed. The research does not observe claimants'

[56] Published in Ministry of Justice, *Personal Injury Discount Rate Research, Ministry of Justice Analytical Series* (Ipsos Mori Social Research Institute, 2013).

[57] Some states in the US set a discount rate which assumes investment in return for awarding a full (non-discounted) worklife expectancy. Here there is a trade-off between employment risk and investment risk.

investment behaviour in a risk-free environment so that claimant investment in risk-bearing assets is consistent with both the over-compensation explanation proposed in the Bill (Figure 4) and the under-compensation explanation uncovered in the Inquiry. In our view, the research findings favour the under-compensation proposition. The risk associated with longevity beyond expectation, with real wage growth, with a PIDR above the risk-free market rate and with an accommodation need in excess of the claim were all raised in the Inquiry evidence. Claimant testimony[58] suggests that investment in risk-bearing assets is a means of minimising risks and shortfalls arising in different parts of the damages system.

The logical conclusion of an approach which raises the PIDR in response to claimants' investing in risk-based assets to overcome the effects of a PIDR in excess of a risk-free rate is a cumulative spiral of rises in the PIDR. As the PIDR increases over the risk-free assumed rate, claimants must take on more risk. This "evidence" of a "risk appetite" provides the prompt for a further increase in the PIDR. This is a positive feedback loop and it drives an unstable system. Using its own internal momentum, the PIDR gets further and further away from its optimal or fair (risk-free) value, limited only by the rate of return on the most risky portfolio of assets, or the tempering voices of the Government Actuary and the panel of experts.

Our conclusion that the premise of Bill is false does not necessarily rule out a risk-based PIDR. It only rules out a risk-based PIDR and the 100% principle. A retreat from the assumption of a risk-free discount rate is a retreat from full restitution. However, a risk-based assumption is compatible with compensation at less than 100%. Although full restitution is deeply embedded within the tort system, it is not an intrinsic feature of that system. Compensation at 100% is a judicial choice and it is a choice that makes the tort system unique.[59] In a speech to PIBA on 16 November 2017,[60] Avoiding risk is expensive. Avoiding all risk is very expensive. There may be arguments that the actual outcomes of a fault-based judicial system may sometimes provide *unreasonable* compensation, the costs of which fall on taxpayers or insurance premiums. These are observable through money not spent on new hospitals or front-line care, higher insurance premiums or, on occasions, a shrinkage or withdrawal of insurance cover from the market. They are the negative effects of a "compensation culture" which the Civil Liability Bill explicitly seeks to address. The Government claims that a risk-based PIDR will lead to less money being spent on legal fees, lower insurance premiums for motorists and more resources for the NHS to spend on care. These are laudable aims and they may materialise in practice.

The beef is not with those aims: it is that the Government seeks to achieve them through a misrepresentation, without proper evidence or scrutiny and without the courage to challenge the 100% compensation status quo. There may well be justification for reducing the measure of damage, but this paper demonstrates that it is not that claimants are currently over-compensated. Claimants are currently under-compensated against a 100% standard. The Bill will increase claimant's exposure to risk and therefore increase the level of their under-compensation. Telling claimants that they are compensated to the full when they are not will leave them wondering who is to blame for the shortfall—themselves or their advisors. This Bill is a missed opportunity to have an honest consultation on the relevant questions. Is the 100% principle too expensive? And how much compromise is fair on Claimants?

[58] Reported in Ministry of Justice, *The Damages Act 1996: The Discount Rate: Review of the Legal Framework Consultation Paper* (CP3/2013). Published in 2017.

[59] P. Crane, *Atiyah's Accidents, Compensation and the Law*, 18th edn (CUP, 2013), p.143.

[60] Sumption LJ, "Abolishing personal injuries law—A project" PIBA Annual Lecture London November 2017.

What is a Personal Injury Anyway?

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LT Damage to property; Economic loss; Personal injury

Introduction

In everyday practice, there is no need to ask the question: is this a personal injury? The injuries set out in the Judicial College guidelines for the award of general damages provide a list which covers almost all of the cases that we will come across in practice. If a claimant is injured even to the modest extent of having neck stiffness and some pain for a week or two, that qualifies as a personal injury. So, too, will gastric illness which amounts only to some days with a gippy tummy. If the claimant's symptoms are any less significant than this, there would seem to be little point in bringing a claim in the first place. Practitioners will automatically apply the legal maxim *de minimis non curat lex* on the basis that there is no value in pursuing a claim for a complaint that is trivial.

No doubt for this reason, there is very little litigation addressing what constitutes a personal injury. From time to time, the issue does, however, arise. One context in which the question can appear is that of limitation. As personal injury has a different limitation period from ordinary tortious action or a claim in breach of contract, it may be critical to determine whether the claimant suffered from a personal injury. The question can also arise where it is essential to establishing a cause of action. What if the defendant owes the claimant a duty of care to prevent personal injury but not to protect the claimant from economic loss: in such a context, the merits of the claimant's claim will turn entirely on whether he has sustained a personal injury or not.

This article focuses on the trilogy of House of Lords/Supreme Court cases in which the HL/SC have grappled with the dividing line at common law between "no injury" and "personal injury": *Cartledge v E Jopling & Sons Ltd* ("*Cartledge*");[1] *Rothwell v Chemical & Insulating Co Ltd* ("*Rothwell*");[2] and *Dryden v Johnson Matthey Plc*.[3] The higher courts have resisted any temptation to provide a definition of actionable personal injury and I shall do the same. Instead, I set out the two-stage test which applies and make an attempt to extract from these cases a range of points which the court will want to have in mind when seeking to determine in any future case whether a person has suffered a personal injury or not.

There is a discrete issue as to when a mental insult constitutes a personal injury. The test has been laid down that a claimant needs to have suffered from a recognisable psychiatric illness, as opposed to "mere" mental upset or anguish. I am not going to explore this particular issue further in this article.

Personal injury completing the claimant's cause of action

A helpful starting point is to recall that a claimant who has a personal injury has suffered *damage* which completes his cause of action. Take a claim in negligence. Unlike, say, trespass, such a claim is not actionable per se. The claimant has to prove that the breach of duty caused him to suffer damage. The personal injury is a form of damage. Provided the claimant was owed a duty to protect him from personal

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[1] *Cartledge v E Jopling & Sons Ltd* [1963] A.C. 758; [1963] 2 W.L.R. 210.

[2] *Rothwell v Chemical & Insulating Co Ltd* [2007] UKHL 39; [2008] 1 A.C. 281.

[3] *Dryden v Johnson Matthey Plc* [2018] UKSC 18; [2018] 2 W.L.R. 1109.

injury, when he suffers his personal injury as a result of the defendant's breach of duty, his cause of action is complete.

So the question of whether a person has a personal injury is really a question as to whether he has suffered from relevant *actionable damage*. Once he has, then his limitation period starts to run[4] and he is entitled only to bring the one action for all the consequences of the breach of duty. He may be able to recover provisional damages but he cannot return later when the consequences of the breach of duty prove to be much more serious than anticipated.

This shows that there is a tension inherent in the analysis of when the claimant *first* suffered actionable damage. On the one hand, by recognising an earlier rather than a later trigger, the courts may be said to be empowering the claimant; he can now bring his action for damages for personal injuries. On the other hand, recognising an earlier trigger may have the effect of disadvantaging the claimant. He may have an actionable claim though at the early stages of a disease process and long before he has suffered the sort of damage that he is really interested in claiming for. This potential disadvantage has been mitigated by the provisions of the Limitation Act 1980[5] and by the court's power to award provisional damages.

The *Cartledge* case

The claimant steel dressers in *Cartledge* had contracted pneumoconiosis as a result of breach of duty by the factory owner defendant. There was no doubt that the claimants had at some point suffered a personal injury, namely pneumoconiosis, but the key question was when they first suffered actionable personal injury and so whether their claims were statute barred by the time they were brought.[6] The key feature in this case was that the claimants' lungs were undoubtedly affected by the disease of pneumoconiosis long before they were aware of this. X-rays were able to show undisputed damage to the lungs at a time when the claimants were without symptoms.

This gave rise to the question: can a person suffer from a personal injury without being aware that he even has a personal injury because it is symptomless. This is not the same question as might arise where a person has been knocked unconscious in an accident. Such a person is unable to function normally as a result of his being knocked unconscious and so undoubtedly has a personal injury even though he is unconscious. Here, the question arose in stark form as to whether a person who is, as it would appear to him at the time, entirely well actually has a personal injury when he has damage to his lungs sufficient to appear on X-ray.

The HL appeared to have no difficulty with recognising that a person can have an actionable personal injury without symptoms and without knowing about it. Lord Pearce, with whom the other Law Lords agreed, held in terms that a person can have actionable personal injury when he has "no knowledge of the secret onset of pneumoconiosis and suffers no present inconvenience from it" [7] and that "[t]here is no legal principle that lack of knowledge in the plaintiff must reduce the damage to nothing or make it minimal".[8]

At the same time, Lord Pearce did not consider that the fact of damage, visible on the X-ray, was necessarily sufficient to constitute actionable personal injury. He held that the question was whether the claimant had suffered "material damage by any physical changes in his body".[9] This, he said, was a question of fact in each case. He drew attention to the de minimis principle, hence if a person has a bodily change but does not feel any symptoms as a result, this would tend to suggest that the claimant did not suffer from

[4] Subject to the knowledge provisions in the Limitation Act 1980.
[5] Limitation Act 1980 ss.11, 14 and 33.
[6] When the actions were brought, the limitation provisions were strict and did not allow for a later date based upon knowledge or for a discretionary power to disapply the limitation period.
[7] *Cartledge v E Jopling & Sons Ltd* [1963] A.C. 758 at 778.
[8] *Cartledge v E Jopling & Sons Ltd* [1963] A.C. 758 at 779.
[9] *Cartledge v E Jopling & Sons Ltd* [1963] A.C. 758 at 779.

material damage. At the same time, if the physical change left the claimant with a hidden impairment, this may suffice to constitute actionable personal injury. In the case of the pneumoconiosis, the damage to the claimants' lungs had the effect of reducing slightly their lung capacity and of putting them at risk of further problems in the future. So, if they had chosen to engage in heavy exercise, they might have discovered that they got out of breath earlier than would otherwise have been the case; and they were prone to developing tuberculosis. This sufficed for the changes in the lungs to qualify as material damage, i.e. actionable injury.

The *Rothwell* case

This is the well known "pleural plaques" case. The claimant employees had been negligently exposed to asbestos dust by the defendant and had, as a result, developed pleural plaques. These are areas of fibrous thickening of the pleural membrane surrounding the lungs. They are visible on X-ray. The pleural plaques themselves do not cause any symptoms; nor do they cause any further illness or disease. What they do is act as a marker that the claimant has been exposed to asbestos dust. That exposure can independently cause a range of illnesses including asbestosis and mesothelioma. So a person with pleural plaques will be advised that he is at increased risk, as against the general population, of suffering from these asbestos-related illnesses, albeit they are not caused by the pleural plaques as such. Some claimants, so advised, got upset and one claimant even suffered from clinical depression. The question then arose as to whether any of the group of claimants with pleural plaques had, at that stage, suffered from actionable personal injury.

The HL held that a claimant does not suffer actionable personal injury when he developed pleural plaques. Whilst this constituted a bodily change, it did not cause the claimant any harm to their health or physical condition. In the language of Lord Hoffmann, the claimant was not physically worse off. Lord Hope asked whether a physical change gave rise to real damage. Lord Rodger employed the language of material damage.

So, in *Rothwell*, the HL were applying the principles established in *Cartledge*. The fact that pleural plaques were symptomless was not a bar, as such, to the claimants having sustained actionable personal injury. The question was whether the bodily change, which the claimants had undoubtedly suffered, caused them to suffer material damage, that is to make them worse off. Given the pleural plaques neither caused symptoms nor were the gateway to further illness, the claimants had not suffered from material damage. As elegantly put in *Dryden*[10] the pleural plaques were a "biological cul de sac". As such they could not be employed to establish actionable personal injury in contrast to the pneumoconiosis which did render the claimants in *Cartledge* liable to infection.

Lord Hope was express in recognising that an injury which, although symptomless, would lead to some other event that is harmful would qualify as material damage.[11] There was no damage with pleural plaques because they "do not give rise to any symptoms, nor do they lead to anything else which constitutes damage"[12] and "because of the absence of a direct causative link between them and the risks and the anxiety which, on their own, are not actionable".[13]

The HL went further and also held that the claimant who had suffered clinical depression still did not qualify for actionable personal injury. This involved the HL distinguishing *Page v Smith*[14] and holding that it was not reasonably foreseeable that a person of reasonable fortitude would develop a psychiatric illness in these circumstances. I shall not explore this point further in this article.

[10] By Harry Steinberg QC at first instance.
[11] See *Rothwell v Chemical & Insulating Co Ltd* [2007] UKHL 39 at [47].
[12] *Rothwell v Chemical & Insulating Co Ltd* [2007] UKHL 39 at [49].
[13] *Rothwell v Chemical & Insulating Co Ltd* [2007] UKHL 39 at [50].
[14] *Page v Smith* [1996] A.C. 155; [1995] 2 W.L.R. 644.

The *Dryden* case

In *Dryden*, the claimant employees were all exposed to platinum salts in breach of duty by their employer, the defendant, whilst at work in a factory making catalytic converters. This exposure led them to develop platinum salt sensitisation. This is an asymptomatic condition. It involves no more and no less than the claimants' bodies being exposed to antigens and producing certain antibodies. The defendant knew there was a risk of its employees becoming sensitised to platinum salts and so conducted regular skin prick tests, by which the claimants were assessed as being platinum sensitised. They were then promptly taken away from the "red zones", areas where they worked where they were liable to be exposed to platinum salts and where they were paid a relatively high wage.

Had the claimants been left in the "red zones", then with further exposure to platinum salts, they would have been liable to go on to develop platinum allergy. This is a condition with symptoms. By being removed promptly from the "red zones", there was no realistic possibility of their ever developing symptoms from exposure to platinum salts,[15] provided, that is, they did not seek out work in another factory making catalytic converters.

This set of facts led to the question: did the claimants suffer from personal injury? There was a secondary question, which only arose if the answer was No, namely whether the claimants were owed a duty to protect them from economic loss suffered as a consequence of being taken away from the "red zones". At first instance, Jay J dismissed the claimants' claim that they had suffered personal injury. The CA adopted Jay J's reasoning and, for good measure, dismissed the claimants' claim for damages for economic loss. The essential reasoning in the HC and CA was that these claimants were never going to go on to develop symptoms because they had been removed timeously from the "red zones". Mere development of antibodies did not suffice to make the physiological change harmful to the claimants. Sales LJ, giving the only judgment in the CA, held that the removal of the claimants from their jobs was a "sort of mitigation of loss in advance of injury".[16] I will not explore in this article the approach taken by the CA to the back-up claim for economic loss.

The SC allowed the claimants' appeal on the issue of whether they had sustained a personal injury and so did not need to address the argument based upon a duty to protect the claimants from economic loss. Lady Black, giving the only judgment with which the other four SCJs agreed, held that the platinum sensitisation constituted a physiological change which was harmful to these particular claimants. She made this point in a number of ways: (a) the impact of their being sensitised was that their bodily capacity for work had been impaired and they were, therefore, significantly worse off;[17] (b) because of the defendant's negligence, their bodies were now in such a state that they needed to avoid further exposure to platinum salts to avoid going on to develop allergy;[18] (c) sensitisation constituted a change to their physiological make-up which meant that further exposure now carried with it the risk of an allergic reaction and for that reason they must change their everyday lives so as to avoid such exposure;[19] and (d) they have suffered a loss of bodily function, part of their capacity to work.[20]

A detour into property damage cases

Although Lady Black considered property damage cases to be of little direct, or even indirect, assistance,[21] I would still find the reasoning employed in property damage cases helpful when considering the approach of the higher courts to personal injury damage. Property can be damaged even though the physical integrity

[15] Platinum salts are not encountered in everyday life and only in certain specialised workplaces, such as the "red zones" of the defendant's factory.
[16] *Dryden v Johnson Matthey Plc* [2018] UKSC 18 at [32].
[17] *Dryden v Johnson Matthey Plc* [2018] UKSC 18 at [40].
[18] *Dryden v Johnson Matthey Plc* [2018] UKSC 18 at [43].
[19] *Dryden v Johnson Matthey Plc* [2018] UKSC 18 at [47].
[20] Also *Dryden v Johnson Matthey Plc* [2018] UKSC 18 at [47].
[21] *Dryden v Johnson Matthey Plc* [2018] UKSC 18 at [46].

of the property is not affected. In *Losinjska Plovidba v Transco Overseas Ltd (The Orjula)*,[22] a layer of hydrochloric acid lying on part of a vessel's deck, which was not in any way altering the physical integrity of the deck, was held to have caused property damage. Mance J assessed that it was relevant to consider whether there had been "injury impairing value and usefulness of the property in question" and whether there was a "need for work and the expenditure of money to restore the property to its former usable condition".[23]

Similarly, in *Hunter v Canary Wharf Ltd*[24] at 366–367, Pill LJ held that the deposit of dust on a building was capable of causing it physical damage: "The damage is in the physical change which renders the article less useful or less valuable."[25] In *Blue Circle Industries v Ministry of Defence*,[26] radioactive material controlled by the defendant spread onto the claimant's land where it mixed with the topsoil. Aldous LJ held this involved property damage:

> "The land itself was physically damaged by the radioactive properties of the plutonium which had been admixed with it. The consequence was economic, in the sense that the property was worth less and required the owner to expend money to remove the topsoil, but the damage was physical."[27]

In *Pirelli General Cable Works Ltd v Oscar Faber & Partners*,[28] Lord Fraser applied the principle established in *Cartledge*, namely that personal injury damage can occur without the claimant's knowledge, to damage to property. Lord Fraser observed how "in both cases they have a damaged article when, but for the defendant's negligence, they would have had a sound one".[29]

What these property damage cases do is show how property can be damage when it is rendered less useful or valuable. This adds colour to the description "worse off" and emphasises the centrality of this assessment. Further, the fact that property can be damaged without its physical integrity being compromised shows just how much of a purposive approach is adopted by the courts: the aim being to protect the claimant's right to enjoy his property.

A further detour into economic loss cases

In *Rothwell*, Lord Hoffmann used the expression whether the claimant was "worse off" as the litmus test for determining whether a physical change constituted actionable damage. "Damage in this sense is an abstract concept of being worse off, physically or economically, so that compensation is an appropriate remedy."[30] This was not the first time that Lord Hoffmann had used this expression in the context of damage completing a cause of action. He had adopted such language in the context of pure economic loss in *Nykredit Plc v Edward Erdman Group Ltd*[31] when he said:

> "What he must show is that he is worse off as a lender than he would have been if the security had been worth what the valuer had said … that is, that he is worse off than he would have been if it had been correct."[32]

[22] *Losinjska Plovidba v Transco Overseas Ltd (The Orjula)* [1995] 2 Lloyd's Rep. 395; [1995] C.L.C. 1325.
[23] *Losinjska Plovidba v Transco Overseas Ltd (The Orjula)* [1995] 2 Lloyd's Rep. 395 at 339.
[24] *Hunter v Canary Wharf Ltd* [1996] 2 W.L.R. 348; [1996] 1 All E.R. 482.
[25] *Hunter v Canary Wharf Ltd* [1996] 2 W.L.R. 348 at 366H.
[26] *Blue Circle Industries Plc v Ministry of Defence* [1999] Ch. 289; [1999] 2 W.L.R. 295.
[27] *Blue Circle Industries Plc v Ministry of Defence* [1999] Ch. 289 at 300H–301A.
[28] *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 A.C. 1; [1983] 2 W.L.R. 6.
[29] *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 A.C. 1 at 16D.
[30] *Rothwell v Chemical & Insulating Co Ltd* [2007] UKHL 39 at [7].
[31] *Nykredit Plc v Edward Erdman Group Ltd* [1997] 1 W.L.R. 1627; [1998] 1 All E.R. 305.
[32] *Nykredit Plc v Edward Erdman Group Ltd* [1997] 1 W.L.R. 1627 at 1638D–E.

In *Nyekredit*, Lord Nicholls approved a definition of actual damage as "any detriment, liability or loss capable of assessment in money terms and it includes liabilities which may arise on a contingency".[33] Suffering a detriment is another way of describing being worse off.

The economic loss cases show how the courts have been astute to identify the earliest point when a claimant is worse off as triggering actual damage. So in *Knapp v Ecclesiastical Insurance Group Plc*,[34] where a fire insurance policy was, due to an insurance broker's negligence, voidable for non-disclosure, the insured's cause of action accrued on its placing and not later. At the point of placing the policy, the claimant's legal position was altered to his immediate, measurable economic disadvantage albeit the fire had not yet occurred and the insurer was yet to elect to avoid the policy.

If the loss is wholly contingent, then it will not constitute actionable damage. In *Law Society v Sephton*,[35] a solicitor misappropriated funds leaving a client to suffer hardship. The client then applied to the Law Society for payment on ground of hardship. The Law Society, as a matter of public law, then exercised its discretion to pay out to the client and then sought to recover these damages from the defendant. Damage to the Law Society was held to have accrued when a claim was made on the hardship fund, not before. Lord Hoffmann explained how:

> "A contingent liability is not as such damage until the contingency occurs. The existence of a contingent liability may depress the value of other property, as in *Forster v Outred & Co* [1982] 1 W.L.R. 86, or it may mean that a party to a bilateral transaction has received less than he should have done, or is worse off than if he had not entered into the transaction (according to which is the appropriate measure of damages in the circumstances). But, standing alone as in this case, the contingency is not damage."[36]

How to determine whether a claimant has sustained an actionable personal injury?

There is a two-stage test to determining whether a claimant has suffered actionable personal injury:

- The claimant needs to establish that there has been a physical change to his body as a result of the defendant's breach of duty.
- The claimant also needs to establish that such physical change has made him worse off to a more than trivial degree.

What is sufficient to constitute a physical change to the claimant's body?

The answer would appear to be almost anything. The change to the claimant's bodies in *Dryden* was about as modest a physical change as it is possible to imagine: there were additional antibodies produced by their bodies in response to antigens. These were changes at the molecular level, capable of being tested by skin prick testing but otherwise entirely invisible and, of course, symptomless.

The property damage cases show how property can be damaged without any compromise to its physical integrity. The question then arises as to whether any physical change to the claimant's body is needed at all. It surely is because this is a claim for damages for *personal injuries*. Take a case of someone imprisoned in a confined space for a period of time. If that person suffers from back ache, then he will have suffered a physical change. But if the person wants to claim damages for being locked up, that is a claim requiring of a different cause of action, for instance a claim for false imprisonment.

[33] *Nykredit Plc v Edward Erdman Group Ltd* [1997] 1 W.L.R. 1627 at 1630D–F.
[34] *Knapp v Ecclesiastical Insurance Group Plc* [1998] Lloyd's Rep. I.R. 390; [1998] P.N.L.R. 172.
[35] *Law Society v Sephton* [2006] UKHL 22; [2006] 2 A.C. 543.
[36] *Law Society v Sephton* [2006] UKHL 22 at [30].

How does one determine whether a person is relevantly "worse off" as a result of the physical change to their body?

The first point to emphasise is that the question is whether *the person* is worse off as a result of the physical change to his body. The loss is suffered by the claimant, not his body. Thus, in effect a distinction is drawn between the person and his body. I find this very helpful when seeking to work out whether there has been actionable damage.

The second point to note is that a person can be worse off even though he is symptomless and knows nothing of the physical change: see *Cartledge* and *Dryden*. Whilst this point is clear, it should be borne in mind at all times. Where the HC and CA went wrong in *Dryden* was in equating damage with symptoms; in their view, nothing short of actual symptoms could amount to actionable damage.[37]

The third point to make is that it would appear the claimant has to show that he is physically worse off as opposed, say, simply to financially worse off. Lady Black in *Dryden* certainly interpreted Lord Hoffmann as setting this test in *Rothwell*.[38] And there is no part of her judgment in which she says that it suffices for the claimant to show that he is merely financially worse off.

The fourth point, related to the third, is that the court adopts a broad or holistic approach to whether the claimant is physically worse off. This must be the case, although Lady Black nowhere says as much, given her acceptance of what was sufficient to constitute "worse off" for the claimants in *Dryden*. These claimants were only physically worse off in the sense that their bodies could not function in their ordinary jobs. It is possible to see this as an aspect of loss of amenity which can suffice to constitute damage in the absence of any pain and suffering.

The fifth point I would make is that I think it more helpful to adopt the analysis used in the property damage cases and to ask whether the claimant's body is less valuable or less useful to him as a result of the physical change to his body. This is certainly the effect of Lady Black's analysis, if not the language employed. In the passages set out above, she held that the claimant's bodies were not fit for performing their ordinary everyday lives (which in their cases involved going to work in the "red zones"). That is directly equivalent to the vessel's deck in *The Orjula* which could not be used as a deck when covered in hydrochloric acid. It could not be used for its ordinary purpose (of walking along). In *Dryden*, the claimants' bodies could not be used to carry them to work so that they could make a living as they had done prior to the defendant's breach of duty. A slightly different way of putting it may be to ask: can the claimant enjoy his body to the extent he would have done but for the defendant's negligence?

The sixth point is that the expression "worse off" is only one of a number of expressions which are, in effect, interchangeable. It could be asked whether there has been material damage or real damage. This is just semantics. The underlying question remains the same and the expression "worse off" does more to direct the court down the right line. Indeed, in *Carder v Secretary of State for Health*,[39] Lord Dyson MR was emphatic in his assessment that the key to actionable damage was whether the claimant was worse off: "… it must not distract from the only relevant question, namely whether the claimant is materially worse off as a result of the alleged tort, i.e. whether he has suffered damage."[40]

The seventh point is that the claimant has to be more than trivially worse off; otherwise, he will be caught by the principle *de minimis non curat lex*. Hence, in the quote above from *Carder*, Lord Dyson referred to the claimant being "materially worse off". The de minimis threshold is easily crossed: the case of *Carder* provides a good working example of just how modest damage can be whilst still being compensable.

[37] See per Lady Black in *Dryden v Johnson Matthey Plc* [2018] UKSC 18 at [28]–[29] when considering "How Jay J and the Court of Appeal saw matters".
[38] See *Dryden v Johnson Matthey Plc* [2018] UKSC 18 at [26].
[39] *Carder v Secretary of State for Health* [2016] EWCA Civ 790; [2017] I.C.R. 392.
[40] *Carder v Secretary of State for Health* [2016] EWCA Civ 790; [2017] I.C.R. 392 at [22].

The eighth point to make is that a pure contingency does not constitute damage. I derive this from the economic loss cases which will, I think, be applied across however unmoved Lady Black was by them on the facts of *Dryden*. It is not enough to determine whether, if various events were to occur, the claimant might suffer from damage. The courts are concerned with whether the claimant *is* worse off at any given point in time.

The ninth point, allied to the eighth, is that the courts do not shy from finding that a person is worse off even though they have yet to suffer more significant damage or will, as on the facts of *Dryden*, in fact avoid all symptoms by virtue of being moved out of the "red zones". So long as a person can properly be said to be worse off now, no question of pure contingency arises.

The tenth point, linked to the two above, is that a person can be said to have suffered damage now where he is liable to go on to develop symptoms, i.e. where the die is now cast. That is the effect of Lord Hope's analysis in *Rothwell* and it is surely right. It would appear that it is not necessary to establish that the claimant is bound to go on to develop symptoms, just that he is at real risk of doing so.

Finally, I would make the obvious point that each claimant is different and the court's task is to determine whether this particular individual is worse off. This simple point is important as shown by the effect of the defendant's concession in *Dryden*. In the SC, it was recognised that sensitivity to sunlight would constitute actionable damage.[41] The defendant then endeavoured to distinguish that concession from the facts of *Dryden* by emphasising how sunlight is present in everyday life for all. But that is not the point. Here, sensitivity to platinum salts was of real consequence to these claimants in their everyday life and that sufficed to make them worse off.[42]

Can *Rothwell* be challenged?

There is nothing in *Dryden* which is inconsistent with the HL's decision in *Rothwell*. Nor, I suspect, is there any desire by the SC to seek to go behind *Rothwell*. I would give a firm No to the question I have set myself.

Conclusion

Dryden gives a further steer as to what constitutes actionable personal injury without seeking to give much by way of firm guidance for future cases. That is, no doubt, deliberate given the dearth of relevant case law and, coupled with that, there being no urgent need for across the board guidance. As and when a new case arises on the margins, I expect it will require to be litigated at least up to the CA in order to work out which side of the line it should fall on. I have sought above to give some sign posts as to how the two-stage test should be operated in practice.

[41] See *Dryden v Johnson Matthey Plc* [2018] UKSC 18 at [38].
[42] See *Dryden v Johnson Matthey Plc* [2018] UKSC 18 at [39].

Universal Credit and the CRU: Who benefits?

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LT Compensation Recovery Unit; Part 36 offers; Personal injury; Recovery of benefits; Universal credit

Abstract

The introduction of Universal Credit will impact the operation of the Compensation Recovery Unit ("CRU"), compensators and claimants alike. The issue of recoverability of benefits within personal injury claims does not appear to have been considered by the Government when creating the Universal Credit regime, and therefore there may be unintended consequences within the compensatory framework. To date, no formal guidance has been issued by the CRU on the impact of the introduction of Universal Credit, and any information received is a result of direct requests to the CRU for clarification.

Introduction

The claimant is injured as a result of an accident and is unable to work. The claimant needs to claim benefits from the Department of Work and Pensions. The claimant also chooses to make a claim against the party they consider to responsible for their injury.

Does the claimant have to repay the benefits to the DWP?

The Social Security (Recovery of Benefits) Act 1997 states that if the claimant makes a successful claim for compensation as a result of an injury or disease claim, then any benefits they claimed as a direct result of the accident may be deducted from the compensation they receive.

The Act is a measure to prevent claimants receiving financial compensation from both the DWP and the party responsible for causing the injury, ensuring that a "double recovery" does not take place.

Any compensation received for general damages—the amount paid for the claimant's pain, suffering and loss of amenity—is protected, but some benefits paid can be deducted from certain heads of loss in special damages.

The Compensation Recovery Unit ("CRU") is tasked with recovering social security benefits in those cases.

How does the Compensation Recovery Unit work?

On being notified of a claim, the insurer of the proposed defendant (the "compensator") notifies the CRU of the relevant details of the claim.

The CRU then issues a Certificate of Recoverable Benefit ("Certificate"). Updated certificates will continue to be issued throughout the claim up to settlement.

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The Certificate lists those benefits received by a claimant as a direct consequence of the incident, which are deemed to be recoverable against a particular head of loss and have accrued during the relevant period. The relevant period begins either:

- the day following the accident; or
- in disease cases, the day on which a recoverable benefit is claimed as a result of the disease.

The relevant period ends either:

- the date of the final compensation payment;
- an agreed date between the compensator and claimant where an earlier payment is treated as concluding the claim; or
- five years after the date of the accident.

The heads of loss against which these accrued benefits can be recovered are:

- Loss of earnings.
- Cost of care.
- Loss of mobility.

The DWP set out the whole range of benefits which can be offset against these heads of loss on its website, and they are also set out in Social Security (Recovery of Benefits) Act 1997 Sch.2. The words "Universal Credit" were inserted into Sch.2 by the Welfare Reform Act 2012, specifically enabling Universal Credit to be offset from loss of earnings.

There are also certain protected heads of loss which may not be offset against any benefits including:

- Damages for pain, suffering and loss of amenity.
- Loss of future earnings.
- Cost of future care.
- Loss of future mobility.
- Loss of expectation of life and bereavement.
- Loss of amenities of life.
- Loss of congenial employment.
- Loss of benefits associated with injured party's work.

It should be noted at this stage that if a claim is made and subsequently withdrawn, dismissed or discontinued, then there is no requirement for the compensator to pay those sums sought by the CRU.

The process
Compensator (insurer) receives a compensation claim
↓
Compensator notifies CRU within 14 days (using form CRU1)—CRU require injured person's name, address, DOB, NI number
↓
CRU issue a Certificate where mandatory information has been provided and no recoverable benefits have been identified
↓
Compensator receives acknowledgment of notification (form CRU4) if a Certificate cannot be issued immediately
↓
When compensator paying compensation, return form CRU4 to apply for a Certificate
↓

Compensator receives acknowledgement of notification (form CRU5) within 14 days
↓
Receive Certificate by date given on form CRU 5 (a copy of the Certificate is sent to the injured person or their representative)
↓
Compensator pays compensation? In the event of any deductions have been made, the injured person must be informed of this
↓
Compensator notifies CRU of the date any compensation payment is made in final discharge of the claim
↓
Compensator is liable to pay to CRU the total amount of recoverable benefits paid in the relevant period and/or recoverable lump sums (relating to industrial disease)
↓
Compensator pays CRU the total amount of recoverable benefits and/or lump sum shown on the Certificate (may be pursued and enforced as a debt through the courts from the 15th day after compensation paid)

Why does Universal Credit matter?

Universal Credit is the consolidation of payments of six individual weekly benefits into one single monthly payment, and is being introduced in stages across the UK. It was detailed within the Welfare Reform Act 2012, with the intention of being simpler than the existing system of benefits and tax credits, and to "make work pay".

The Department of Work and Pensions expects the national roll-out of the full digital service for online applications for Universal Credit to be completed by December 2018. An area with "full digital service" is an area where everyone who would have ordinarily made a new claim for any of the benefits above, will now have to claim Universal Credit online instead.

The Government then plans to start transferring people who are still on existing benefits or tax credits onto Universal Credit from July 2019. They plan to complete this process by March 2022.

Universal Credit will replace the following benefits:

- Child Tax Credit.
- Housing Benefit.
- Income Support.
- Income-based Jobseeker's Allowance.
- Income-related Employment and Support Allowance.
- Working Tax Credit.

Universal Credit and the CRU

Of the six benefits listed above being replaced by the single Universal Credit ("UC") payment, there are currently three benefits which can be recovered by the CRU. Furthermore, these benefits can be recovered against *loss of earnings* claims only. An amendment to the Social Security (Recovery of Benefits) Act 1997 Sch.2 was introduced by secondary legislation of the Welfare Reform Act 2012 confirming that UC is recoverable against loss of earnings claims only:

- Income Support.
- Employment and Support Allowance ("ESA").
- Jobseeker's Allowance ("JSA").

The remaining three benefits to be replaced by Universal Credit are *not* recoverable against any head of loss:

- Housing Benefit.
- Working Tax Credit.
- Child Tax Credit.

Under the current system, if a claimant was in receipt of both JSA and Housing Benefit for example, the JSA payment would be listed on the CRU certificate as recoverable, provided that there was a loss of earnings claim. The Housing Benefit would not.

If the claim was successful, the JSA payments would be repayable by the compensator by deducting that figure from the loss of earnings claim as appropriate.

Where the amount of compensation agreed in respect of the loss of earnings claim is less than the amount of JSA to be recovered, then the compensator is also liable to pay the difference.

So far, so good.

When a claimant is moved to the Universal Credit system, they no longer receive payments for JSA and Housing Benefit on a weekly basis, but receive a single monthly payment. The payment is not broken down in any way, and it is based on an assessment of the claimant's circumstances.

This means that a single UC payment figure is listed on the Certificate, irrespective of how that single payment might reflect the previous benefits which were being received by the claimant.

This figure will not indicate how any previous payments for those six benefits have been integrated into the single payment, as those benefits are no longer deemed to exist.

We have sought clarification from CRU regarding whether the UC payment can be broken down, and they have responded as follows:

> "UC is a monthly paid benefit which cannot be broken down further into weeks or days. Where there is a change of circumstances within a relevant assessment period (i.e. accident related sick note is submitted) the full months UC benefit is recoverable …
>
> UC is paid 'in respect of' an incident if it is paid on the basis of the claimant being incapable of work due to the incident, even if the claimant would have been paid UC on some other basis if the accident had not happened.
>
> Additionally the amount of UC on the Certificate can only be offset against the injured person's compensation in respect of loss of earnings during the relevant period (The Social Security (Recovery of Benefits) Act 1997 s.8Sch.2).
>
> You will appreciate that the advice contained in this letter cannot be taken as definitive interpretation of the law, that will ultimately be a matter for the courts …"

As it stands, it is clear that the CRU has no access to any form of breakdown and it is their expectation that the sum listed on the certificate is to be repaid in its entirety.

This is a departure from the existing system, and brings with it some consequences which may not have been considered.

What does it mean in practice?

As a demonstrable example, we have seen a Certificate where the claimant is currently in receipt of Universal Credit, having previously received payments of Employment and Support Allowance. The financial result of the change to Universal Credit and the consequences for CRU recoveries are worthy of note:

- Prior to the change to Universal Credit, the claimant received the Employment and Support Allowance payments totalling £57.90 a week.
- The payment was then changed to Universal Credit, as Employment and Support Allowance is one of the six benefits to be brought into the remit of the single UC payment.
- This payment now totalled £600+ a month (around £150+ a week).

The CRU position is that this entire UC sum is recoverable against a loss of earnings claim, and will not (and cannot) be reduced to reflect the relative value of the previous recoverable benefit.

Using the example above, the weekly Employment and Support Allowance sum represents only around a third of the weekly equivalent UC sum now being sought by the CRU.

Again, it must be stressed that this change will only affect those claims with loss of earnings elements due to the particular benefits being subsumed into the UC.

However, in those claims with loss of earnings elements, it is apparent that CRU recovery amounts could potentially increase significantly; the example above shows an increase of £100+ per week.

Offers and settlement

Part 36 offers in personal injury or disease claims can be made gross or net of any CRU liability. Making an offer gross of any CRU liability, means that the CRU liability will be paid from the offer sum and not, as in the case of a net offer, as an additional liability for the compensator.

Dependent on whether an offer is made gross or net of CRU liability, the rollout of UC could have some interesting effects on a claim with loss of earnings:

- Any offer made to a claimant expressed as gross of recoverable benefits (and then accepted) could result in reduced compensation amounts for the claimant. We would expect solicitors to be alive to this point, yet it remains to be seen whether or not claimant firms will accept gross offers inclusive of Universal Credit recoverable benefits at the same level as before—or whether they will try to apply a "premium" to acknowledge the change in the amount of recoverable benefits.
- There is an increased risk to compensators and legal representatives that any offers made net of UC repayments, will result in additional liability for the compensator and possibly involve the undertaking of a CRU appeal on what is still an emerging issue. On a claim where there is a particularly large sum to be recovered for loss of earnings, this sum could be substantial.

We have set out some examples below to highlight the possible ramifications of the introduction of Universal Credit on a variety of cases, and the impact of making an offer gross or net of any CRU liability on the compensator and claimant.

Case examples

Example One

A claimant was injured as a result of the admitted negligence of the defendant. He is unable to work due to the injury, and as a result loses his part-time job. He receives benefits whilst he recovers. He makes a claim against the defendant.

A valuation of £10,000 for general damages and £4,000 for loss of earnings is agreed by the claimant and defendant, who agree that the proposed settlement is gross of any CRU repayments due.

Part 36 offer gross of CRU

- **Claimant subject to Universal Credit**

  The claimant receives a monthly Universal Credit payment of £609.95 a month. He receives these payments for 12 months. The defendant receives a Certificate which sets out that he has received £7,319.40 in Universal Credit.
  The recovery of the Universal Credit payment is deducted from the loss of earnings claim. As the amount of compensation in respect of the loss of earnings claim is less than the amount of Universal Credit to be recovered, the compensator is also liable to pay the difference.
  The claimant receives £10,000 in damages. The compensator pays £7,319.40 in total to the CRU, including an additional £3,319.40 to the settlement agreed for loss of earnings. The compensator pays £17,319.40 in total.

- **Claimant not subject to Universal Credit**

  The claimant is over 25 and he receives £73.10 a week in Employment and Support Allowance for 52 weeks as he is placed in the work-related activity group. The defendant receives a Certificate which sets out that he has received £3,801.20 in Employment and Support Allowance.
  The recovery of the Employment and Support Allowance payments is deducted from the loss of earning claim. The outstanding sum of £3,801.20 is repaid and the claimant receives a total of £10,198.80 in damages.
  The compensator pays nothing in addition to the £14,000 settlement agreed.

Part 36 offers net of CRU

- **Claimant subject to Universal Credit**

  The recovery of the Universal Credit payment is payable by the compensator after the settlement of the claim.
  The claimant receives the full £14,000 in damages. The compensator pays £7,319.40 in addition to the damages, totalling £21,319.40.

- **Claimant not subject to Universal Credit**

  The recovery of the Employment and Support Allowance payments is payable by the compensator after the settlement of the claim for £14,000.00.
  The claimant receives £14,000 in damages. The compensator pays the £3,801.20 to the CRU, resulting in a total payment of £17,801.20.

Example Two

A claimant was injured as a result of the negligence of the defendant. She is unable to work due to the injury, loses her job, and receives benefits whilst she recovers. She makes a claim against the defendant. Liability is admitted. Settlement of £25,000 for general damages and £10,000 for loss of earnings is agreed.

Part 36 offer gross of CRU

- **Claimant subject to Universal Credit**

  The defendant receives a Certificate which sets out that she has received £10,979.10 in Universal Credit.
  The claimant receives £25,000 in damages. The compensator pays £10,979.10 in total to the CRU, including an additional £979.10 to the settlement agreed for loss of earnings. The compensator pays a total of £35,979.10.

- **Claimant not subject to Universal Credit**

  As she is severely limited by what she can do, the claimant receives Employment and Support Allowance in the sum of £73.10 a week for the first 13 weeks, and then £110.75 a week thereafter for the remaining 65 weeks.
  The total benefits of £8,147.75 are deducted from the loss of earnings claim and the claimant receives a total of £26,852.25 in damages. The compensator pays nothing in addition to the £35,000 settlement agreed.

Part 36 offers net of CRU

- **Claimant subject to Universal Credit**

  The claimant receives £35,000 in damages. The compensator pays £10,979.10 in addition to the damages, totalling £45,979.10.

- **Claimant not subject to Universal Credit**

  The claimant receives £35,000 in damages, and the compensator pays the additional £8147.75 too, totalling £43,147.75.

Example Three

A claimant is injured as a result of the negligence of the defendant. He is able to continue working yet requires some care and assistance from his partner. He receives Universal Credit during the period he receives care and assistance.

The claim settles for £50,000.00 including £2,000.00 for care and assistance. During the relevant period, he received £1,500 in universal credit.

In this instance, the compensator does not have to pay back any of the Universal Credit payment, or pre-Universal Credit any of the equivalent three benefits, as the only head of loss against which a recovery for those benefits can be made is a loss of earnings claim.

CRU Appeals

Ordinarily, should the compensator become aware during the claim, that the Certificate has an error or that the amount of benefits being recovered is incorrect, then the compensator may seek a review. The review should set out where the alleged error lies or why the benefits sought are incorrect.

In limited circumstances, once the claim has settled in its entirety, and any CRU liability has been paid, the compensator can make an appeal to the Appeals Tribunal, albeit the appeal papers are initially filed with CRU.

It may be the case the claimant received benefits for a period of time, which extended beyond the prognosis period for the injury sustained. Other examples might be that the claimant received benefits to which they were not entitled, or that the rate shown on the Certificate was incorrect.

In these circumstances, the recovery sought by the CRU cannot be said to relate to the claim against the compensator, and might therefore result in a successful appeal which can result in a partial or full refund. If the appeal is successful, then those monies recovered are returned to the compensator.

As it stands, the CRU has stated that they have no methodology or ability to break the UC payments down; the onus potentially now lies with compensators and their legal representatives to access the claimant's benefit records for the purpose of a CRU appeal. However, until further clarification is provided by the CRU on the application of Universal Credit, the appeal process might well be considered for those compensators who are required to pay additional sums back to the CRU as part of a settlement involving Universal Credit.

Such an appeal might be framed on the basis that a similar claim in another area not yet trialling Universal Credit, resulted in a significantly lower recovery sum of JSA by way of example.

However it remains to be seen, whether or not such an appeal (or a preliminary review) would be considered by the Appeals Tribunal. Provided that the UC sum to be recovered is line with the period of injury, and the rates are not incorrect, then it is difficult to see on what basis an appeal could be made.

The system had clearly been designed in this manner, albeit it seems unlikely that the impact of the change to Universal Credit on the settlement of personal injury claims will have been high on the Government's agenda when dealing with the reforms.

The future

The introduction of Universal Credit has been greeted in some quarters with dismay, whilst others have praised it as a necessary change to ensure that those working will be in a better position than those who do not.

From a compensators perspective, the introduction of Universal Credit on a broader level is likely to be welcomed, as it will encourage those who can return to work to do so and thus reduce loss of earnings claims.

However, for those who are unable to work due to the severity of their injuries, then Universal Credit will have an impact albeit on the smaller scale of case by case offers and settlement.

The single biggest beneficiary to the change is the Government, who will see the sums recovered on a Universal Credit Certificate increase than the current benefit regime. Depending on the circumstances and the basis of any settlement offer, any detriment from the change will be borne by the claimant or the compensator.

In the absence of further guidance and the possibility of apportionment, we may see some satellite litigation on this point once the complete rollout of UC occurs. It is possible, and we are hopeful, that the DWP will provide further formal guidance on this issue in the near future, and that apportionment of the Universal Credit payment will be possible, albeit we are doubtful this will come to fruition.

In the meantime, claims handlers at both compensators and their legal representatives will have to be mindful as to the precise terms of any Pt 36 offers so as not to incur additional liabilities, and claimants will have to be alive to the increased sums capable of being recovered.

Reduction Factor Adjustment in *Swift v Carpenter*[1]

Victoria Wass[*]

Adjustment of awards; Amputation; Disabilities; Future loss; Loss of earning capacity; Measure of damages; Ogden tables

Case notes

Ms Swift was 43 years old at the time of trial. She suffered crushing injuries to both lower limbs in a car crash which resulted in a below knee amputation to her left leg and some rigidity in her right ankle and foot. Ms Swift benefits from a range of privately-purchased well-fitting prosthetics. The ongoing impacts of injury are some mobility limitations, phantom limb pain and fatigue. She is disabled (para.108). At the time of trial Ms Swift was employed in her pre-injury job in travel journalism and marketing. She had returned to this role on an 80% contract. She was found to be "capable and committed"[2] although limited by her "pain, fatigue and the other demands on her finite resources".[3]

Activity limitations

Her work requires travel to visit and review hotels and resorts. This involves evening receptions and regular late-night working:

> "In both these domains her ability to function is affected by her pain which is unpredictable, intrusive and tiring. It is also, albeit to a lesser extent with provision of a range of prosthetics, limited by the amputation itself."[4]

Her daily activities outside work such as lifting and carrying and working at ground level are restricted and she was awarded seven hours per week of care assistance for cleaning, shopping, lifting and carrying.[5] She appears to have difficulty with stairs and was awarded adaptation costs to install a lift at home.[6] Her activity limitations were predicted to increase with age with back pain and degenerative changes to the joints of her lower limbs such that she would require a wheel chair for mobility from her mid- to late-sixties or early seventies.[7]

The Ogden application

The strict application of the Ogden reduction factors estimate pre-injury employment at 0.89 of remaining working life time for a non-disabled graduate female aged 43 and in employment. This is reduced by injury to 0.60 for a disabled graduate 43 year old female in employment.

[1] The author is grateful to Colin Ettinger for bringing the judgment to her attention, to William Latimer-Sayer QC for advice on an early draft, and to Anthony Carus for suggesting the use of Figure 1 back in 2008 when the author was reviewing *Conner v Bradman*.

[*] Victoria Wass is professor at Cardiff Business School teaching reward management, evidence-based practice and researching in the area of labour markets and disability-related disadvantage. She was a member of the research team who developed the reduction factors in the sixth and seventh edition of the Ogden Tables and she has been a member of the Ogden Working Party since 2009. She provides expert evidence on earnings and employment prospects in personal injury claims and on the indexation of earnings-related claims in periodical payments orders, both in the UK and internationally.

[2] *Swift v Carpenter* [2018] EWHC 2060 (QB) at [108].
[3] *Swift v Carpenter* [2018] EWHC 2060 (QB) at [109].
[4] *Swift v Carpenter* [2018] EWHC 2060 (QB) at [109].
[5] *Swift v Carpenter* [2018] EWHC 2060 (QB) at [8] and [62].
[6] *Swift v Carpenter* [2018] EWHC 2060 (QB) at [138].
[7] *Swift v Carpenter* [2018] EWHC 2060 (QB) at [9].

Neither side contended for a strict application. The claimant argued for an uplift to the pre-injury reduction factor on the basis of her commitment to and enjoyment of her work and a reduction to the post-injury reduction factor on the basis that an amputation is an above-average impairment.[8] The defendant argued for: (i) a *Smith v Manchester*[9] award of £40,000; (ii) a post-injury reduction factor of 0.89 because the impact of her disability had been accounted for by the reduced multiplicand associated with part-time working as per *Clarke v Maltby*[10] (any further reduction would amount to double recovery); and (iii) an upward adjustment to the post-injury reduction factor of 0.60 following *Conner v Bradman & Co Ltd*.[11] Despite disagreement on the reduction factors, no expert evidence was taken on the issue.

The reduction factor adjustment

The presiding judge, Lambert J, rejected the claimant's arguments. In relation to the arguments put forward by the defendant she rejected (i) and (ii) but she was persuaded by (iii) and she applied an uplift to the post-injury reduction factor from 0.60 to 0.70. This uplift implies that the claimant's employment prospects over her working life time are 34% better when compared to the reference group which matches her age group, disability status, high-level qualification and employment status.

The uplift is explained on the basis that the claimant's limitation was not "truly captured" by the limitations in relation to the specific capacities set out in the guidance notes reproduced immediately after the definition of disability in the Explanatory Notes (Government Actuary's Department 2011 para.35). These notes originate from the Disability Discrimination Act 1995 ("DDA") ss. D15–D27[12] and are used in the Labour Force Survey to guide interviewers and respondents when deciding on disability status. As is set out in the guidance, and in the judgment, in relation to limitation of mobility, the guidance is:

> "unable to travel short journeys as a passenger in a car, unable to walk other than at a slow pace or with jerky movements, difficulty in negotiating stairs, unable to use one or more forms of public transport, unable to go out of doors unaccompanied."

In its use as a classification aide it is intended to be indicative and not exhaustive nor exclusive. Nevertheless, the description does not match the claimant who plans to undertake a para-athlete triathlon (swimming 100m, running 1km, and cycling 3km). These plans are testimony to the ability of the latest generation of digital prosthetics to reduce activity limitation. It is also notable that Ms Swift appears to have avoided problems which can affect the stump and its fit with the prosthesis.

The guidance notes were removed from the definition of disability under the Equality Act 2010 so that a specific capacity limitation is no longer required. Guidance is still provided in the form of descriptions of a wider range of activity limitations, many of which are linked to pain and fatigue (conditions experienced by the claimant). This guidance can be found in the Appendix to the Equality Act 2010 Guidance produced by the Office for Disability Issues[13] with some relevant examples reproduced here:

> "Difficulty waiting or queuing, for example, because of a lack of understanding of the concept, or because of pain or fatigue when standing for prolonged periods.
>
> Difficulty using transport; for example, because of physical restrictions, pain or fatigue, a frequent need for a lavatory or as a result of a mental impairment or learning disability.

[8] While an amputation is an above-average impairment, it is the severity of the activity limitation (the disability) that it gives rise to that is important for the reduction factors.

[9] *Smith v Manchester Corp* (1974) 17 K.I.R. 1; (1974) 118 S.J. 597.

[10] *Clarke v Maltby* [2010] EWHC 1201 (QB).

[11] *Conner v Bradman and Co Ltd* [2007] EWHC 2789 (QB).

[12] See Office for Disability Issues, *Disability Discrimination Act: Guidance on matters to be taken into account in determining questions relating to the definition of disability* (1996).

[13] See Office for Disability Issues, *Equality Act 2010: Guidance on matters to be taken into account in determining questions relating to the definition of disability* (2011), 53–55.

Difficulty in going up or down steps, stairs or gradients; for example, because movements are painful, fatiguing or restricted in some way.

A total inability to walk, or an ability to walk only a short distance without difficulty; for example because of physical restrictions, pain or fatigue.

Difficulty accessing and moving around buildings; for example because of inability to open doors, grip handrails on steps or gradients, or an inability to follow directions."

Expert advice

It is not for the expert to decide on the reduction factors rather it is for the expert to advise the court on their meaning and application. Reduction factor adjustments are often difficult decisions for the court to make. Precedents set in other cases are not always helpful because these decisions were difficult too. The approach adopted by the judge is understandable and correct within the context of the information that she appears to have had before her. Where there is disagreement over the application of the reduction factors because one or both parties are contending for an adjustment, and given that the defendant raised the cases of *Conner v Bradman* and *Clarke v Maltby*, then the judge might have benefited from an expert opinion.[14] My advice would have made the following information available. It may have made for a more robust justification of the adjustment. It may also have led to a different adjustment.

(i) The list of specific capacities used here to increase the post-injury reduction factor was intended for a different purpose and was revised in the Equality Act 2010 where it was removed from the definition of disability and reworked in the guidance notes. The list was intended to support the disability classification rather than as a means of assessing the extent of disability or the level of impact on employment prospects. The list of descriptions was not meant to be limiting in terms of which specific restrictions were included in the definition and which were not. To the extent that in practice the specific capacities list had this effect, it was both downgraded in terms of its influence and widened in terms of its coverage.

(ii) The reference group on the strict application of the reduction factors comprises those who are employed and therefore whose characteristics most closely match those of the claimant. I have previously advised that adjustments should be limited to cases "where the claimant is idiosyncratic in some way which we haven't already measured and we can predict the direction in which this will affect the claimant's employment prospects".[15] The size of any adjustment to the reduction factor (which represents a movement away from the norm) should be proportionate to the degree to which the claimant's characteristics and/or circumstances are likely to be different from those of his/her peers, as defined by sex, age, employment status, disability and educational achievement.[16] Here the claimant is capable, she makes effective use of enabling technology and she is committed to living her life as a disabled person as closely as possible to that which she enjoyed as a non-disabled person. Importantly in this case, the standard reduction factor of 0.60 includes allowance for the fact that Ms Swift is employed following injury. Everyone in the 0.60 reference group is employed. Her prospects are not being compared with those of all disabled graduate females but only with those whose limitations in work are sufficiently modest and manageable and/or their ability and commitment to managing those limitations are sufficiently high that they

[14] See W. Latimer-Sayer and V. Wass, "Ask the Expert: William Latimer-Sayer asks Victoria Wass some questions about the practical application of the Ogden Reduction Factors" [2013] *Journal of Personal Injury Law* 1, 35–44 and V. J. Wass, "Billett v Ministry of Defence and the meaning of disability in the Ogden Tables" [2015] J.P.I.L. 37–41, 41.

[15] W. Latimer-Sayer and V. Wass, "Ask the Expert: William Latimer-Sayer asks Victoria Wass some questions about the practical application of the Ogden Reduction Factors" [2013] J.P.I.L. 35–44, 38.

[16] V. Wass, "Discretion in the Application of the New Ogden Six Multipliers: The case of Conner v Bradman and Company" [2008] J.P.I.L. 155–164, 164.

are employed. The reduction factor for the group who are not employed is much lower than 0.60 at 0.38.

(iii) The claimant's prospects consequent on her losing or leaving her current job are included in the 0.60. The reduction factor in the non-employed state, 0.38, reflects the difficulties that disabled people encounter entering employment from a position of non-employment. If Ms Swift were to lose or leave her current job, she too, as a disabled person, would likely encounter difficulty securing another one. The reduction factor of 0.60 reflects this added difficulty. Recruitment presents particular barriers for disabled people and this has as much, if not more, to do with employer negative attitudes towards employing disabled people than it does with their capability in and commitment to work.

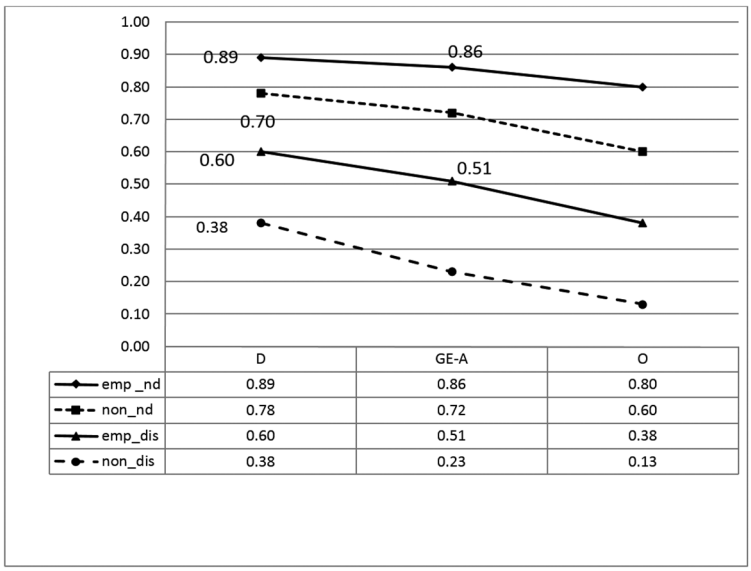
(iv) Increasing limitation with age and consequent reduction in employment prospects towards retirement age is reflected in the reduction factor of 0.60. The reduction factor does not represent a 60% chance of employment over in the next five years. Rather the risks are loaded towards retirement age. Ms Swift is currently expected to work until 67 years. Although the medical opinion is that she will be capable of doing so in sedentary work,[17] it is also that she will be at greater risk of back pain and degeneration of her limb joints and that by her retirement age she will likely be using a wheelchair. Adding pain and fatigue consequent on her injury with that which develops naturally with aging, the employment risks contained within the 0.60 will likely be concentrated towards the later years.

It may be that the judge considered all of these in making her decision. They do not appear to have been put to her during the trial and there is no reference to them in the judgment. The role of the expert is make sure that these points are clarified and considered. If they are, then they will be covered in the judgment and the judgment in turn can usefully inform future cases where reduction factor adjustment is proposed.

A reasonable adjustment?

I continue to find it useful to set out the reduction factors graphically to assist with determining the direction and magnitude of any reasonable adjustment. In Figure 1 below, the pre-injury position is reflected by the reduction factor of 0.89. Had Ms Swift not been working at the time of injury, her employment prospects would have been lower at 0.78. In the post-injury disabled state her employment prospects are 0.60 (employed) and 0.38 (non-employed). The upward adjustment due to capability, commitment and a particularly successful rehabilitation is from 0.60 to 0.70, a 34% uplift. Let us now undertake a thought experiment in which Ms Swift has a mid-level qualification such as GCSEs, A levels or vocational qualifications instead of a degree. This provides a useful reference point from which to compare the adjustment made in this case. In our thought experiment, the reduction factor of 0.86 pre-injury reduces to 0.51 post-injury. We can see from Figure 1 that high-level qualification is particularly important for disabled people (simply put, qualification is measured on the horizontal axis and the graphs are steeper for disabled people than for non-disabled people). If we now uplift the claimant's employment prospects by assuming she has a degree, the magnitude is a 26% uplift. The comparison is useful. If taking into consideration points (i)–(iv) above, the court wishes to uplift the claimant's post-injury reduction factor to 0.70, it needs to satisfy itself that the effect of the claimant's character and her enabling technology were greater than the effect of her degree in boosting her employment prospects. If we know that the factors and reasoning set out above have been taken into account in valuing post-injury earnings, the judgment can more reliably inform future decisions in this area.

[17] *Swift v Carpenter* [2018] EWHC 2060 (QB) at [9].



	D	GE-A	O
emp _nd	0.89	0.86	0.80
non_nd	0.78	0.72	0.60
emp_dis	0.60	0.51	0.38
non_dis	0.38	0.23	0.13

Figure 1: Ogden Reduction Factors for a woman aged 40–44.[18]

[18] Source: Government Actuary's Department, *Ogden Tables: Actuarial Tables with Explanatory Notes for use in Personal Injury and Fatal Accident Cases*. 7th edn (2011), para.42.

Assignment of Conditional Fee Agreements after *Budana*

David Marshall
Managing Partner, Anthony Gold Solicitors

Assignment; Conditional fee agreements; Law firms; Novation; Personal injury claims; Retainers; Success fees

PROCEDURE

A conditional fee agreement is a contract between the solicitors' firm and its client and the normal rules of contract apply. The Law Society's model CFA makes provision for when the contract can be terminated by either party, but contains no express provisions relating to assignment of rights under the contract. Obviously the client can choose to instruct another solicitor to complete the case. Sometimes this is done because the solicitor has terminated the CFA in accordance with its terms; for example, if he considers the client is no longer going to win, or the client has rejected his advice on a settlement offer, or the client has breached its terms. Or the client may have lost confidence in the solicitor and terminated the CFA. In either eventuality, the Law Society model CFA (and any other well-drafted CFA) makes provision for what happens to the solicitor's costs when the CFA is ended. The client and the solicitor then enter into a new CFA for the work that remains to be done.

This article is, however, concerned with the situation that arises where all three parties—client, original solicitors and new solicitors—all want to preserve the rights and liabilities arising under old CFA; that is the CFA originally made between the original solicitors and the client. This might, for example, arise where the change in contracting party is one of form rather than substance (e.g. a change from partnership to LLP or to limited company). Or sometimes to keep the after the event insurance policy it is necessary for the original CFA to be preserved even if the client is instructing a new firm. Or a firm might be closing down its personal injury department and responsibly finding a new home for its clients.

If the contracting parties all agree to transfer rights and responsibilities under the original CFA from the original solicitors to the new solicitors, then as a matter of law such a transfer must be either an assignment or a novation. An assignment is a continuation of the original contract but with the benefit and burden transferred from one (or sometimes both) of the original contracting parties to a new party. It is as if the original contract were made between the new solicitors and the client with effect from the date of the assignment onwards. Novation is where the new solicitors take over the benefits and burdens of the original solicitors, but the contract is in effect a new contract between the client and the new solicitors. Confusingly in ordinary English and indeed often in legal documentation the word "assignment" is used to describe both a true legal assignment and a novation. It is rare for the transfer document to describe itself as a "novation". What the transfer document is called makes no difference to its legal effect (an application of the principle in *Street v Mountford*,[1] whereby if you call a spade a fork, it still remains a spade nonetheless).

Usually it does not matter whether the transfer document for a CFA is in law an assignment or a novation. Both transfers are effective, depending upon their operative terms, to discharge the contractual arrangements between the original solicitors and the client and to create a binding contract going forward between the client and the new solicitors.

However, there have been two periods of time when it has made a considerable difference whether the transfer of a CFA is an assignment rather than a novation. The first was between 1999 and 2005 when the

[1] *Street v Mountford* [1985] A.C. 809; [1985] 2 W.L.R. 877.

Conditional Fee Agreements Regulations 2000[2] applied. These set out detailed requirements for a solicitor to undertake before a CFA was made. Case law in the so-called "costs wars" provided that these requirements had to be strictly complied with. If they were not, then, unless the breach was de minimis, the CFA was unenforceable. Although the client would be unlikely to be interested in taking the point after a successful conclusion to the case, because of the indemnity principle the paying party could step into the shoes of the client and avoid paying the costs. Solicitors therefore usually took great care to comply with the Regulations. However, problems arose, for example, when individual solicitors changed firms and their clients followed. The solicitor did not want to burden the clients with more documentation. Or they did not want to change the (recoverable) success fee under the original CFA which should be reassessed under a new agreement. Therefore in many cases CFAs were purportedly assigned in such situations. If the transfer was in fact an assignment, then, as the original CFA still subsisted, and provided the CFA Regulations had been complied with at the outset, there was no need to repeat them on each transfer to a new solicitors' firm. If, however, the transfer was a novation, then each time the case transferred then the Regulations would have to be complied with for the new CFA even though the same individual solicitor and the same client would have already carried out this exercise at least once. If it was not repeated, then the risk was that the no fees would be payable by the losing party to the new solicitors' firm.

In *Jenkins v Young Brothers Transport Ltd*,[3] solicitor had, in the name of her then firm, entered into a CFA with a client. While the litigation proceeded she moved firms twice. On each occasion the benefit of the CFA was assigned by the former firm to the subsequent firm. Rafferty J held that the transfer was an assignment and applied the principle of "conditional benefits" (see below):

> "[The original solicitors were] under the general burdens of a solicitor acting for a client under a CFA , imposed in part in its section 6 , 'Our responsibilities', and by rules of professional conduct. [They were] obliged to act in Mr Jenkins's best interests and to secure for him in his claim for damages the best possible outcome. By virtue of the CFA [they were] entitled to the benefit of payment for work done only if his claim were successful. The CFA section 'Paying us' reads: 'If you win your claim you pay our basic charges, our disbursements and a success fee' and there are provisions for the calculation of costs and for any failure to beat a CPR Pt 36 offer. It follows that the benefit of being paid was conditional upon and inextricably linked to the meeting by [the new solicitors] of its burden of ensuring to the best of its ability that Mr Jenkins succeeded … the condition was relevant to the exercise of the right. In our judgment, upon the facts in this case the benefit and burden of the CFA could be assigned as within an exception to the general rule."

There was obviously a strong public policy motivation behind the judgment. And Rafferty J did not deal with the issue of the other exception to the general rule, that of a personal contract. But in *Davies v Jones*[4] the decision was cited by the Court of Appeal at least without disapproval:

> "Plainly an inextricable link between benefit and burden would satisfy the tests formulated in all the earlier cases. That is sufficient for present purposes, though I have some doubt whether the relevant benefit and burden were correctly described."

The second period of time when the distinction between assignment and novation mattered related to the transfer of cases where the original CFA was made before 1 April 2013, and thus provided for a recoverable success fee (and was linked to a recoverable premium for after the event insurance) and the case was transferred to the new solicitor on or after 1 April 2013. If the transfer was an assignment it was argued that the provisions relating to recoverability applied to the work done by the new solicitors. If it

[2] Conditional Fee Agreements Regulations 2000 (SI 2000/692).
[3] *Jenkins v Young Brothers Transport Ltd* [2006] EWHC 151 (QB); [2006] 1 W.L.R. 3189.
[4] *Davies v Jones* [2009] EWCA Civ 1164; [2010] 2 All E.R. (Comm) 755.

was a novation then it was argued that the post-Jackson provisions under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") applied so that the success fee was not recoverable. Furthermore it was unlikely that the transfer document in seeking to preserve a pre-LASPO CFA would also comply with the requirements for a post-LASPO CFA such as the mandatory cap on the success fee to 25% of general damages and past loss (under the Conditional Fee Agreements Order 2013[5]). In such circumstances, the novated CFA would be likely to be held unenforceable so no costs at all could be recovered under it. There were transitional provisions under LASPO s.44(6) to preserve recoverable success fees but only for CFAs entered into before 1 April 2013.

Some transfers of pre-LASPO CFAs on or after 1 April 2013 were in circumstances similar to those outlined above (e.g. upon solicitors changing firms) or upon changes of structure of the original solicitors' law firm (from partnership to LLP or on incorporation). However, market factors meant that many firms were ceasing to do personal injury work or being taken over by other firms so the issue became very common. On behalf of the Law Society as intervenor, I gave a witness statement which the court of appeal said showed:

> "that there have been a number of challenges which practitioners working in the personal injury field have faced since the introduction of the Jackson reforms, and in particular the introduction of fixed recoverable costs. These have included the need for solicitors firms to have greater access to working capital and guaranteed volumes of work."

Gloster LJ noted:

> "Mr Marshall further points out that the way in which some firms are responding to the effect of the reforms is by changing their structure, for example by merging, while others diversify their business or simply leave the market, whether by choice or following the collapse of their business. This has necessarily lead to a substantial number of arrangements, very similar to those in the instant case, whereby portfolios of personal injury retainers are transferred from an existing firm to a new, or successor, firm. There is thus a wide variety of circumstances in which issues similar to those in the present case might arise; for example: the instructed firm might have ceased to practise in a particular area (as is the case on the instant facts); a client may have wished for their case to continue to be dealt with by an individual solicitor who had moved firms (as in Jenkins); conversely, a client might have lost confidence in one firm and wished to instruct a new firm; or the instructed firm might have become a new entity through merger (as in *Plevin v Paragon Personal Finance Limited* [2017] UKSC 23; [2017] 1 W.L.R. 1249) or by the incorporation of a firm which had previously existed as a partnership."

So, the court of appeal in *Budana v The Leeds Teaching Hospitals NHS Trust*,[6] an appeal from a decision of Besford DJ under the "leapfrog" procedure, went on to consider the question of whether the transfer of a CFA from the original solicitors to new solicitors can be an assignment in law, so that rights under the original CFA, particularly a recoverable success fee, subsist to the benefit of the new solicitors after the transfer and even after recoverability for new CFAs had been abolished by LASPO. The Law Society were given permission to intervene in writing and orally.

The claimant had instructed the original firm of solicitors, Baker Ross, to pursue a tripping claim against the hospital. Having decided that personal injury work would no longer be viable for their business following LASPO, Baker Ross decided to transfer all their personal injury cases to the new firm of solicitors, Neil Hudgell. The original solicitors notified their intention to the claimant on 22 March 2013 and she did not indicate any objections. A transfer agreement between the firms, listing the many cases

[5] Conditional Fee Agreements Order 2013 (SI 2013/689).
[6] *Budana v The Leeds Teaching Hospitals NHS Trust* [2017] EWCA Civ 1980; [2018] 1 W.L.R. 1965.

being transferred, including the claimant's, together with a Master Assignment Deed, were signed on 25 March 2013. The claimant was told on 31 March 2013 that the case had been transferred to the new solicitors and on 10 April 2013 she signed and returned a letter agreeing to the transfer and a deed of assignment dated 31 March 2013 with the new solicitors, which attached a copy of the Master Deed. On 17 May 2013, the claimant signed a "back up CFA" with the new solicitors with a zero success fee and compliant with LASPO. The claim was successful and damages of £4,150 plus costs were agreed. The costs fell for assessment.

The defendants first argued that the original solicitors' letter of 22 March had simply terminated the retainer so there was nothing to assign on 25 March. The judge at first instance had agreed. Gloster LJ held however that "it is clear that the [original solicitors] CFA was not terminated by [original solicitors] conduct" and neither the 22 March letter nor any purported assignment:

> "could amount to a termination of the contract without the claimant having elected to treat the contract as terminated. It is trite law that a repudiatory breach by one party cannot unilaterally terminate the contract. Instead, the innocent party may elect between termination and affirmation of the contract. Unless and until the innocent party terminates the contract, it subsists."

The defendants then argued secondly that the transfer amounted in law to a novation and not an assignment.

It was agreed by the parties that:

- whereas an unqualified benefit of a contract usually can be freely assigned, the burden of a contract usually cannot be assigned;
- the benefit of a personal contract cannot usually be assigned; and
- where a right under a contract was conditional upon, or qualified by, performance of some obligation in return for which the right has been granted, an assignee of the benefit of such right will only be entitled to exercise the right subject to performance of the burden ("the conditional benefit principle").

Prior to the court of appeal decision in *Budana*, the Supreme Court in *Plevin v Paragon*[7] had passed comment on the question of assignment in the course of determining the recoverability of after the event premiums. However, the point was not argued, so was not a binding authority on the issue. But nonetheless Gloster LJ noted that "Lord Sumption noted that it was 'common ground that the CFA was in principle assignable' without doubting the correctness of that proposition".

Accordingly, Gloster LJ held that:

> "there is no reason in principle why rights and benefits under a firm of solicitors' contracts with its clients, or its books of business, should not be capable of assignment in today's business environment, for the practical reasons set out in the Law Society's submissions and evidence (and subject to any statutory or regulatory prohibitions to the contrary, which were not suggested to be applicable in the present case). I do not consider that the question of assignability of rights and benefits is limited to a situation where the client's solicitor moves to a different firm (as in *Jenkins*), or one where there are a series of technical assignments to successor firms (as in *Plevin*). It would include situations such as the present where a third party firm buys an existing firm's goodwill and work in progress."

The question of whether the contract between solicitor and client is a personal contract depends upon the facts. In some cases, such as volume personal injury work "what the client wants is representation by a competent practitioner and not necessarily representation by a specific individual (whom he or she may probably never meet)".

[7] *Plevin v Paragon* [2017] UKSC 23; [2017] 1 W.L.R. 1249.

However, in any event, Gloster LJ held that the client's consent to the transfer was crucial to the question of whether in law the transfer was an assignment or a novation. Gloster LJ rejected the application of the conditional benefits principle in this context. This was because under the deed the new solicitors were obliged to undertake the work going forward and the original solicitors were discharged. This distinguished it from other cases where conditional benefit did apply where there was no direct contractual nexus between the parties. She also held that the reasoning in *Jenkins* was not correct, even though the Law Society's evidence was that the profession had worked for many years on that basis.

For these reasons, in her judgment, the transfer in *Budana* was a new contract which in law was a novation and not an assignment. Given that a key reason for this decision was that the client had consented to the transfer, it seems difficult to conceive of a situation in future where this would not also apply.

However, Gloster LJ reformulated the issue that the court of appeal had to decide instead as:

> "whether, for the purposes of the transitional provisions of LASPO s.44(6), the fee payable by the claimant to NH, under the 'transfer' arrangements between BR, NH, and the claimant, was "a success fee payable by … [the claimant] under a conditional fee agreement entered into before 1 April 2013."

The focus thus changed from analysis of the contractual arrangements to an analysis of the intentions of parliament in enacting the transitional arrangements for LASPO.

Gloster LJ noted that the clear intention of the three parties was to substitute the new solicitors for the original solicitors on the terms of the original CFA for future work. The policy of the transitional provisions of LASPO had been described by Lord Sumption in Pleven "in relation to both success fees and ATE premiums, is to preserve vested rights and expectations arising from the previous law …".

In the same way Gloster LJ held:

> "that purpose would be defeated by an overtechnical application of the doctrine of novation so as to prevent any litigant, who had begun a claim under a CFA prior to 1 April 2013, from recovering costs in respect of a success fee, simply because a novation had occurred as a result of a change in the constitution of the firm of solicitors acting for her, or as a result of conduct of her claim case being transferred, for whatever reason, to a new firm of solicitors."

Failure to do so might also impede access to the courts which would be in breach of the European Convention on Human Rights art.6. Accordingly, LASPO s.44 was to be construed to give effect to the purpose of the policy. The success fee was recoverable under a purposive reading of the transitional provisions of LASPO, notwithstanding that as a matter of law the transfer had been a novation and not an assignment. It should be noted that the purposive reading required a re-writing rather than the omission or addition of merely a few words.

Beatson LJ agreed with Gloster LJ on the assignment/novation point and on the purposive construction of s.44. He was more doubtful whether there could be different kinds of solicitor/client contracts, some of which are personal contracts and others which are not, but that was irrelevant for the purpose of the decision. Davis LJ agreed that the appeal should be allowed and on the broad purposive interpretation of the transitional provisions under LASPO s.44. However, he would also have held that the transfer was in law an assignment. His starting point was that the retainer was an entire contract. He considered that the effect of the judgment in *Jenkins* was correct even if its reasoning could have been improved. The parties all intended the transfer to be an assignment and in so far as necessary the conditional benefit principle should be extended to give effect to this outcome. He concludes:

> "They agreed—claimant, [original solicitors], [new solicitors]—on an assignment of the [original] CFA and intended that it, and its provisions, should be preserved, not replaced. I do not see that the law then compels the result nevertheless to be an entirely new replacement contract, by way of

> novation, wholly superseding the original CFA and thereby controverting the parties' intentions and agreement."

This was the minority view, but should the issue of assignment as opposed to novation become important again in the future might provide grounds for a future Supreme Court challenge on this.

It is always wise to have the "belt and braces" of a compliant post 1 April 2013 CFA to fall back on just in case as the solicitors did in *Budana* (*Forde v Birmingham CC*[8] is authority for the proposition that you can have more than one retainer at the same time as a fall back if one retainer fails).

So, in conclusion, following *Budana*, a CFA can be transferred between firms. The consequence may well often be a novation rather than an assignment of the existing contract. That may not much matter ordinarily. Where it did matter (as in *Budana* because of the change in the recoverability rules), the court interpreted the transitional provisions of LASPO purposively to assist the claimant in maintaining recoverability after the transfer notwithstanding the novation.

[8] *Forde v Birmingham CC* [2009] EWHC 12 (QB); [2009] 1 W.L.R. 2732.

The Serious Injury Guide: The First 5,000 Days

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Case management; Expert witnesses; Guidelines; Interim payments; Letters of claim; Notification; Offers; Personal injury claims

The Serious Injury Guide was born out of a meeting with Colin Ettinger over a coffee outside the London Stock Exchange on 23 February 2005 when we met in our respective Presidential positions within APIL and FOIL. It was quite fitting (and accidental) when I discovered that the London Stock Exchange cite "Integrity and trust" as being at the core of what they do, operating under the banner "my word is my bond". Lofty aspirations indeed but an interesting way to start a review on the workings of the Guide.

How has the Guide developed in the first (almost) 5,000 days? What does it bring at a practical level and, finally, what next?

The initial discussions between FOIL, insurers and APIL concerned the development of a code of conduct for multi-track cases due to the gap in the market left by the PI pre-action protocol which only applied "in spirit". From my perspective, whilst the spirit was (on occasions) willing, the flesh was sadly not in all too many cases! Collaboration and case planning had to be redesigned and redeveloped on a case by case basis, a wholly ineffective way to progress cases. This was all the more so when dealing with rehabilitation needs for seriously injured claimants.

From the viewpoint of a lawyer acting for insurers, all too often we were kept at arm's length being drip fed details of the rehabilitation issues and, most importantly, of the progress towards maintenance levels of rehab and support which always delineate the point at which the case ought to be resolved, if not much earlier. It was this sense of separation from the issues that played a large part in our objections to the stance taken by the lawyer acting for the claimant in *Wright v Sullivan*.[1]

Over a long series of meetings over several years, Colin and I saw respective presidents come and go and the discussions continued; this project was never going to be resolved in the term of one presidency! With each round of discussions we frequently found ourselves in debate side-tracked by war stories from one "bad" experience or another on both sides of the divide, but as time progressed the drafting committee evolved into one with a common purpose to make this project work, rising above perceived poor practice and to focus on what worked well already. It was a highly revealing process with so much "baggage" to be debunked through the negotiations.

At the heart of the Guide are a number of key developments that I would like to focus on.

The pre letter of claim notification

A common cause of complaint was the delay between the letter of claim and the date of the incident so that an insurer was frequently blindsided on rehabilitation needs and even details of the claim until the lawyer was in a position to serve a detailed letter of claim.

The initial notification means that the insurer can instigate enquiries quickly, hopefully speeding up the response to the claim. Where the claimant is blameless it enables one or more defendants to "bang" heads to sort out how the claim is managed whilst they progress the debate on the side-lines over who will pay, or not.

[1] *Wright v Sullivan* [2005] EWCA Civ 656; [2006] 1 W.L.R. 172.

At a practical level, this development works very well. More often than not, my insurer client gets the early notification. This means that the case lands with the right level of handler and both sides are on the front foot when looking at case progression, rehabilitation and reserving. Within a few days of the letter of claim a date is in the diary for a case planning meeting to work towards.

Route mapping or case planning

It really should not be a revolutionary step to expect experienced practitioners and insurers (with or without lawyers) to meet and try to agree how to move the case forward in partnership. It is does not mean that peace will breakout on all issues, but it does elevate the debate beyond the email environment (we all have this to endure!) and to work to fact, not perception. It is fact of life that it is so much harder to hide behind rhetoric across a table than it is behind a PC screen.

In the early days these meetings were a mixed bag due to their novelty, but they were equally highly informative as well as humorous. One early meeting on a serious case with a highly experienced partner springs to mind where, at every point of my making a suggestion or proposal, my assistant spotted their leg twitching beneath the table with more and more urgency! Call it an early warning as to the boundaries to the discussion.

In a similar vein the most common riposte in the early days was that what I was suggesting was not "in the Claimant's best interests". I am pleased to say the quality of the debate and discussion has moved on light years in the vast majority of cases.

Universally, I have found these meetings hugely beneficial to all concerned, especially when coming across claimant lawyers and counsel for the first time. Trust and respect develop with time and delivery, but putting a name to face is always helpful.

Whilst not required or expected in every case, having the opportunity to meet the family as part of the case planning has long term ramifications for the conduct of the action. The claim combatants will be a temporary feature, the disability is for life and so their involvement is absolutely critical to effective resolution. Why does it help?

One obvious point, but easily overlooked, is that the perception of the family will be to see the insurer/insurance lawyer and the tortfeasor as one and the same person. This perception, whilst understandable can be very harmful as damages become part of a perceived punishment, far removed from what we are supposed to be trying to achieve. Claimant lawyers can do much to puncture this misconception, and this helps a lot in what is an already charged situation for the families. This simple step can do so much to build trust; equally insurers and their lawyers need to be conscious of the need nurture this relationship!

A second reason is what we might refer to as "fake news". For whatever reason the messages that are fed back to the family become lost in translation. I have, on occasions, seen the route mapping meeting minutes before they are sent to the family and was shocked (and disappointed) at the version being fed back. Such translation errors can take years to unwind, if they ever can be.

I have found such contacts with the families, the claimants and case managers of huge benefit. More often than not I leave the meetings with a far better insight as to what matters to the family. Settlement requires a leap of faith at some point in time as we (not even counsel) have the luxury of certainty; this requires insight, empathy and mutual understanding, if we are to avoid unnecessary friction. It is disappointing that this sort of meeting remains a relative rarity.

An ongoing route mapping process is critical to the progression of these cases and the manner in which the term has become second nature is a sign of real progress; it forms the foundation to the success of the Guide and the manner in which the claims of those who are seriously injured are dealt with.

Prompt disclosure

In the bad old days records came through in an ad hoc way. There were (frankly) silly arguments about the right of an insurer to see the records, and over when this could take place. This fed the climate of suspicion that in turn acted as a brake on rehab funding and case progression generally. APIL's support for prompt release of records and rehabilitation material is welcomed and has gone some considerable way to reduce (but sadly not to eradicate) the friction on this point.

Experts access and timing

This has progressed significantly in the life of the Multi Track Code and then the Guide. During the case planning there is always an agenda item dealing with the selection and timing of Pt 35 experts.

Whereas in the past it was more akin to trench warfare with rafts of experts being lined up behind the lines and then produced like rabbits from a hat, only to find that that they all gave provisional views and needed to be reviewed after a further 12–18 months. We now see sensible dialogue about appropriate base line reports that will help inform interim requests and rehabilitation. In cases where this is not achieved it seems the only way to manage this is through the court, with budgeting?

The level of upheaval that medico-legal appointments have on families and the rehab process requires sensitive handling by all concerned. There are always a number of core fields that I will require in these cases to enable me to have an informed view on rehab and reserve, for example a base line neuropsychology report, neuro rehab or spinal reports. The experience I have is that, in the past, counsel for claimants were guilty of overdoing the nature and extent of the initial reports required. The route mapping process helps to ameliorate this. In cases where the claimant lawyer is less experienced and relies heavily on counsel it is imperative that counsel is drawn into the discussion early on.

That said it always frustrates when some counsel seem to treat every case as a vehicle that is assumed to end at a trial. We all know this event happens very rarely indeed, so why do we have to slavishly build timetables to "trial", unless there is a central blocker such as liability? Should not the focus be on mutually reaching the point where each side are able to sensibly take a view? These cases are rarely (if ever) binary exercises. The sooner a deal is done the sooner the claimant can do with the damages what they want to do as well as capture investment opportunities which are missed by the duration of the claim process.

Offers

The Code discourages the making of Pt 36 offers *without dialogue* first. In higher value work this has to be the right approach. Part 36 will drive a wedge between the parties by the risk of weaponising rehab. Also offers will unsettle claimants and families already struggling to adjust to life-changing injuries and disruption.

Whilst offers can (and should) be considered, pre-emptive dialogue can pave the way to further discussions and the possibility that *both* sides may welcome an attempt to draw a line under the case. Rehab outlay for the future is then the claimant's to spend without reference to the defendant.

However, offers need not be Pt 36, or even cost threatening, but rather be phrased as a time limited offer to achieve closure. The timing and method of the offer is an issue for careful thought on both sides.

There is no ban on offers as some claimant lawyers maintain to be the case under the Guide, but offers require careful thought so as not to endanger the environment of trust that the Guide seeks to engender. This is not an easy balance to strike.

Interim costs

The Guide encourages early cost interims on the liability issue once this is resolved. It is does not mean that every case under the Guide carries a right to interims on costs. This has proven to be a source of some confusion.

However, my experience is that in cases where there is likely to be a long delay on quantum, for example frontal lobe injuries in children, insurers may well consider interims to alleviate the burden over disbursements on a case by case basis if the route mapping environment progresses well.

Interims on damages

In the same vein as costs the Guide encourages insurers to consider early interims on damages. Such payments are central to the route mapping process if liability is accepted as they are the clearest demonstration of cooperation and support for the claimant and their family.

However, there is one caveat; the interim payment route is a two-sided exercise within collaborative working. The insurer will want and expect reciprocal visibility around the rehabilitation work. This requires budgets, goals and objectives and details of where the previous money has gone. An excel spreadsheet attached to the emailed request for the interim detailing the past outlay, providing details of income such as state funding, and a broad budget on the planned expenditure saves a lot of heart ache and delay.

I am always surprised at the lack of detail claimant lawyers have as to the loss of earnings. All insurers will be alive to the loss of a bread winner and the need to replace this income in an appropriate way. It is not unusual in 100% cases for us to discover some months into the case that despite no request for an interim, the family have raided savings to pay the rent or mortgage. As mentioned earlier, this creates friction and "fake news", wholly avoidable. Past loss of earnings are easily documented, even if in broad parameters, at quite an early stage; it is thus surprising that it takes so long to provide details in many cases.

Statutory funding

As an issue there are few that cause so much discord and debate, but which also demonstrates why the Guide works. Prior to the Guide becoming more widely adopted it was almost impossible to get a discussion up and running on the issue beyond the riposte that they were to be ignored due to the application of the 100% principle. Strict legal application misses the point in that there are, even in 100% liability cases, where a short fall may arise, be it through causation, life expectancy reduction, the application of RvJ on housing. State funding is but one way of militating the shortfall through creative dialogue. Pragmatism should win over dogma, but it needs both sides to think outside the box with an open mind. The SIG encourages this approach.

What next?

The Guide is an evolving piece of work.

At a macro level, our sector faces a cycle of new and difficult challenges be it the future discount rate, the effects of Brexit, changes in the political wind, shifts in life expectancy projections, developments in technology, economic swings etc. All these issues will have a dynamic effect on current and future serious injury claims. The Guide provides a vehicle which should facilitate hope we can all adapt to change, preferably outside of the bunker.

At a micro level, I would identify case managers as an area that will require work in the near future. The interesting recent survey by Exchange Chambers revealed a worrying degree of friction between case managers, claimants and their lawyers. The relationship tensions worked both ways. This survey matched

my personal experience in recent months, coinciding with the worrying consolidation of the market driven by outside investment.

Quality, but above all independent, case managers are a real force for good in complex cases. In some of my cases effective case managers have been the difference in really challenging circumstances; without their input the effects of the already serious injuries would have been made far worse and the regimes were stabilised. The worry is that these cases are not the norm; far too often the perception is that the case manager has become part of a commercial model that has perhaps lost its way. Case managers already tread a difficult path established by *Wright v Sullivan*[2] (servants struggle with two masters). The case managers have not addressed this themselves so the time is perhaps ripe for a review as suggested by the late Brooke LJ[3] when delivering his judgment in *Wright v Sullivan*.

I understand that CMSUK are exploring an accreditation scheme which might help, but for me the devil will be in the detail on this, with the pivotal issues being independence and transparency (subject to appropriate concerns on privilege). I am convinced that progress can be achieved through dialogue on this difficult issue.

"Integrity and trust" and "my word is my bond"

I started this short review of the Serious Injury Guide by picking up these guiding principles of the Stock Exchange, where the project was born. The more I reflected on my experience of the Guide the more appropriate these values seemed to be to the way in which we endeavour to deal with these cases. The amazing levels of fortitude and determination that seriously injured claimants and their families show in all these cases is humbling but also serves to reinforce the mutual burden that applies on both sides of the claims divide to try to make the journey as easy as can reasonably be achieved within the system in which we work.

This calls for a mix of pragmatism, cooperation, imagination and above all humour, all features that have been demonstrated over the years by the steering committee of the Serious Injury Guide and all those participants who have worked so hard to make it the roaring success that it has been in both changing (and challenging) perceptions and assisting in the resolution of complex PI cases. The steering committee will continue to work together as the Guide becomes (I hope) a critical component in every catastrophic injury handler/lawyer's "toolkit".

Here's to the next 5,000 days!

[2] *Wright v Sullivan* [2005] EWCA Civ 656; [2006] 1 W.L.R. 172.

[3] *Wright v Sullivan* [2005] EWCA Civ 656 per Brooke LJ at [28]; "If experience comes to show that there are indeed problems which need to be addressed, it is desirable that, in the first instance, they be addressed among those concerned with these matters, with a view to professional guidance being promulgated on the point, rather than by judges who may have an imperfect grasp of all the possible ramifications of any new practice."

Using Technology to Remain Profitable in a Competitive Environment

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Clients; Electronic communications; Law firms; Mobile applications; Personal injury; Practice management

"Technology is an enabler" is a phrase that has become well-used in recent times, not least in the field of personal injury. Once upon a time, it was hard to foresee how technology could transform businesses like Apple, Amazon and Tesla into household names. Today, technology plays a part in every business and the legal sector is no different.

Indeed, the personal injury sector has always been at the forefront of innovation and technology has played a major role in the survival of firms. This is in no small part due to the onslaught to reduce recoverable fees stemming back years on the premise that a personal injury claim is a simple process that requires little legal guidance and input. Faced with the continued threat of reduced fees but having to balance the requirement to deliver the standards of sound legal advice, law firms have had to evolve to streamline systems and processes to stay in business.

As a consequence, personal injury practitioners have turned to various strategies to keep their doors open. One has been to harness the power of technology to influence the costs associated with running a personal injury practice. It is no great surprise that technology can help law firms to lower costs but with so many options, it can become expensive to trial innovations without knowing the true impact in the firm.

That having been said, without doubt one of the largest challenges any firm faces (and this would easily extend to any service industry) is that of *communication*. Communication is an area of importance for us as practitioners but also for our clients. Without *effective* communication, our clients cannot make informed decisions in order to allow us to progress their case forward. Put quite simply, unless we can explain to our clients quickly and easily any given event or situation to our clients quickly and easily, they cannot tell us what they would like us to do next. That can result in a delay moving a case forward, confusion requiring time and effort to resolve or worse, a total breakdown in the relationship.

Here I will endeavour to explain why tackling *communication* with clients is a road to success.

What does the research tell us?

Every year, The Office of Communications ("Ofcom") who is the UK's communications regulator, produces a report known as the *Communications Market Report*.[1] This is an annual statistical survey of changes in the communications sector across the UK. The report can be broken down into geographical regions to provide a more in-depth analysis but in the main, looks to identify trends across a number of platforms to include computers, smartphones, devices, mobile, email, television, and the postal service, to name but a few.

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[1] Ofcom, *Communications Market Reports* at *https://www.ofcom.org.uk/research-and-data/multi-sector-research/cmr* [accessed 18 October 2018].

The latest report released on 3 August 2017[2] had some very interesting insights which are worth summarising and considering here. For example, only 29% of adults own a desktop PC which is the lowest-used device for primary internet access. Desktop use as a primary method of accessing the internet has been more than cut in half from 28% in 2013 to just 11% in 2017.

Naturally, we as practitioners require a desktop PC within our offices although many firms are moving to laptops and mobile devices such as tablets to give freedom to their fee earners to work wherever, whenever. However, our clients are rarely sat behind a desk with a traditional desktop PC. With connectivity being so easy through other devices like smartphones and tablets, it is no surprise that desktop PC use is down to such low levels. Even laptop use as a primary method of internet access is down to 26% from 46% in 2013.

Conversely, a smartphone device is the one item that adults are most likely to own at 76% with 96% of 16–34 year olds owning one. To compound the strength of this device, primary internet use via a smartphone is up to 42% from just 15% in 2013. Smartphones have seen a meteoric rise in demand and use, predominantly the result by technological advancements pioneered by Apple and Samsung. The chances are that your household has several active smartphones/tablets which have been designed to conveniently slip into your lifestyles and our clients are no different.

More specifically on communication, social media apps are opened on average 13 times a day. Communication apps are opened 12 times a day with 74% of 25–34 year old's using WhatsApp.[3] Our clients have the time to stop what they are doing and check their (instant) messages and updates on social media simply because they have a personal urge to "check-in" and get up to date there and then. Gone are the days when people had to wait to check in with friends or family; or catch the latest news story on television; communication and social media platforms have transformed the way information is delivered and how it is consumed. The legal industry is no exception.

If it's not broken, don't fix it!

A well-used and true saying, it is far easier to decide not to change anything simply because things are working just fine today. However, tomorrow is a new day and changes can be enforced on us which will cause our *practice* to become broken. Waiting for that to happen and trying to solve it after is like not servicing your car and waiting for it to break down; it's too late.

Personal injury firms have generally been resilient and forward-thinking, looking to anticipate what could *break* in the future. Playing out potentially catastrophic situations for a practice has led to innovative ideas, some of which have been implemented before any such event, some put on the shelf to wheel out when necessary and others cast to one side. However, there is one area that nearly all personal injury firms have invested, and that is on their own IT systems.

IT systems in this context can mean hardware and infrastructure such as servers, cloud technology, desktops, laptops, tablets, integrated software systems and of course, case management systems. In the world of personal injury, case management systems can prove integral to the efficient management of a matter, including risk. Firms have little trouble justifying the need to invest in such IT systems, believing that they are absolutely necessary and will play a major role in the success of the practice. They are not wrong but the majority of firms stop there and don't look beyond that single platform.

These IT systems are what I have come to call *inward facing* technology. Technology that is put in place to serve the interests of the firm. For certain, that technology will yield benefit to clients but they cannot see it; access it; use it; understand it and; as a result, they cannot influence it.

[2] Ofcom, The Communications Market 2017 at *https://www.ofcom.org.uk/research-and-data/multi-sector-research/cmr/cmr-2017* [accessed 18 October 2018].

[3] Cross-platform instant messaging and Voice over IP service at *https://www.whatsapp.com/* [accessed 18 October 2018].

Inward facing technology allows practitioners to communicate with each other; drive efficiencies in case management; lower risk; deliver results faster but the client cannot appreciate the level of impact such systems have which means they cannot contribute to help in all of these areas and many more.

On the other hand, *outward facing* technology is something that is directly client facing. It is accessible to them all of the time; they can contribute to it; use it; appreciate it and; help in a collaborative way to reach a very mutual goal, settlement.

The difference cannot be underestimated. A piece of technology that is *client orientated* forces you to stand in your client shoes and decide what do they need to help move a case forward? It is a very different question to the one personal injury practitioners are used to; what do *we* need to move a case forward? The perspective is flipped and opens up an array of theories, ideas and topics that are all worthy of consideration. However, when focussing on the topic of technology, you can't help but think about a platform that allows them to contribute to the efficiency of a case moving forward.

Once you open up to the idea of *outward facing* technology, a number of benefits become obvious: speed; education; information; self-service; data gathering; document completion; to name a few.

Allow me to prove my point using Amazon as an example. I'm sure many readers will use Amazon as an online platform to purchase goods and services. Amazon has become a leader in using *outward facing* technology to drive the growth and domination of their business. Their platforms allow anyone to have the freedom to search and buy what they need within a matter of seconds.

Their "desktop" platform allows you to search an item and displayed back will be some images to enlarge as you hover your mouse over the item; choose options around the item (maybe size or colour); product information; compare with similar items; look at reviews; look at answered questions; see what other items have been bought together (upselling); sponsored products related to the item in question (cross-selling); the list goes on. Everything that a buyer might need has been thought of and catered for to allow them to buy with confidence.

Take their smartphone app as an alternative. You can search, even by scanning a barcode and access some of the features in the desktop version but Amazon have recognised a very significant difference in this platform; buyers have access to a smaller screen than a desktop so Amazon have to show the key features and answer the biggest questions in a buyer's mind. Yet they do it so well you can search and buy in under 10 seconds.

It's not uncommon to be in a store and find a product you want. Once you look at the price, you click open your Amazon app, scan the barcode on the item, see its cheaper and swipe to buy, delivered to your home or place of work the next day. Amazon have found a way to literally "steal" customers while in a competitor's store!

What is most impressive of all, is that Amazon buyers (and I am one) have a very deep and personal relationship with their platforms, *not their people*. I have never spoken to anyone at Amazon about any product or service I use with them. Their platforms are set up around their customers to such a high level that the demand to call them and take up time of their employees handing my issues is zero. Imagine a law firm where you had no emails and no calls from your clients. Some might argue that would be a very artificial and dull law firm offering little by way of client service. Others would argue that would encapsulate the future of a law firm using technology to drive efficiency and enhance client service.

I go back to the research I identified earlier. Our clients are using these platforms not because they have to but because they want to. A legal service is no different and we are naïve if we think it is. If a consumer of legal services wants to use platforms like Amazon then who are we to deny them. It's a win-win. The law firm's client effectively self-serves and provides information as and when necessary. The law firm actions those instructions and moves a matter forward to a settlement.

So, what will outward facing technology achieve?

Once you accept the idea that *outward facing* technology has a significant part to play in the future of personal injury practices; then the next question to ask is what will it achieve?

Like any piece of technology, there has to be a clear objective and even a return on investment if it is to be successful. Uncovering what it is going to achieve will be the foundation upon deciding what the technology will be and how it will do it.

There are any number of objectives that are worth considering.

Customer service

By using technology to improve a firm's customer service levels, you would expect to see a drop in inbound calls/emails that take up valuable fee earner time and as a result increases productivity. Clients will begin to place positive reviews online and even recommend the firm more often to their network, generating new business.

Self-service

Effectively the Amazon way. Implement technology to provide a platform where clients self-serve their interests without human contact. This feeds directly into the current movement of consumers according to the research. It will lower operational cost in a firm, it will increase productivity and reduce the duration of an average case.

Lower cost

Such technology could be used with a clear objective to lower operational overheads. Driving communication through a new platform will lower costs such as print, paper and postage. It will save fee earner time and effort. It will free up "office space" as you reduce paper consumption.

These are likely to be the most significant but there are others and indeed a blend of the above three. Personally, I believe customer service to be the strongest objective as it has the opportunity to have the biggest impact across a firm. You can't improve your customer service without becoming more efficient and effective which will serve to lower inbound communications; increase productivity and business. It's an easy win-win situation between a client and their firm.

So what are the types of outward facing technology?

Once the objective has been identified, you are then free to explore into the various options open to you.

It is important to not lose sight of your demographic of clients at this stage. The demographic will dictate what "hardware" is best served to deliver your technology (desktop; tablet; or smartphone). Research indicates that desktop use is going down and smartphone use is going up. That would point most obviously to a platform that is easily accessible on the screen size of an iPhone or Samsung Galaxy. Yet there are some client bases that may prefer a larger screen so tablets might be more appropriate. My view is to steer away from desktops as the evidence points to such low levels of use, so client adoption will be low. Instead focus on a platform that works best on a smartphone but can easily migrate onto a tablet. Mobile apps are a good example of such a platform.

With your demographic in mind, you are able to consider two main alternatives: an online system (portal) or a mobile app.

Across both platforms a client would log in to gain access to information; case updates; messaging facilities; documents etc. From here they can securely manage their case.

There are some key differences though that are worth considering. A portal will require a client to log into their case every time. Mobile apps don't need to have that facility as an app can be left running in the background indefinitely while the user accesses other software. For quick access, security such as Touch ID can be deployed.

A portal will have to rely on emails to drive a prompt to the client that there has been some activity. The email would alert a client to log into the portal and take action. That requires the client to continue to monitor their emails, something that is becoming more of a challenge with the current levels of spam and multiple emails that consumers now hold. That will cause a delay in case progression.

A mobile app uses PUSH technology so alerts/notifications arrive on a client's smartphone/tablet the instant an update has happened. That drives action immediately for a client to open the app and see what is happening.

Development of portals are typically cheaper than that of mobile apps. However, how a portal is used and designed is usually compromised when compared to a mobile app. Mobile apps are renowned for providing an engaging and rewarding user experience. They are intuitive, flexible and innovative. They are easy to navigate, understand, take action and move on. Portals are typically conventional and out-dated. They require patience from clients as they get used to the system. They can be clunky as a client moves from one screen to another with load time becoming a frustration.

Personally, my view is that mobile apps offer far more in terms of functionality and future-development opportunities. The biggest obstacle with a portal is that it constantly requires a client to either think "oh I must log in to the portal and see what's going on" or seeing an email prompting them to take a look. A mobile app uses PUSH technology with alerts and notifications to drive those prompts. As a result, a mobile app will always see higher engagement and use.

We shouldn't forget that many firms are already using "outward facing technology" today to great effect. Websites are effective at showcasing a firm's services, people, culture and achievements. Some websites are what I would call "brochure" sites where the visitor really just finds information about the firm. Other sites are "lead-gen" or lead generation sites where the sole purpose is for a visitor to leave their details or positively engage in someway by either calling the firm or using live chat.

Text messaging can be an effective resource, especially if linked to a firm's case management system. Texts from a firm can achieve a high level of engagement especially if there is the ability for a user to text back to the firm. Some systems I have come across are limited in their ability to return texts which makes this form of outward facing technology limited.

E-sign platforms have been used to great effect for securing instructions. This is typically where a client is sent an email with a link to click which sends them to a secure webpage. Here they accept terms and conditions of use and then proceed to review a document and sign. A digital copy of the signed document is then sent to the law firm and a copy by email back to the client. An effective tool in the past which has evolved but not to the level of a similar solution on mobile apps.

Why mobile apps are best?

My personal view is that mobile apps are at the centre of digital transformation and should play an integral part in your digital/technological strategy.

With a mobile app you get a higher level of benefits that any other platform. Clients can open up your app and find out everything they need to know about you and your services. They can read a message you've sent them updating them on their case. They can open up a document and absorb the information on the go. They can message you just as they would message their friends and family if something pops into their mind. They can instruct you on a new unrelated matter. They can complete questionnaires through it. They can sign forms and documents returning them to you securely and quickly. They can share it with friends and family generating new business.

All of these features create huge benefits of convenience and speed which contributes to a fulfilling relationship with you through a mobile app.

Some firms are using existing apps to help communicate with their clients without having their own dedicated mobile app platform. For example, a business that has a Facebook account can use Messenger with their clients to have a conversation or share images/documents. The same applies with WhatsApp. Firms use apps like Skype or Google Hangouts to see and speak to clients face to face to have a conversation.

There are many apps out there that can be harnessed today to improve your client communication and ultimately service. The difficulty is that a firm's brand identity is hidden and access to data is very limited which restricts understanding around the true impact of these tools.

If you believe that a mobile app is worth considering as a communication tool for your law firm here are a few pointers and things to consider:

- What's the purpose of the app? Is it to increase engagement with your clients and get faster responses in which case user experience is key.
- Is it to deliver documents? In which case, have an eye on data usage and how you are going to lessen the impact on people's allowances.
- Is it to lower operating costs such as paper, print and postage? In which case, make sure your clients can do everything they need to do to provide you with instructions through your app; build questionnaires, sign documents, upload documents and so on.
- Or is it to enhance client experience and offer something different to your competitors?
- My advice wouldn't be to build an app to generate business. If you start with that objective you will lose sight of the main reason people have apps.
- Make sure you can extract as much data as you can. With my mobile app platform, inCase for example, we can extract every time a person logs into the app, down to the minute. That allows us to build up trends based on use which helps us determine if we need to allocate resources at a particular time in the day or to a particular demographic or group of people.
- Don't lose sight of user experience. Apps are meant to be simple. They aren't supposed to come with lengthy manuals and complicated systems. At the back end it can be as complicated as you need it to be but not at the front end where customers/clients engage. They should be self-explanatory and allow people to navigate around quickly and do what they need to do and get out. In other words, self-service.
- Pay attention to the colour schemes. A firm's brand is important to the firm but to their client it isn't that important. They are already a client of the firm. The client has no further need to be convinced to use a firm's service. The firm just needs to deliver on what was promised. The simple most basic colours work the best.
- Make the most of push technology. Only with apps can you drive action quickly. The notifications on a client's smartphone, on their smart watch, drives intrigue and interest. The little red number 1 above the corner of your app icon will be a thorn in their side to deal with wherever they are.
- Finally, and probably most important of all, integrate it into your existing systems. People don't like change and firm employees are no different. Making this as easy for them to use will ensure its success. Integration into your case management system will allow the firm to drive automation. It will give staff the ability to send standard messages or their own bespoke message within seconds. It avoids the need to duplicate the work and makes it easy to manage and train.

Having a mobile app doesn't need to be complicated or even expensive. At the beginning of any app they are simple and straightforward. They evolve as the people using them evolve. Consider building a minimum viable product or MVP; something that ticks the main objective but which you can build upon later.

Ask clients what they want. After all the app is for their benefit as much as it is for the firm so find out what will make them use it.

Ultimately, we all know that investment in IT is an important element of any law firm. But don't think that the investment is only on your internal systems, that inward facing technology. There is a lot to be gained from considering investment into outward facing technology like mobile apps.

Getting back to communication

All the types of outward facing technology I have described above are a form of communication. I've just focussed more on mobile apps as I believe that is where the biggest gains are to be had. Each one looks to improve communication to some degree and take a step away from more traditional methods such as post and email.

But why is communication so important to the success of a firm?

I suspect that the majority of Complaint Partners (and I am one) if asked what the number 1 complaint is, they will say it is something related to communication. Either lack of updates or; not returning calls/emails or; losing trust in their legal representative. Legal firms are not alone here. In any service industry, communication is generally the number 1 challenge and it is the root of all success when it comes to customer/client service.

In personal injury, the industry has continually faced an onslaught from the insurance industry backed by the Government to chip away at the recoverable fees of representing claimants. Despite the high levels of regulation imposed on PI firms; rising costs of marketing and; inflation, PI firms are expected to maintain service standards for less fees. There comes a point when something has to give and regrettably the easiest area to compromise is client service.

However, it doesn't need to be. With all the change, including changes ahead, there are opportunities to embrace and one area is the changing face of clients. The average client is willing to engage with any professional service through online platforms. The likes of Apple, Samsung, Facebook, Whatsapp and Amazon have paved the way in ensuring our clients are comfortable using online platforms to engage and purchase products/services. Who thought 10 years ago that you would be comfortable logging into a banking app to check your balance, move your money, make payments to third parties? Every major bank now has a mobile app which has evolved from a desktop portal of some kind to the point that high street branches are closing because the demand is just no longer there.

Imagine a PI firm that harnesses an online platform like a mobile app to effectively offer a self-service solution to a client. By being more open and transparent through an app with clients will result in less demand from them for action. Visibility of their case, what has happened, what is happening now and what is going to happen is key to unlocking your fee earners time to focus energy where it matters.

A PI firm would be forgiven for feeling that either the Jackson reforms or impeding reforms are the cause of their decline. The reality is that even if the Jackson reforms didn't happen or the coming reforms are thrown out, such a PI firm that doesn't evolve with the way their clients want to consume their legal service will fail anyway. The power shifted a long time ago and clients have a lower tolerance than before. Tackle communication with your clients and you are beyond halfway to not only surviving but thriving.

My point is to keep an open mind. Nothing needs to change immediately but unless you consider what could happen and begin to consider the options, you could find yourself being forced to make a quick and irrational decision later which will cost everything, as many a firm has since found out in recent years.

The Rise of the Machines: A New Risk for Claims?

Kurt Rowe*

Artificial intelligence; Autonomous vehicles; Claims handling; Cyber attacks; Digital technology; Drones; Insurance; Personal injury

Abstract

In a world where digital and connected technologies are increasingly augmenting our lives and our businesses, Kurt Rowe, associate at national law firm Weightmans LLP and Head of the Cyber and Digital Liabilities Sector Focus Team at the Forum of Insurance Lawyers, takes us on a modern day Dickensian tour of how technology is transforming how compensators process and settle claims looking at the past, the present, and the future.

Evidence of the so called "Digital Revolution" is ubiquitous, so much so that the way in which we do business and interact with each other is undergoing a seismic shift, visible for all to see. Business and industry is embracing this revolution to introduce ever more efficient work processes to provide more cost effective services to increasingly financial savvy consumers.

When you think of the digital revolution you may well think of robotics, social media etc, you probably wouldn't immediately think of insurance or claims. The insurance industry has perhaps had a reputation for a lack of investment in technology, stereotypically seen as old cumbersome beasts. This couldn't be further from the truth.

The insurance industry has been at the forefront of the technological advancements experienced by society over the last few decades. With new technologies come new risks, something that the insurance industry knows a lot about. It is this knowledge of how risks manifest that makes insurers key strategic partners to those looking to develop new technologies. From a pure insurance perspective though, Insurers need to understand new technologies to be able to price their policies accordingly. This risk assessment and product development process also helps insurers under the how emerging technologies create clear benefits and opportunities for insurers through streamlining and automation as well as increasing the volume and accuracy of information available to insurers.

The past

The fact that insurers have used technologies to augment their claims processes is no secret. When I started working in insurance over 15 years ago dealing with injury claims, there was the Colossus injury valuation tool, a clever piece of technology designed to assist claims handlers in reaching an accurate and fair assessment of the value of an injured persons claim for pain suffering and loss of amenity. There wasn't just Colossus, others used COA, a system providing a similar service to the claims industry. Whilst there was much criticism from claimant representatives, perhaps more owing to a lack of understanding of the technology, these systems have facilitated hundreds of thousands of fair and reasonable settlements over the last decade or so.

Insurers were some of the first to use direct links, sending customer information and instructions electronically and automatically to those who would be providing elements of a claims service on behalf

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of the insurer, garages, breakdown companies and glass replacement companies to name a few. Some were even able to instruct legal expenses insurers using the same technology.

Insurers were some of the first to utilise database systems, realising that the more information they had on claims trends, the better service they could provide to their customers whilst still maintaining control of their claims spend. A greater degree of control of claims spend maximises the return to shareholders whilst at the same time allowing the reduction of insurance premiums for consumers. This level of intelligence also allowed insurers to look at seasonal trends to ensure their customer facing propositions were adequately staffed to ensure a consistent level of service, after all, who likes waiting on the phone to report a claim?

Some insurers worked together with Thatcham Motor Research Centre and began the process of identifying opportunities to work with manufacturers initially on vehicle security systems, but as time progressed to issues such as driver and passenger safety. Thatcham today are at the forefront of vehicle safety and are key partners in the development of autonomous vehicles and driver assistance systems.

The present

If we fast forward to the present day, technology remains a vital part of the insurance claims proposition. Colossus and COA still exist and are very much more advanced to the system used decades ago, yet they continue with their initial objective of assisting claims handlers to efficiently, quickly, and accurately facilitate fair and reasonable settlements of personal injury claims. Insurers still have their databases collecting information on claims trends, and tying these databases in with predictive analytic systems provides insurers with a greater degree of intelligence about their customers, claims trends and are useful weapons in the fight against insurance fraud and financial crime.

Insurers also have access to a wealth of other available technologies. CCTV evidence is extremely useful in understanding how accidents occurred and provide other snippets of useful information. Their use is increasing with commercial fleets adopting them and an increase in dash-cam technologies, a type of CCTV, in the consumer space is helping provide clarity to those investigating claims and helping in the fight against opportunistic and organised fraud. Another type of video technology, surveillance, is used to understand the severity of an injury and to prevent fraud, while social media is utilised to understand the impact of claims on their day to day lives and also to continue that fight against fraud.

The vehicles we drive hold a wealth of information, either through telematics boxes which are fitted as a result of pay as you drive style insurance products or through systems built into the vehicles themselves, record data useful to insurers. They can use this data to understand the cause of and the severity of an accident, the location of a stolen vehicle, and some of these technologies even record the number of passengers in the vehicle at the time of an accident and even whether or not seatbelts and other safety measures were correctly deployed.

It is not simply about collecting data though, insurers use technology to provide better services to their customers and the public at large. They share accident information with HPI which allows consumers to be able to check whether their vehicle has been involved in an accident causing a total loss, or whether the vehicle has been stolen and recovered. They provide information to the Motor Insurers' Database which allows the prompt identification of an insurer in the event of an accident, or provides the police with information on the insurance position of vehicles which in turn allows them to remove uninsured drivers from our roads. They share information with other insurers through systems like the CUE database, or MIAFTR which helps in the combating of fraud and financial crime.

Whilst perhaps not necessarily embracing technology to the same extent as the like of Amazon, the insurance industry certainly demonstrates its willingness to innovate to create new and novel ways of dealing with claims. The author has seen this first hand as a defendant representative on the Ministry of Justice steering group which, in partnership with claimant representatives, created the claims portals

allowing injury claims to be brought quickly and easily, cutting the cost and the time taken to process an injury claim. Over 700,000 personal injury claims from road traffic accidents are submitted and run through the claims portal every year.

The future

So it is evident that the insurance industry is innovating for various reasons, to provide a competitive advantage, to streamline operations, to reduce costs, and to provide customer facing services. If anything the pace of innovation is starting to increase with insurers now looking to the future in terms of how technologies will further augment society and there are a number of developments which are likely to change the way in which claims manifest and how they are handled. Let's explore them.

Autonomous vehicles

There is not day that passes where there is not some nod to autonomous vehicles in the media. From announcements on the latest trials on our roads to reports of accidents involving the new technologies. The march towards an autonomous future where social inclusion and the reduction of road accidents are the drivers for transport development are on the not too distant horizon, although I suspect that they are somewhat further away than the three-five years mooted by some of the more optimistic market commentators.

Government has recently passed the Automated and Electric Vehicles Act 2018 which is an enabling Act to support the further development of these technologies with a view to the UK becoming a centre for innovation.

These autonomous vehicles have the potential to radically change the nature of motor insurance and the claims that they generate. As computers take over and the opportunities for human error abate, it is likely that the volume of motor accidents will decrease, however, technological failure may well mean that when an accident does occur, it could be more serious. It will certainly prove to be more complex with traditional motor insurance making way for a more product liability type insurance. As with most digital technologies, establishing liability and the tortfeasor will also become more complex with situations where the vehicle manufacturer, the software developer, or a combination of both could be liable for an accident. If you throw in the current package of driver assistance systems where the driver still assumes responsibility, the driver could be jointly liable with manufacturers and software developers too.

However, as with telematics today, the volume of information that will be available to assist insurers and others understand the cause of accidents will be immense. In the long term, the determination of liability could well be accelerated to the point where an instant decision is made, and where the automated vehicle itself reports the claim setting in motion an automated claims process, and even potentially booking itself in for repairs.

Drones

Drones are seeing an increase in their commercial utilisation with the likes of Amazon and other distribution companies looking to test drone deliveries. Government again have sought to assist commerce by relaxing the rules covering the use of commercial drones in sub-urban spaces to promote testing of these technologies. We may not be too far off seeing parcels delivered to our doors via drone.

This, of course, creates a myriad of risks with dangers to property and people from drones which will be flying in close proximity to urban areas. Whilst drones are unlikely to change the way that claims are actually dealt with, there are likely to create more airborne related claims as their use develops. It is perhaps

interesting that government is yet to table further legislation on drone regulation, but it is expected imminently.

Artificial Intelligence ("AI") and connected devices

This is a rapidly developing technology, the potential of which is enormous. Artificial intelligence has the potential to transform the way in which claims are handled. Indeed, variants of the technology, such as decision engines, are being used today to reduce the operational burdon in processing and analysing vast amounts of data. These decision engines have the ability to create efficiencies in the supply of legal services too. As an example, Weightmans have partnered with the University of Liverpool and software company Kira Systems to develop an AI solution capable of extracting data for the purpose of fuelling a decision engine to carry out legal reasoning and identify legal arguments for settling cases and running cases.

In some areas, Insurance policies are being sold computer systems that conduct conversations online or on the phone, known as chatbots. These ever sophisticated systems have the ability to automate human interaction. In fact, chatbots are increasingly fooling consumers in to thinking that they are speaking with real people. Chatbot technology is also being used by law firms and barristers chambers to speed up the delivery of services to clients. For example, Billy Bot is a project by Clerksroom to create a junior clerk robot which they describe as "a cheeky chappie". Chatbots are also increasingly used by insurers and other organisations to automate their Q&A sites and to automate an interactive customer experience which in the past would have meant trawling lists of questions which may or may not have been similar to your own query. It is not just external applications that are the playground of chatbots, Weightmans have introduced a chatbot called bAIley used to deal with routine HR queries to free up the time of HR advisors allowing them to concentrate on more complex matters. Weightmans plan to expand bAIley into other areas of their business having realised the benefits of this type of AI program. One major benefit of chatbots is that they learn as they go and together with automated customer service apps have the ability to interface with an insurer's claims, fraud, policy and repair systems, increasing the speed of an insurer's response to its policyholders.

AI has the ability to transform how we interact with our insurers and how they in turn deliver their services to us. Most of those reading this article will have a smart assistant on their phone or some other gadget. As this technology develops, your smart assistant could help you achieve insurance quotes, administer claims and interact with your insurer on your behalf. Insurers in turn, will be able to extrapolate data more efficiently, use more advanced geo-profiling systems to price risk, and draw in automated predictive analytics to validate and process claims more quickly.

In fact, AI has the ability to radically transform claims processes through the application of algorithms to route new claims and to automate decision making processes such that a claim could in theory be settled in minutes, including a full consideration of potential fraud indicators. The other technologies referred to in this article, autonomous vehicles, drones, physical robots, connected devices will all have the ability to self report claims meaning that first notification of loss will become increasingly automated. Connected devices (the so called internet of things) such as smart meters etc. will be able to identify potential risks and report them to insurers as well as bringing them to the attention of the consumer. The whole basis of risk and mitigation of risk will change.

This is a challenge that some insurers are rising to meet. Aviva have created their Digital Garage, Allianz have created their Digital Factory and other major insurers are creating similar innovation hubs. These organisations are developing the future of insurance and how they utilise connected devices and AI to enhance their customer proposition through the creation of new products and services and creating efficiencies.

IT based negotiation systems and portals

There has been a move towards IT based solutions to claims handling. We have already discussed the creation of the claims portal as a method of communication and it is understood that the proposed reforms contained within the Civil Liability Bill impacting the way low value RTA claims are brought and compensated will create an opportunity to introduce further systems and portals to the process.

It is understood that the Ministry of Justice in conjunction with key defendant and claimant stakeholders are in the process of developing a claims portal type system which is accessible by those claimants who may choose to bring their personal injury claim without the benefit of legal representation. It is anticipated that volumes of unrepresented claimants will increase and it is commendable that the industry is already looking at how best to utilise technology to create a seamless and transparent claims process.

The new claims portal accessible by unrepresented claimants is not the only way that technology is assisting in the negotiation of claims. There are a number of online negotiation tools being created by law firms and insurers. For example, the Kennedy's owned Cybersettle system which in effect creates an online home for parties to settle their claims with the minimum of legal interaction. This is perhaps a modern digital version of an old idea, insurers have been looking at similar systems for years, and have previously looked at a system for predicting liability in RTA's. This automated negotiation, similar, one supposes, to the eBay customer resolution centre, a form on online dispute resolution allowing the parties to input their negotiation thresholds and the system can create a settlement in the event of overlap. With the advancements in digital technology, these online automated dispute resolution systems are likely to become mainstream due to the efficiencies and speedy settlements that they can facilitate. This in turn could reduce the need to incur costly legal fees, retaining those fees for disputes that actually require legal support.

The digital court

The court service has even begun embracing technology, from the launch of the money claim on line service in 2002 to the circa £750M investment in the online court, it is clear that the court services believes that digital technologies have a place to play in the judiciary and in how we resolve disputes in this country. The idea of a judicial lead online dispute resolution service has its appeal, it will undoubtedly create efficiencies and remove a large amount of waste in the judicial system, and this will lead to a reduction in the delays currently experienced in achieving a judicial determination by freeing up judicial time.

Whilst Briggs LJ went to some length to set out that personal injury claims will be out of scope for the new online court, he did express views that if the proposed personal injury reforms led to a position where the consumer suffered detriment due to the inability to secure legal representation that he would revisit the rationale for keeping personal injury claims out of scope. Whilst the creation of a new claims portal accessible to unrepresented claimants will undoubtedly remove any potential for consumer detriment, it perhaps seems inevitable that the two digital solutions could end up complimenting each other as the respective systems develop. Perhaps this will be a natural long-term consequence as digital capabilities and as demand for connected and digital services increase.

The risks of technology

Whilst technology brings with it attractive benefits in terms of efficiency, speed, and scale such benefits can also lead to accidental and deliberate misuse. Therefore, it is essential that the risks associated with these technologies are understood by those looking to introduce them to their businesses and processes.

Perhaps most surprising then is that in the new digital world the risks we need to be alive to are actually nothing new. Many have existed for hundreds of years and will be very familiar to those reading this article. Instead it's the new ways that technology allows them to manifest that catches us unawares.

Crime is a good example. Theft, vandalism and ransom, even terrorism, can all be perpetrated with malicious software covertly and sometimes inadvertently with the unwitting assistance of employees, installed on everyday devices like computers and smartphones. Factor in more sophisticated digital devices such as autonomous cars, drones, or indeed any of the myriad everyday items that are now "alive" with technology, connected devices or the so-called "Internet of Things", and the scope for mischief is amplified.

The sheer scale with which such crimes can be perpetrated are staggering with the internet offering anywhere-to-anywhere connectivity, allowing major crimes in involving the theft of money and/or information to be carried out by a variety of perpetrators ranging from large scale "hacking factories" to teenagers from the comfort of their own bedroom.

Our increasing reliance leaves our businesses and information open to crimes of this nature through vulnerabilities in our systems, the rapidly changing digital world, and often, through the simple errors and omissions of our own employees in adhering to processes designed to protect our information.

Most readers will probably be fed up with reading commentary about the GDPR, but when it comes to the application of technology, especially technologies as discussed within this article which process vast amounts of personal data, the implications of the GDPR and the Data Protection Act 2018 are ripe for consideration.

We all know the well-publicised fines now available to the Information Commissioners Office ("ICO") for a breach of the GDPR, but add to this the cost of notification of a major event to both the ICO and to the affected data subjects. Claims are also inevitable, with typical exposures arising from technological failure and misuse potentially including business interruption, property damage, breach of privacy and data protection laws, even personal injury claims are on the cards, including claims for emotional distress after the misuse of private information was "relabelled" a tort earlier by the Court of Appeal in *Vidal-Hall v Google Inc*.[1] It is clear then that the cost the failure or compromise of any of these systems leading to a data breach could be catastrophic.

Important then for those designing these new technologies and IT systems to ensure that the GDPR principle of privacy by design or default is at the heart of the development process and remains at the heart of the systems as they operate in the real world with real client data.

Final thought

Whilst insurers and the claims industry may not necessarily be as advanced as some other sectors in the application of technologies, it is clear that technology has been utilised successfully within our sector where it has provided a clear benefit. Technology will continue to shape our industry providing both threats and opportunities. The key to success is to welcome the digital revolution with open arms, roll your sleeves up and get involved in understanding how these technologies can benefit your business and the clients that we all serve. A failure to move with the times could well have serious business impacts for those caught unaware or those with a lacksidaisical approach to technology and data protection. The future of claims, personal injury claims, is an exciting one and it makes much more commercial sense for a firm to push against the open door than to try to close it against a tide of technological innovation.

[1] *Vidal-Hall v Google Inc* [2015] EWCA Civ 311; [2016] Q.B. 1003.

Case and Comment: Liability

Bowes v Highland Council

(IHCS (2 Div); The Lord Justice Clerk (Lady Dorrian); Lord Menzies; Lord Drummond Young; 5 June 2018; [2018] CSIH 38)

Liability—road traffic accidents—negligence—bridges—defects—duty of care—local authorities' powers and duties—damages—contributory negligence

Bridges; Contributory negligence; Defects; Duty of care; Road traffic accidents; Scotland

David Michael Bowes was self-employed, running a heating and plumbing business. At about 10.00am on 2 February 2010, he was driving his Toyota Hilux 4x4 pickup on the A838 road in a westerly direction. Whilst travelling across the Kyle of Tongue bridge the vehicle crossed from the westbound to the eastbound lane, mounted the kerb on the north side of the bridge, collided with the parapet and fell into the water. Mr Bowes was unable to escape from the vehicle and drowned.

His family raised an action of damages against the local roads authority on the basis that the accident had been caused by their failure at common law to take reasonable care for his safety while crossing the bridge. Quantum was agreed subject to liability.

Mr Bowes had been travelling alone and in poor weather conditions and the road surface had been covered with snow and slush. Unchallenged evidence was led that he was a careful and slow driver. There were no witnesses to the accident but it could be inferred from the evidence that as the vehicle had crossed the bridge, it had travelled into the opposite lane, mounted the kerb and collided with the parapet. The railings of the parapet had broken off at the welds and had swung out. The vehicle had fallen into the water.

In July 2005, an engineer carried out a principal inspection of the bridge which found defects, namely continued deterioration of major structural elements. In a report, defects to the parapet were categorised as severe, meaning that they affected the integrity of the structure and it was essential to repair at an early date. In addition, twice yearly monitoring of the bridge and parapets was recommended.

Five further inspections between early 2006–2008 detected no defects in the section of parapet which failed. Those that were detected were sufficiently serious to adversely affect the parapet's containment strength and there was an increase in defects. Subsequently, the council ceased to monitor the parapet.

In 2008, the council commissioned a report from consultant engineers. It noted that the parapet did not comply with current standards for restraint, its defects reduced containment strength and the containment level was unclear. The pursuers claimed that in accordance with the common law duty of care, Highland Council ought to have introduced interim measures prior to the accident, such as a temporary barrier, a reduction in the speed limit to 30mph, temporary traffic lights and consequential single lane carriage and warning signs.

The council's case was that they did not owe a duty of care to the deceased and as a result, there was no obligation on them to provide a parapet of any strength. Accordingly, there was no requirement to put in place temporary measures pending replacement of the defective parapet. Given the low risk of an accident arising out of the condition of the parapet temporary measures were unnecessary given their cost, limited utility and the other risks created by such measures.

At first instance, Lord Mulholland found[1] that there was no evidence that the deceased's loss of control had been caused by mechanical failure or medical condition. Nor was there any evidence that the bridge carriageway surface had been responsible. The tyre tracks in the snow veered at a shallow angle. Significantly, there was no indication that the vehicle had violently swerved. The judge held that it was an inescapable inference that the loss of control had been due to the driver's negligence and not to any failure on the council's part.

However, the parapet had not operated as it ought to have in the accident. It was designed to contain vehicles weighing up to one and a half tonnes travelling at 50mph and striking it at an angle of 20 degrees. The weight of the deceased's vehicle was 2,050kg, his speed was in the range of 20–40mph and the angle of impact had been less than 15 degrees. Therefore, had the parapet been acting to its design capacity, the vehicle would have been contained and would not have left the bridge and at worst, Mr Bowes would only have sustained minor injury.

The judge held that the council's decision to discontinue monitoring was wrong. It made no sense. It was contrary to previous advice in relation to a matter clearly related to safety. It meant that Highland Council had no idea of the parapet's containment strength, whether it was continuing to deteriorate, the extent and rate thereof, and the measures, if any, which ought to be taken to address it. It was essential that decisions thereon ought to be kept under review and revisited in the light of the state of the parapet. In addition, the council had carried out no risk assessment in relation to the parapet prior to this accident and basic health and safety principles had not been applied to the critical issue of its safety.

The pursuers had established that immediately prior to the accident, Highland Council knew that:

- the parapet was not compliant with current standards;
- was defective;
- its containment capacity was compromised to an unknown extent;
- it would not operate as intended; and
- had it been operating as designed, it would have contained the vehicle.

Highland Council was the roads authority responsible for managing and maintaining the bridge. The parapet was an integral part of the road. There was a long tract of authorities requiring roads authorities to exercise reasonable care in their management of the roads. The judge held that the parapet was clearly defective in that its containment capacity, if any, was unknown, which posed a danger to road users and there was a significant risk of an accident. It was designed to safeguard road users who came into contact with it. Mr Bowes had been entitled to rely on it to prevent serious injury or loss of life. Had it been functioning as designed, he would not have drowned, thus it was a hazard.

Lord Mulholland also held that Highland Council had been placed on notice that the parapet was defective to the extent that the containment capacity was unknown at the date of the accident. The hazard had not been dealt with and the risks that it posed had not been mitigated. There had been an urgent requirement to address the hazard. The council had taken six years to do so after being placed on notice of the problem.

A reduction in speed and single lane carriageway was not unduly onerous and had in fact been imposed during the remedial works in 2011. The interim measures were reasonably practicable and the cost modest. The possibility of an accident of the kind which occurred was foreseeable, and Highland Council had breached its duty to deal with the hazard by implementing interim measures until the parapets were replaced. Had it done so, Mr Bowes' death would have been prevented.[2]

[1] *Bowes v Highland Council* [2017] CSOH 53; 2017 S.L.T. 749.

[2] *MacDonald v Aberdeenshire Council* [2013] CSIH 83; 2014 S.C. 114, applied and *Sargent v Secretary of State for Scotland* 2001 S.C.L.R. 190; 2000 Rep. L.R. 118, considered.

Lord Mulholland found that there was no basis for any finding of contributory negligence on the deceased driver's part. The defender appealed.

The Inner House confirmed that roads authorities in Scotland have a duty of care towards road users at common law as set out in *MacDonald v Aberdeenshire Council* and where there was such a duty, the scope thereof had to be assessed in the same way, whether the defender was a local authority or private entity; the cost of taking preventative steps and the defender's financial circumstances would be no more than a relevant consideration.[3]

They accepted that the Lord Ordinary had been correct to reject the submission that the present case was one in which the test for the standard of care required to be assessed according to the test for professional negligence as set out in *Hunter v Hanley*.[4] Instead, it was appropriate to apply the ordinary standard of reasonable care where the case concerned the issue of managing the road at that locus pending such repair or replacement, it was not an issue based on technical matters of professional judgment.[5]

The parapet presented a hazard to safe passage over the bridge but it could not be viewed in isolation. The defective parapet did not create a significant risk of an accident in the sense of causing the deceased's initial loss of control and collision with the parapet but it did create a significant risk of an accident in the sense of causing the deceased's collision with the parapet to lead to his vehicle falling from the bridge into the sea. The significance of the hazard or risk to safety in the present case had already been identified by the reclaimers themselves and deemed sufficient to justify repair or replacement of the parapet in early course. The basis for failing to install the interim measures suggested did not appear to have been based on any particular professional judgment and there appeared to have been no logical or rational basis for their rejection. The Lord Ordinary had not erred on the issue of foreseeability.

However, they held that it could not be accepted that the acts of the deceased in driving out of the lane in which he had been in, across the opposing lane, onto the kerb and into the bridge while on a straight line road with no other vehicles present, had no causative effect. There had been an identifiable error by the Lord Ordinary's failure to take account of the deceased's negligence, which they concluded was sufficient to justify interference by the court; equally, the Lord Ordinary's apportionment was not one which was reasonably open to him.

They held that both elements of the defective parapet as well as the deceased's negligent driving had causative effect and one could not be isolated form the other in arriving at a just and equitable outcome. The blameworthiness of the authority was demonstrably far greater than that attributable to the deceased on the known facts. That justified them bearing substantial responsibility for Mr Bowes' death but a contribution of 30% was appropriate in recognition of the deceased's conceded negligence. The reclaiming motion was allowed in part and the case put out by order.

Comment

The key change on appeal in this case is that the Inner House allowed the claim for contributory negligence, and adjudged this to be at the level of 30%, but in upholding the first instance decision the court also further buttresses the interesting decision of Lord Mulholland on a "road design" case, that might not necessarily be followed in England and Wales.[6]

As with so many traffic issues it was never clear why the deceased suddenly veered across the road bridge on the Kyle of Tongue. The vast majority of traffic incidents are caused by "driver error" and this

[3] *MacDonald v Aberdeenshire Council* [2013] CSIH 83 considered.
[4] *Hunter v Hanley* 1955 S.C. 200; 1955 S.L.T. 213.
[5] *Hunter v Hanley* 1955 S.C. 200 considered.
[6] See the Case Comment on Lord Mulholland's first instance decision in the Outer House of the Court of Session by this author at [2017] J.P.I.L. C155–C159.

encompasses a raft of potential issues, some of which like "micro sleep",[7] "driver distraction" from mobile telephone usage,[8] and "automatism from losing consciousness" have received detailed analysis.[9] Even something as commonplace as a driver reaching for a mint in his jacket pocket on the passenger seat can cause a vehicle to slew across a motorway and kill three people and an unborn child; after an unblemished driving record and academic career, Dr Thomas Munch-Petersen never drove again and served a prison sentence of 90 days.[10]

The Inner House in *Bowes*, in a full review, staunchly upholds the reasoning of the first instance judgment. While considering in detail the arguments made on behalf of the Highland Council, who are responsible for more than 1,400 bridges on their road network,[11] and as with practically all local authorities subject to "budgetary constraints", there had been a clear breach of the Scottish common law duty of care.[12]

However, on the fourth ground of appeal, where counsel for the reclaimer had made the point that Lord Mulholland had, for "unimpeachable reasons" concluded that the deceased had been negligent, there is a different perspective on contributory negligence.[13] Counsel had contended that a finding that Mr Bowes' death was not caused by his own fault was "bizarre" and "defied common sense".[14] The reclaimers urged a finding of 75%, as was the reduction by the Court of Appeal in *Yetkin v Mahmoud*[15] where the claimant admitted crossing a main road without waiting for a pedestrian light in her favour. In response, the legal team on behalf of the Bowes family argued that the loss of control was simply a *causa sine qua non*, a mere precondition to the defective parapet causing the plunge into the sea; and without that failure of the bridge perimeter rail the vehicle would have been retained and deflected and the deceased would have suffered, at most, minor injury.[16] Instead, the parapet "unzipped".

Lady Dorrian, the Lord Justice Clerk, in coming to a view on contributory negligence notes that counsel for the reclaimer local authority framed this situation as:

> "The deceased drove out of the lane in which he was driving, across the opposing lane, onto the kerb and into the bridge, on a straight line road and with no other vehicles around."

The Inner House concludes that these acts or omissions were part of the causative framework, along with the defective parapet.[17]

Since the apportionment legislation of 1945 it is of course axiomatic that this matter of contributory negligence goes to the law of remedies and not to liability.[18] Noting the discussion on the Law Reform (Contributory Negligence) Act 1945 s.1(1) by the Supreme Court in *Jackson v Murray,* also in a road incident, the vital distinction is made by Lord Reed that the apportionment is in respect of "responsibility for the damage (not, it is to be noted, responsibility for the accident)".[19] Indeed, this case of *Bowes* is a useful illustration of the Reed principle.

The Inner House concludes that Lord Mulholland "went wrong" on contributory negligence, so rectify this in what they consider to be a dual causation case—careless driving by Mr Bowes but also the full knowledge by the Council that the defective parapet in their control was creating a danger. They make

[7] In the US, the National Highway Traffic Safety Administration estimates that 2.5% of fatal crashes and 2% of injury crashes involve drowsy driving; National Highway Traffic Safety Administration, *Traffic Safety Facts Crash Stats: Drowsy Driving* (Washington DC: 2011).
[8] J. Fulbrook, "Deadly distractions: Mobile telephones and transport litigation" [2018] J.P.I.L. 89–97.
[9] See for a useful introduction N. Tomkins, Case Comment on Radice v Worster [2016] J.P.I.L. C52–C54; [2015] EWHC 3732 (QB).
[10] *Fatal Error; Confessions of an Accidental Killer* (London: Short Books, 2003).
[11] "Judges find driver 30% to blame for bridge death" *Aberdeen Press and Journal* 8 June 2018.
[12] *Bowes v Highland Council* [2018] CSIH 38; 2018 S.L.T. 757 at [45].
[13] *Bowes v Highland Council* [2017] CSOH 53; 2017 S.L.T. 749 at [11].
[14] *Bowes v Highland Council* [2018] CSIH 38; 2018 S.L.T. 757 at [29].
[15] *Yetkin v Mahmoud* [2010] EWCA Civ 776; [2011] Q.B. 827. See the Case Comment at [2010] J.P.I.L. C182–C186.
[16] *Bowes v Highland Council* [2018] CSIH 38; 2018 S.L.T. 757 at [40].
[17] *Bowes v Highland Council* [2018] CSIH 38; 2018 S.L.T. 757 at [56].
[18] See further J. Goudcamp, *Tort Law Defences* (Oxford: Hart, 2013), p.71.
[19] *Bowes v Highland Council* [2018] CSIH 38; 2018 S.L.T. 757 at [20].

the judgment that "the blameworthiness of the reclaimers is demonstrably far greater than that attributable to the deceased upon the known facts".[20]

A tantalising aspect of this case is the potential distinction between the Scottish and English perspectives on road design cases. Lord Drummond Young, a judge in the Inner House in *Bowes*, has elsewhere noted in a perceptive review in *MacDonald v Aberdeenshire Council* that:

> "For the most part the Scottish cases indicated an approach that was more favourable to the claims of road users against the highway authority; the English cases, by contrast, appeared to have developed a position that was hostile to such claims."[21]

No doubt some of this divergence can be attributed to the statutory intervention in England and Wales that began with the Highways Act 1959, and clearly many cases are "fact sensitive", but the trajectory shown in *Bowes v Highland Council* is certainly rather more sympathetic to that shown to claimants in classic highway cases in the House of Lords such as *Stovin v Wise*,[22] *Goodes v East Sussex*[23] *and Gorringe v Calderdale MBC*.[24] Honour has probably now been satisfied for the reclaimers in *Bowes* with the success on the contributory negligence point[25] so Supreme Court guidance for the whole of the UK will probably await a further case at some point.[26]

Practice points

- A warning needs to be repeated on this case, that Scottish practice may diverge from that elsewhere in the UK.
- Date of knowledge was critical in this case; the defects in the bridge parapet were categorised as "severe" in 2005, but were not dealt with until 2011.
- The Lord Ordinary at first instance in the Outer House found it "surprising" and "alarming" that basic health and safety principles of risk assessment were not applied to the parapet, and this perspective was fully endorsed on appeal.
- The Inner House noted that this incident of an "unzipping" parapet "was not said to be foreseeable with the benefit of hindsight: it had been predicted".[27]
- Apportionment for contributory negligence in this case was based on the fact that although it was difficult to determine the "relative causative potency" of the two factors involved, the blameworthiness of the Council was "demonstrably far greater".[28]

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[20] *Bowes v Highland Council* [2018] CSIH 38; 2018 S.L.T. 757 at [64].
[21] *MacDonald v Aberdeenshire Council* [2013] CSIH 83; 2014 S.C. 114 at [51].
[22] *Stovin v Wise* [1996] A.C. 923; [1996] 3 W.L.R. 388.
[23] *Goodes v East Sussex* [2000] 1 W.L.R. 1356; [2000] 3 All E.R. 603.
[24] *Gorringe v Calderdale MBC* [2004] UKHL 15; [2004] 1 W.L.R. 1057.
[25] The father of David Bowes, on hearing of the appeal, made the not unreasonable point that "If they had spent as much on the bridge in the first place as they are willing to do on legal costs I would not have lost my son", "Family 'horrified' as Council appeals bridge death ruling" *Aberdeen Press and Journal* 10 April 2017.
[26] See generally Ch.15 on "Highways" in C. Booth and D. Squires, *The Negligence Liability of Public Authorities* (Oxford: OUP, 2005); on non-repair of highways 8-210 and 20-191 to 20-193 in M. Jones (ed), *Clerk & Lindsell on Torts* (London: Sweet & Maxwell, 2018); and Ch.7 in J. Morrell and R. Foster, *Local Authority Liability* (Bristol: Jordan Publishing, 2015).
[27] *Bowes v Highland Council* [2018] CSIH 38; 2018 S.L.T. 757 at [33].
[28] *Bowes v Highland Council* [2018] CSIH 38; 2018 S.L.T. 757 at [64].

Carter v Kingswood Learning & Leisure Group Ltd

(QBD; Foskett J; 27 June 2018; [2018] EWHC 1616 (QB))

Liability—personal injury—negligence—causation—adventure activities—abseiling—instructors—duty of care—neck—vertebra

LT Adventure activities; Breach of duty of care; Causation; Neck; Personal injury; Vertebra

In January 2013, the claimant, Mrs Pauline Carter, was aged 47. She was a primary school teacher working at Thorpe Lea Primary School in Egham, Surrey. Along with a number of children from the school, together with other teachers, she attended the Kingswood Centre in Bembridge on the Isle of Wight between Monday, 28 January 2013, and Friday, 1 February 2013. Kingswood is an outdoor events centre primarily engaged in providing school children with "adventure playground" activities. Pauline Carter's task, along with that of the other member of the school staff allocated to the group, Lucy Drake, was to supervise a group of about ten children forming part of the overall cohort of children attending a residential activity course at the Kingswood Centre.

In the early afternoon of 29 January 2013, Pauline Carter was present at an organised abseiling lesson. She had abseiled many years previously. She claimed that, during the lesson, when she reached a vertical drop she was not prepared for it and the top half of her body flopped backwards before being stopped by her safety harness leading to her head being pulled backwards exerting force through her neck.

A few days later she suffered a stroke as a result of a vertebral artery dissection ("VAD"). The claimant alleged that for her to suffer that type of fall the safety rope, which was controlled by the defendant's instructors, must have become slack, so that when her weight was supported through the main abseil rope and she applied the brake, the tension on the safety rope was lost and would not have restrained her from falling or flopping backwards. After her stroke, the claimant was in a "locked in" situation whereby she could only communicate by blinking. She was not able to communicate her version of events until nearly a year after her stroke. At that point, it was confirmed that VAD had been the cause. She did not suggest a connection between the VAD and abseiling until a year after that. She brought a personal injury claim against the company responsible for the Kingswood Centre. There was a trial on liability.

Foskett J held that in the circumstances of the difficulties faced after the claimant's stroke, it was unsurprising that the suggestion that her upper body had "flopped back" suddenly in a way that she found disconcerting had not emerged earlier. That factor would not necessarily of itself result in a rejection of her account, but memory could distort reality and he recognised that there was a need for caution.

Commenting that no court would wish to hold unfairly against someone like the claimant with her particular difficulties, he pointed out that she had plainly been a very active person and would have undertaken the abseiling with confidence. He felt the claimant applying the brake at that point did not seem at all likely. However, he held that if she had that was only one part of the necessary scenario for a breach of duty to arise. The other part required her to move her hand on the safety rope in a way that pulled it towards her, creating some slack. He found it impossible to conclude that she had done that.

There was nothing that she did as she descended to prompt her to pull on the safety rope. It was not possible to see why she might have panicked, which would have been out of character. She had never suggested that she had pulled the rope and, since she claimed a fairly vivid recall of what occurred, that was found to be telling.

None of the instructors had any experience of that happening before. They stated that if someone felt unstable it was likely they would have applied the brake rather than pulling the safety rope. If there was a pull on the rope, however, an instructor would know instantly and let out more rope. That was a complete answer to any suggestion that an instructor had been momentarily distracted.

The judge held that it was unlikely that the claimant had applied the brake and then pulled on the safety rope. It was more likely that she maintained a continuous descent and something happened that caused her neck to jerk. Therefore, on the balance of probabilities, she had failed to establish that there was a flopping of the upper part of the body in the way described with a consequent neck injury.

The court accepted that she experienced some form of jerk to the neck, but not in the way suggested. The process of recreating a fairly insignificant event had caused it to become magnified in the claimant's mind. That was perfectly understandable, but it was an explanation for the way in which the circumstances had "developed" in the case advanced. The jerk to the neck was not shown to have been a result of some negligently permitted slack in the safety rope, and no breach of duty had been established.

On the basis of the court's conclusion on breach of duty it was not necessary to determine whether the jerk of the neck was likely to have caused the VAD. However, the judge accepted that there was evidence adding broad support for the proposition that in some cases a VAD can be caused by minor neck injury. That did not prove that it was the cause (or indeed merely a contributory cause) in the claimant's case. However, given the report soon after the event of a jerk to the neck during the abseiling exercise, followed shortly thereafter by well-attested neurological symptoms, he would have concluded, albeit on a bare balance of probabilities, that the jerk constituted minor neck strain which did cause the VAD.

The claim was dismissed.

Comment

This case is about abseiling and breach of duty; I have never abseiled, nor do I think that, at my age and size, I am ever going to! The case is also about causation in respect of a vertebral artery dissection. Unfortunately, as the case did not get past first base, this issue was not fully addressed. VAD is surprisingly common; I guess I see several claims a year where it is a feature.

The most important aspect of this case is that it serves as a reminder of some basic principles of English law, viz. that the burden of proof is on the claimant to prove their case and that the salient facts upon which a court may find a breach of duty must be established by the evidence presented. While practitioners (especially defendant practitioners) may sometimes feel that we are close to no fault liability, that is not the case. A duty of care must still be owed; there must be a breach of that duty and harm or damage must flow as a consequence. Here the claimant, who was a primary school teacher on a residential activity course, together with a number of school children, was clearly owed a duty of care by the activity centre and the supervisor of the abseiling activity.

The claimant, Mrs Pauline Carter, who at the time was 47 years old, had abseiled many years previously. The whole abseiling event seemed well organised and was taking place on a purpose-built tower. She was the first to go so as to set an example to the children. Nothing dramatic happened, and by the time the matter came to trial some five and half years later, it is perhaps understandable that witnesses who were supervising the abseiling activity struggled to fully remember the events. Essentially, the claimant's case was that there was nothing intrinsically wrong with the system of abseiling but rather that it was the way in which it was implemented. In this respect, the court was assisted by experts in adventure activities who had been retained by the respective parties. These experts were largely agreed on the system operated by the activity centre:

- Two harnesses are worn connected by a karabiner so that thighs, waist, chest and shoulders are supported.

- An abseil rope (controlled by the person abseiling) is connected to the waist harness and a safety rope (controlled by the instructor) is connected to the chest harness. The person abseiling should hold one rope in each hand at all times.
- This means that the weight of the person descending should be supported more or less equally by the two ropes.
- There should always be some tension in the safety rope to control the speed of descent and the amount of tension is controlled by the instructor.
- If the safety rope is freely fed through an Italian hitch friction system, slack can be created. Similarly, if the participant locks their abseil device and pulls on the safety rope, slack in that rope can be created.
- At the top of the tower, there is a downward incline before the vertical drop so as to make it easier for participants.

The claimant's evidence was that as she went over the vertical edge of the tower to commence her descent, the top half of her body "flopped backwards" and her head and neck jerked backwards. Although Mrs Carter felt that it was not very pleasant she went on to complete her descent.

Later that same afternoon, Mrs Carter was taking part in fencing as another activity and felt very sick and generally awful, but carried on. She then felt fine but again felt sick a week later when cycling. Some three weeks or so after visiting the centre, Mrs Carter tragically sustained a stroke that left her "locked-in", though did make a slow, gradual but partial recovery. On admission to hospital it was recorded: "no neck injury but abseiling prior to admission—? minor neck injury". At first there was no suggestion of a causal link and claim between the abseiling event and the VAD. The letter of claim seems to have been issued in late 2015 with proceedings issued early in 2016 and before limitation.

Foskett LJ had no doubt that Mrs Carter was an honest witness and clearly early on there was an indication that something may have occurred during the abseiling exercise. The judge was also impressed with the evidence of the instructors of the day. The claimant's case was that the upper part of her flopped back causing the injury to her neck and that for this to happen it was necessary for the safety rope attached to her chest harness to become slack and that this could only happen by either the instructor feeding the rope through the Italian hitch or the claimant pulling on the safety rope herself. In both scenarios, the brake to the abseil rope would need to have been applied. Foskett J discounted both scenarios finding it inconceivable that the claimant, who was an active and confident woman, would apply the abseil brake and at the same time pull on the safety rope. Similarly, there was no need for an experienced and competent instructor to feed safety rope through the hitch when the claimant was still in sight and would be able to tell instantly if there was any pull on the safety rope.

As a consequence, Foskett J concluded that:

> "the net effect of this analysis is that I do not consider it has been established, on balance of probabilities, that there was a flopping of the upper part of the body in the way that the Claimant has described it with a consequent neck injury."

Though he was prepared to accept that she did experience some form of jerk to the neck. He went onto say that in his "judgement the process of re-creation of a relatively insignificant event has caused the event to become magnified in the Claimant's mind". While accepting that there was a jerk to the neck, there was no evidence that it was caused by some slack occurring negligently in the safety rope and without that no case of breach of duty can be established; there was nothing lacking in the instructions Mrs Carter had received and she was doing what she was expected to do in her descent.

Although Foskett J's conclusions did not require him to address causation, it is worth making some comment based on the joint statement of the medical experts:

- Symptoms of cervical arterial dissection may not develop until some days or weeks after dissection.
- Though 70% are said to be symptomatic within two weeks of an event.
- Cervical artery dissections can occur without obvious provocation and thus the claimant may have sustained her VAD prior to her visiting the activity centre.
- Most commonly they are reported as being "spontaneous" with no defined provocation but where there is, this is most often minor trauma to neck or head.
- Quoting from the joint statement:

> "4.3 Statistically, cervical artery dissections are most commonly recorded as occurring spontaneously. We think it likely however, that many such cases have undiscovered genetic or anatomical predispositions which affect the strength and integrity of the arterial walls, rendering them especially susceptible to shear stress."

Ultimately it was academic that the defendant's expert concluded that the abseil was a possible rather than probable cause of the dissection and the claimant's expert concluded that, given Mrs Carter's history of the events, that the abseil probably caused the VAD.

Practice points

- The human mind and memory is a strange thing. Where several people are asked to recount something they have just seen, they will all say slightly different things. Similarly, we all conflate events in our lives. In short, insignificant events can become magnified in a claimant's mind.
- This decision serves as a reminder to practitioners that it is for the claimant to prove their case.
- Whether or not there is a breach of duty must be borne out of the facts and evidence presented.
- Not all cases will be successful.

David Fisher

Barclays Bank Plc v Various Claimants

(CA; Sir Brian Leveson PQBD, McCombe LJ and Irwin LJ; 17 July 2018; [2018] EWCA Civ 1670)

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

LT Doctors; Employers' liability; Independent contractors; Job applicants; Medical examinations; Sexual assault; Vicarious liability

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

assessment, with Dr Bates having been nominated by the bank to carry out the assessments for applicants from North East England.

Dr Bates practised from a consulting room at his home, which is where the alleged sexual assaults took place. He died in 2009. A recent police investigation into the cases of 48 complainants found sufficient evidence to prosecute Dr Bates had he been alive. The court had to determine, as a preliminary issue, whether the bank was vicariously liable for assaults that Dr Bates allegedly committed.

The doctor was provided with pro forma examination forms by the bank, headed by its logo and entitled "Barclays Confidential Medical Report", and was paid a set fee for each examination. The claimants claimed that Dr Bates was a direct employee of the bank or was in a role "akin to employment". The bank contended that Dr Bates was not an employee but an independent contractor and it was, therefore, not vicariously liable. The bank also argued that Dr Bates was not performing a role for the bank that was akin to employment.

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

She considered the decisions' *Cox v Ministry of Justice*[1] and *Mohamud v Wm Morrison Supermarkets Plc*[2] and applied the five criteria relevant to the first-stage test as identified in *Cox* and *Various Claimants v Institute of the Brothers of the Christian Schools*[3] and *Cox v Ministry of Justice*.[4] She found that the tort was committed as a result of activity undertaken by the doctor on behalf of the bank; was for the bank's benefit and an integral part of its business activity; that the doctor was working under the bank's control in respect of the nature of the medical assessments and completion of the reports; and that the bank was more likely to have the means to compensate the victims and could be expected to be insured against such liability. She concluded that the tort was sufficiently closely connected with the bank's quasi-employment of the doctor, and that it was fair and just to find the bank vicariously liable. The bank appealed.

The Court of Appeal held that the law of vicarious liability had developed in recent times, and required answers to the specific questions laid down in *Cox* and *Mohamud* and affirmed in *Armes v Nottinghamshire CC*[5] rather than the question of whether the alleged tortfeasor was an independent contractor.[6] There would be cases involving independent contractors where vicarious liability was established. Changes in employment structures and in contracts for the provision of services were widespread. Operations intrinsic to a business enterprise were routinely performed by independent contractors, over long periods, accompanied by precise obligations and high levels of control.

With regard to the first-stage test, they confirmed that the judge rightly concluded that the bank had more means to satisfy the claims than the long-distributed estate of the doctor. However, she also correctly gave that matter little weight, as no liability could be founded on that consideration alone. The bank's submission that that question should be considered as at the time of the torts was rejected. They held that would be impractical, would cause satellite litigation, and could operate to defeat rather than facilitate justice. Insofar as the question carried any weight, it had to be considered at the time of litigation.

Davies J was also right to conclude that the activity was being taken on behalf of the bank. The bank wanted to employ people long-term and to arrange life insurance for them, but the principal benefit was to the bank as the prospective employer. The process was also part of the bank's business activity and the

[1] *Cox v Ministry of Justice* [2016] UKSC 10; [2016] A.C. 660.
[2] *Mohamud v Wm Morrison Supermarkets Plc* [2016] UKSC 11; [2016] A.C. 677. *Mohamud* is discussed in P. Morgan, "Certainty in Vicarious Liability: A Quest for a Chimaera?" (2016) 75 *Cambridge Law Journal* 202.
[3] *Various Claimants v Institute of the Brothers of the Christian Schools* [2012] UKSC 56; [2013] 2 A.C. 1.
[4] *Cox v Ministry of Justice* [2016] UKSC 10; [2016] A.C. 660.
[5] *Armes v Nottinghamshire CC* [2017] UKSC 60; [2018] A.C. 355.
[6] *Cox v Ministry of Justice* [2016] UKSC 10, *Mohamud v Wm Morrison Supermarkets Plc* [2016] UKSC 11 and *Armes v Nottinghamshire CC* [2017] UKSC 60 followed.

risk of the tort arose from arrangements made by the bank. The bank specified the nature of the examinations, as well as the time, place and examiner.

The issue of the control exercised by the bank over the doctor, which was perhaps the most critical factor, depended on the particular facts and the judge was correct in her findings and reasoning in that respect. With regard to the stage 2 test, the judge correctly found that the medical examinations were sufficiently closely connected with the relationship between the doctor and the bank; they were the purpose of that relationship. The judge's conclusions were just and fair.[7]

The court said that a "bright line" test based on the status of independent contractors would make the conduct of business easier for parties and their insurers. However, ease of business could not displace or circumvent principles established by the Supreme Court. Establishing whether an individual was an employee or a self-employed independent contractor could be full of complexity and evidential pitfalls. The *Cox*/*Mohamud* questions would often represent no more challenging a basis for analysing the facts in a given case. The appeal was dismissed.

Comment

It has often been said that vicarious liability is on the move. Traditionally, practitioners will have looked at the year of a judgment as an easy tool to identify how relevant a judgment was to their caseload. It seems now that we are seeing a flow of Supreme Court and Court of Appeal decisions that would fit more with a monthly referencing system as opposed to an annual one.

The concept of vicarious liability is something that has grown out of the judgments of Chief Justice Holt in *Boston v Sandford*[8] and *Turberville v Stamp*.[9] In the latter he stated:

> "if my servant doth anything prejudicial to another, it shall bind me when he may be presumed that he acts by my authority, being about my business."

If we look at those words we can see the genesis of the concept of vicarious liability that has led us to the five-stage test[10] to identify the relationship capable of supporting a finding of vicarious liability and the sufficiently close connection test that links the wrongdoing to the person to be found vicariously liable.[11] In *Cox,Mohamud* and latterly *Armes* the Supreme Court made it clear that those changes are important and deliberate.

What seems implicit in the five-stage test that we see explored in this case is that the courts explicitly recognise what was always intended: that those who take the benefit of the tortfeasor carrying out work for their business should also take the burden when things go wrong. It is just for that person to meet a damages claim in those circumstances. However, for some, it is said to be surprising that an independent contractor who commits a wrong can shift the responsibility for that act to someone else. With respect, that is to misunderstand vicarious liability. Vicarious liability is not about the person who committed the tort; it is about providing redress for the victim of that wrong and who can and should pay for that wrong putting right as far as the law of tort is capable.

The court of appeal here adopt the phrase used by Nicola Davies J below of "quasi-employment" which is helpful in that it is an easy shorthand for describing a relationship that meets the five-stage test. It was always understood that an independent contractor could be caught by the five-stage test and the court commented as follows:

[7] *Various Claimants v Institute of the Brothers of the Christian Schools* [2012] UKSC 56 and *Cox v Ministry of Justice* [2016] UKSC 10 followed.
[8] *Boston v Sandford* (1691) 2 Salk. 470.
[9] *Turberville v Stamp* 91 E.R. 1072; (1698) 1 Ld. Raym. 264.
[10] Confirmed in *Cox v Ministry of Justice* [2016] UKSC 10 and *Armes v Nottinghamshire CC* [2017] UKSC 60.
[11] Confirmed in *Mohamud v Morrison Supermarket Plc* [2016] UKSC 11.

> "Moreover, it seems clear to me that, adopting the approach of the Supreme Court, there will indeed be cases of independent contractors where vicarious liability will be established."

This, the court, correctly held was nothing more than a reflection of the change in society that has seen widespread changes in the structures of employment and of contracts for services and clearly what Lord Reed had in mind when he gave judgment in *Cox*. This, in turn, reflected the position that Lord Dyson had made clear in *Mohamud* which was that there had been a recognition in the development of the doctrine through case law that:

> "… developments in the modern workplace (and the changing legal relationships between 'workers' and 'organisations', to use neutral terms) necessitated a change in the law as to the type of relationship that has to exist between a worker and an organisation for vicarious liability to arise."

Whilst the overall outcome is important in the five-stage test, there was also some helpful guidance on how some of the individual stages of those tests were intended to work. It was argued that the requirement of the test stage that focuses on the creation of risk required the court to find that the quasi-employer was negligent in creating that risk. This was rejected on the basis that it would make an approach under vicarious liability redundant as there would be a cause of action directly against the quasi-employer in those circumstances. All that is required is that they have put the claimant in a position of risk.

On control, the court confirmed the view that was expressed in *Armes*, that the level of control is not high but helpfully clarified beyond that the test is narrowly focused on the activity complained of by the claimant and the question is what it was the quasi-employer could direct the wrongdoer to do and not how they go about it. This is not an extension of the doctrine at all, but merely restating what has been said before in *Cox, Armes* and also, originally, in *The Catholic Child Welfare Society v Various Claimants*.[12]

On the ability of the parties to meet a damages claim, the court confirmed that whilst the head could not found liability on its own it was relevant and the correct time to assess that was at the time of litigation. This element of the five-stage test has always been more of a secondary consideration in that it simply confirms that the purpose of vicarious liability is to shift responsibility for meeting losses to where it should justly be. It recognises that the underlying purpose of vicarious liability is to provide redress. That would not be met if the liability to pay could be shifted to a party without the means to meet those damages.

The decision, in this case, is unsurprising and is part of the onward march of vicarious liability. That has, though, to be understood in the proper context. The law of tort should reflect the society in which it operates and develop to adapt to changes in that society. It seems that at all levels of our judiciary this is understood[13] and their judgments show the law being applied to the development of the gig economy in our jurisdiction.

Practice points

- A quasi-employment relationship can support a finding of vicarious liability. We are now far beyond it being limited to particular relationships that would support, for example, a label of employment. The case law reflects the law adapting to the needs of the society it sits in.
- The test is the five-stage test set out in *Cox* and *Armes* by the Supreme Court.
- That is the only test that matters, and simply labelling the tortfeasor as an independent contractor does not take the situation outside the scope of vicarious liability.

[12] *The Catholic Child Welfare Society v Various Claimants* [2012] UKSC 56.

[13] *The Catholic Child Welfare Society v Various Claimants* [2012] UKSC 56, *Cox v Ministry of Justice* [2016] UKSC 10, *Mohamud v Morrison Supermarket Plc* [2016] UKSC 11 and *Armes v Nottinghamshire CC* [2017] UKSC 60 in the Supreme Court. *Barclays Bank* in the Court of Appeal and the High Court.

- Control is one of those stages and it relates to the control exhibited by the quasi-employer over the wrongdoer at the time the act being complained of occurred.
- The ability of a party to meet a damages claim is relevant, but only insofar as it reflects the goal of vicarious liability to provide a means of redress where it is just to do so.

Brett Dixon

Sherratt v Chief Constable of Greater Manchester[1]

(QBD; King J; 16 July 2018; [2018] EWHC 1746 (QB))

Liability—negligence—duty of care—police—assumption of responsibility—assurances—delay—emergency services—self-harm—suicide—Fatal Accidents Act 1976—Law Reform (Miscellaneous Provisions) Act 1934—Human Rights Act 1998

Assumption of responsibility; Assurances; Delay; Duty of care; Emergency services; Police; Reliance; Self-harm; Suicide

This claim arose out of the death of Ms Georgina Beevers ("the deceased") who was found dead at her home on the morning of the 30 January 2012. The claimant, Paul Sherratt, was the partner of the deceased at the time of her death and father to her children. For the purposes of the proceedings it was accepted that the deceased took her own life.

There were two pleaded causes of action: common law negligence and alleged breaches of convention rights under the Human Rights Act 1998. The claimant brought the claim for the benefit of the deceased's dependants, including himself, pursuant to the Fatal Accidents Act 1976 and for the benefit of the Estate of the Deceased pursuant to the Law Reform (Miscellaneous Provisions) Act 1934.

The deceased's mother had made a 999 call concerned about her daughter's welfare. The mother had explained to the call handler that she could not get to her daughter because she herself was ill, but said that she was concerned because she had been trying to dissuade the daughter from taking an overdose and was worried that she might still do so. The call handler assured the mother that she would dispatch officers to the daughter's address and that if the daughter needed to be transferred to hospital, the police would arrange for it to be done.

The call handler initially graded the call as grade 1 (emergency attendance) but shortly afterwards downgraded it to grade 2 (priority attendance). Police officers attended the daughter's address three-and-a-half hours after the call but there was no response. They attended again the following day to find that the daughter had committed suicide by taking an overdose. The claimant brought proceedings against the police in negligence, and a hearing was held to decide as a preliminary issue whether the police owed the daughter a duty of care arising out of the 999 call.

The recorder found that the police had assumed responsibility for the daughter's welfare as a result of the call handler's assurances to the mother that officers were being dispatched forthwith and would arrange for her daughter's transfer to hospital, and that the mother had relied on that assurance to her detriment because otherwise she would have taken other steps to try to help her daughter, such as calling for an ambulance herself or seeking other assistance. The defendant chief constable appealed.

[1] Also known as: *Beevers (Deceased), Re*.

King J held that it had been reasonably open to the recorder to find that the call handler had given specific assurances to the mother that police officers would be dispatched forthwith as a priority step to check on her daughter's well-being and that, if required, the daughter's transfer to hospital would be arranged by the police rather than by the mother. It had also been reasonably open to the recorder to find detrimental reliance on the mother's part. She had relied on what she was told by the call handler and therefore took no further steps herself to get help to her daughter, the deceased.

King J further held that the recorder had not erred in holding that the chief constable through his control room had assumed responsibility for the deceased's welfare, thereby giving rise to a sufficiently close relationship of proximity so as to give rise to a duty of care. Notwithstanding that the assurances were given to the mother rather than to the daughter and that the reliance was by the mother rather than the deceased, he held that there had been sufficient reliance on the assurances to bring the case within the "assumption of responsibility" exception to the general rule that the police did not owe a private law duty of care in negligence to individual citizens for failing to comply with their public duty to investigate and prevent crime.[2]

The judge stated that the deceased was obviously a vulnerable individual in need of welfare assistance which the chief constable was offering to provide. It did not matter for the purposes of an imposition of a duty of care to the deceased that that assistance was sought not by her directly but by her mother on her behalf, or that the assurances were given not to the deceased directly but to the person who it was known was seeking assistance on her behalf.

The critical fact was that the chief constable through his call handler knew that the mother was calling on behalf of her daughter who was in no position to make the call herself. The facts were broadly analogous to those in *Kent v Griffiths (No.3)*,[3] in which the ambulance service was held liable for the injury suffered by an asthmatic after his doctor had relied on assurances that the ambulance was on its way.[4] In finding an assumption of responsibility, the recorder was not marginalising the Hedley Byrne principles. He was patently mindful of the line of authority concerning assumption of responsibility in the context of actions against the police, and had regard to the requirement to find an assumption of responsibility based on assurance and detrimental reliance.

The recorder had not erred by failing to distinguish between a duty of care to protect a person from an external threat and one to protect them from their own actions. On the recorder's findings, the chief constable had accepted responsibility for the daughter's welfare, having been told that she represented a risk to her own safety due to her mental state. In circumstances where the chief constable had accepted such responsibility when the intervention of another agency might have prevented her death, it was not necessary for the chief constable to have detained the daughter, for example under the Mental Health Act, for a duty of care to arise.[5] The actions and words of the call handler were sufficient to affix the chief constable with responsibility for the daughter's safety, notwithstanding that the threat was from herself. The appeal was dismissed.

Comment

The judgment in *Sherratt* is at first glance surprising in view of the recent decision of the Supreme Court in *Michael v Chief Constable of South Wales*.[6] In *Michael*, a 999 call that the deceased had made to the police seeking urgent assistance on account of threats that her violent ex-partner had made was routed to Gwent Police call centre. The call handler informed the deceased that the call would be passed to the

[2] *M v Commissioner of Police of the Metropolis* [2007] EWCA Civ 1361; [2007] Po. L.R. 238 considered.
[3] *Kent v Griffiths (No.3)* [2001] Q.B. 36; [2000] 2 W.L.R. 1158.
[4] *Kent v Griffiths (No.3)* [2001] Q.B. 36 considered.
[5] *Vellino v Chief Constable of Greater Manchester* [2001] EWCA Civ 1249; [2002] 1 W.L.R. 218 considered.
[6] *Michael v Chief Constable of South Wales* [2015] UKSC 2; [2015] A.C. 1732. See, further, J. Goudkamp, "A Revolution in Duty of Care?" (2015) 131 *Law Quarterly Review* 519.

South Wales Police, in whose area the deceased lived, and that the deceased should keep the line free. Upon being transferred, the call, which had initially been graded as requiring an immediate response, had its priority downgraded. Before South Wales Police called the deceased, she again called 999 with her call being routed to Gwent Police. The call hander heard the deceased scream following which the line then went dead. By the time that the police arrived at the deceased's premises, the deceased had been murdered by her former partner.

Delivering the majority reasons, Lord Toulson emphasised that, ordinarily, there is no duty of care to prevent harm from being caused by others (and that must include self-harm) absent special circumstances, such as where there had been an assumption of responsibility. His Lordship said:[7]

> "The refusal of the courts to impose a private law duty on the police to exercise reasonable care to safeguard victims or potential victims of crime, except in cases where there has been a representation and reliance, does not involve giving special treatment to the police. It is consistent with the way in which the common law has been applied to other authorities vested with powers or duties as a matter of public law for the protection of the public."

Lord Toulson found that responsibility had not been assumed for the deceased. His Lordship said:[8]

> "The only assurance which the call handler gave to [the deceased] was that she would pass on the call to the South Wales Police. She gave no promise how quickly they would respond. She told [the deceased] that they would want to call her back and asked her to keep her phone free, but this did not amount to advising or instructing her to remain in her house, as was suggested. [The deceased's] call was made on her mobile phone. Nor did the call handler's inquiry whether [the deceased] could lock the house amount to advising or instructing her to remain there."

Michael evidently adopts a fairly restrictive approach to the circumstances in which responsibility will be assumed and the decision in *Sherratt* is thus somewhat unexpected. However, it is clear that, in view of the findings made by the Recorder, there are significant differences between the factual matrix in *Sherratt* on the one hand and that in *Michael* on the other hand. King J distinguished *Michael* in the following way:[9]

> "although the police handler did not state any specific time as to when the police would arrive, the clear message being given to the Mother was twofold, namely that help for her daughter was going to be dispatched to her house promptly and quickly and secondly that she should leave with the police any need for the daughter to get to hospital. These were clearly different from the assurances or lack assurances [sic] given in *Michael* …"

This approach suggests that concentration on the individual factual circumstances may make all the difference when it comes to determining whether the assumption of responsibility test is satisfied.

Beyond the contrast with *Michael*, *Sherratt* is of interest for two main reasons. First, and oddly, no mention was made in it of the Supreme Court's landmark decision in *Robinson v Chief Constable of West Yorkshire Police*,[10] which was decided several months before the hearing in *Sherratt*. *Robinson* manifests significant hostility towards the *Caparo* test for the existence of a duty of care. Lord Reed, delivering the reasons of the Supreme Court, instead said that whether a duty of care exists in novel cases should be determined by reasoning by analogy to other cases. Although the focus in *Sherratt* was on the assumption of responsibility test rather than the *Caparo* test, it is surprising that *Robinson* did not feature in King J's reasons given its significant importance to duty of care jurisprudence, the fact that it is a very recent

[7] *Michael v Chief Constable of South Wales* [2015] UKSC 2 at [115].
[8] *Michael v Chief Constable of South Wales* [2015] UKSC 2 at [138].
[9] *Sherratt v Chief Constable of Greater Manchester* [2018] EWHC 1746 (QB) at [74].
[10] *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4; [2018] 2 W.L.R. 595.

decision, and bearing in mind that it too involved the police context. The apparent side-lining in *Sherratt* of *Robinson* may suggest some reluctance to follow it.

Secondly, *Sherratt* confirms that responsibility can be assumed without there being any direct contact between the defendant and victim, and without, consequently, any reliance on the part of the victim. In *Sherratt*, the police never had contact directly with the deceased. Instead, the relevant contact was between the police and the deceased's mother. It was the mother who was found to have relied on the police. *Sherratt* follows in this regard a fairly long line of authority, including *White v Jones*,[11] in which a negligent solicitor was held to have owed a duty of care to intended beneficiaries under a will despite his never having had any contact with the latter. However, exactly when the assumption of responsibility test will be relaxed in this way is unclear.

Practice points

- The assumption of responsibility test remains a device by which the omissions doctrine (i.e. the rule that a person is not required to take positive action to safeguard another person's safety or interests) can be circumvented.
- The assumption of responsibility test is not restricted to claims in respect of pure economic loss but applies also to claims in respect of personal injury (and property damage).
- Classically, both an assumption of responsibility and reliance thereon is required in order for the assumption of responsibility test to be satisfied although, exceptionally, the requirement of reliance will be dispensed with.
- Whether or not responsibility has been assumed is an objective question. The parties' subjective states of mind are not to the point.
- The assumption of responsibility must be voluntary. This means that the defendant must freely accept the obligation to look out for the claimant. Compulsion or pressure will usually prevent the assumption of responsibility test from being satisfied.
- Ordinarily, a defendant will not assume responsibility to protect a claimant from the wrongdoing of third parties. That is perhaps especially so where the wrongdoing is criminal in nature.
- It appears that the assumption of responsibility test is increasingly concerned with the individual factual circumstances of each case.

Dr James Goudkamp

Kaizer v Scottish Ministers

(IHCS (1 Div); The Lord President (Carloway); Lord Brodie; Lord Drummond Young; 29 May 2018; [2018] CSIH 36)

Liability—negligence—prisoners—assault—duty of care—reasonable care—scottish prison service

LT Attempts; Causation; Duty of care; Murder; Presumptions; Scotland; Scottish Prison Service; Threats

[11] *White v Jones* [1995] 2 A.C. 207 HL; [1995] 2 W.L.R. 187.

On 4 December 2009, while the pursuer Polish national Daniel Kaizer was on remand at HMP Aberdeen, he was assaulted in the prison gym by a fellow prisoner, Keith Porter. The attack fractured Kaizer's skull and left him with headaches, concentration problems and psychological difficulties.

Porter was subsequently convicted of attempted murder. The jury returned a unanimous verdict and found that the attack was racially motivated. A week prior to the incident, Porter had pleaded guilty to attempting to murder another Polish male approximately five months earlier. Kaizer claimed that the attack was an implementation of a threat made to him by Porter a week earlier which he had reported to a prison officer, who had asked another Polish prisoner to look after Kaizer. Lord Woolman imposed an order for Lifelong Restriction on Mr Porter with a punishment part of five years, to commence at the expiry of his current sentence.

The pursuer sought damages at common law against the Scottish Ministers, as being responsible for the Scottish Prison Service. The proof was restricted to liability. The Lord Ordinary found them liable for loss, injury and damage sustained by the pursuer.[1]

The defenders appealed.

The court held that the Lord Ordinary's finding that the prison officer's failure to report the threat to the pursuer in the gym constituted negligence, and the defenders' acceptance of that, carried an inference that the absence of a report amounted to a failure to take reasonable care for his safety and the issue of causation was thus sharply raised.

They held that where negligence was established and the existence of a risk of injury was demonstrated in the context of a prison setting, the court was entitled to make the reasonable assumption that the prison authorities would not only do something about it but that the risk would be reduced to such a level that it would, in all probability, not occur and causation thus had to be taken to be established in the absence of some extraordinary factor which made the incident otherwise inevitable. There was, in any event, a sufficient evidential basis for the Lord Ordinary's findings.

The appeal was refused and the case remitted to the Lord Ordinary for a Proof on Quantum.

Comment

With one exception, this case raises no issue of principle. For the most part, it is merely an appeal against a determination of fact with matters hinging simply on whether the Lord Ordinary was entitled to reach the finding that he did concerning causation. The exception relates to the remark by the Lord President that, given the circumstances in which the pursuer was injured, the existence of negligence on the part of the prison officer raised a presumption that causation was satisfied. An issue arises as to what, precisely, the Lord President had in mind in this regard. His Lordship may have meant merely that it was unlikely that causation was not established in the circumstances that prevailed as found by the Lord Ordinary.

If that is all that he had in mind, the Lord President's comment is entirely unremarkable. However, it appears that he may have had in view a formal presumption that would result in the issue of causation being disposed of adversely to the defenders absent sufficient proof moving from them. If this is what the Lord President meant, recognising the presumption had the effect of assigning the burden of proof in relation to causation to the defenders.

The second way in which to read the Lord President's remarks seems to be the more plausible of the two interpretations, and this note will consequently proceed on the basis that the second way of understanding the Lord President's comment is correct. Three points merit mention in this regard. The first is that the correctness of the Lord President's remark is, with respect, questionable. It is trite law that the burden of proof in respect of all facts in issue that are constitutive of the pursuer's cause of action rests

[1] *Kaizer v Scottish Ministers* [2017] CSOH 110; 2017 Rep. L.R. 124.

on the pursuer throughout including in relation to causation, and the suggested presumption is incompatible with that basic principle.

The second point concerns the fact that the Lord President considered that the presumption was warranted because the prison service was in a position of special control over both the pursuer and the assailant. An important question thus arises as to whether the presumption applies in circumstances beyond the prison context.

Would, for example, it apply in claims brought by pupils against educational authorities? Or to claims commenced by patients against hospitals? The stated rationale for the presumption suggests that it should apply whenever the requisite control exists. If that is so, the school and hospital settings are thus prime contexts in which the presumption may be enlivened.

The third and final point is that the Lord President's remarks regarding the presumption are, strictly speaking, dicta. It was unnecessary for his Lordship to rely on the presumption in order to refuse the reclaiming motion because he found that the Lord Ordinary had a sufficient evidential basis for his conclusions regarding causation. In these circumstances, the status of the presumption that the Lord President articulated must remain somewhat unclear.

Practice points

- A clear distinction exists in the law of evidence between a formal presumption regarding a fact in issue and the suggestion that a given fact in issue is likely or unlikely to exist in the individual circumstances of the case.
- Although the burden of proof in relation to causation rests on the claimant/pursuer throughout, *Kaizer* suggests that Scots law may recognise an exception to this rule. The possible exception is that, where there is negligence and the defender enjoys special control over the pursuer or the circumstances that led to the pursuer's injury, it will be presumed that the negligence is causally relevant.
- Beyond the prison context, the school and hospital settings are, perhaps, the main instances where the control needed to enliven the apparent presumption may exist.

Dr James Goudkamp

Case and Comment: Quantum Damages

Henderson v Dorset Healthcare University NHS Foundation Trust

(CA (Civ Div); Sir Terence Etherton MR, Sir Ernest Ryder, Macur LJ; 3 August 2018; [2018] EWCA Civ 1841)

Damages—negligence—diminished responsibility—illegality—manslaughter—mental disorder—negligence—precedent—public policy—ratio decidendi

Damages; Diminished responsibility; Illegality; Manslaughter; Mental disorder; Negligence; Precedent; Public policy

The claimant had been diagnosed with paranoid schizophrenia. She had been living in supported accommodation. The defendant managed and operated her mental health team. She began to experience a relapse. Her housing support worker reported that her mental state was deteriorating but the mental health team did not assess her immediately.

The claimant's mother came to the claimant's home and the claimant, suffering from psychosis, stabbed and killed her. The claimant was charged with murder and detained in a mental health hospital. Experts concluded that she had known what she was doing. The Crown agreed to a plea of manslaughter by reason of diminished responsibility. The sentencing judge remarked that there was no suggestion that the claimant bore a significant degree of responsibility. The defendant admitted that but for its breach of duty in failing to respond adequately, the stabbing would not have occurred. The claimant subsequently brought common law negligence claims against the trust seeking damages for various heads of loss, including her loss of liberty caused by her compulsory detention and loss of part of her mother's estate pursuant to the operation of the Forfeiture Act 1982.

As a preliminary issue the judge found that he was bound by *Clunis v Camden and Islington HA*[1] and *Gray v Thames Trains Ltd*[2] to reject the claims on the ground that they were barred by the doctrine of illegality. In reaching that conclusion, he rejected the appellant's submission that *Clunis* should not be followed, pursuant to the third exception to stare decisis outlined in *Young v Bristol Aeroplane Co Ltd*,[3] on the basis that its reasoning was wholly inconsistent with the discretionary approach subsequently laid down by the majority of the Supreme Court in *Patel v Mirza*,[4] instead finding that neither *Patel*, nor any of the other Supreme Court cases in the line of authority leading to that decision, had expressly criticised *Clunis* or *Gray*.

The claimant appealed and contended that the judge had been wrong to consider himself bound by *Gray* and *Clunis*. She submitted that *Clunis* did not survive *Patel*, and that the majority of the court in *Gray* had approved the reservation of Lord Phillips limiting its ratio to those who, unlike her, had significant responsibility for the offences they had committed.

The Court of Appeal held that *Clunis* had been approved by the majority of the House of Lords in *Gray*, and Lord Hoffmann had characterised the ratio of *Clunis* into a narrow rule, restricted to the facts, and a

[1] *Clunis v Camden and Islington HA* [1998] Q.B. 978; [1998] 2 W.L.R. 902.
[2] *Gray v Thames Trains Ltd* [2009] UKHL 33; [2009] 1 A.C. 1339.
[3] *Young v Bristol Aeroplane Co Ltd* [1944] K.B. 718; [1944] 2 All E.R. 293.
[4] *Patel v Mirza* [2016] UKSC 42; [2017] A.C. 467.

wider rule, derived from the reasoning. The former was authority for the proposition that a person who had been convicted of a serious criminal offence could not recover damage in tort which was the consequence of a sentence of detention imposed on that person for the criminal act. The latter was authority for the proposition that such a person could not recover for damage which was the consequence of that person's criminal act.[5] By reason of that general statement of principle, and as a matter of public policy, there was a defence of illegality to all the claimant's claims because:

- she had been convicted of a serious criminal offence;
- it could not be said that she did not know the quality and nature of her act or that what she was doing was wrong since her mental state did not justify a verdict of not guilty by reason of insanity;
- in such a case the court could not and should not go behind the conviction in order to ascertain whether she had no responsibility for the serious crime to which she pleaded guilty; and
- she sought to rely on her illegal act of manslaughter to advance her claims.

In addition, the majority of the House of Lords in *Gray* had agreed that:

- *Clunis* was correctly decided;
- in the context of a criminal conviction for unlawful killing, there was a wider and a narrower form of public policy which precluded a claim by the killer from recovering damages in proceedings for negligence against the person whose act or omission was alleged to have been responsible for bringing about the claimant's unlawful conduct in carrying out the killing;
- the narrower form was that there could be no recovery for damage which flowed from loss of liberty, a fine or other punishment lawfully imposed in consequence of the unlawful act since it was the law, as a matter of penal policy, which caused the damage and it would be inconsistent for the law to require compensation for that damage; and
- the wider form was a combination of public policy and causation: if the tortious conduct of the defendant merely provided the occasion or opportunity for the killing, but (in causation terms) the immediate cause of the damage was the criminal act of the claimant, it was offensive to public notions of the fair distribution of resources that a claimant should be compensated (usually out of public funds) for such damage.

The majority in *Gray* had not agreed with Lord Phillips' reservation. The consequence of those principles, which bound the court, was that all the heads of loss claimed by the claimant were barred as a matter of public policy.[6] They found it impossible to discern in the majority judgments in *Patel* any suggestion that *Clunis* or *Gray* were wrongly decided or to discern that they could not stand with the reasoning in *Patel*. *Gray* and *Clunis* remained binding on the court.

The appeal was dismissed.

Comment

The current case is the Court of Appeal's most recent consideration of the doctrine of illegality. This is an ancient doctrine that has been applied by the civil courts over several centuries. It was perhaps most famously stated by Lord Mansfield in the eighteenth century in his maxim in *Holman v Johnson*:[7]

[5] *Clunis v Camden and Islington HA* [1998] Q.B. 978 and *Gray v Thames Trains Ltd* [2009] UKHL 33 followed.
[6] *Gray v Thames Trains Ltd* [2009] UKHL 33 followed.
[7] *Holman v Johnson* 98 E.R. 1120; (1775) 1 Cowp. 341.

> "No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act."

Founded on notions of public policy, the doctrine seeks to prevent claims arising out of a claimant's illegal act. It is a potential defence that arises in a broad range of civil actions including cases based in contract, trusts, property and company law. It is certainly not a concept exclusive to the law of tort.

The precise scope of this doctrine has often been considered to be unclear. Many of the cases where the doctrine has been applied are difficult to reconcile and can appear inconsistent. As was once observed in the Court of Appeal, it is an area of law where, "as any hapless law student attempting to grapple with the concept of illegality knows, it is almost impossible to ascertain or articulate principled rules from the authorities …".[8]

The central issue in the current case was whether it was correct to debar the claimant's action for damages where she had killed her mother whilst undergoing a psychotic episode. The defendants were negligent in that they failed to treat the claimant's psychiatric disorder. They accepted that, had the claimant been treated properly, she would not have killed her mother. The claimant's awareness and degree of control over her actions was considered by the judge in the criminal proceedings to have been very limited. Nevertheless she was convicted of manslaughter by reason of diminished responsibility. She was not found to be not guilty by reason of insanity. In other words, she had some responsibility, even if it was diminished, and even though it was relatively minimal.

Very similar issues have previously been considered by the appeal courts in two particular cases:

Clunis v Camden and Islington HA[9]

Mr Clunis had stabbed and killed a man whilst he was suffering from a schizoaffective disorder. He was convicted of manslaughter on the ground of diminished responsibility and detained in a secure hospital under the Mental Health Act 1983. At the material time, he had been under the treatment of the defendant health authority for his mental health problems. He brought an action in negligence against the health authority alleging that, had they treated him properly, he would not have killed and would not have been deprived of his liberty.

The Court of Appeal held that the doctrine of illegality should apply and the case be struck out. It was held that public policy precluded such a claim unless the claimant had no knowledge of what he was doing. The claimant's mental state had not justified a verdict of not guilty by reason of insanity. He must therefore have been considered in the criminal proceedings to have had a degree of responsibility, even if it was substantially diminished. Consequently, his actions still amounted to a criminal act and the court should not "allow itself to be made an instrument to enforce obligations alleged to arise out of the plaintiff's own criminal act".[10]

Gray v Thames Trains Ltd[11]

The claimant in this case had developed Post-Traumatic Stress Disorder as a result of his involvement in a train crash caused by the defendant's negligence. His psychiatric condition caused him to suffer a substantial personality change, becoming violent and aggressive. He subsequently killed another man and was convicted of manslaughter on the ground of diminished responsibility. It was accepted that he was suffering from the effects of his psychiatric disorder at the time of the killing. Mr Gray included in his action against the defendant railway company various claims for damages arising out of the killing and

[8] per Gloster LJ in the Court of Appeal in *Patel v Mizra* [2014] EWCA Civ 1047 at [47].
[9] *Clunis v Camden and Islington HA* [1998] Q.B. 978.
[10] *Clunis v Camden and Islington HA* [1998] Q.B. 978 per Bedlam LJ at 990D.
[11] *Gray v Thames Trains Ltd* [2009] UKHL 33, [2009] A.C. 1339.

his subsequent criminal conviction on the basis that these flowed from the accident. The House of Lords decided that all of the claims linked to the killing were precluded on grounds of public policy.

All of their Lordships in *Gray* who cited the Court of Appeal's decision in *Clunis* did so without criticism. Lord Hoffmann went on to identify two rules of public policy in this context of a criminal conviction for unlawful killing. The first is a "narrower rule" (previously applied in *Clunis*) that you cannot recover damage which flows from loss of liberty or any other sanction imposed upon you in consequence of your own unlawful act. In essence, if the criminal law imposes a penalty upon you, then it would be inconsistent for the civil law to also require another to compensate you for that penalty. The courts had to maintain this principle of consistency.

The "wider rule" identified by Lord Hoffmann in *Gray* precludes compensation being recovered for a loss suffered in consequence of one's own criminal act. This was justified on the basis that it is offensive to public notions of the fair distribution of resources that a claimant should be compensated for the consequences of his own criminal conduct. But further to this, he felt there may also be an issue of causation preventing such claims. Whilst the defendant's negligence may have provided the occasion for the claimant's actions, and whilst the damage may not have happened without that negligence, it does not necessarily follow that the defendant's tortious act caused the harm. It might instead be said that it was the claimant's criminal act that caused it.

Patel v Mizra: Has this changed the situation?

The current case is very much on all fours with the earlier decisions in *Clunis* and *Gray*. One might wonder, why there was any need for the Court of Appeal to revisit these issues after the appeal courts had previously provided substantial guidance in very similar cases?

The main reason for the legal uncertainty that gave rise to this appeal was that, in the intervening period after *Gray*, the Supreme Court had again reviewed the doctrine of illegality in *Patel v Mizra*.[12] In doing so their Lordships had inevitably looked more broadly at the scope and nature of the doctrine of illegality.

Patel is factually very different to *Clunis* and *Gray*. In particular, it is a case based in contract rather than tort. Mr Patel gave a sum of money to Mr Mizra to place bets on share price movements on the basis of insider information. The issue was whether his claim seeking the recovery of that money from Mr Mizra (who never placed the bets) was barred by illegality. Whilst several members of the nine judge court expressed the appeal as being limited to issues of a contract tainted by illegality (and where the illegal activity never took place), they nevertheless carried out a detailed analysis of the law, including consideration of earlier authorities such a *Gray*.

In his lead judgment, Lord Toulson considered the broad approach the courts should take to the doctrine:

> "So how is the court to determine the matter if not by some mechanistic process? In answer to that question, I would say that one cannot judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system, without a) considering the underlying purpose of the prohibition which has been transgressed, b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality."[13]

A range of factors could be considered. These included the seriousness of the conduct; whether it was intentional; its centrality to the issues; and whether there was a marked disparity in the parties' respective culpability. In Mr Patel's case, after a consideration of these factors, it was found that there was no reason

[12] *Patel v Mizra* [2016] UKSC 42; [2017] A.C. 467.
[13] *Patel v Mizra* [2016] UKSC 42 per Lord Toulson at [101].

to deny him the relief he would have been granted had there been no suggestion of illegality. The relevant question had been, "not whether the contract should be regarded as tainted by illegality … [but] whether the relief claimed should be granted".[14]

Patel is an important case with potentially wide reaching implications for the application of the doctrine of illegality. So does the approach to illegality in *Patel* alter the position in situations such as those that were considered in *Clunis*, *Gray* and in the current case?

Whilst it was argued on behalf of the claimant here that the position had shifted, and that the court was no longer bound by *Clunis* or *Gray*, the Court of Appeal did not agree. *Patel* was concerned with the application of the doctrine in the specific context of a contractual dispute with issues of unjust enrichment. Its application to earlier authorities in the context of a tortious claim required considerable caution. There was no suggestion from the Supreme Court in *Patel* that the decision in *Gray* was incorrect. *Clunis* and *Gray* remained binding authorities. It therefore remains the position that, notwithstanding the fact that a claimant may have little if any responsibility for taking another's life due to mental illness, the fact of their conviction for manslaughter—a criminal offence—will be sufficient to invoke the doctrine of illegality.

Practice points

- Any claim for damages founded on an allegation that the defendant's negligence or breach of duty resulted in the claimant being subject to a criminal sanction is likely to fail because of the doctrine of illegality.
- This is likely to be the position even if the claimant's degree of personal responsibility is minimal or insignificant because they were suffering from a mental disorder that resulted in diminished responsibility.
- The position is, however, different if they the claimant committed an act and is found not guilty by reason of insanity. In this situation they have no personal responsibility and, if their actions were caused by the negligence of a third party, it is potentially possible to bring a claim.

Richard Geraghty

Swift v Carpenter

(QBD; Lambert J; 6 July 2018; [2018] EWHC 2060 (QB))

Personal injury—road traffic accidents—damages—foot—lower leg—below knee amputation—prosthetics—care and case management—aids and equipment—holidays—transport costs—loss of earnings—accommodation—measure of damages

Amputation; Disabilities; Foot; Future loss; Living accommodation; Loss of earning capacity; Lower limbs; Measure of damages; Ogden tables

The claimant Charlotte Swift was born on 25 September 1974. In October 2013, she suffered serious lower limb injuries in a road traffic accident on the M5 motorway when travelling as a front seat passenger. The driver of the vehicle was the defendant, Malcolm Carpenter. At the time of the accident he was Charlotte's

[14] *Patel v Mizra* [2016] UKSC 42 per Lord Toulson at [109].

partner; they subsequently married. Liability in respect of the accident was admitted. The action for personal injury and consequential financial losses proceeded to trial on the issue of quantum only.

The claimant suffered crushing injuries to both feet and lower legs. On the left side, an open fracture and crush injury compromised the blood supply to the ankle and foot. The limb could not be salvaged and the claimant underwent a left sided trans-tibial (below knee) amputation in early November 2013. The right foot was also badly crushed causing a dislocation of the great toe and a number of fracture dislocations of the bones in the midfoot. These injuries were treated by the insertion of a metal plate in the midfoot and by fixation of the broken toes with wires and screws. She suffered a fractured sternum and a relatively minor closed head injury, neither of which have caused any significant ongoing functional disability. The claimant was in hospital in Birmingham for a month and then transferred to Charing Cross Hospital in London where the amputation stump was revised and shortened due to poor healing of the wound. She was eventually discharged home on 18 December 2013 but remained under the care of the out-patient clinical teams at Charing Cross Hospital during 2014.

She later developed serious complications with phantom limb pain originating from the missing left foot and pain and stiffness, particularly in the midfoot, on the right side. She continues to suffer from stiffness of the right ankle and stiffness of the midfoot. She will be prone to back pain in the future due to the altered mechanics of gait. She is at higher risk of degenerative changes in the major lower limb joints which will need to be managed by physiotherapy and by anti-inflammatory medication. She will continue to be fit for sedentary work until normal retirement age.

Her physical activity level will reduce in later life (as with many able-bodied people). Either in her mid to late 60s or early 70s, she will probably need to use a wheelchair: initially this will be for longer distances outdoors but gradually she will need to use a wheelchair more, including indoors. She will remain self-caring until her late 70s and early 80s when she will start to need more help. During the last two years of her life she will need assistance with transfers and help from a single carer: during these last two years she will need help to get out of a low chair, help with toileting, bathing and with her bed-time routine. She is compromised in terms of performing heavier aspects of housework, lifting, carrying, and working at ground level such as cleaning a floor.

There was no dispute over the claimant's life expectation which was agreed to be normal. The life multiplier for future loss was agreed to be 55.02 (using the current -0.75% discount rate). General damages and past losses including interest were agreed between the parties at £290,000. For future loss the judge made the following awards:

• Aids and Equipment	£913,299
• Care and Case Management	£668,342
• Future Home Maintenance	£90,000
• Loss of Earnings	£481,573
• Loss of Future Pension Contribution	£50,422
• Accommodation	£968,732
• Travel and Transport	£233,180
• Medical and Therapies	£132,626
• Additional Holiday Costs	£254,877
• Miscellaneous Expenses	£15,000

The total award of damages was £4,098,051.

Comment

For practitioners who are involved in cases on behalf of people who have been seriously injured, this would be a very interesting case. There are very few reported cases relating to an amputation. Furthermore, this is another case which addresses particular issues concerning high value cases, in particular accommodation. There are three particular aspects that will be commented on.

The first relates to the judge's approach to the evidence on various categories of the claim in order to assess what the claimant should be awarded. The first of these relates to the type of prosthesis that the claimant was claiming the cost for. The two prostheses in issue were the Meridium and the Echelon. The pros and cons of both were debated at length at trial. The judge awarded compensation on the basis that the claimant would use the Meridium.

The defendant's arguments that the claimant had not purchased any of these prostheses and also that she had not adopted their own expert's recommendation to try out the Echelon, were not accepted by the court. Lambert J obviously considered that it was sufficient for the claimant to rely on the evidence of her treating prosthetist whose clinical preference was for the Meridium. Furthermore, her evidence that she had actually tried this prosthesis and found it afforded a greater degree of ankle movement and would enable her to wear a wider range of shoes was sufficient to make the finding. Accordingly, the evidence that the claimant had actually tried out the Meridium was crucial as well as acting on the advice of her own clinician.

Another area of contention, was the cost relating to holidays. Evidence was given on both sides by care experts. However, Lambert J found that neither expert was in a position to advise the court on holiday costs, her conclusion was that the cost of future holidays should be based on what the claimant had done in respect of holidays since the accident but prior to trial. Once again this goes to show that evidence relating to what has happened in the past will be used in respect of assessment for the future. This may cause difficulties for claimants if they do not have sufficient funds to be able to take, in this instance, holidays, that they would want to. Accordingly, it is important to have evidence in place that sets out a holiday programme for the future and also to have it properly costed. This does not need expert evidence, but does require appropriate investigation into costings and ensuring such information forms part of the evidence in the case.

Another point concerning the holiday claim relates to the costs of additional accommodation and travel. Again, the care experts were unhelpful. Lambert J commented "both appear to have simply plucked figures from the air". It is essential that if reliance is to be placed on costings by experts, they must be appropriately thought out, a rationale given with evidential support. This was lacking. This may have impacted adversely on the amount the claimant recovered.

A further point relates to the cost of an alternative vehicle. It seems that in her Schedule of Loss, the claimant argued for the purchase of a bigger vehicle than she had. There was no basis for this either in the lay or expert evidence. Indeed, the claimant's own expert said that there should be a specialist assessment. Whilst the court did not consider that there was justification for a bigger car in any event, Lambert J also went on to say that, in effect, there was insufficient evidence available to identify what would have been a suitable alternative vehicle.

A point worthy of mention in this respect concerns evidence that relates to the loss of earnings claim. The claimant sought a substantial increase in future loss of earnings in order to reflect the fact that she would not be achieving promotion. Lambert J found that there was no evidence to support an uplift in the magnitude advanced by the claimant:

> "The claimant herself did not give evidence, save in the most general terms, concerning her uninjured career growth. There is no evidence of the range of jobs for which the claimant would have been

> suitably qualified; the sort of competition she would have faced; whether earnings for editorial or marketing work tend to plateau and if so at what level."

Lambert J went on to say that an expert may have been able to have assisted the court. Accordingly, Lambert J referred to the claimant's previous earnings and noted that there had been the increases made and based future losses on that information. However, the amount that the claimant recovered was not as much as she claimed.

The second particular aspect that is worthy of comment relates to the claimant's residual earning capacity. Lambert J was concerned as to whether she should apply an Ogden 7 reduction factor to the multiplier and, if so, what the appropriate reduction factor should be. She rejected the defendant's submission that the application for reduction factor would amount to double recovery given the differential between the claimant's injured and uninjured multiplicand. Accordingly, she did not follow Owen J in *Clarke v Maltby*.[1] She regarded his approach as fact specific. She went on to say:

> "The purpose of Ogden 7 reduction factor is to reflect that, by reason of the disability, a claimant is more likely to experience periods of time when he or she is not working at all and that periods of unemployment may be longer because of the disability."

She therefore applied a reduction factor as "it does not amount to a double recovery".

Lambert J went on to say that it is legitimate to adjust the factors upwards or downwards to reflect features of the particular case: "Such adjustment is not impermissible judicial tinkering."

The reduction factor in this case was 0.6, however, Lambert J considered that a deviation was justified. Reference in the judgment is made to the way in which the Ogden 7 approach contemplates that a disability or health problem may affect day to day activities. In her discussion of these, she notes that these did not really reflect the claimant's disability but nevertheless did not consider the reduction factor should be significantly uplifted. Lambert J went on to say:

> "However, even though not captured by the listed examples in the text to Ogden 7, there is no doubt that the claimant is disabled in a way which may threaten her employment status. Her job crucially depends on her ability to travel to visit and review hotels and resorts. Her work involves evening receptions and regular late-night working. In both of these domains her ability to function is affected by her pain which is unpredictable, intrusive and tiring. It is also, albeit to a lesser extent with the provision of a range of prosthetics, limited by the amputation itself."

The judge also noted that the claimant was a person capable and committed and that the witness gave evidence that the claimant was functioning to a high standard. Accordingly, the reduction factor should be increased but to 0.7 as opposed to the midpoint between table C and table D (non-disabled and disabled) which the defendant had argued for.

The third issue which is worthy of comment relates to the rejection of the claimant's claim for the additional capital costs of accommodation. Lambert J considered that she was bound by *Roberts v Johnstone*.[2] Adopting this formulation there would be a nil award. This approach follows the decision in *JR (A Protected Party) v Sheffield Teaching Hospitals NHS Foundation Trust*.[3] Lambert J said about this:

> "The real point which Mr Arney (claimant's counsel) was making to me, both in the Schedule and in submissions, is that the *Roberts v Johnstone* formula is no longer fit for purpose in the modern context of a negative discount rate. It leads to unfairness and a result which is not consistent with the principle of full restitution. He submits that it could never have been the intention of the Court of

[1] *Clarke v Maltby* [2010] EWHC 1201 (QB).
[2] *Roberts v Johnstone* [1989] Q.B. 878; [1988] 3 W.L.R. 1247.
[3] *JR (A Protected Party) v Sheffield Teaching Hospitals NHS Foundation Trust* [2017] EWHC 1245 (QB); [2017] 1 W.L.R. 4847.

> Appeal to have devised a formula which resulted in a nil award. However, I note that the problems or anomalies which the application of the formula can produce have been present since 1989: the need to fund the property to purchase by scavenging from damages allocated to other losses is intrinsic in the *Roberts v Johnstone* formula itself … 'robbing Peter to pay Paul' effect of the formula leads to particularly anomalous (and problematic) results in a number of different contexts: in catastrophic injuries/short life cases; and cases in which there has been a discount for contributory negligence or a compromise has been reached; in cases in which damages for care needs are to be met by periodical payment order thus drastically reducing 'surplus' income which might be used to fund a property purchase. … the effect of a negative discount rate is to create a further (albeit larger) category of anomaly."

The writer does not consider that the above comment on *Roberts v Johnstone* justifies it being followed. In this judgment, reference was made to the full compensation principle on a number of occasions. The most recent endorsement of the decision was by the Supreme Court in *Knauer v Ministry of Justice*[4] when Lord Neuberger and Lady Hale in a joint judgment held:

> "It is the aim of an award of damages in the law of tort, as far as possible, to place the person who has been harmed by the wrongful acts of another in the position in which he or she would have been in had the harm not been done; full compensation, no more but certainly no less."

It is also interesting to note that the Government committed to the full compensation principle in relation to the comments that they have made concerning the legislation currently going through parliament relating to the alteration of the discount rate. In February 2017, the Lord Chancellor said:

> "I remain absolutely committed to the principle of full compensation—the 100% principle."

Accordingly, whilst Lambert J said that she was bound by *Roberts v Johnstone*, she is indeed also bound by the Supreme Court decision in *Knauer* and by not awarding compensation in respect of the cost of accommodation her decision contravenes Knauer.

On behalf of the claimant, a number of alternative ways of assessing compensation was advanced. However, Lambert J made the comment that in respect of all of these they would have overcompensated the claimant in respect of this particular head of loss. Though, applying the full compensation principle, she would have been entitled to have capped the claim at the amount of the capital loss. Lambert J had before her Robert Weir QC's JPIL article "Capital accommodation claims and the discount rate: Is it time for a conscious uncoupling?"[5] in which he argues that *Roberts v Johnstone* can be distinguished. Consideration was not given to that discussion.

In addition, whilst Lambert J did refer to *George v Pinnock*,[6] no consideration was given to the importance of that decision. This decision was not overruled by *Roberts v Johnstone*. It laid down an alternative way of assessing the compensation for the cost of accommodation. This supported the proposition that damages for this loss can be assessed in terms of annual mortgage interest which would be payable. *George* allows a mortgage interest rate to be used when assessing the loss. Interestingly, in this particular case, Lambert J does suggest this approach has some favour:

> "Further, for my part, I doubt that if it were to be contended that mortgage interest rates were to be the basis for the loss calculation, it would be sufficient to rely on: interest only mortgage rate: expert evidence on the trajectory of such rates in the future would be required. Such evidence is not currently deployed by the claimant."

[4] *Knauer v Ministry of Justice* [2016] UKSC 9; [2016] A.C. 908.
[5] R. Weir QC, "Capital accommodation claims and the discount rate: Is it time for a conscious uncoupling?" [2018] J.P.I.L. 53–60.
[6] *George v Pinnock* [1973] 1 W.L.R. 118; [1973] 1 All E.R. 926.

The writer does not consider that such expert evidence is needed relating to mortgage rates. It would be impossible for an expert to project what future mortgage rates are likely to be, it would be mere speculation. Furthermore, it is not considered that that would assist the court to any great extent. A speculative interest rate is no more accurate method of assessing the quote reference on *JR (A Protected Party) v Sheffield Teaching Hospitals NHS Foundation Trust*,[7] he suggested that reference should be made to the information provided by the Bank of England. This concerns the average standard variable rates available through the data series on its interactive database. The series CFNZ61X provides the monthly average of UK resident banks sterling standard variable rate mortgage to individuals and individual trusts seasonally adjusted. This is information in the public domain. This is not an ideal solution. Calculation of the lump sum is still dependent on assessment of life expectancy, and compensation would not be adequate in respect of those with a shorter life expectancy. Robert Weir's proposal for calculating this particular head of loss, full recovery of the capital sums subject to the claimant mitigating their loss, is really the best approach.

Practice points

- The importance of having sufficient evidence to prove every aspect of loss being claimed cannot be overstated.
- When considering how to apply reduction factors, careful consideration should be given to how the approach has been interpreted by the courts as well as the various commentaries on this aspect.
- In light of this decision, claims for the cost of accommodation should not be abandoned, as it is considered that the approach adopted by Lambert J is incorrect.

Colin Ettinger

CC v TD

(QBD; Freedman J; 23 May 2018; [2018] EWHC 1240 (QB))

Damages—road traffic accidents—death—dependency claims—fatal accident claims—contributory negligence—divorce—reconciliation

LT Dependants; Dependency claims; Fatal accident claims; Reconciliation; Separation; Spouses

On 21 June 2014, at approximately 1.00am, Mr JC ("the husband") was tragically killed in a road traffic accident when crossing the A45 in Coventry on foot. He was struck by an Audi RS being driven by the defendant at a speed of approximately 86mph, the speed limit for this urban road was 40mph. He was killed instantly. Primary liability was conceded at an early stage but contributory negligence remained in issue.

Mrs CC, the widow of JC ("the wife"), brought a claim on behalf of the Deceased's estate under the Law Reform (Miscellaneous Provisions) Act 1934 (as amended), and on behalf of herself and her three children as dependants of the Deceased under the Fatal Accidents Act 1976 (as amended).

[7] *JR (A Protected Party) v Sheffield Teaching Hospitals NHS Foundation Trust* [2017] J.P.I.L. C166–C170.

The husband and wife's relationship began in 1986; they married in 2004. The husband was the main breadwinner; the wife worked part-time. When their relationship became strained they began marriage counselling in 2012, but in November 2013 the wife obtained divorce advice from a lawyer. The husband started drinking heavily, became verbally abusive and began an affair.

In January 2014, the wife moved out with the two youngest children, aged 14 and 11; the oldest child, aged 18, had already left home. The wife filed for divorce a month later with no opposition from the husband. The husband stopped paying the mortgage on the matrimonial home and in mid-May the couple agreed it should be sold.

The court had to determine the damages to be awarded. The wife claimed that, notwithstanding their separation at the time of his death, she would have reconciled with the husband and terminated the divorce proceedings, particularly once she had fully considered the financial implications of divorce.

The defendant argued that the husband had been contributorily negligent in failing to use a pedestrian crossing close to the accident site and failing to observe his vehicle's approach. He further contended that the divorce would have gone ahead and the wife's claim for loss of financial dependency on the husband should be limited accordingly.

The judge held that failure to use a pedestrian crossing did not constitute negligence per se. The accident occurred at 1.00am when the volume of traffic was light. The road was well lit with an unobstructed field of view of some 300m from the husband's crossing point. He could not have appreciated that the defendant would be travelling at 86mph in a 40mph zone and it was not unreasonable for him to think he had time to cross when the defendant's vehicle was more than 200m away. The accident was wholly caused by the defendant's negligent driving.

The judge then considered the chance of reconciliation between the husband and wife. He noted the marriage counselling in 2012 holding that it showed that the marriage was in trouble for some considerable time before the January 2014 separation. It was clear from the wife's communications with her lawyer that by November 2013 she was intent on divorce. There was nothing to suggest that she retreated from that position at any stage thereafter; rather, she became more resolute when the husband became abusive and began an affair. There was very little contact between the parties in the five months after the wife moved out, and neither party actively attempted reconciliation. The husband continued his affair, chose not to defend the divorce and refused to meet the mortgage payments on the matrimonial home.

As to the financial implications of divorce, the wife had reflected on financial matters before filing the petition. She might not have received detailed advice at that point but she did discuss with her lawyer how the couple's assets might be distributed. Even if she had subsequently received more detailed financial advice, the court did not believe she would have changed her mind about the divorce. In the short term, she would not have been significantly worse off than if she remained married; in the long term, her earning capacity could increase if she chose to work full-time. At no time had she discussed with her lawyer whether she could afford to divorce the husband. Accordingly, the judge concluded that there was no significant chance that, but for his death, they would have reconciled: it was no more than a speculative possibility.[1]

The wife's claim for loss of financial dependency was limited to what she would have received by way of maintenance payments until 2020 when the youngest child turned 18. On the financial evidence in her case, the appropriate figure was assessed at £10,500 per annum. In addition, the children were entitled to a modest award of £5,000 for each child for loss of intangible benefits having been denied the benefit of their father's love and affection.[2] Judgment was entered for the claimant in the sum of £101,514.18 (inclusive of interest).

[1] *Davies v Taylor* [1974] A.C. 207; [1972] 3 W.L.R. 801 followed.
[2] *Beesley v New Century Group Ltd* [2008] EWHC 3033 (QB) and *Hayes v South East Coast Ambulance Service* [2015] EWHC 18 (QB) applied.

Comment

Actions arising out of a person's death are based on statutory provisions and, as such, they form a relatively discrete area of law that is distinct from other personal injury claims. The current action is a case in point, dealing with two particular issues unique to fatal claims:

- How should the courts determine dependency claims under the Fatal Accidents Act 1976 where a married couple had separated prior to the death of a spouse?
- When can an award of damages be made for the *loss of intangible benefits* arising out of the death of a family member?

Marital breakdown and dependency

The Fatal Accidents Act 1976 permits a dependency claim to be brought on behalf of the husband or wife of the deceased. But how should the court approach the issue of dependency when the marriage had already broken down prior to the death and the couple, whilst not yet divorced, lived separately? Can the dependency be assessed on the basis that, but for the fatal accident, there remained a likelihood that there would have been a reconciliation and the marriage would have been saved? Alternatively, should the possibility of reconciliation be ignored and any dependency assessed on the basis the couple would have remained apart?

Prior to the decision of the House of Lords in *Davies v Taylor*,[3] the general approach of the courts was to consider whether the claimant was able to establish, on a balance of probabilities, that the parties would have been reconciled. However, in *Davies* it was held that the correct test for a claim for dependency where the relationship had broken down prior to the death is to consider whether there was a reasonable expectation of pecuniary benefit from the deceased. Where a couple had separated, it is for the surviving spouse to show there was a significant chance that there would have been a reconciliation. They do not need to prove it was more likely than not that the relationship would have been rescued. The prospects of reconciliation must be more than a mere speculative possibility for it to be taken into consideration. If the court is satisfied that there was a substantial possibility of a resumption of cohabitation, then this would be assessed in percentage terms. This percentage is then applied to the value of the dependency claim.

Of course, the corollary to this approach to the possibility of marital reconciliation is that the courts can also take account of the possibility that a marriage will fail. In a case where a married couple where still living together at the date of death, if there is substantial evidence that the marriage would have failed then the surviving spouse's dependency claim may be reduced to reflect that chance.[4]

Loss of intangible benefits

The court also dealt here with the issue of an award for loss of intangible benefits. These are lump sum awards granted to dependents in some cases. They have their origin in the decision in *Regan v Williamson*[5] in which the court made a separate award to compensate for the loss of the special nature of the care provided by a mother. Following *Regan*, the courts have regularly awarded lump sums to dependents for the loss of the special attention and affection they would have received from the deceased.

Such awards are routinely made in addition to the dependency claim for loss of services. The reasoning for this is that the award for loss of intangible benefits is intended to compensate for the unique quality of the services provided by the deceased family member. This is considered to be something over and above the mere replacement of those services which could be provided by appropriate hired help.

[3] *Davies v Taylor* [1974] A.C. 207; [1972] 3 W.L.R. 801.
[4] See, e.g. *Owen v Martin* [1992] P.I.Q.R. Q151.
[5] *Regan v Williamson* [1976] 1 W.L.R. 305; [1976] 2 All E.R. 241.

More recently in *Mosson v Espousal (London) Ltd*,[6] Garnham J cast some doubt upon the validity of loss of intangible benefits as a distinct head of loss. He was unwilling to make such an award to a widow following the death of her husband on the basis that these matters were adequately covered by her separate loss of services claim. However, further to *Mosson* there have been other first instance decisions where, as here, the courts have rejected the approach of Garnham J and have made awards under this head of loss.[7]

Many of the reported awards for intangible benefits relate to the loss of a wife or mother. The courts do also make awards for the loss of a husband. What is of particular interest in the current case is that it provides an example of a court making such an award on behalf of adult children in relation to the loss of their father. As the judge observed, the children had been denied the benefit of the love and affection which their father would have bestowed upon them and an award for each was appropriate.

It is important to acknowledge that the courts will not always contemplate claims for loss of intangible benefits following the death of a family member. There are recent examples of the courts preferring the approach of Garnham J in *Mosson* and refusing to make such awards in some cases.[8] Until we have some definitive guidance from the Court of Appeal on this head of loss there will remain a degree of uncertainty as to its application in practice.

Practice points

- A dependency claim can take into consideration the possibility of reconciliation of a marriage that had broken down prior to the death, although there must be a significant chance of reconciliation rather than it being only a speculative possibility.
- The prospect of a marriage breaking down can be taken into consideration in a dependency claim if there is substantive evidence that this might have happened.
- The courts can make awards for *loss of intangible benefits* to compensate for the loss of the special quality of the services provided by a family member. This can be awarded in addition to a services dependency claim.

Richard Geraghty

EMS (A Child) v ES

(QBD (NI); Maguire J; 21 Match 2018; [2018] NIQB 36)

Damages—personal injury—road traffic accidents—contributory negligence—contribution—children—causation—cervical spine—child restraints—severe injuries—Civil Liability (Contribution) Act 1978 (c.47) s.2(1)—Law Reform (Contributory Negligence) Act 1945 (c.28) s.1

Cervical spine; Child restraints; Children; Contribution; Contributory negligence; Northern Ireland; Personal injury; Road traffic accidents

The plaintiff in this case was born on 1 August 2012. On 21 August 2014, while a rear seat passenger in a car driven by the first-named defendant, the plaintiff, then aged 2, sustained serious injuries as a result

[6] *Mosson v Espousal (London) Ltd* [2015] EWHC 53 (QB).
[7] See, e.g. *Grant v Secretary of State Transport* [2017] EWHC 1663 (QB).
[8] See also the comments of Baker J in *Magill v Panel Systems* [2017] EWHC 1517 (QB) at [61].

of a road traffic accident. The first-named defendant is the plaintiff's aunt. She was the driver of the Volvo car in which the plaintiff had been a rear seat passenger at the time of the accident. The plaintiff was secured in the back of the car by a booster seat. There was no-one else in the car save for the driver.

At an earlier hearing, the judge had found the second defendant van driver responsible for the accident and had decided the main liability issues. The claimant had received head, abdominal and spinal injuries. The plaintiff's aunt, had seated her in the car on a Graco booster seat, which was unsuitable for a child of her age and weight. The judge in addition held that the child had not been properly secured in it, since the belt had been positioned below her left arm rather than above it, over her shoulder.

The hearing related only to the spinal injuries, namely a probable unstable fracture at C5/6, an upper thoracic spinal injury with ligamentous disruption at T3, mild disruption at C6/7 and spinal cord damage at T3. The aunt argued that the claimant would have suffered the same injuries in any event.

The judge confirmed that the onus of proof was on the second defendant van driver to show that the first defendant should be liable to contribute to damages in accordance with the Civil Liability (Contribution) Act 1978 s.1(1)[1] and s.2(1).[2] He recognised that in seat belt cases, the approach to contributory negligence was to consider blameworthiness as well as causation but to avoid prolonged and expensive inquiries by determining a share of responsibility that was just and equitable in the majority of cases.[3] He noted that approach had been applied in cases involving children and the use of child seats and was approved in *Hughes v Williams (Deceased)*.[4]

The main issue was whether the first defendant's failure to use, or use properly, a suitable child seat contributed materially to the plaintiff's spinal injuries. The judge considered the expert evidence and then drew his own conclusions. He held that the second defendant had established on the balance of probabilities that the acts and/or omissions of the first defendant in respect to the booster seat had contributed materially to the plaintiff's injuries.

The seat was inappropriate for the claimant's age and weight and in the way it had been operating at the time of the accident. Its restraining effect was likely to have amounted to little more than that of a lap belt so that her upper body and shoulders were unrestrained. Although even with proper restraint the plaintiff's head would have been affected, firm upper body restraint would have meant a lower likelihood of such extensive injuries. That was consistent with the second defendant's expert evidence. The judge concluded that given her age, it was far more likely that the child's injuries would have been in the upper cervical spine.

The judge said that any apportionment of liability between joint tortfeasors must keep in mind the statutory test and must reflect what the court considered to be just and equitable "having regard to the extent of [the joint tortfeasor's] responsibility for the damage in question". However, no party had argued that the *Froom* guidance should not be applied as well.

Accepting that the negligent driver had to bear the greater share of responsibility, the judge held that the logic of the overall conclusion pointed firmly towards deciding that, had it not been for the negligence of the first defendant, the plaintiff's injuries would have been substantially less. In particular, had the child been placed in an appropriate form of restraint she would not, on the balance of probabilities, have sustained the spinal cord injury at T3. Instead she would have received injuries in the upper cervical spine of a lesser degree of seriousness. The judge concluded that a 25% contribution towards the plaintiff's cervical spine injuries was appropriate.

[1] Entitlement to contribution.
[2] Assessment of contribution.
[3] *Froom v Butcher* [1976] Q.B. 286; [1975] 3 W.L.R. 379 followed.
[4] *Hughes v Williams (Deceased)* [2013] EWCA Civ 455; [2013] P.I.Q.R. P17 followed.

Comment

Where a child is injured in a road accident, it is open to the defendant driver to seek a contribution from the parent (or other responsible) person if they failed to take reasonable steps to ensure that the child was secured with an appropriate seat restraint whilst travelling. It is clear that a duty is owed in these circumstances and so liability will hinge on breach and causation. However, there then arises the difficult question of the extent of any contribution.

The Civil Liability (Contribution) Act 1978 s.2(1) states that:

> "… the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question."

As Simon Brown J (as he then was) stated in *Madden v Quirke*, the word "responsibility" in s.2(1) "involves considerations both of blameworthiness and of causative potency".[5] This chimes with the considerations involved in the assessment of a claimant's share of responsibility under the Law Reform (Contributory Negligence) Act 1945 s.1. As a result, the tendency has been to treat defendants who fail to use an appropriate child seat restraint and claimants who have failed to wear a seatbelt as analogous and so to apply the longstanding authority of *Froom v Butcher*.[6]

In *Froom*, Lord Denning stated:

> "Whenever there is an accident, the negligent driver must bear by far the greater share of responsibility. It was his negligence which caused the accident. It was also a prime cause of the whole of the damage. But in so far as the damage might have been avoided or lessened by wearing a seatbelt, the injured person must bear some share. But how much should this be? Is it proper to inquire whether the driver was grossly negligent or only slightly negligent? Or whether the failure to wear a seatbelt was entirely excusable or almost forgivable? If such an inquiry could easily be undertaken, it might be as well to do it … But we live in a practical world. In most of these cases the liability of the driver is admitted, the only question is: what damages should be payable? This question should not be prolonged by an expensive inquiry into the degree of blameworthiness on either side, which would be hotly disputed. Suffice it to assess a share of responsibility which will be just and equitable in the great majority of cases."[7]

He then went on to set up two standard categories of reduction in damages of 25% and 15%:

> "Sometimes the evidence will show that the failure made no difference. The damage would have been the same, even if a seat belt had been worn. In such case the damages should not be reduced at all. At other times the evidence will show that the failure made all the difference. The damage would have been prevented altogether if a seat belt had been worn. In such cases I would suggest that the damages should be reduced by 25 per cent. But often enough the evidence will only show that the failure made a considerable difference. Some injuries to the head, for instance, would have been a good deal less severe if a seat belt had been worn, but there would still have been some injury to the head. In such case I would suggest that the damages attributable to the failure to wear a seat belt should be reduced by 15 per cent."[8]

The Court of Appeal expressed its support for referring to *Froom* in child seat contribution cases in *Jones v Wilkins* back in 2000.[9] Keene LJ noted in this case that the similarity in the language used in the

[5] *Madden v Quirke* [1989] 1 W.L.R. 702 at 707E; [1989] R.T.R. 304.
[6] *Froom v Butcher* [1976] Q.B. 286; [1975] 3 W.L.R. 379.
[7] *Froom v Butcher* [1976] Q.B. 286 at 295–296.
[8] *Froom v Butcher* [1976] Q.B. 286.
[9] *Jones v Wilkins* [2001] R.T.R. 19; [2001] P.I.Q.R. P12.

1978 and 1945 Acts is so "striking" that "there is no reason why the principles applicable under the statutes should be different in cases where the facts are themselves similar".[10] *Froom*, he said, "was a decision which can provide valuable guidance in similar cases".[11] 13 years later, the Court of Appeal reaffirmed this approach in *Hughes v Williams (Deceased)* when it rejected an attempt to distinguish *Froom*.[12]

In this case, the mother of a child who had been badly injured in a car accident caused by the defendant was required to make a 25% contribution because she had chosen to put her child on a booster seat rather than to use the other child seat in the car which had a five-point harness. It was clear from the manufacturers' instructions that the booster seat was not suitable for the child and that the injuries would largely have been avoided had the mother used the child seat instead. On appeal, counsel for the mother sought a reduced contribution on the basis that the case was more analogous to *Capps v Miller*.[13]

In *Capps*, a motorcyclist who had sustained a head injury in a road accident had his damages reduced by 10% because, whilst he had been wearing a crash helmet, he had not fastened the chin strap. It was argued that, like the claimant in *Capps*, the mother in *Williams*, had taken measures to keep her child safe, even though they proved to be ineffective, and that making the wrong choice between safety precautions was quite different from failing to use a seat belt at all. In rejecting this argument, Black LJ noted that *Williams* involved a safety device that should not have been used rather than a safety device which was not being used properly and that, unlike in *Capps*, the trial judge had been able to make findings about the degree to which the child's injuries were worse because of the mother's negligence.[14]

The 15% and 25% standard deductions are seen to be appropriate in child seat contribution cases because the themes arising frequently overlap with the themes featured in Lord Denning's judgment in *Froom*. For example, in *Williams*, Black LJ noted that the mother was in no way to blame for the accident itself in the same way as Lord Denning noted that injured claimants are not to blame in seat belt cases. She also noted that the fact that the mother honestly believed that her child would be safe in the booster seat chimed with Lord Denning's acknowledgment that there were those who honestly but wrongly believed that they were safer without a seat belt.[15]

In *Jones*, a mother had carried her child on her lap in the front passenger seat. The seatbelt she was wearing crossed only her own shoulders and chest though the lap belt was round both of them. Had a suitable seat restraint been used, the child's injuries would largely have been avoided and she was required to make a contribution of 25%. The driver responsible for the accident appealed on the basis that the mother's contribution should be increased. However, the Court of Appeal was satisfied that the trial judge had reached a just and equitable decision, bearing the responsibility of each of the parties in mind.

He had not relied solely on *Froom* but had exercised his discretion under the 1978 Act independently of that case.[16] Whilst the mother increased the risk of injury by carrying the child on her lap, it was the defendant driver who created a substantial risk of injury when he swerved onto the wrong side of the road and so he was more blameworthy.[17] The Court of Appeal also noted that 25% was appropriate because whilst the mother had not complied with the law, she had not left her child wholly unrestrained. In addition, whilst restraining the child with the lap belt of an adult seat belt had made the situation worse, the blame to be attached to the mother should be limited by their lack of understanding of this risk—a lack which they shared with much of the public and which, in that sense, was objectively understandable.[18]

[10] *Jones v Wilkins* [2001] R.T.R. 19; [2001] P.I.Q.R. P12 at [14].
[11] *Jones v Wilkins* [2001] R.T.R. 19; [2001] P.I.Q.R. P12.
[12] *Hughes v Williams (Deceased)* [2013] EWCA Civ 455; [2013] P.I.Q.R. P17.
[13] *Capps v Miller* [1989] 1 W.L.R. 839; [1989] 2 All E.R. 333.
[14] *Hughes v Williams (Deceased)* [2013] EWCA Civ 455 at [61].
[15] *Hughes v Williams (Deceased)* [2013] EWCA Civ 455 at [58].
[16] *Jones v Wilkins* [2001] R.T.R. 19 at [20].
[17] *Jones v Wilkins* [2001] R.T.R. 19 at [8].
[18] *Jones v Wilkins* [2001] R.T.R. 19 at [22].

The above suggests that judges should not blindly rely on *Froom* in such cases but should consider causative potency and relative blameworthiness in detail in the circumstances of the case to ensure that they reach the appropriate level of contribution. Nevertheless, the Court of Appeal has demonstrated a marked reluctance to depart from the standard contributions.

Keene LJ noted in *Jones* that the figures put forward in *Froom* were guidelines and that the 25% figure was not an absolute and immutable ceiling in every single case. He acknowledged that there could be exceptional cases justifying more than a 25% contribution, for example, where an adult deliberately carried a child on their lap with no seat belt or other fitted restraint. However, he also noted that such cases would be rare because the guidance in *Froom* would apply in the vast majority of cases.[19] Similarly, in *Williams,* Black LJ referred to *Stanton v Collinson*[20] as a "quite recent endorsement of *Froom v Butcher* and a useful reminder of the powerful public interest in there being no prolonged or intensive enquiry into fine degrees of contributory negligence".[21] In light of the above, the judge in *EMS (A Child)* acted properly in referring to *Froom*. However, his decision that the first defendant should make a 25% contribution to the damages is confusing.

Lord Denning suggested in *Froom* that 25% would be appropriate in cases where the damage would have been prevented altogether. However, the judge concluded that, had it not been for the negligence of the first defendant, the injuries to the plaintiff would have been substantially lessened. This finding would seem to make a 15% contribution more appropriate. The judge notes that, had the plaintiff been placed in an appropriate form of restraint, she would not have sustained the spinal cord injury at T3 but would instead have sustained injury to her upper cervical spine, which would not have been as serious.[22] It seems, therefore, that the judge focused on whether the particular type of damage sustained, rather than damage in general, would have been prevented altogether but there is no support for this approach in *Froom*.

Arguably this is simply because the point was not contemplated at the time though it seems out of line with the approach taken in seat belt cases, which are much more common. As noted above, in reaching a "just and equitable" decision, judges should consider all of the circumstances of the case and so the judge could potentially have found reason to believe that a 25% contribution was appropriate regardless of the fact that injury to the child would not have been avoided altogether. However, the judge's reasoning focuses almost entirely on causation. He did note that the negligent driver must by far bear the greater share of responsibility but this aspect of blameworthiness is already reflected in the 15% and 25% guidelines. As such, whilst it is clear from the evidence that the first defendant should have made a contribution in this case, the apportionment does seem a little harsh.

Practice points

- In child seat contribution cases, the courts will usually rely on the standard guidelines outlined in *Froom v Butcher*, though judges should ensure that they are exercising their discretion under the 1978 Act to reach a just and equitable decision, bearing the responsibility of each of the parties in mind.
- The *Froom* guidelines of 25% and 15% are expected to reflect both relative blameworthiness and causation in the vast majority of these cases. Whilst it is possible to depart from these guidelines, such cases will be extremely rare.

[19] *Jones v Wilkins* [2001] R.T.R. 19 at [16]–[19].
[20] *Stanton v Collinson* [2010] EWCA Civ 81; [2010] C.P. Rep. 27; [2010] R.T.R. 284.
[21] *EMS (A Child) v ES* [2018] NIQB 36 at [56].
[22] *EMS (A Child) v ES* [2018] NIQB 36 at [61].

- If the use of an appropriate child seat restraint would have lessened the injury, rather than avoided it altogether, then a 15% contribution should be regarded as just and equitable unless there are other circumstances suggesting that a 25% contribution would be more appropriate.

Annette Morris

Case and Comment: Procedure

Docherty v Secretary of State for Business, Innovation and Skills

(IHCS; Lord President (Lord Carloway); Lord Menzies; Lord Brodie; 22 August 2018; [2018] CSIH 57)

Personal injury—civil procedure—pleural plaques—asbestosis—negligence—asbestos dust—exposure in Scotland and England—diagnosis and death when resident in England—allocation of jurisdiction—applicable law—Damages (Scotland) Act 2011—Rome II—Private International Law (Miscellaneous Provisions) Act 1995

Allocation of jurisdiction; Damages; Deceased persons; Personal injury claims; Relatives; Scotland

Mr James Docherty ("the deceased") died on 30 September 2011. A post mortem examination disclosed the presence of pleural plaques and indicated levels of asbestos exposure generally associated with asbestosis. It was alleged by the pursuers that the deceased was a mechanical fitter who served an apprenticeship with Scotts Shipbuilding and Engineering Company in Greenock[1] from about 1941 to 1947, during which time he was exposed to inhalation of asbestos dust. Between 1954 and 1979, the deceased worked for Imperial Chemical Industries Ltd ("ICI") at their plant in Teesside, during which time he was again exposed to quantities of asbestos dust.

In about 2003, the deceased began to experience respiratory symptoms and continued to suffer from chest problems from time to time thereafter. In September 2009, he was admitted to hospital in Middlesbrough, where a CT scan showed, inter alia, basal bronchiectasis with fibrosis and mild pleural thickening. He continued to suffer respiratory difficulties until he died in 2011.

Relatives of the deceased raised an action under the Damages (Scotland) Act 2011 against the defender in relation to the deceased's exposure to asbestos in the course of his employment in Scotland and subsequent development of pleural plaques and death. The defender moved for dismissal of the action, arguing that English law applied where, at the time of his diagnosis and death, the deceased was resident in England.

The claim had been dismissed as irrelevant in so far as directed against the deceased's employers in England, where he had also been exposed to asbestos, on the basis that Scots law did not apply.[2] The pursuers were allowed to amend their pleadings to bring a claim under English law, but maintained their primary position that Scots law applied.

There were three issues before the court:

- Whether the applicable law is determined by the Rome II Regulation;[3]
- If so, what was the applicable law under the Regulation; or
- If not, what was the applicable law under the common law of Scotland.

The court held that the Rome II Regulation did not apply. The case gave rise to an issue of conflict of laws, but by virtue of the commencement provision in art.31, the Rome II Regulation had no application.

[1] For whose liabilities the defender would now be responsible.
[2] *Docherty v Secretary of State for Business Innovations and Skills* [2015] CSOH 149.
[3] Rome II Regulation 864/2007 on the law applicable to non-contractual obligations [2007] OJ L199/40.

The event giving rise to damage was the negligent exposure to asbestos, which occurred before the entry into force of the regulation.

The Lord Ordinary also held that the Private International Law (Miscellaneous Provisions) Act 1995 had no application to the case. It did not apply to acts or omissions giving rise to a claim which occurred before the 1995 Act's commencement. Accordingly, Lord Tyre concluded that the matter fell to be determined by the pre-1995 Act common law. He accepted that authoritative guidance was provided by dicta in cases concerning inhalation of harmful dust. The presence of dust in an employee's lungs was not of itself regarded as constituting injury, and no cause of action borne of negligent exposure arose until it did.[4]

Lord Tyre ruled[5] that the locus delicti was where the injury took place and not, if different, where the antecedent negligent act or omission occurred.[6] The pursuers' claims fell to be determined according to English law, and their case so far as based on the 2011 Act was held to be irrelevant. The action under Scots law was dismissed and proof before answer allowed in relation to claim proceeding under English law.

The pursuers appealed and argued that the Lord Ordinary had erred in his identification of the locus delicti. Alternatively, if English law was applicable, the whole of it fell to be applied and as application of the English choice of law rules would consider Scots law to be appropriate to govern the claim, there would thus be a renvoi back to Scots law.

The court held that it could only be concluded, on the facts of the case, that the locus delicti was Scotland. It was where the shipyard was located, it was where the deceased was employed and where he was exposed to, and inhaled, asbestos dust. The fact that the deceased was in England when he developed asbestosis was of importance to the pursuers' cause of action only to the extent of the fact that the pursuers had to prove that he had developed asbestosis, they did not need to prove where he was when that occurred. The delict was the act of the defender in exposing the deceased to asbestos and as far as the action was now concerned, this occurred in Scotland. Scots law therefore governed the defender's operations in Scotland relative to their workforce. In establishing the lex loci delicti, the emphasis was on the place of the defender's actings and not the place where an injury emerged.

The court pointed out that the pursuers' alternative argument would involve the curious exercise of a Scots court determining that on particular facts, the locus delicti was England but then abandoning that conclusion in deference to the hypothetical judgment of English court on the same facts that the locus delicti was Scotland but it did not address whether an English court, if seised with jurisdiction, would impose a requirement for double actionability and therefore actionability under English law as the lex fori. In addition, the argument was entirely unsupported by averment, in Scottish proceedings, foreign law was a matter of fact and therefore had to be pled if it was to be founded on.

Per Lord President Carloway, that the defender referred to the significance of the later, and greater, exposure to asbestos in the employment of the former second defenders in England in the calculation of damages but that did not arise for decision at the present stage; whether there required to be an apportionment, and the effect of any recovery by the late widow's estate against the former second defenders in proceedings in England would be required to be argued, if necessary, in due course.

The reclaiming motion was allowed, the interlocutor recalled and claims of all the pursuers were allowed to proceed to proof on the basis of Scots law.

[4] *Brown's Executrix v North British Steel Foundry Ltd* 1968 S.C. 51; 1968 S.L.T. 121, and *Grieves v FT Everard & Sons Ltd* [2007] UKHL 39; [2008] 1 A.C. 281, followed.

[5] *Docherty v Secretary of State for Business Innovations and Skills* [2018] CSOH 25; 2018 S.L.T. 349.

[6] *Joseph Evans & Sons v John G Stein & Co* (1904) 7 F. 65; (1904) 12 S.L.T. 462 followed.

Comment

> "Where a man while working in Scotland, inhaled asbestos fibres that cause injury to his body after he had become resident in England, which law is applicable to determine the admissibility of claims for damages made by his Executors and relatives after his death?"

That was the question Lord Tyre asked himself and it neatly summarises the question for the appeal judges to determine in this case, following the pursuers' appeal of his decision in March 2018.

The practical reason that this matters is that under Scots law damages are greater in fatal accidents act claims, pursuant to the Damages (Scotland) Act 2011, which allows for many more relatives of the deceased to claim damages, as compared to the poor relation in English law that is the Fatal Accidents Act 1976. If English law applied then only the widow of the deceased, as opposed to his 23 other relatives, would have a claim for damages.

The Inner House (appeal court) held that Lord Tyre had made two errors in law:

- holding that the lex loci delicti referred to the place where the harmful event occurred or the injury was sustained rather than the place where the wrongful act occurred and so he had confused breach of duty (delict) with whether a cause of action arose; and
- English law would itself identify Scots law as the correct law.

Lord President Carloway stressed that it did not necessarily follow that even if a final event must occur in order to complete a cause of action that the place where that final event occurs is the locus delicti.

The Inner House also correctly opined that the pathology of the deceased's condition was entirely independent of any external event or occurrence that had anything to do with England. This seems a matter of plain common sense.

They pointed out that the consequences if Lord Tyre's judgment was upheld would include the anomaly that the defender could be operating exclusively in Scotland and yet find themselves facing a claim governed by the law of a country with which they had no prior connection. Furthermore, the pursuer, a person who had worked in Scotland and sought to claim against his employer could be deprived of a claim for damages by moving to a foreign country where the law differed.

They rightly, in my view, considered it was fair and proper that a company conducting operations by reference to the requirements of Scots law in Scotland should be held accountable by those laws and not by reference to another legal system which they could not have foreseen would have applied to them at the relevant time.

The key was where the harm took place.

This of course mirrors the approach taken by the English Supreme Court on the EL trigger litigation case *BAI (Run Off) v Durham*.[7]

This seems sensible and provides certainty in this area but it is important to recognise that this judgment only applies to cases where the negligent exposure took place prior to 1995. Post 1995 exposure to asbestos litigation will be governed by the Private International Law (Miscellaneous Provisons) Act 1995 and the Law Applicable to Non-Contractual Obligations (Scotland) Regulations 2008,[8] which implemented Rome II into Scottish Law.

The Rome II Regulations conversely seem to indicate that the place where the disease manifests itself will be the applicable jurisdiction. Therefore, had the deceased in this case been exposed to asbestos post 1995 then the court would have presumably have had no choice but to hold that English law applied.

Many defendant lawyers have opined that this decision means that so called "forum shopping" in fatal cases such as this will continue. Another way of analysing it would be to say that until the English

[7] *BAI (Run Off) v Durham* [2012] UKSC 14; [2012] 1 W.L.R. 867.
[8] Law Applicable to Non-Contractual Obligations (Scotland) Regulations 2008 (SSI 2008/404).

Parliament legislates to greatly improve the provisions for relatives to recover damages in fatal cases to make English law comparable with the generosity of Scottish law in this regard then of course it will be the duty of the solicitors acting for the executors and dependents or penitential dependants in a fatal case such as this to consider the best forum to litigate the case to maximise the potential damages that are recoverable.

Practice points

- In asbestos cases where the claimant/deceased has worked in Scotland and was exposed to asbestos there prior to 1995 it is imperative that their solicitor takes a full and detailed account of that exposure and carefully considers whether the case should be brought in the English or Scottish courts, weighing up the potential difference on quantum accordingly with reference to the number of potential relatives who under Scottish law could benefit from the more generous provisions.
- The key factor to considering jurisdiction pre-1995 is where the negligent exposure took place and not where the disease developed.
- Post 1995 exposure cases are not affected by this decision as Rome II will apply and the jurisdiction will be the place where the disease manifests itself.

Kim Harrison

Gempride Ltd v Bamrah

(CA (Civ Div); Davis LJ, Hickinbottom LJ; 21 June 2018; [2018] EWCA Civ 1367)

Civil procedure—agents—before the event insurance—bills of costs—costs—dishonesty—hourly fees—law costs draftsmen—CPR r.44.11

Agents; Bills of costs; Costs; Dishonesty; Hourly fees; Law costs draftsmen; Personal injury claims

The underlying claim which led to this appeal was straightforward. Ms Jagrit Bamrah was admitted as a solicitor in December 1999. From 3 July 2008, she was in practice as a sole practitioner under the style Falcon Legal Solicitors ("Falcon Legal"). The firm was incorporated in 2012 but continued to trade under the same name.

On 10 July 2008, Ms Bamrah visited a client in a block of flats owned by Gempride. Whilst leaving, she tripped over a doorstop in the floor, and fell heavily on her right side. She suffered no bone injury, but considerable soft tissue injuries to her right hand, arm and shoulder. Falcon Legal acted for Ms Bamrah. On 13 November 2008, Ms Bamrah wrote a letter before claim to a company in Gempride's group, understanding it to be the owner of the relevant premises. On 16 January 2009, Gempride's insurers (AXA Insurance ("AXA")) admitted liability on its behalf.

There then followed considerable exchanges concerning quantum. On 20 June 2011, Ms Bamrah issued protective proceedings in the Croydon County Court, the Claim Form indicating that the value of the claim exceeded £25,000 but not £50,000. However, on 22 November 2012, she served a schedule of pecuniary loss claiming nearly £750,000, which was increased to just over £900,000 on 8 January 2013. Gempride through AXA made several offers of settlement, including a Pt 36 offer of £50,000 on 18 March 2013.

Ms Bamrah accepted that offer late, on 12 April 2013, on the basis that Gempride would also pay her costs.

Ms Bamrah, as claimant, had made a conditional fee agreement with Falcon Legal which specified an hourly rate of £232. The rate was later increased to £280 as the defendant's unreasonableness, as perceived by the claimant, had increased the complexity of the matter. After the claim was settled, with the defendant liable to pay the claimant's reasonable costs, the firm instructed costs draftsmen to settle a bill of costs. The draftsmen drafted a bill claiming a £280 rate throughout the claim, which the claimant certified as accurate. The defendant offered £241 throughout, which the claimant accepted. The defendant requested details of other available methods of financing. The claimant replied that before-the-event ("BTE") insurance funding had not been available. Accordingly, the defendant did not pursue any issues about alternative funding.

However, the claimant had had BTE insurance, but had not used it as her policy did not permit her to instruct her own firm. Master Leonard found that the claimant had certified a misleading bill of costs and had given untrue information regarding funding. Under r.44.11,[1] he disallowed the profit costs in the bill insofar as they exceeded the rate recoverable by litigants in person. On appeal, HH Judge David Mitchell (sitting with District Judge Langley as an assessor) held that the claimant was not responsible for errors made by the draftsmen as they had not acted according to her instructions, that she had not acted dishonestly and that the statement on BTE funding was correct. He allowed the appeal and ordered costs in the claimant's favour, including her costs of attending the appeal. The defendant appealed again.

The Court of Appeal held that solicitors remained responsible for the conduct of anyone to whom they subcontracted work, especially where the subcontractor was not a legal representative. "Unreasonable" conduct was essentially conduct permitting of no reasonable explanation. "Improper" conduct was conduct which the consensus of professional opinion would regard as improper. Mere mistake, error of judgement or negligence was not unreasonable or improper conduct. Although, to be unreasonable or improper, a legal representative's conduct had to breach the representative's duty to the court, it did not have to breach any formal professional rule or be dishonest. Where a r.44.11 application was made, the applicant had the burden of proof. Even where the threshold criteria were satisfied, the court had discretion as to whether to make an order. Any order had to be proportionate to the misconduct.

Turning to the issue of agency, the court also held that the judge had failed to consider the legal relationship between the firm and the costs draftsmen. The firm were authorised litigators. The draftsmen were not authorised and had not held themselves out to be. Accordingly, the judge had erred in finding that the claimant could not be liable for the draftsmen's conduct insofar as they had not complied with her instructions.[2]

The next issue was dishonesty. The court held that the judge had erred in considering that, if the defendant did not prove that the claimant had intended to mislead when making representations, it could not show that her conduct fell within r.44.11. Unreasonable or improper conduct did not require dishonesty.[3] Further, the defendant's allegations had not necessarily involved dishonesty on the claimant's part.

In certifying that the bill of costs was accurate and that the costs claimed did not exceed the costs she was required to pay the firm, the claimant's conduct had been unreasonable or improper. When she received the offer of £241 throughout, she should have realised that the offer was more than she had been contractually obliged to pay the firm. Her acceptance of the offer was held to be incapable of sensible explanation. While she might have been advised by the draftsmen that it was proper to retrospectively increase the rate, her conduct in allowing the bill to be submitted with a rate she knew exceeded the contractual rate had been at least reckless.

[1] Court's powers in relation to misconduct.
[2] *Crane v Canons Leisure Centre* [2007] EWCA Civ 1352; [2008] 1 W.L.R. 2549 followed.
[3] *Ridehalgh v Horsefield* [1994] Ch. 205; [1994] 3 W.L.R. 462 applied.

On the issue of availability of BTE insurance they held that the judge had erred in proceeding on the basis that, where a litigant had BTE insurance but chose not to use it because the firm they wished to instruct would only do so on terms that the policy did not cover, it could properly be said that insurance was not available. Where alternative funding was available, but not taken up, that raised the issue for the paying party of whether the receiving party had acted reasonably in funding the litigation with prospective additional liabilities. The claimant had not intended to mislead, but the defendant had, almost inevitably, been misled.

When it came to costs of lower hearings the court noted that the claimant had attended the appeal before the judge as a party, not as a representative. The fact that she was a lawyer did not entitle her to her costs of attendance, let alone at her own professional rate. Even without an express ground of appeal, they held that they had jurisdiction to make consequential orders including as to costs below. The defendant was permitted to seek a consequential variation of the costs order made against it below.

The court made an order under r.44.11. but held that an order disallowing all the profit costs above the litigant in person rate would be disproportionate. Half those costs were disallowed. The appeal was allowed.

Comment

It is said that to represent one's self is to have a fool for a client. Within the conduct of this piece of litigation a review of the somewhat unusual history would certainly discourage anyone from doing so in the future. A unique case, it begins with the fact that this solicitor was not only a partner in a law firm and becoming subject to potential sanctions from the court but she had in fact been the claimant in the original action; a compensation claim that occurred just a week after she set up her own firm. She was the sole practitioner in her own firm who managed to get nearly every aspect of her own claim from start to finish wrong. She entered an invalid CFA and then went on to seek damages not to exceed £50,000 on her claim form which she never amended whilst seeking damages not far short of £1m. She went on to instruct a firm of costs specialists to assist her in dealing with the detailed assessment of the successful claim who let her down as well. A claim in which having represented herself through her own firm she later instructed a second firm to complete it.

Whilst is it is perhaps easy to be distracted by the unusual history of this case nevertheless this was a salutary reminder of the significance both of being an officer of the court but secondly, the meaning of the certification of a bill of costs which is subsequently found to be inaccurate. In this case, the solicitor had wrongly certified a bill of costs with an hourly rate in excess of the one to which she was entitled. In addition, she had also signed points of reply in which she had wrongly asserted that she did not have alternative methods of funding her claim and so justifying her use not only of a conditional fee agreement but also in securing the recovery of an after the event insurance premium.

One of the admonishing paragraphs of the Court of Appeal decision sends out the clearest of messages:

> "The Judgement firmly reasserts the solicitor's responsibility for the detailed assessment process. Solicitors are accountable for the action of their costs draftsman."
>
> "It seem to be an important matter of principle that solicitors on the record—and other authorised litigators and 'legal representatives' for the purposes of the CPR—understand that they remain ultimately responsible for the acts and omissions of those to whom they delegate parts of the conduct of litigation, particularly where those to whom such work is delegated are not authorised. It is only in that way that the supervisory jurisdiction of the court can be effectively maintained."

This is a judgment that examines the behaviour of an officer of the court; their responsibility for any agents to whom they may delegate their activities; the significance of certifying bills of costs and related

documents; and perhaps most importantly as the other aspects are well trodden issues, an examination of the level of conduct necessary to trigger any form of wasted costs or punitive award.

The legal basis for the issue of representation and being an officer of the court was described at [5] of the leading judgment from Hickinbottom LJ himself a former solicitor:

> "Section 13 of the Legal Services Act 2007 … restricts the performance of 'restricted legal activities' to persons who are either authorised or exempt, including the employees of such persons (s.15). Section 12 (1) defines 'restricted legal activities' to include the conduct of litigation (s.12(1)(b)) and the exercise of a right of audience (s.12(1)(a)). To conduct litigation or exercise the right of audience without being entitled to do so is a criminal offence (s.14)."[4]

Most solicitors who conducted litigation under conditional fee agreements from at least 1995 onwards will be familiar at least with the title if not the detail of the authority in *Bailey v I B C Vehicles Ltd*.[5] Many a paying party would have received a reply to their points of dispute challenging the enforceability of the retainer and asking for sight of it with this case referenced. It was cited at [10]:

> "… as officers of the court, solicitors are trusted not to mislead or to allow the court to be misled. This elementary principle applies to the submission of a bill of costs …"

That theme was taken up by Henry LJ in a concurring judgment (at 575g–576c), with which Butler-Sloss LJ expressly agreed:

> "RSC Order 62 rule 29(7)(c)(iii) [now CPR PD 47 para.5.21] requires the solicitor who brings proceedings for taxation to sign the bill of costs. In so signing he certifies that the contents of the bill are correct. That signature is no empty formality. The bill specifies the hourly rates applied, and the care and attention uplift claimed. If an agreement between the receiving solicitor and his client … restricted (say) the hourly rate payable by the client, that hourly rate is the most that can be claimed or recovered on taxation … The signature on the bill of costs under the rules is effectively the certificate by an officer of the court that the receiving party's solicitors are not seeking to recover in relation to any item more than they have agreed to charge their client under a contentious business agreement.
>
> The court can (and should unless there is evidence to the contrary) assume that his signature to the bill of costs shows that the indemnity principle has not been offended …
>
> … [T]he other side of a presumption of trust afforded to the signature or an officer of the court must be that breach of that trust should be treated as a most serious disciplinary offence.
>
> The rule number and terminology have of course subsequently changed; but the principles set out in that passage remain good. Indeed, they are well-established and trite law. Neither party before us suggested otherwise."

It is believed that this appeal is the first one to examine CPR 44.11 and the issue of what constitutes "unreasonable or improper conduct". The court began by noting that this phrase is not defined in the rule but para.11.2 of the Practice Direction is the closest:

> "Conduct which is unreasonable or improper includes steps which are calculated to prevent or inhibit the court from furthering the overriding objective."[6]

Much was made in this judgment of concerns that some at least of the solicitor's actions could be open to the interpretation of dishonesty. The paying party defendant never actually sought to make out that case

[4] *Gempride Ltd v Bamrah* [2018] EWCA Civ 1367 at [5].
[5] *Bailey v I B C Vehicles Ltd* [1998] 3 All E.R. 570; [1998] 2 Costs L.R. 46.
[6] *Gempride Ltd v Bamrah* [2018] EWCA Civ 1367 at [16].

and the court agreed that was the proper thing to do although it was still clearly unhappy with much of the conduct of this solicitor. The court noted, however, that the use of the terms "unreasonable" and "improper" would have the same meanings as they have in wasted cost provisions and dishonest actions were not necessary for the court to consider that the threshold had been met for making orders. The court early on in its judgment set out the propositions that it considered relevant to the appeal to be derived from r.44.11.

> "i) A solicitor as a legal representative owes a duty to the court, and remains responsible for the conduct of anyone to whom he subcontracts work that he (the solicitor) is retained to do. That is particularly so where the subcontractor is not a legal representative and so does not himself owe an independent duty to the court.
> ii) Whilst 'unreasonable' and 'improper' conduct are not self-contained concepts, 'unreasonable' is essentially conduct which permits of no reasonable explanation, whilst 'improper' has the hallmark of conduct which the consensus of professional opinion would regard as improper.
> iii) Mistake or error of judgment or negligence, without more, will be insufficient to amount to 'unreasonable or improper' conduct.
> iv) Although the conduct of the relevant legal representative must amount to a breach of duty owed by the representative to the court to perform his duty to the court, the conduct does not have be in breach of any formal professional rule nor dishonest.
> v) Where an application under CPR rule 44.11 is made, the burden of proof lies on the applicant in the sense that the court cannot make an order unless it is satisfied that the conduct was 'unreasonable or improper'.
> vi) Even where the threshold criteria are satisfied, the court still has a discretion as to whether to make an order.
> vii) If the court determines to make an order, any order made (or 'sanction') must be proportionate to the misconduct as found, in all the circumstances."

Whilst many of the challenges to CFA retainers that were so familiar in the early part of this century have gone away there still remain echoes of that time and this is a case which those representing paying parties will no doubt cite in support of other challenges where necessary. For example it is noted early on in the judgment that the CFA was entered into by the solicitor as the client and claimant with her own firm of solicitors of which she was the sole practitioner. By the time that the matter had come before the court, it was accepted that in fact the CFA was void because she could not contract with herself: nine years later.

From the facts as recited in the judgment there appears to be no evidence that the solicitor ever actually served notice of the CFA and therefore fettering her ability to seek to recover the additional liabilities from the defendant and yet curiously this does not appear in the judgment as being a feature.

It may be thought, not unfairly, that this was a solicitor new to these administrative issues and who was perhaps lacking guidance. However, leaving aside a less generous interpretation as to her ability to identify the problems that she was finding herself getting into, one clear hint emanated from her attempts to persuade her before the event insurers to extend their indemnity to her. They had previously declined to do so before the issue of proceedings saying:

> "it would be fundamentally wrong to allow a policy holder who is a solicitor to act for themselves under policy terms and to charge her insurers for her time."[7]

[7] *Gempride Ltd v Bamrah* [2018] EWCA Civ 1367 at [41].

Despite that the solicitor actually used this rejection as justification for taking out an after the event insurance policy with a recoverable premium and did not seem to run into the same objection from her new ATE providers. At this stage, liability remained admitted in the case albeit causation was challenged and yet she felt able to certify this case as having a "medium-high 75%" risk level to the case.[8]

This in fact changed less than a year later when it became clear that her expert evidence was not being accepted by the defendant as a result of which she determined that in fact the risk had now increased to "high!! 75%–100%".[9]

Not for the first time in this case, the solicitor was then critical of her agent not apparently behaving in accordance with her instructions as she apparently alleged that their agreement to extensive disclosure of documents by her went beyond her instructions. Shortly after this, for reasons unknown, she decided to transfer her instructions to another firm of solicitors who entered into a new CFA and took the benefit of the ATE insurance. A few months later she accepted a Pt 36 offer of £50,000 which had been made against a gross claim for £900,000. At this point, she instructed her firm of costs draftsman to prepare her bill of costs. She had apparently had previous relationships with the firm for clients of her firm and despite various queries having been raised on a number of matters in the draft bill she went ahead and signed the certificate on the bill to confirm it was accurate.

The first assessment was heard in the Supreme Court Costs Office by Master Howarth who determined that she had certified a bill that was incorrect; that she was responsible for incorrect answers in response to the points of dispute and that her behaviour had been unreasonable both in providing misleading information in relation to the existence of alternative funding and by certifying the bill as accurate when it was not. The Master therefore decided that her conduct was unreasonable and improper within the meaning of r.44.11 and he disallowed her profit costs as far as they exceeded the fixed hourly rate recoverable by litigants in person.

Somewhat bizarrely her costs lawyers did not notify her of the appeal and she did not put any evidence in to deal with the challenges although she was given opportunity to do so by the Master. It was as a result of this that when the matter went to appeal it was dealt with as a full rehearing. That appeal turned into a 13-day hearing during which her costs rose to £950,000. Thus, it is perhaps not surprising that when the defendant paying party was subsequently required to meet these costs after the judge on appeal overturned the Master's decision the defendant took the case to the Court of Appeal having secured permission in writing from Jackson LJ.

By the time of the hearing at the Court of Appeal the various grounds which had been dealt with before had been rationalised and relabelled as follows:

Ground A—agency.
Ground B—dishonesty/intention to deceive.
Ground C—hourly rate.
Ground D—availability of BTE insurance.
Ground E—cost of attendance.
Ground F—costs below.

The cost lawyers themselves applied to be added as a respondent to the appeal before the judge by which time the solicitor was clear that she was blaming them for the majority of the issues that had arisen. She considered herself to have been misled by them; they had breached their duties and were guilty of incompetence and negligence. She said at para.5.13 of her statement:

> "the whole point of my instructing Lawlords, and agreeing to pay them, was so that I could and would rely on their expertise and advice, and they would … take control of, and responsibility for, conduct

[8] *Gempride Ltd v Bamrah* [2018] EWCA Civ 1367 at [43].
[9] *Gempride Ltd v Bamrah* [2018] EWCA Civ 1367 at [44].

> of the relevant detailed assessment proceedings, so that I would have to devote minimal time and effort to such proceedings."

Perhaps unusually in the context of an appeal against an assessment, the solicitor found herself being cross examined by the paying party principally because she had not provided any evidence to deal with some of the substantive points at issue. Matters that were put to her included the fact that there were various errors to her bill including the VAT percentage figure as well as the hourly rate issue. It is perhaps a little surprising when one steps back and considers the narrative to date that this judge and his assessor actually overturned the decision of the Master.

The judge determined that the solicitor could not be held responsible for the acts and omissions of her costs lawyers because although it was accepted that they were her agents for the purposes of the assessment they had not acted in accordance with her instructions and indeed had acted contrary to them. He took the view that the Master had made findings of dishonesty against the solicitor and perhaps less surprisingly he did not think that there was evidence that she had been so. Perhaps the most surprising finding by this judge was that he accepted that the certified rate was unlawful in that it breached the indemnity principle but decided that the cost lawyers had unreasonably misunderstood her instructions that the rate was increased later than the CFA and that the solicitor was unaware of what was going on. It is perhaps this element that gives the clue to the judge's view where he perhaps became unduly focused upon the issue of dishonesty.

Turning then to the various allegations and the first in relation to agency. It is perhaps noteworthy here to remember that paying parties have had to meet the inflated effect of the costs of cost lawyers for some time precisely because they are held to be the agent of the instructing solicitor and therefore that solicitor is able to include their charges as part of their own rather than as a disbursement. In the older recoverable CFAs that meant that a solicitor would be able to charge a success fee on that work which usually frustrated paying parties not only because of the inflation of the base costs but by the application of the success fee when by definition the cost lawyer has not actually taken on any risk; judgment usually having been determined at the time they are instructed.[10] So of course, if solicitors are going to be able to make profit from those arrangements it is hardly surprising that they must also take the burden when that situation goes wrong. Part of the reasoning in *Crane v Cannons Leisure Centre*[11] was that it was important that costs draftsman could not perform solicitors work. They were not authorised to do so but it was vital that the solicitors who were authorised were responsible for the acts of their draftsmen.

As Hickinbottom LJ put it:

> "The court found that the ability of the cost draftsman to appear in court as advocates was founded upon the fiction that they were temporary employees of the solicitors."[12]

This case was similar to *Crane*.[13] For these reasons this part of the judgment on appeal was overturned:

> "Although only an extension of the conventional principles of agency into the particular statutory field with which we are concerned, at a time when new business practices mean that solicitors are more frequently subcontracting work out to the unauthorised, it seems to me to be an important matter of principle that solicitors on the record—and other authorised litigators and 'legal representatives' for the purposes of the CPR—understand that they remain ultimately responsible for the acts and omissions of those to whom they delegate parts of the conduct of litigation, particularly where those to whom such work is delegated are not authorised. It is only in that way that the supervisory jurisdiction of the court can be effectively maintained. Although an order under CPR rule 44.11

[10] *Crane v Cannons Leisure Centre* [2007] EWCA Civ 1352.
[11] *Crane v Cannons Leisure Centre* [2007] EWCA Civ 1352.
[12] *Gempride Ltd v Bamrah* [2018] EWCA Civ 1367 at [99].
[13] *Gempride Ltd v Bamrah* [2018] EWCA Civ 1367.

> cannot be made against someone who is neither a party nor a legal representative, for the purposes of that rule the conduct of someone who is not an authorised litigator may be attributable to a legal representative on agency principles as explained in the authorities to which I have referred."

The appeal judges were clear in their view that to make a determination that conduct was unreasonable and improper did not require any finding of dishonesty. Of course, once that decision was reached it was inevitable that this aspect of the appeal had to be overturned.

Turning to the hourly rate, Hickinbottom LJ noted two different interpretations of the solicitor's own evidence. At the hearing below, she said that the movement from the original hourly rate to the later one occurred:

> "on the basis of what she perceived as unnecessary requests for disclosure by Gempride's solicitors … the letter of instruction to Lawlords was intended to convey a prospective change in rate from June 2012."[14]

Lawlords, her costs lawyers contended that they understood the letter to mean that she wanted to charge £280.00 for the whole of the bill. It would seem that she then understood the position to be that Lawlords accepted the difference but would continue to claim £280.00 but would make clear to Gempride in negotiation the correct position. A somewhat strange interpretation but the appeal court determined that in any event she would have been guilty of improper or unreasonable conduct particularly as when she received the offer from the paying party of £241.00 per hour throughout she should have realised that the error had not been explained as this was more than the lower rate for any period of time.

The next ground in relation to the availability of alternative funding including BTE was an often considered issue in the context of recoverable additional liabilities but remains no less relevant in the current era of CFAs where the clients themselves are bearing the additional liabilities. Arguably it is more important now that the solicitor makes proper efforts to ensure that his or her client is not bearing an unnecessary burden. It is quite common in lower value personal injury cases that a prospective claimant has the benefit of before the event insurance and most competent practitioners who nevertheless would still wish to represent their client will ensure that their funding arrangements at least match those that would be available to their client if they went with the alternative funding. To press on and still seek additional liabilities because the alternative funder will not indemnify the client seems a particularly risky course to take. For those who consider that position they should reflect upon the words of Hickinbottom LJ:

> "Where such alternative funding was available, but not taken up, that gives rise to the issue of whether the litigant acted reasonably in funding the litigation with prospective additional liabilities. That secondary issue is one which again for obvious reasons, the paying party may wish to investigate with some care; but of course, that question is not reached if alternative funding was not available. The receiving party cannot exclude the possibility of that investigation by himself assessing that he had acted reasonably in not choosing to fund the litigation by that alternative means. With respect to the judge I do not consider that it is reasonably arguable that 'availability' in this context can be construed differently."[15]

Causation to this is noted at [39] where Hickinbottom LJ cited the Master:

> "… although the position was rectified when the CFA documents were later disclosed, costs could have been compromised on the basis that there was no alternative funding available without Gempride being any the wiser."

[14] *Gempride Ltd v Bamrah* [2018] EWCA Civ 1367 at [119].
[15] *Gempride Ltd v Bamrah* [2018] EWCA Civ 1367 at [136].

In what seems like a legal form of chutzpah, the solicitor sought to charge the paying party for the costs of her as a lawyer in relation to her personal attendance as a party to the appeal at the 13-day hearing below. The best that could be offered by the solicitor's advocate in this appeal was that the court should not consider the ground because of a technical issue in relation to the granting of permission. The court dismissed that argument and allowed the appeal on that promptly.

Having regard to the judgment and the level of approbation from both judges, it is perhaps therefore a little surprising that in the end this solicitor did as well as she did in her eventual costs recovery. The costs claimed by now were just short of one million pounds. The court determined that there was no dishonesty but that nevertheless her conduct was serious within the parameters of "unreasonable and improper" and the paying party was clearly deceived by this including for example the representation made by the solicitor to the availability of BTE insurance which actually led to the paying party putting forward significant offers for payment of costs. Perhaps the court was influenced by the fact that the CFA was in fact now determined as invalid[16] but then went on to say:

> "I have carefully considered whether it will be appropriate to maintain the Master's order that Ms Bamrah be prevented from recovering profit costs at any rate greater than the rates appropriate to a litigant in person. However, in all the circumstances (and notably in the light of the express finding below that Ms Bamrah was not dishonest), I consider that such an order would be disproportionate. In my view it would do justice to the case if half the profit costs in part 1 of the bill as otherwise assessed by the court be disallowed under CPR rule 44.11."

This unfortunate solicitor is reported as seeking permission to appeal to the Supreme Court so there may be more to come. It is difficult to see how that will be successful. The law on both the duties of a solicitor as an officer of the court and the status of their agency have been fixed for a long time. An examination of the meaning of unreasonable and improper conduct may be fertile ground for an academic lawyer but on these facts for this solicitor? For the good order of all involved in the recovery of party and party costs there has to be a clarity of status and purpose. This case should be left to rest.

Practice points

- Solicitors should take the upmost care in the instruction of their agents both in terms of competence but on the work delivered.
- Solicitors are able to recover a fee for the time spent checking the bill.
- It is important that the bill is checked fully and completely.
- If a paying party considers that there has been inappropriate material in relation to a cost claim then if it wishes to bring a misconduct application under CPR 44.11 or any other wasted costs application it should be against the solicitor and not the agent.

Mark Harvey

[16] *Gempride Ltd v Bamrah* [2018] EWCA Civ 1367 at [162].

Tuson v Murphy

(CA (Civ Div; Underhill LJ, Bean LJ, Sales LJ; 22 June 2018; [2018] EWCA Civ 1461)

Personal injury—civil procedure—costs—conduct—dishonesty—future loss—loss of earnings—measure of damages—non-disclosure—psychiatric harm—Pt 36 offers—time limits

LT Conduct; Costs; Dishonesty; Non-disclosure; Part 36 offers; Time limits

The claimant had brought a claim for £1.5 million following a fall from a horse. She had broken her arm, but recovered physically. The defendant admitted liability. The claimant then developed obsessive compulsive disorder ("OCD"); two psychiatrists attributed it to the accident. Disclosure and witness statements were due by April 2014. The claimant served statements indicating that she was unable to work. She did not reveal that in late 2013, she had obtained a playgroup franchise under which she provided children's play facilities. The defendant made a Pt 36 offer in April 2014. In 2015, the defendant discovered the claimant's playgroup activities. The claimant claimed that she had never intended to run the playgroup as a business, but had engaged in it as a means of dealing with her OCD.

The defendant's solicitors made a second Pt 36 offer in the sum of £352,060. It then obtained a psychiatric expert's report casting doubt on causation of the OCD. The claimant did not accept the offer within the 21-day period, which expired on 8 October 2015. The claimant made a Pt 36 offer for less than half of her original claim however, she accepted the defendant's offer on 1 December 2015.

The defendant was ordered to pay the claimant's costs only up to 1 April 2014 on the basis that that was the time at which the claimant had begun to mislead the defendant with regard to her disability. The claimant was to pay the defendant's costs thereafter.

The claimant appealed. She accepted liability for the defendant's costs from 8 October to 1 December 2015 but submitted that the order to pay its costs from 1 April 2014 was a retrospective penalty which was unjust and disproportionate in the light of the information available at the time.

The Court of Appeal held that where a Pt 36 offer was accepted outside the 21-day period, CPR r.36.13(5) required the court to order that the claimant be awarded costs up to the date on which the relevant period expired and provided that the offeree pay the offeror's costs for the period from the date of expiry of that period to the date of acceptance unless it would be unjust to make such orders. According to CPR r.36.13(6), in considering whether such orders would be unjust, the court had to take into account all the circumstances of the case including the matters listed in CPR r.36.17(5). One of those was "the information available to the parties at the time when the Part 36 offer was made".

The claimant's attempt to run a playgroup did not amount to evidence that her disability was fabricated. Had that been the case, the defendant would not have made an unconditional Pt 36 offer. The case was not one of gross exaggeration.[1] However, the playgroup activity was material to the claimant's argument that she was, and might remain for a long period, incapable of any work. They concluded that she had plainly withheld the information about the playgroup from her solicitors, her employment expert and the court. Her reasons for that were unconvincing and the costs judge had been entitled to describe her conduct as dishonest and misleading. However, his judgment did not address the fact that the Pt 36 offer was unconditional, rather than a Calderbank offer, and that it was made with knowledge of the claimant's material non-disclosure and knowing that acceptance within 21 days would, by virtue of CPR r.36.13(1), entitle her to her costs to date.

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

The court accepted that costs decisions were fact-sensitive and no attempt could be made to list the categories of case in which it would be unjust to make the normal order.[2] However, they pointed out that costs were not entirely a matter of discretion, even where a party had behaved dishonestly. In *Tiuta Plc v Rawlinson & Hunter (A Firm)*.[3] it was said that it was highly unlikely to be unjust to apply the default rule where the claimant had accepted a Pt 36 offer out of time, provided that nothing emerged from the facts to show that the defendant's assessment of the risks and benefits involved in making the offer had been significantly upset, contradicted or misinformed.

That view was confirmed to be correct. In particular, *Tiuta* was right to distinguish between cases where the facts known to the defendant at the time of the Pt 36 offer did not change significantly during the period before the delayed acceptance, and those where the defendant's assessment of the value of the case at the time of the offer was upset or undermined by subsequent events or facts discovered later. In the first type of case, it was highly unlikely to be unjust to apply the default costs rule.[4]

Even though the claimant's material non-disclosure was dishonest and misleading, the judge's exercise of his discretion was flawed. The defendant was ordered to pay the claimant's costs up to 8 October 2015, the claimant remaining liable for the defendant's costs from 8 October to 1 December 2015. The appeal was allowed.

Comment

Part 36 was described as a "self-contained code" by Moore-Bick LJ in *Gibbon v Manchester CC*,[5] a phrase that has since been incorporated into the rule itself when Pt 36 was last amended in 2015. The judgment in this case is a reminder of the significance of that principle, which means that the terms of the rule will be strictly applied. Furthermore, where the court does have a discretion this will often be constrained by the terms of Pt 36 compared with, for example, the more general discretion afforded to the court when dealing with costs under Pt 44.

The countervailing point, though not expressly explored in this judgment, is that when the court is exercising the power to deal with costs under Pt 44 any offers outside Pt 36 should not be treated as necessarily carrying the consequences applicable if the terms of that rule did apply.

This case concerns, specifically, the proper approach, within the self-contained code that is Pt 36, to what might be termed the default position on costs, following late acceptance of a Pt 36 offer to settle the whole claim, found in Pt 36.13(5) and the circumstances in which the court can properly depart from that default position. The judgment is, accordingly, a useful reminder about a number of general points concerning Pt 36 offers including:

- the self-contained nature of Pt 36 (with such offers not being subject to the general law of contract);
- the very specific cost consequences that will apply when a Pt 36 offer to settle the whole claim is accepted within the relevant period;
- the likely, though not inevitable, cost consequences when an offer to settle the whole claim is accepted after expiry of the relevant period (with discretion for the court to make a different order where the usual consequences would be "unjust");
- the discretion as to the basis of assessment where there is late acceptance of a Pt 36 offer; and
- the distinction between Pt 36 offers and non-Pt 36 offers (the latter being subject to the more general discretion as to costs found in Pt 44).

[2] *SG (A Child) v Hewitt (Costs)* [2012] EWCA Civ 1053; [2013] 1 All E.R. 1118 followed.
[3] *Tiuta Plc v Rawlinson & Hunter (A Firm)* [2016] EWHC 3480 (QB).
[4] *Tiuta Plc v Rawlinson & Hunter (A Firm)* [2016] EWHC 3480 (QB) approved.
[5] *Gibbon v Manchester CC* [2010] EWCA Civ 726; [2010] 1 W.L.R. 2081.

It is worth considering each of these topics, starting with the important point that, as a self-contained code, the general law of contract is not always applicable to Pt 36 offers.

The self-contained code

When giving judgment in *Gibbon*, Moore-Bick LJ not only described Pt 36 as a "self-contained code" but also coined the phrase that, unlike the case at common law, a Pt 36 offer remains "on the table" until changed or withdrawn, under the terms of the rule itself. This is an important preliminary to considering the approach a court should take to the costs consequences provided for under the rule.

Given that most Pt 36 offers remain open for acceptance whilst still "on the table" an offeror who discovers some new material fact, suggesting the offer no longer represents a reasonable settlement for the offeror, will usually be well-advised to change or withdraw the offer, even though that means losing its potential cost consequences.

Conversely, an offeree who does not make timely acceptance of an offer but then establishes matters which suggest the offer represents a favourable settlement may wish to promptly accept that offer.

It is important to recognise, making the offeror's need to withdraw or change the offer where appropriate so important, that such acceptance is likely to be effective although, as the judgment in this case illustrates, there may be times when a material change of circumstances, between offer and acceptance, will have an impact on the usual cost consequences.

All this emphasises the wisdom of the words said by Carnwath LJ, giving judgment in *Onay v Brown*,[6] that:

> "The moral of this story is that someone who writes a letter headed 'part 36 offer', and which is stated as 'intended to have the consequence of that rule', should make sure that he knows what those consequences are … If the party writing the letter does not want those consequences to apply, he should put his offer in some other way, as is expressly permitted by rule 36.2."

Consequently, a party should always consider, before making an offer, whether it is appropriate to use the machinery of Pt 36 and, if the offer is made under Pt 36, to keep the need for a change to or withdrawal of that offer under review.

The self-contained nature of Pt 36 is therefore crucial to the substantive subject matter of the offer but also has significance for the ancillary costs consequences, on judgment, also, more relevantly for present purposes, on acceptance, whether that be within or after the relevant period.

Costs on acceptance within the relevant period

An important consequence of Pt 36, both offeror and offeree need to bear in mind, is the deemed costs order applicable when an offer to settle the whole claim is accepted within the relevant period. That such an order, once deemed to be made, cannot be set aside or varied is confirmed by *Lahey v Pirelli Tyres Ltd*[7] and *Walker Residential Ltd v Davis*.[8]

The ruling in *Lahey* confirmed that on timely acceptance the claimant was entitled to such costs as were assessed in full. Very much the same approach to the meaning of "costs", but on judgment, was subsequently taken by the Court of Appeal in *Webb v Liverpool Women's NHS Foundation Trust*.[9] With timely acceptance the claimant is, therefore, afforded considerable protection on costs by use of the Pt 36 machinery.

[6] *Onay v Brown* [2009] EWCA Civ 775; [2010] 1 Costs L.R. 29.
[7] *Lahey v Pirelli Tyres Ltd* [2007] EWCA Civ 91; [2007] 1 W.L.R. 998.
[8] *Walker Residential Ltd v Davis* [2005] EWHC 3483 (Ch).
[9] *Webb v Liverpool Women's NHS Foundation Trust* [2015] EWHC 449 (QB); [2015] 3 Costs L.O. 367.

Costs on acceptance after the relevant period

What might be regarded as the cast-iron protection for the claimant on costs, where an offer to settle the whole claim is accepted within the relevant period, does not apply when such an offer is accepted after the end of the relevant period. Once the relevant period has expired that does not afford an unfettered discretion on costs as the court must still have careful regard to the terms of Pt 36.

Part 36.13(4)(b) deals specifically with acceptance of an offer to settle the whole after expiry of the relevant period. Whilst that rule provides, unless agreement is reached, that liability for costs be determined by the court, Pt 36.13(5) goes on to provide what is sometimes described as a default position, namely that the claimant be awarded costs up to the date on which the relevant period expired and the offeree do pay the offeror's costs thereafter to the date of acceptance.

The court has a discretion to depart from the default position but Pt 36.13(5) itself confirms that discretion is only to be exercised where such order would be "unjust". In deciding that issue Pt 36.13(6) requires the court to have regard to "all the circumstances of the case" and, specifically, those matters listed in Pt 36.17(5).

So how will the court approach the question of when it will be "unjust" for the costs consequences provided for by Pt 36 to apply on late acceptance?

In *Webb*, Stanley Burnton LJ specifically approved the comments of Briggs J (as he then was) in *Smith v Trafford Housing Trust*[10] who said that the burden on showing the usual consequences provided for under Pt 36 presents a "formidable obstacle to the obtaining of a different costs order". This point was reinforced in *Briggs v CEF Holdings Ltd*[11] where Gross LJ held:

> "In my judgment, it is very important not to undermine the salutary purpose of Part 36 offers. It is important too that in considering often attractively advanced submissions as to uncertainty the court should not be drawn into microscopic examination of the litigation details. It is true that every case in this area is fact-specific but the important point is that there is a general rule which emerges from Part 36, namely, that if the offer is not accepted within time then the claimant bears the costs of the defendant until such time as the offer is accepted. If, of course, the offeree can show injustice, then a different situation will prevail - but it is up to the offeree to show injustice, not simply that it may have been difficult to form a view as to the outcome of the litigation."

Nevertheless, uncertainties may sometimes be enough to render the usual costs consequences "unjust", a point recognised by the Court of Appeal in *SG v Hewitt*.[12]

The judgment in this case does help to identify when, and when not, a party may be able to argue the default position on costs under Pt 36.13(5) will be "unjust". Very often, as in both *SG* and *Briggs*, it is the offeree, when accepting late, who seeks to mitigate the consequences of the default rule. There may be occasions, and this case is an illustration, when it is the offeror who argues those consequences are not sufficiently harsh on the offeree. In that context the Court of Appeal approved the analysis of Andrew Baker J in *Tiuta Plc v Rawlinson & Hunter*[13] who said:

> "… it seems to me, that in the case of a claimant's acceptance of a defendant's Part 36 offer, where the acceptance is given after the expiry of the relevant period, if nothing emerges from the facts to show that the defendant's assessment of the risks and benefits involved in making the offer he made is in some significant way upset or contradicted or misinformed, it is highly unlikely to be unjust to apply the default rule. The defendant must be taken to have been content to compromise on the basis of paying the claimants' costs on the standard basis to the end of the relevant period by reference to

[10] *Smith v Trafford Housing Trust* [2012] EWHC 3320 (Ch); (2012) 156(46) S.J.L.B. 31.
[11] *Briggs v CEF Holdings Ltd* [2017] EWCA Civ 2363; [2018] 1 Costs L.O. 23.
[12] *SG (A Child) v Hewitt* [2012] EWCA Civ 1053; [2013] 1 All E.R. 1118.
[13] *Tiuta Plc v Rawlinson & Hunter* [2016] EWHC 3480 (QB).

his assessment of matters as they stood when the offer was made. If nothing is shown to the court clearly to upset or undermine that assessment, there will almost always be nothing unjust about holding the defendant to it."

Giving judgment in this case Bean LJ observed:

"I agree entirely with what Andrew Baker J said in *Tiuta*. In particular, he was right to emphasise the difference between:

a) a case where the facts known to the defendant's advisers at the time of the Part 36 offer do not change significantly during the period before the delayed acceptance; and

b) a case where the defendant's advisers' assessment at the time of making the Part 36 offer of the true value of the case, based on the facts then known to them, is upset or undermined by subsequent events or subsequently discovered facts.

In the first type of case it is highly unlikely to be unjust to apply the default costs rule."

It is important to note that dishonesty, of itself, will not automatically render the usual cost consequences under Pt 36 "unjust". Applying the approach identified in *Tiuta* much may depend upon whether it is established there was dishonesty prior to the offer.

In *Purser v Hibbs*,[14] the defendant had made a Pt 36 offer in July 2013 which was accepted in November 2014 by the claimant, after disclosure of surveillance evidence obtained earlier in 2014. Whilst accepting the claimant had been deliberately malingering, by 2014 the judge concluded the defendant could not, on a balance of probabilities, show that such deceit extended back materially into the period prior to the Pt 36 having been made and, on this basis, it would not be unjust for the normal order under Pt 36.10(5) to apply.

Similarly where a defendant chooses to make use of the Pt 36 machinery, or even chooses to keep an offer "on the table" knowing of developments, the defendant is seeking the potential benefits of Pt 36 so must be taken to have accepted the potential burden.

Even when the normal consequences of Pt 36 would be "unjust" it is important to remember that this discretion applies only to the incidence of costs and is unlikely to vitiate the acceptance itself, given the concept that Pt 36 offers will remain "on the table" until changed or withdrawn.

The judgment in this case reiterates that, although without the security where an offer is accepted within the relevant period, the claimant will usually be protected so far as costs are concerned, even on late acceptance, at least up to the end of the relevant period. In addition to the ruling in *Purser*, exactly the same conclusion was reached in *Jopling v Leavesley*[15] and *Dutton v Minards*.[16]

Ultimately, however, each case will depend on "all the circumstances" of that particular case, given the terms of Pt 36.17(5). Furthermore, it is important to have regard to the specific factors identified in that rule though frequently, as the line of cases culminating in this decision indicate, the most important factor is often the information, or indeed lack of information, available to the parties at the time when the Pt 36 offer was made.

That is not to say, even when the default costs rule applies, a late accepting party will not face any penalty in costs but, rather than departing from the default position, this is more likely to be reflected in the basis of assessment.

[14] *Purser v Hibbs* [2015] EWHC 1792 (QB).
[15] *Jopling v Leavesley* [2013] EWCA Civ 1605; [2014] W.T.L.R. 807.
[16] *Dutton v Minards* [2015] EWCA Civ 984; [2015] 6 Costs L.R. 1047.

Assessment on the standard or indemnity basis?

If the offeree behaves unreasonably in accepting an offer at a very late stage, the fair solution is not to routinely depart from the consequences provided for under Pt 36 but to make an order that such costs as are payable by the offeree on late acceptance, be assessed on the indemnity, rather than the standard, basis.

Part 36 leaves open the basis for assessment of such costs and hence the court can apply Pt 44 to do justice as a series of cases dealing with late acceptance have emphasised including: *ABC v Barts Health NHS Trust*,[17] *Jordan v MGN Ltd*,[18] *Optical Express Ltd v Associated Newspapers Ltd*,[19] *Lokhova v Longmuir*,[20] *Hislop v Perde*,[21] and *Holmes v West London Mental Health NHS Trust*.[22]

Assessment of costs on the indemnity basis, following late acceptance of a Pt 36 offer, may be of particular significance to claims subject to fixed costs under s.IIIA Pt 45 following the Court of Appeal ruling in *Hislop v Perde*.[23]

However, before the court can order costs be assessed on the indemnity basis under Pt 44 it will be necessary to identify conduct on the part of the paying party which is "out of the norm": *Whaleys (Bradford) Ltd v Bennett*.[24]

Offers outside Pt 36

All of this emphasises the need for the offeror to think carefully about the cost consequences of Pt 36 when deciding whether the potential benefits of making an offer under the rule outweigh the potential disadvantages.

The Supreme Court confirmed in *Summers v Fairclough Homes Ltd*[25] a non-Pt 36 can, and perhaps should, be made where the offeror wishes to propose terms as to costs that depart from the provisions found in Pt 36.

Here the Court of Appeal noted the defendant had chosen to deploy the machinery of Pt 36 and that this was a point the trial judge had failed to properly grapple with in making the order he did as to costs.

Where, however, an offer is not made in accordance with Pt 36 such an offer will not necessarily carry the same costs consequences and, rather, the court will have to apply the more general discretion under Pt 44, a point emphasised in a number of cases.[26]

Accordingly, when choosing not to make use of the procedure set out in Pt 36 for making offers the offeror does need to be mindful of the potential sacrifice in terms of costs consequences. The ability to make an offer outside the terms of Pt 36, which has specific provision as to costs, may be of relevance to the question whether an express provision for assessed costs, when terms of settlement are reached in a case otherwise subject to fixed costs, will exclude fixed costs, a point that appears to have been accepted in *Solomon v Cromwell Group Plc*[27] and *Broadhurst v Tan*.[28]

[17] *ABC v Barts Health NHS Trust* [2016] EWHC 500 (QB); [2016] 2 Costs L.R. 271.
[18] *Jordan v MGN Ltd* [2017] EWHC 1937 (Ch); [2017] 4 Costs L.R. 687.
[19] *Optical Express Ltd v Associated Newspapers Ltd* [2017] EWHC 2707 (QB); [2017] 6 Costs L.O. 803.
[20] *Lokhova v Longmuir* [2017] EWHC 3152 (QB); [2017] 6 Costs L.R. 1189.
[21] *Hislop v Perde* [2018] EWCA Civ 1726.
[22] *Holmes v West London Mental Health NHS Trust*, unreported, 29 July 2018 QBD.
[23] *Hislop v Perde* [2018] EWCA Civ 1726.
[24] *Whaleys (Bradford) Ltd v Bennett* [2017 EWCA Civ 2143; [2017] 6 Costs L.R. 1241.
[25] *Summers v Fairclough Homes Ltd* [2012] UKSC 26; [2012] 1 W.L.R. 2004.
[26] Including *Coward v Phaestos Ltd* [2014] EWCA Civ 1256; [2015] C.P. Rep. 2, *Saigol v Thorney Ltd* [2014] EWCA Civ 556; [2014] 4 Costs L.O. 592, *Sugar Hut Group Ltd v AJ Insurance Service* [2016] EWCA Civ 46; [2016] C.P. Rep. 19 and *Burrell v Clifford* [2016] EWHC 294 (Ch); [2017] E.M.L.R. 2.
[27] *Solomon v Cromwell Group Plc* [2011] EWCA Civ 1584; [2012] 1 W.L.R. 1048.
[28] *Broadhurst v Tan* [2016] EWCA Civ 94; [2016] 1 W.L.R. 1928.

Practice points

The judgment in this case illustrates how the terms of Pt 36 are intended to strike the right balance between certainty, for all concerned, of costs consequences where offers are made under the rule but the need, occasionally, to temper those provisions so as to do justice in the individual case. A number of practice points can usefully be drawn from the judgment.

- Parties should always appreciate the consequences of a Pt 36 offer before making such an offer.
- The significance of Pt 36 offers remaining "on the table" should make both offeror and offeree keep such offers under careful review throughout the life of the case.
- Claimants can draw comfort from the security as to costs offered under Pt 36, even on late acceptance. Both need to be mindful of the circumstances when the court may depart from the default rule on late acceptance, whilst both parties need to be aware of the court's power to direct costs after late acceptance be assessed on the indemnity basis if there is conduct, on the part of the paying party, which can be characterised as "out of the norm".

John McQuater

McDermott v Inhealth Ltd

(QBD; Lavender J; 19 July 2018; [2018] EWHC 1835 (QB))

Civil procedure—personal injury—boxing—brain damage—Bullock *orders*—Sanderson *orders—costs orders—time*

Bullock orders; Co-defendants; Costs; Personal injury claims; Sanderson orders

The claimant Darren McDermott was an accomplished professional boxer. Unbeknown to him, he had an aneurysm in his brain. If this had been known, his annual licence to box would not have been renewed, for his own safety. He was required by the British Boxing Board of Control to undergo annual brain imaging as a condition of the renewal of his licence. He did this in March 2010.

Darren McDermott continued with his boxing career. In August 2010, he received a blow to the head whilst sparring. This caused the aneurysm to bleed, resulting in brain damage and significant cognitive deficits. He claimed that, following the routine brain scan conducted in 2010 one or other of the defendants should have identified that he had an aneurism and should have told him.

The imaging was arranged by the second defendant InHealth Ltd, which then operated the London Imaging Centre. The imaging was carried out by the third defendant University Hospitals Birmingham NHS Foundation Trust. The resulting scan images were to be sent to InHealth and provided by them to the first defendant Ivan Moseley, a consultant neuroradiologist, who was to review them.

This process took place pursuant to a protocol, which was devised by InHealth Ltd. Dr Chandrashekar Hirjibhai Thakkar was their clinical lead for neuroradiology. He was responsible for ensuring that the protocol was appropriate. The protocol did not require what is known is an axial gradient echo or "GE" scan. That is the type of scan which would have revealed the existence of Darren McDermott's aneurysm.

Nevertheless, the trust did conduct a GE scan. The GE scan images showed the aneurysm, but InHealth did not report the existence of the aneurysm. There was an unresolved issue whether this was because the

Trust did not send the GE scan images to InHealth, InHealth did not provide the GE scan images to Ivan Moseley or Ivan Moseley did not identify the aneurysm from the GE scan images.

Darren McDermott brought an action for damages against all three defendants, pleading that Inhealth had been negligent in designing its protocol (the protocol claim), and that all three defendants had been negligent in their handling of the scan images (the scans claim). In April 2017, over two years after service of the particulars of claim, Inhealth admitted liability. At that stage, the claimant discontinued his claims against the consultant and the trust. The amount of his damages has now been agreed.

As to costs, the district judge made a time-limited *Bullock* order. He ordered the claimant to pay the consultant's costs, and he ordered Inhealth to pay the costs that the claimant was liable to pay to the consultant together with the claimant's non-generic costs against the consultant and the Trust, but only in respect of the period after 1 December 2016. He imposed the time restriction on the basis that the case was not a classic *Bullock* case because the protocol claim, on which the boxer had succeeded, was a freestanding claim and 1 December was the date by which Inhealth should have admitted liability for it.

The claimant appealed and submitted that the order should not have been made subject to any time restriction.

The judge held that there are four considerations were relevant to the making of a *Bullock* order:

- The court had to consider the reasonableness of the claimant's conduct in pursuing more than one defendant. Here it was reasonable for the boxer to have sued all three defendants, and it was reasonable for him to have discontinued the scans claim once Inhealth had admitted liability on the protocol claim.
- While it was not a necessary condition for a *Bullock* order that the defendants should be blaming one another, it was a relevant consideration. Inhealth had blamed the Trust and the consultant who had, in turn, relied on Inhealth's protocol to excuse them from liability.
- While a pre-trial admission of liability by one defendant would not automatically preclude the making of a *Bullock* order, the court had to consider whether the claims against the different defendants were alternatives to one another.
- The court had to consider whether the claims were independent of each other.[1]

The district judge treated the protocol claim as an independent cause of action in the *Mulready* sense and, in doing so, he erred. Inhealth was a defendant to both the protocol claim and the scans claim, being responsible for both devising the protocol and arranging the scans. Both claims concerned the allegation that one or other of the defendants was responsible for the fact that the aneurysm had not been identified, and the consultant and the Trust had relied on the protocol in their defence to the scans claim.

The judge concluded that it was appropriate that Inhealth should pay all the costs that the claimant was liable to pay to the consultant, and all of his non-generic costs against the consultant and the Trust without limitation. The claimant had acted reasonably in suing three defendants who were blaming one another, and it would not be unjust to order Inhealth to bear the costs that he had reasonably incurred in consequence of its negligence. The appeal was allowed.

Comment

Where proceedings are brought against two or more defendants, and the claimant is successful, but not against all of them, *Bullock* and *Sanderson* orders are a useful way of seeking to ensure that the claimant is not penalised in costs if it was reasonable for him to have joined all of the defendants. It will be recalled that a *Bullock* order[2] is one where the court orders the claimant to pay the successful defendants' costs

[1] *Mulready v JH & W Bell Ltd (No.1)* [1953] 2 Q.B. 117; [1953] 3 W.L.R. 100 followed.
[2] *Bullock v London General Omnibus Co* [1907] 1 K.B. 264.

and allows him to add them to his own costs and recover them from the losing defendant. By contrast a *Sanderson* order[3] requires the losing defendant to pay the costs of the successful defendants directly (the choice between a *Bullock* or *Sanderson* usually being determined by the potential solvency of the unsuccessful defendant).

Such orders are clearly possible under the wide discretion provided by CPR r.44.2(1)(a) subject to the overriding objective, and are based on long standing principles of fairness, although the editors of the *White Book*[4] like to remind litigators that there is no rule of law compelling the court to make an order of either variety. There is a wide selection of factors that may be put in the balance when weighing the merits of *Bullock* or *Sanderson* orders as can be seen from the modern case law such as *Irvine v Commissioner of Police for the Metropolis*,[5] *Moon v Garrett*[6] and *Dixon v Blindley Heath Investments Ltd*.[7]

In a recent clinical negligence action[8] in which a *Bullock* order was made at the conclusion of the trial, Nicol J rejected a submission (based on first instance obiter dicta from a 2007 authority[9]) that *Bullock* orders were appropriate only in cases where the claimant *does not know* which party is at fault. That may be a relevant factor, but it is not decisive. The courts have repeatedly emphasised that there are no hard and fast rules governing how the discretion should be exercised, but the dominant issue remains the reasonableness of joining the defendants in the first place.

When such orders are made at the end of a trial, the court is in a good position to determine the reasonableness of the claimant's actions and the culpability of the respective defendants. It can also consider specific issue costs orders where the claimant has only succeeded in part against the unsuccessful defendant to whom it would be unfair to impose a burden of paying 100% of the successful defendants' costs. In the present case, however, the costs orders had to be considered in the context of one defendant making an admission of liability on one aspect of the claims, whilst the claims against the other defendants were then discontinued.

In such circumstances, the court had a tricky task in ascertaining the relative culpability of each defendant and the reasonableness of the claimant's actions in joining them all. It was important that the fact the trust and the consultant might yet have been liable to the claimant (had there been a trial) was not a bar to making a *Bullock* order. The result might be seen as a disincentive for one of multiple defendants to make an admission before the issues of liability are determined, but such issues can be resolved through separate contribution proceedings if necessary. With the advent of QOCS, *Bullock* orders may lose some of their importance, and given the propensity of PI cases to settle at JSMs and for claimants to limit the number of defendants wherever possible for costs and tactical reasons, they will probably remain a relatively rare phenomenon.

Finally, this case goes to show the lengths claimants have to go to in order to recover compensation when a number of private institutions or individuals are involved in medical services. Review of the law of vicarious liability is long overdue, particularly involving treatment in private hospitals where claimants have an invidious task joining all relevant medical practitioners, sometimes in situations where they are not properly insured. In a country where, if anything, private medical treatment is on the increase, a simple route to recovery for injured patients should be secured.

[3] *Sanderson v Blyth Theatre Co* [1903] 2 K.B. 533 CA.
[4] CPR 44.4.28.
[5] *Irvine v Commissioner of Police for the Metropolis* [2005] EWCA Civ 129; [2005] 3 Costs L.R. 380 CA.
[6] *Moon v Garrett* [2006] EWCA Civ 1121; [2006] C.P. Rep. 46 CA.
[7] *Dixon v Blindley Heath Investments Ltd* [2016] EWCA Civ 548; [2016] 4 Costs L.O. 627.
[8] *Jabang v Wadham* [2017] EWHC 1993 (QB); [2017] 4 Costs L.R. 807.
[9] *Whitehead v Searle* [2007] EWHC 2046 (QB).

Practice points

- Claimants should do what they can to encourage a defendant to expressly blame other tortfeasors before joining the latter in proceedings. This gives the best costs protection should the claim fail against those tortfeasors. By contrast, those acting for defendants will want to avoid blaming others wherever possible.
- In addition it is sensible to notify defendants beforehand that others will be joined to the proceedings if liability is not admitted, and expressly forewarning them that *Bullock* or *Sanderson* orders will be sought.
- Whether multiple defendants are joined or not, abandoning unmeritorious parts of a claim should be considered as soon as possible to mitigate against issue-based cost orders limiting the application of *Bullock* orders.
- Part 36 or Calderbank offers regarding costs orders should be made wherever possible if costs order cannot be agreed without a hearing.

Nathan Tavares QC

Calderdale and Huddersfield NHS Foundation Trust v Atwal

(QBD; Spencer J; 1 June 2018; unreported)

Personal injury—clinical negligence—fraudulent claims—civil procedure—administration of justice—contempt of court—costs orders—committal for contempt—mitigation—sentence length

LT Clinical negligence; Committal for contempt; Contempt of court; Costs; Fraudulent claims; Investigations; Personal injury claims; Social media

The defendant pursued a claim for damages for injuries allegedly suffered in 2008, as a result of negligent treatment at one of the Trust's hospitals. The injuries were fractures of two fingers and a laceration of the lower lip. Liability was always admitted. As soon as the claim was intimated in 2011, two years before proceedings were issued, the Trust made a Pt 36 offer of £30,000. The claim as pleaded in the schedule of loss and damage in November 2014 was for a total of £837,109, including very substantial claims for future loss of earnings and future care, based on the proposition that the defendant was unable to work and was grossly incapacitated.

The solicitors acting for the Trust were suspicious. His claimed disabilities were inconsistent with entries in the contemporaneous medical records. In 2015, they commissioned covert video surveillance of the defendant and investigated his social media postings, which gave the lie to much of what he was asserting. The Trust's defence was amended to plead fraudulent exaggeration and to seek to strike out the whole of the special damages claim as an abuse of process.

On 16 March 2016, two months before the assessment of damages hearing was to take place, the defendant's solicitors notified the Trust that he would now accept the Pt 36 offer of £30,000 made nearly five years earlier. This brought the claim to an end.

There was a consent order by which the defendant was allowed his costs up to 5 January 2012 but had to pay the Trust's costs from that date onwards. The defendant's costs up to 5 January 2012 were agreed at £25,000. The Trust's costs from that date onwards were agreed at £60,000. This meant that the whole of the defendant's £30,000 compensation was swallowed up in paying the Trust's costs. He had had a

genuine claim for damages in respect of negligent hospital treatment for injuries sustained as a victim of assault in 2008, leaving him with some modest disability for finger injuries for a short time. After eight years of litigation he came out of it with nothing, and owing £5,000 to the Trust.

In April 2018, the court found 14 allegations of contempt proved against the defendant. The trust applied to commit the defendant to prison following the contempt of court findings.

Spencer J held that the defendant had deliberately and grossly exaggerated the extent of any continuing disability attributable to his negligent hospital treatment. He consistently maintained that he was unable to drive, lift, pursue his career as a DJ, that his earning capacity was seriously reduced, and that he required a great deal of help in managing day-to-day tasks. The defendant finally accepted that it was "misleading and inaccurate" to say that driving was difficult, to say that he struggled to lift heavy items and that he required 3.75 hours of care and assistance daily, but the admissions had been made very late. The seriousness of the case was aggravated by the fact it was an attempted fraud on the National Health Service. It was the first case of contempt where proceedings had been brought by an NHS Foundation Trust.

The defendant had not persisted in his dishonesty once it was uncovered. It was not a claim which was dishonest from the start: the defendant had had a genuine cause of action, and had suffered a degree of genuine disability. Although it was more than two years since his dishonesty was uncovered, that provided little mitigation because the delay was largely the result of the defendant's failure to engage with the proceedings. The court did not accept that he had been unaware of them. Further, the mere fact of delay would not normally save a defendant from immediate custody, especially where proceedings had been deliberately strung out.[1]

The judge made plain that the public had to clearly understand that false claims undermined the administration of justice in a number of serious ways: insurers and other institutions had to spend a great deal of time and money identifying such claims; they damaged the system of adversarial justice which depended on openness, transparency and honesty, and they took up a great deal of court time and resources.

Those who made false claims should expect to go to prison. There could be no credit for pleading guilty, although the court gave some modest credit for the very belated acknowledgement of dishonesty. There was no particular mitigation in the defendant's personal circumstances. A sentence of immediate custody was necessary to mark the serious contempt and to deter others. The application was granted and the court imposed concurrent sentences of three months' imprisonment for each contempt.

Comment

The committal of Sandip Singh Atwal played itself out between 2016 and 2018 and culminated in two hearings before the Hon. Mr Justice Spencer in April and June 2018. Mr Atwal did not attend the first hearing on 12 April 2018 despite the strenuous efforts of the Trust's solicitors to serve him and alert him to the proceedings. The judge commented that Mr Atwal had "conspicuously failed and refused to engage in the proceedings ever since his dishonesty was uncovered" but the judge was satisfied that it was appropriate to proceed with that hearing in his absence. He found 14 of the 22 allegations of contempt proved and reserved judgment. The subsequent hearing (at which Mr Atwal appeared) on 1 June dealt with the issue of costs and penalty.

As the judge noted, contempt proceedings are quasi-criminal. In order to proceed in the absence of the defendant Atwal, the judge paid regard to the principles which a judge in the Crown Court would apply when deciding whether to proceed with a trail in the defendant's absence. These principles are summarised in *R. v Jones*,[2] along with a checklist which was suggested by Cobb J in *Sanchez v Oboz*.[3]

[1] *Aviva Insurance Ltd v Kovacic* [2017] EWHC 423 (QB) considered.
[2] *R. v Jones (Anthony William)* [2002] UKHL 5; [2003] 1 A.C. 1.
[3] *Sanchez v Oboz* [2015] EWHC 235 (Fam); [2016] 1 F.L.R. 897.

The Trust had applied to use an alternative method of service at the defendant's usual or last known residence (his parents' home) and attempted service of various documents on at least six occasions, had received calls from the defendant and spoken to the defendant's parents after some of these attempts. The judge considered these efforts in the light of the *Jones* principles and *Sanchez* checklists and was satisfied that the defendant was aware of the proceedings and the hearing date and that he could proceed.

The 12 April judgment set out in detail the considerable amount of work necessary to both serve Atwal and prove the allegations of contempt. The Trust had embarked on surveillance of Atwal and a survey of his social media activities. This was supplemented by the evidence from the various medical and nursing experts to whom Atwal had made the false statements, medical records running to several hundred pages confirming what was said, private investigator reports and so on.

This was reflected in the costs claimed by the Trust. The work involved is neatly summarised at [11] of the 1 June judgment:

> "11. I bear in mind that the contempt proceedings arose from proceedings in which there was a fraudulent attempt to obtain damages for personal injuries of around £837,000 in a claim worth no more than £30,000. The litigation was complex in the sense that it required meticulous analysis and proof of the truth or falsity of statements made by the defendant to the doctors and other professionals who examined him, and made in his pleadings and his witness statement. Very considerable additional work was generated by the defendant's conduct in failing to engage at all with the proceedings.
>
> Finally, there is the wider factor that these are proceedings involving the liberty of the subject properly brought in the public interest by an NHS Trust, whose conduct of the proceedings had to be, and has been, measured, careful and thorough."

It was unsurprising, therefore, that the Trusts costs for the work culminating in the application to commit and subsequent hearings amounted to £82,000.

The judge commented:

> "12. I am satisfied that the costs as a whole, and individually, are not disproportionate. This was a heavy case in the High Court, which involved two years' hard work by solicitors' and counsel, with two substantive hearings before High Court Judges as well as several interlocutory hearings. Work on the prospective application for committal began as early as April 2016, even before the consent order which brought the original proceedings to an end …"

Atwal's counsel submitted that this was disproportionately high, but the judge did not agree. He commented that counsel:

> "12. … criticises, in particular the amount of time spent on letters out and emails (108 hours) and on perusal and preparation (280 hours). In my judgment this ignores the reality that a very great deal of extra work was generated by the defendant's failure to engage with these proceedings, requiring repeated attempts to serve him with the court process and prove service. More important still it also ignores the fact that in order to prove the falsity of the statements made by the defendant, it was necessary to contact all the doctors and other experts, as well as several of the factual witnesses, in order to double check and prove the accuracy of their reporting of the defendant's offending statements. These were, after all, very serious allegations with the liberty of the subject at stake …"

It is useful to remind ourselves that this work has a counterpoint: the work necessary to rebut an allegation of fundamental dishonesty in those cases where it is alleged, but can be rebuffed.

Where allegations of fraud made in civil personal injury claims of whatever value can be defended by the accused claimant, then the claimant's defence to the allegations must be properly made out. This requires a substantial amount of work, particularly because the risks of a finding of fraud are likely to lead to an application to commit and imprisonment, as occurred in this case. These were the arguments successfully made in *Qader v Esure Services Ltd*[4] where the claimant faced being confined to fixed recoverable costs while attempting to rebut allegations of fraud.

Penalty

A civil finding of fraud or fundamental dishonesty can lead to criminal consequences as occurred here. In *Summers v Fairclough Homes Ltd*,[5] Summers valued his claim at more than £800,000, but surveillance revealed him to have grossly exaggerated the effect of his injuries. The court found that while he had undoubtedly suffered serious injuries, he had also fraudulently misstated the extent of his claim. Lord Clarke, quoting Moses LJ in *South Wales Fire and Rescue Service v Smith*[6] said:

> "Those who make such false claims if caught should expect to go to prison. There is no other way to underline the gravity of the conduct. There is no other way to deter those who may be tempted to make such claims, and there is no other way to improve the administration of justice."

Once the findings of contempt had been proved, it was inevitable that Atwal would be imprisoned. There was substantial evidence to prove that he had deliberately misled the various experts who had examined or interviewed him. He had also signed false statements of truth on his witness statements and schedule of loss and damage. In relation to these, the falsehoods, if persisted in, would have interfered with the administration of justice and caused him to be awarded more damages than to which he was entitled. Atwal knew the statements and representations were false and knew the effect they would have on the administration of justice and his award.

Reading both decisions one wonders why Atwal's civil claim legal advisors failed to uncover his activities before the NHS did so, (particularly his claims that he was unable to work as a DJ), because the evidence to counter this was publicly available on YouTube and other social media platforms. It is also notable that other than a "bullish" letter from his solicitors to the effect that he denied any fraud and would belatedly accept the Trust's Pt 36 offer, his solicitors then offered no counter evidence and played no further role in the claim. It is not only the civil claim's defendant who should undertake to uncover dishonest behaviour: claimant representatives should actively ensure that their clients understand the potential consequences for making dishonest statements.

But should they go further? Some claimant lawyers routinely warn their clients that defendants will monitor their social media activity and that they should be careful not to exaggerate claims which can be exposed by their Facebook pages, for example. While this behaviour has tended to be confined to RTA, public liability and employers' liability insurers, the NHS can now be included in the group of those interested in what the claimant is up to: with budgets tight and a move towards cutting the cost of clinical negligence to the NHS, this will become commonplace.

Should claimant lawyers also check up on their client? An early indication that something is not right with the claim ought to trigger a warning that further steps should be taken to check that the claims continue to stand up to scrutiny. Not only could this preserve the claimant's liberty, but it could also save the substantial costs being run up by the NHS: costs which will ultimately fall upon the dishonest claimant to pay.

[4] *Qader v Esure Services Ltd* [2016] EWCA Civ 1109; [2017] 1 W.L.R. 1924.
[5] *Summers v Fairclough Homes Ltd* [2012] UKSC 26; [2012] 1 W.L.R. 2004.
[6] *South Wales Fire and Rescue Service v Smith* [2011] EWHC 1749 (Admin).

Finally, a comment on representation. At the first hearing Mr Atwal was unrepresented and did not attend. It was at this hearing that the 14 allegations of contempt were proved. Mr Atwal would have found it almost impossible to rebut the evidence put before the court, but that is beside the point. He had no legal representation at a hearing which would affect his liberty.

This is not unusual. Time and time again I see reports where law firms appear to abandon their clients once the defendant alleges fraud in cases such as this. Should they be under a duty to ensure their former client is at least directed to a lawyer who can assist/apply for legal aid so that they have representation at the contempt and committal hearings? It is usual to read reports where the jailed client was unrepresented. See *Circle Anglia Ltd v James Lee Mitchell*[7] (22 allegations of contempt), *UK Insurance Ltd v Stuart John Gentry*,[8] *Aviva Insurance Ltd v Aleksandar Kovacic*[9] (12 counts of contempt), to name but a few of the most recent examples. When coming off the record in the civil claim, solicitors should give pause for thought about the penalty their client may face and point them in the direction of suitable legal representation.

Practice points

- In order to successfully apply for committal, the applicant should bear in mind the two forms of contempt and ensure the evidence collected supports the allegations in detail.
- Failure by the contemptor to attend a hearing for committal is not insurmountable provided that substantial steps have been taken to bring the proceedings to his or her attention in accordance with the factors summarised in *R. v Jones* and the checklist in *Sanchez v Oboz*.
- The NHS is now likely to pursue other applications for contempt: this decision shows that it is prepared to put considerable effort into uncovering dishonest claims.
- Claimant lawyers must warn their clients of the potential consequences of making dishonest statements.
- Claimant lawyers should also consider the likely penalties if contempt applications are likely and advise clients to seek urgent legal advice and/or apply for legal aid.
- Where there is a possibility or suspicion of exaggeration or dishonesty, claimant lawyers should consider checking their client's activities on social media as quickly as possible to ensure that the claims being made continue to stand up to scrutiny.

Helen Blundell

[7] *Circle Anglia Ltd v James Lee Mitchell*, unreported, 6 June 2018 QBD per Cheema-Grubb J.
[8] *UK Insurance Ltd v Stuart John Gentry* [2018] EWHC 37 (QB).
[9] *Aviva Insurance Ltd v Aleksandar Kovacic* [2017] EWHC 2772 (QB).

Commissioner of Police of the Metropolis v Brown

Chief Constable of Greater Manchester v Brown

(QBD (Admin); Whipple J; 31 July 2018; [2018] EWHC 2046 (Admin))

Personal injury claims—civil procedure—access to justice—costs—discretion—multiple claims—qualified one-way costs shifting—CPR r.44.13, r.44.16(2)(b)

Costs; Data protection; Discretion; Multiple claims; Personal injury claims; Police; Qualified one-way costs shifting

Ms Andrea Brown was a serving officer in the Met until November 2013. In December 2011, while employed but on sick leave, she had travelled to Barbados with her daughter without notifying her line manager of her whereabouts. This was a breach of police service procedures as to absence management.

As part or preparatory work for possible later disciplinary proceedings against her, the Met submitted a request for information to the National Border Targeting Centre ("NBTC") the police arm of which is managed by the Greater Manchester Police ("GMP"). The GMP responded by email giving the Met information about Ms Brown's trip to and from Barbados, attaching a copy of her passport and a print-out containing other information about her recent travel arrangements and passport details.

The Met then approached Virgin Atlantic, the relevant carrier. It asked for information using a "Personal Data Request Form". The airline responded by email with details of the flight, passenger names (Ms Brown travelled with her daughter) and other details; a copy of the booking form was attached. That information was used against Ms Brown in the disciplinary process which culminated in a finding that she had a case to answer but that a sufficient sanction would be "informal management action".

Ms Brown then sued the Police. She claimed that they had misused facilities at their disposal for gathering data and information, which facilities existed for the purpose of detecting and preventing crime, and did not permit the requests or disclosures in this case.

Ms Brown pursued four causes of action: (1) breaches of the Data Protection Act 1998 ("DPA"); (2) breaches of the Human Rights Act 1998 ("HRA"); (3) misfeasance in public office; and (4) the tort of misuse of private information. The Police conceded (1) and (2). Ms Brown lost on (3). Ms Brown won on (4).

As part of her case on (1), (2), (3) and (4), Ms Brown advanced a claim that she had sustained personal injury, in the form of depression but the judge rejected that claim. He held that she had not suffered personal injury in the form of any recognised psychiatric injury, and that in any event, the breaches of the DPA did not cause or materially contribute to any such injury as she might have been able to establish. The judge did accept that she had suffered distress, sufficient to warrant an award of damages under the DPA s.13(2).

In the Judgment on Remedies, HH Judge Luba QC rejected her claim for aggravated and exemplary damages and made a single global award of general (compensatory) damages to reflect the three causes of action on which she had succeeded. He awarded her £9,000. He apportioned the aggregate amount of the orders for damages and interest made in the Respondent's favour two-thirds/one-third between the Met and GMP respectively.

The award was less than the Pt 36 Offer made by the Met on 26 February 2016, and equalled the Pt 36 offer made by the GMP on 2 May 2016. Against this background the issue of costs came before the judge

who decided that QOCS applied, automatically, to protect Ms Brown against any adverse costs order which might be made against her in the Police's favour. The judge's reason for doing so, in summary, was that her claim included a claim for damages for personal injury which related to all the various parts of her claim, so that he had no discretion to disapply QOCS protection.

The Police appealed and argued that the judge erred in law in construing CPR Pt 44 so as to confer "automatic" QOCS protection on Ms Brown. They also argued that her claim was for much more beyond damages for personal injury and that the mixed nature of Ms Brown's claim meant that QOCS protection was not automatic, but was subject to the judge's discretion.

Whipple J confirmed that the exception in CPR r.44.16(2)(b)[1] to the protection of the qualified one-way costs shifting regime applied to proceedings in which the claimant had claimed damages for something else, in addition to a claim for personal injuries. In such "mixed" cases the judge had discretion to determine whether it would be just to permit a defendant to enforce a costs order against the claimant.

However, because Ms Brown advanced claims within the proceedings other than a claim for damages for personal injury, it was held that her case did come within the exception. The consequence was that the judge did have a discretion to permit enforcement of the defendant's costs order, to the extent he considered it just. A further hearing was fixed before the judge at which the judge was to consider whether it was appropriate, in light of this judgment, to exercise his discretion under CPR 44.16(2)(b). The appeal was allowed.

Comment

The behaviour of the defendants, in this case, was rightly made subject to an award of damages by the trial judge, HH Judge Luba QC. It was also right that where the claimant failed to obtain a judgment more advantageous than the offers made by the defendants that a costs order was made. That should happen in these circumstances unless it is unjust to do so.[2]

Once the costs order has been made the next question became whether the defendants could enforce that costs order notwithstanding the general prohibition on enforcement of costs orders against claimants who unsuccessfully bring personal injury claims. This would have to be on the basis that the claim fell into one of the exceptions as the claim included non-personal injury elements.

There are a number of exceptions to qualified one-way costs shifting ("QOCS") that have all been subject to judicial scrutiny. The mixed claim exception is one that requires more careful scrutiny than it had been afforded here at first instance. The principle of the QOCS provisions, as recently referred to by Foskett J in *Siddiqui v University of Oxford*[3] when he confirmed that the approach in *Jeffreys v Commissioner of The Police for the Metropolis*[4] was correct is important as it had as:

> "an important objective to ensure that the QOCS provisions are not abused by simply 'dressing up' a non-personal injuries claim in the clothes of a personal injuries claim to avoid the normal consequences of failure in litigation."

That is an important point. The applicability of QOCS was a policy decision in relation to personal injury claims to preserve access to justice for claimants who under the measures introduced in the Legal Aid and Punishment of Offenders Act 2013 had lost the ability to recover the success fee and after the event premium in successful claims against the losing party.

PROCEDURE

[1] Orders for costs made against the claimant may be enforced up to the full extent of such orders with the permission of the court, and to the extent that it considers just, where (b) a claim is made for the benefit of the claimant other than a claim to which this section applies.

[2] CPR 36.17(3) provides that the "court must, unless it considers it unjust to do so, order that the defendant is entitled to" costs in accordance with the remainder of that provision.

[3] *Siddiqui v University of Oxford* [2018] EWHC 536 (QB); [2018] 4 W.L.R. 62.

[4] *Jeffreys v Commissioner of The Police for the Metropolis* [2017] EWHC 1505 (QB); [2018] 1 W.L.R. 3633; [2017] 4 Costs L.O. 409.

To widen the applicability of QOCS beyond that intent would be wrong and could serve ultimately to dilute the protection afforded to that class of cases. The wording off CPR 44.16(2) is the mechanism that those drafting the rules, implementing the policy, chose to use. Separating out the personal injury elements from the non-personal injury elements in order to do justice in the particular case can be very difficult for a judge.

Jeffreys established a guiding principle, that just because a personal injury element could not be divided from the other elements of the claim did not mean that the QOCS protection could not be removed. Once that starting point has been established, the use of the word "may" in CPR 44.16(2) permits the judge to exercise their discretion as to whether, in the circumstances of the case, some removal of the QOCS protection is possible and justifiable.

Useful guidance comes from Foskett J in *Siddiqui* when he considered the time spent in relation to breach of duty arguments that were relevant to the personal injury elements of the claim and the elements related to pure economic loss which on the face of it were not personal injury related:

> "I cannot see any reason in principle why I should not reflect some part of that time in the order made pursuant to the exception to the QOCS provisions, though plainly I must be careful not to make an order that unfairly deprives him of the legitimate QOCS protection to which, by virtue of the acknowledged personal injury element of the claim, he is entitled."

The appeal court in this case correctly applied that approach and returned the matter back to HH Judge Luba QC to consider the exercise of that discretion on the basis of whether it just to remove any QOCS protection.

Practice points

- The QOCS regime does apply to claims that include other types of loss if there is an element of personal injury involved.
- The mechanism by which the court protects the intent of the QOCS regime is the discretion in CPR 44.16(2).
- That discretion is wide. In the normal course of events, a judge would likely make an order permitting enforcement of a percentage of the order for costs made. That would reflect how much of the claim they found was not for personal injury.
- The discretion is wide enough that they could find that no QOCS protection was to be removed on the basis that the personal injury elements were pervasive and present in all the arguments the courts and parties dealt with.
- Given the clear judgment of Foskett J in *Siddiqui*, it is arguable that the discretion could not be used to remove QOCS protection in its entirety. The purpose of what he describes as legitimate QOCS protection would prevent that. Additionally, as a matter of construction of the rules[5] removal in its entirety under the discretion would not be possible as a decision that there was no personal injury element to the claim would be required to do that.
- Whilst it was not a subject of the appeal, in this case, it would be sensible for practitioners to consider the issue of justice in two ways if acting in similar circumstances: (a) Is it unjust to permit the costs order under Pt 36 to be made, which would involve wider considerations than the QOCS discretion; and (b) what, if any, removal of the QOCS protection does justice require?

Brett Dixon

[5] Which apply QOCS protection to claims for personal injury damages with CPR 44.13(1)(a) providing: "44.13(1) This Section applies to proceedings which include a claim for damages—(a) for personal injuries".

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