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Editorial

In this edition of JPIL we have 10 articles covering a variety of subjects. We are very pleased that Lord Justice Irwin permitted his speech given to the Personal Injury Bar Association to be published in full. Needless to say, this is a very interesting read. Irwin LJ does express concern about some developments within the litigation arena. He wonders whether Law firms owned by outsiders operating in the Conditional Fee Agreement environment may be conducting business in such a way that may compromise the outcomes of claims. He suggests certain actions that may take place in order to try and deal with this possible problem. He also considers that a fault based system is intrinsic to personal injury cases. If this is the position, he argues for greater use of claims for aggravated or exemplary damages, where appropriate.

We also delighted that Professor Richard Lewis has allowed us to publish an article that he has written based on research carried out in order to investigate whether the character of people involved in personal injury claims affects that outcome irrespective of legal rules. The article challenges traditional perspectives of tort where it is often implicit the claims are resolved only in court on the basis of textbook rules on liability and damages.

Duncan Fairgrieve writes about reforming the European Product Liability Directive.[1] The European Commission is obliged to do this under the terms of the directive that requires a five-year review. He observes that there are clearly challenges posed by the advent of new technology and by specific products such as farmer cuticles. He considers that the likely approach of adopting guidance is an appropriate method to adopt to adapt the Directive to these new challenges.

The recent Supreme Court decision in the *Darnley* case is reviewed by Deborah Blythe, the solicitor who represented the claimant.[2] She gives a very informative explanation of the rationale for the decision noting in particular that the Supreme Court rejects the concept of the duty being referable to the status of the employee, and confirms it is owned by the organisation.

Maya Sikand and Laura Profumo consider the changing nature of public authority liability in the context of police actions and duties. They note that recent developments have implications far beyond their immediate context. They further note that greater emphasis is placed upon the importance of the Human Rights Act in order to ensure accountability and transparency for State-specific failings.

In another review of a clinical negligence case, Mark Ashley and Stuart Keyden deal with the decision of the High Court in *Crossman*.[3] It is concerned with causation which in the context of clinical negligence, as the authors point out, is fraught with difficulties. Having carried out a thorough analysis of this case, they conclude that it was incorrectly decided.

Sheryn Omari has written an article relating to the implications of the gig economy and it's bearing on workers' rights. The Court of Appeal has recently decided issues concerning employment in *Aslam v Uber BV*.[4] The decision has significant implications in respect of duty of care owed by and to Uber drivers.

I am also extremely pleased that Patrick Curran has written an article for us regarding the drafting of pleadings in workplace accident cases. Patrick has some time now written and updated books concerning pleadings in personal injury cases. This article concerns the significance of breaches of statutory duty now that they can no longer be relied upon in order to establish liability. He considers this in the context of the recent decision in *Cockerill* and gives excellent guidance for practitioners regarding how such cases should be pleaded.[5]

[1] Directive 85/374 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] OJ L210/29.
[2] *Darnley v Croydon Health Services NHS Trust* [2018] UKSC 50; [2018] 3 W.L.R. 1153.
[3] *Crossman v St George's Healthcare NHS Trust* [2016] EWHC 2878 (QB); [2016] 11 WLUK 697.
[4] *Aslam v Uber BV* [2018] EWCA Civ 2748; [2018] 12 WLUK 365.
[5] *Cockerill v CXK Ltd* [2018] EWHC 1155 (QB); [2018] 5 WLUK 355.

The Journal is always interested in reviewing potential reforms to the Personal Injury Compensation system. Accordingly, it is very welcome that Eoin Quill has written an article concerning the functioning of the Personal Injuries Assessment board in Island. When this was introduced it was considered controversial. The new system was introduced to replace an existing personal injury compensation system similar to those in the UK. Having given a description of the process, he concludes that overall personal injury claims levels in Ireland are not greatly different now from what they were. The new system was introduced to bring down the cost of personal injury claims but it seems that this has only succeeded to a limited extent.

The last article concerns an application for an interim payment to purchase a suitable property. Mark Cawley gives a detailed account of the case in question (*LP v Wye Valley NHS Trust*).[6] This is particularly topical bearing in mind the decisions in *Swift v Carpenter* in which such claims were denied. It is interesting to note that the presiding judge, McKenna J, expressed some doubt as to whether these decisions were correct.[7]

Finally, I should mention that there are significant changes at JPIL. Nigel Tomkins, who has been the case comment editor for some 19 years, has retired. We wish to thank Nigel very much indeed for the hard work and skill that he has shown in preparing this section for many conditions. His diligence has ensured that there are comprehensive comments on all significant personal injury cases that have been decided for many years. It is perhaps a reflection of the enormous work that Nigel has done that he is being replaced by two individuals. They are Brett Dixon and John McQuater. Brett and John were both on the editorial board and very familiar with what is needed for this particular section of the Journal. We wish them good luck with their endeavours. This edition is the first where they have completed the case and comment section.

I should also mention that this will be my last edition as the General Editor. The next edition will be jointly edited by Jeremy Ford and me. Jeremy is a barrister at 9 Gough Square specialising in representing personal injury claimants in high value cases. Jeremy will take over as the General Editor for the third edition of the Journal in 2019.

Colin Ettinger

[6] *LP v Wye Valley NHS Trust* [2018] EWHC 3039 (QB); [2018] 11 WLUK 428.
[7] *Swift v Carpenter* [2018] EWHC 2060 (QB); [2018] 7 WLUK 138.

Can compensation bring satisfaction? What do damages for personal injury represent?[1]

Lord Justice Irwin[*]

Common law; Compensation; Damages; Fault; Personal injury

Thank you for the invitation to give this lecture. It is always a pleasure to sing for one's supper by speaking to a large group of experts, on a topic about which you the audience know as much as I do.

There are two stimuli for this talk. First, it is good, from time to time, to lift our heads above the detail, the practical administration of the law, and ask ourselves in a broader sense what we are about. The second stimulus came as I listened to a section of this lecture given last year by my most distinguished predecessor, Lord Sumption. Those of you who were present may recall that, towards the end of his talk, he suggested that our system of tort damages should in effect be abolished, in favour of a no-fault insurance system, stripping out the cost and trouble of deciding fault, and focussing simply on the assessment of the award. Somewhat wistfully, he immediately went on to say his suggestion would never be put into practice however, because it would cost too much.

As I listened, I found myself disagreeing with the idea, not because of the cost, and not because it would greatly add to the income of the members of this association, litigating causation and quantum for many more clients. Why was I disagreeing? Because it felt wrong, unjust, to abolish the notion of fault from an award of damages. And why is that? What is the reason for the instinctive (or is it learned) link between fault and compensation? What does an award of damages mean to people? How far do damages bring more than simple financial recompense, whether for past or future loss? Have the commercial interests of insurers and lawyers, and risk avoidance by government, reduced the satisfaction derived from damages? I want to reflect on these questions in this talk. I rather fear, we may end with nearly as many questions as we began.

I am going to start, not by looking at damages themselves, but at the system through which personal injury damages are recovered. I wish to take the bird's eye view, perhaps I should say the drone's eye view, quite consciously.

By the late 20th century, the insurance industry had long morphed from its beginnings in bodies providing mutual assurance into major profit-driven commercial enterprises. By the 1990s, there were few mutual bodies surviving. The NHS Litigation Authority, now NHS Resolution, is the only major exception I can think of, which is not a commercial enterprise.

From the 1990s, legal aid for personal injury claims has been progressively restricted or abolished. The drive to do so has emerged from the Treasury, not from the Lord Chancellor's Department or its successors. At the outset in the late 1980s the idea was that conditional fee agreements, an established but very limited mechanism in Scotland, would fill the gap.[2] Other ideas, such as a Contingency Legal Aid Fund based on the Hong Kong model, were pushed aside, as was the fact that the net cost to government of personal injury legal aid, once recovered costs and recouped benefits were accounted for, was £30 million per annum, even then a very minor figure in the departmental budget. The governmental drive for change was unstoppable.

[1] Personal Injury Bar Association, Annual Lecture, 15 November 2018. Originally published at *https://www.judiciary.uk/announcements/speech-by-lord-justice-irwin-personal-injury-bar-association-annual-lecture/* [accessed 18 January 2019].

[*] I am very grateful to Dr Philip Holdsworth for his assistance on Saxon law, and to my judicial assistant Ifsa Mahmood, for assistance in the preparation of this lecture.

[2] Created by the Courts and Legal Services Act 1990 s.8.

During this process, the Treasury dispatched a young, very clever and personable official, to oversee discussions between the DCA as it had become, the Bar Council and the Law Society. His name was Simon Less, which I always liked: less by name, less his objective.

Over the same period at the end of the 20th century and the beginning of the 21st century, union membership fell.[3] In 1989, UK trades union membership was 10.04m. In 2004/2005, it was 7.5m. In 1989, 38.6% of employees were unionised. In 2005, the figure was 28.3% (incidentally, in 2017 it was 22.9%). A big benefit that unions could offer was access to legal services, and no-win, no-fee arrangements reduced their appeal.

Through the years since, conditional fees have been extended and altered, contingency fees legalised and expanded, and legal aid in personal injury claims very largely abolished. You know that better than I.

At the same time, the reforms following on from the Clementi Report of December 2004[4] have transformed the ownership and organisation of many legal practices. The effects of the Legal Services Act 2007 have been swift and transparent in terms of the formal regulatory structures governing the legal profession. However, their effects so far as Alternative Business Structures, and the question of who owns legal practices, are much more opaque.

Sir David Clementi, now Chairman of the BBC, was himself a former Chairman of Prudential Plc. The holdings of a major publicly-listed insurance corporation such as "The Pru" will be clear and transparent, for those who know how to trace them. However, as recent events may suggest, other ownership structures and flows of money in the insurance industry may be markedly less transparent.

Regulatory control of Alternative Business Structures is quite limited. Such enterprises must be licensed, and a range of particulars must be furnished to the relevant regulator, either the Solicitors' Regulation Authority or the Bar Standards Board.[5] The BSB has been notified of 10 ABS entities, the SRA of some hundreds. In neither case does the Register tell the reader who owns the entity.

There is nothing to prevent, for example, a legal practice being owned by a claims handling company (a so-called claims farmer), or the claims handling company (or the indeed legal practice) being owned by an insurer. Nor, as far as I can see, is there any necessity for such ownership to be transparent. These are not ordinary businesses, but companies in control of professional practices, which require rigorous enforcement of professional rules and the avoidance of conflicts of interest. There is much more reason for transparency than in the ordinary commercial sphere. I wonder if there is not a need to make such information publicly available, in a clear and comprehensible form. Should we not see who is profiting from what? As the Americans say: who has skin in the game?

Now what has all this got to do with personal injury damages, the ingredient of fault in the award of damages, and what damages mean to those who are injured? Well, I suggest that the commercialisation of the system—I apologise for the word—may mean that commercial or "producer" interests have become dominant, and that at least to some extent the way personal injury litigation and compensation is managed reflects the interests of the producer more than those injured, or the public at large. In cruder language, that this is often a sausage machine, processing large numbers of claims of small or moderate value in a very risk-averse and costs-responsive way.

One measure of that would be if there are significant numbers of claims brought which would not have been brought in the past, and would not be pursued now, but for the combination of no win, no fee agreements on the one hand, and marketing and advertising by the commercial parties on the other. Another measure of the impact of "producer" interests might be consistent under-settlement of claims, to limit

[3] See *https://assets.publishing.service.gov.uk* [accessed 18 November 2019] Tables 1.1 and 1.2b.
[4] *Report of the Review of the Regulatory Framework for Legal Services in England and Wales* December 2004 at *https://webarchive.nationalarchives.gov.uk* [accessed 18 November 2019].
[5] Legal Services Act 2007 s.87.

exposure on the part of legal practices, and insurers. And what of the recent drive to establish fraud if at all possible, not for its own sake, but so as to avoid qualified one-way costs shifting?

The hackneyed phrase "compensation culture" is not only tired and dull, but misleading. If there is an excess number of not very worthwhile personal injury claims—arising from events which, in a former era, the aggrieved party would have ignored, or treated with stoicism—then that change does not arise from a general spontaneous uprising in greed. The cases arise because people have been subjected to intensive and repeated marketing by claims handlers or law firms. And often the prime benefit for such claims, claims which would not otherwise be brought because not so serious as to demand action, is not to the claimants who receive modest and often standardised awards, but to those who process the claims, both for and against such claimants. We should not forget that, without claims, defendants' insurers would make no profit.

When the figures are teased out, there has been no marked increase in the number of personal injury claims over very recent years: in fact there has been a decrease. The figures for the last eight years are tabulated by the Government's Compensation Recovery Unit.[6] Overall claims were 987,381 in 2010/2011, peaked at 1,048,309 in 2012/2013 and in 2017/2018 were around 19% down at 853,615. This must reflect in part, ever safer roads. 2013 and 2015 represented the two years with the lowest ever reported personal injury accidents.[7]

However, if one goes further back, a different pattern can be discerned. In 1979, according to government statistics, there were 72,751 serious or fatal road accidents in Great Britain. In 2016, the number was 23,420.[8] So, our roads are very much safer now that they were 40 years ago. Yet in 2017/2018, there were 683,329 motor claims. From 2000 to 2017, AXA reported there had been a 100% increase in motor claims.[9] As another example, fatal injuries to workers were 495 in 1980 and 135 in 2016/2017, yet workplace claims increased.

I appreciate of course that statistics may mislead. Fatal accidents may not be a perfect proxy for injuries. Improved medical science keeps people alive who would previously have died. But the broad picture, despite some decline in very recent years, has been more personal injury litigation, against a background of a much safer environment. We will see if recent costs changes alter that.

I have been unable to find reliable research or data on under-settlements. Intuitively, my guess is that they are widespread. The costs risk now being primarily borne by lawyers, insurers and even potentially claims farmers, are a potent force towards under-settlement. Of course, if the case being under-settled is a minor claim which was only stimulated by advertising no-win, no-fee arrangements in the first place, then no great loss to the injured party will arise. But the pressures leading to under-settlement cannot be confined to such cases. Perhaps the real point is that we have no evidence as to the extent of this effect.

Over the same decades there have been a number of moves to make damages awards more consistent, and thus more predictable. It is easy to see the utility of those changes. The down-side may be a sense that here too a sausage-machine is operating, different from the long common law tradition of jury awards, which persisted in England beyond World War II, and still persists in the US.

In fact, standardisation of damages' awards is a very old idea. People think of the maxim "an eye for an eye, a tooth for a tooth" as biblical in origin,[10] but Christ in the Sermon on the Mount was referring to a provision which is traceable to the Code of Hammurabi, King of Babylon from 1792 to 1750 BC.

But how about this.

Legal procedures were crude, lawyers a subset of the priesthood and very thin on the ground, and legal aid non-existent. So King Aethelberht of Kent (who reigned in the early 7th century AD) set the

[6] Compensation Recovery Unit performance data: updated 23 April 2018.
[7] House of Commons Briefing Paper No.06061 18.x.2017. *Motor Car Insurance* p.9.
[8] See *https://www.gov.uk/government/statistical-data-sets/ras10-reported-road-accidents#table-ras10013* [accessed 18 November 2019].
[9] House of Commons Paper No.06061 18.x.2017 p.14.
[10] Matthew 5 v38.

compensation to be paid for each injury.[11] There was a comprehensive range of standard awards. For striking off the little finger, 11 shillings; for a stab to the thigh 1–2 inches deep, 1 shilling; 2–3 inches deep, 2 shillings; 3 inches deep, 3 shillings. Loss of four front teeth was 6 shillings. Bruises were differently compensated if they were showing outside the clothes or not. Toes other than the big toe required half the compensation of the corresponding finger—and so forth. There was a standardised award for those who needed medical treatment of 30 shillings. It is worth pointing out that in 7th century Kent a shilling was a measure of gold, about 1.3 grams, and so a reasonable sum.

There are some standard awards which look odd to the modern eye. At 6 shillings, the compensation for piercing through the generative organ seems a little mean to me, particularly in the light of the 11 shillings award for the loss of a little finger. Then, if you stole church property (that is to say, God's property) you had to pay the church 12-fold compensation. If a man lay with a maiden belonging to the King (this being a slave society) he had to pay 50 shillings compensation (to the King, not the maiden).

The most important award was the Wergild, the amount to be paid for the death of a man. This was again standardised, and depended on the status or inherited rank of the man or woman who died: 1,200 shillings for a 1,200 shilling man, 200 for a 200 shilling man, and so forth. In the code of King Alfred,[12] the law had to accommodate the presence of Britons—Celtic people not Saxons—who were referred to as "Welshmen". They cost less: 60 shillings for the death of a Welshman with no land, for example.

Well, apart from the curiosity of all this, it can I think tell us of the universality of the idea that compensation needs to be regulated; and that as a means of reparation it is very widespread in time and place. One more thing, it was linked to fault: it had to be paid by the wrongdoer, in some cases assisted by his kin. The Kentish Code is insistent on this. Decree 30 of Aethelberht reads:

> "If one man slays another, he shall pay the wergild with his own money and property (i.e. livestock or other goods) which whatever its nature must be free from blemish [or damage]."

The Code also provided for staged payments of the Wergild, and for sureties to guarantee the payments were kept up. This was all critically important, not just to replace the wealth or earnings capacity lost, but to assuage the feelings of the injured person or the family of the deceased. This was the means by which the State ensured a sufficient sense of justice, of satisfaction, and thus kept the peace. These awards were intended to go beyond compensation in the narrowest sense.

Perhaps the greatest jurist and scholar of Natural Law—that law that is said to arise universally and without reference to specific creed or express law of the state—was the 17th century Dutchman Hugo de Groot, or Grotius.[13] In his famous book *De Jure Belli ac Pacis*[14] he wrote:

> "It has been said … that the rights due to us arise from three sources, which are contract, injury and law. It is unnecessary here to dwell upon the nature of contracts which has been already so fully discussed. The next point therefore to which we proceed is an inquiry into the rights resulting to us from injuries received. Here the name of crime or misdemeanor is applied to every act of commission or neglect repugnant to the duties required of all men, either from their common nature or particular calling. For such offences naturally create an obligation to repair the loss or injury that has been sustained." (Ch.17)

Grotius wrote that "the loss or diminution of anyone's possessions is not confined to injuries done to the substance alone of the property, but includes everything affecting the produce of it, whether it has been gathered or not", in other words compensation must extend to the consequences of damage or loss.

[11] See *www.law.harvard.edu>courses>materials* [accessed 18 November 2019].
[12] King of Wessex, 871–899 AD.
[13] 1583–1645.
[14] *On the law of War and Peace* 1625 at *https://socialsciences.mcmaster.ca/econ/ugcm/3ll3/grotius/Law2.pdf* [accessed 18 November 2019].

And critically, the individual who committed the injury, whether by negligence or otherwise, is responsible for repair of the losses.

According to the eminent English legal historian Sir Frederick Pollock, it was natural law, thinking, in particular as described by Grotius, which was the origin of, or was at least a congruent development with, the common law notion of the responsibilities and standard of action of the "reasonable man". In his essay "The History of the Law of Nature: A Preliminary Study"[15] he wrote:

> "Within the last century and a quarter, or thereabouts, the whole doctrine of negligence has been built up on the foundation of holding every lawful man answerable for at least the amount of prudence which might be expected of an average reasonable man in the circumstances. Now, St German pointed out as early as the sixteenth century that the words 'reason' and 'reasonable' donate for the common lawyer the ideas which the civilian or canonist puts under the head of 'Law of Nature'. Thus natural law may fairly claim, in principle though not by name, the 'reasonable man' of English and American law and all his works, which are many."

Thus, it seems to me fair to observe that the principle that reasonable compensation for injury, and the consequences of injury, are the responsibility of the person who has caused the injury, is an absolutely fundamental part of just law, of natural law, as well as of common law. So let us now turn to the common law.

McGregor on Damages has had two very distinguished editors, the late and much missed Harvey McGregor QC, and now Mr Justice Edelman, of the High Court of Australia. The introductory parts of Ch.1 of the 20th edition constitute an elegant analysis of the legal fundamentals, and include the definition of damages, initially laid down by McGregor in 1961. Edelman traces the changes since then. McGregor's 1961 definition was adopted wholesale by the House of Lords in *Broome v Cassell & Co*.[16] For reasons which Edelman explains, the definition has had to change. There is no time to discuss those changes here, but I recommend those pages as mind-clearing for all tort lawyers. Edelman emphasises that:

> "The requirement of a wrong is entirely necessary; it is an essential feature of damages. There is thus excluded from damages three common types of case giving pecuniary satisfaction by success in an action because they are not dependent on wrongdoing. These are actions for money payable by the terms of a contract, actions for restitution based on unjust enrichment, and actions under statutes where the right to recover is independent of any wrong."[17]

In Ch.2 McGregor addresses the "object of an award of compensatory damages". He straight away cites what has become Answer 1 from the law student's Catechism of Damages, the general rule as to the measure of compensatory damages, as laid down in the speech of Lord Blackburn in *Livingstone v Rawyards Coal Co*:[18]

> "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 in if he had not sustained the wrong for which he is now getting his compensation or reparation."

How often have we all seen that cited as the ultimate ground for the scope of compensation? How rarely have we looked back at the case itself, to find the context and the full extent of Lord Blackburn's speech.

Livingstone v Rawyards concerned land in Lanarkshire. The pursuer Livingstone held property rights—the "feu"—in something over 1½ acres of land, on which 30 cottages were built. The land was surrounded by the Rawyards property. In the 1870s, the Rawyards Co mined the Coal under Mr Livingstone's land,

[15] Sir F. Pollock, "The History of the Law of Nature: A Preliminary Study" [1900] *Journal of Comparative Legislation* 418.
[16] *Broome v Cassell & Co* [1972] A.C. 1027 at 1070E; [1972] 2 W.L.R. 645.
[17] *McGregor on Damages*, 18th edn para.1-004.
[18] *Livingstone v Rawyards Coal Co* (1880) 5 App. Cas. 25 at 39; (1880) 7 R. (H.L.) 1.

believing they had the right to do so. Livingstone was ignorant of his rights. The mining caused subsidence. In the course of investigation, it transpired that Livingstone had the rights in the coal under his land, not the Rawyards Coal Company. The extraction was what in English law would be called trespass, but it was agreed it was innocent trespass. The innocence of both parties is emphasised in the speeches of Lord Cairns LC and Lord Hatherley. And thus the measure of damage fell to be decided.

The full principle enunciated by Lord Blackburn goes beyond the passage so frequently cited. The full passage reads:

> "The point may be reduced to a small compass when you come to look at it. I do not think there is any difference of opinion as to its being a general rule that, 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 in if he had not sustained the wrong for which he is now getting his compensation or reparation."

That is the passage we have seen so often. The speech goes on:

> "That must be qualified by a great many things which may arise—such, for instance, as by the consideration whether the damage has been maliciously done, or whether it has been done with full knowledge that the person doing it was doing wrong. There could be no doubt that there you would say that everything would be taken into view that would go most against the wilful wrongdoer—many things which you would properly allow in favour of an innocent mistaken trespasser would be disallowed as against a wilful and intentional trespasser on the ground that he must not qualify his own wrong, and various things of that sort. But in such a case as the present, where it is agreed that the Defenders, without any fault whatever on their part, have innocently, and, being ignorant, with as little negligence or carelessness as possible, taken this coal, believing it to be their own, when in fact it belonged to the Pursuer, then comes the question,—how are we to get at the sum of money which will compensate them?"

Thus, on this formulation, the principle of exact compensation for loss sustained is confined to the innocent trespasser, is not appropriate for a wilful or intentional trespasser, and arguably not for cases of any significant negligence or carelessness.

Now of course the law has developed since then, despite the repeated reliance on Lord Blackburn's dictum. In *Rookes v Barnard (No.1)*,[19] the House of Lords clarified the circumstances in which exemplary and aggravated damages could be awarded, please note, by the jury, still then responsible for making the award in many cases. There could still be a considerable degree of flexibility, often even where exemplary or aggravated damages are not in question. As Lord Devlin put it:

> "It must be remembered that in many cases of tort damages are at large, that is to say, the award is not limited to the pecuniary loss that can be specifically proved. In the present case, for example, and leaving aside any question of exemplary or aggravated damages, the appellant's damages would not necessarily be confined to those which he would obtain in an action for wrongful dismissal. He can invite the jury to look at all the circumstances, the inconveniences caused to him by the change of job and the unhappiness maybe by a change of livelihood. In such a case as this, it is quite proper without any departure from the compensatory principle to award a round sum based on the pecuniary loss proved." (1221)

In personal injury cases, damages for pain, suffering and loss of amenity are "at large".

[19] *Rookes v Barnard (No.1)* [1964] A.C. 1129; [1964] 2 W.L.R. 269.

In *Broome v Cassell*, the House of Lords essentially upheld the analysis of Lord Devlin in *Rookes v Barnard*. It is fair to say that their Lordships differed, as Justices of the Supreme Court sometimes still do, in considering the wider implications and approach. Lord Hailsham LC, for example, emphasised the breadth, or potential breadth, of even explicitly compensatory awards:

> "Nevertheless in all actions in which damages, purely compensatory in character, are awarded for suffering, from the purely pecuniary point of view the plaintiff may be better off. The principle of restitutio in integrum, which compels the use of money as its sole instrument for restoring the status quo, necessarily involves a factor larger than any pecuniary loss." (1071B)

By 1999, the Law Commission concluded that general damages for non-pecuniary loss were too low.[20] This led to the hearing before the five-judge Court of Appeal in *Heil v Rankin*,[21] in which the court moved some way to meet the views of the Law Commission. They introduced a tapered increase for awards then above £10,000, rising to an increase of one-third for catastrophic injuries.

By the time of *Heil v Rankin*, the *Guidelines for the Assessment of General Damages in Person Injury Cases* had been published, the first edition in 1992. Essentially the awards for pain, suffering and loss of amenity have simply been uprated in step since. Although, Lord Judge CJ emphasised in *Simmons v Castle*[22] that the Court of Appeal still has "the power and the duty" to review and if necessary alter "the level of damages, this has not happened save in non legally-aided cases, and there as a consequence of the Jackson Costs Reforms". As Lord Judge acknowledged, that case had not involved a general review of the awards of general damages. The court noted that Sir Rupert had observed that the levels of damages "… is not high at the moment".[23] The court also noted the observation by Lord Woolf in *Heil v Rankin* that the obligations of the Court of Appeal to review the level of damages included responding to "changes which take place in society".[24]

At the very least, one can say that even in relation to compensatory damages, there may be more authority for flexibility, and potentially for change, than might be assumed.

Underpinning the speech of Lord Blackburn, the sense of natural justice, and I would guess the instinctive sense of all those of us who conduct or adjudicate personal injury claims, on whichever side of the adversarial fence, from the Bar or the Bench, is the idea that the outcome should be just, and bring fair recompense. If that is not the product of the system, then the public will look beyond the system of civil justice, if not for money, then for that intangible sense of justice or fair play.

I believe there is an increasing desire for acknowledgment or recognition of wrong beyond pure financial compensation for identified loss. You see that in how families talk after accidental bereavement: a most conspicuous recent example being the loss of so many people in the fire at the Grenfell Tower. In that inquiry and others, those who have lost relatives or those displaced from their homes, want acknowledgement as much as financial recompense; although they want and need the latter too.

You see the same impulse in the increasing and worldwide phenomenon of leaders apologising for past wrongs that were very often never the responsibility of the leader concerned. One of the very earliest examples of such an apology was in 1970 when Chancellor Willy Brandt of West Germany fell to his knees before the monument to the Warsaw Uprising. In 2007, Prime Minister Tony Blair apologised for the slave trade, and Prime Minister Gordon Brown apologised in 2009 for the treatment of Alan Turing and of other gay men. Prime Minister David Cameron apologised in 2012 for the disaster at the Hillsborough Stadium in 1989, and for the failure in the following years to identify and acknowledge the poor decisions

[20] Law Commission Report No.257: *Damages for Personal Injury: Non-pecuniary Loss*, 19 April 1999.
[21] *Heil v Rankin* [2001] Q.B. 272; [2000] 2 W.L.R. 1173.
[22] *Simmons v Castle* [2012] EWCA Civ 1039; [2013] 1 W.L.R. 1239 at [12].
[23] *Simmons v Castle* [2012] EWCA Civ 1288; [2013] 1 W.L.R. 1239 at [13]; *Jackson: Final Report*, Ch.10, [5]–[6].
[24] *Simmons v Castle* [2012] EWCA Civ 1039; [2013] 1 W.L.R. 1239 at [11]; *Heil v Rankin* [2001] Q.B. 272; [2000] 2 W.L.R. 1173 at [28]–[29].

and actions of the police which allowed the tragedy to happen. In May this year, Prime Minister Theresa May apologised for the treatment of the "Windrush" citizens.

We have seen two Australian Prime Ministers apologise for the cruelty to the "lost generation" of indigenous Australians and for the treatment of children, including child migrants, in Australian institutions. The Pope, Archbishops and Bishops have apologised for sexual abuse, and the protection of or failure to report clerical abusers. The Canadian Prime Minister Justin Trudeau has issued a raft of apologies to those who were children in institutions in Canada, to gay people, to Jewish refugees from Europe in 1939 whose ship was turned away and even to a group of Sikh, Muslim and Hindu migrants from Imperial India who were refused immigration to Canada in 1914. There is a strong desire for recognition or acknowledgement of wrongs.

Of course, such acknowledgement can be given in the course of a judgment at the end of a trial, but that is a rare event indeed nowadays in this field. Is it not implicit in what Lord Blackburn was saying that, to the extent that is possible, damages awards should embody recognition of fault, and the degree of fault, by differentiating between the tort that is a wrong, but "innocent", the tort that flows from carelessness or negligence, and the tort that is grossly negligent, or indeed wilful and deliberate?

In my view, we have seen at least one and possibly more examples where the demand for such recognition, for an expression of justice, has spilled over from the civil law, and forced the extension of criminal liability.

I drive a motor car. Most of those here will do so. I defy any honest-minded driver to say they have never done anything whilst driving that constituted careless driving—not dangerous driving, but careless driving. A single misjudgement of distance, a slight excess of speed, or being a little late in braking. As from 2006, the offence was created of causing death by careless driving.[25] Thus, matters that had always been dealt with by purely civil litigation became criminal. The relevant sentencing guidelines[26] mean that, if the carelessness or negligence is mid-range or above (but still short of dangerous driving), and especially if the negligence kills more than one person then, despite culpability which was previously thought insufficient to justify criminal liability, a person of good character may go to prison.[27]

A similar process, it seems to me, has taken place in relation to corporate manslaughter, introduced by the Corporate Manslaughter and Corporate Homicide Act 2007, which set out to define and ascribe criminal liability in such cases, and has been followed by sentencing guidelines in 2015.[28] This has intentionally extended criminal liability beyond the previous common law manslaughter by gross negligence, imported criminal liability to organisations, and greatly increased the penalties which can be passed.

I should not be understood to suggest that the extension of criminal liability in those fields is wrong: that is a matter for Parliament. I do suggest that it is likely that the limits on damages awards in civil claims, particularly in the context of what I have called the commercialisation of the tort system, has contributed to the drive to extend criminal liability in these ways.

Let me try and draw the threads together. First, a couple of suggestions which I believe make good sense. Would it not be good for our system if regulators were required to be informed, and to publish, all the ownership, including ultimate ownership, of legal practices? These are not just ordinary businesses. When law practices or chambers were confined by the old professional Rules, their independence from outside ownership was protective at least to some degree of conflict and undue commercial pressure. That has gone with Alternative Business Structures. Let us see in detail who owns whom: who has skin in the game.

Secondly, it seems to me that under-settlement of personal injury claims is a ripe field for academic study. I have no doubt about the complexity of the exercise: confidentiality, commercial reputation, legal

[25] Road Safety Act 2006 s.20, inserting s.2B into the Road Traffic Act 1988.
[26] *Causing Death by Driving: Definitive Guideline*, Sentencing Council, 19 July 2018.
[27] *Causing Death by Driving: Definitive Guideline*, Sentencing Council, 19 July 2018 p.15.
[28] *Health & Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offence: Definitive Guideline*, Sentencing Council, 2015.

professional privilege and sheer judgement about litigation risk would all represent considerable barriers. However, it would be a valuable piece of research if it could be achieved.

On a more reflective note, am I right in my sense that our system of claiming and awarding damages has become too standardised, and is failing to bring acknowledgement, or recognition, where it should do so? Actual losses, past and future, should be computed as carefully, and with as much technical accuracy as possible. A great deal has been done over recent decades to improve that: more accurate and elaborated heads of claim, periodical payments, conditional awards and so on. Nor do we want to stimulate pointless marginal contests in place of sensible settlements.

But if I am right that fault is intrinsic to tort, and Lord Sumption is right that a no-fault system of compensation will never come about, then I suggest it may be time to consider how acknowledgement, or recognition of fault, may be marked, at least in more egregious cases of fault and in larger cases. That might be by greater use of claims for aggravated or exemplary damages, where appropriate. It might be by stipulating public acknowledgement of fault and apology as part of settlement. Should the Civil Procedure Rules address that? Should there be costs consequences of gross negligence, or of a failure to admit and acknowledge serious fault? Should aggravated and exemplary damages be recoverable by the insurer from the insured?

I have no settled ideas on these questions, which will be for the professions to explore and develop, in any event. I do have the sense that justice requires the injured citizen, where possible, to receive satisfaction and acknowledgement of fault from our civil justice system, as well as strictly computed damages for his or her financial losses and attributable needs.

Thank you very much for listening.

When People Matter: Finding Humanity in Tort Law[1]

Richard Lewis[*]

Claimants; Damages; Personal injury; Socio-legal studies; Torts

Abstract

This article examines whether the character of people involved in personal injury claims affects their outcome irrespective of the legal rules. For example, does the personality or background of the litigants or their lawyers influence whether an action succeeds and how much damages are then paid? A rise in the number of claims is noted here as part of a contested "compensation culture" in personal injury. In a demographic analysis, the article identifies typical claimants and the injuries from which they suffer. Claims have been gathered in increasing numbers by law firms in response to market pressures encouraging them to process minor injury cases in bulk. The firms have changed their structure and created "settlement mills" where there may be little scope for individuals to affect the routine processing of small claims. By contrast, in more serious injury cases, character and personality are more likely to make a difference. These findings are suggested by the author's empirical study of the views of lawyers on the operation of the claims system: practitioners who have been interviewed are given voice here. The article challenges traditional perspectives of tort where it is often implicit that claims are resolved only in court on the basis of textbook rules on liability and damages. There has been a failure to take account of other factors which may influence both the settlement of claims and the very few cases that go to trial. In this wider context, the article forms part of a literature revealing that the operation of the tort system in practice differs markedly from that in theory. It calls into question those philosophies of tort liability which fail to consider how claims are actually determined.

Introduction

This article considers whether claims for compensation for injury may be influenced by the character and personality of individuals involved in the litigation process irrespective of what the legal rules prescribe. The possibility was acknowledged by a barrister interviewed as part of a wider project which provided a key source for this article. He was asked: "Apart from the black-letter law, what are the main factors which might influence whether a claim succeeds?" His immediate response was:

> "It's the personal stories, it's the people involved, it's the humanity." (EW24)

[1] This is a revised version of an article published as R. Lewis, "Humanity in Tort: Does Personality Affect Personal Injury Litigation?" (2018) 71(1) *Current Legal Problems* which can be accessed at *https://doi.org/10.1093/clp/cuy002* [accessed 18 January 2019]. The present article is reprinted by permission of Oxford University Press on behalf of University College London.

Companion articles arising from the wider empirical research project were published as R. Lewis, "Strategies and Tactics in Litigating Personal Injury Claims: Tort Law in Action" [2018] J.P.I.L. 113 and R. Lewis, "Tort Tactics: An Empirical Study of Personal Injury Litigation Strategies" (2017) 37(1) *Legal Studies* 162.

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This concise reply encapsulates the theme for this article. It was expanded upon by other respondents to the survey. They gave various illustrations of how the personality of claimants, in particular, could be important to the process. Other parties said to have an influence included, as might be expected, the lawyers and insurance representatives involved in handling the claim. However, also mentioned were the claimant's family, potential witnesses and those providing expert evidence. In some cases, the particular defendant could make a difference but this was exceptional. For the few cases that went to trial, the particular judge was recognised as important. Overall, one interviewee concluded:

> "I think there's always going to be a dichotomy between the letter of the law and the practice of the law. There is bound to be, for this reason: you cannot envisage the letter of the law applying simply because the practice of the law brings into the mix other things like human resources, ability of people, subjectivity …" (EW5)

Although almost all personal injury claims are disposed of by negotiations which are conducted out of court,[2] there has been only limited research into factors other than the formal law that may affect these settlements. However, a major study was conducted by Laurence Ross in the US in 1970.[3] He showed that there were various pressures upon insurance company negotiators which helped to determine the outcome of their claims. These pressures derived from the structure of their organisation and their working environment. Important for present purposes, the study also revealed how outcomes were affected by the attitudes and values of the people involved in the process. Similarly, Hazel Genn's pioneering study in the UK 30 years ago emphasised the importance of the people involved in settling tort claims.[4] She identified "situational factors" affecting the outcome. These included the personality and claims philosophy of the negotiators as well as the ability of claimants themselves to withstand the stress of litigation.[5] Both studies, in effect, subscribed to the thesis that: "to understand the legal system and the nature of rights and duties, it is not sufficient to know the formal rules; one must know the law in action."[6]

Relying upon this approach, in recent publications I explored how the tactics used by lawyers when conducting personal injury cases could affect their outcome.[7] These tactics are being used in a litigation environment which has changed significantly since Genn's study was conducted. Here I now turn away from tactics to consider how personality may also affect claims.

Despite limited academic study of the settlement of injury claims,[8] practitioners are very ready to agree with the thesis that the reality of the law often differs from how it is supposed to operate in theory. Indeed, this may not be a surprising revelation even to a layperson. However, it is rarely acknowledged by writers of legal textbooks on tort. Students are left to gain an understanding of how the law operates by reading texts founded upon case law from which much of the humanity has been removed: they must arrive at an

[2] Judges determine less than 1% of all cases. P. Cane and J. Goudkamp, *Atiyah's Accidents, Compensation and the Law*, 9th edn (Cambridge University Press, 2018), 10.1. Out of 943 cases only 2 went to trial in the data supplied by insurers to Jackson LJ for the *Review of Civil Litigation Costs: Final Report* (2010) Ch.2 paras 3.3 and 3.4. In the specialised area of clinical negligence only 0.7% of cases went to trial in 2016–2017 according to the National Audit Office Report, *Managing the Costs of Clinical Negligence in Trusts* (2017, HC 305 session 2017–2019), para.3.14. For earlier similar general findings see *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (1978, cmnd.7054, chairman Lord Pearson) (the Pearson Report) Vol.2 table 12, and the Lord Chancellor's Department, *Report of the Review Body on Civil Justice* (1988, cm.394). H. Genn, *Judging Civil Justice* (Cambridge University Press, 2009), Ch.2.

[3] H. L. Ross, *Settled Out of Court: The Social Process of Insurance Claims Adjustment*, 2nd edn (Aldine, 1980), 234. Earlier empirical work is noted by H. Kritzer, "The (Nearly) Forgotten Early Empirical Legal Research" in P. Cane and H. Kritzer, *The Oxford Handbook of Empirical Legal Research* (OUP, 2010), 887.

[4] H. Genn, *Hard Bargaining: Out of Court Settlement in Personal Injury Actions* (Clarendon Press, 1987) and, more generally, D. R. Harris, M. Maclean, H. Genn, S. Lloyd-Bostock, P. Fenn, P. Corfield and Y. Brittan, *Compensation and Support for Illness and Injury* (OUP, 1984).

[5] H. Genn, *Hard Bargaining: Out of Court Settlement in Personal Injury Actions* (Clarendon Press, 1987), 16.

[6] Introduction to H. L. Ross, *Settled Out of Court: The Social Process of Insurance Claims Adjustment*, 2nd edn (Aldine, 1980).

[7] R. Lewis, "Tort Tactics: An Empirical Examination of Personal Injury Litigation Strategies" (2017) 37 *Legal Studies* 162 and R. Lewis, "Strategies and Tactics in Litigating Personal Injury Claims: Tort Law in Action" [2018] J.P.I.L. 113.

[8] However, for the UK see R. Dingwall et al, "Firm Handling: The Litigation Strategies of Defence Lawyers in Personal Injury Cases" (2000) 20 *Legal Studies* 1, A. Boon, "Co-operation and Competition in Negotiation: The Handling of Civil Disputes and Transactions" (1994) 1 Int. J. of the Legal Profession 109, A. Boon, "Ethics and Strategy in Personal Injury Litigation" (1995) 22 J. Law & Society 353 and S. Halliday, J. Ilan and C. Scott, "Street-Level Tort Law: The Bureaucratic Justice of Liability Decision-Making" (2012) 75 M.L.R. 347.

objective, principled decision which can be reconciled with precedent and used as a guide for the future. The cases studied are primarily drawn from appellate decisions and are very unrepresentative of the mass of claims. The nuanced findings of fact made by the trial judge based on the evidence presented are rarely explored. The true effect of the injury upon the day to day life of a claimant is never revealed. The convoluted process through which the case may have progressed via civil procedure rules is not exposed, and how and why the case arrived in court and was not settled beforehand is not explained.

Elsewhere I have catalogued various myths perpetuated in one way or another by these texts.[9] They include views such as the following: that tort actions for personal injury are of universal application in as much as they can be founded upon any type of injury whereas, in practice, they are almost all confined to the discrete areas discussed further below; that individuals who are defendants have control over whether and how defences are implemented whereas, in fact, it is insurance companies who almost exclusively determine how the litigation proceeds; that cases are determined predominantly by judges in court as opposed to being informally settled by representatives, many not being legally qualified; that proof of fault lies at the heart of litigation whereas the truth is that it is unusual for fault to be contested; that the facts are fully investigated and determined with due process whereas, in practice, costs dictate that rough and ready "rules of thumb" are applied to dispose of most claims with minimal investigation; that most of the compensation that is paid out by the system is for the financial losses which result from serious injury, whereas two thirds of all the damages that are awarded are for pain and suffering and the cases usually concern only very minor injury; and finally, that the damages award provides full compensation for all loss suffered whereas, in fact, there has been a history of substantial under-compensation in the minority of cases which involve serious injury.

When it comes to accounting for character and personality there is a wide literature which could be considered relevant. A few examples only will be given here. Already discussed are the studies by academics of the process by which tort claims are settled. There are accounts of particular actions which add the necessary colour, for example, to the Thalidomide tragedy[10] or to tobacco litigation.[11] More broadly, for example, the work of Brian Simpson in placing cases in their historical context gave new life to the characters involved and revealed how their personal circumstances influenced the litigation.[12] Many authors have attempted a similar analysis of the parties involved in the most famous case in civil law, *Donoghue v Stevenson*.[13] Films have been made in an attempt to bring the case even more to life.[14] There are books written by and about judges and these may cast light on what happened in individual cases. Judges in the highest appellate court have merited detailed study[15] and there is an increasing literature on the extent that judges may be influenced by factors in their personality.[16] The humanity of judges, barristers and solicitors

[9] R. Lewis and A. Morris, "Tort Law Culture: Image and Reality" (2012) 39 J. Law & Society 562 and "Challenging Views of Tort" [2013] J.P.I.L. 69–80 and 137–150.

[10] H. Teff and C. R. Munroe, *Thalidomide: The Legal Aftermath* (Saxon House, 1976) and Sunday Times Insight Team, *Suffer the Children: The Story of Thalidomide* (Andre Deutsch, 1979).

[11] C. Mollenkamp, *The People vs Big Tobacco* (Bloomberg Press, 1998) and M. A. Derthick, *Up in Smoke: From Legislation to Litigation in Tobacco Politics*, 3rd edn (CQ Press, 2011).

[12] I should acknowledge here the formative influence of Brian Simpson who was my College tutor at Oxford University almost 50 years ago. D. Sugarman, "Brian Simpson's Approach to Legal Scholarship" (2012) 3 *Transnational Legal Theory* 112. In particular, see A. W. B. Simpson, *Leading Cases in the Common Law* (Clarendon Press, 1995) and, in a similar vein, R. Rabin and S. Sugarman, *Tort Stories* (Foundation Press, 2003).

[13] *Donoghue v Stevenson* [1932] A.C. 562; 1932 S.C. (H.L.) 31. See the extensive literature cited in M. Chapman, *The Snail and the Ginger Beer* (Wildy, Simmonds and Hill, 2009), J. Thomson (ed), *Donoghue v Stevenson: The Paisley Papers* (W. Green, 2013), P. T. Burns, *Donoghue v Stevenson and the Modern Law of Negligence* (Continuing Legal Education Society of British Columbia, 1991), Resources of the Scottish Council of Law Reporting*http://www.scottishlawreports.org.uk/resources/dvs/donoghue-v-stevenson.html* [accessed 18 January 2019].

[14] The Scottish Council of Law Reporting at *https://vimeo.com/29950972* [accessed 18 January 2019]. The Justice Society of British Columbia at *https://www.youtube.com/watch?v=ogm1URzhTjA* [accessed 18 January 2019].

[15] A. Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart Publishing, 2013).

[16] See the references in K. Burns, "In this Day and Age: Social Facts, Common Sense and Cognition in Tort Law Judging in the United Kingdom" (2018) 45 J. Law & Society 226, R. Cahill-O'Callaghan, "The Influence of Personal Values on Legal Judgments" (2013) 40 J. Law & Society 596 and by the same author "Reframing the Judicial Diversity Debate: Personal Values and Tacit Diversity" (2015) 35 *Legal Studies* 1. P. Laleng, "Winners and Losers in the Court of Appeal: An Empirical Study of Personal Injury Cases (2002–16)" [2018] J.P.I.L. 36.

has been the subject of recent investigation by the Institute of Advanced Legal Studies among others.[17] More generally, we could turn to the classic legal realist literature to reinforce this approach. However, there is very little reference to such materials in the tort texts.

What effect this has upon students of tort law is uncertain. More generally, it has been suggested that the abstract nature of legal study comes as something of surprise to many students in their first year at university. The ideals with which many entered law school are changed or abandoned. Their motivation shifts from interest in the subject to the professional success that may follow. The study of law has been compared to medicine in as much as it has been accused of being a de-humanising experience.[18] To an extent, this article seeks to the counter the abstract nature of legal study by stating the obvious: that law is made and affected by people.

As evidence of this, reliance is placed on the experience of a group of lawyers who were interviewed about how personal injury litigation operates in practice. Much of the first part of the article is taken up with the words of these lawyers to show how and where personality may affect claims. However, the second part of the article makes a major qualification to the first: the influence of individuals is shown to be severely limited where minor injury cases are processed in bulk. Statistics are analysed to determine who are typical litigants and from what injuries they suffer. To an extent, these figures make the system less abstract and place more flesh on the bones of litigation. However, they also reveal that most claims are brought for only for very minor injury. The article then describes how law firms have changed their business structures to process these small claims with maximum efficiency. In these run-of-the-mill cases the character and personality of those involved in litigation are much less likely to affect matters. In this second part of the article, therefore, elements of an impersonal and mechanised process are revealed as applying to many claims. We begin, however, by describing how the interviews were conducted and the qualitative research carried out.

The interviews and the wider project

The survey involved conducting 29 structured interviews of lawyers in England and Wales which were recorded, transcribed and made anonymous. Each interview lasted on average 90 minutes and in total they produced a text of 258,000 words. The interviews were carried out in 2014 by a field worker who had previously been employed as a personal injury solicitor for 14 years. Although the interviews were closely structured, they ranged over many issues and extended far beyond the scope of the present article. This was because the questions were devised to cover matters relating to a wider project which compared personal injury litigation in three jurisdictions across four countries: Norway and the Netherlands were to be compared to England and Wales. Funding for this project came from the Institute for European Tort Law based in Vienna. A range of common questions were devised for each country in order to investigate how "the law in the books" is translated into "the law in action" and identify some of the factors which affect that transition. General and specific questions covered such matters as the lawyers' objectives when given notice of a potential claim; the tactics that are used by both sides to achieve those objectives; the pressures that arise during the litigation including, for example, the effect of the costs recovery rules; and the effect of procedural reforms such as the adoption of streamlined processes and the increasing use of

[17] Research on "the humanity of law" has been conducted by the Information Law and Policy Centre of the Institute of Advanced Legal Studies. From 2014–16 conferences were held on the humanity of judging, judgecraft and emotions, and the humanity of barristers. See *http://ials.sas.ac.uk /research/research-centres/information-law-policy-centre/research/humanity-law* [accessed 18 January 2019]. cf. the obituary of the torts scholar and later Ontario Supreme Court Justice, Allen Linden: "He was able to humanize the law unlike anyone I've ever seen" *The Globe and Mail* 16 September 2017. More generally, see the emergence of studies in emotion and the law. S. Bandes, *The Passions of Law* (NYU Press, 2001) and H. Conway and J. Stannard, *Emotional Dynamics and Legal Discourse* (Hart Publications, 2016). The considerable increase in clinical legal education and pro bono work in U.K. law schools in recent years may also indicate a desire to bring students closer to the humanity of legal practice.

[18] See *https://www.cuttingedgelaw.com/page/humanizing-legal-education* [accessed 18 January 2019] and M. Schwartz, "Humanizing Legal Education: An Introduction to a Symposium Whose Time Came" (2008) 47 Washburn L.J. 235. More generally, A. T. Kronman, *Education's End: Why Our Colleges and Universities Have Given Up on the Meaning of Life* (Yale UP, 2008).

judicial case management. Therefore, although there was discussion about the personality, character and background of those involved in litigation, it was only as part of the wider study.

Among the interviewees there were 13 claimant solicitors and one claimant legal executive. On the other side, there were nine defendant solicitors and an insurer. However, seven solicitors had represented the other side when working elsewhere and may have been better placed to appreciate the perspectives of both. In addition, five barristers with mixed practices were interviewed. There were eight women in total. The interviewees had various levels of experience and seniority. They covered a wide area of personal injury work. This included high volume routine road traffic claims as well as more individual work-related liability although this also included large scale occupational disease claims. Some interviewees had dealt with public liability claims, many of them involving trips and slips and usually resulting in only minor injury. Among the more experienced lawyers were those who had done a variety of work but were now involved only with higher value claims. Some of them concentrated exclusively on catastrophic injuries. Among the specialists were four clinical negligence lawyers and one solicitor who now only worked on product liability claims. The lawyers were selected in various ways: most were chosen from personal injury firms' websites to reflect the need for diversity in age, experience and nature of work; others were recommended by those interviewed; and a few were personally known to the researchers. All except four were based in cities in the southwest.

The interviews were structured, and open questions were used to investigate individual topic areas. For present purposes, they were specifically asked what they considered to be the main factors influencing whether a claim succeeds and how much damages are then paid. They were also asked their opinion about whether the system was fair and efficient. The relationship they had with their client and others in the litigation process was investigated. Various open questions relating to specific parts of the project also produced discursive answers that were relevant to the personality and character of the parties in litigation. The quotations from the interviews were therefore drawn from a range of responses across the project area.

When personality and character may influence claims

Claimants

It has been suggested that claimants are in a weak position to control the conduct of their litigation.[19] They are very much in the hands of their solicitor when it comes to the strategy that is to be adopted and they are heavily reliant upon the advice given when deciding whether to accept or reject an offer of settlement. Claimants are unlikely to challenge the level of settlement, no matter how meagre. Nor will they dispute discontinuance of the claim. In this sense, Genn suggests that claimants make no appreciable impact on the outcome. Whilst it may be true that they have little or no input with regard to strategy, it is argued here that claimants can significantly affect the claim in other respects.

- **The good claimant**

  Respondents to the survey indicated a variety of ways in which claims could be influenced. Most important is whether a claimant is able to explain clearly what happened and give a full account of how the injury affects their everyday living. Is the claimant articulate, presentable and convincing so as to influence other people encountered in the course of the litigation? Those influenced could include, for example, the medical personnel who examine the claimant and later give expert evidence upon the injury suffered. Ultimately, the claimant

[19] H. Genn, *Hard Bargaining: Out of Court Settlement in Personal Injury Actions* (Clarendon Press, 1987), 39 citing earlier studies and D. R. Harris, M. Maclean, H. Genn, S. Lloyd-Bostock, P. Fenn, P. Corfield and Y. Brittan, *Compensation and Support for Illness and Injury* (OUP, 1984), 125 and 320.

may encounter a judge who has to understand the evidence that he gave and assess its persuasiveness and veracity:

> "You start with the claimant—what do I think of the claimant? What do I think will be the impression made by this claimant before a judge?" (EW3)

> "You get chatting to a client on the telephone and sometimes from having a conversation with the client you can get a vibe as to whether … if we were to run this all the way to trial, they need to obviously come across well. Sometimes whether they're at fault or not—if they're unable to explain clearly exactly what happened—then that could go against them." (EW26)

At times this assessment could tip the balance as to whether an action was brought in the first place. It may even mean that a claim would be brought despite weakness in the evidence:

> "Even … where the case still might not be in your favour, if you know you've got a good client who would come across well, then that might be a case that you might take a punt on." (EW10)

Good claimants were also recognised as those who could help obtain evidence and identify witnesses. They would respond efficiently to requests for documents and be prepared to offer other help in support of the claim. It was also thought that those that kept in touch with their solicitor and monitored closely the progress of the claim were more likely to obtain more damages:

> "It very much depends on how helpful the claimant is … It's getting the evidence and sometimes the claimant doesn't have that evidence … They seem to think sometimes that once we know about their claim, that's their involvement done and that they don't need to do anything more and the work is all done by the firm. Unfortunately, that's not the case. We need their help to bring that evidence." (EW21)

A particular aspect of helping to supply evidence is the attitude of the claimant to disclosing intimate details of his life and relationships. For example, the psychological effects of the injury may not be readily apparent, and the claimant may be reluctant to disclose how relationships with spouses, family and friends have been impaired:

> "Where you might want to investigate the psychiatric side of the tragedy, my practice would be to give the client a choice and say, 'well, do you want us to open up that side of your life? If we do, we might add a few thousand pounds to your claim but if we don't I can still get a settlement for you.' So, what the client hopes to achieve is sometimes relevant to the damages we recover." (EW1)

One barrister contrasted the effect of having a seriously injured claimant who was keen to give evidence at trial with the difficulties in giving sometimes faced by a defendant put into the witness box:

> "[One trial involved] a young lad who'd been rendered blind as a result of the Road Traffic Accident and he was actually quite bullish about the whole process, not in an aggressive way, but he just wanted to go and give his evidence, not that he could actually say that much but he gave his evidence. The defendant—the woman who had run him over—was terribly nervous and upset and distressed, and so I think the insurers knew that she was going to be a pretty awful witness, and so the boot was on the other foot.

> Liability can be like that: the claimant is not confident but has a feeling as to what their case is and how they want to advance it, whilst the poor old defendant is normally shattered by having destroyed someone's life." (EW25)

Similarly, the tragic personal circumstances of the case could be brought home to the defendant's representatives if they were to meet the claimant before trial. This could happen in a joint settlement meeting. The parties have been increasingly encouraged and sometimes judicially directed to arrange such meetings to help resolve matters.[20] Various tactical issues then arise in relation to when such a meeting should be held, what should be negotiated and who should be present. A claimant solicitor emotively saw an advantage in his client being present at such meeting because his view of the other side was a very negative one:

> "I don't think they have any emotion at all. They're heartless basically, whatever they may say … When we have these [meetings] the last thing they want to do is meet our client just in case it tugs on their heartstrings at all. I think that they generally view our clients as lead swingers and fraudsters who are just laying it on, and they're looking for that at every available opportunity. And I just think it helps them sleep at nights because otherwise … 'What did you do today, Daddy?' 'Oh, I just kept some seriously injured man out of a couple of million pounds he was entitled to by hoodwinking the system'." EW9

The natural sympathies that lawyers may have for those who are seriously injured may influence how a case is dealt with and ultimately determined. By contrast, if the claimant remains anonymous this may help harden the defence. Although such factors may be well understood by lawyers in practice, there is no discussion in tort texts of sympathy and emotion as being relevant to tort claims.

- **The good claimant's family**

It is not only the claimant who might make a favourable impression. There could also be family members involved in the litigation. For example, they may be witnesses of the accident or they may provide evidence of the effect of the injury upon the claimant and the extent that care and assistance are now required:

> "What won it was … the judge fell in love with the family. Loads of family members were called and they just came across as entirely genuine, entirely supportive of their relative … It was just a whole load of colourful characters who were actually quite funny, naturally so, when they gave evidence. And it went down so well." (EW9)

- **The bad claimant**

In contrast to claimants whose personality or circumstances generated sympathy, there were other claimants who were thought not to possess the required abilities or who had an unattractive personality. This might affect how ready the solicitor was to take on their case or then to pursue it with full determination. A difficult claimant's case may be settled prematurely:

> "Some clients are absolutely lovely to talk to on the phone, they're an absolute pleasure to work with, and some are just nightmares and you … think, I can't wait to get your claim settled." (EW21)

[20] Jackson LJ, *Review of Civil Litigation Costs: Final Report* (2010), Ch.36.

One solicitor was keen to ensure that a case involving such a claimant should not come to court:

> "… because the judge may hate the claimant. We had a case that we settled here recently, and we knew that if the claimant went into the witness box the judge would take such a dislike to him—he's such an unattractive individual that you wouldn't want to let him anywhere near the witness box. And when you advise them about settling, to actually tell him that …" (EW9)

A barrister pointed to some specific features which might influence a court. He thought it was important to consider whether the claimants are:

> "… decent [people] who come across well or whether they are looking a bit dodgy and have a history of alcohol and drug abuse." (EW16)

Other claimants could be penalised for not being in a position to fully co-operate with their solicitor. They might be reluctant to disclose the true effects of their injury or they may be unable to help furnish evidence of wrongdoing or the extent of loss. They may not keep adequate records or promptly respond to requests for assistance, or they may be reluctant to keep on top of their case by pressing their solicitor for information. Most important, perhaps, was the claimant's ability to communicate effectively with his own solicitor and with others in the litigation process:

> "There are people who will just come across much worse. It's not their fault. Unfortunately, perhaps, the law penalises those who are stupid, inarticulate, and nervous, and people say stupid things in witness boxes under pressure." (EW3)

- **The claimant's resources and attitude to risk**

Those who can withstand the pressures of litigation do better than those who cannot, with the result that those from a particular class or background may be more likely to succeed.[21] Where the pressure is financial, it is clear that those with money to sustain them during what may become a very long period of litigation will be better protected and less ready to settle for a low sum. Claimant lawyers recognised this:

> "If you get somebody who's got very good resources—say they've been off ill for a long time but they've got good sickness pay and benefits and stuff like that—then of course it might not be such a big deal to hang on and hold out. But if you've got somebody who's got very poor sick provision or huge financial pressures on them, then an offer of half the value of their claim is far more effective." (EW7)

> "If they're unemployed, [the insurer] may put forward a lower offer to try and tempt the client to settle. They know the claimant may be in need of money, as opposed to a high earner." (EW28)

Offers to settle are more likely to be made at a time when claimants are most vulnerable. A solicitor noted that an offer had been made shortly before his client's wedding, whilst several recognised a seasonal element to offers:

[21] H. L. Ross, *Settled Out of Court: The Social Process of Insurance Claims Adjustment*, 2nd edn (Aldine, 1980).

> "From the end of October … right up until mid-December, we'll have quite a few offers coming in, just trying to tempt them to settle before Christmas." (EW14)

More generally, the typical case often used to illustrate the general inequalities in the legal system involves a "one-shotter" accident victim suing a "repeat player" insurer.[22] The insurer can group together the cases it defends and, whilst a tactic may succeed in one case, it may not in another. The risk taken in a particular case can be matched against others and a long view can be taken of the success of litigating groups of cases. By contrast, the claimant has no such luxury and is acutely aware that success or failure depends upon his immediate claim. On offer could be a sum of money larger than otherwise would be encountered in a lifetime. If the case is pressed to the limit and offers of settlement refused there is a danger that the claimant might be penalised by having to pay the legal costs of both sides. This could substantially reduce any damages awarded. Faced with such a risk, claimants are likely to take a very conservative attitude to any offers put on the table. They are very ready to put an end to the litigation. The inequality of arms between the parties was recognised by a barrister:

> "I think, generally speaking, defendants are insurers and insurers have big wedges of money and can take views as to indemnities and risk assessment across groups of cases. But for the claimant it's their only case and they're the one who's injured. So … I don't think the playing field is level at all." (EW19)

The eagerness of claimants and their solicitors to get something from the system is reflected in the fact that they have been found to be very keen to accept any formal offer made to them by the "risk neutral" insurer. One study found that two thirds of claimants accepted the very first offer made by a defendant.[23] The idea that personal injury litigation is punctuated by a series of offers and counter-offers does not therefore reflect the typical case.

The pressures of litigation are not only financial. The mental resilience needed to sustain a claim to what may be a bitter end can be considerable. Uncertainty, delay and the need to concentrate on making a good recovery are all reasons for settling early for a lower sum. The defendant can take advantage of these pressures:

> "I always have a number of cases every year where I say: 'Don't accept, I'm sure I can get you more'. And they say … 'I just want an end to it because it's hanging over me'." (EW17)

The lack of resilience may even stem from the accident itself:

> "If [the insurer] were to receive a psychological report which shows the impact that the claim is really having on the client—they've been diagnosed with either stress or a depressive disorder as a result of this and it's clear in the report that the client just wants this case resolved—I wouldn't be surprised if we then received an offer very shortly after disclosing that. They're really going to effectively dangle that carrot in front of the client." (EW14)

[22] The seminal article is Galanter, "Why the 'Haves' Come Out Ahead" (1974) 9 Law & Society Rev. 95. However, R. Dingwall et al, "Firm Handling: The Litigation Strategies of Defence Lawyers in Personal Injury Cases" (2000) 20 *Legal Studies* 1 emphasises that not all defendants in personal injury cases are "repeat players" and they should not be treated as a homogenous group. Other limits of the article were examined in an anniversary special issue in (1999) 33 Law & Society Rev. 795.

[23] According to D. R. Harris, M. Maclean, H. Genn, S. Lloyd-Bostock, P. Fenn, P. Corfield and Y. Brittan, *Compensation and Support for Illness and Injury* (OUP, 1984), table 3.3. However, T. Goriely, R. Moorhead and P. Abrams, *More Civil Justice? The Impact of the Woolf Reforms on Pre-Action Behaviour* (The Law Society and the Civil Justice Council, 2002), 154 found more incidence of bargaining: only a third of cases settled after one offer, but almost two thirds did so after two and 90% after three offers.

A defendant admitted he made use of other weaknesses which he thought existed not only in the claim itself but also in claimants personally. In particular, the threat of driving the case to trial could be a very effective weapon:

> "I'm pretty sure that the vast majority of [claimants] have no intention of going anywhere near a courtroom and just want what they can get. And often it's not so much what they can get, it's how quickly they can get it. So I do think in the volume claims arena—say up to £50,000—I think that's a key factor and one which any decent defendant will try and exploit." (EW18)

Defendants

Although most defendants in tort are individual people, they play only a limited part in tort claims: they have only a "walk on" role.[24] This is because they are almost all insured. It is insurers who pay out 94% of tort compensation.[25] In 9 out of 10 cases the real defendants are not individuals but insurance companies, with the others being public bodies or large self-insured organisations. A handful of insurers dominate the market.[26] Although they are not named in the law reports and therefore rarely mentioned in tort textbooks, insurers are the "elephant in the living room".[27] That is, they are almost always present and dominate proceedings, and yet judges and jurists rarely discuss this fact.[28]

In practice, therefore, it is very rare indeed for an individual to be the real defendant controlling the case and ultimately paying any damages due. Instead, defendant policyholders cede control over to their insurer and thereafter usually play little or no part in the litigation process. For example, Harry Street, a Professor of Law at Manchester University and founding author of *Street on Torts*, revealed that he was once a defendant in a case but only discovered that it had been determined on appeal when he read about it in a newspaper.[29] He had played no part in the proceedings. Insurers in practice determine the litigation tactics that are used and how any defence is to be conducted. This means, for example, that they commonly make admissions without the consent of the insured,[30] and they can settle cases in spite of objection from the policyholder.[31]

In the survey, therefore, the personality of the individual who was the defendant and caused the injury was rarely raised as a relevant factor. A barrister contrasted the attitude of the defendant with that of the insurer who ultimately called the tune:

> "Defendants vary enormously. I don't think that people are necessarily irresponsible in the sense that as individual defendants they want to do people out of proper compensation. Even a company … will happily see a person that they hold in regard who has been injured in their employment well compensated for their injury. But, of course, the problem is that it is not them who are actually making the decisions. It is the insurers." (EW19)

[24] H. L. Ross, *Settled Out of Court: The Social Process of Insurance Claims Adjustment*, 2nd edn (Aldine, 1980), 66 noting that, after the accident, defendants rapidly fade from the scene and seldom reappear.

[25] *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (1978, cmnd.7054, chairman Lord Pearson), Vol.2 para.509.

[26] R. Lewis, "Litigation Costs and Before-The-Event Insurance: The Key to Access to Justice?" (2011) 74 M.L.R. 272.

[27] R. Lewis, "Insurers and Personal Injury Litigation: Acknowledging 'The Elephant in the Living Room'" [2005] J.P.I.L. 1.

[28] R. Lewis, "Insurance and the Tort System" (2005) 25 *Legal Studies* 85.

[29] D. W. Elliott and H. Street, *Road Accidents* (Penguin, 1968), 209.

[30] . T. Goriely, R. Moorhead and P. Abrams, *More Civil Justice? The Impact of the Woolf Reforms on Pre-Action Behaviour* (The Law Society and the Civil Justice Council, 2002), 90.

[31] However, this very wide discretion given to insurers to conduct the litigation behind the insured's back is subject to some limit as recognised in *Groom v Crocker* [1939] 1 K.B. 194; [1938] 2 All E.R. 394.

Despite this, some respondents noted that in rare cases there were certain individual defendants who might influence the outcome. In clinical negligence claims, for example, the reputation of a doctor may be at stake and as a result the case may be defended much more vigorously by the organisation offering indemnity against liability. Being accused of negligence in a caring profession may therefore provoke a much stronger defensive response than, for example, where the accusation relates to bad driving:

> "[Some doctors] are so upset if a claim is made against them … [that] the defence organisations … are very, very cautious with them and very supportive … They won't just go, 'well, it's obvious, let's admit'. It's not like that, it's really difficult …" (EW8)

Even though medical insurers may therefore be more prepared to run the risk of incurring increased costs in mounting a defence in an uncertain case, there are still limits on the extent that the doctor involved can influence what is done:

> "If they start influencing the … process of the claim too much, then [the insurer] will exercise their control clause." (EW8)

Another example in the survey of where the views of an individual defendant could affect the outcome concerned employer's liability claims:

> "You do get cases where you know that the manager of the factory just doesn't like your client and no matter what you say or do it is not going to settle. He is not going to get that extra £10,000 because they just don't like him … You can't negotiate in those circumstances." (EW7)

This was seen as a particular problem in some cases involving stress at work where the employer may be especially keen to end the work relationship.

> "You often find that the employer is actually quite closely involved and … that they really don't want these people who have been given a breakdown [to return to work]. There is a big problem with personalities within the organisation (to put it neutrally) coming back. They are at risk again obviously of causing more damage to them. So they are very keen to see an end to the employment relationship." (EW4)

Lawyers and claims handlers

In general terms, it may be common knowledge that successful litigation is dependent upon the experience and ability of those handling the case. However, it remains the case that the most important advice that can be given to a potential tort claimant is to employ a good lawyer. Similarly, the skill of the claims handler representing the defendant will determine how the case proceeds. In Genn's study 30 years ago, it was found that there were various structural and situational inequalities between the parties which placed insurers at a considerable advantage in defending claims. A key factor was whether the claim was brought by an experienced lawyer who specialised in such litigation.[32] Since that time there has been increasing specialisation within firms.[33] However, there has also been market pressure to acquire and process bulk claims and this has resulted in many smaller claims being left in the hands of inexperienced paralegals:

[32] H. Genn, *Hard Bargaining: Out of Court Settlement in Personal Injury Actions* (Clarendon Press, 1987), 164.

[33] ICF Consulting Services, *An Assessment of the Market for Personal Injury* (2016), a report for the Solicitors Regulation Authority at *https://www.sra.org.uk/sra/how-we-work/reports/pi-report.page* [accessed 18 January 2019]. The founding of the Association of Personal Injury Lawyers in 1990 and its subsequent activity reflects the increasing abilities and resources of claimant lawyers. M. Williams, "A.P.I.L." (1991) 19 Civil Justice Q. 103. The Association now has 3,300 members, employs 25 people, and has a turnover of £2.35 million with reserves of over a million pounds. It is extremely well organised, and has its own Press, Parliamentary and Research officers as well as other administrators. APIL, *Annual Report and Accounts 2016*.

> "Paralegals don't have the same level of experience and you get a turnover of them, so they stay 18 months and go off to pastures greener and so there's a danger they won't build up the experience that you would have got through the usual route." (EW17)

As a result:

> "Sometimes you will get quite stupid responses which you think, 'well, they clearly don't understand what's been going on here' or they clearly don't know the law frankly. And that's because it's being dealt with by someone incredibly junior who's probably running a huge number of other cases and is doing it as a real sausage factory." (EW7)

One solicitor emphasised her skill level could make a real difference to the result:

> "In these days of rank on rank of paralegals being employed, the defendants will take advantage … There's an element of panic—let's get this settled—and another one bites the dust. Well, with us old hacks, we know when we're being spun a line and we will get more compensation." (EW10)

Elsewhere I have described in detail how the tactics adopted by lawyers could affect the outcome of individual cases irrespective of their legal merits.[34] Again the particular character of solicitors was shown to be relevant. Although their overall management of claims was largely dictated by organisational and structural pressures, it was also affected by individual personality.[35] For example, how ready are solicitors to accept the additional pressures of going to trial? Our responses indicated that whilst some may relish the excitement and adrenalin produced at trial, others fear the loss of control and the uncertainty which resulted.

Only two further examples of how tactics relate to the personality of the litigators are given here. The first concerns the controversial question whether to take a combative or conciliatory approach in conducting negotiations. Psychological factors involving the background of the solicitor could influence this,[36] as reflected in a comment from a senior defendant lawyer:

> "I come from a background of doing things that make me potentially quite combative. For instance, I spent a lot of years doing martial arts. So, in a way, when you read around subjects like that, there's all kinds of pseudo philosophical stuff that gets transmitted into American corporate structures … Therefore, you can become very good at mind games … [Y]eah, you can do all the usual tricks … There are … a lot of claimant lawyers who seem to run things on the basis of: 'This is a points exercise and every time I get one over on you I will.' Now the difficulty with that situation is—as one of my old bosses used to say to me—if you're going to put the boot in, make damn sure your laces are done up." (EW5)

The second example relates to the analogy between conducting negotiations to settle an injury claim and the playing of a card game. Both can be marked by the exaggeration of the strength of one's hand and by the use of bluff to gain the desired position. Not everyone is good at this and the influence of personality is clear:

> "I think people have difficulty in negotiating, particularly if they're trying to drive a better deal than they've actually got authority to drive. So, the poker player—there's not a poker player in all of us—some are better at it than others." (EW11)

[34] R. Lewis, "Tort Tactics: An Empirical Examination of Personal Injury Litigation Strategies" (2017) 37 *Legal Studies* 162 and R. Lewis, "Strategies and Tactics in Litigating Personal Injury Claims: Tort Law in Action" [2018] J.P.I.L. 113.

[35] Similarly, H. Genn, *Hard Bargaining: Out of Court Settlement in Personal Injury Actions* (Clarendon Press, 1987), 38.

[36] Psychological factors affecting negotiations are considered by C. Menkel-Meadow, "Lawyer Negotiations: Theories and Realities—What We Learn from Mediation" (1993) 56 M.L.R. 361 at 377.

Cases can also be influenced by factors other than the skill and experience of the representatives or the tactics that they use. For example, in the US it was suggested that insurance claims adjusters came from a conservative political background and this was reflected in the moderate offers of settlement they made.[37] In contrast, it might be expected that claimant lawyers would have more liberal political views and develop a greater sympathy with their clients. In the present survey, one solicitor noted that her employment in a firm which was closely aligned to a trade union gave not only job satisfaction but also energised her work. Another respondent similarly acknowledged that his approach to litigation was influenced by his wider view of the world:

> "I'm driven personally by the desire to make a difference to help people. That is why I am a personal injury lawyer … That is why I spend a lot of time outside the cases campaigning, trying to make a difference in people's lives … including contributing to a political context or sharing my knowledge and expertise with others to bring them on." (EW03)

It may be, therefore, that the political views or wider social attitudes of practitioners influence how they approach their work. However, the survey did not directly investigate this and produced only limited evidence in support.

Judges

Most interviewees said that they did not relish going to trial. There were several reasons for this, the most common being fear of the uncertainty that would result.

> "I would far rather a sensible settlement than a trial because you don't have any control when you get to trial: witnesses say things you wouldn't expect them to; claimants say something differently; who knows what the judge is going to react like? I think it's a lottery that I don't need to join." (EW6)

As part of the unpredictability it was noted that the sympathies of individual judges could vary considerably and have an effect of the outcome of the case:

> "Judges are human beings, so they will view things in different ways." (EW4)

> "It's a tightrope … Much still depends on which judge you get." (EW9)

There were similar comments about decisions made by lower courts:

> "It very much comes down to the judge that you get on the day … Counsel that work with these Masters day in, day out, know which ones tend to be more claimant friendly, which ones tend to be defendant friendly … And again, more locally, if you instruct local counsel, they will generally have an idea which approach a District Judge is going to take to it before you actually go into the courtroom." (EW14)

A couple of barristers agreed with this, and the only insurer interviewed suggested:

> "You pretty much know how it's going to land when you know which judge you're going to draw." (EW29)

However, one lawyer thought judges less predictable and suggested that they had "good" and "bad" days when their temperament might affect the outcome:

[37] H. L. Ross, *Settled Out of Court: The Social Process of Insurance Claims Adjustment*, 2nd edn (Aldine, 1980), 41 onwards.

> "Even where I have got a client where I believe them, I have done enough trials to know that four out of ten judges on a grumpy day probably would not. So, it is worth factoring in something to try and get it settled …" (EW10)

This lawyer also thought that a judge might be influenced by the media, especially in relation to compensation culture:

> "I think that the judges are affected by the media as well—all the business about local authorities having no money. They do not like slipping and tripping cases … You just need one judge who has a crazy-paved footpath and they are not going to accept your client's case. It is a lottery in that way." (EW10)

By contrast, certain claimants were thought to be more likely to attract the sympathy of the court. One lawyer suggested a possible reason for him losing a case was that:

> "… it was a litigant in person. I turned up with a high-powered suit and a case, and she turned up with a handbag. I think the sympathy element was in the judgment." (EW13)

The sympathy of the court was also thought to depend sometimes upon the nature of the injury suffered:

> "If you have a claimant of a particular demographic, they are in my experience more likely to succeed both in terms of breach of duty and success in terms of quantum than another type of claimant … For instance, it is exceedingly difficult to defend mesothelioma claims because it is widely viewed—rightly or wrongly—that the use of asbestos is something that requires compensation to be paid to all of the individuals who have suffered as a result of that use of asbestos. I won't say regardless because that would be unfair but with little weight being given to issues like breach of duty and the state of knowledge at the time that the materials were in use …" (EW5)

Asbestos victims who contract mesothelioma were also cited as examples by two other defendant lawyers:

> "I am not suggesting for a moment it is nothing but a horrendous diagnosis and it is a death sentence and it is a horribly painful death by all accounts, but I think it does colour judicial decisions. I think claimants with mesothelioma or their dependents that are bringing the claim do have the sympathy of the court." (EW12)

> "There is a perception in many corners that actually the burden of proof in mesothelioma claims … has disappeared—well that 20–0 per cent is now good enough … The judiciary often will bend over backwards … to find in favour of the claimant." (EW11)

A barrister added a word of caution and denied that judges were generally sympathetic to claimants merely because they had suffered injury:

> "I don't think that the fact that the individual is injured will necessarily influence judges. I think by and large judges are quite objective about that." (EW15)

However, he did go on to say:

> "What will potentially influence a judge … is how a person comes across in evidence and, I think while judges will try their best not to do so, if they like a particular witness, or a particular person, or dislike them, then that may influence the outcome." (EW15)

Who are tort claimants and what injuries do they suffer?

In this second half of the article we move away from the survey to consider a broader picture of personal injury litigation. We use statistics to determine who are likely to be personal injury litigants and from what injuries they suffer. A powerful image of the traditional portrayal of justice is that of the universal application of the law to all citizens. All are equally subject to the law and all can equally benefit or be penalised by it. In reality, there is only limited scope for actions in tort for personal injury. Only certain people suffering particular injuries are likely to attract compensation. However, there is very little acknowledgement in tort texts of the factors discussed below.

Based on official statistics,[38] there are almost a million claims brought for personal injury every year. This means that annually there is a claim made for every 67 people in the UK. Whether claims are made very much depends on the incidence of insurance for they are largely found in the areas where it is compulsory to be covered against tort liability.[39] As a result, road and work accidents predominate. In 2016–2017, they constituted 86% of all claims with road traffic injuries comprising 79% of the total and employer's liability accounting for another 7%.[40] These two categories have traditionally dominated personal injury litigation even though they may account for only a minority of all the possible causes of injury.[41] Accidents commonly result, for example, from activities in the home or in following leisure pursuits or in the course of providing health care. However, very few of these result in a damages award.[42] Injuries are very unlikely to be compensated if they occur in areas not covered by liability insurance or where there is no other "deep pocket" such as that provided by a government body or a large self-insured company. Those suffering as a result of a disease find it much more difficult than an accident victim to sue in tort[43]: for each disease claim made there are 29 based on accident.[44] Overall, therefore, although work and transport injuries dominate the tort system, they are not representative of injuries or disabilities in the general population. It is clear that, irrespective of the need to establish liability, tort in practice covers some groups much better than others and it ignores the plight of many. Where and how you get injured is all important.

Apart from location, it also matters from which section of society you come. People from certain demographic groups are more likely to sue than others. For example, claims can be subject to a gender and age analysis, although there is almost no reference to this in tort texts.[45] On average, settlements are somewhat more likely to be obtained by men: women receive only 43% of the total despite constituting 51% of the population.[46] This difference is accentuated for work injuries where women obtain less than a

[38] In 1989, the Compensation Recovery Unit (CRU) was set up by Government to recover from damages certain social security benefits paid as a result of the tortious injury to the claimant. Reliable data has been generated on the number and types of claims and settlements that are made irrespective of whether cases reached trial or were settled out of court. Department for Work and Pensions, *Compensation Recovery Unit—Performance Statistics* at *http://www.dwp.gov.uk/other-specialists/compensation-recovery-unit/performance-and-statistics/performance-statistics* [accessed 18 January 2019]. The figures are discussed in more detail in R. Lewis, A. Morris and K. Oliphant, "Tort Personal Injury Claim Statistics: Is there a Compensation Culture in the UK?" (2006) 14(2) *Torts Law Journal* 158 and [2006] J.P.I.L. 87. See also R. Lewis and A. Morris, "Tort Law Culture: Image and Reality" (2012) 39 J. Law & Society 562 and "Challenging Views of Tort" [2013] J.P.I.L. 69–80 and 137–150.

[39] The lack of coherent policy behind compulsory insurance was traced in C. Parsons, "Employers Liability Insurance—How Secure is the System?" (1999) 28 Industrial L.J. 109.

[40] Department for Work and Pensions, *Compensation Recovery Unit—Performance Statistics*.

[41] The *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (1978, cmnd.7054, chairman Lord Pearson), Vol.2 table 57 and P. Cane and J. Goudkamp, *Atiyah's Accidents, Compensation and the Law*, 9th edn (Cambridge University Press, 2018), 1.4 and 8.1.3.

[42] D. R. Harris, M. Maclean, H. Genn, S. Lloyd-Bostock, P. Fenn, P. Corfield and Y. Brittan, *Compensation and Support for Illness and Injury* (OUP, 1984), table 2.2.

[43] J. Stapleton, *Disease and the Compensation Debate* (Clarendon Press, 1986).

[44] In the four years from 2012–16 almost 4 million accident claims were registered but there were only 136,000 disease claims. Response to a Freedom of Information Request from the author by the Department for Work and Pensions, July 2016.

[45] D. R. Harris, M. Maclean, H. Genn, S. Lloyd-Bostock, P. Fenn, P. Corfield and Y. Brittan, *Compensation and Support for Illness and Injury* (OUP, 1984), Ch.2 found in a detailed demographic survey that women, the elderly, the young and unemployed were less likely to seek legal advice about the possibility of claiming.

[46] Compensation Recovery Unit figures for the three years 2009–2012 as supplied for a Ministry of Justice Analytical Report, the Ipsos Mori Social Institute Report, *Discount Rate Research* (2013), 3.3. The author directed the research for this report.

quarter of all settlements.[47] However, women are more likely to be the recipients of compensation for clinical negligence: they obtain 56% of all the settlements in this area, although medical claims are relatively few being only 2% of the total.[48] If we look at age differentials it appears that those under 35 are somewhat more likely to receive damages: they account for half of all settlements even though they comprise only 44% of the population. By contrast, the youngest are less likely to be recipients: those under 18 receive only 9% of awards despite constituting about 23% of the population.[49] Similarly, older people do not receive settlements in proportion to their number: those aged 65 or more obtain only 6% of the total despite comprising about 17% of the population. Finally, again the few medical claims differ from the average with less than a third of claimants being under 35 years old, and with 18% being at least 65. This may simply reflect that fact that elderly people are more likely to receive medical treatment. In contrast, the elderly are less likely to be injured in motor vehicles and therefore they generate only 4% of the settlements in those cases.

Claimants are far more likely to make a claim today than they were 40 years ago.[50] Whilst historical data is in short supply, data which is available supports the view that over the long-term there has been a very substantial increase in personal injury claims. They appear to have risen four-fold since the 1970s. In 1973, the Pearson Commission estimated that there were about 250,000 claims.[51] In 1988, it was thought that claims had grown to around 340,000.[52] This figure then doubled by the new millennium. However, the rising trend in claims has not been a consistent one. Indeed, numbers actually fell slightly between 1998 and 2006 but they have since risen again and are now a third more than they were at the start of the millennium. The landmark figure of a million was exceeded in 2013 since when claims have declined by 6% to fall just short of that figure.[53] However, these overall claims figures disguise major changes which have taken place in relation to particular kinds of injuries. These changes are revealed in the table.[54]

[47] See Ipsos Mori Social Institute Report, *Discount Rate Research* (2013) and the Department for Work and Pensions, *Accessing Compensation: Supporting People Who Need to Trace Employers Liability Insurance* Consultation Paper (2010), 40 para.46 citing unpublished statistics of the Compensation Recovery Unit. Reasons for women gaining less compensation are examined in R. Lewis, "Industrial Injuries Compensation: Tort and Social Security Compared" (2017) 46 Industrial L.J. 445.

[48] Department for Work and Pensions, *Compensation Recovery Unit—Performance Statistics*.

[49] Ipsos Mori Social Institute Report, *Discount Rate Research* (2013), table 3.3 contrasted with the age structure figures for the general population in the Office for National Statistics, *2011 Census* table 3a.

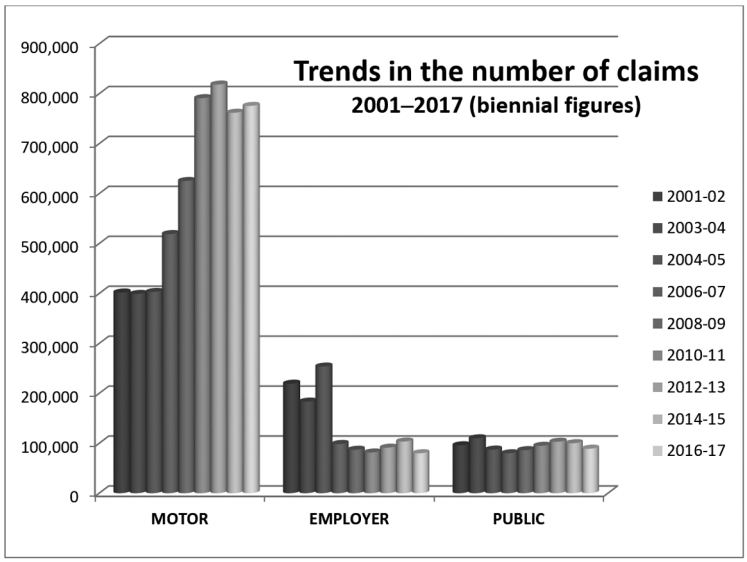
[50] See generally A. Morris, "Tort and Neo-Liberalism" in K. Barker, K. Fairweather and T. Granham (eds), *Private Law in the 21st Century* (Hart Publishing, 2017), Ch.24. Reasons for the increase are traced in R. Lewis, "Structural Factors Affecting the Number and Cost of Personal Injury Claims in the Tort System" in E. Quill and R. Friel (eds), *Damages and Compensation Culture* (Hart Publishing, 2016), Ch.2 and R. Lewis, "Compensation Culture Reviewed: Incentives to Claim and Damages Levels" [2014] J.P.I.L. 209.

[51] *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (1978, cmnd.7054, chairman Lord Pearson), Vol.2 para.59 and generally P. Cane and J. Goudkamp, *Atiyah's Accidents, Compensation and the Law*, 9th edn (Cambridge University Press, 2018), 8.1.3.

[52] Lord Chancellor's Department, *Report of the Review Body on Civil Justice* (1988, cm.394). H. Genn, *Judging Civil Justice* (Cambridge University Press, 2009), para.391. This estimate is given with no indication of the facts upon which it is based and seems not to be derived from the research from Inbucon Management Consultants, *Civil Justice Review: Study of Personal Injury Litigation* (Lord Chancellor's Department, 1986).

[53] Department for Work and Pensions, *Compensation Recovery Unit—Performance Statistics*. For more detail see R. Lewis and A. Morris, "Tort Law Culture: Image and Reality" (2012) 39 J. Law & Society 562 and "Challenging Views of Tort" [2013] J.P.I.L. 69–80 and 137–150.

[54] The table has been compiled by the author using the annual statistics published by Department for Work and Pensions, *Compensation Recovery Unit—Performance Statistics*.



As can be seen, public liability claims have remained constant, hovering around 100,000 a year. By contrast between 2000 and 2007, the number of employers' liability claims fluctuated considerably, reaching a peak of 291,000 in 2004. This was largely due to the creation of temporary special schemes of compensation for coalmining diseases.[55] These schemes closed in 2004 and since then the annual number of employers' liability claims has fallen by almost two thirds to less than 100,000. There are now fewer such claims than there were in 1973.[56] They have declined in relative importance to such an extent that they account for only 7% of all claims whereas in 1973 they represented 45%.[57]

In stark contrast to other types of claim, those involving motor vehicles have doubled since 2004. They number 780,000 today.[58] As discussed elsewhere,[59] this substantial increase is responsible for the long-term rise in the total of all personal injury claims. In 1973, motor claims constituted 41% of all personal injury claims; by 2001, this had increased to 54%; and for 2017, they constituted 79% of all claims. A notable feature has been the growth of claims involving whiplash injury which now constitute well over half of all the motor claims that are made.[60] This figure rises to 87% if the separate categories of neck or back injury are added to whiplash. It has been controversially and mistakenly suggested that by 2004 the UK had substantially more whiplash cases than any other European country. Since then, however, the number of claims may have doubled.[61]

[55] The claims of miners in respect of, first, respiratory disease, and secondly, the use of vibrating tools led to settlement schemes which were called "the biggest personal injury schemes in British legal history and possibly the world". From 1999–2004, about 760,000 claims were registered. Department of Trade and Industry, *Coal Health Claims* at *http://www.dti.gov.uk/coalhealth/01.htm* [accessed 18 January 2019].

[56] Considered in more detail in R. Lewis, "Industrial Injuries Compensation: Tort and Social Security Compared" (2017) 46 Industrial L.J. 445.

[57] Only one in seven workers suffering disease or injury make a claim according to the Trades Union Council and the Association of Personal Injury Lawyers, *The Compensation Myth: Seven Myths about the "Compensation Culture"* (2014). For examination of why so many injured people do not make a claim in the US see D. Engel, *The Myths of a Litigious Society: Why We Don't Sue* (University of Chicago Press, 2016).

[58] Department for Work and Pensions, *Compensation Recovery Unit—Performance Statistics*.

[59] R. Lewis and A. Morris, "Tort Law Culture: Image and Reality" (2012) 39 J. Law & Society 562 and "Challenging Views of Tort" [2013] J.P.I.L. 69–80 and 137–150 and R. Lewis, "Compensation Culture Reviewed: Incentives to Claim and Damages Levels" [2014] J.P.I.L. 209.

[60] 58% according to CRU figures supplied to the Transport Committee, Eleventh Special Report, 2013–2014, *Cost of Motor Insurance: Whiplash: Further Government Response to the Committee's Fourth Report of Session 2013–14* (HC 902), 4 and table 1 annex B Contrast the lower figures supplied by CRU to APIL following a Freedom of Information Act request. J. McGlade, "No Basis for Reforms?" [2017] J.P.I.L. 63. However, these figures fail to take account of the threefold rise in injuries classified as either "neck" or "back" injuries and excluded from the "whiplash" figures.

[61] European Insurance and Reinsurance Federation (CEA), *Minor Cervical Trauma Claims* (2004), 4. In its response to the Ministry of Justice Consultation CP17/2012, APIL emphasised the European data is unreliable and outdated, and in its response the Law Society similarly doubted the insurers' figures. For more trenchant criticism of the figures see K. Oliphant, "The Whiplash Capital of Europe? European Perspectives on Compensation

How disabling is the injury suffered by the typical tort claimant? In practice, the injury is rarely serious: claimants suffer very little, if any, loss of earnings and they rarely incur medical costs or feel the need to claim any social security benefit.[62] Tort damages for future financial loss are only awarded in 7% of cases and the amount is less than 9% of the total damages bill.[63] In contrast, the largest component of the damages award is the payment for pain and suffering: it is rarely acknowledged that two thirds of the total compensation paid to claimants by the tort system is for this non-pecuniary loss.[64] This head of damages is so prominent because the tort system overwhelmingly deals with small claims where there is no other head of loss to be compensated. As a result, the great majority of cases in practice settle for less than £5,000[65] which is the equivalent of about two month's average salary.

We have seen that the typical claim in four out of five cases is for a whiplash or a neck injury following a road traffic accident. The symptoms can be difficult to disprove.[66] Although whiplash in exceptional cases can be very disabling, usually the pain and discomfort is temporary. These claimants soon make a full recovery and are left with no continuing ill effects. Often, therefore, the only financial incentive to sue for personal injury lies in the availability of non-pecuniary loss. It is the engine that drives the tort system.[67] It should also be recognised that these minor injury cases, predominantly involving pain and suffering, account for the extraordinarily high costs of the system: for every pound a claimant receives almost another pound is spent in administration.[68] Many would question whether such a high costs ratio can be justified. However, the essential point to note here is that those claimants in tort who suffer significant injury are very much the exception rather than the rule. Their cases are litigated very differently. For present purposes, it is in their cases that personality and character are more likely to affect the outcome of the claim. By contrast, we now turn to consider how minor claims are processed.

Culture" in E. Quill and R. Friel (eds), *Damages and Compensation Culture* (Hart Publishing, 2016), Ch.1. It has also been argued that, based on insurers' own statistics, the cost of whiplash claims actually fell by 17% in the years from 2007–2016. Capital Economics, *Boosting Insurers' Profits* (2017) at *https://accesstojusticeactiongroup.co.uk/ce-report/* [accessed 18 January 2019].

[62] The Compensation Recovery Unit was issuing a nil certificate in 70% of cases. R. Lewis, *Deducting Benefits from Damages for Personal Injury* (OUP, 1999), para.14.05.

[63] *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (1978, cmnd.7054, chairman Lord Pearson), Vol.2 para.44 and table 107. However, in 2002, the ABI estimated that 46% of the value of claims between £100,000 and £250,000 comprised future loss. Lord Chancellor's Department, *Courts Bill: Regulatory Impact Assessment* (2002) table 8.

[64] *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (1978, cmnd.7054, chairman Lord Pearson), Vol.2 table 107. The Health and Safety Executive similarly estimated that the cost of including pain and suffering would increase payroll costs from 1% to 2.5% in an integrated compensation scheme for work injury. Greenstreet Berman, *Changing Business Behaviour—Would Bearing the True Cost of Poor Health and Safety Performance Make a Difference?* (2002).

[65] Capital Economics analysed 171,000 motor cases settled in 2016 and found compensation was below £5,000 in 80% of them. *Legal Futures*, 4 July 2017. In a survey of conditional fee claimants in 2011 half of them received less than £5,000. Insight Delivery Consultancy, *No Win No Fee Usage in the UK*Appendix 5 of the Access to Justice Action Group, *Comments on Reforming Civil Litigation Funding*. More generally, P. Cane and J. Goudkamp, *Atiyah's Accidents, Compensation and the Law*, 9th edn (Cambridge University Press, 2018), 1.4.6.

[66] Ministry of Justice, Consultation Paper, *Reducing the Number and Cost of Whiplash Claims* CP17/2012 (cm.8425 2012) para.6.

[67] By contrast, non-pecuniary loss also accounts for much of the disproportionate cost of the tort system. It also provides opportunities for exaggeration of losses and fraudulent claims. It is thus a root cause of many of the concerns about compensation culture. R. Lewis, "Compensation Culture Reviewed: Incentives to Claim and Damages Levels" [2014] J.P.I.L. 209, 54–56. For acknowledgement of the case for abolishing or limiting such claims see Lord Sumption, "Abolishing Personal Injuries law—A Project" [2017] J.P.I.L. 1, Personal Injuries Bar Association Annual Lecture 2017. For a limited rebuttal see J. Morgan, [2018] J. Professional Negligence 122.

[68] P. Cane and J. Goudkamp, *Atiyah's Accidents, Compensation and the Law*, 9th edn (Cambridge University Press, 2018), 16.1. The *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (1978, cmnd.7054, chairman Lord Pearson), Vol.1 para.256 estimated that the cost of operating the tort system amounted to 85% of the value of tort payments distributed to claimants. The Lord Chancellor's Department, *Report of the Review Body on Civil Justice* (1988, cm.394). H. Genn, *Judging Civil Justice* (Cambridge University Press, 2009), para.432 estimated that the cost of the tort system consumed 125–175% of damages awarded in the County Court. Jackson LJ, *Review of Civil Litigation Costs: Final Report* (2010), also found evidence of disproportionately high costs. Data collected for one survey showed that for 280 cases which had come before the District Court the claimant costs alone amounted to £1.80p for every £1 of damages paid. On average, costs exceeded damages for cases settled up to £15,000 in the "fast track" procedure. C. McIvor, "The Impact of the Jackson Reforms on Access to Justice in Personal Injury Litigation" (2011) 30 Civil Justice Q. 411. In clinical negligence cases in 2016–2017, claimant legal costs exceeded the damages awarded in 61% of claims according to the National Audit Office Report, *Managing the Costs of Clinical Negligence in Trusts* (2017, HC 305 session 2017–2019).

"Settlement mills" and the mechanical disposal of claims

Reasons for the rise in the number of claims described above have been examined in detail elsewhere.[69] However, it is suggested here that there is a connection between the increase in claims and the ways in which litigation is now financed.[70] An outline is given of how changes in finance have affected the way in which solicitors obtain and then deal with new claims.

Conditional fees were introduced to replace legal aid in personal injury cases in 1995.[71] As a result, the financial risk of litigating now falls predominantly on claimant lawyers. "No-win, no-fee" may attract clients but firms must pay disbursements and maintain their cash flow until they are able to win these cases and recover their litigation costs. Although it is relatively unusual for a claimant's case not to succeed,[72] a firm's failure to recover its costs can prove very expensive. In addition, the costs recoverable have been increasingly curtailed. A series of measures have reduced the exposure of defendants to legal costs which are disproportionate to the value of the claim.[73] "Success fees"' have also been abolished so that the increased fee formerly recoverable from defendants when a case was won is no longer payable.[74] The most important change to limit costs has been the introduction of fixed fees. Progressively, since 2010, fees have been set for various classes of work especially where the claim is of low value. Many of these claims are now processed by an electronic "Claims Portal" which streamlines procedures. As a result, the fees that can be recovered have been reduced considerably.

Overall, the reforms have led to a substantial reduction in the financial return that can be made on personal injury work.[75] This has had widespread consequences. It has affected, for example, the tactics used in litigation and how claims are processed.[76] It has also led to a change in the structure of personal injury law firms and has limited the way in which lawyers interact with their clients. The structure of firms began to change when, in response to the changes in finance, they saw the need to solicit claims in bulk. They capitalised on initiatives first taken by claims management companies to trawl for clients: they aggressively used advertising and other methods to pursue potential claimants much more vigorously than in the past.[77] Business models have been devised which argue that firms must increase the number of claims they process and manage them more efficiently. Firms have been urged to "get big, get niche or get out".[78] In other words, they need either to become larger and more efficient to deal with minor claims in bulk or they must develop specialist skills to deal with the minority of claims where more serious injury is suffered. Otherwise they will fail. In response to greater competition for claims, many firms have indeed gone out of business. Others have been lost in a series of mergers. In 2014, this led the head of ill-fated

[69] See R. Lewis, "Structural Factors Affecting the Number and Cost of Personal Injury Claims in the Tort System" in E. Quill and R. Friel (eds), *Damages and Compensation Culture*, (Hart Publishing, 2016) Ch.2 at 39–51.

[70] For detailed analysis see Jackson LJ, *Review of Civil Litigation Costs: Final Report* (2010), see A. Morris, "Deconstructing Policy and Costs and Compensation Culture" in E. Quill and R. Friel (eds), *Damages and Compensation Culture* (Hart Publishing, 2016), Ch.7 and J. Sorabji, *English Civil Justice after the Woolf and Jackson Reforms* (CUP, 2014).

[71] Courts and Legal Services Act 1990 extended by the Access to Justice Act 1999.

[72] Insurers admitted that liability is not even partially contested in 90% of road traffic claims and 80% of work claims. Jackson LJ, *Review of Civil Litigation Costs: Preliminary Report* (2009). As a rough check, using the Compensation Recovery Unit figures for the seven years from 2010–2017, the author found that the number of settlements recorded were 97% of the number of claims made. However, this figure makes no allowance for the fact that costs are not always recoverable in full even though a claim succeeds.

[73] See R. Lewis, "Structural Factors Affecting the Number and Cost of Personal Injury Claims in the Tort System" in E. Quill and R. Friel (eds), *Damages and Compensation Culture*, (Hart Publishing, 2016) Ch.2.

[74] The Legal Aid, Sentencing and Punishment of Offenders Act 2012 s.44. A success fee now can only be obtained from the lawyer's own client instead of from the defendant. The fee can be deducted from the damages obtained. A further limit on claimant recovery is that defendants no longer have to reimburse the cost of insurance premiums paid by the claimant to indemnify them against being liable for costs should their action fail.

[75] A. Morris, "Deconstructing Policy and Costs and Compensation Culture" in E. Quill and R. Friel (eds), *Damages and Compensation Culture* (Hart Publishing, 2016), 129.

[76] R. Lewis, "Tort Tactics: An Empirical Examination of Personal Injury Litigation Strategies" (2017) 37 *Legal Studies* 162 and R. Lewis, "Strategies and Tactics in Litigating Personal Injury Claims: Tort Law in Action" [2018] J.P.I.L. 113.

[77] Discussed in more detail in R. Lewis, "Compensation Culture Reviewed: Incentives to Claim and Damages Levels" [2014] J.P.I.L. 209 and Jackson LJ, *Review of Civil Litigation Costs: Final Report* (2010). Following concerns about market abuse especially by claims management companies, the payment of referral fees to obtain claims was banned in 2013 but has still continued to some degree.

[78] David Marshall, (2013) 157 Sol. J. 16 October 2013, the author being a former President of the Association of Personal Injury Lawyers.

Slater & Gordon to predict that just three firms would soon control up to 40% of all claims.[79] Market share and efficient dealing with bulk claims have thus been said to hold the keys to survival and success.

In parallel with these changes in the structure of claimant firms there has been a consolidation in the insurance market. A handful of insurers now dominate personal injury so that in motor claims, for example, there are only four companies which share over half the market.[80] To increase efficiency, insurers have sharply reduced the number of law firms which act for them. These firms have had to survive a competitive tendering process to obtain this work and they have had to limit their costs accordingly. The significant development for present purposes is that insurers can no longer be seen as acting exclusively for defendants because they now also assist many claimants. This is because of the rapid expansion of before-the-event insurance which now covers more than half the population.[81] As a result, insurers direct injured policyholders who have this cover for their legal costs to go to one of the few law firms that have been selected and approved by them. Insurers' thus control representation not only for the great majority of defendants but also for very many claimants. This has further contributed to the production of bulk litigation within specialist firms on both sides of the industry.

These demands for greater efficiency and reduced cost have encouraged law firms not only to expand but also to employ many more junior staff to deal with the increasing volume of claims. A lot of the work involving run-of-the-mill cases is now being carried out by unqualified or paralegal personnel who are paid much less than an employed solicitor.[82] Partners in firms now have the difficult task of supervising a team of junior employees whilst also ensuring that the higher value claims are dealt with by more experienced litigators. At the lower level there has been what has been described as a "dumbing down" of the industry. An insurer interviewed for the survey suggested that:

> "There's a two-tier legal profession. The volume stuff is not dealt with by lawyers at all—it's accident management … And then you get what I regard as proper lawyers dealing with it from mid-range up." (EW29)

A defendant lawyer agreed:

> "On both sides there has been … a 'dumbing down' because the market has driven us in that direction. Fixed fees … means that you can't afford to … employ vastly experienced, expensive lawyers to do the work, so you have to get paralegals in to do the work." (EW11)

To accompany this change in staff, firms have developed standardised procedures to ensure that inexperienced personnel deal with claims as efficiently as possible:[83]

> "The only way to supervise a huge number of individuals is in a mechanistic way. The only way you're going to get them to perform (if they're not … sufficiently experienced or qualified to make

[79] "Slater chief predicts rapid consolidation in PI market" [2014] Law Soc. Gazette 1 May 2014. A year later, the three leading firms controlled an estimated 22% of the market. N. Rose, "Slater & Gordon strikes £677 million deal to buy Quindell" [2015] *Legal Futures* 30 March 2015. However, as a result of this deal the firm revealed that it had suffered catastrophic losses. Offices were closed, a serious fraud investigation begun, and a class action suit was brought by shareholders. By 2017, the shares in that "alternative business structure" firm had lost 98% of their value and it was recapitalised by its lenders. *Financial Times* 30 June 2017.

[80] Based on the premiums collected in 2012, the companies are Direct Line, Admiral, Aviva and AXA. Evidence of Thompsons solicitors to House of Commons Transport Committee, *Driving Premiums Down: Fraud and the Cost of Motor Insurance* (2014) First Report of Session 2014–2015 (HC 285). Association of British Insurers, *Company Rankings 2014–Motor*.

[81] R. Lewis, "Litigation Costs and Before-The-Event Insurance: The Key to Access to Justice?" (2011) 74 M.L.R. 272, FWD Group, *The Market for "BTE" Legal Expenses Insurance* (2007).

[82] Association of Personal Injury Lawyers, *The Impact of the Jackson Reforms on Costs and Case Management* (Evidence to the Civil Justice Council) (2014). D. Evans, "Shifting Strategy in the Personal Injury Market" [2014] J.P.I.L. 85. See also the report for the Solicitors Regulation Authority by ICF Consulting Services, *An Assessment of the Market for Personal Injury* (2016), a report for the Solicitors Regulation Authority.

[83] Local authorities similarly use routinised, simplistic and bureaucratic methods when handling injury claims. S. Halliday, J. Ilan and C. Scott, "Street-Level Tort Law: The Bureaucratic Justice of Liability Decision-Making" (2012) 75 M.L.R. 347. Insurers are increasingly using computerised procedures not only to assess claims value via programs such as Colossus but also to deal with other matters. "Zurich Insurance starts using robots to decide personal injury claims" *Reuters Business News* 18 May 2017.

good judgment calls of their own) is via a quite confined and narrow corridor of 'this is what you do, this is what you do, this is what you do'. 'If they do that, you do this'." (EW5)

An experienced lawyer expressed regret about the opportunities to learn and develop for those now entering the industry:

"I feel very sorry for people who are going in at a junior level because it can be very restrictive, and they may not be able to investigate in the way that I had the opportunities when I started out in the career. I think it is more a call centre factory line because it has to be: it is more bang, bang, bang. I think then there is less scope for development." (EW20)

These paralegals work in what has been identified in the US as "settlement mills" where the main features are that:

"Clients are rarely met; lawsuits are rarely filed; facts are rarely investigated; and settlement values are often calculated using formulaic going rates … Settlement mills' 'assembly-line' resolution of claims thus represents quite a departure from the intimate, individualized, and fact-intensive process thought to underlie traditional tort."[84]

The pattern of claims handling in the UK is similar: cases are being resolved earlier and without resort to formal court documents,[85] and there is little time or money available to investigate the facts. Judges have acknowledged that they:

"need to adopt a realistic standard when assessing the performance of solicitors conducting litigation under a high volume, low cost commoditised scheme … [S]olicitors cannot be expected to turn over every stone …"[86]

How little might be done in certain low value claims was noted by a respondent to the survey:

"We used to spend a lot of time investigating cases and liability … Now we just chuck them straight into the portal and see if the other side simply accept it." (EW6)

The legal process has not only been de-skilled but also de-personalised in these new claim factories. This has affected how even experienced claims handlers interact with their clients:

"If you think a case is only worth two or three thousand, you haven't got the time to spend two hours with the client taking a detailed statement … It's mitigating against that kind of more thorough approach which ultimately helps you understand the case." (EW7)

[84] N. Engstrom, "Sunlight and Settlement Mills" (2011) 86 New York University L.R. 805, 810 and "Run-of-the-mill Justice" (2009) 22 Georgetown J. of Legal Ethics 1485. For discussion of "dumbing down" of staff following implementation of the Woolf reforms in 1999 in the UK see T. Goriely, R. Moorhead and P. Abrams, *More Civil Justice? The Impact of the Woolf Reforms on Pre-Action Behaviour* (The Law Society and the Civil Justice Council, 2002), Ch.2. The history of the adoption of mechanical processes for various types of claim over many years in the US is traced by S. Issacharoff and J. F. Witt, "The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law" (2004) 57 Vanderbilt L.R. 1571. Their conclusion offers a major criticism of much recent tort theory: "The bureaucratic aggregation of our tort practice calls into question the individualized accounts of tort practice that are increasingly influential in the corrective justice literature."

[85] T. Goriely, R. Moorhead and P. Abrams, *More Civil Justice? The Impact of the Woolf Reforms on Pre-Action Behaviour* (The Law Society and the Civil Justice Council, 2002), 159 estimated that, because of earlier settlement, the number of cases disposed of only after the issue of formal proceedings had declined by a third. It has always been the case that the great majority of claims are settled informally: almost forty years ago 86% of cases were being settled without formal proceedings in the form of a writ being issued. The *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (1978, cmnd.7054, chairman Lord Pearson), Vol.2 table 12. Although NHS Resolution deal with more complex cases which are generally of higher value, in 2016–2017 it settled two thirds of claims before court proceedings began. National Audit Office Report, *Managing the Costs of Clinical Negligence in Trusts* (2017, HC 305 session 2017–2019), para.3.13.

[86] Jackson LJ *Thomas v Hugh James Ford Simey Solicitors* [2017] EWCA Civ 1303 at [46]; [2017] 9 WLUK 11. The judge was the author of the major report on costs.

> "A lot of the firms, they're not spending the time with the clients that they used to because they can't afford to … People are doing more and more on the telephone. They're not having that face to face meeting and the regular contact." (EW20)

Limited contact with clients is especially likely when they no longer live locally. The claim may have been gathered by a call centre and then referred to a solicitor from a different part of the country to the claimant. The case is simply one on a conveyor belt to be processed with many others in a routine manner.[87] The difficulties caused by such limited contact with clients were summed up by another solicitor:

> "There are lots of things that you pick up from seeing a client … You are putting injury in context. That is going to be much less likely to happen certainly in lower value claims." (EW3)

> "We need to create relationships with clients. If you have relationships with your clients, you gain their trust and they will tell you things. If you don't, it's just a process and they won't understand that they should have been telling you these things …" (EW3)

Overall, according to some judges, in the last ten years or so there has been a decline in the quality of work done when preparing cases for trial.[88] They suggest that a reason for this is that junior staff who are insufficiently trained may now be more commonly involved. In addition, they suspect that claimant representatives have not actually met their clients face to face.

These various features of legal practice which have resulted from processing claims in bulk may become less prominent when further changes which are planned for personal injury litigation come into effect.[89] Two new measures are among the most important of all those that have been taken to combat "compensation culture". First, for road traffic accidents alone, the small claims court limit is to be raised from £1,000 to £5,000 whilst, for other injury claims, it will be doubled to £2,000. These new thresholds radically affect the ability to recover legal costs and, as a result, will restrict access to justice for many claimants. Secondly, new fixed low tariffs are to be established to compensate whiplash injuries where the effects last for less than two years. At the lowest level, a sum of only £235 may be available. The extent that claims will be reduced as a result is uncertain,[90] but we may be sure that, with increasing pressure on costs, law firms will continue to deal with claims as efficiently as possible. Gathering claims en masse, albeit from a more restricted pool, will still be an attractive successful business strategy no matter whether this is done in the established field of road accidents or in relatively new areas such as where there is loss of hearing at work, sickness suffered on holiday or post-traumatic stress or other injury results from military service.[91]

With this caveat that the processing of bulk claims may diminish in importance, we conclude that it is in these run-of-the-mill cases—where investigation is limited and contact between lawyer and client restricted—that personality and character are less likely to have an effect. This contrasts with larger value claims which are more complex, take longer to resolve and are more likely to progress further towards trial. It is in these cases that the influence of individuals upon their outcome is more likely to be found.

[87] For judicial discussion of solicitors having little personal contact with claimants and firms using extensive questionnaires and standardised letters to enable a high number of claims to be dealt with at limited cost see *Proctor v Raleys Solicitors* [2015] EWCA Civ 400; [2015] 4 WLUK 570.

[88] ICF Consulting Services, *An Assessment of the Market for Personal Injury* (2016), a report for the Solicitors Regulation Authority.

[89] Following the Ministry of Justice Response in February 2017 to the Consultation on *Reforming the Soft Tissue Injury ("whiplash") Claims Process* (cm.9299, November 2016) reforms were set out in the Prisons and Courts Bill Pt 5. These were lost on the dissolution of Parliament in June 2017 but were resurrected in the Civil Liability Act 2018.

[90] But see the Ministry of Justice calculations relating to whiplash, *Impact Assessment* (MoJ 015/2016, reissued March 2018).

[91] The Association of British Insurers in *Noise Induced Hearing Loss Claims* (ABI, 2015) noted a 250% increase in claims from 2010–2013. The Association of British Travel Agents claim that holiday sickness cases increased sevenfold from 2013–2016 but these figures are contested. *Legal Futures*, 23 October 2017. Whilst some practitioners see increased technology as a saviour leading to even more mechanical disposal of cases, others see firms abandoning such work entirely. N. Hilbourne, "Small claims expert: personal injury tariff scheme would force me to leave market" *Legal Futures*, 28 September 2017.

Conclusion

The experience of those in practice reveals that the personality and character of various parties involved in personal injury litigation can affect its outcome irrespective of the formal legal rules prescribed in the law of tort. Claimants, lawyers and insurance representatives can all influence the result. In a few cases, the individual defendant can also be important and, in the very exceptional cases that go to trial, the judge. This conclusion is based upon interviews with practitioners: the views of solicitors and barristers provide a different perspective on the tort system from that which students usually encounter via the writings of academics and the legal opinions of judges. The study is related to earlier work which examined the importance of the tactics used by lawyers in personal injury litigation. Both areas provide examples of how the resolution of claims is dependent upon factors not confined to the application of the black letter law. They illustrate the distinction between "law in the books" and "law in action" and form part of a wider critique of tort scholarship and teaching.

Although personality and character may thus be relevant in litigation, this article has also described areas where it is less likely that an individual will affect the outcome of a case. For a variety of reasons, personal injury law firms have changed their structure. They have been encouraged to acquire claims for minor injury in bulk and then process them as efficiently as possible. To do this, firms have employed junior personnel and restricted their field of operation by closely directing them as to how these claims are to be dealt with. Only limited time can be spent on investigating and processing and there may be little direct contact with individual claimants. It is in these cases that the personality of those involved in litigation is less likely to affect matters. In effect, this is largely the result of the bureaucratised framework which sets the parameters for settling cases in bulk as efficiently as possible.

These basic features of the personal injury system may be all too familiar to experienced practitioners. However, they have been examined by only a handful of the many scholars who specialise in the study of tort law. Instead, these academics are more likely to be pre-occupied with finding theoretical bases for tort liability. Those who defend the present system, for example, by espousing corrective justice as the foundation for their citadel are failing to take account of how personal injury litigation is really conducted.[92] These traditionalists accentuate the gap between what is taught in theory and what happens in practice. Overall, although this article has sought to restore some humanity to the study of law, it has also revealed an impersonal and mechanised process which applies to many claims. It is important to appreciate both features in order to understand the wider context of tort law and go beyond the examination of rules which often have only limited application in the real world.

[92] See fn.84. For an excellent wide-ranging review of theory in tort see S. Hedley, "The Revolution in Liability for Negligence" in S. Worthington, A. Robertson and G. Virgo (eds), *Revolution and Evolution in Private Law* (Hart Publishing, 2018), Ch.6 and esp. p.109: "So the symbolic justifications given for tort grow more distant from how tort actually works, and tort faces an ongoing crisis of legitimation".

Reforming the European Product Liability Directive: Plus ça Change, Plus c'est la Même Chose?

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LT Defective products; EU law; Personal injury; Pharmaceuticals; Product liability; Software

Introduction

The process leading up to the adoption of the European Product Liability Directive[1] (the progenitor of the Consumer Protection Act 1987) in the 1970s and 1980s was complicated. As part of the delicate compromise which represented the final text of the Directive, a periodic review process was agreed upon by the Member States and the European Institutions, so as to facilitate monitoring of the operation of the Directive and allow for a formal evaluation process.

Article 21 of the Directive thus provides that the Commission must prepare a report to the Council on the application of the Directive on a five-yearly basis.[2] This has given rise to a series of Commission reports since the inception of the Directive in 1985. With the 5th Review having recently been published, the objective of this piece is to reflect on the review process and the issues identified in the European Commission's Report. In an initial section, we will review the background to, and history of, the review process and will then examine the current review.

The history of reviewing the Product Liability Directive

The history of reviewing the Product Liability Directive has been a somewhat chequered one. In the early 1990s, an official study was commissioned into the impact of the Directive,[3] but the ultimate report was not well-received,[4] and the resultant Commission report on the implementation of the Directive in 1995[5] was a disappointingly terse document. In this short review, the Commission indicated that it would monitor and evaluate the effect of the exemption in favour of primary agricultural produce and game, and this subsequently resulted in an amendment of the Directive.[6]

The Commission's subsequent Green Paper on Liability for Defective Products in 1999[7] examined a wider range of issues, including the burden of proof, development risks, 10-year long-stop, supplier's liability, type of goods covered, type of damage covered and access to justice. Responses to the Green Paper were, however, considered to be inconclusive, and the Commission consequently considered in its

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

[2] Every five years the Commission shall present a report to the Council on the application of this Directive and, if necessary, shall submit appropriate proposals to it.

[3] McKenna & Co, Report for the Commission of the European Communities on the Application of Directive 1985/374/EEC on Liability for Defective Products (1994).

[4] See, e.g. G. Howells, *The Law of Product Liability*, 2nd edn (Butterworths, 2007), para.4.27; P. Machnikowski, *European Product Liability : An Analysis of the State of the Art in the Era of New Technologies* (Intersentia, 2017), p.23.

[5] First report on the application of the Council Directive on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (85/374/EEC) Brussels, 13 December 1995, COM(95)617.

[6] Directive 1999/34 amending Council Directive 85/374 on the approximation of the laws, regulations and administrative provisions of the member states concerning liability for defective products [1999] OJ L141/20.

[7] European Commission, *Liability for defective products* (COM (99) 396).

Second Report on the Directive in 2000,[8] that further investigatory work was required. Two expert groups were formed[9] and two further studies commissioned in order to obtain more data about the practical impact of the Directive across the EU. This renewed research effort resulted in the Lovells (now HoganLovells) report on the application of the Directive of 2003[10] and the Fondazione Rosselli report of 2004 on the development risks defence.[11]

In analysing how the Directive was being applied across the EU, the Lovells report concluded that there was some experience of the Directive in almost all Member States, but that the Directive had only moderately increased the prospects of product liability claims being brought, or the success of those claims. It was, however, observed in the Lovells study that there was little appetite expressed on the part of responders for major reform of the Directive. The report thus concluded that it was important to look at the Directive as one part of a broader system involving product safety and consumer protection laws, judicial practices and procedures and cultural and social factors.

The Commission published its Third Review in 2006.[12] Whilst this document did not consider major changes to be necessary, the Commission did suggest that monitoring should be undertaken of certain central issues such as the concept of defect, the development risks defence, the burden of proof, the minimum threshold for property damage and a regulatory compliance defence.

The Fourth Commission report was published in September 2011 and covered the period from 2006–2010.[13] The Commission concluded that there had been an increase in both the absolute number of cases brought on grounds of product liability and an increase in the *relative* use of the Directive in cases brought on the classic grounds of civil or contractual liability.[14] The Commission again concluded, as in previous such exercises, that no major change to the Directive was necessary, though it was again proposed that monitoring should occur as to the overall balance between consumer protection and producers' interests.[15] It was again seen as premature to propose a review of the Directive; the Commission accepted that there was little appetite for reform.[16] One of the highlights of the Report, from an academic perspective, was the importance attributed by the Commission to the research and understanding of Product Liability with emphasis placed on the collection and exchange of information, and a specific mention being made of the database of decisions concerning product liability of the Product Liability Forum of the British Institute of International and Comparative Law.[17]

The current review

The European Commission launched a further evaluation of the Product Liability Directive in 2017, which was designed to examine the key features of the Directive: defect, product, defences etc to determine whether the Directive was "still fit for purpose". A series of initiatives were put in place as part of that

[8] COM (2000) 893 Final.

[9] One comprised of experts designated by national authorities, the other by stakeholders.

[10] Lovells, *Product Liability in the European Union* (2003) at *http://ec.europa.eu/enterprise/regulation/goods/docs/liability/studies/lovells-study_en.pdf* [accessed 22 January 2019].

[11] F. Rosselli, *Analysis of the Economic Impact of the Development Risk Clause as provided by Directive 85/374 on Liability for Defective products* (2004). The conclusions of the Rosselli study supported the status quo, concluding that the development risks defence was an important feature of the Directive which helped achieve the balance between producers and consumers, and that its removal could stifle innovation.

[12] European Commission,*Third report on the application of Council Directive on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products* (September 2006: COM(2006) 496 final).

[13] European Commission, *Fourth report on the application of Council Directive on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products* (September 2011: COM(2011) 547 final).

[14] European Commission, *Fourth report on the application of Council Directive on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products* (September 2011: COM(2011) 547 final), p.4.

[15] European Commission, *Fourth report on the application of Council Directive on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products* (September 2011: COM(2011) 547 final), p.11.

[16] European Commission, *Fourth report on the application of Council Directive on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products* (September 2011: COM(2011) 547 final), p.11.

[17] Product Liability Forum of the British Institute of International and Comparative Law, "Product Liability Decisions Database" at *http://www.biicl.org/plf/* [accessed 22 January 2019].

evaluation, and a public consultation was launched concerning the operation of the Directive in order to collect stakeholders' feedback on the application and performance of the Directive on liability for defective products. A particular concern raised was whether the Directive was still adapted to new advances in technology, including Cloud technology, robotics, autonomous systems, Internet of Things, defective apps, and non-embedded technology.

The Commission received 113 responses to the public consultation with 35% of responses from producers, 35% from consumers, as well as of course from others (e.g. from the public sector and civil society).[18] From a geographic perspective, the largest country of origin for responses was Germany with over 30% of respondents stating that that was their country of domicile; followed by Belgium, Bulgaria, and France. Disappointingly, only a handful of respondents were from the UK.

In terms of results of the survey, the standout figure is that 68% of respondents stated that they believed the Directive strikes a fair balance between the interests of producers and those of consumers. As in previous reports, the indication is that for a majority of stakeholders, the right balance has thus been found in global terms. That initially positive perspective is viewed, however, a little differently when consideration is given of the application of the current rules to new technology. Only half of producers and consumers thought that the Directive was adequate to cover needs relating to new technology. Moreover, a significant number of responders[19] considered that the application of the Directive might be problematic or uncertain for some such products, such as products performing automated tasks based on algorithms, data analytics, self-learning algorithms or products purchased as a bundle with related services. In light of this, and somewhat unsurprisingly, a significant number of responders (though only a quarter of producers) considered that the Directive needed to be adapted for the innovative products mentioned.

How could the Directive be reformed?

One of the key issues going ahead is thus how, if the Directive is to be adapted, is this to be best undertaken? The options for reforming the European Product Liability Directive cover a series of possibilities. The most ambitious approach would be to amend the Directive by means of further EU legislation so as to update and improve upon the current the text of the Directive. This was the choice adopted in the sphere of product safety, with the implementation of the General Product Safety Directive 2001/95,[20] as well as new package of measures currently under discussion. That process of amendment would, however, be time-consuming and potentially controversial, particularly given that the general feeling seems to be that the Directive strikes a fair balance between the interests of producers and those of consumers. Set against that, however, is the view, expressed in the public consultation by a large number of consumers (43.7%) who are in favour of a revision of the Directive. Given that this view was seemingly explained by the perceived challenges posed by new technological products,[21] then a compromise position might be to adopt bespoke legislation which could be devised for dealing with just such specific issues relating to that type of product. That did not seem, however, to attract a great deal of support amongst the survey responders, with only 12.5% of producers, 23% of consumers and 12% of the other respondents (i.e. public authorities and civil society) in favour of new legislation specifically for those technological products.

Legislative reform is, of course, not the only route to clarification, and might indeed be seen as an over-reaching response to the issues identified. In the Third Report on the Directive,[22] mentioned above,

[18] European Commission, *Brief Factual Summary on the Results of the Public Consultation on the Rules on Producer Liability for Damage Caused by a Defective Product* (Brussels, 30 May 2017).

[19] Namely 45% of producers, 58% of consumers and 44% of other respondents (including public authorities and civil society).

[20] Directive 2001/95 on general product safety [2001] OJ L11/4.

[21] As 68% of respondents to the consultation believed that the Directive struck a fair balance between the interests of producers and those of the consumers.

[22] European Commission, *Third report on the application of Council Directive on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products* (September 2006: COM(2006) 496 final).

the Commission set out three possible alternative ways to ensure further harmonisation of product liability law:

- by means of the case law of the CJEU;
- using the power of control of the Commission through, in particular, infringement proceedings; and
- continuous analysis within working groups.

The first two former options of CJEU case law and Commission-initiated infringement proceedings have played a role in specific areas of Product Liability. This has, however, only had a relatively limited impact, given in particular the surprising lack of product liability cases at a European level. Over and above these options, one additional method of reform, which has been adopted in the past is that of soft law solutions, such as Guidelines.[23] This particular approach was envisaged as part of the recent Commission public consultation.

Although soft law instruments have sometimes been seen as controversial,[24] there has been an increasing use of such guidance at a European level, in areas as diverse as Unfair Commercial Practices[25] and maritime transport.[26] Within the sphere of products regulation, guidance has been drawn up for many issues including general product safety[27] and individual products such as cosmetics and medicines.[28] Whilst the Product Liability Directive does not provide explicitly for the use of Guidelines,[29] the European Commission has repeatedly consulted on this possibility during the reviews of the Directive,[30] and there have been other examples of non-binding guidance arising on the Commission's own initiative. Guidance could clearly play a role in the sphere of product liability, such as in clarifying the parameters of certain issues, thereby providing legal certainty to stakeholders affected by the Directive in a way which does not ultimately tie the hands of the courts or policy-makers.

Fifth Report and evaluation of the Directive (2018)

As a result of the aforementioned process, the Fifth Report of the European Commission was published in May 2018, covering the period 2011–2015.[31] The Report is accompanied by a Staff Working Document providing a detailed analysis of the evaluation of the Directive during the period 2000–2016.[32]

[23] For a general discussion of the use of soft law instruments with product liability, see for instance during the process leading to the Fourth Review of the Directive, discussed further in D. Fairgrieve, G. Howells and M. Pilgerstorfer, "The Product Liability Directive: Time to Get Soft" (2013) *Journal of European Tort Law* 1.

[24] European Parliament has been in the past cautious about the use of "soft law", see, e.g. European Parliament, *Resolution of 4 September 2007 on Institutional and Legal Implications of the Use of 'Soft Law' Instruments (Official Journal of the European Communities (OJEC)* 24 July 2008, No.C187 E/75, 2007).

[25] European Commission, *Commission Staff Working Document: Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices* (May 2016 ; COM(2016) 320).

[26] Regulation 3577/92 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) [1992] OJ L364/7.

[27] See, e.g. *Guidance Documents on the Relationship Between the General Product Safety Directive and Certain Sector Directives with Provisions on Product Safety* (DG SANCO, November 2003).

[28] See, e.g. *Guidance document on the demarcation between the cosmetic products Directive 76/768 and the medicinal products Directive 2001/83* (October 2015).

[29] Unlike, e.g. the General Product Safety Directive in which Guidance on the RAPEX and other notification systems was foreseen in Annexe II of the Directive.

[30] See for instance during the process leading to the Fourth Review of the Directive, discussed further in D. Fairgrieve, G. Howells and M. Pilgerstorfer, "The Product Liability Directive: Time to Get Soft" (2013) *Journal of European Tort Law* 1.

[31] European Commission, *Fifth report on the application of Council Directive on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products* (85/374/EEC) COM/2018/246 final.

[32] European Commission Staff Working Document: *Evaluation of Council Directive on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products* SWD(2018)157.

In the Fifth Report, a number of key concepts of the Directive, namely product, producer, defect, damage and defences, were assessed by the Commission to determine whether they remain "fit for purpose", particularly in the context of new technological developments.[33]

It will not be of great surprise that the Commission, as in past reports, concluded that "the Product Liability Directive continues to be an adequate tool"[34] and that it was "efficient at delivering a stable legal framework for the single market and for harmonising consumer protection".[35] The Commission thus considered that overall, the Directive achieves "a reasonable balance between protecting those who suffer injury and ensuring fair competition on the single market".[36] More unusually, however, the report includes some critical comments about the Directive. The Commission thus notes that the Directive's "effectiveness is hampered by concepts (such as 'product', 'producer', 'defect', 'damage', or the burden of proof) that could be more effective in practice".[37] It is also noted that "the balance between costs and benefits relating to the Directive is not uniform across Member States and sectors or product types for injured persons".[38] Over and above the challenge of technology, healthcare products are specifically mentioned as raising particular issues. The Commission thus indicates that in terms of pharmaceutical products, the "cost of proving a defect" might not be "fairly distributed between producers and injured persons".[39] It was therefore noted that due to their particular complexity, there might be need for "[s]pecific analytical work" on pharmaceutical products.[40]

As a solution to this problem, the Commission has taken a decision to draft "comprehensive guidance"[41] on the application of the Directive, so as inter alia to provide "a better common understanding"[42] of key concepts such as product, damage, and defect, as well as "clarifications" as to the issue of burden of proof. Such an option has been considered in the past, but it is interesting to see such a decisive statement on this topic. The drafting of Guidance will be coupled with a more detailed assessment focussing on the impact of "emerging digital technologies" and determining whether the "existing product liability framework is appropriate to ensure effective redress for consumers and investment stability for businesses".[43] The Commission thus states that on the basis of this work, the "guidance and the assessment will help us to pave the way forward for a product liability framework fit for the digital industrial revolution".[44]

As a result of these announcements, an Expert Group was set up to explore the various issues,[45] and sub-divided into two formations, the Product Liability Directive formation[46] and the New Technologies

[33] European Commission, *Fifth report on the application of Council Directive on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products* (85/374/EEC) COM/2018/246 final, 7.

[34] European Commission, *Fifth report on the application of Council Directive on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products* (85/374/EEC) COM/2018/246 final, 2.

[35] European Commission, *Fifth report on the application of Council Directive on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products* (85/374/EEC) COM/2018/246 final, 6.

[36] European Commission, *Fifth report on the application of Council Directive on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products* (85/374/EEC) COM/2018/246 final, 6.

[37] European Commission, *Fifth report on the application of Council Directive on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products* (85/374/EEC) COM/2018/246 final, 8.

[38] European Commission, *Fifth report on the application of Council Directive on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products* (85/374/EEC) COM/2018/246 final, 6.

[39] European Commission, *Fifth report on the application of Council Directive on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products* (85/374/EEC) COM/2018/246 final, 6.

[40] European Commission, *Fifth report on the application of Council Directive on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products* (85/374/EEC) COM/2018/246 final, 8.

[41] European Commission, *Fifth report on the application of Council Directive on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products* (85/374/EEC) COM/2018/246 final, 2.

[42] European Commission, *Fifth report on the application of Council Directive on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products* (85/374/EEC) COM/2018/246 final, 6.

[43] European Commission, *Fifth report on the application of Council Directive on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products* (85/374/EEC) COM/2018/246 final, 6.

[44] European Commission, *Fifth report on the application of Council Directive on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products* (85/374/EEC) COM/2018/246 final, 2.

[45] For further details, and Minutes of this Group, see *http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupMeeting&meetingId=4341* [accessed 22 January 2019].

[46] Managed by DG GROW.

formation.[47] The Product Liability Directive formation was asked to provide advice and expertise on the implementation of the Directive, and "assess the extent to which the provisions of the Directive are adequate to resolve questions of liability in relation to traditional products, new technologies and new societal challenges". It will thus give assistance to the Commission in drawing up guidance on the implementation of the Directive. The New Technologies formation will assess whether and to what extent existing liability schemes are adapted to the development of the new technologies such as Artifical Intelligence, advanced robotics, the IoT and cybersecurity issues. If the existing regime is deemed not to be adequate, the New Technologies formation will provide recommendations on how it should be designed.

Priority areas to review

Many wish lists could be provided of areas to be reformed under the Directive (proof, the defences, causation) but in this short appraisal we will focus upon the "type" of products covered by the Directive and that of defect.

Product: software

The Product Liability Directive has a broad reach in terms of the products covered, with the Directive referring in art.2 to "all movables". Discussion has, however, arisen in respect of some product types, and in recent times new technology has created some difficulties. In light of the importance of new technology, as set out above, it is striking that it still remains an open question whether software is a "product" within the meaning of art.2 of the Directive and the Consumer Act 1987 s.1(2).[48] This is not the forum for a detailed discussion of the issue, and is actually part of a broader debate about whether intellectual products generally are included within the scope of the Directive. Uncertainty has been generated by the fact that the relevant part of the definition in the Directive refers to "movables" and that the word is not further defined, although components are expressly included. In some jurisdictions, it has been settled that the product in question must be a material item,[49] and in Belgium it is explicitly stated in legislation that intangible products are excluded from its implementation of the Directive.[50] Contrariwise, there are certainly arguments in favour of interpreting the notion of "movables" in the Directive to include intangibles.[51] Indeed, in the Commission Staff Working Document accompanying the Fifth Report on the Directive, it was noted that "[f]or some authors software most often takes the form of a movable item and can be considered a 'product' from the perspective of consumers and business users".[52] Whatever has been decided at a Member State level on the meaning of "movables", an autonomous interpretation is given to concepts in European instruments.

Professor Machnikowski has, however, pointed out that a further issue is whether the fact that intangible products are stored on material supports changes to the position:

[47] Managed by DGs JUST, GROW and CNECT.

[48] See generally J. Miller and R. Goldberg, *Product Liability*, 2nd edn (Oxford: OUP, 2004), paras 9.97–9.103.

[49] Meltzer and Armstrong have argued that "it is generally accepted that, with the exception of electricity and any other intangible items specifically included by national legislation … intangible products fall outside the Directive's scope because they are not 'movable'. Intangible products include products such as pure information and intellectual products of the human mind (as distinct from the physical media in which these intangible products can appear). Thus, errors, shortcomings and other defects in information should not give rise to liability under the Directive." (J. Meltzer and D. Armstrong, "The European Union Product Liability Directive" in A. McDougall and P. Popat (eds) *International Product Law Manual* (2011), p.221).

[50] Article 2 of Act dated 25 February 1991 on Liability for Defective Products. See also in Austrian, the law on product liability (§ 4 Produkthaftungsgesetz) which refers explicitly to a "movable *tangible* thing", therefore excluding digital content products which are not embedded in tangible goods.

[51] Particularly given that it is made clear in the Directive that the notion of "Product" includes electricity (art.2 of the Directive).

[52] European Commission, Commission Staff Working Document: *Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices* (May 2016; COM(2016) 320), p.51. Note that at an earlier point, Lord Cockfield on behalf of the Commission stated, in response to a question made by a MEP, that "the Directive applies to software in the same way, moreover, that it applies to handicraft and artistic products" ([1989] OJ C-114/76 p.42).

> "[t]he issue that is not explicitly regulated in the Directive, and which is not always tackled in legal writing or by court rulings in the Member States, is whether non-material content written on a material item (first and foremost software and digital content stored on a device) may be treated as a component or raw material, which would allow their authors to be treated as producers."[53]

As software is often bought as part of a tangible product, the ultimate product straddles the tangible and intangible divide. Meltzer and Armstrong have opined that liability could arise in such circumstances:

> "Liability under the Directive arguably could arise, for example, if the software in a global positioning system were to malfunction and cause false driving directions to be delivered to consumers, causing injury."[54]

In France, a ministerial response dating from 1998 stated that the provisions on product liability could apply to software,[55] subject however, to the occurrence of body injuries directly linked to a defect of the product, which it was admitted was "a very rare hypothesis". Just such a scenario occurred, however, in an Italian case noted by Professor Eleonora Rajneri, when an airbag failed to inflate during an accident due to "wrong information given by its software which was meant to measure the speed and the inclination of the car, despite the fact that the mechanics of the airbag" were working normally.[56] The Italian court[57] held the airbag producer liable for the physical injuries thereby caused to the driver.[58]

It has been suggested by some commentators that only mass-produced software,[59] rather than bespoke software products, should be covered by the Directive. Mass-produced software sold ready to use is said to be proximate to other manufactured goods, providing justification for the application of the Directive.[60] As Goldberg has also noted:

> "in the case of 'ready-to-use' software, such software represents a method of distribution analogous to the mass distribution of any product. Since the underlying policy considerations for justifying strict liability are applicable to mass-produced software, strict liability should be imposed on the supplier when consumers are injured by the defects in such software."[61]

More difficulty is generated by the issue of bespoke-created software, in respect of which it is said that the activity concerned is closer to the provision of services than that of goods, and therefore for that very reason should be outwith the Directive. Goldberg has distinguished this from that of "off the peg" software on the basis that bespoke-created software:

> "is not placed in the stream of commerce since it is distributed to only one customer, the supplier is usually in the same position as the user in respect of anticipating and controlling risks, and the supplier is not in a better position than the user to bear the costs."[62]

This distinction may not, however, always be an easy one to make in relation to the software purchased, particularly given that the extensive options provided to consumers as to the package they acquire, as well

[53] P. Machnikowski (ed), *European Product Liability: an Analysis of the State of Art in the Era of New Technologies* (Intersentia, 2016), p.693.
[54] Meltzer and D. Armstrong, "The European Union Product Liability Directive" in A. McDougall and P. Popat (eds), *International Product Law Manual* (2011), p.221.
[55] *Réponse ministérielle* 24 August 1998 p.4728.
[56] See Italian Report in J. Page (ed), *Products Liability* (forthcoming).
[57] Trib. Cassino, 20 December 2007.
[58] For the position in the Netherlands, see W. van Boom, J.-S. Borghetti, A. Bloch, E. Karner, D. Nolan, K. Oliphant, A. Scarso, V. Ulfbeck and G. Wagner, "Product Liability in Europe" in H. Koziol, M. Green, M. Lunney, K. Oliphant, Y. Lixin (eds), *Product Liability: Fundamental Questions in a Comparative Perspective* (De Gruyter, 2017), p.355 para.10/279.
[59] See, e.g. S. Whittaker, "European Product Liability and Intellectual Products" (1989) *Law Quarterly Review* 125.
[60] S. Whittaker, "European Product Liability and Intellectual Products" (1989) *Law Quarterly Review* 125, 130–131.
[61] Miller and Goldberg, *Product Liability*, 2nd edn (Oxford: OUP, 2004), para.9.102.
[62] Miller and Goldberg, *Product Liability*, 2nd edn (Oxford: OUP, 2004), para.9.102 fn.358.

as the bundling together of tangible products with associated services, have had a tendency to blur the line.

Defect

As is well-known, liability under the Directive is premised upon damage caused by a defect in a product. The concept of "defect" is defined in art.6 of the Directive; at its heart is the issue of whether a product "does not provide the safety which a person is entitled to expect". This notion has always been shrouded by a degree of mystery and some uncertainty due to its open-textured nature. Whilst the notion of defect has generated a good amount of cases before courts in the various Member States,[63] precious little case law has been handed down until recently at a European level. That has changed due to two recent decisions of the CJEU in *Boston Scientific GmbH v AOK Sachsen-Anhalt*,[64] and *W v Sanofi Pasteur MSD*.[65] The first case, the *Boston Scientific* decision, is a complicated and nuanced one.[66] Suffice it to say here that the ECJ took the position that the particular products concerned by that case (pacemaker and implantable cardiac defibrillator) had an "abnormal potential for damage" and were defective because they belonged to a group or production series of products which had been shown to have a significantly higher than normal risk of such a fault. The defect standard was thus conceptualised *in terms of risk*, with the court not considering it necessary to weigh that risk up against the product's benefits or wide societal utility of the product.

In the *Sanofi* case, which concerned a preliminary reference from France to the ECJ as regards the French litigation concerning the claim that hepatitis B vaccination gives rise to demyelinating disease.[67] The French judge asked whether art.4 of Directive 85/374 on product liability should be interpreted as precluding national judges from assessing causation through presumptions. The decision of the court focussed mainly on the issue of proof, but the court did seem to approve the standard referred to in the *Boston Scientific* decision. In defining what it is necessary for the claimant to show in proving defect in the context of a vaccine case, it was stated that this requires that the vaccine "causes abnormal and particularly serious damage to the patient who, in the light of the nature and function of the product, is entitled to expect a particularly high level of safety".[68] However, many other issues still remain subject to uncertainty. What is meant by "abnormal" in this context? What is the relevant reference point? Should the judge compare the safety offered by the product in question with other "comparator" products? If so, which products are appropriate comparators? Are hypothetical comparator products permitted and if so, how should they be constructed?

Conclusion

The cards are now in the European Commission's hands as to the direction in which product liability in Europe will be taken. Whilst there does seem to be a large degree of consensus about the fact that the Directive works well in many ways, there are clearly challenges posed by the advent of new technology and by specific products such as pharmaceuticals. Although there does not seem to be the popular demand or political will to launch a full process of legislative amendment, the approach of adopting guidance is an appropriate method to adopt to adapt the Directive to these new challenges.

[63] For a recent example in the UK, see *Wilkes v De Puy International Ltd* [2016] EWHC 3096 (QB); [2018] Q.B. 627 and *Gee v DePuy International Ltd* [2018] EWHC 1208 (QB).

[64] *Boston Scientific Medizintechnik GmbH v AOK Sachsen-Anhalt - Die Gesundheitskasse* (C-503/13) [2015] 3 WLUK 138; [2015] 3 C.M.L.R. 6 at AG§27.

[65] *W v Sanofi Pasteur MSD SNC* (C-621/15) [2017] 4 W.L.R. 171.

[66] For further discussion, see D. Fairgrieve and M. Pilgerstorfer, "European Product Liability after Boston Scientific: an Assessment of the Court's Judgment on Defect, Damage and Causation" [2017] E.B.L.R. 879.

[67] On this generally, see J.-S. Borghetti, "Causation in Hepatitis B Vaccination Litigation in France: Breaking Through Scientific Uncertainty?" (2016) 91 *Chicago-Kent Law Review*.

[68] *W v Sanofi Pasteur MSD SNC* (C-621/15) [2017] 4 W.L.R. 171 at [41].

Duty of Care Imposed on Non-Medically Qualified Staff in a Hospital Trust[1]

Deborah Blythe

Accident and emergency departments; Causation; Clinical negligence; Duty of care; Hospitals; Waiting time

Abstract

In this article, Deborah Blythe, solicitor for Michael Darnley examines the views expressed by the Court of Appeal and the important points which came out of the judgment of the Supreme Court.

Facts

Mr Darnley attended Mayday A&E department in May 2010. He told the receptionist that he had been hit on the head in an assault and feared he had a head injury and wanted to be seen urgently. He told her that his head was hurting and he felt terrible. He was incorrectly told by the A&E receptionist that he would have to wait for up to four to five hours to see a doctor. In fact, as the receptionist knew, he should have been told that under the hospital's head injury protocol he would be triaged by a nurse within 30 minutes and depending upon the findings of the triage nurse he may have to wait longer to see a doctor. He waited for 19 minutes and then left to go home to bed where he collapsed over an hour later due to the effects of an extradural haematoma caused in the assault.

The case lost in the High Court, lost in the Court of Appeal, but won in the Supreme Court.
Summary of the majority views in the Court of Appeal:

- The giving of incorrect information by the receptionist was not an actionable misstatement. When giving the claimant information the receptionist was not assuming responsibility to him for the catastrophic consequences that he might suffer if he simply walked out of the hospital.
- It was not fair just or reasonable per *Caparo Industries Plc v Dickman*[2] to impose a duty on the receptionist or the Trust acting by the receptionist not to provide inaccurate information about waiting times because it would add a new layer of responsibility to clerical staff and it would add a new head of liability for NHS trusts and produce a floodgates situation.
- There should be a distinction between non-medical staff and medical staff in determining whether a duty of care exists. A duty of care in negligence reflects the task being performed and if this principle was applied then it followed that the hospital trust did not have a legal responsibility to provide accurate information about waiting times. The information was given as a mere courtesy.
- Creating a new head of liability would lead to a negative social cost. Healthcare providers could close down this risk by instructing reception staff to say nothing to patients apart from asking for the details. Sales LJ considered that the imposition of such a duty could lead to defensive practices on the part of the NHS trust in the withdrawal of information which is

[1] *Darnley v Croydon Health Services NHS Trust* [2018] UKSC 50; [2018] 3 W.L.R. 1153.
[2] *Caparo Industries PLC v Dickman* [1990] 2 A.C. 605; [1990] 2 W.L.R. 358.

generally helpful to the public. Imposing a duty would end up with the courts having to adjudicate issues as to who said what to whom an A&E waiting room.

- A patient has to take responsibility for any consequences for the harm that they suffer by leaving without telling staff. The claimant was told to wait but he left after 19 mins without telling the staff and there was no duty on the staff to prevent him from leaving. It was his own responsibility that he suffered catastrophic injury as a consequence.

The Supreme Court gave short change to these views:

- They dismissed the idea that to impose a legal duty would create a new layer of responsibility to clerical staff. Such a view was overstated and that the legitimate expectation of a patient is that he will receive from each person concerned with his care, a degree of skill appropriate to the task which he or she undertakes.[3] A receptionist in A&E should be expected to take reasonable care not to provide misleading advice as to the availability of medical assistance.
- It was inappropriate to distinguish between medical and non-medical staff and the status of an employee of an organisation is not relevant to whether the organisation owes a duty of care, and that the duty of the trust must be considered in the round. Whilst it is not a function of the reception staff to give wider advice or information in general to patients it is the duty of the NHS trust to take care not to provide misinformation to patients and that duty is not avoided by the misinformation having been given by reception staff.
- Imposing a duty did not produce an onerous burden. The standard is that of an averagely competent and well-informed person performing the function of the receptionist at a department providing emergency medical care.
- Imposing a duty would not create a new head of liability for the Trust. In this regard, the judge in the High Court found as a matter of fact that at the time when the claimant attended A&E both the receptionists were aware that the standard procedure for anyone complaining of a head injury would be seen by a triage nurse and they accepted in their evidence that the usual practice was that such a patient would be told that they would be seen by a triage nurse within 30 minutes of arrival. In this particular case, there was no reason given as to why the claimant was not told of the standard procedure. On the particular facts, the judge at the High Court found that the receptionist had departed from the standard procedure in the advice given to Mr Darnley.
- There would not be a flood gates situation. There was no reason to suppose that the factual context of an A&E department was likely to give rise to any unusual evidential difficulties. The burden of proof of the provision of misleading information is on the claimant. Hospital staff would be able to give evidence as to their usual practice. The requirements of establishing negligence and causation would remain effective control factors.
- It was acknowledged that hospital A&E departments operate in very difficult circumstances and under colossal pressure and this consideration may well prove highly influential in many cases when assessing whether there has been a negligent breach of duty.
- It was only necessary for a claimant to establish the third limb of *Caparo* namely fair just and reasonable where the duty of care contended for is of a novel category. This was not considered to be a novel case because there were no reported precedent cases. The case came within a well-established category of duty of care and all that was required was the application to particular circumstances of established principles.
- The issue of patient responsibility was rejected for the simple reason that claimant was not armed with all the necessary information to enable him to make a decision whether to leave.

[3] *Wilshire v Essex AHA* [1987] Q.B. 730; [1987] 2 W.L.R. 425.

If he had been given the correct information but left nevertheless without telling anyone then he would be responsible for any harm suffered as a result of leaving. However that was not the scenario here.

- The Trust did not enjoy any special status in terms of owing any common law duties of care.

In summary therefore, the judgment is an important one because it rejects the tendency of the courts to elide duty, scope of duty and breach.

It rejects the concept of the duty being referable to the status of the employee, and confirms it is owed by the organisation.

It confirms that the Caparo 3-stage test should rarely be used.

It rejects the argument that a patient's decision-making process is to be considered without reference to the alleged breach.

It rejects the argument that the NHS should have some special status because of its functions and purposes.

Finally, the decision will hopefully put an end to the argument that a hospital trust should not be responsible for any harm caused to a patient if they leave the hospital of their own accord without being seen. The defendant tried this argument in the case of *Macaulay v Karim*.[4] This case involved a claim for compensation after Mr Macaulay lost a leg and fingers due to a flesh-eating bug arising from the Mayday Hospital's delay in taking blood tests which would have diagnosed a serious underlying infection and would have led to him being admitted and having timely treatment. Instead Mr Macaulay left the hospital without having had any treatment or investigations. The judge rightly held that the case could be distinguished from that of *Darnley* because Mr Macaulay was already in the system when the alleged negligence occurred. It was accepted by the judge that there was a failure on the part of the clinical staff to carry out blood tests in a timely way and if they had been so done Mr Macaulay would have remained in the A&E department. On the balance of probabilities, the blood tests would have revealed abnormalities and Mr Macaulay would have been admitted.

[4] *Macaulay v Karim* [2017] EWHC 1795 (QB); [2017] 7 WLUK 341.

Minding the Gap: Where does tortious liability for public authorities end and human rights liability begin?

Maya Sikand

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LT Criminal investigations; Damages; Duty of care; Duty to undertake effective investigation; Immunity from suit; Inhuman or degrading treatment or punishment; Personal injury; Police officers; Police powers and duties

Determining the scope of liability in negligence for public authorities has long been an issue that has vexed the courts. The Supreme Court judgment in *Robinson v Chief Constable of West Yorkshire*[1] brings some clarity to this area. It debunks the myth of *Hill*[2] "core immunity" for good, confirming there is no general rule denying liability in relation to operational policing and that the police, and public authorities in general, are prima facie liable for negligence causing personal injury like anyone else. Such reasoning marks a satisfying reaffirmation of orthodox tortious principles. Just a few weeks after handing down *Robinson,* the Supreme Court promulgated yet another key judgment in *Commissioner of Police of the Metropolis v DSD*.[3] The timing is auspicious. *DSD* confirms that police will be liable under the ECHR art.3 for harm occasioned to victims of serious crime by investigative failings. The ratio fills, to some extent, the lacuna of liability left by *Robinson*. Taken together, the cases provide a firm steer on how claims against the police, and other such public authorities, will fare in the future.

Robinson v Chief Constable of West Yorkshire

It is salutary to first understand the scope and significance of *Robinson*. The facts of the case are appealingly simple. The claimant, an elderly pedestrian, suffered injuries when knocked down by two police officers and a suspected drug dealer, as the officers struggled to arrest him. The Supreme Court, sitting as a panel of five, unanimously agreed that the defendant owed a duty of care to avoid causing reasonably foreseeable harm to the claimant, and other such bystanders, in the course of apprehending criminal suspects. In the leading judgment, Lord Reed bemoans the "uncertainty and confusion" [3] over the correct construction of negligence liability which has beset the courts in recent years. No more perhaps is such confusion indicative than in the wildly diverging judgments provided by the lower courts in *Robinson*. At first instance, whilst it was held that the officers who initiated the arrest had been negligent, they remained immune from suit under *Hill*, such acts comprising core operational duties. In the Court of Appeal, Hallett LJ rigidly adhered to the *Caparo*[4] test, precluding any such duty of care on the basis of policy and public interest considerations [51]. The case was held as a "paradigm example of why the courts are loath to impose a duty towards individual members of the public on the police engaged in their core functions" [51]. The Supreme Court held the case to signify the converse, criticising the misplaced reliance on policy and "immunity" alike.

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[1] *Robinson v Chief Constable of West Yorkshire* [2018] UKSC 4; [2018] A.C. 736.
[2] *Hill v Chief Constable of West Yorkshire* [1989] A.C. 53; [1988] 2 W.L.R. 1049.
[3] *Commissioner of Police of the Metropolis v DSD* [2018] UKSC 11; [2018] 2 W.L.R. 895.
[4] *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605; [1990] 2 W.L.R. 358.

Central to Lord Reed's judgment is his clarification of the correct approach to the formulation of a duty of care in tort (see at [21]–[30]). He strenuously rejects the conception of *Caparo* as setting down a single test to be indiscriminately applied in all cases of negligence. Rather, the courts should adopt a nuanced, incremental approach, rooted in precedent and the development of tortious duty by analogy with established authorities. Lord Reed makes clear that the so-called *Caparo* test should only be revisited in a novel legal situation, where the principles derived from pre-existing pockets of liability cannot assist. The significance of this for practitioners should not be underestimated. On the instant facts, the existence of a duty of care can be implied from the application of established principles of personal injury liability: there is no need to resort to lengthy policy weighing.

Having set the stage, Lord Reed proceeds to deliver his ratio of Diceyan equivalence: public authorities are subject to the same tortious liabilities as private individuals [32]. He makes clear that public defendants, such as the police, are accorded no special status under the common law duty of care, subject to the ordinary principles of negligence. He separates statutory duties from those at common law, making clear that the former have no part to play in his extant analysis [36]. Rather, Lord Reed interprets the long line of case law on public authority liability simply as confirmation of the principle that there is no general common law liability for omissions. This was clarified in cases such as *Stovin v Wise*[5] and *Gorringe v Calderdale MBC*,[6] which repaired the damage done by *Anns v Merton LBC*[7] in its fixation on policy, by a return to the "orthodox common law foundation" [39]. Therefore, private and public bodies alike owe no duty of care to individuals to prevent harm caused by the conduct of third parties, save for specified circumstances, such as the assumption of responsibility or a position of control over the third party. Rather than breaking with precedent, such reasoning is entirely au fait with conventional tort law principles.

Turning to the position of the police, Lord Reed makes clear that the ratio of *Hill* has been crucially and consistently misunderstood. He underscores Lord Keith's own words in *Hill* that "there is no question that a police officer, like anyone else, may be liable in tort to a person who is injured as a direct result of his acts or omissions" (59), supported by ample case law such as *Knightley v Johns*[8] (officer's negligent instruction at a road accident resulted in the claimant crashing). Police are subject to the same tortious principles as all others, no more lenient or stringent. Lord Keith's conclusion that the police owe no duty of care to safeguard victims or potential victims of crime is entirely consistent with this, as an expression of the omissions principle above. His comments on post-*Anns* policy concerns and "immunity" related solely to these circumstances. Far from standing as authority for the proposition that the police enjoy a general immunity from suit, Lord Reed confirms *Hill* simply establishes the police owe no duty of care to individual members of the public, in the performance of their investigative function, to protect them from criminal harm [53]. In doing so, Lord Reed is far from breaking new ground. His reasoning draws on *Michael v Chief Constable of South Wales*,[9] where Lord Toulson held the police were not liable for their failures to respond to specific information that the victim's life was at risk. Lord Toulson eschewed any notion of "special immunity" in favour of the routine application of common law principles which, in "failure to act" cases, militated against liability (at [115]–[116]). Much of the commentary on *Robinson,* hailing the judgment as dismantling *Hill* "core immunity", is therefore misguided. Lord Reed simply affords the judgment the definitive clarification it deserves.

In distilling the above principles, Lord Reed gives short thrift to the authorities relied on by the defendant which tend towards supporting a general immunity. At [56]–[69] he undertakes a lengthy analysis of such cases, dismissing the majority on the basis that they concern novel categories of liability or, alternatively,

[5] *Stovin v Wise* [1996] A.C. 923; [1996] 3 W.L.R. 388.
[6] *Gorringe v Calderdale MBC* [2004] UKHL 15; [2004] 1 W.L.R. 1057.
[7] *Anns v Merton LBC* [1978] A.C. 728 at 751–752; [1977] 2 W.L.R. 1024.
[8] *Knightley v Johns* [1982] 1 W.L.R. 349; [1982] 1 All E.R. 851.
[9] *Michael v Chief Constable of South Wales* [2015] UKSC 2; [2015] A.C. 1732.

can be properly construed as cases of omission (see *Smith v Chief Constable of Sussex Police*[10]). The central normative distinction remains between "careless acts causing personal injury (and) careless omissions to prevent acts (by other agencies) causing personal injury" [69]. Accordingly, whilst the police are not liable for third-party harm (as per *Hill*, *Michael*, and *Smith)* they remain under a duty of care to avoid causing reasonably foreseeable personal injury in the course of their operations [70]. Whilst this line of reasoning appears uncontroversial, note the dissenting judgments of Lord Mance and Lord Hughes who both consider *Robinson* presents a fresh policy choice, removed from Reed's incremental approach [84], [95].

On the stark facts, however, the Supreme Court was unanimous that the police were liable for personal injury, the case concerning a positive negligent act resulting in direct harm to the appellant [72]–[80]. The implications of *Robinson* are significant. On the one hand, it definitively confirms that public authorities, such as the police, will be held to the same tortious standards as private parties. If an individual, or indeed property, is harmed by the positive acts of the police, a claim for damages will generally lie. However, in making clear that public entities are under no special obligations vis à vis private law duties, the judgment forecloses other possible avenues of liability, such as the implication of common law duties of care from statutory powers. Most importantly, for present purposes, *Robinson* confirms that litigants will struggle to bring successful negligence claims where they suffer loss as a result of police investigatory omissions, namely the failure to apprehend a perpetrator. Alternative routes to redress must therefore be sought.

The Human Rights Act: A new frontier

The coming into force of the Human Rights Act 1998 ("HRA") changed the contours of public authority liability. The Act created a new public law cause of action under ss.6(1) and 7, allowing proceedings to be brought where a public authority had acted incompatibly with a Convention right set out in Sch.1. In turn, s.8(3) empowers the court to award damages where such are necessary to afford "just satisfaction" to the victim. However, HRA claims differ considerably from those in negligence, in both substance and form. First, the nature of ECHR obligations is binary, comprising both negative and positive aspects. Therefore, whilst the negative limb requires the State to refrain from acting in violation of the Convention right, the positive limb goes further—to require the state to take active steps to ensure the Convention right is effectively protected. This contrasts starkly with the tortious "omissions" principle as endorsed in *Robinson*, rationalised on the converse basis that public authorities should not be held liable for the acts of third parties. Secondly, whilst tortious claims are inherently compensatory, with damages recoverable as of right, HRA remedies are vindicatory: "the concern will usually be to bring the infringement to an end and any question of compensation will be of secondary, if any importance" (as per *Anufrijeva v Southwark LBC*[11]). If awarded, damages, whilst largely of a significantly lower-level than tortious damages, are governed by the broader maxims of "just satisfaction" and equity.

HRA claims will often step in where private law claims founder on merits. For instance, in *Michael,* whilst the claim for negligence was rejected at the summary judgment stage, the claim alleging the police breached their operational duties under the ECHR art.2, in failing to respond to the known threats to the victim's life, was allowed to proceed to trial [139]. In her dissenting judgment, Lady Hale commends the concomitant force of HRA claims against the police which "means that the policy reasons advanced against the imposition of a duty in negligence … have 'largely ceased to apply' in a case such as this" [196]. Similarly, whilst in in *X (Minors) v Bedfordshire CC*,[12] the House of Lords held social services were not liable in negligence for failing to protect children from neglect, a reformulated claim under the ECHR

[10] *Smith v Chief Constable of Sussex Police* [2008] UKHL 50; [2009] A.C. 225.
[11] *Anufrijeva v Southwark LBC* [2003] EWCA Civ 1406 at [53]; [2004] Q.B. 1124.
[12] *X (Minors) v Bedfordshire CC* [1995] 2 A.C. 633; [1995] 3 W.L.R. 152.

art.3, *Z v United Kingdom*[13] succeeded in Strasbourg. Consequently, in *JD v East Berkshire NHS Trust*[14] the court disapplied *X (minors),* primarily on the basis that the decision "cannot survive the Human Rights Act" [83]: common law should be re-calibrated to meet the evolving needs of the area and of the ECHR. Of course, *D v East Berkshire* has itself been overruled, by the extremely restrictive decision of the Court of Appeal *CN v Poole BC*,[15] decided before *Robinson*, which sought to bring social services liability in line with other public bodies, relying heavily on *Michael* and reaffirming the primacy of *X v Bedfordshire*, which they said was still good law. The judgment of the Supreme Court is anxiously awaited, the case having been expedited and heard in July this year. In the meanwhile, a large class of claimants, will be wholly dependent on the HRA.

Indeed, the extent to which the common law should be developed in harmony with the HRA 1998 has been a topic of close debate. Arguments in favour focus on the existence of "positive" duties within the Convention which require of the State special and specific action, as opposed to the bilateral nature of tortious liability. In *Smith v Chief Constable of Sussex*,[16] heard together with *Van Colle v Chief Constable of the Herefordshire Police,* the House of Lords rejected the suggestion that the existence of an art.2 claim was sufficient to generate a parallel duty of care towards victims of crime. The argument is most vigorously rejected by Lord Brown at [136]–[139], who relies on the fundamental difference between such claims to conclude that there is "no good reason" for mirroring one in the other, adding nothing to "the vindication of the right nor be likely to deter the police from the action or inaction which risks violating it" [139]. The preservation of the *Hill* principle was paramount. This was duly affirmed by Lord Toulson in *Michael,* holding there was no basis for creating a duty of care to mirror that of arts 2 and 3, or for "gold plating the Claimant's convention rights" to provide civil compensation on an alternative basis [125]. Unsurprisingly, the Court of Appeal in *CN* endorsed such views in obiter, finding there was "no requirement and indeed no justification" to extend civil liability on this basis [91]. Of course, this cuts both ways: litigants cannot demand that human rights principles be trimmed down to size to fit the domestic tortious mould.

Commissioner of Police of the Metropolis v DSD

It is against the broader canvas of HRA liability that police claims under arts 2 and 3 have developed. Such claims afford a collateral route to challenge the restrictive *Hill* ratio, refined by Lord Reed in *Robinson* so as to preclude police liability for harm caused to victims of crime by third parties. In the seminal case of *Osman v United Kingdom*,[17] the police had failed to heed reports of the danger to the applicant, who was later severely attacked, and his father killed. The Strasbourg court concluded that there arose an implied positive obligation under art.2 to protect such an individual from harm by taking such steps as were reasonably in their power. However, the circumstances were narrowly framed, namely where the State "knew or ought to have known at the time of the existence of a real and immediate risk" [115]–[116]. As later noted in *Van Colle,* the test is necessarily restrictive, applying a duty to protect known individuals from threatened violence, as opposed to investigating past violence. The scenario in *Hill,* for instance, falls under the latter. Subsequent Strasbourg cases, such as *MC v Bulgaria*,[18] where deficient legal protection for rape complainants was considered a breach of art.3, inform the articulation of a broader investigative duty. However, the rationale for such an extension is far from clear in the Strasbourg jurisprudence. It is not until *DSD* that it is expressly confirmed and clarified in domestic law.

[13] *Z v United Kingdom* (29392/95) [2001] 5 WLUK 297; [2001] 2 F.L.R. 612; [2001] 2 F.C.R. 246; (2002) 34 E.H.R.R. 3.
[14] *JD v East Berkshire NHS Trust* [2003] EWCA Civ 1151; [2004] Q.B. 558.
[15] *CN v Poole BC* [2017] EWCA Civ 2185; [2018] 2 W.L.R. 1693.
[16] *Smith v Chief Constable of Sussex* [2008] UKHL 50; [2009] A.C. 225.
[17] *Osman v United Kingdom* (23452/94) [1998] 10 WLUK 513; [1999] 1 F.L.R. 193; (2000) 29 E.H.R.R. 245.
[18] *MC v Bulgaria* (39272/98) [2003] 12 WLUK 130; (2005) 40 E.H.R.R. 20.

The facts of *DSD* will be familiar. The two claimants, DSD and NBV alleged the police had acted in breach of the art.3 positive duty, in failing to effectively investigate the serious sexual assaults perpetrated against them by John Worboys. Such extensive failings, catalogued by Green J in the High Court[19] at [244]–[313] included the failure to collect CCTV evidence, record evidence, or make any overriding link between the numerous, similar allegations made by a number of women. By the time the case reached the Supreme Court, it was solely the nature and implications of the art.3 investigative duty which was in issue, the appeal having been brought by the police. For the majority, Lord Kerr confirmed that the investigative obligation comprised systemic and operational aspects, and extended to cases of ill-treatment by non-state agents at [58]–[59]. Lord Hughes dissented only on the basis that such an obligation did not extend to operational failings, rationalised on the basis of *Osman* public policy concerns. However, given Green J's factual findings on failures at first instance, the appeal was unanimously dismissed.

The decision of *DSD* is timely. The Supreme Court conclusively recognises the existence of a positive duty on the police to investigate allegations of serious crime, expanding upon the protective duty under *Osman*. Whilst *Robinson* reaffirms the absence of a duty of care towards victims of crime, *DSD*, promulgated a short time later, effectively provides an alternative route forward under the HRA 1998. Victims of crime seriously failed by the police now have a means of seeking domestic remedies. Not only are the police subject to a broad structural obligation, namely to have an effective legal and prosecutorial framework in place, but, in accordance with Lord Kerr's presiding logic, must equally ensure operational efficiency in individual investigations into serious allegations. It is of note that the respondents (claimants) had, prior to bringing the HRA claim, already failed in an earlier negligence claim, against Worboys and his insurer (*AXN v Worboys*[20]). Consequently, Lord Kerr argues against the synthesis of the two areas of law, with any implied ECHR duty considered "on its own merits, without the encumbrance of jurisprudence under common law" [68]. He goes further to make expressly clear that the policy reasons underpinning *Hill* have no place in the human rights arena and that, in any event, liability may well "act as an incentive to avoid (egregious) errors" [71]–[71]. Lord Neuberger similarly assents that the scope of the Convention must not be "narrowed to achieve consistency" with domestic law and subsume the limitations of *Hill* [97]. Lord Hughes is alone in his attempt to import a policy dimension into ECHR construction. It is somewhat odd that no reference is made to *Robinson* in this common law commentary.

The Supreme Court puts in place certain mechanisms to guard against the prospect of potential floodgates litigation. The threshold for liability requires that: (a) the investigative failings must be "obvious and significant" or "really serious" [54/72] or "conspicuous or substantial"; and (b) the triggering conduct must be a 'credible' claim of art.3 ill-treatment. Further, Lord Neuberger's proviso at [92] is that the "seriousness" of an alleged operational failure has to be looked at in context:

> "Provided that courts bear clearly in mind 'the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources' and the need to interpret the duty 'in a way which does not impose an impossible or disproportionate burden on the authorities' (*Osman v United Kingdom* (1998) 29 E.H.R.R. 245 at 116), I find it hard to understand why an investigation which is seriously defective in purely operational terms should, in effect, be held to satisfy the investigatory duty."

However, there are still significant issues for practitioners to navigate. As observed by Lord Hughes, the requirement for "serious" failings may well rather "present than solve" threshold issues in its lack of clarity, leading to arguable recourse to the standard for negligence [135]. It is right to say that the facts of *DSD* are unique, and readily support the art.3 formula. The serial crimes of Worboys were met by systematic, protracted failings by the police, such that were readily conceded at trial. The fact that NVD,

[19] *Commissioner of Police of the Metropolis v DSD* [2014] EWHC 436 (QB); [2014] 2 WLUK 990.
[20] *AXN v Worboys* [2012] EWHC 1730 QB; [2012] 6 WLUK 554.

one of Worboy's last victims, was able to recover for the preceding investigative failings is indicative of this. How such claims will fare in the context of more routine but serious allegations remains to be seen.

Further, Lord Kerr is too preemptory in dismissing the possibility that every "burglary, car theft or fraud" might now fall within the Convention scope [53]. Equivalent positive duties have already been held to exist under arts 4 and 8 (see *O v Commissioner of Police for the Metropolis;*[21] *KU v Finland*[22]). The possible extension of such an investigative obligation to other allegations of third-party harm, i.e. damage to property under art.1 Protocol 1, is, as Lord Hughes suggests, perfectly conceivable [129].

Human Rights damages: Scope for creativity

There is one further aspect of *DSD* that rewards attention. Green J's quantum judgment,[23] untouched by the Supreme Court and already approved by the higher courts, offers a masterly analysis of human rights damages. He makes clear that the primary aim of the Convention is to ensure the protection of the minimum standard of rights, and that, pursuant to the HRA s.8(3), any award of damages will be ancillary and accordant with "just satisfaction". However, all cases of art.3 violation will result in an award of damages by their inherent nature. Whilst pecuniary loss will follow much the same restitutionary principles as tort law, he endorses a far more "broad brush", flexible approach to the quantification of non-pecuniary harm [17].

The Strasbourg Court will readily assume some form of generalised moral or psychological damage, even in the absence of any expert of medical evidence. Thus "precision in establishing causation is not an identifiable hallmark of Strasbourg case law" [25], albeit proof of material harm will enhance such awards [68(i)]. Amongst the other factors that will inform an assessment of HRA damages are the seriousness, scale, and duration of the violation [68(iv), 118], the overall context to the violations [36], and the conduct of the defendant [126]. The latter will include consideration of whether the conduct was in bad faith, whether an apology has been made, or if there is a need to "encourage others to bring claims against the State by increasing the award" [40]. The possible contributory fault of the claimant (i.e. in making a delayed complaint) may also be relevant [67(v)]. Drawing on ECtHR comparator case law, Green J makes clear that art.3 damages claims will vary sizably, ranging from 1,000–100,000 euros, the latter bracket reflecting a violation with multiple aggravating factors and state complicity [68(vii)].

It is on such a basis that Green J undertakes a broad assessment of the damages for DSD and NBV. In doing so, he recognises the causative complexities in apportioning a tranche of the post-assault psychological damage to the defective investigation itself, as opposed to Worboy's acts. Another novelty of course is the fact that NBV was also compensated for the defendant's causal responsibility for her rape, owing to the previous investigative failings [138], as pointed to above. Having taken a "final standing-back, totality exercise", he grants DSD and NBV the high-range awards, within the Strasbourg context, of £22,250 and £19,000 respectively, to reflect the severity and extent of the failings and consequent harm.

Green J's judgment raises another issue of universal importance for HRA quantum assessments. He was tasked with considering the extent to which parallel awards already received by the claimants-civil settlement against Worboys and CICA claims—affected the current proceedings. In doing so, he concludes that whilst such awards must be necessarily considered under s.8(3), they by no means preclude the court from awarding separate damages or restrict additional awards to a nominal sum [14]. Any damages awarded under art.3 related to materially different loss than that under the previous claims, which compensated only for the damage caused by the assaults, and not in any part for the subsequent police failings [60]. Therefore, whilst accommodating for some overlap between the claims, Green J makes clear that, in exercising ECHR jurisdiction, he is not hidebound by tortious principles of compensation.

[21] *O v Commissioner of Police for the Metropolis* [2011] EWHC 1246 (QB); [2011] 5 WLUK 587.
[22] *KU v Finland* (2872/02) [2008] 12 WLUK 72; (2009) 48 E.H.R.R. 52.
[23] *D v Commissioner of Police for the Metropolis* [2014] EWHC 2493 (QB); [2015] 1 W.L.R. 1833.

Significant comfort can be taken from Green J's judgment in his recognition that the quantification of HRA damages is often no more than a matter of "juridical gestimation" [25]. One must be guided by an intuitive analysis of the facts within the framework of Strasbourg principles. The call for "modesty" is therefore relative, recognising the primarily vindicatory nature of HRA claims. There is, Green J suggests, considerable scope for recovery in this area.

The shape of things to come

This article has considered the changing nature of public authority liability in the context of police actions and duties. However, recent developments have implications far beyond their immediate context. As indicated above, for example, *Michael* was heavily relied upon by the defendant in *CN v Poole* to limit social services lability. However, where *Robinson* firmly draws the line at third-party liability, *DSD* intervenes to reflect the necessarily composite, public nature of HRA duties. The further broadening of such an investigative duty is likely, in pace with the constantly evolving nature of the Convention. However, rather than attempt to reform tort law in order to absorb such growth, *DSD* confirms that redirection through the human rights route is instead preferable. The importance of the Human Rights Act in this regard, ensuring accountability and transparency for State-specific failings, not limited to police failings, is not to be undervalued.

Causation, Loss of Chance, and the Troublesome Case of Crossman

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Causation; Clinical negligence; Consent; Duty of care; Loss of chance; Material contribution

Causation in clinical negligence is fraught with difficulty; bodies are complex systems and it can be impossible to determine the true effect of negligence on a person's health. This article examines the different ways in which causation is treated in clinical negligence; it considers the basic "but for" principle that underpins causation, it considers the exceptions that have developed to this basic principle, and it considers some of the attempts made to extend these exceptions.

In doing so, the article examines the recent decision in *Crossman v St George's Healthcare NHS Trust*,[1] a case which illustrates the challenges posed by causation, and concludes that *Crossman* was incorrectly decided.

The "but for" test

It is trite law that it is for the claimant in a clinical negligence action to prove, on the balance of probabilities, that the defendant's breach of duty caused the damage. It is similarly well-established that when considering causation in clinical negligence, the starting point is the "but for" test. Consider the following example: a patient suffers a simple scaphoid fracture. Unfortunately, the treating Doctor fails, negligently, to diagnose the fracture. The scaphoid heals outside of the optimal position. The patient is left with a permanently stiff wrist. The medical evidence suggests that with competent medical treatment it was probable, i.e. a higher than 50% chance, that the patient would have enjoyed a full return to function. Therefore were it not for the doctor's negligence (or to put it another way, "but for" the negligence) the patient would have enjoyed a far better outcome and compensation is therefore payable. This is an example of "but for" causation in the clinical negligence setting leading to a successful claim for the patient.

Another example of the "but for" test in operation is the case of *Hotson v East Berkshire HA*,[2] the facts of which are well-known to many in the clinical negligence sector: a young boy fell from a tree and injured his hip. The injury was not adequately diagnosed. He developed avascular necrosis and required a hip replacement. However, the fall from the tree (a factor that would always have been present) meant that avascular necrosis (and everything that came with that condition) was likely to occur in any event (with odds of around 75%) irrespective of the doctor's negligence. The doctor did not cause the avascular necrosis because it was likely to have happened in any case.

Another well-known but perhaps more contentious example comes from *Gregg v Scott*.[3] Mr Malcolm Gregg had cancer. His GP, Dr Scott, failed to spot signs which might have led to an earlier diagnosis. At the time of the GP's negligence, Mr Gregg was unlikely to survive the effects of the cancer (his prospects

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[1] *Crossman v St George's Healthcare NHS Trust* [2016] EWHC 2878; [2016] 11 WLUK 697.
[2] *Hotson v East Berkshire HA* [1987] A.C. 750; [1987] 3 W.L.R. 232.
[3] *Gregg v Scott* [2005] UKHL 2; [2005] 2 A.C. 176.

of recovering were assessed as being in the region of 45%). Therefore because Mr Gregg was already unlikely to survive, the GP's negligence did not satisfy "but for" causation.

These examples show that a defining characteristic of "but for" causation is the crossing of the threshold between likely and unlikely. Put another way, a claimant must establish that in the absence of the alleged negligence it is likely that the injury would not have occurred.

Loss of chance

It might be argued that the outcome in *Gregg*, in particular, was unfair on the claimant. His GP had been negligent. Mr Gregg would almost certainly have felt that a reduction in his chances of surviving was something that should be compensated, particularly where it was already statistically unlikely that he would survive his cancer.

For Mr Gregg to succeed in his claim he would have needed to show that a loss of chance—in his case the additional chance of surviving—was a compensatable loss.

There is authority to suggest that loss of chance can be the foundation of a claim. The classic example of this is the beauty contest case of *Chaplin v Hicks*.[4] Mr Hicks was a theatrical manager. He arranged for a competition to be run in the national press whereby aspiring actresses would have their photographs published in newspapers and the public would vote on those they considered to be the most beautiful. The top 50 candidates would be offered a meeting with Mr Hicks, and he would then select the 12 best candidates and provide them with three-year long engagements as paid actresses. Miss Chaplin did not receive notice of the meeting in time to attend it, and Mr Hicks refused to rearrange. Thus, she lost the chance to be selected as one of the 12 winners. The Court of Appeal viewed the chance of success as an item of property of which Miss Chaplin had been deprived. Her claim for compensation therefore succeeded.

However, in *Gregg v Scott*, the House of Lords found that it was not a valid basis for a claim in clinical negligence. Unlike the example of a beauty contest, where it is a simple matter to calculate the extent of the lost chance, the preponderance of unknown factors operating in the human body makes it very difficult, if not impossible, to calculate the value of a chance with any certainty.[5] Furthermore, the nature of the chance is significantly different in medicine to the beauty contest example (where the loss was of property, namely the easily quantifiable chance of securing a contract to work as an actress).[6]

Indeed, the point has been considered further (albeit obiter) by the Court of Appeal in *Wright v Cambridge Medical Group*[7] where no less than Lord Neuberger MR, as he was then, commented that loss of chance in clinical negligence "… should probably be treated as effectively foreclosed by the views expressed by the majority of the House of Lords in *Gregg v Scott*".

Modifications and exceptions to "but for" causation

The "but for" test is not a panacea, however. It is not effective in producing an answer to causation in cases where there are two or more independent possible causes (occurring at the same time or sequentially/cumulatively) and where it is not possible to say which of those causes is the operative one. Similarly, it is not always effective in producing an answer to causation in cases involving a doctor's failure to obtain a patient's consent before embarking on a course of treatment.

The limitations of the "but for" test were highlighted by Lord Bingham in *Chester v Afshar*[8] when he said:

[4] *Chaplin v Hicks* [1911] 2 K.B. 786; [1911] 5 WLUK 41.
[5] *Gregg v Scott* [2005] UKHL 2 at [58]. Lord Phillips at [170].
[6] *Gregg v Scott* [2005] UKHL 2 at [24], Lord Hoffmann at [83].
[7] *Wright (A Child) v Cambridge Medical Group (A Partnership)* [2011] EWCA Civ 669 at [82]; [2013] Q.B. 312.
[8] *Chester v Afshar* [2004] UKHL 41; [2005] 1 A.C. 134 at [8].

> "It is now, I think, generally accepted that the 'but for' test does not provide a comprehensive or exclusive test of causation in the law of tort … More often, applied simply and mechanically, it gives too expansive an answer: 'but for your negligent misdelivery of my luggage, I should not have had to defer my passage to New York and embark on SS Titanic'."

We examine *Chester* in more detail below given its leading role in consent cases, but Lord Bingham's comments also provide a prelude to the introduction of the doctrine of material contribution in clinical negligence, a doctrine which provides at least a partial answer to cases involving multiple causes.

"Material contribution"

The doctrine of material contribution has played a prominent role in clinical negligence litigation since the Court of Appeal's decision in *Bailey v Ministry of Defence*[9] a case which has its roots in the industrial disease cases of *Bonnington Castings Ltd v Wardlaw*,[10] *McGhee v National Coal Board*[11] and *Fairchild v Glenhaven Funeral Services Ltd*.[12]

Given its significance to the issue of causation in clinical negligence, the case is well known. The claimant underwent surgery and following this she aspirated her own vomit. In turn, she suffered a cardiac arrest, with the resulting period of hypoxia-ischaemia causing her to suffer brain damage. At first instance, the judge found that the defendant was in breach of duty for failing to adequately resuscitate the claimant post-operatively. The physical cause of the aspiration of vomit (and the consequential cardiac arrest and brain damage) was her weakness and thus her inability to react to the vomiting. The judge found that there were two contributory causes of that weakness: (1) weakness caused by the non-negligent consequences of surgery and the underlying condition which brought about the need for surgery; and (2) weakness caused by the negligent failure to adequately resuscitate the claimant. The judge was not able to determine which of these causes was the dominant cause, so he found that each had contributed materially to the overall weakness. As such, causation was established.

The issue on appeal (as it relates to the issue of material contribution) was whether it was "enough for the claimant to establish that, on the balance of probabilities, a lack of care made a material contribution—something greater than negligible—to the weakness of her condition".[13]

Summarising the position in respect of cumulative causes, and in a passage that will be familiar to all clinical negligence practitioners, Waller LJ[14] confirmed the modification to the conventional "but for" test as follows:

> "If the evidence demonstrates on a balance of probabilities that the injury would have occurred as a result of the non–tortious cause or causes in any event, the claimant will have failed to establish that the tortious cause contributed. Hotson exemplifies such a situation. If the evidence demonstrates that 'but for' the contribution of the tortious cause the injury would probably not have occurred, the claimant will (obviously) have discharged the burden. *In a case where medical science cannot establish the probability that 'but for' an act of negligence the injury would not have happened but can establish that the contribution of the negligent cause was more than negligible, the 'but for' test is modified, and the claimant will succeed*." (emphasis added)

The judge at first instance had therefore applied the correct test on causation, and the appeal was dismissed.

[9] *Bailey v Ministry of Defence* [2008] EWCA Civ 883; [2009] 1 W.L.R. 1052.
[10] *Bonnington Castings Ltd v Wardlaw* [1956] A.C. 613; [1956] 2 W.L.R. 707.
[11] *McGhee v National Coal Board* [1973] 1 W.L.R. 1; [1972] 3 All E.R. 1008.
[12] *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22; [2003] 1 A.C. 32.
[13] *Bailey v Ministry of Defence* [2008] EWCA Civ 883; [2009] 1 W.L.R. 1052 at [35].
[14] *Bailey v Ministry of Defence* [2008] EWCA Civ 883; [2009] 1 W.L.R. 1052 at [46].

Since the decision in *Bailey* the Privy Council has held (in *Williams v Bermuda Hospitals Board*[15]) that material contribution is not confined to cases in which there are simultaneous multiple contributing causes; successive events can each amount to a material contribution to a subsequent adverse outcome.

Consent

Not simply a modification to "but for" causation, there is an *exception* to the "but for" test in clinical negligence cases where it is found that a patient has not given their full consent to a procedure. The exception is rooted in public policy, and stems from the well-known decision of the House of Lords in the case of *Chester v Afshar*.

Since 1988, Miss Carole Chester had suffered repeated episodes of low back pain. By 1992, it was apparent that several of her intervertebral discs were protruding into her spinal canal. Conservative management did not address her pain and increasing lack of function, and so it was recommended that Miss Chester undergo surgery on her spine. The operation was performed by Mr Afshar, a neurosurgeon, but as a result of a non-negligent complication of surgery Miss Chester suffered significant nerve damage and was left partially paralysed.

There was a 1–2% chance of this complication occurring. Mr Afshar had performed the operation competently and had not made the complication more likely; the risk of the complication occurring would have been the same whenever Mr Afshar performed the surgery. However, he had not warned Miss Chester of the risk. If he had done so, Miss Chester would have at least postponed the operation.

Applying ordinary principles of causation, the House of Lords was of the view that Miss Chester could not satisfy the test of causation. Because the risk which eventuated was liable to occur at random irrespective of the skill and care with which the operation might be performed, the surgeon's failure to warn neither affected the risk nor was the effective cause of the injury she sustained. In reaching this conclusion, the House endorsed the minority view of McHugh and Hayne JJ in the Australian High Court case of *Chappel v Hart*.[16] As per McHugh J in *Chappel*:[17]

> "In the absence of a statute or undertaking to the contrary, therefore, it would seem logical to hold a person causally liable for a wrongful act or omission only when it increases the risk of injury to another person ('increases' in this context includes 'creates'). If a wrongful act or omission results in an increased risk of injury to the plaintiff and that risk eventuates, the defendant's conduct has materially contributed to the injury that the plaintiff suffers whether or not other factors also contributed to that injury occurring. If, however, the defendant's conduct does not increase the risk of injury to the plaintiff, the defendant cannot be said to have materially contributed to the injury suffered by the plaintiff."

What Miss Chester had lost was a chance to avoid an injury. As outlined above, we know from *Gregg v Scott* that loss of chance is not a valid foundation for a clinical negligence claim. Lord Hoffmann put the issue as follows in *Chester*:[18]

> "In my opinion, this argument is about as logical as saying that if one had been told on entering a casino that the odds on the number 7 coming up at roulette were only 1 in 37, one would have gone away and come back next week or gone to a different casino. The question is whether one would have taken the opportunity to avoid or reduce the risk, not whether one would have changed the scenario in some irrelevant detail. The judge found as a fact that the risk would have been precisely the same whether it was done then or later … It follows that the claimant failed to prove that the

[15] *Williams v Bermuda Hospitals Board* [2016] UKPC 4; [2016] A.C. 888.
[16] *Chappel v Hart* (1998) 195 C.L.R. 232.
[17] *Chappel v Hart* (1998) 195 C.L.R. 232 at 27.
[18] *Chester v Afshar* [2004] UKHL 41; [2005] 1 A.C. 134 at [31].

> defendant's breach of duty caused her loss. On ordinary principles of tort law, the defendant is not liable."

Thus, the claim would fail on ordinary "but for" causation. However, this would mean that there was no effective redress for the loss of personal autonomy suffered by Miss Chester as a result of having undergone surgery to which she had not fully consented. The court recognised the increased importance given to personal autonomy over recent years[19] and concluded that this justified a finding in her favour, which it recognised amounted to a "modest departure from traditional causation principles".[20] Many might consider this to amount to significantly more than a "modest departure" and it is clear that the court's intention was to limit this policy-based exception to cases involving a failure in the consenting process given the importance of the right of autonomy and dignity of the patient to make an informed choice.

Attempts to broaden *Chester v Afshar*

Chester v Afshar therefore allows a claim that would usually fail on conventional causation principles to succeed where three conditions are met. First, there is a breach of duty on the part of the clinician for failing to obtain consent in respect of a particular complication; secondly, the claimant can show that she would have at least delayed undergoing surgery; and thirdly, that the particular complication did occur. *Chester* therefore provides a very powerful tool by which claimants can bypass the difficulties posed by "but for" causation.

It is perhaps unsurprising, therefore, that attempts have been made to broaden the scope of *Chester* in a number of ways, two of the most significant being: (1) cases involving a failure to warn of a particular complication where something indirectly related to that complication then occurs; and (2) cases where there is a negligent failure to warn of complication A but complication B (which is warned of) occurs.

As we discuss below, these attempts have not been successful in extending the scope of *Chester* (in the case of scenario (1) above), and should not be successful (in the case of scenario (2)).

Indirect consequence

Meiklejohn v St George's Hospital NHS Trust[21] concerned treatment of the claimant's aplastic anaemia. He was seen by a leading specialist and was given a form of medical treatment known as ALG. The specialist also took a blood sample, which was to be analysed by another leading specialist. ALG was administered and caused a side-effect and this side effect was treated with steroids. The steroids themselves caused a rare side-effect, avascular necrosis, which in turn caused the claimant to require bilateral hip replacements.

The claimant argued that he had not given his full consent to the taking of the blood sample. If he had known more about why the blood sample was intended this would have led to him declining the ALG, and in turn avoiding avascular necrosis. Thus, the claimant sought to identify a deficiency in the part of the consent process that was not directly related to the provision of ALG, and to rely on that deficiency as a means of establishing liability for his injuries.

The Court of Appeal gave short shrift to this argument, Rafferty LJ stating:[22]

> "In *Chester* a surgeon non-negligently recommended surgery with a low risk of a disabling condition of which he did not warn and which the patient endured. It was agreed that he should have warned her. The Judge found that, warned, she would have taken time to reflect but probably undergone the

[19] Lord Walker in *Chester v Afshar* [2004] UKHL 41; [2005] 1 A.C. 134 at [92].
[20] Lord Steyn in *Chester v Afshar* [2004] UKHL 41; [2005] 1 A.C. 134 at [24].
[21] *Meiklejohn v St George's Hospital NHS Trust* [2014] EWCA Civ 120; [2014] 2 WLUK 465.
[22] *Meiklejohn v St George's Hospital NHS Trust* [2014] EWCA Civ 12 at [33] and [34].

surgery albeit on a different day with a different surgeon. All five of their Lordships concluded that she failed on causation since the surgeon's breach of duty had not increased the risk of her suffering the complication but three thought public policy merited an exception to traditional rules on causation.

Chester is at best a modest acknowledgement, couched in terms of policy, of narrow facts far from analogous to those we are considering. Reference to it does not advance the case for the Claimant since I cannot identify within it any decision of principle."

In any event, it was clear that even if the claimant had been given more detailed advice as part of the consent process he would have agreed to receive the same treatment as he did.

Other complication

The traditional route to liability via *Chester v Afshar* is for a surgeon to negligently fail to warn of complication A, and for complication A to occur. But what if the surgeon negligently fails to warn of complication A and instead complication B (which was warned of) occurs?

We can infer from *Meiklejohn* that an A/B claim would probably fail, but by looking beyond the realms of clinical negligence we see that such a claim would certainly fail.

South Australia Asset Management Corp v York Montague Ltd,[23] aka *SAAMCO*, concerns the extent of liability for a negligent and over-optimistic property valuation. York Montague Ltd had been engaged by SAAMCO to value a property which it proposed to use as security for a loan of some £11m. York Montague negligently advised SAAMCO that the property was valued at £15m. It was not; it was in fact worth £5m at the time of the valuation. Matters deteriorated; the property market crashed and so when the property came to be sold it realised a little under £2.5m. The House of Lords had to assess the extent of the valuer's liability, with Lord Hoffmann defining the problem thus (at [16]):

"What therefore should be the extent of the valuer's liability? The Court of Appeal said that he should be liable for the loss which would not have occurred if he had given the correct advice. The lender having, in reliance on the valuation, embarked upon a transaction which he would not otherwise have undertaken, the valuer should bear all the risks of that transaction, subject only to the limitation that the damage should have been within the reasonable contemplation of the parties."

Lord Hoffmann continued:

"18. Rules which make the wrongdoer liable for all the consequences of his wrongful conduct are exceptional and need to be justified by some special policy. Normally the law limits liability to those consequences which are attributable to that which made the act wrongful. In the case of liability in negligence for providing inaccurate information, this would mean liability for the consequences of the information being inaccurate.

19. I can illustrate the difference between the ordinary principle and that adopted by the Court of Appeal by an example. A mountaineer about to undertake a difficult climb is concerned about the fitness of his knee. He goes to a doctor who negligently makes a superficial examination and pronounces the knee fit. The climber goes on the expedition, which he would not have undertaken if the doctor had told him the true state of his knee. He suffers an injury which is an entirely foreseeable consequence of mountaineering but has nothing to do with his knee.

20. On the Court of Appeal's principle, the doctor is responsible for the injury suffered by the mountaineer because it is damage which would not have occurred if he had been given correct information about his knee. He would not have gone on the expedition and would

[23] *South Australia Asset Management Corp v York Montague Ltd* [1997] A.C. 191; [1996] 3 W.L.R. 87.

> have suffered no injury. On what I have suggested is the more usual principle, the doctor is not liable. The injury has not been caused by the doctor's bad advice because it would have occurred even if the advice had been correct."

The doctor's failure to warn and the subsequent avalanche injury, just like the surveyor's negligent valuation and the subsequent fall in the property market, are both examples of A/B cases, i.e. cases where liability should be capped or limited to the consequences of the provision of inaccurate information (or where we may say there is only a tenuous link between the negligent advice and the actual harm occurring).

Therefore, applying the logic of SAAMCO, *Chester v Afshar* would not result in liability in an A/B case. This conslusion would seem to be supported by the recent judgment of the Court of Appeal in *Khan v MNX*.[24] Furthermore, while the public policy basis for the *Chester* exception would clearly apply in an A/A case, it is unclear that it would apply in an A/B case.

Crossman v St George's Healthcare NHS Trust

In the recent High Court decision in *Crossman*, the claimant, Rodney Crossman, required treatment for degenerative changes affecting his cervical spine. It was agreed that he would try conservative treatment first (physiotherapy) and that if his symptoms were to persist he would undergo spinal surgery. Owing to admitted negligence on the part of the hospital Mr Crossman did not have the opportunity to attempt conservative treatment, and instead proceeded straight to surgery. Despite being performed competently the operation caused injury to a nerve root, leaving Mr Crossman in pain.

It was common ground between the parties that the risk of perioperative injury to the nerve root was in the order of 0.5%. It was also agreed that if Mr Crossman had been able to pursue conservative treatment this would have failed, that he would have undergone the same operation as he did albeit some three months later and that the risk of injury to the nerve root would have been the same when the hypothetical later surgery would have been performed as it was when Mr Crossman's surgery was in fact performed (i.e. 0.5%). Mr Crossman had merely undergone surgery earlier than he should have. Thus, to recover compensation Mr Crossman needed to show that it was the negligent bringing forward of his operation date that was the "cause" of his injury.

After hearing the case, HH Judge Peter Hughes QC (sitting as a deputy High Court Judge) found in favour of Mr Crossman. He did so on the basis of "but for" causation; put another way, if the surgery had been performed later, the complications would probably not have occurred. According to the judge: "Mr Crossman was unlucky. Had he had the operation on a different occasion, on the balance of probabilities the operation would have been successful."[25]

Given that the risks associated with most procedures are less than 50% (indeed, in many cases, such as Mr Crossman's, the risks are negligible, at least in percentage terms) the decision in *Crossman* is of considerable interest. Mr Crossman's case fell into a different (lesser) category to Miss Chester's as it was one which involved a simple mistake in the implementation of the treatment plan rather than any failure in the consent process. Mr Crossman's case was not of sufficient gravity to activate the narrow, policy-driven *Chester* exception to the ordinary principles of causation.

To follow the logic of the judgment, if a claimant can establish that a procedure should have been performed at a different time, causation is likely to be established, notwithstanding that the risk that eventuated would have been the same whenever the procedure would have been performed.

[24] [2018] EWCA civ 2609.
[25] *Crossman v St George's Healthcare NHS Trust* [2016] EWHC 2878 (QB) at [45]; [2016] 11 WLUK 697.

Was Crossman correctly decided?

Mr Crossman suffered a non-negligent complication from surgery. The only negligence in his case related to the date of his procedure. If the procedure had been performed at the planned date, the risk of the complication (0.5%) would have been at the same level as it was when the operation was in fact performed.

This was not a case where the negligence made the complication likely, when it had previously been unlikely. Further, the breach of duty made no difference to the risk of the complication. Following the dicta in *Chester*, the case fails on ordinary "but for" causation principles. As per McHugh J in *Chappel*: "If, however, the defendant's conduct does not increase the risk of injury to the plaintiff, the defendant cannot be said to have materially contributed to the injury suffered by the plaintiff."

Mr Crossman was essentially in the same position as Miss Chester before she benefited from the narrow policy-driven exception that, as outlined above, does not extend to his case; what Mr Crossman lost was the chance to avoid an injury. As above, we know that loss of chance is not compensatable in clinical negligence cases. He would fall foul of the roulette wheel analogy deployed by Lord Hoffmann in *Chester*.

As outlined above, Mr Crossman's case would not fall within the narrow and exceptional remit of the *Chester* exception, as indeed was identified in the judgment. Furthermore, the case does not activate any of the other modifications to "but for" causation which are discussed above.

The weight of case law is clear that Mr Crossman was not entitled to compensation for the minor administrative error which had had such serious consequences. If *Crossman* were correctly decided it would represent a significant change in the law by permitting claims for loss of chance in a clinical negligence setting.

As such, the authors can only conclude that if a case were to be heard with substantially the same facts as Mr Crossman's it would result in a very different judgment. Unless the court could find a way to depart from the often-cited authorities discussed above it would have to dismiss such a claim.

Uber-careful: Implications of Modern "Gig Economy" Litigation for the Employer's Common Law Duty of Care

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Common law; Drivers; Duty of care; Employers' powers and duties; Employment status; Workers

"Gig economy" litigation and the reach of employment rights

Over the past five or so years, the expression and phenomenon of the "gig economy," that is, a labour market characterised by short-term contracts or freelance work rather than permanent contracts of employment, have rapidly moved from novelty to prevalence. This movement has brought with it challenges for courts and businesses alike.

Individuals who undertake work in the "gig economy" have been characterised and treated by the organisations providing the work as "independent contractors". As a result, they have been considered to fall outside legislation conferring employment rights and protections.

Since 2016, the courts of England and Wales have seen a great deal of litigation over this issue. The transportation company, Uber,[1] was the first respondent to such claims brought in the Employment Tribunals and which are now furthest through the court structure of all the gig economy cases.[2] The case of *Aslam & Farrar v Uber BV*[3] was recently before the Court of Appeal, which upheld the decision of the Employment Tribunal and Employment Appeal Tribunal ("EAT") that the drivers are not independent contractors but rather "workers". Subject to a further and final appeal to the Supreme Court, the outcome of the case will affect at least 50,000 Uber drivers in this jurisdiction and may well have an analogous effect upon Uber drivers in other cities.

Both the Employment Tribunal and the EAT have determined that the claimant Uber drivers, Yaseen Aslam and James Farrar, whose legal action is treated as representative of the claims of multiple other (named) drivers, are "workers" within the meaning of that term as set out in the Employment Rights Act 1996 ("the 1996 Act") s.230(3)(b). That is, they are individuals who have entered into or work under any other contract, other than a contract of employment, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

The legislative scheme differentiates between "workers" and "employees" since the latter, for the purpose of rights conferred by the 1996 Act, are individuals who have entered into or work under a contract of employment, whether oral or in writing. "Contract of employment" is defined as a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing. "Contract of service" is not defined, leaving the determination of the question of whether any particular arrangement amounts to such a contract or a contract of employment, for the courts, applying the traditional tests such

[1] Uber was found to be a provider of transportation services by the Court of Justice of the European Union in *Asociación Profesional Élite Taxi v Uber Systems Spain SL* (C-434/15) EU:C:2017:981; [2018] Q.B. 854 at [37]–[40].

[2] The case of *Dewhurst v Citysprint* [2017] 1 WLUK 16 did not proceed to the Employment Appeal Tribunal. The claim brought by 50 Deliveroo riders in the Employment Tribunals was settled on 29 June 2018 (see *https://www.leighday.co.uk/News/News-2018/June-2018/Deliveroo-pays-out-in-employment-rights-claim#* [accessed 22 January 2019].

[3] *Aslam & Farrar v Uber BV* [2018] EWCA Civ 2748 ; [2018] 12 WLUK 365.

as whether there is mutuality of obligation, a requirement of personal service, control and whether the terms are consistent with the agreement being a contract of employment. Some of these concepts have traditionally been referred to as the dominant purpose test, the control test and the integration test. Courts are obliged to consider all the circumstances: *Autoclenz Ltd v Belcher*,[4] and there is no single key with which to unlock the words of the statute in every case: *Bates van Winkelhof v Clyde & Co LLP* at [38]–[39] per Baroness Hale PSC.[5] Where personal service is lacking (because the contract provides for a genuine right on the part of the individual to send a substitute to perform the work[6]) or there is no mutuality of obligation, there will be no contract of employment.

Employees are entitled to the full gamut of employment rights and protections. In contrast, independent contractors have no employment rights as they are considered sufficiently capable of protecting their own interests without the need for Parliament's assistance. "Worker" status falls in between these two extremes, entitling workers to some, but not all, protections. The 1996 Act is drafted such that every employee is a worker, though not every worker will be an employee.

It has been held that the relationship between Uber drivers and Uber London Ltd (the holder of the required Private Hire Vehicle Operator's Licence in respect of the London area) is not one of principal and agent where the principals (Uber drivers) enter into a separate contract with each passenger as and when they agree to take a trip, as Uber (the purported agent) has contended. Instead, Uber drivers are integrated into the Uber business of providing transportation services, marketed as such, such arrangements being inconsistent with the drivers acting as separate businesses on their own account as independent contractors.[7] As a result, it has been held that Uber drivers undertake to perform personally their driving work or service (it is not in dispute that login details for their driver accounts cannot be shared) "for" Uber which cannot be a client or customer of any profession or business undertaking carried on by the drivers and that the drivers do not, by driving, carry out any such profession or business on their own account.

This finding was confirmed by the Tribunals' application of the control test, which, in other contexts, is also the basis for a finding of vicarious liability on the part of employers. The Employment Tribunal found, and the EAT and Court of Appeal upheld (with a slightly different emphasis), that Uber exercises control over its drivers by carrying out interviews and an induction process, by preventing drivers from having access to passenger details or providing their details to passengers, by resolving passenger complaints without recourse to the drivers, by having previously provided a guaranteed earnings scheme for new drivers, by indemnifying drivers against fraud, by meeting cleaning costs, by requiring that drivers accept most of the trip requests allocated to them and by operating a ratings system and taking an associated performance management approach to this.[8]

Whilst it is a trite proposition that each case will turn on its own facts, *Uber* appears to mark the start of a jurisprudential trend of finding that individuals who undertake work in the "gig economy" are "workers" rather than independent contractors. This has been the case in respect of cycle couriers specialising in the delivery of medical supplies,[9] cycle couriers more generally[10] and minicab drivers.[11]

In the world of employment rights these findings are significant for claimants. "Worker" status entitles them to such benefits as the right to be paid minimum wage, the right to holiday pay and protection from being subjected to a detriment (including dismissal) for blowing the whistle. Some ink has been spilled in relation to the possible cost consequences for employers of it being found that people they treated as

[4] *Autoclenz Ltd v Belcher* [2011] UKSC 41; [2011] I.C.R. 1157.
[5] *Bates van Winkelhof v Clyde & Co LLP* [2014] UKSC 32; [2014] 1 W.L.R. 2047.
[6] The right of substitution must be genuine and reasonably unfettered. See *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29 at [34] per Lord Wilson.
[7] *Aslam & Farrar v Uber* [2017] 11 WLUK 238; [2018] I.C.R. 453 EAT at [109]. See also the judgment of the majority of the Court of Appeal at [2018] EWCA Civ 2748 at [95].
[8] *Aslam & Farrar v Uber* [2017] 11 WLUK 238; [2018] ICR 453 EAT at [113] and [2018] EWCA Civ at [96].
[9] *Dewhurst v Citysprint UK Ltd* ET/220512/2016, 5 January 2017 Employment Judge Wade.
[10] *Gascoigne v Addison Lee Ltd* ET/2200436/2016, 2 August 2017 Employment Judge Wade.
[11] *Lange v Addison Lee Ltd* ET/2208029/2016 Employment Judge Pearl, upheld on appeal to the EAT UKEAT/0037/18/BA.

independent contractors are in fact the beneficiaries of such rights, and in relation to whether such costs are likely to be passed on to the consumer.

The question which has received comparatively less consideration is that concerning the impact on organisations' other liabilities which do not immediately (unless unmet) sound in pay-outs to workers. In particular, what do the early outcomes of the "gig economy" litigation mean for the employer's common law duty of care to these newly formally-anointed "workers"?

Employers' liability: Existence of the duty of care

Health and safety legislation neatly side-steps the complications which have attended the determination of who is entitled to which employment rights. The Health and Safety at Work Act 1974 for example, commences by stating that the provisions of Pt I shall have effect with a view to "securing the health, safety and welfare of *persons at work*" (emphasis added). Section 3 of the 1974 Act goes on to impose a duty upon both employers and self-employed persons to conduct their undertakings in such a way as to ensure, so far as is reasonably practicable, that persons not in their employment but who may be affected thereby are not exposed to risks to their health and safety. This clearly imposes a duty upon employers to protect the health and safety of those who are self-employed but nonetheless affected by the employer's business.

The position at common law is slightly less clear.

The liability of an employer to its employees in negligence is, of course, merely a species of the general law of negligence.[12] Hence, applying first principles, an employer only owes a common law duty of care to an employee where the generally applicable tests for recognising such a duty have been satisfied, namely: (i) foreseeability; (ii) proximity; and (iii) that it is fair, just and reasonable for a duty to be imposed: *Caparo Industries Plc v Dickman*.[13] More recently, it has been confirmed that this threefold test comprises little more than labels to attach to features of situations which the law recognises as giving rise to a duty of care.[14] That is, there is no single test which can be applied in all cases in order to determine whether a duty of care exists and instead, the law adopts an approach based, in the manner characteristic of the common law, on precedent, and on the development of the law incrementally and by analogy with established authorities.[15]

This latterly-reinforced view of the Supreme Court suggests the possibility, indeed, the likelihood of an expansion of employers' liability at common law in the context of personal injury, commensurate with the expansion of rights and protections for "gig economy" workers in the context of employment law. That is, if there was ever any serious doubt, it now appears inevitable that courts will recognise the that employers owe a duty of care to those who are not, strictly speaking, "employees" as such but who would fall within the definition of "worker" in the employment context.

This is not simply the result of the influence of analogous developments in employment law. On the contrary, the seeds of such inevitability were likely sown in existing personal injury jurisprudence.

It has been said that the common law duty of care owed by the employer is peculiar to the employer-employee relationship and that, in general, it is not owed to those who are not employees. However, on ordinary principles there has nevertheless always existed the normal duty to show reasonable care for that over which the defendant (provider of work) has control. In *Inglefield v Macey*,[16] the High Court held that although the plaintiff was an independent contractor, in circumstances where the defendant provider of work had supplied the necessary equipment, as a matter of principle, the defendant owed a

[12] *White v Chief Constable of South Yorkshire Police* [1999] 2 A.C. 455 at 505 per Lord Hoffmann.
[13] *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605 at 617–618 per Lord Bridge.
[14] *Michael v Chief Constable of South Wales Police* [2015] UKSC 2 at [106] per Lord Toulson.
[15] *Robinson v Chief Constable of West Yorkshire* [2018] UKSC 4 at [21] per Lord Reed.
[16] *Inglefield v Macey* [1967] 1 WLUK 239; (1967) 2 K.I.R. 146.

duty to take care regarding the equipment with which the plaintiff had been supplied. The High Court further accepted that the defendant owed a duty at least to warn the plaintiff if he was setting him to work at some place which was dangerous, of conditions of which the plaintiff might be unaware and of which the defendant was aware.[17]

Similarly, while, at the level of general principle, it has been held that he or she who engages an independent contractor ("the Lump") does not owe the duty to the contractor: *Jones v Minton Construction*,[18] there have been other cases where courts have overcome this by recognising an independent contractor as an employee specifically in order to impose a duty of care: *Lane v Shire Roofing Co (Oxford) Ltd*.[19] In the latter case, the Court of Appeal expressly observed that when it comes to the question of safety at work, there is a real public interest in recognising the employer/employee relationship when it exists, because of the responsibilities that the common law and statute place on the employer.[20]

In other situations, following discussion in the case-law, Parliament, through legislation, has specifically extended the duty of care to particular classes of individual. An example of this is the case of Crown servants to whom the duty is owed by the Crown pursuant to the Crown Proceedings Act 1947 s.2(1)(b).

Previous incremental developments in employers' liability are also apparent in the fact of a duty being owed to an employee by a parent company, on ordinary principles of negligence. Relevant circumstances which have been said to justify the existence of a duty of care are: (1) that the business of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge of some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employee's protection.[21] These have been characterised as being simply an illustration of the way in which the *Caparo* "principles" may be satisfied between a parent company and the employee of a subsidiary.

Indeed, it has long been recognised that it is the fact of the employer's control and the employee's reliance on the employer which justify courts imposing a duty to take care to protect the employee from harm.[22] If control and resultant reliance form the basis of the existence and substance of the duty of care, it must follow that where an individual has been determined to be a worker on the basis of the "control test" the employer owes him or her some form of common law duty of care. As in the case of the duty owed to employees, the extent of the duty and the standard of care must vary depending upon the extent of control, or in other words, the facts of each case.

Extent and substance of duty of care owed to "gig economy" workers

The duty of care to "employees" has traditionally been said to comprise three "heads": the provision of safe staff; safe equipment; and a safe system of work.[23] However, these heads do not amount to separate duties, instead forming one duty within the law of negligence. Hence an employer would not escape liability simply because it may be difficult to assign its conduct to one of the three heads.[24]

Some of these traditional heads may be of less relevance to employers and workers involved in the "gig economy" in which individuals frequently carry out their work independently, without reference to any "staff", provide their own equipment in the form of a motor vehicle or bicycle which they have purchased themselves and do not have a particular place of work, instead carrying out their work on public roads

[17] *Inglefield v Macey* [1967] 1 WLUK 239; (1967) 2 K.I.R. 146 at 155.
[18] *Jones v Minton Construction* [1973] 1 WLUK 257; (1973) 15 K.I.R. 309.
[19] *Lane v Shire Roofing Co (Oxford) Ltd* [1995] 2 WLUK 281; [1995] I.R.L.R. 493.
[20] *Lane v Shire Roofing Co (Oxford) Ltd* [1995] 2 WLUK 281; [1995] I.R.L.R. 493 at 421 per Henry LJ.
[21] *Chandler v Cape plc* [2012] EWCA Civ 525; [2012] 1 W.L.R. 3111 at [80].
[22] *Clerk & Lindsell on Torts*, 22nd edn, [13-04].
[23] *Wilsons and Clyde Coal Co Ltd v English* [1938] A.C. 57 at 78 and 86 per Lord Wright and Lord Maugham respectively.
[24] *Clerk & Lindsell on Torts*, 22nd edn, [13-13].

and associated paths. However, it bears repeating that each case will turn on its own facts. Uber London Limited publishes a list of makes and models of vehicles which it will permit drivers to use to carry out its transportation services. It prohibits the use of vehicles manufactured before 2006.[25] If an employer's such list only permitted the use of vehicles which it knew or ought reasonably to have known to be unsafe, the use of one of which resulted in injury to a driver, it is difficult to see how the employer would not be found to be in breach of its duty of care to said driver.

This would represent a development beyond the scope of the most relevant legislation, namely the Employer's Liability (Defective Equipment) Act 1969, s.1(1) of which renders employers liable for injury suffered by an employee in the course of his or her employment in consequence of a defect in equipment *provided by his or her employer* for the purposes of the employer's business. However, it would be in keeping with the principle of incremental development of the common law of employers' liability.

More obviously applicable to the "gig economy" is the duty to provide a safe system of work. This obligation requires the employer to give such general safety instructions as a reasonably careful employer who has considered the problem presented by the work would give to his or her workers: *General Cleaning Contractors Ltd v Christmas* at 189 per Lord Oaksey.[26] However, depending upon the circumstances of any given case, it may also involve arranging the physical layout of the job, determining the sequence in which the work is to be carried out, the provision in proper cases of warnings and notices, and the issue of special instructions.[27] It has been held that while the duty to provide a safe system of work is not absolute, a high standard is exacted.[28] In contrast, it has also been held that where the operation is simple and the decision how it shall be done has to be taken frequently, it is natural and reasonable that it should be left to the worker on the spot.[29] However, if the system or mode of operation is prolonged, for example (even if not complicated), it is a matter for the employer to take responsibility and decide what system shall be adopted.[30]

Whether the obligation to prescribe a system of work is breached is therefore a question of fact. How it is answered depends upon the nature of the operation and whether it is one which requires proper organisation and supervision in the interests of safety.[31] Where there is such an obligation, its substance is to take reasonable steps to provide a system which will be reasonably safe, having regard to the dangers necessarily inherent in the operation.[32] A safe system of work will often require that the employer has undertaken an adequate risk assessment.[33]

The employer does not discharge its duty to provide a safe system of work simply by providing such a system. It must also take reasonable steps to see that the system is properly implemented.[34] This requires instruction of the employee in the system and supervising him or her in implementing it.[35] In sum, the employer must take reasonable care to see that the system is followed and it will always be a question of degree and of fact whether this has been done in a given case.[36]

It should be noted that the mere foreseeability of a risk to an individual worker does not give rise to breach of the duty of care if the particular risk is one which could be met by employees taking obvious precautions. This was made clear in the case of *Jaguar Cars Ltd v Coates*[37] where it was held that steps

[25] *Aslam v Uber BV* ET/2202550/2015 at [44].
[26] *General Cleaning Contractors Ltd v Christmas* [1953] A.C. 180; [1953] 2 W.L.R. 6.
[27] *Speed v Thomas Swift & Co Ltd* [1943] K.B. 557 at 563 per Lord Greene.
[28] *Winter v Cardiff RDC* [1950] 1 All E.R. 819 at 822 per Lord Porter.
[29] *Winter v Cardiff RDC* [1950] 1 All E.R. 819 at 823.
[30] *Winter v Cardiff RDC* [1950] 1 All E.R. 819 per Lord Oaksey.
[31] *Clerk & Lindsell on Torts*, 22nd edn, [13-21].
[32] *General Cleaning Contractors Ltd v Christmas* [1953] A.C. 180 at 195 per Lord Tucker.
[33] *Vaile v Havering LBC* [2011] EWCA Civ 246 at [30]; [2011] 3 WLUK 406.
[34] *Barcock v Brighton Corp* [1949] 1 K.B. 339 at 343; [1949] 1 All E.R. 251.
[35] *Clerk & Lindsell on Torts*, 22nd edn, [13-23].
[36] *Clerk & Lindsell on Torts*, 22nd edn, [13-23].
[37] *Jaguar Cars Ltd v Coates* [2004] EWCA Civ 337; [2004] 3 WLUK 132.

without a handrail did not pose a risk to those who used them with reasonable care.[38] In contrast, where the employer ought to realise that a work practice poses serious risk to employees, it bears the onus of showing that it was impractical to control or eliminate the risk. It does not discharge this onus simply by asserting that the cost of doing so would have been too high or that workers would not have adhered to any training. An employer may rely on such matters but will only discharge the onus upon it where they are supported by sufficient relevant evidence.[39]

Such theoretical principles call to be tested by a practical example based in the "gig economy". In June 2017, an Australian Uber driver accelerated while his passenger was still in the process of stepping out of the driver's vehicle. This sent the passenger into the path of a bus by which he was hit and killed at the scene. The Uber driver was charged with negligent driving shortly thereafter. At the time of the accident, he had been working for Uber for 21 hours without a substantial break.[40]

On 27 October 2017, Uber's New South Wales operation introduced a system whereby drivers would be logged off from the Uber platform (thereby rendering them unable to accept any further driving jobs) automatically for a six-hour break after they had been logged on for 12 hours. Prior to 27 October 2017, Uber had developed guidelines advising drivers against continuing to work if they felt tired. There is no evidence that drivers were actively trained in these guidelines.

In hypothetical litigation over such a situation based in employer's liability in the courts of England and Wales, Uber might argue that the risks associated with driving while fatigued are so well-known and driving itself such a common task as to fall within Lord Oaksey's description of an operation that is "simple and the decision how it shall be done has to be taken frequently …" such that there was no obligation upon it to prevent drivers from undertaking any further driving after a certain number of hours' work. In addition, it may contend that the number of hours worked by a driver is a matter over which it expressly does not exercise control (which partly explains why Uber drivers had never contended that they were "employees" within the meaning of that expression as set out in the 1996 Act and pursuant to the common law tests cited above). That is, drivers are under no obligation ever to switch on the Uber app in order to be allocated driving jobs.

Such arguments would, however, ignore the principle that employers must allow for the fact that employees may be inadvertent or become heedless of risks, particularly where they are encountered on a regular basis.[41] In addition, they would also ignore the reality that drivers sign up to the Uber platform in the co-extensive interests of Uber in having drivers to provide the transportation services it offers to passengers and of drivers themselves in earning a living. Once drivers log on to the Uber app, as was found in *Aslam & Farrar v Uber BV*, they are obliged to accept most of the jobs allocated to them.[42]

The arguments would also ignore the reality that most Uber drivers rely upon driving work as their only, or principal, source of income. These realities underscore the words of Lord Oaksey in *General Cleaning Contractors Ltd v Christmas* which, although uttered in 1953, are no less relevant today in the context of a "gig economy" facilitated by technology which was unheard of to Lord Oaksey:

> "Workmen are not in the position of employers. Their duties are not performed in the calm atmosphere of a board room with the advice of experts. They have to make their decisions on narrow window sills and other places of danger and in circumstances in which the dangers are obscured by repetition."[43]

[38] The Court of Appeal also found that the trial judge had erred in equating his finding of foreseeability of risk with a finding that there was a duty to provide a handrail. The Court of Appeal held that one does not follow from the other, *Jaguar Cars Ltd v Coates* [2004] EWCA Civ 337 at [11].

[39] See *Clerk & Lindsell on Torts*, 22nd edn, [13-30].

[40] "Uber driver charged with negligent driving after passenger's death '21 hours into his shift'" *ABC news*, 5 December 2017 at *http://www.abc.net.au/news/2017-12-05/uber-driver-charged-with-negligent-driving-over-passenger-death/9226462* [accessed 22 January 2019].

[41] *Clifford v Charles H Challen & Son Ltd* [1951] 1 K.B. 495 at 498 per Lord Denning.

[42] *Aslam & Farrar v Uber BV* [2016] 10 WLUK 681; [2017] I.R.L.R. 4 at [51].

[43] *General Cleaning Contractors Ltd v Christmas* [1953] A.C. 180 at 190; [1953] 2 W.L.R. 6.

Conclusion

The foregoing demonstrates that the seeds of the extension of the concept of an employment relationship were planted within the common law of negligence concerning personal injury as early as the first half of the 20th century. Where courts have perceived an apparently unjust allocation of the consequences of inherently risky work to the person carrying it out, they have found an employment relationship which permits the re-allocation of that risk to the, typically better-resourced (and insured), provider of the work. Courts have generally done this however, on a piecemeal basis, as and when a particular injustice is perceived to arise on the specific facts of a given case. The recent "gig economy" litigation in the field of employment rights, appears to have, relatively suddenly, extended the duty of care to a substantial class of workers. The latter's classification as "workers" within employment legislation is the result of the exercise by the employer of significant control over the manner in which their work is carried out, the very same control which courts have historically accepted as the basis for the imposition of a duty of care for the welfare of workers.

Pleading Reliance on Breaches of Statutory Duty Post-ERRA: A Short Review of Principles and Practice in the Light of Recent Case Law

Patrick Curran

Breach of statutory duty; Employers' liability; Personal injury

PROCEDURE

The case of Cockerill

Authoritative guidance on the significance of breaches of statutory duty post-ERRA is to be found in the case of *Cockerill v CXK Ltd and Artwise Community Partnership*.[1] The claimant was injured in an accident at work at about 9.30am on the morning of 1 October 2013, some nine-and-a-half hours after the Enterprise and Regulatory Reform Act 2013 came into force.

Whilst the judgment represents the first judicial expression of the principles involved, it is submitted that the roots of those principles are deeply embedded in 19th and 20th century case law on the inter-relation of breaches of statutory duty to common law negligence in respect of the duty of care an employer has towards employees. The judicial approach offers some implicit guidance[2] on the permissibility of pleading breaches of statutory duty as matters of fact upon which a claimant may rely.

The facts

In the course of her employment as a careers adviser by CXK (a charity), the claimant was visiting unfamiliar premises (formerly an old school building) occupied by an organisation called Artwise. She let herself in by opening the exterior door at the entrance and, having observed a warning sign on the door, carefully and successfully negotiated a seven-inch step down into a small lobby. From there, the only way into the rest of the premises was through an interior door, which was propped open, into a kitchen. A second seven-inch step down was beyond this door. That step had hazard warning tape applied to it. There was a clear sign on the lobby side of the door warning of the step beyond, although this was not visible when the door was propped open. The claimant went through the doorway but failed to see the step, and fell into the kitchen, badly injuring her ankle. The claimant brought proceedings against CXK as her employers and against Artwise as occupiers.

The claim against Artwise, as occupier, failed upon the basis that the judge held that there was no duty to keep the door closed. When the door was open, the claimant could not see the sign, but she could see the step itself. A risk assessment had been performed by an experienced engineer associated with Artwise, which was sufficient in the view of the judge, who held that the hazard tape was a reasonable response to the risk presented by the step and the consequent risk of falls.

As to the claim against the employers, the judge accepted that in considering the nature of the modern employer's duty at common law it was still permissible to have regard to their statutory duties, to understand in more detail the steps reasonable and conscientious employers could be expected to take to provide a reasonably safe workplace and system of work. Whilst they had performed no risk assessment of their

[1] *Cockerill v CXK Ltd* [2018] EWHC 1155 (QB); [2018] 5 WLUK 355.

[2] No express reference to pleadings is made in the judgment, and, in any event, the claimant failed to establish liability against both her employer and the occupier of the premises in which the accident happened.

own, they were aware of that done by the occupiers, and were entitled to regard it as sufficient. Had they performed their own risk assessment it was difficult to see how it would have differed.

The judge emphasised that:

> "[c]are is needed with this analysis. In removing the claimant's cause of action for breach of statutory duty, the 2013 Act did not repeal the duties themselves. Those duties continue to bind employers in law. So they continue to be relevant to the question of what an employer ought reasonably to do. However by enacting s.69 [of ERRA], Parliament evidently intended to make a perceptible change in the legal relationship between employers and employees in this respect. It removed direct actionability by claimants from the enforcement mechanisms to which employers are subject in carrying out those statutory duties. What I have referred to as this 'rebalancing' intended by s.69 was evidently directed to ensuring that any breach of those duties would be actionable by claimants if, but only if, it also amounted to a breach of a duty of care owed to a particular claimant in any given circumstances; or in other words, if the breach was itself negligent. It is no longer enough to demonstrate a breach of the regulations. Not all breaches of the statutory regime will be negligent."[3]

Dealing with the liability of CKX as employers, the judge made reference to a number of well-known authorities on employer's liability at common law, and continued as follows:

> "77 [Counsel for the Claimant] also relied on *Kennedy*,[4] and on *Allison v London Underground Ltd*,[5] to draw attention to the important part that RAs [risk assessments] play in the content and discharge of an employer's duty of care. In that connection he drew particular attention to regulation 3(1) of the Management of Health and Safety at Work Regulations 1999, …, and to which he suggested, in my view correctly, regard should be had in considering whether an employer has properly discharged its duty of care. As a result of s.69 of the 2013 Act, regulation 3 no longer creates an *actionable* duty on employers to carry out a RA.[6] On the other hand, taking reasonable steps to be satisfied that workplace risks have been properly assessed and controlled is an obvious measure for an employer to take in discharge of its duty of care. The effect of the 2013 Act must in practice mean that, so far as an employer's duty to an employee is concerned, its regulatory duty to undertake a RA must be borne in mind, and what it was reasonable for an employer to do or not do in this respect must be considered in context and in the circumstances of individual cases."

The judge then expressly adopted[7] the guidance provided by the Supreme Court in the Scottish case of *Kennedy*:[8]

> "… a reasonably prudent employer will conduct a risk assessment in connection with its operations so that it can take suitable precautions to avoid injury to its employees … The requirement to carry out such an assessment, whether statutory or not, forms the context in which the employer has to take precautions in the exercise of reasonable care for the safety of its employees. That is because the whole point of a risk assessment is to identify whether the particular operation gives rise to any risk to safety and, if so, what is the extent of that risk, and what can and should be done to minimise or eradicate the risk."[9]

In particular:

[3] *Cockerill v CXK Ltd* [2018] EWHC 1155 (QB) at [18].
[4] *Kennedy v Cordia (Services) LLP* [2016] UKSC 6; [2016] 1 W.L.R. 597, a case concerned with pre-ERRA events.
[5] *Allison v London Underground Ltd* [2008] EWCA Civ 71; [2008] I.C.R. 719.
[6] Original emphasis.
[7] *Kennedy v Cordia (Services) LLP* [2016] UKSC 6; [2016] 1 W.L.R. 597 at [78].
[8] *Kennedy v Cordia (Services) LLP* [2016] UKSC 6; [2016] 1 W.L.R. 597.
[9] *Cockerill v CXK Ltd* [2018] EWHC 1155 (QB) at [110].

> "It follows that the employer's duty is no longer confined to taking such precautions as are commonly taken or … such other precautions as are so obviously wanted that it would be folly in anyone to neglect to provide them. *A negligent omission can result from a failure to seek out knowledge of risks which are not themselves obvious*."[10]

The case of *Kennedy v Cordia (Services) LLP*[11]

The case of *Kennedy* was based upon an incident that pre-dated the coming into force of the 2013 Act, although the existence of the Act was acknowledged. The case is however of particular significance as a decision of the Supreme Court and of equal authority in both Scotland and England.

The facts

K was employed by C as a home carer in Glasgow. On her way to visit a client she slipped and fell on a snowy and icy footpath injuring her wrist. K brought a claim against her employer alleging negligence and breach of the Personal Protective Equipment ("PPE") Regulations and the Management Regulations. C denied liability on the basis that it had made adequate risk assessments and had given appropriate instructions to its employees.

K succeeded at first instance, but that decision was reversed on appeal. The Supreme Court allowed K's appeal, giving the following significant reasons relevant to the present subject:

> (1) Risk assessments should be a "blueprint for action". Although a failure to carry out a sufficient and suitable risk assessment was unlikely to be the direct cause of an injury, the way to approach the question as to the adequacy of precautions taken by an employer was through a consideration of the suitability and sufficiency of the risk assessment; see the case of *Allison v London Underground Ltd*.[12]
>
> (2) K had been exposed to a risk to her health and safety at work, namely the risk of slipping and falling on snow and ice while travelling between clients' houses. The risk of slipping could not be avoided, and therefore it had to be evaluated and addressed in accordance with PPE principles. C had identified the risk, but its risk assessment gave no consideration to the possibility of individual protective measures, instead relying on the measure of last resort, namely giving appropriate instructions to employees, and those instructions were inadequate.
>
> (3) Because there had been no consideration of the possibility of individual protective measures to reduce the risk, such as anti-slip attachments, it followed that there had been a breach of the PPE Regulations reg.4(1).
>
> (4) The context within which employer's liability was to be considered had changed considerably since the early 20th century, in that it was now generally recognised that a reasonably prudent employer will conduct a risk assessment so that it can take suitable precautions to avoid injury to its employees. The expansion of the statutory duties imposed on employers in the field of health and safety had given rise to a body of knowledge and experience in this field, which created the context in which the court has to assess an employer's performance of its common law duty of care. A negligent omission can result from a failure "to seek out knowledge of risks which are not in themselves obvious".
>
> (5) Where an employee has been injured as a result of being exposed to a risk against which she should have been protected by the provision of personal protective equipment, and it is established that she would have used personal protective equipment if it had been provided, it will normally be

[10] *Cockerill v CXK Ltd* [2018] EWHC 1155 (QB) at [111], emphasis added.
[11] *Kennedy v Cordia (Services) LLP* [2016] UKSC 6; [2016] P.I.Q.R. P9.
[12] *Allison v London Underground Ltd* [2008] EWCA Civ 71; [2008] P.I.Q.R. P10.

reasonable to infer that the failure to provide the personal protective equipment made a material contribution to the causation of the injury.

The 19th century and early 20th century cases involving statutory duty and negligence

The classic formula as to an employer's "duty to provide a safe place and safe system of work, safe plant and equipment" derives in part from Lord Herschell's opinion in *Smith v Charles Baker & Sons*:[13]

> "It is quite clear that the contract between employer and [employee] involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk. Whatever the dangers of the employment which the employed undertakes, amongst them is certainly not to be numbered the risk of the employer's negligence, and the creation or enhancement of danger thereby engendered."

There is a wealth of authority for the proposition that an employer's duty at common law includes concepts such as "faults of omission";[14] and "neglect of a proper precaution".[15] In *Wilsons and Clyde Coal Co Ltd v English*,[16] Lord Thankerton said at [84]–[86]:

> "The true question is, [w]hat is the extent of the duty attaching to the employer? Such a duty is the employer's personal duty, whether he performs or can perform it himself, or whether he does not perform it or cannot perform it save by servants or agents. A failure to perform such a duty is the employer's personal negligence. This was held to be the case where the duty was statutory, and it is equally so when the duty is one attaching at common law. A statutory duty differs from a common law duty in certain respects, but in this respect it stands on the same footing."

In the Scottish case of *Lochgelly Iron and Coal Co v McMullan*[17] the pursuer in an action under the Common Law of Scotland claimed damages for the death of his son, a miner employed by the appellants. The pursuer averred that in breach of the Coal Mines Act 1911 s.49 (roof of every working place to be secure) the son was put to work in a place where the roof had not been made secure, and part of the roof fell and killed him. The House of Lords held, that these averments disclosed a case of "personal negligence of the employers" within the meaning of the Workmen's Compensation Act 1925 s.29(1), and that the action was competent. Lord Atkin said:[18]

> "Where the duty to take care is expressly imposed upon the employer and not discharged, then in my opinion the employer is guilty of negligence and of 'personal' negligence."

Hodson LJ in *Roberts v Dorman Long*[19] said:

[13] *Smith v Charles Baker & Sons* [1891] A.C. 325; [1891] 7 WLUK 92.

[14] See *Morton v William Dixon Ltd* [1909] S.C. 807; (1909) 1 S.L.T. 346, in which Lord President Dunedin said, in a case involving a claim by a miner against his employers alleging negligence in failing to take precautions against the fall of coal from the top of the shaft into the space between the side of the shaft and the edge of the cage: "Where the negligence of the employer consists of what I may call a fault of omission, I think it is absolutely necessary that the proof of that fault of omission should be one of two kinds, either to show that the thing which he did not do was a thing which was commonly done by other persons in like circumstances, or to show that it was a thing which was so obviously wanted that it would be folly in anyone to neglect to provide it."

[15] per Lord Normand, in *Paris v Stepney BC* [1951] A.C. 367; [1951] 1 All E.R. 42: "The kind of evidence necessary to establish neglect of a proper precaution was considered in *Morton v William Dixon Ltd* by Lord President Dunedin". However, Lord Dunedin's formulation was held to be out-of-date and unduly restrictive in *Kennedy v Cordia (Services) LLP* [2016] UKSC 6 at [111].

[16] *Wilsons and Clyde Coal Co Ltd v English* [1938] A.C. 57; [1937] 3 All E.R. 628.

[17] *Lochgelly Iron and Coal Co v McMullan* [1934] A.C. 1; 1933 S.C. (H.L.) 64.

[18] *Lochgelly Iron and Coal Co v McMullan* [1934] A.C. 1 at 9.

[19] *Roberts v Dorman Long & Co Ltd* [1953] 1 W.L.R. 942 CA; [1953] 2 All E.R. 428.

> "In considering these questions from the common law aspect one cannot, I think, consider them in dissociation from the Building Regulations, of which regulation 97, the one here relied on, deals specifically with safety belts. The provision of safety belts is said to be part of a safe system of work, but as Somervell LJ said in *England v National Coal Board:*[20]
>
> > 'The reasonable employer is entitled to assume, prima facie, that the dangers which would occur to a reasonable man have occurred to Parliament or the framers of the regulations.'[21]
>
> This is not to say that the regulations are exhaustive, but it seems to me that regulation 97 is there for the purpose of defining the employers' obligations in what may be described as the ordinary processes of the work. In exceptional circumstances or, as Somervell LJ said, where some special peril is going to be met with, the common law duty is not to be restricted by the regulations."

Modern developments

The modern development of the "ruling principle" behind an employer's duty was traced by the Supreme Court in *Kennedy* back to the speech of Lord Keith of Avonholm in *Cavanagh v Ulster Weaving Co Ltd*,[22] where he observed that the ruling principle was that an employer was bound to take reasonable care for the safety of his workmen, and all other rules or formulas must be taken subject to that principle. That point had already been made by Lord Normand in *Paris v Stepney BC*,[23] and by Lord Reid in *Morris v West Hartlepool Steam Navigation Co Ltd*.[24]

In *Kennedy*[25] the court agreed with the observations of Smith LJ in *Threlfall v Hull CC*,[26] that in recent times it has become generally recognised that a reasonably prudent employer will conduct a risk assessment in connection with its operations so that it can take suitable precautions to avoid injury to its employees. The requirement to carry out such an assessment, *whether statutory or not*, forms the context in which the employer has to take precautions in the exercise of reasonable care for the safety of its employees.

The whole point of a risk assessment, it was said, is to identify whether the particular operation gives rise to any risk to safety and, if so, what is the extent of that risk, and what can and should be done to minimise or eradicate the risk. The duty to carry out such an assessment was, therefore, as Lord Walker of Gestingthorpe said in *Fytche v Wincanton Logistics Plc*,[27] logically anterior to determining what precautions a reasonable employer would have taken in order to perform his common law duty of care. A negligent omission can result from a failure to seek out knowledge of risks that are not in themselves obvious. A "less outdated formulation of the employer's common law duty of care" could be found in *Baker v Quantum Clothing Group Ltd*.[28]

Convictions

Many breaches of statutory duty under health and safety regulations are criminal offences, by virtue of the provisions of the Health & Safety at Work Act 1974 s.33. By the Civil Evidence Act 1968 s.11 in any civil proceedings the fact that an employer has been convicted of an offence by or before any court in the UK is admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that the offence was committed, unless the contrary is proved; and for the purpose of

[20] *England v National Coal Board* [1953] 1 Q.B. 724 CA; [1953] 2 W.L.R. 1059.
[21] Not disapproved on appeal to the HL.
[22] *Cavanagh v Ulster Weaving Co Ltd* [1960] A.C. 145; [1959] 3 W.L.R. 262.
[23] *Paris v Stepney BC* [1951] A.C. 367; [1951] 1 All E.R. 42.
[24] *Morris v West Hartlepool Steam Navigation Co Ltd* [1956] A.C. 552 at 571; [1956] 1 W.L.R. 177.
[25] *Kennedy v Cordia (Services) LLP* [2016] UKSC 6 at [110].
[26] *Threlfall v Hull City Council* [2010] EWCA Civ 1147; [2011] I.C.R. 209.
[27] *Fytche v Wincanton Logistics Plc* [2004] UKHL 31; [2004] I.C.R. 975 at [49].
[28] *Baker v Quantum Clothing Group Ltd* [2011] UKSC 17; [2011] 1 W.L.R. 1003 at [9].

identifying the facts on which the conviction was based, the contents of any document which is admissible as evidence of the conviction, and the content of the charge-sheet etc on which the person in question was convicted, is admissible in evidence for that purpose.

Thus a further point arises in circumstances in which there has been a prosecution and a conviction: the conviction may be pleaded and tendered in evidence as proof of the facts of the breach in question, which in turn may be submitted to be proof of breach of the employer's common law duty of care.

Conclusions

- A breach of an employer's statutory duty is as much a matter of fact as it may be a matter of law: whether it be by an act or by an omission.
- Under CPR Pt 16.4.1(a) a claimant must give a concise statement of the facts upon which he or she relies to establish liability against a defendant. If, therefore, the evidence discloses acts or omissions in breach of statutory duty by an employer towards an employee, it is not merely appropriate but necessary to plead such breaches of statutory duty.
- In considering the nature of modern employer's liability at common law it remains permissible to have regard to the employer's statutory duties, to understand *in detail* the steps reasonable and conscientious employers may be expected to take to provide a reasonably safe workplace and system of work.
- The cases of *Cockerill* and *Kennedy* make it unmistakably clear that the circumstances of an accident at work are of the greatest significance: "context is inescapable." The employer's duty at common law is to take reasonable care to establish a safe system of work, to make a suitable and sufficient risk assessment, and to consider whether any employee is in a position of special vulnerability.
- On the specific point of risk assessments since ERRA s.69 took effect, while there is no longer direct liability for breach of statutory duty under health and safety regulations requiring employers to carry out a risk assessment, such a breach of duty remains a relevant consideration, since the taking of reasonable steps to be satisfied that workplace risks have been properly assessed and controlled is an obvious measure for an employer to take in discharge of its duty of care at common law.
- Any relevant conviction may also be pleaded.

Appendix

The following general form of pleading breaches of statutory duty is suggested for the consideration of those settling pleadings on behalf of claimants, taking the facts of an accident in which a nurse suffers injury when falling over having tripped upon power leads attached to an ECG machine.

IN THE [*name of court*]

Case number …

BETWEEN:

ARAMINTA NIGHTINGALE

Claimant

and

OXBRIDGE NATIONAL HEALTH SERVICE TRUST

Defendants

PARTICULARS OF CLAIM

1. At all relevant times the claimant was employed by the defendants as a Grade C Enrolled Nurse at the Lord Cardigan & Light Brigade New Ward ("the ward") at their Crimea War Memorial Hospital, Balaclava Street, Oxbridge.
2. The ward is and was at all relevant times a detached building for the care of elderly patients, constructed in the year 1995, and first used in January 1996. In the premises, the claimant's place of work was a "new workplace" within the meaning of the Workplace (Health, Safety and Welfare) Regulations 1992 reg.2,[29] which applied to the ward.
3. On 1 January 2019, the claimant was on duty in the ward and went to attend a bed-ridden patient, Mr Charles Lutwidge Dodson, when she tripped upon trailing leads from an ECG machine behind a screen at the adjacent bed, lost her balance, and fell to the floor, suffering injury, loss and damage.
4. The claimant's accident was caused or contributed to by the defendants' breach or breaches of their common law duty of care to her, or those of their employees or their agents acting in the course of their employment.
5. The claimant will rely upon evidence of the defendants' failure to comply with their statutory duties, as set out below, on the ground that the performance of such duties is:
   (1) an obvious and necessary precautionary measure for reasonable employers to take in discharge of their duty of care at common law to an employee such as the claimant (in particular by active enquiry into, and assessment of, all risks to which the claimant was exposed in the course of her employment);
   (2) necessary for compliance with the express requirements of legislation specifically directed to the health and safety of its employees; and thus
   (3) the all-important context in which the court has to assess the defendants' performance of their common law duty of care.[30]
6. Further or alternatively, in respect of the defendants' duty of care at common law to provide the claimant with a safe system and safe place of work, safe plant and equipment, (including the taking of reasonable steps in the performance of such duties to enquire into and to be satisfied that workplace and equipment risks have been properly assessed) the claimant will refer to the particulars of disregard of statutory duty below. While not in themselves founding liability directly, by reason of the provisions of the Enterprise and Regulatory Reform Act 2013 s.69, nevertheless, as matters of fact, such breaches of statutory duty constitute breaches of duty at common law, or alternatively are evidence of such breaches, in that the defendants as responsible employers should not have failed to comply with relevant statutory provisions imposing obligations upon them for their employees' health and safety. By reason of such breaches they exposed the claimant to an unnecessary risk of injury.

PARTICULARS OF NEGLIGENCE

(a) Negligently, in disregard of reg.12(3) of the Regulations, failing to keep the floor of ward 11 free from obstructions, or from articles (the trailing leads) which might cause a person to slip, trip, or fall, and causing or permitting the leads to be or to become or to remain a danger and a trap for the claimant.
(b) Negligently, in disregard of reg.10 of the Regulations, failing to provide sufficient floor area and unoccupied space for the purposes of health, safety and welfare of the claimant where she worked.

[29] Workplace (Health, Safety and Welfare) Regulations 1992 (SI 1992/3004).
[30] See *Kennedy v Cordia (Services) LLP* [2016] UKSC 6 at [64].

(c) Negligently, in disregard of reg.12 of the Regulations if, which is not admitted, the same was required for further use, failing to ensure that the ECG machine was placed in such a position that the leads did not obstruct the claimant's means of access to the patient (Mr Dodson) in the adjacent bed.

(d) Negligently, in breach of reg.5(1) of the Regulations, failing to maintain the workplace in an efficient state and efficient working order.

(e) Placing the ECG machine on the wrong side of the bed in which the patient was being monitored.

(f) Failing to heed complaints of careless conduct by ECG operators made orally by the claimant on occasions before her accident to staff nurses on duty at the ward at various times which she cannot now better particularise, but which should have been recorded by the staff nurses spoken to by the claimant.

7. In the premises, whether by failing to comply with the provisions of the Regulations or otherwise, the defendants negligently (i) failed to provide the claimant with a safe place or safe system of work: (ii) failed to provide the claimant with safe plant and equipment; (iii) failed to warn her of risks of which they should have been aware; and (iv) exposed her to an unnecessary risk of injury.

PARTICULARS OF INJURY

(The claimant's date of birth is the 1 January 1998.)

[set out particulars]

PARTICULARS OF SPECIAL DAMAGE

[set out particulars]

[Conclude as usual]

The Functioning of the Personal Injuries Assessment Board in Ireland

Eoin Quill*

Ireland; Personal Injuries Assessment Board in Ireland; Personal injury claims

PROCEDURE

Introduction

The Personal Injuries Assessment Board ("PIAB") was established for the purposes of reducing the cost and time of delivery of tort compensation for personal injuries in Ireland, in the hope that this—in conjunction with other tort reform measures—would bring down the cost of insurance.[1] The Board commenced operation in July 2004 and has had a considerable degree of success in reducing the cost of delivery of compensation and this initially led to reduced insurance costs, though this reduction has waned over time. It operates as a non-adversarial administrative process to facilitate low cost early resolution of cases in which liability is not contested. The process is partly mandatory, in that any claims within the Board's remit cannot proceed to litigation without authorisation from PIAB; however, the assessment process can only take place with the parties' consent; furthermore, once the assessment is issued parties are free to accept or reject it.

Background

The cost of the tort system and its impact on insurance rates paid by businesses and motorists in particular have been prominent on the Irish political agenda since the 1980s.[2] An early reform effort was the Courts Act 1988, abolishing the use of juries for nearly all personal injury cases in the High Court ("IEHC") in the hope that judicial assessment of damages would reduce the quantum, thereby reducing insurance costs.[3] This proved ineffective, as judges used their prior experience (from practice and from the bench) of jury awards to set damages levels. The result was that awards made by judges were broadly in line with jury awards and the established upward trajectory continued.[4] The jurisdiction of the lower courts was subsequently increased and the number of IEHC and lower court judges was increased and that process has continued after the introduction of the PIAB; these measures were not solely designed to reduce the cost of the tort system, but were aimed at easing the pressure on IEHC lists for all types of litigation. This did affect the tort process, in that many cases could now be heard by lower, local courts. This permitted those cases to get to trial quicker and at a lower cost and it also took some of the pressure off of IEHC

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[1] The principal legislation is the Personal Injuries Assessment Board Act 2003; the Board was established on the 13 April 2004; jurisdiction for workplace injuries claims commenced on 1 June 2004; other claims covered by the Act came under the Board's jurisdiction on 22 July 2004. The Board's website is at *www.piab.ie/*. Irish legislation can be accessed on the website of the Attorney General's Office, *www.irishstatutebook.ie/* and on the British and Irish Legal Information Institute website ("BAILII"), *www.bailii.org*.

[2] See, e.g. the Motor Insurance Advisory Board (Establishment) Order 1984 (SI 299/1984); Despite the name, the Board engaged in a wide-ranging review of all liability insurance in Ireland (not just motor) and the legal landscape only formed part of its review; its 2002 report sets out in great detail the state of insurance costs and the litigation environment immediately prior to the introduction of the PIAB—*Motor Insurance Advisory Board Report* (Dublin: Stationery Office, 2002).

[3] Juries in the Circuit Court (equivalent of the County Court) had been abolished by the Courts Act 1971; the District Court is a court of summary jurisdiction only and has never had juries.

[4] Deloitte & Touche, *Report on The Economic Evaluation of Insurance Costs in Ireland* (Department of Enterprise and Employment, 1996) identified a significant rise in the value of awards over the period from 1985–1994. For further clarification on the objectives and failings of the 1988 Act, see D. Dowling, "Personal Injuries Assessment Board: A Decade of Delivery?" in E. Quill and R. Friel, *Damages and Compensation Culture* (Oxford: Hart, 2016), 156.

waiting lists, thus speeding up the time taken for more serious cases to get to trial. A counter effect was that lower court judges could now award higher amounts of damages in cases of minor injuries. In practice, little real benefit by way of reduced insurance costs flowed from the changes.

The cost of delivery of tort compensation and the time taken to resolve cases became key points of focus after the abolition of juries.[5] In 1990, the Fair Trade Commission Report[6] found that litigation costs on average were 24.6% of total outlay, i.e. damages plus associated costs, (though up to 40% for small claims); this translates to costs amounting to 32.6% of compensation paid. In 1996, a government commissioned report by Deloitte & Touche on insurance costs found that legal costs were rising in conjunction with rising damages levels, with legal fees varying from 8% to 50% of total outlay; the relationship of costs to compensation had risen to 35.5%. The fees were proportionately highest in cases where the damages were at the lower end of the scale (under IR£20,000) and decreased proportionately as damages increased. Later, the Motor Insurance Advisory Board found the average cost of litigation expenses had risen to almost 30% of total outlay by 2000, so that costs then represented 42% of compensation paid, rising further in subsequent years; the figure for 2003 (the last before the introduction of the PIAB) was 31% of total outlay or 46% of compensation paid.[7]

The time taken to resolve claims was briefly noted as problematic in the 1996 Report, though little specific detail was provided. Research subsequently conducted for the Special Working Group tasked with implementation of aspects of the 1996 Report noted that by 1999 cases took six times longer to finalise in Ireland than England, with Irish claims averaging 946.86 days from claim to settlement.[8] The much greater involvement of counsel in Irish claims compared to England was identified as a significant factor in the higher cost and slower progress of claims in Ireland.

The 1996 Report recommended the establishment of an assessment board for claims where liability was not disputed, the quantum at issue was small and parties consented to its jurisdiction. This echoed a recommendation of the Fair Trade Commission Report. The 1996 Report also suggested the establishment of a clear set of guidelines on general damages to improve the consistency of awards. The Special Working Group recommended such a board be used for both motor accident claims and occupational injuries claims, but removed the notion of confining the process to small claims, expanding it to all claims in the two areas; the model was adapted from the Swedish Road Traffic Injuries Board. The SWG recommendation was echoed by the MIAB Report in 2002. In the event, the ensuing legislation went somewhat further and included virtually all personal injury claims within the process, with medical negligence claims as the principal exception.

The PIAB process

The role of the PIAB is to assess compensation or pass claims on to the courts in most types of personal injury cases. Claims not covered by the process are medical malpractice claims, claims by police officers for injuries incurred in the course of their duties, (which are covered by a special statutory scheme), claims for breach of constitutional rights or European Convention rights, or claims in respect of air and sea carriage covered by EU law or international conventions. In practice, medical malpractice claims are the

[5] Other concerns, such as the pleadings process, limitation of actions and fraud were addressed separately in the Civil Liability and Courts Act 2004 Act and solicitors were precluded from advertising for personal injury business.

[6] *Report of Study into Restrictive Practices in the Legal Profession* (Dublin: Stationery Office 1990). The FTC was a precursor to the Competition Authority, now merged with consumer protection in the Competition and Consumer Protection Commission.

[7] *Motor Insurance Advisory Board Report* (Dublin: Stationery Office, 2002); *Motor Insurance Advisory Board Report 2004* (Dublin: Stationery Office, 2004).

[8] *Second Report of the Special Working Group on a Personal Injuries Tribunal 2001* (Department of Enterprise and Employment), Appendix 3–B Greenford, The Handling of Personal Injury Claims by Insurers in England and Ireland. The average time between making a claim and settlement was 3.6 time longer, but Irish claims were generally filed much later than English ones. See also *Motor Insurance Advisory Board Report* (Dublin: Stationery Office, 2002), Executive Summary, Point E71, D. Dowling, "Personal Injuries Assessment Board: A Decade of Delivery?" in E. Quill and R. Friel, *Damages and Compensation Culture* (Oxford: Hart, 2016), 150.

most significant exception, with almost 1,000 cases a year filed in the IEHC.[9] Claimants covered by the legislation are not entitled to initiate proceedings in court without the authorisation of the PIAB. Parties may settle without recourse to the process.

The application process and the forms for notifications and authorisations required are readily available on the PIAB website and a helpline is available to assist claimants in completing the forms. The application form, which is only four pages, requires the applicant to indicate the alleged facts causing injury, the identity of the person responsible, the details of the injury and itemise the special damages losses suffered to date and likely to be suffered into the future, including an estimate of the financial amount of each item. The form is divided into lost wages, medical expenses and other losses or expenses (with the boxes for others being the smallest of the three areas of loss on the form); it specifies that claimants will have an opportunity to update and provide further details in respect of any claim for special damages. This form must be accompanied by a medical assessment form and receipts and documentation in support of any losses claimed (including any correspondence with the respondent); the claimant pays a €45 application fee, which is normally returned via the assessment—it will only be kept if the claimant has wasted costs, e.g. by an unwarranted failure to show for a medical assessment.

The PIAB notifies the respondent, who has 90 days to decide whether to submit to the process. A failure to respond is treated the same as consent to the process. If the respondent refuses to submit to the process, the applicant will be issued with an authorisation to proceed to court. The PIAB does not engage with liability issues; however, a respondent that believes there is a liability issue can nonetheless submit to an assessment in order to get an idea of the full value of the claim and then make a decision on whether to pay up or reject the assessment. The respondent's fee is €600 and the system is primarily funded through these fees.

If a claim raises issues that the Board is unable to deal with then an authorisation permitting the applicant proceed to court will be issued immediately; such issues include significant psychological harm, complex injuries unlikely to resolve within the assessment timeframe, trespass cases involving issues of personal dignity or other circumstances specified in the legislation.

Assessment is by a documentary process only, with no oral hearing, and compensation levels are required to be set by following tort law principles of assessment. Currently there are 26 assessors listed on the PIAB website. Apart from the fees mentioned above, any additional costs incurred by the PIAB in conducting the assessment may be met by the respondent if they are deemed to be exceptional. Medical expenses related to an additional examination are expressly stated to be exceptional and the standard fee is €150; this fee is incurred in most claims and a panel of independent medical experts is maintained by the PIAB in order to facilitate any necessary examination. In some instances, an actuarial report may be required to determine the current value of future income loss or future medical care. Assessors also have the power to request relevant information from various sources, most notably from the Revenue and Social Welfare, who will hold important information on income.

The PIAB also has discretion to allow a claimant to recover reasonably incurred expenses. Legal fees are not generally regarded as recoverable, but the Board does allow them in a number of instances—primarily in cases involving minors or fatal accidents or in cases where professional assistance is needed in identifying the respondents. The PIAB website identifies criteria by which recoverability of fees is decided; the principal factors are whether the PIAB could provide the assistance required (e.g. through the helpline) and whether the claimant has difficulties in understanding any of the processes. Initially the PIAB refused to deal with solicitors appointed by claimants and insisted on dealing directly with claimants, despite the fact that the right to legal representation is specifically acknowledged in the legislation; the Irish Supreme Court ("IESC") held the policy of refusing to contact solicitors acting for applicants was an unlawful interference with the professional/client relationship; the IESC held that the

[9] See the Courts Service Annual Reports, available on the Courts Service's website at *www.courts.ie* [accessed 22 January 2019].

PIAB is entitled to copy the applicant with any correspondence sent to their solicitor.[10] The cost of medical and actuarial reports other than those arranged by the PIAB are not generally recoverable; the initial medical report accompanying the application is an exception—provided it is for a reasonable fee, it will be included in the assessment.

A Book of Quantum was published as a guide to general damages in 2004 to help parties understand the approximate value of claims—one could look up the value of an injury and add the vouched losses and expenses figures to the range of general damages specified. The Book was put together somewhat hastily and suffered from a number of drawbacks which have been documented in a number of commentaries—mainly Byrne & Binchy's Annual Reviews of Irish Law and my own commentaries in the Tort and Insurance Law Yearbooks on European Tort Law produced by the European Centre of Tort and Insurance Law ("ECTIL") and the Institute for European Tort Law of the Austrian Academy of Sciences and the University of Graz ("ESR/ETL"). A second edition of the Book of Quantum was published in 2016 and is a significant improvement of the first edition, though it still has some flaws.

The Board is required to complete the assessment within nine months of the respondent's consent to the process, with a possible extension of up to six months more in exceptional circumstances. Claims unlikely to be finalised within nine months are generally authorised to proceed to litigation as soon as this becomes apparent. Once an assessment is made the parties are notified in writing and have discretion to accept or reject it—the applicant has 28 days to reply in writing; the respondent has 21 days. If the applicant fails to respond, an authorisation to proceed to court is issued; if the respondent fails to reply, an order to pay is issued. If accepted by both sides, an assessment has the same legal effect as a court judgment. If either party rejects the assessment, then the applicant is issued with an authorisation to proceed to court. There are statutory provisions in place to deal with the complications arising in cases of multiple respondents to a claim.

Where a claimant is authorised to proceed to court, the statutory time limit for bringing a claim is extended; not only is the running of time suspended for the duration of the PIAB process, but a further six months after the issuing of the authorisation to proceed to court is disregarded in the calculation of the statutory limitation period. This was introduced to encourage engagement with the process.

Where a claimant has rejected the PIAB assessment and the defendant has accepted the assessment, the claimant is at risk of failing to recover costs if the amount awarded by the court, or accepted by the claimant in settlement negotiations, does not exceed the PIAB assessment. There are detailed statutory provisions specifying when costs are excluded for failure to exceed the assessment.

Some statistics

Statistical information on personal injuries in Ireland was in a somewhat haphazard state in the era prior to the introduction of the PIAB, but has improved over the years. Not only has the PIAB provided reliable data, but the Courts Service Annual reports have become more detailed. The MIAB had the best available information at the time when preparing its 2002 Report (having access to insurers' data not publicly available) and envisaged the PIAB having to deal with 27,000 cases per year; the total number of personal injury claims in the courts at that time was in the region of 30–35,000 per year.

In its first full year of operation in 2005, 20,000 claims were filed with the PIAB and 1,000 assessments issued. These figures represent some teething problems with the novel system getting underway and are not representative of its overall functioning. There had been a sudden rush of claims filed in court in mid-2004, with lawyers bringing proceedings for many claims earlier than they normally would to avoid having to engage with the PIAB process. This reduced the number of claims going to the PIAB in its early stages. The assessors were engaged in an entirely new process and may have taken time to adjust, accounting

[10] *O'Brien v PIAB* [2008] IESC 71; [2009] 3 I.R. 243.

for the low level of assessment in 2005. By 2007, the Board was receiving over 23,000 applications and issuing over 8,000 assessments and a similar pattern of operation continued until 2011 when applications rose to over 27,600 and assessments rose to almost 10,000. From then there was further growth to a peak in 2016 of about 34,000 applications and almost 13,000 assessments; in 2017 this fell back slightly to about 33,000 applications and just over 12,600 assessments. These figures show that between 35 and 40% of applications result in an assessment. The 2017 Annual Report provides a table showing that in the 12 years from 2006–2017 there were 120,057 assessments to the value of €2,751.31million. Of these the acceptance rate is running at approximately 60%.

The cost of delivery peaked at 8.8% of the value of accepted awards in 2010 and 2011 and has steadily declined down to 6.2% in 2017 (the average over the years is approximately 7.5%). Assessments have consistently been made in just over seven months from the finalisation of the application (and generally less than a year from the initial application). In most years, motor accidents have accounted for between 70% and 75% of claims, with claims against employers running at just a little under or over 10% and all others running at just below 20%.

The Courts Service Annual Reports show the number of personal injury cases climbing to a peak of approximately 22,500 in 2017, with approximately 60% of these filed in the lower courts (mostly in the Circuit Court). This is effectively the PIAB cases other than those where an assessment is accepted plus the cases not covered by the process. Approximately 1,500 cases per year result in a judicial award of damages (less than 10% of cases filed), so most cases are still settled by negotiation. The reports don't provide a figure for failed cases, but my personal experience of reading superior court decisions suggests the number is low—there are very few judgments rejecting claims outright and most of those are due to unreasonable delays in initiating the claim or in progressing the case through the courts.

The 2014 PIAB report suggested that costs for personal injury cases litigated through the courts had risen to 58% of the value of awards. The 2015 Annual Report by Insurance Ireland suggested the figure was over 60%.[11]

There was a steady downward trend for car insurance in the years 2004–2007 but there was a rise of almost 7% in 2008; by 2010 it was up by 14% on the 2007 figure. Very significant rises occurred from 2014–2016 and modest reductions occurred in 2017 and 2018.[12] The net effect is that motor insurance rates now are comparable to those before the introduction of PIAB. Research from a Government Working Group shows that employer' liability premiums remained stable between 2011 and 2016, while public liability insurance showed a steady moderate increase over the same period.[13]

Commentary on the process

Now to turn to a few brief observations about the process and its functioning. First, the Book of Quantum; the foreword to the second edition explains that it was compiled by independent consultants who:

> "examined representative samples from over 51,000 closed personal injuries claims from 2013 and 2014 based on actual figures from Court cases, insurance company settlements, State Claims Agency cases and Personal Injuries Assessment Board (PIAB) data."

[11] Available at *http://www.insuranceireland.eu/media/Annual-report-2015.pdf* [accessed 22 January 2019]. A government report puts the cost in motor claims at 57% in 2015 (with legal costs amounting to 44.2%), see Cost of Insurance Working Group, Report on the Cost of Motor Insurance (Department of Finance, 2017) at *https://www.finance.gov.ie/wp-content/uploads/2017/07/170110-Report-on-the-Cost-of-Motor-Insurance-2017.pdf* [accessed 22 January 2019].

[12] This is derived from the Consumer Price Indices available in the statistics archives of the Central Statistics Office's website at *https://www.cso.ie/en/statistics/prices/archive/* [accessed 22 January 2019]. See also the Cost of Insurance Working Group, Report on the Cost of Motor Insurance (Department of Finance, 2017).

[13] Cost of Insurance Working Group, Report on the Cost of Employer and Public Liability Insurance (Department of Finance, 2018) at *https://www.finance.gov.ie/wp-content/uploads/2018/01/180125-Report-on-the-Cost-of-Employer-and-Public-Liability-Insurance.pdf* [accessed 22 January 2019].

This raises questions as to whether the book is fully compliant with the Board's statutory duty which requires awards to be made on the same principles as tort law. First of all, settlements are notoriously affected by matters other than the applicable principles of law and so it is doubtful whether they constitute a reliable basis for fulfilling the statutory mandate of the Board; on the other hand, very few low value claims get as far as a judicial decision, so there may be little else to use (and much of the PIAB's work involves low value claims). The use of prior PIAB assessments runs the risk that shortcomings in the first Book of Quantum have a continuing influence. The narrow time frame risks overlooking binding precedents on quantum. It is unlikely that any complaint about these matters will be raised by participants; insurers will not be bothered by the use of settlement figures, as it is their own practice that is endorsed; claimants won't complain if the amount is above the figure a judge would give and if the amount is lower, they can reject the award and negotiate a higher sum or proceed to court.

The listed categories of injuries have been expanded and the accompanying descriptions are better than in the first edition (items added include eye injuries, concussion, clavicle injuries and food poisoning), so the second edition is more useful that the first. There are still some notable absences; neither reproductive organs nor breasts are listed, despite the fact that they may obviously be damaged in the types of accidents the PIAB deals with. One further issue is that the amounts in the book are not rounded off (and judges always award general damages in round figures), so it may wrongly appear to the public that there is a mathematical precision in the setting of amounts.[14]

Any shortcomings in the Book of Quantum may be remedied if parliament follows the recent recommendation of the Personal Injuries Commission (chaired by Mr Justice Nicholas Kearns) that a Judicial Council should set guidelines for general damages, taking over this function from the PIAB.[15]

There is also an element of a lack of transparency in respect of the calculation of claims; while the process is outlined in general terms on the PIAB website, there is no detailed breakdown of awards data into special and general damages and it is not clear how much is communicated to participants. As a result, there is a shortfall in public knowledge in respect of the makeup of awards and so it is difficult to comment on their effectiveness in delivering one of the central statutory purposes of the Board.

One final point is worth making in respect of damages levels— I have been unable to find any IEHC decisions on quantum disputes following the rejection of a PIAB assessment. This suggests that the 40% of cases where the assessment is rejected are settled by the parties. One can only speculate on how these settlements are reached; insurers are more likely than claimants to be satisfied with assessments and may only be able to press for a lower figure if they have a strong case for contributory negligence or can point to some other significant shortcoming in the case for liability. Given the high legal and other costs involved in litigating, one suspects that in most cases an offer somewhat above the assessment will satisfy both parties—the claimant gets a bit more and the insurer avoids significant costs.

Turning from damages to costs, a few further observations can be made. First, the medical and actuarial reports arranged by the Board provide single low-cost reports on the areas covered, not multiple reports by parties with a free market on fees charged, so it is considerably cheaper than traditional tort costs for the same matters. Secondly, the discretion given to the PIAB to determine what costs are reasonably incurred raises some questions. The general approach of disallowing legal costs has shifted costs onto claimants should they chose to engage legal assistance—which effectively reduces the compensation recovered, so a public saving is made at the expense of accident victims. This may well be fair in the simplest of cases, but it will not always be so. The PIAB web-site provides some sparse guidance on when legal costs will be allowed and gives an indication of relevant factors (mentioned earlier); little detail is provided on how these factors are weighted. This means that the Board is effectively self-regulating on

[14] This criticism was levelled at the first edition in R. Byrne and W. Binchy, *Annual Review of Irish Law 2003* (Dublin: Thomson Round Hall, 2004), 629 f.

[15] See *https://dbei.gov.ie/en/Publications/Second-and-Final-Report-Personal-Injuries-Commission.html#* [accessed 22 January 2019].

this matter, with no independent oversight bar judicial review which is very costly and time-consuming; only a handful of cases have actually been taken. Although the Board provides significant help to claimants to engage with the process, professional assistance may be justified in making claims and interpreting awards in some cases beyond those currently accepted by the Board. The addition of some form of low-cost independent oversight of costs decisions and/or low-cost assistance in interpreting awards could benefit the system. Establishing such mechanisms may face practical problems, such as resistance or lack of co-operation from the legal professions, but at least a conversation between the professions and the politicians could explore the possibilities. The history of this process, however, suggests a lack of political interest in such adjustments. Nothing of this sort can be found in the Government's Cost of Insurance Working Group reports. They have, however, sought to encourage greater engagement with the PIAB process in order to reduce costs; the recommended method of doing so is to penalise non-engagement with the process (non-engagement includes not providing necessary details in respect of special damages or failing to attend medical appointments) and this is provided for in a Bill currently under consideration in the Irish parliament.

Costs in cases where PIAB awards are accepted have shown a steady downward trajectory and the 6% mark should represent the levelling off point as it is unlikely that costs can realistically drop much more (though the Government is trying to generate a slight reduction by reducing the parties' charges where they submit documents electronically). Such cases currently represent about one fifth of all personal injury cases and the overall saving to the personal injury system is significant, but perhaps not as much as was originally hoped for. If the mechanisms I proposed in the previous paragraph were pursued, a modest increase in costs would ensue; even if such costs were to amount to half of the current costs (which would be a very high figure for what is proposed), the total cost would still be under 10%. This would not be an unreasonable cost increase to deliver greater substantive justice and it could encourage greater rates of engagement with the process and acceptance of assessments. If the government proposals are successful, then the overall cost of the personal injury system will reduce as more claims are settled without recourse to litigation, but unfairness to some claimants in respect of costs will persist.

In respect of litigated cases, the rise in costs as a proportion of the overall cost of the damages delivered is not surprising; with the more straightforward cases taken out, the litigated ones involve greater relative cost. It remains to be seen if the Legal Services Regulatory Authority established under a 2015 statute will have any effect on the level of legal costs in such cases.

Reduced insurance was a main driver for the introduction of the PIAB; in the early years this was achieved to a significant extent, as insurers passed on savings to customers, despite the lack of a formal process requiring this. Insurance rate reductions were never likely to continue indefinitely, as the new reduced level of systemic costs would become the norm and the industry would simply acclimatise to this new level of costs. The 2008–2010 and 2014–2016 rises in motor insurance rates show that external factors unrelated to tort costs can have a significant impact; one suspects the global recession was largely responsible for the first. The latter was probably heavily affected by the need to address problematic business practices within the insurance industry—it is noteworthy that two insurance companies folded in this period.

Conclusion

Overall personal injury claims levels in Ireland are not greatly different now from what they were prior to the introduction of the PIAB, though they were somewhat lower for about a decade. Approximately one fifth of the cases (perhaps the most straightforward ones) are resolved quickly and cheaply by the process. The process probably assists in the low-cost resolution of a significant number of other cases (especially those settled after an assessment is rejected). While the initial drop in insurance rates has been countered by external factors, these factors would have occurred anyway; insurance rates probably would

have risen by even more if the PIAB was not bringing cost savings. The process was a brave departure into the unknown, bringing significant systemic change in return for no more than a hope of big savings; critics feared a major loss of substantive justice for claimants. The reality is somewhere in between; the cost of delivery of personal injury compensation is reduced, but not by as much as was hoped for; impairment to substantive justice is nowhere near as bad as feared. Overall, the process is a useful improvement to the system; with some tweaks it could be made even better, but it will not provide a panacea to the social problems it was designed to address—total delivery costs for personal injury compensation are still high, as are insurance rates, as both are subject to a range of factors beyond those that the PIAB can affect.

An Application for an Interim Payment to Purchase a Suitable Property: LP (A Protected Party By Her Litigation Friend, MP) v Wye Valley NHS Trust[1]

Mark Cawley

Brain damage; Clinical negligence; Interim payments; Lump sum awards; Measure of damages; Personal injury claims; Protected parties; Special accommodation

Abstract

In this article Mark Cawley, solicitor for LP, examines the views expressed by HH Judge McKenna in the High Court when granting the claimant's application for an interim payment to fund a suitable property purchase. The claimant's counsel was Adam Weitzman QC, 7 Bedford Row, instructed by Irwin Mitchell LLP.

Facts

This claim for medical negligence arises as a result of the defendant's negligence in failing to prevent a series of strokes which have left the claimant with significant physical and cognitive deficits. The claimant also brought a claim for a delay in diagnosing her breast cancer.

In January 2018 the Oncology expert opined that the claimant's life expectancy was between 3–6 years. A split-trial on liability was due to be heard in October 2018. The claim was compromised beforehand by an admission of liability at 95% on the strokes.

The strokes caused an acute left hemisphere infarction. The claimant's ability to use language was severely affected. This cognitive decline meant that the claimant was much less able to perform the tasks of daily living. The strokes caused a new left sided cerebellar infarct and ischemia in both occipital lobes. The claimant developed slurred speech, impaired swallowing and increased left limb weakness. She suffered further problems with cognition and behaviour and a significant deterioration in her physical condition. She now suffers increased fatigue and has developed severe problems with her balance. She is now much more wheelchair dependent.

The combined effect of the strokes has been a very significant impairment of the claimant's physical and cognitive abilities. The claimant now suffers from an organic affective disorder and an organic anxiety disorder with symptoms of anxiety and depression. The strokes and the physical and cognitive symptoms combined with a pre-existing vulnerability have caused a permanent deterioration in the claimant's mental condition.

She is now dependent on care from others to complete the tasks of daily living; she requires assistance to eat, dress and wash and needs to be supervised by another. She is anxious, depressed and irritable which makes caring for her onerous and difficult. She has lost her ability to independently engage in activities. She now lacks capacity to litigate and to manage her own financial affairs and is a protected party and beneficiary.

[1] *LP v Wye Valley NHS Trust* [2018] EWHC 3039 (QB); [2018] 11 WLUK 428.

Summary of the application for an interim payment to purchase a suitable property for the claimant

The defendant had made a previous interim payment on account of damages in the sum of £100,000.00. This was insufficient in meeting the claimant's immediate needs until the case reached a trial on quantum.

The claimant would be entitled to her damages by way of interim payments so long as they did not fetter the trial judge's discretion to make a periodical payments order. However, even where this risk might occur, the court is entitled to make an order for an interim payment if the claimant has a real need for it.

The claimant currently lives with her husband who is the litigation friend. He was required to leave his employment to care for the claimant. They live in a three-bedroom, two-storey ex-council mid-terraced house. The property is not suitable to meet her needs. She requires single level accommodation with good access to the property, a wet room and sufficient space for her wheelchair. The claimant is sensitive to noise and requires somewhere quiet, where she can keep occupied and active.

The claimant's accommodation expert assessed the house and confirmed it was not suitable for her needs. The claimant's care expert also considered her home to be unsuitable for her needs. In particular, the property is on two levels and the only bathroom is on the first floor. The claimant is unable to use the stairs without assistance and as a result, accidents have occurred when she cannot get to the bathroom in time. She is unable to shower or use the bath without assistance. She cannot safely complete drink or meal preparation tasks. The accommodation expert did not consider that the home could be suitably adapted to meet her needs.

The estate is not in a good neighbourhood and the claimant and her husband have experienced hostility from the neighbours who are loud and abusive. This causes the claimant to be nervous and anxious, which in turn exacerbates her cognitive and behavioural problems.

The claimant's husband was desperate to move to a property which would meet her immediate needs and was actively looking for properties. However, without any immediate funds they found that properties in the area sold quickly and so they were not able to resume their search until the necessary funds were in place to enable them to purchase a property. The claimant has a limited life expectancy (3–6 years) and so there was a need to move her to suitable accommodation immediately.

To date the claimant has received, and continues to receive, all her care from her husband. She is fully dependent on him for all aspects of her daily routine. She requires assistance with toileting, bathing, medication and meal preparation. He also provides assistance with getting her dressed. He completes all domestic chores himself, including all the cleaning and washing. He regularly has to provide assistance during the night as she needs help getting in and out of bed and with toileting.

The claimant's difficulties are compounded by her fatigue, emotional and cognitive issues. She tires easily and becomes frustrated and angry. She requires constant supervision and emotional support to try and stimulate her. As a result her husband has been unable to return to employment. To date, a lack of therapy has been provided to enable her to have alternative carers to reduce the burden on her husband. This is a strain on him as he has to take her out of the home to try and improve her symptoms. She is unable to leave the home unsupervised. When outside the house, he pushes her in a wheelchair and drives her to all appointments.

The starting point for the claimant's application for an interim payment is identified in CPR 25.7(4): "… the court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment". The schedule of loss served in support of the application amounted to around £1,300,000, excluding general damages.

The claimant has both limited and uncertain life expectancy so that a PPO will be appropriate for at least care and case management. However, she is entitled to her past and future damages as a lump sum up until the date of trial or the date on which any such PPO is likely to commence. The model PPO direction

adopted by NHS Resolution, which they are unwilling to alter, provides for a PPO paid in advance commencing on 15 December of the relevant year. In the claimant's case, this would be 15 December 2019 at the earliest and damages, even if they post-date trial, will be capitalised to that date.

The appropriate JCG bracket is 3(A)(b) Moderately Severe Brain Injury: £192,000 to £247,280 although the claimant will fall at the lower end because of her impaired life expectancy. It was submitted that the claimant would contend for an award of £180,000 to £190,000 at a trial on quantum. A comparable case was put forward: *Parry v North East Wales NHS Trust Kemp B3-011*[2] where an award of £183,000 at today's values was made for a stroke victim with physical and cognitive deficits and a seven-year life expectancy. For the purpose of the application a figure of £150,000 was a conservative estimate of the claimant's award for PSLA.

For the purpose of the application the claimant's past care was calculated at £135,513 and assessed on the basis that the litigation friend would continue to provide care until 15 December 2019 at the earliest and that a 25% reduction should be applied to the provision of this gratuitous care. The care expert also recommended domestic support at £4,972 to assist the litigation friend and to replace the tasks the claimant would have previously performed.

Past expenses were also calculated including gardening and DIY (£3,413), travel (£784), the cost of relocating back from overseas to the UK (£17,000) and additional expenditure (£7,081); a total of £28,278. The claimant had reasonably moved overseas to mitigate her loss by seeking accommodation which met her needs. It was submitted that this could be equated to the costs of renting in the UK which would have been similar to that recommended by the accommodation expert.

The neuropsychiatry expert recommended a psychologically informed care package and the care expert recommended a care package which encompassed occupational therapy (£2,940), speech and language therapy (£2,500), a dietician (£600), psychological intervention (£2,500), and if the claimant would allow following other rehabilitation, support from paid carers including domestic support. Therefore a case manager was also required. Assuming "light touch" case management of ten hours pcm until December 2019 the cost was calculated at £14,300. The total cost of case management and therapies was calculated at £22,840.

As the claimant lacks capacity and the award will exceed £50,000 a financial deputy is required. The costs of appointment are £5,843 with a surety bond of £325. Annual management costs prior to the conclusion of the claim will be in the region of £16,109. Further costs will be incurred in purchasing a property and making adaptations of £12,720. Total Court of Protection costs to December 2019 were estimated at £34,997.

Applying a multiplier of 5.16 the total claim for aids and equipment recommended by the care expert was calculated at £30,967.

Summary of the claimant's accommodation claim

In *Cobham Hire Services Ltd v Eeles*,[3] the Court of Appeal set out a two-stage test for interim judges to consider when making a decision on applications for interim payments. The first test was to assess the likely amount of the final judgment, leaving out the heads of future loss which might be dealt with via periodical payments. It was also accepted that accommodation costs, adaptation costs and removal costs would be awarded as a lump sum so these could be included in the first stage.

The Court of Appeal indicated that a judge hearing this type of application should assess the likely final award on a conservative basis. It was also indicated that additional future losses could be included if the

[2] *Parry v North East Wales NHS Trust* [2002] 7 WLUK 207; [2003] 4 Q.R. 6.
[3] *Cobham Hire Services Ltd v Eeles* [2009] EWCA Civ 204; [2010] 1 W.L.R. 409.

Judge was satisfied that there was a necessary and urgent need for the funds requested (the second stage). In *Oxborrow v West Suffolk Hospitals NHS Trust*,[4] it was held:

> "… there will be cases … in which the judge at the interim payment stage will be able confidently to predict that the trial judge will capitalise elements of the future loss so as to produce a greater lump sum award. In such a case, a larger interim payment can be justified. Those will be cases in which the Claimant can clearly demonstrate a need for an immediate capital sum, probably to fund the purchase of accommodation."

The Court of Appeal in *Cobham v Eeles* also recognised that it was important in personal injury cases that funds were made on an interim basis to purchase accommodation. The stage 1 and stage 2 tests were specifically adopted to allow for the purchase of property at an interim stage in the litigation. This decision predated the change in the discount rate. If a defendant relies on the -0.75% discount rate to deny any liability to compensate a claimant for the capital costs of property then the effect, when combined with Cobham, is to deny a claimant this interim remedy. This is something which the Court of Appeal did not intend. In these circumstances, the application of *Cobham* needs to be tempered, at the least a more liberal approach to making a stage 2 calculation should be adopted.

The *Eeles* stages have widely been applied by claimants in seeking interim payments to purchase suitable properties to meet their needs. The accommodation costs were applied on the calculations set out in *Roberts v Johnstone*.[5] Capitalised accommodation costs were calculated on the basis of compensation for the loss of use of capital required by the purchase of a more expensive property. An assumed rate of return was calculated at 2.5% until February 2017 when the discount rate was changed from 2.5% to -0.75%.

It is well established that future expenditure is to place the injured party as nearly as possible in the same financial position as he or she would have been in but for the negligence.[6] However, as a result of the change in discount rate, it is no longer possible to make an award for accommodation costs on the *Roberts v Johnstone* principle. As discussed in *Manna v Central Manchester University Hospitals NHS Foundation Trust*,[7] "Peter is no doubt robbed to pay Paul", meaning claimants must now use other heads of loss to fund accommodation costs.

As a result various arguments have been presented as alternative solutions to the *Roberts v Johnstone* calculation. These include awards for mortgage costs to be paid by PPO, awards of capital for purchase costs with a life interest and reversion to the defendant, or charge in favour of the defendant, and the notional loss of investment income replaced by the notional cost of mortgage interest.

The stance taken by NHS Resolution was that the court is bound by *Roberts v Johnstone* and so the claimant is entitled to a nil award for accommodation costs. The decision in *Eeles* was clearly made on the basis that claimants would recover funds enabling them to purchase suitable properties. The court cannot speculate what might happen with the discount rate in future, and therefore must consider the calculations in the two-stage test, as was applied by HH Judge Curran QC in *Porter v Barts Health NHS Trust*.[8] It was held the claimant was entitled to an interim payment to purchase a suitable property on the basis that:

> "Whilst the trial judge is likely to regard himself or herself bound by the principles, however imperfect, established by the case of *George v Pinnock*, I am confident that the court while having regard to the risk of over-compensation, will not permit the Claimant to be under-compensated as the result of the change in the discount rate, since the court must follow the decision of the House of Lords in *Wells*

[4] *Oxborrow v West Suffolk Hospitals NHS Trust* [2012] EWHC 1010 (QB); [2012] 4 WLUK 394.
[5] *Roberts v Johnstone* [1989] Q.B. 878 ; [1988] 3 W.L.R. 1247.
[6] *Wells v Wells* [1999] 1 A.C. 345; [1998] 3 W.L.R. 329.
[7] *Manna v Central Manchester University Hospitals NHS Foundation Trust* [2017] EWCA Civ 12; [2017] 1 WLUK 248.
[8] *Porter v Barts Health NHS Trust* [2017] EWHC 3205 (QB); [2017] 12 WLUK 456.

> *v Wells* and make an award of damages for future expenditure which places the Claimant as nearly as possible in the same financial position as she would have been but for the accident.
>
> … In the instant case I am satisfied that the purchase and adaptation of [the property] represents the only viable solution to [the claimant's] needs and I am satisfied that the trial judge will allocate by way of damages in the form of a lump sum sufficient capital to enable her to be accommodated substantially in accordance with the requirements set out in the experts' reports."

It was envisaged the defendant would dispute the claimant's entitlement to an interim payment for accommodation costs on the basis of the decisions of William Davies J in *JR v Sheffield Teaching Hospitals NHS Foundation Trust*[9] and Lambert J in *Swift v Carpenter*.[10] In *JR*, there was a nil award in respect of the capital cost of accommodation but the judge outlined this was because of the lack of evidence presented to the court of available alternatives. The judge, with some hesitation, refused to make an award for capital costs but indicated he was concerned that with a negative discount rate the *Roberts v Johnstone* approach was no longer appropriate. He also noted the observations of Tomlinson LJ in *Manna v Central London University Hospitals NHS* Foundation Trust that this approach was increasingly "artificial". The claimant was therefore given permission to appeal. The defendant subsequently conceded the appeal shortly before the hearing and paid most of the capital costs. A copy of the approval advice prepared by counsel for the Court of Appeal was appended to the claimant's application.

The defendant, on behalf of NHS Resolution, failed to argue the point on appeal and therefore it was submitted that they should not be able to defend the claimant's application for an interim payment on the same basis.

It would be better for the claimant if she is able to purchase rather than rent. Renting a property will not provide the long-term stability that she requires and she has already moved three times since her strokes. The accommodation expert assessed the cost of purchasing an appropriate property at £325,000. The uninjured equity is £105,000 so a capital sum of £220,000 would be required to allow a purchase. The traditional *Roberts v Johnstone* approach using the current discount rate of -0.75% would allow nothing for the capital costs of accommodation. Where, as here, a claimant requires alternative accommodation because of injuries caused by the tortfeasor it cannot be correct that there is no recovery for the capital costs of that accommodation.

Having decided not to take the point in the Court of Appeal it would be wrong for NHS Resolution to now rely upon the negative discount rate to deny the claimant any capital costs. An alternative rate of return should be adopted. It was submitted that an appropriate rate is 4% which is the standard variable rate for an interest only mortgage. This would comply with the principles identified by the Court of Appeal in *George v Pinnock*. In the alternative it was submitted that, at the very least, a rate of 1.3% should be adopted which is the conservative rate of return that claimants can expect if investing over 30 years identified by the Government Actuarial Department as part of the consultation paper. The capital costs are £45,408 at 4% and £14,757.60 at 1.3%.

	4.00%	**1.30%**
Purchase price	£325,000	£325,000
Uninjured equity	£105,000	£105,000
Difference	£220,000	£220,000
Multiplicand	£8,800	£2,860
Multiplier	5.16	5.16

[9] *JR (A Protected Party) v Sheffield Teaching Hospitals NHS Foundation Trust* [2017] EWHC 1245 (QB); [2017] 1 W.L.R. 4847.
[10] *Swift v Carpenter* [2018] EWHC 2060 (QB); [2018] 7 WLUK 138.

	4.00%	**1.30%**
Loss	*£45,408*	*£14,758*

Once purchased a property would have to be adapted. The accommodation expert identified the costs of adaptation as £157,704. It would cost a further £45,000 if carer's accommodation is to be added which will be required if at any point the litigation friend is unable to care for the claimant. The ancillary costs of moving were calculated including purchase costs (£9,700), sale costs (£2,700) and a property finder and feasibility study (£7,250). A total of £19,650. Total accommodation costs were calculated as £267,762. This excludes any rental costs that the claimant would incur whilst the necessary adaptations were being undertaken to any property purchased.

The total value of the heads of loss identified above was £684,857. With a 5% reduction to reflect the compromise on liability the figure was £650,614. The claimant sought a further £400,000, taking the total interim payments to £500,000. This was 76.85% of the likely damages to December 2019. With this reduction it was submitted that the court can be satisfied that CPR 25.7(4) is satisfied and that the interim payment sought was not more than a reasonable proportion of the likely amount of the final judgment.

Summary of the judgment from HH Judge McKenna

On the basis of the medical, care and accommodation evidence served on behalf of the claimant, the judge considered there was no doubt that there was a real need for the payment requested.

General Damages: the strokes have caused significant physical impairments in the form of loss of balance, loss of stamina and fatigue with difficulty swallowing, serious cognitive deficits and an altered emotional state. As a result, the claimant is no longer able to look after herself and has become wholly dependent upon her husband. The appropriate Judicial College guideline, therefore was identified as 3(a)(b)). As a result of her impaired life expectancy, the claimant will fall at the lower end of that bracket. *Parry v North East Wales NHS Trust* was accepted as a comparable case. Therefore a figure of £150,000 was a conservative estimate of the claimant's prospective award for pain, suffering and loss of amenity. The appropriate figure for interest on the same basis was £4,500.

Past Losses: The case was timetabled to a trial on quantum in the summer of 2019 and the first payment under any PPO is likely to take effect on 15 December 2019. The judge considered it was entirely appropriate that the assessment of the likely amount of a final judgment should be calculated to that date and, can properly include the cost of future case management and therapies calculated to that date as well as other more traditional past expenses.

The judge did not have any expert evidence from the defendant as to the various heads of loss and, having regard to the need to ensure that the assessment was on a conservative basis, a discount of 25% was applied to as follows:

Past Care	**£135,512.00**
Other Past expenses	£28,278.00
Future case management and therapies	£22,840.00
Court of Protection costs	£34,997.00
Equipment	£30,960.00
	£252,594.00
Less 25%	£63,148.50
	£189,445.50

Past Care	**£135,512.00**
	£189,500.00 (rounded)

Accommodation costs: the reasoning of HH Judge Curran QC in the *Porter* case was adopted. The judge considered it would be wrong in principle to allow NHS Resolution, having compromised the appeal in *JR*, to rely on the negative discount rate to deny the claimant any capital costs when such costs are plainly required to return her to the position she would have been but for the defendant's admitted negligence.

In those circumstances, an alternate rate of return needed to be adopted. When considering the two rates submitted (4% or in the alternative, 1.3%), and having regard to the need for a conservative valuation, 1.3% was adopted based on the Government Actuary Department figures. Therefore a figure of £150,000 in respect of adaptation and £15,000 in respect of ancillary costs was applied but excluded the cost of carer's accommodation. The figures for accommodation therefore were as follows:

Capital costs	**£14,758.00**
Cost of adaptation	£150,000.00
Ancillary costs	£15,000.00
	£179,758.00
	£180,000.00 (rounded)

To summarise therefore, a conservative assessment of the relevant heads of loss was assessed as follows:

Pain and suffering and loss of amenity	**£150,000.00**
Interest	£4,500.00
Other losses	£189,500.00
Accommodation	£180,000.00
	£524,000.00

There had to be a 5% reduction to reflect the compromise on liability which amounted to a figure of £497,800.00. In the circumstances, HH Judge McKenna determined an appropriate sum to award by way of a further interim payment was therefore £350,000. Together with the sum of £100,000 already paid, this was just shy of 90% of the conservative estimate of the likely damages and therefore amounted to no more than a reasonable proportion of the likely amount of the final judgment expected.

Discussion points

At the time of writing this article, the discount rate remains at -0.75%. It is acknowledged that the rate is likely to change now the Civil Liability Bill has completed the necessary legislative stages and awaits Royal Assent. This is likely to impact the calculations identified above.

It is also acknowledged at the time of writing that the decision in *Swift v Carpenter* might be the subject of an appeal. A subsequent decision from the Court of Appeal is likely to set a precedent for calculating accommodation losses in future personal injury claims.

It has been argued since the change of the discount rate to -0.75% that *Eeles v Cobham* can no longer be considered good law since the claimant would be awarded nil for accommodation costs and therefore would not be able to recover a sufficient interim payment to fund a property purchase. This judgment (and

Porter v Barts Health NHS Trust) clearly identifies a method for applying the two-stage test set out in *Eeles v Cobham* for a Claimant to achieve a sufficient interim payment by using a rate of 1.3%.

The timing of trial is important and particularly for cases handled by NHS Resolution. This judgment allows for future losses that would ordinarily be subject of a PPO after the trial date to be considered within the *Eeles* calculation up until the date of the first PPO (15 December for NHS Resolution cases).

NHS Resolution compromised the appeal in *JR* and paid the claimant the majority of the accommodation costs. Despite this, the NHS Resolution has sought to dispute accommodation costs in other cases on the basis of the decision by William Davies J. HH Judge McKenna agreed with the claimant's submissions that it would be wrong in principle to deny the claimant's accommodation costs on this basis, particularly when they were required to return her to the position she would have been in but for the defendant's admitted negligence. Until there is a judgment from the Court of Appeal, the strength of the argument applied by NHS Resolution using the decisions of *JR* and *Swift* has been somewhat diminished.

The claimant's schedule of loss outlined different scenarios for accommodation including full purchase costs, rental costs or using a standard variable rate for an interest only mortgage. Defendants are still likely to object to these arguments and therefore expert evidence from an accommodation expert and independent financial advisor are imperative. It is important to note from the decisions in *JR* and *Swift* that the judges did not have the benefit of the required expert evidence to support the claimants' arguments.

There is now a window in which to use *LP* and *Porter* to seek interim payments for an accommodation purchase and timely applications to court will be important before another change in the discount rate or decision from the Court of Appeal.

Case and Comment: Liability

Darnley v Croydon Health Services NHS Trust

(SC; Lady Hale PSC, Lord Reed JSC, Lord Kerr JSC, Lord Hodge JSC, Lord Lloyd-Jones JSC; 10 October 2018; [2018] UKSC 50)

Clinical negligence—personal injury—duty of care—causation—health—hospitals—accident and emergency departments—waiting time

Accident and emergency departments; Clinical negligence; Duty of care; Waiting time

The claimant brought a clinical negligence claim against the defendant as the NHS Trust responsible for the Mayday Hospital, Croydon and the employer of staff, including A&E receptionists, working at that hospital.

The claimant's claim was dismissed at trial. The claimant's appeal, against that judgment, was dismissed by a majority of the Court of Appeal. The claimant brought a further appeal to the Supreme Court.

The claimant was taken to the defendant's A & E Department where he was told by the receptionist, in an off-hand way, that it would be up to four or five hours before he was seen.

After 19 minutes in the waiting area the claimant, who was in pain, decided to go home.

The claimant's condition deteriorated and he was taken back to the defendant's hospital where a CT scan of the head revealed the presence of an extradural haematoma.

The claimant was then transferred to St George's Hospital for neurosurgery, to remove the haematoma, but, by then, it was too late to prevent permanent injury, leaving the claimant with long term disabilities, namely a severe and very disabling left hemiplegia.

The claimant alleged the reception staff at the defendant's hospital, for whom the defendant was responsible, had been in breach of duty and that this caused his injuries. Proceedings were, accordingly, commenced against the defendant.

The Supreme Court considered that the approach of the majority in the Court of Appeal, on the issue of duty of care, was flawed. This case fell squarely within an established category of duty of care, as case law confirms such a duty is owed by those running a casualty department to persons presenting themselves complaining of illness or injury and before they are treated or received into the care of the hospital. That duty is to take reasonable care not to cause physical injury to the patient: *Barnett v Chelsea and Kensington Hospital Management Committee*.[1] It was not appropriate to distinguish between medically qualified professionals and administrative staff for determining whether there was a duty of care. The defendant did, accordingly, owe the claimant a duty of care and the real question was whether such duty had been breached.

On the question of breach it was not unreasonable to require that receptionists take reasonable care to avoid providing misleading information. The duty of care had been breached.

The breach of duty was causative as the trial judge had found that if the claimant had been told he would be seen within 30 minutes then he would have remained at the hospital.

The case was remitted back to the Queen's Bench Division for an assessment of damages.

[1] *Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 Q.B. 428; [1968] 2 W.L.R. 422.

Comment

This unanimous decision of the Supreme Court provides clarity on the three discrete elements of the tort of negligence, places the potential dead hand of *Caparo v Dickman*[2] in its proper perspective, and buttresses the notion that a hospital patient should not be given erroneous and misleading information.

Lord Lloyd-Jones in a cogent judgment overturns the majority decision of the Court of Appeal, which despite the protestation from Jackson LJ that he is "not usually sympathetic to 'floodgates' arguments" then proceeds to animadversions on the appellant's case that "litigation about who said what to whom in A&E could become a fertile area for claimants and their representatives".[3] Understandably, the familiar "floodgates" theme was taken up in the report on the Court of Appeal decision by the *Daily Telegraph*,[4] as well as the earlier denials of liability praised as "common-sense" and as a "pragmatic decision" in *Clinical Risk*.[5] A subsequent comment pondered "whether the Supreme Court agrees with the two previous rulings" as "that court can be unpredictable".[6]

With respect, the judgment by Lord Lloyd-Jones accurately depicts the flaws in the majority decision of the Court of Appeal and supports the dissenting judgment of McCombe LJ who focuses on the nub of the case that:

> "Incomplete and inaccurate information had been provided negligently. The failure to impart the reality of the triage system to the appellant on his arrival was, on the facts of this case, a breach of duty by the hospital."[7]

The Court of Appeal had indeed discussed the guidelines of the National Institute for Health and Clinical Excellence ("NICE") which at that time stipulated that all patients presenting to an emergency department with a head injury should be assessed by a trained member of staff within a maximum of 15 minutes of arrival at a hospital.[8] Sadly, that was not done. Nor was the prospect of an imminent arrival of a triage nurse indicated to Mr Darnley or his friend Mr Tubman, who had driven him to Mayday Hospital. On the contrary, the receptionist "did not have a helpful attitude" and told them they would have "to go and sit down and that [Mr Darnley] would have to wait up to four to five hours before somebody looked at him".[9]

The first myth that Lord Lloyd-Jones demolishes is that *Darnley* may be the imposition of a duty of care in a "novel situation". A brisk reconnoitre of the eternal discussions on Lord Bridge's default test in *Caparo* demonstrates that it is wholly unnecessary to go back to first principles "on every occasion" when "an established category of duty is applied".[10] Jackson LJ had suggested that finding for Mr Darnley would create "a new head of liability for NHS health trusts".[11] In response, Lord Lloyd-Jones reiterates the fundamental point of the "established category" that casualty departments owe a duty of reasonable care, as indicated in *Barnett v Chelsea and Kensington Hospital Management Committee*.[12] That famous case of arsenical poisoning in a cup of tea proffered to a security guard failed on the third element of causation, as even though the casualty officer had breached his duty of care in refusing to attend to the patient, sadly even if he had attended it would have been too late. But it is clearly the leading precedent establishing a duty of care on casualty departments.

[2] *Caparo Industries plc v Dickman* [1990] 2 A.C. 605; [1990] 2 W.L.R. 358.
[3] *Darnley v Croydon Health Services NHS Trust* [2017] EWCA Civ 151 at [55]; [2018] Q.B. 783.
[4] "No payouts for NHS receptionist blunders", *Daily Telegraph*, 24 March 2017.
[5] "Hospital Receptionist under no Duty to give Accurate Waiting Time Information" *Clinical Risk* CR 21 5 (98).
[6] J. Mead, "Receptionist not required to give detailed advice on waiting times" *Journal of Patient Safety and Risk Management* CR 23 3 (121).
[7] *Darnley v Croydon Health Services NHS Trust* [2018] UKSC 50 at [13] quoting McCombe LJ at [77] of *Darnley v Croydon Health Services NHS Trust* [2017] EWCA Civ 151.
[8] *Darnley v Croydon Health Services NHS Trust* [2017] EWCA Civ 151 at [8].
[9] *Darnley v Croydon Health Services NHS Trust* [2018] UKSC 50 at [2]. See also "Man left paralysed after A&E receptionist gave wrong advice wins compensation" *Metro* 10 October 2018.
[10] *Darnley v Croydon Health Services NHS Trust* [2018] UKSC 50 at [15].
[11] *Darnley v Croydon Health Services NHS Trust* [2017] EWCA Civ 151 at [53].
[12] *Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 Q.B. 428 per Nield J at 435–436.

Secondly, another major case in the medical literature is deployed by Lord Lloyd-Jones, to indicate that it is "not appropriate to distinguish, in this regard, between medical and non-medical staff".[13] This point derives from the unusual factual circumstances of the ambulance crew unaccountably going missing in *Kent v Griffiths*, where their negligent delay in responding to an emergency call from a doctor at the home of the asthma victim led to her brain damage.[14] That case also assists, according to Lord Lloyd-Jones, because of the "close analogy" with "inaccurate information by non-medically qualified staff" in producing "a delay in the provision of urgently required medical attention with the result that serious physical injury was suffered".[15]

Thirdly, Lord Lloyd-Jones notes that the Court of Appeal erroneously "elide issues of a duty of care and negligent breach of duty". The discussion in the Court of Appeal that A&E waiting areas are not always "havens of tranquility" is said to be observations "directed at false targets".[16] While it is "undoubtedly the fact that Hospital A&E departments operate in very difficult circumstances and under colossal pressure",[17] Lord Lloyd-Jones avers that it is "not unreasonable to require receptionists to take reasonable care not to provide misleading information as to the likely availability of medical assistance".[18] Noting the trial judge's finding that the appellant and his friend were told they would have to wait "for up to four or five hours to see a doctor", as opposed to a half hour wait for the triage nurse, the information given was "incomplete and misleading", and it was clearly negligent.[19]

The majority in the Court of Appeal purported to suggest that, even if there was a breach of a duty of care, the claim failed on the third element of causation, "echoing" the view of the trial judge that "the appellant should accept responsibility for his own actions" in leaving after 19 minutes to go to his parents' home in search of paracetamol.[20] But such an action was, of course, predicated on having been told that there was a four to five hour wait for attention. As the trial judge had also made a finding of fact that if Mr Darnley's subsequent collapse had occurred in a hospital setting, as opposed to his parents' home, he would have undergone surgery and "would have made a very near full recovery", any suggestion of a break in causation was "simply not made out".[21]

It is particularly refreshing that, in his excellent analysis of the law of negligence, Lord Lloyd-Jones remarks how he was "greatly assisted" by a case note on the Court of Appeal judgment by Professor James Goudcamp, until recently a member of the JPIL editorial board.[22]

Time will tell whether *Darnley* opens the floodgates on hospital receptionists' liability. It seems unlikely. As with predictions of doom for ambulance drivers after *Kent v Griffiths* the more likely scenario is, as predicted by Mr Darnley's solicitor, Deborah Blythe, that "hospitals have nothing to fear from the Supreme Court judgment".[23] But if receptionists become even more aware of the need to indicate triage for someone with a "red flag presentation" of head injury, then that may save others from a catastrophic bleed on the brain, paralysis and long-term disabilities.

Practice points

- A very helpful re-examination of the principles in *Caparo v Dickman,* underlining that the *Caparo* test should only be used to impose a duty of care in "novel" situations.

[13] *Darnley v Croydon Health Services NHS Trust* [2018] UKSC 50 at [17].
[14] *Kent v Griffiths (No.3)* [2001] Q.B. 36; [2000] 2 W.L.R. 1158.
[15] *Darnley v Croydon Health Services NHS Trust* [2018] UKSC 50 at [20].
[16] *Darnley v Croydon Health Services NHS Trust* [2018] UKSC 50 at [21].
[17] *Darnley v Croydon Health Services NHS Trust* [2018] UKSC 50 at [22].
[18] *Darnley v Croydon Health Services NHS Trust* [2018] UKSC 50 at [24].
[19] *Darnley v Croydon Health Services NHS Trust* [2018] UKSC 50 at [27].
[20] *Darnley v Croydon Health Services NHS Trust* [2018] UKSC 50 at [29].
[21] *Darnley v Croydon Health Services NHS Trust* [2018] UKSC 50 at [31].
[22] *Darnley v Croydon Health Services NHS Trust* [2018] UKSC 50 at [23]. See generally J. Goudkamp, "Breach of Duty: A Disappearing Element of the Action in Negligence?" [2017] *Cambridge Law Journal* 76, 480–483.
[23] *Law Society Gazette*, 11 October 2018.

- A clarification that the duty of care in a hospital environment is owed by the institution as a whole, and it is inappropriate to distinguish between medical and non-medical staff.
- There is a duty to take reasonable care not to misinform patients.
- Contrary to the view of the majority in the Court of Appeal, liability for hospital receptionists on providing misleading information on the availability of medical assistance is not "a new head of liability for NHS trusts" but "falls squarely within an established category of duty of care".

Julian Fulbrook

Hassell v Hillingdon Hospitals NHS Trust

(QBD; Dingemans J; 6 February 2018; [2018] EWHC 164 (QB))

Personal injury—negligence—clinical negligence—causation—informed consent—paralysis

Causation; Clinical negligence; Informed consent; Paralysis

Dingemans J explained, at the outset of his judgment, that:

> "This is the hearing of a claim for damages arising out of the treatment of Tracy Hassell ('Mrs Hassell') by the Hillingdon Hospitals NHS Foundation Trust ('the NHS Trust') from June until October 2011. The claimant had a C5/6 decompression and disc replacement operation on 3 October 2011 which was performed by Mr Ridgeway, a spinal orthopaedic surgeon. The claimant suffered a spinal cord injury during the operation which caused tetraparesis and rendered her permanently disabled. The claimant complained that the surgeon did not warn her the operation might leave her paralysed and did not discuss other conservative treatments before the decision to have the operation was made, and also said that the operation was negligently performed so as to cause damage to the spinal cord. The defendant maintained the claimant was warned about the risks of paralysis and that the operation was carried out using reasonable care and skill."

Dingemans J noted that in *Montgomery v Lanarkshire Health Board*[1] it was said that a doctor is:

> "… under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatment … the doctor's advisory role involves dialogue, the aim of which is to ensure that the patient understands the seriousness of her condition, and the anticipated benefits and risk of the proposed treatment and any reasonable alternatives, so that she is then in a position to make an informed decision. This role will only be performed if the information provided is comprehensible."

That duty is to enable adult patients of sound mind to make their own decisions about treatment and also to avoid the occurrence of a particular physical injury the risk of which a patient is not prepared to accept: *Chester v Afshar*.[2]

A claimant in a clinical negligence claim needs to establish the injury in question was caused by the defendant's breach of duty. If, however, the claimant can prove there was no informed consent, and the

[1] *Montgomery v Lanarkshire Health Board* [2015] UKSC 11; [2015] A.C. 1430.
[2] *Chester v Afshar* [2004] UKHL 41; [2005] 1 A.C. 134.

relevant treatment would not have been given had such consent been sought, then causation will be proved: *Chester*. In contrast, if the claimant shows a failure to act with reasonable care and skill in giving the treatment that claimant will need to show such failure caused the relevant injury.

The claimant had not been told about the risk of paralysis and, had the claimant been given such information she would not have had the operation when she did. Accordingly, although the judge found that the surgeon used reasonable care and skill in carrying out the operation, and in any event, the cause of the spinal cord injury could not be identified, both breach of duty and causation had been established on the basis there was a lack of informed consent and the consequences of this.

Comment

Introduction

This case highlights a number of important points that can arise in clinical negligence litigation, including issues about what was, or was not, said by the clinician to the patient, the importance of consent in relation to breach of duty and the increasing significance of consent in relation to causation.

Conflict of evidence

Whilst it will often be difficult for a patient to challenge what was, or was not, said by a clinician at a consultation the judgment, in this case, illustrates factors which will tell in favour of the claimant's account.

- The claimant was able to give a coherent account of risks she did recall being warned of, namely the risk relating to a hoarse voice.
- Correspondence sent out by the clinician, following the meeting, did not record a warning he contended had been given.
- The clinician's oral evidence was inconsistent with his witness statement, suggesting that a lack of consistency in the information given on risks was not an isolated occurrence.

Consent: Duty

This judgment illustrates the increasing significance of the Supreme Court ruling in *Montgomery v Lanarkshire Health Board*[3] concerning the need for advice and consent.

The judgment also confirms some important points about the proper way to obtain consent:

- There needs to be a dialogue between clinician and patient because that is likely to help identify what is important to the patient as well as clearing up any misunderstandings.
- Timely information is necessary; giving advice at the door of the operating theatre is too late for these purposes.

Consent: Causation

The judgment also highlights how important consent issues can be to the question of causation, applying *Chester v Afshar*.[4]

If there is a breach of duty by failing to give relevant advice then provided the claimant can establish such treatment would probably not have been agreed to, had there been no breach of duty, and that the

[3] *Montgomery v Lanarkshire Health Board* [2015] UKSC 11.
[4] *Chester v Afshar* [2004] UKHL 41.

damage complained of occurred as a result of that treatment the claim will succeed. It will not be necessary, in these circumstances, for the claimant to establish the precise mechanics by which the injury occurred.

Accordingly, in cases based on breach of duty by lack of advice causation, in comparison with other types of clinical negligence claim, will often be a relatively straightforward issue.

Practice points

Useful practice points from this judgment include the following.

- Evidence that is likely to be relevant in determining a dispute about what was, or was not, said during a consultation.
- The timing, and way in which, advice is given on risks and alternative treatments.
- The approach to causation in cases based on breach of duty for lack of proper advice.

John McQuater

Khan v MNX (2018)

(CA (Civ Div); Sir Ernest Ryder, Hickinbottom LJ, Nicola Davies LJ; 23 November 2018; [2018] EWCA Civ 2609)

Clinical negligence—damages—causation—clinical negligence—consequential loss—duty of care—foreseeability—haemophilia—wrongful birth

LIABILITY

LT Autistic spectrum disorder; Causation; Clinical negligence; Consequential loss; Duty of care; Foreseeability; Haemophilia; Wrongful birth

The defendant doctor appealed against a decision that she was liable to the claimant mother for losses associated with her son's autism.

Prior to her pregnancy, the mother had asked the doctor to establish whether she carried the haemophilia gene. The doctor arranged a blood test, and the mother was led to believe that any child she had would not have haemophilia. She later became pregnant and gave birth to her son, who had haemophilia and autism.

The mother brought an action for damages based on wrongful birth. The doctor admitted that but for her negligence, the child would not have been born because his mother would have undergone foetal testing for haemophilia during her pregnancy and would have had a termination.

The court found that the mother was entitled to damages in relation to the costs of bringing up a child with haemophilia and that she was entitled to the additional costs in relation to the child's autism.

The Court of Appeal held that given the limits of advice sought by the mother the "scope of duty" test set out in *South Australia Asset Management Corp v York Montague Ltd* ("*SAAMCO*"),[1] was not only relevant but determinative of the issues.

The purpose of the consultation was to put the mother in a position to enable her to make an informed decision in respect of any child which she conceived who was subsequently discovered to be carrying the haemophilia gene. Given her specific enquiry, namely would any future child of hers carry the haemophilia gene, it would be inappropriate and unnecessary for a doctor at such a consultation to volunteer any

[1] *South Australia Asset Management Corp v York Montague Ltd* [1997] A.C. 191; [1996] 3 W.L.R. 87.

information about other risks of pregnancy including the risk of autism. In giving such information it would be incumbent on a doctor, consistent with her/his own professional obligations, to take account of a variety of factors which on the facts of the instant case the doctor was unaware of.

Whilst the doctor would be liable for the risk of a mother giving birth to a child with haemophilia because there had been no foetal testing and consequent upon it no termination of the pregnancy, the mother would take the risks of all other potential difficulties of pregnancy and birth. The scope of the doctor's duty was not to protect the mother from all the risks associated with becoming pregnant and continuing with the pregnancy.

In concluding that the doctor should be liable for a type of loss which did not fall within the scope of her duty to protect the mother against, the judge did not apply the SAAMCO "scope of duty" test but reverted to the "but for" causation test. The SAAMCO test required there to be an adequate link between the breach of duty and the particular type of loss claimed. It was insufficient for the court to find that there was a link between the breach and the stage in the chain of causation. In finding that the mother was deprived of the opportunity to terminate the pregnancy what the judge was, in fact, referring to was one of the links in the chain of causation whereas following SAAMCO the link had to be between the scope of the duty and the damage sustained.

The appeal was allowed.

Comment

Introduction

The cause of action in this case, as with most clinical negligence claims, was the tort of negligence.

In *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)*[2] Viscount Simonds observed:

> "It is, no doubt, proper when considering tortious liability for negligence to analyse its elements and to say that the plaintiff must prove a duty owed to him by the defendant, a breach of that duty by the defendant, and consequent damage. But there can be no liability until the damage has been done. It is not the act but the consequences on which tortious liability is founded. Just as (as it has been said) there is no such thing as negligence in the air, so there is no such thing as liability in the air … It is vain to isolate the liability from its context and to say that B is or is not liable, and then to ask for what damage he is liable. For his liability is in respect of that damage and no other."

Negligence was subsequently described as a "composite" tort by May LJ in *Sam v Atkins*[3] when he said:

> "It is commonplace to analyse a cause of action in negligence compartmentally, examining a duty of care, breach of the duty, causation and damage. That is convenient, but technically wrong. Negligence is a composite concept necessarily combining all the elements I have mentioned."

These judgments recognise that to establish "negligence" the claimant must prove that the defendant has breached a duty of care, owed to the claimant, causing damage of a kind for which the defendant will be held legally liable.

Whilst each element of the tort does need to be proved May LJ was surely right to caution against over-compartmentalisation, given that these individual building blocks do overlap.

[2] *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)* [1961] A.C. 388; [1961] 2 W.L.R. 126.
[3] *Sam v Atkins* [2005] EWCA Civ 1452; [2005] 11 WLUK 265.

Duty

The starting point is identifying the duty owed by the defendant to the claimant, as that may help discern the damage for which the defendant will be liable if the duty is breached.

Hence in *Groom v Selby*[4] Hale LJ held:

> "It is fair, just and reasonable that a doctor who has undertaken the task of protecting a patient from unwanted pregnancy should bear the additional costs if that pregnancy results in a disabled child."

It was essential for the claimant to prove the defendant owed a duty of care, as that was the basis for a claim in negligence in the event of a breach. However, the duty owed was not just a starting point but also an important consideration when deciding the damage for which the defendant would be liable, by reference to the scope of the duty.

Breach

The defendant admitted there had been a breach of the duty of care which was owed to the claimant.

Causation: "But for"

But for the defendant's breach of duty, the claimant would not have incurred the additional costs of upbringing that related to the child's autism, a point which influenced the trial judge.

The Court of Appeal, however, considered it was essential to take account also of causation in the sense of linkage between the damage suffered and the duty of care breached.

Causation: Remoteness

In *South Australia Asset Management Corp v York Montague*[5] ("*SAAMCO*"), where Lord Hoffmann said the real question in these cases was identifying "the kind of loss in respect of which the duty was owed" and explained:

> "There is no reason in principle why the law should not penalise wrongful conduct by shifting on to the wrongdoer the whole risk of consequences which would not have happened but for the wrongful act."

Lord Hoffmann went on to give a hypothetical example by way of illustration when he said:

> "I can illustrate the difference between the ordinary principle and that adopted by the Court of Appeal by an example. A mountaineer about to undertake a difficult climb is concerned about the fitness of his knee. He goes to a doctor who negligently makes a superficial examination and pronounces the knee fit. The climber goes on the expedition, which he would not have undertaken if the doctor had told him the true state of his knee. He suffers an injury which is an entirely foreseeable consequence of mountaineering but has nothing to do with his knee."

In *Chester v Afshar*,[6] the House of Lords emphasised that causation could not be properly addressed without a clear understanding of the scope of the defendant's duty, Lord Walker distinguishing injury that was merely coincidental when he explained:

[4] *Groom v Selby* [2001] EWCA Civ 1522; [2002] P.I.Q.R. P18.
[5] *South Australia Asset Management Corp v York Montague Ltd* [1997] A.C. 191.
[6] *Chester v Afshar* [2004] UKHL 41; [2005] 1 A.C. 134.

> "… if a taxi-driver drives too fast and the cab is hit by a falling tree, injuring the passenger, that is pure coincidence. The driver might equally have avoided the tree by driving too fast, and the passenger might have been injured if the driver was observing the speed limit."

In *Chester*, the claimant's case was not one of coincidence given, as Lord Walker went on to say, that:

> "Bare 'but for' causation is powerfully reinforced by the fact that the misfortune which befell the claimant was the very misfortune which was the focus of the surgeon's duty to warn."

Furthermore, giving his judgment in *Chester* Lord Hope stated:

> "… damages can only be awarded if the loss which the claimant has sustained was within the scope of the duty to take care … the issue of causation cannot be properly addressed without a clear understanding of the scope of that duty."

In the Court of Appeal, Nicola Davies LJ noted that the purpose of the claimant's consultation with the defendant was to establish whether she was a carrier of the haemophilia gene and said:

> "The focus of the consultation, advice and appropriate testing was directed at the haemophilia issue and not the wider issue of whether, generally, the respondent should become pregnant."

On this basis, Nicola Davies LJ went on to state that the claimant:

> "… remained willing to accept the risk of having a child born with autism but would not have accepted that she still had a risk of having a child born with haemophilia …"

In these circumstances, Nicola Davies LJ held that:

> "Given the limits of the advice sought and the appropriate testing which should have been provided the scope of duty test identified by Lord Hoffman in *SAAMCO* is not only relevant but determinative of the issues which have to be addressed by a court."

The scope of the defendant's duty was, therefore, not to protect the claimant from all risks associated with becoming pregnant and continuing the pregnancy and, accordingly, in concluding the defendant should be liable for a type of loss which did not fall within the scope of the defendant's duty to protect the claimant against, the trial judge did not apply the SAAMCO scope of duty test but reverted to the "but for" causation test.

The Court of Appeal held it was insufficient to find there was a link between the breach of duty and a stage in the chain of causation, in this case, the pregnancy itself, and then conclude the defendant was liable for all the reasonably foreseeable consequences of that stage, here the pregnancy. Nicola Davies LJ explained:

> "In finding that the respondent was deprived of the opportunity to terminate the pregnancy what the judge is in fact referring to is one of the links in the chain of causation whereas following SAAMCO the link must be between the scope of the duty and the damage sustained."

The trial judge had, accordingly, erred in drawing an analogy with *Chester* rather than SAAMCO as unlike *Chester* the misfortune which befell the claimant was not the very misfortune the defendant had a duty to warn against, whilst in the context of this case the development of autism was a coincidental injury, of the kind described by Lord Walker in *Chester*, and not one within the scope of the defendant's duty.

Practice points

A number of practice points can be drawn from this judgment.

- The tort of negligence is composite in nature but it often remains necessary to, as May LJ observed in *Sam*, consider carefully how each individual element of the tort has a bearing on the others.
- In a complex case, of this nature, it may be necessary to assess (individually and collectively):
  - — the nature and scope of the duty said to be owed by the defendant to the claimant;
  - — the breach of that duty;
  - — if there was a causal connection between such breach and damage said to be suffered; and
  - — whether all the damage, even if causally connected with the breach of duty, can said to have been within the scope of the duty or, putting the matter another way, a foreseeable consequence of that breach rather than what might be termed a coincidental event.

John McQuater

Brown v Craig Nevis Surgery

(Outer House, Court of Session; Lord Armstrong; [2018] CSOH 84)

Clinical negligence—personal injury—duty of care—advice—general practitioners

Causation; Clinical negligence; Compensatory damages; Duty of care; General practitioners; Medical treatment; Scotland; Witnesses

A claim was brought on behalf of the estate of William Brown (the deceased) against general practitioners practising together in partnership as Craig Nevis Surgery.

On 29 December 2010, the deceased suffered, for the first time, an episode of chest pain. The deceased consulted his GP that day and arranged for an ECG.

Over the next few days the deceased suffered further chest pain and saw the GP again, on 31 December 2010, who reviewed the ECG already undertaken and made an urgent referral for an exercise ECG or Exercise Tolerance Test ("ETT").

The deceased attended the GP again on 5 January 2011 and on 6 January 2011 attended the A&E department at Belford Hospital, Fort William. ECGs were carried out but those were normal and the deceased was discharged. Later that day the deceased collapsed and was taken back to Belford Hospital but pronounced dead at 4.45pm.

A post mortem examination concluded:

> "Post-mortem disclosed an enlarged heart with significant narrowing of the left main coronary artery. There was also prominent pulmonary oedema in keeping with acute left ventricular failure. Microscopy has shown evidence of previous myocardial ischaemia … Individuals with an enlarged heart are at increased risk of sudden death, most likely mechanism of death being the development of arrhythmia."

Lord Armstrong concluded the deceased suffered symptoms between 29 December 2010 and 6 January 2011, that included chest pain even when at rest.

Lord Armstrong, on the basis the GP's notes did not record the deceased was suffering pain on minimal exertion or that his condition has worsened, concluded a breach of duty in history taking.

Lord Armstrong concluded that the GP was also in breach of duty by failing to diagnose acute coronary syndrome.

Lord Armstrong also held that by 31 December 2010, the GP ought to have provided the deceased with advice on action required if his condition worsened, but failed to do so. Such advice would have included the need to call an ambulance or go to a hospital if symptoms deteriorated and to make a 999 call in the event of chest pain on minimal exertion or at rest.

Lord Armstrong concluded that if, on 31 December 2010, the GP had provided appropriate treatment the likelihood of a fatal cardiac event, the principal cause of which was ischemia, would have been significantly reduced and if, on 31 December 2010, the deceased had been referred immediately to hospital his death would have been avoided. Even if, again on 31 December 2010, the GP had provided appropriate advice in the event the deceased's condition worsened it was likely that the deceased would have followed such advice and hence been admitted to hospital promptly.

Had the deceased been admitted to hospital the benefit of bed rest would have protected him from exposure to the consequences of physical exertion provoking cardiac arrest (such exertion causing an acute rise in blood pressure and risk of ischemia and arrhythmia).

Accordingly, Lord Armstrong concluded:

> "On the basis of the relevant case law to which I was referred, namely *Hunter v Hanley* 1955 S.C. 200, *Bolitho v City and Hackney Health Authority* [1998] A.C. 232, *Honisz v Lothian Health Board* [2006] CSOH 24, and *Amanda McGuinn v Lewisham and Greenwich NHS Trust* [2017] EWHC 88 (QB), and my findings in relation to the agreed issues, I find that Dr Smith was professionally negligent and breached the duties of care which she owed to the deceased, in that on Friday 31 December 2010, she (i) failed to diagnose unstable angina, (ii) failed to refer him immediately to hospital, (iii) failed to provide appropriate worsening advice, and (iv) failed to prescribe the medication appropriate for a diagnosis of stable angina. Having considered the further authorities to which I was referred, namely *Wright v Cambridge Medical Practice* [2013] Q.B. 312; *Hughes-Holland v BPE Solicitors* [2017] 2 W.L.R. 1029; and *South Australia Asset Management Corp v York Montague Ltd* [1997] A.C. 191, and applying the principles to be derived from them to the facts of this case, I am satisfied, given my findings in relation to the agreed issues, that it is proved that these failures were materially causative of death, in that their consequences were that the deceased was denied the appropriate treatment which, on the balance of probabilities, would have reduced his level of cardiac ischaemia to the extent that ventricular arrhythmia would have been prevented. I find, in addition, that in any event, if the fatal cardiac event on Thursday 6 January 2011 was caused by exposure to cold, as a provocational trigger, her failures were responsible for him being denied the protection from such exposure which admission to hospital would have provided."

Comment

The importance of good, clear and detailed lay witness evidence as well as the importance of choosing the right medico-legal expert were striking features in this judgment.

Lord Armstrong placed great weight on all the lay witness evidence given from Dr Smith, Mrs Brown (the widow) and Mr Campbell (friend of deceased). In particular, it was Mrs Brown's detailed evidence on her husband's deteriorating condition from 29 December 2010 through to his admittance to hospital on 6 January 2011 which Lord Armstrong seemed to be particularly struck by. This fed into his key conclusions that Dr Smith failed to take a proper history from the deceased at the various GP appointments he attended with her and also that two of the defender's expert witnesses, Dr Gaskell (General Practitioner expert) and Professor Channer (expert witness on cardiology), had not taken into account Mrs Brown's detailed lay witness evidence when forming their expert opinion and therefore were not to be preferred.

The importance therefore of taking detailed, accurate and precise lay witness evidence was exemplified in this case as well as the importance of ensuring that your expert witnesses all see and take account of that lay evidence within their reports.

Lord Armstrong found that Dr Gaskell was "overly defensive of Dr Smith's actions, and indeed not obviously impartial" and therefore "attached little weight to his views". He was particularly unimpressed by the fact that Dr Gaskell expressly stated (flying in the face of all the other expert evidence in the case and relevant guidelines) that "worsening advice" (i.e. what a patient should do if his condition deteriorates) was not a necessary requirement of ordinary competence for a GP during a consultation, nor that the prescription of aspirin was standard practice in 2010 when a patient presented with symptoms such as the deceased did.[1]

Professor Channer's evidence was "internally inconsistent" and Lord Armstrong found him to be "insufficiently neutral, independent and objective".[2] It was of note to the judge that in cross-examination, Professor Channer stated he had retired from clinical practice in the NHS in April 2012 and that since 2014 he was only engaged on medico-legal matters. He had not been involved in the clinical treatment of NHS patients for over six years. In relation to instructions, over the last 12 month period before he gave oral evidence in this case, less than 20% of his reports had been written following instructions on behalf of claimants.[3]

Thus the defender's choosing of seemingly partial and overly defensive medico-legal experts did them no favours in this case.

The judgment is clear that the reasonable standard of care for a GP during a consultation of suspected angina requires "a detailed clinical assessment and a detailed history". It is no defence in such situations to plead that the deceased did not elicit such a history upon initial questioning; Lord Armstrong stated:

> "it was incumbent on Dr Smith to adopt a proactive approach in taking the deceased's history, which should have involved appropriately refined and penetrating questioning …"[4]

So it is not enough to just listen to the patient—one has to probe further than that. Presumably though if the patient simply refused to reveal the history upon being pressed and appropriately questioned that should afford a defence to a GP in this situation?

The breaches of duty by Dr Smith were multiple but for the pursuers to succeed Lord Armstrong needed to confirm that those breaches were causative of his death. He found that had the deceased been admitted to hospital on 31 December 2010, death on 6 January 2011 would have been avoided. It was likely that exposure to the cold had been the provocational trigger to his fatal cardiac event.

Writing this case comment over Christmas 2018 is particularly poignant. Poor Mr Brown died over the Christmas holiday period eight years ago, very suddenly, having previously seemed to all around him a fit, healthy, and active man, leaving behind him a grieving widow and family. Sometimes we lawyers need reminding that behind the technicalities of such a case report as this there are real people whose lives have been devastated as a result of the mistakes of others.

Practice points

- Ensure key lay witnesses are identified at the start of any case or as soon as practicable thereafter and that detailed and comprehensive witness statements are taken from them and sent to the all experts for comment within their reports at the appropriate point in the case—in this case, Mrs Brown's evidence was key in persuading the judge of the detail and severity

[1] See *Brown v Craig Nevis Surgery* [2018] CSOH 84 at [190]; [2018] 8 WLUK 139.
[2] See *Brown v Craig Nevis Surgery* [2018] CSOH 84 at [191].
[3] See *Brown v Craig Nevis Surgery* [2018] CSOH 84 at [148].
[4] See *Brown v Craig Nevis Surgery* [2018] CSOH 84 at [196].

of the deceased's symptoms, which in turn fed into his assessment and analysis of Dr Brown's history and note taking and her breach of duty in that regard.

- Yet again the importance of choosing medico-legal experts who the court will be impressed by is highlighted in this judgment. Judges tend to prefer experts who are currently actively practising in the field they are providing their opinion on. Experts need to be reminded of their duties to the court to be impartial, independent and objective and to at all times assist the court.

Kim Harrison

Warner v Scapa Flow Charters

(UKSC; Lady Hale President, Lord Reed Deputy President, Lord Sumption, Lord Hodge and Lord Briggs; 17 October 2018; [2018] UKSC 52)

Civil procedure—personal injury—shipping—accidents—death—divers—fatal accident claims—interpretation—passengers—prescription—Scotland—suspension—Treaties—Athens Convention 1974—Merchant Shipping Act 1995 (c.21) Sch.6—suspension or interruption of limitation/time bar period—knowledge—infant pursuer/claimant—pursuer/claimant lacking capacity

℔ Death; Divers; Fatal accident claims; Limitation periods; Nonage; Scotland

Lex Warner had chartered the vessel the MV Jean Elaine for a one-week diving trip commencing 11 August 2012. On 14 August 2012, he was preparing to dive on a wreck to the north-west of Cape Wrath. Whilst dressed in diving gear, he fell on the deck. He was helped to his feet and went ahead with the dive. He got into difficulty whilst diving and was recovered to the vessel but could not be revived and was pronounced dead.

His widow, Debbie Warner, brought an action against the defender alleging negligence. The claim was brought as an individual and on behalf of her son, who had been born in November 2011. A claim for damages was intimated and the summons was signed on 14 May 2015. The defence filed to the claim argued that the claim was time-barred under the Athens Convention.

The parties agreed that the Athens Convention applied to the claim and that the date of disembarkation was no later than 18 August 2012. The Lord Ordinary upheld the time bar defence and dismissed the action. Lord Glennie gave judgment in the Inner House on 16 February 2017 upholding the finding of the Lord Ordinary in relation to her claim, but reversing it in relation to the son finding it was not time-barred. The appeal to the Supreme Court was brought by the defender.

The Athens Convention has force of law in the UK by virtue of the Merchant Shipping Act 1985 s.183 and the Carriage of Passengers and their Luggage by Sea (Domestic Carriage) Order 1987 (SI 1987/670) extended the application of the Athens Convention to contracts for the domestic carriage of passengers by sea. Article 16 of the Convention subjects the claim on behalf of the son to a two-year time bar[1] unless the specific provisions of Article 16(3) applied whereby the law of the court seized of the action governs the grounds of suspension and interruption of limitation periods in the son's favour.

In interpreting international conventions, the court was required to consider the objective meaning of the words used and the purpose of the convention as a whole. In doing so, the court can look at foreign

[1] Athens Convention art.16(1).

court judgments on the convention, writings of jurists and the travaux préparatoires of the Convention. Those sources provided no assistance in respect of the interpretation of the relevant words in art.16(3): "grounds of suspension and interruption of limitation periods."

Those words should not be given a technical meaning, and it was not appropriate to draw upon the domestic law of civil systems when it was an international convention designed to operate in a number of jurisdictions. There was in any event, no uniformity in approach within the differing civil legal systems. Any interpretation of the Athens Conventionart.16(3) as excluding domestic rules which have the effect of postponing the start of a limitation period would also give rise to serious anomalies. The words "the grounds of suspension … of limitation periods" were sufficiently wide to cover domestic rules which postpone the start of a limitation period as well as those which stop the clock after the limitation period has begun.

Applying the natural meaning of the words, the existence of a ground in a domestic limitation statute which suspended the limitation periods set out in that statute, such as in this appeal the Prescription and Limitation (Scotland) Act 1973 s.18 (legal disability by reason of non-age or unsoundness of mind) is sufficient to bring art.16(3) into operation and extend the art.16 time bar by one year. Having regard to the domestic provisions in s.18, it operated to postpone the expiry date of the limitation period by instructing the court to disregard the time during which the pursuer of the action was under a legal disability. In any event, postponement of the start of a limitation period did not fall outside an international understanding of a "suspension" of limitation periods.

Article 16(3) requires the court to look to the basis for the domestic grounds for suspension of limitation periods. In s.18(3) of the 1973 Act, the grounds for the disregard of time are that the pursuer is under a legal disability by reason of non-age or unsoundness of mind. Under art.16(3) of the Convention that legal disability based on the domestic law of the country the action was brought in has the effect of suspending the running of the two-year time bar imposed by art.16(1) and 16(2). The application of the grounds of suspension in s.18(3) of the 1973 Act involved no inconsistency with the Athens Convention art.16(2). The three year long stop in art.16(3) would prevent any domestic based suspension of the limitation period from going beyond that.

The claim on behalf of the son was not time-barred. The appeal was dismissed.

Comment

This appeal raised a question about the interpretation of the Athens Convention art.16 relating to the Carriage of Passengers and their Luggage by Sea 1974 (the Athens Convention) and its application to the Scots law of limitation of actions.

Initially, there were two aspects to the case. The first was Mrs Warner's own claim. She said that she was unaware that her husband's death had been caused by an act or omission attributable to the defenders until the publication of an accident investigation report in December 2013. Her case was that time did not start running for time bar purposes until then. She lost at first instance and on appeal. That was not appealed to the Supreme Court.

The second aspect and the one that the Supreme Court considered, was Mrs Warner's claim as guardian to her and her deceased husband's son who was born in November 2011. The question was as he was an infant at the time of his father's accident did the two-year time bar apply?

In England and Wales, the basic rule under the Limitation Act 1980 is that time runs from the date of accrual of the cause of action until the date an action is brought. Any intervening disability on the part of the claimant does not affect the running of time. In *Prideaux v Webber*,[2] the Limitation Act 1623 was held to be a good bar despite the fact that the King's courts were not available when time was running seemingly

[2] *Prideaux v Webber* 83 E.R. 282; (1660) 1 Lev. 31.

due to the fact that rebels had allegedly usurped the government. The only exceptions were minors, married women, persons of unsound mind, prisoners and those beyond the seas. The courts applied the 1623 statute even though it led to some pretty hard decisions.[3]

In *Rhodes v Smethurst*,[4] Alderson B expressly rejected the view that the limitation period, once it had begun to run, could be interrupted. In England and Wales this means that if *at any time,* post accident, a claimant has capacity the limitation period has started to run. The briefest period of lucidity may be enough. Once the limitation period starts to run it cannot stop.

In Scotland, the Prescription and Limitation (Scotland) Act 1973, creates a position in Scotland which is very similar to England and Wales in some respects though different in others. Section 18(3) states that "where the pursuer is a relative of the deceased, there shall be disregarded in the computation of the period … any time during which the relative was under legal disability by reason of nonage or unsoundness of mind".

It is not appropriate to look to the domestic law of certain civil law systems for a technical meaning of the words in an international convention designed to operate in many common law systems. There was no uniformity in the use of the expression "suspension" when the Athens Convention was adopted. An interpretation of art.16(3) of the Convention as excluding domestic rules which had the effect of postponing the start of a limitation period would give rise to serious anomalies.

The court held that the words "the grounds of suspension … of limitation periods" were sufficiently wide to cover domestic rules which postponed the start of a limitation period as well as those which stopped the clock after the limitation period had begun. It did not matter whether time had already begun to run or had not started. They based this on their interpretation of the words "suspension and interruption of limitation periods" as they appear in art.16.3 of the Convention.[5]

As a result, the court held that it was legitimate, in circumstances where the relative of the deceased, as here, was under a legal disability, to regard the limitation period as suspended or interrupted during that period. In the case of nonage, they held that commencement of the limitation period would, in fact, be suspended before it even started.

Convention cases are always a worry. Special rules abound and one area where they impact is limitation/time bar. It's interesting to look at the difference in the language of Montreal and Athens Conventions. In Montreal on limitation of actions art.35 states:

> "1. The *right to damages shall be extinguished* if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.
> 2. The method of calculating that period shall be determined by the law of the court seised of the case." (Emphasis added)

In Athens art.16 under time-bar for actions it states:

> "1. Any action for damages arising out of the death of or personal injury to a passenger or for the loss of or damage to luggage *shall be time-barred* after a period of two years.
> 2. The limitation period shall be calculated as follows:
> (a) in the case of personal injury, from the date of disembarkation of the passenger;
> (b) in the case of death occurring during carriage, from the date when the passenger should have disembarked, and in the case of personal injury occurring during

[3] *Prideaux v Webber* 83 E.R. 282; (1660) 1 Lev. 31, *Rhodes v Smethurst* 150 E.R. 1335; (1838) 4 M. & W. 42 and *Homfray v Scroope* 116 E.R. 1357; (1849) 13 Q.B. 509.

[4] *Rhodes v Smethurst* 150 E.R. 1335; (1838) 4 M. & W. 42.

[5] "The law of the court seized of the case shall govern the grounds of suspension and interruption of limitation periods, but in no case shall an action under this Convention be brought after the expiration of a period of three years from the date of disembarkation of the passenger or from the date when disembarkation should have taken place, whichever is later."

carriage and resulting in the death of the passenger after disembarkation, from the date of death, provided that this period shall not exceed three years from the date of disembarkation;

(c) in the case of loss of or damage to luggage, from the date of disembarkation or from the date when disembarkation should have taken place, whichever is later.

3. *The law of the court seized of the case shall govern the grounds of suspension and interruption of limitation periods*, but in no case shall an action under this Convention be brought after the expiration of a period of three years from the date of disembarkation of the passenger or from the date when disembarkation should have taken place, whichever is later.

4. Notwithstanding paragraphs 1, 2 and 3 of this Article, the period of limitation may be extended by a declaration of the carrier or by agreement of the parties after the cause of action has arisen. The declaration or agreement shall be in writing."

Under Montreal as the right to damages "shall be extinguished" if you miss the two year limit there appears to be no flexibility at all. In Scotland, under Athens, there is some limited flexibility. Despite the fact that English and Welsh law has a similar postponement provision in the Limitation Act 1980 to that in the 1973 Act in Scotland currently in England and Wales the position remains that the two-year time period is mandatory for all claimants in "Athens" cases.

However, in light of this ruling, surely this will not remain the case for long. I am confident that claimant solicitors will argue that the principles of this case should be applicable in England and Wales. I have no doubt that, given the opportunity, the Supreme Court will agree.

Practice points

In cases where the Athens convention applies:

- In the case of personal injury or death the limitation period is two years.
- For personal injury cases the limitation period starts from the date of the passenger disembarkation.
- In the case of death occurring during carriage, the limitation period starts from the date on which the passenger should have disembarked.
- In the case of a personal injury occurring during carriage and resulting in the death of the passenger after disembarkation: the limitation period starts from the date of death, provided that the period does not exceed three years from the date of disembarkation.
- The date on which the pursuer/claimant had knowledge that the injuries were attributable in whole or in part to an act or omission does not assist in obtaining an extension to the limitation period.
- The fact that the pursuer is an infant and/or lacks capacity means that in Scotland the two year limitation period is suspended before it actually begins. There seems to be no reason why this should not be the same in England and Wales.

Nigel Tomkins

Griffiths v (1) Chief Constable of Suffolk (2) Norfolk and Suffolk NHS Foundation Trust

(QBD; Ouseley J; 10 October 2018; [2018] EWHC 2538 (QB))

Negligence—mental health—police—torts—human rights—breach of duty of care—duty to warn—fatal accident claims—hospital admissions—inhuman or degrading treatment or punishment—mental health assessments—mental patients—murder—police—right to life—right to respect for private and family life—risk—suicide

LT Breach of duty of care; Duty to warn; Hospital admissions; Mental health assessments; Mental patients; Murder; Police powers and duties; Right to life; Risk

The claimants were children of a murdered woman (A) who sought damages from the first defendant chief constable and second defendant NHS trust.

A had, on 2 May 2009, informed a friend (B) that she was getting back with her ex-boyfriend. B attempted suicide that night and was taken to hospital on 3 May. An assessment panel concluded that he did not meet the criteria for compulsory admission under the Mental Health Act 1983. B did not accept voluntary admission and so was discharged into the care of the second defendant's crisis team.

On 5 May, A made a 999 call at 5.56pm. A explained that B was harassing her and that she was frightened. The call-taker graded the call as requiring a response within four hours.

At around 9.45pm, the first defendant's control room phoned A and asked if an officer could attend the following day, to which A agreed.

At around 2.40am on 6 May B broke into A's house and murdered her.

The claim was brought under the Fatal Accidents Act 1976 on the basis that A's death was caused by the wrongful act, neglect or default of the first defendant and/or the second defendant and seeking damages under the Human Rights Act 1998 arts 2, 3 and 8.

The first defendant was held not to have breached its duty of care towards B. It followed that no breach of duty towards A could arise from any breach of duty towards B.

The panel had carried out a proper assessment of B and was not negligent in concluding the absence of any mental disorder of a nature or degree which warranted detention in hospital for assessment, the first limb of the Mental Health Act 1983 s.2. In any event, there was no basis upon which the second limb of that section could have been satisfied on the evidence of risk to others.

There was no negligence in the formulation or operation of B's care plan and no negligence in the failure to detain B.

The law did not generally impose liability on a defendant for failing to prevent harm caused by someone else, unless the defendant had assumed a positive responsibility to safeguard someone, or they were in a position of control over the person who caused the harm, and should have foreseen the likelihood of them causing damage to someone in close proximity if the defendant failed to take reasonable care in the exercise of that control.

Whilst the first defendant had sufficient control over B to satisfy that control test during the assessment period there was no basis upon which the panel ought to have known that B posed a risk to the life of A or of causing harm which would amount to a breach of art.3. Nor should the first defendant have known that B posed a risk to A of stalking, harassment and assault.

On the basis of the information which the panel had or ought to have had on 3 May there was no evidence to support the contention that there should have been a warning contact to A or the second defendant.

On the human rights claim against the first defendant, the judge held that the operational duty did not arise, because the first defendant did not know, nor ought it to have known, of any real or immediate risk to A's life, nor of any risk that her art.3 rights would be breached. There were no steps which it failed to take which it should have done in respect of such risks: *Osman v United Kingdom*[1]; *Rabone v Pennine Care NHS Foundation Trust*.[2]

On the human rights claim against the second defendant, the judge concluded there was no basis for a finding of a breach of any aspect of the art.2 or art.3 protective duty, operational or systemic. There was clearly a risk of harassment and stalking, and of unwanted presence at A's home. However, there was nothing to suggest that it was an imminent risk, against which measures were required that night. Accordingly, if there were a protective duty in relation to such a risk, which could arise under art.8, the second defendant did not breach it in their response to the call. A breach of art.8 could not be raised where art.2 and art.3 were not breached, nor did Strasbourg jurisprudence permit a breach of art.2 or art.3 to be based on a failure to take steps which an Article 8 duty would have required, where no breach of art.2 or art.3 was or should have been foreseen: *Van Colle v United Kingdom*.[3]

Comment

Introduction

The trial of this action considered a range of issues including claims in negligence and under the Human Rights Act against both defendants.

The judgment highlights the difficulties in pursuing claims, whatever the cause of action, against parties, on the basis, they are responsible, indirectly, for the wrongdoing of third parties.

Here the family of A sought to establish liability on the part of Suffolk Police and/or the NHS for harm caused by the actions of B.

After a lengthy analysis of all the factual and expert evidence the judge turned to the legal basis, in the light of factual findings made, of the claims in both negligence and under the Human Rights Act.

Negligence: NHS

The standard of care, as ever, was that identified in *Bolam v Friern Hospital Management Committee*,[4] namely did the individual act in accordance with the practice accepted as proper by a responsible body of medical men skilled in that particular profession?

Applying that test the judge concluded there was no breach of duty towards B and hence there could be no breach of duty to A.

Dealing with the contention that the NHS had a duty to warn A or the police the judge turned, for the law dealing with liability for a careless omission, to the summary given by Lord Toulson in *Michael v Chief Constable of South Wales Police*.[5] That judgment identified the two recognised types of situation when the common law might impose liability for omissions, Lord Toulson stating:

> "99 The first is where D was in a position of control over T and should have foreseen the likelihood of T causing damage to somebody in close proximity if D failed to take reasonable

[1] *Osman v United Kingdom* (23452/94) [1998] 10 WLUK 513; [1999] 1 F.L.R. 193.
[2] *Rabone v Pennine Care NHS Foundation Trust* [2012] UKSC 2; [2012] 2 A.C. 72.
[3] *Van Colle v United Kingdom* (7678/09) [2012] 11 WLUK 340; (2013) 56 E.H.R.R. 23.
[4] *Bolam v Friern Hospital Management Committee* [1957] 1 W.L.R. 582; [1957] 2 All E.R. 118.
[5] *Michael v Chief Constable of South Wales Police* [2015] UKSC 2; [2015] A.C. 1732.

care in the exercise of that control. *The Dorset Yacht* case [1970] A.C. 1004 is the classic example, and in that case Lord Diplock set close limits to the scope of the liability. As Tipping J explained in *Couch v Att-Gen* [2008] 2 NZLR 725, this type of case requires careful analysis of two special relationships, the relationship between D and T and the relationship between D and C. I would not wish to comment on Tipping J's formulation of the criteria for establishing the necessary special relationship between D and C without further argument. It is unnecessary to do so in this case, since Ms Michael's murderer was not under the control of the police, and therefore there is no question of liability under this exception.

100 The second general exception applies where D assumes a positive responsibility to safeguard C under the *Hedley Byrne* principle, as explained by Lord Goff in *Spring v Guardian Assurance Plc* [1995] 2 A.C. 296. It is not a new principle. It embraces the relationships in which a duty to take positive action typically arises: contract, fiduciary relationships, employer and employee, school and pupil, health professional and patient. The list is not exhaustive. This principle is the basis for the claimants' main submission, to which I will come (issue 3). There has sometimes been a tendency for courts to use the expression 'assumption of responsibility' when in truth the responsibility has been imposed by the court rather than assumed by D. It should not be expanded artificially."

The judge concluded neither of these exceptions could be established, explaining:

> "It is plain on the facts that there was no basis upon which the panel, on the material which it actually had, could have foreseen that Mr McFarlane might murder Ms Griffiths or carry out any form of serious assault."

Human Rights: NHS

On the Human Rights claim against the NHS Ouseley J observed:

> "The basis for the state's protective duty towards a potential victim is set out by the ECtHR in *Osman v UK* (1998) 29 E.H.R.R. 245 which at [115]–[116] accepts that Article 2 'may also imply in certain well-defined circumstances a positive obligation from the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual'. The Court recognised the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources. This positive obligation should not be applied in such a way as to impose impossible or disproportionate burdens on the authorities. Not every claimed risk to life could entail an obligation to take operational measures to prevent it. To prove a violation of that positive obligation to prevent and suppress offences against the person, in the context of Article 2, [116] : '… it must be established … that the authorities knew or ought to have known at the time of the existence of a real and immediate threat to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk …'."

On this basis, having regard to the facts found, the judge concluded the operational duty did not arise because the NHS did not know, nor ought it to have known, of any real or immediate risk to A's life, nor of any risk that her art.3 Rights would be breached.

The judge also rejected an alternative way in which the operational duty was said to have arisen based on *Bljakaj v Croatia*.[6] This was on the basis that the court there did not find a duty was owed to the general public because of a duty to prevent a suicide, rather because the relevant authority should have foreseen the wrongdoer was a violent danger to the general public, the fact he was a suicide risk was not of itself the basis on which that risk was said to arise. Accordingly, on the facts found, Ouseley J concluded:

> "I accept that there was a risk that Mr McFarlane would commit suicide when he was not detained or admitted, but it was reasonably judged not to be imminent. It can be described as low/moderate. However, the lawful relevant protective steps had been taken towards him. I do not consider that that could be regarded as a basis for saying that an operational duty to protect others arose when the risk of suicide was the only risk foreseeable, and proper steps to guard against it were taken. There was no basis for requiring the police to be informed or for steps to protect the general public to be taken. There was simply no such risk."

On the basis no art.8 claim could arise if the art.2 and art.3 claims failed, the Human Rights claim against the Trust was dismissed.

Negligence and Human Rights: Police

On the facts found the judge accepted there was nothing to suggest, objectively, to the police there was a real and immediate threat to life or of serious assault, especially when B was not in the present of A and A had agreed the police could call the next day as well as there being nothing in her language or tone, when calling the police, to suggest was covering up a fear.

Accordingly, Ouseley J concluded:

> "The level of failure in operation or in a system necessary to constitute a breach of the protective duties in either Articles 2 or 3 is far higher than the level of failures here, such as they might be."

Ouseley J went on to state:

> "I also conclude that there was clearly a risk of harassment and stalking, and of unwanted presence at Ms Griffiths' home of which the Suffolk Police knew on 5 May. But there was nothing to suggest that it was an imminent risk, against which measures were required that night. So if there were a protective duty in relation to such a risk, which could arise under Article 8, the Suffolk Police did not breach it in their response, by grading the call as 3, and ringing back at 21.43 and acting in reliance upon what Ms Griffiths said. I do not accept that a breach of Article 8 can be raised where Articles 2 and 3 were not breached, nor that Strasbourg jurisprudence permits a breach of Articles 2 or 3 to be based on a failure to take steps which an Article 8 duty would have required, where no breach of Articles 2 or 3 was or should have been foreseen."

The claims against the police were, therefore, also dismissed.

Practice points

Practice points that can be derived from this judgment include the following:

- Only in limited circumstances will a party be negligent for careless omission.
- To succeed in a Human Rights claim, in circumstances such as those arising in this case, there will need to be a "real and immediate threat to life or of serious assault" and if there

[6] *Bljakaj v Croatia* (74448/12) [2014] 9 WLUK 448; (2016) 62 E.H.R.R. 4.

is a systems failure that will need to be fairly significant to constitute a breach of the relevant protective duties.

- In these circumstances, a breach of art.8 cannot be raised where arts 2 or 3 have not been breached.

John McQuater

Witley Parish Council v Cavanagh

(Court of Appeal (Civil Division); Bean LJ, Flaux LJ and Henry Carr J; 11 October 2018; [2018] EWCA Civ 2232)

Personal injury—falling tree—inspection cycles—guidance—landowners duty—resources—inspection frequency—local authority—duty of care

Breach of duty of care; Local authorities' liabilities; Personal injury; Trees

On 3 January 2012, the claimant was driving a single deck bus along the A283 Petworth Road in Witley, when a large lime tree fell onto the bus causing serious personal injuries to him. The land on which the tree grew was owned by Witley Parish Council. They had asked a tree surgeon, Mr Kevin Shepard, to undertake an inspection of all the trees on their land in 2006. His report stated that "the survey will be for 24 months".

They also had in place a system of inspection, including the tree in question, that saw trees inspected every three years. Mr Shephard was instructed to inspect again in 2009, to specifically include the tree in question. His report recorded "no works". The Council took that to mean it had been inspected and required no work. At trial, Mr Shephard maintained that it meant no inspections had been carried out in the absence of full maps. The judge at the trial held that to be deliberately untruthful and that a cursory inspection of the tree had in fact been done in 2009.

By the time the tree fell a fungal bracket, indicative of internal decay, had formed. The judge found that this would not have been visible even if the inspection in 2009 had been fuller. Hence any negligence on the part of Mr Shephard was not causative of the accident.

The issue on appeal was the basis upon which the Council was found to be liable, namely that the three-year inspection period adopted by them was not sufficient. The relevant legal principles were confirmed to be those set out in *Stagecoach South Western Trains v Hind*.[1] The Council had been refused permission to appeal on the basis that those principles had been applied incorrectly. What was left was a challenge to the judge's findings of fact and evaluation of the evidence.

The judge's findings and reasoning were supported by the evidence, in particular, the expert evidence of the respondent and the Forestry Commission guidance. His finding that the tree was a high-risk tree in a high-risk zone was consistent with the guidance and the expert evidence. The reliance on the wording in the Health and Safety Executive sector information minutes by the appellant was not helpful. Whilst it suggested a less stringent approach to inspection was permissible it was out of line with other guidance such as that of the Forestry Commission. The HSE appeared to advocate a less stringent inspection regime, possibly because it was looking at a potential criminal prosecution rather than a civil liability.

[1] *Stagecoach South Western Trains v Hind* [2014] EWHC 1891 (TCC); [2014] 6 WLUK 259.

The judge's reasoning in relation to the need for inspection at least every two years and his conclusion as to the liability of the Council are unimpeachable. Appeal dismissed.

Comment

In practical terms, this decision is vital for landowners whose land contains trees which are accessible to the public. The Court of Appeal considered the level of risk and consequent frequency of inspection.

The lime tree in question, the court heard from the claimant's expert, was in a high risk zone. "The location of the 25–30 metre high lime tree" was "adjacent to a bus stop and two benches where people and vehicles are frequently present".[2] But there were competing arguments in court as to what constituted "high risk": the Court of Appeal and High Court both considered the guidance available to the defendant/appellant.

The Department of Transport Code of Practice for 2005 indicated that trees should be inspected every five years, adding the proviso: "a period which may be reduced on the advice of an arboriculturist".

The judge noted that this guidance was only a starting point for deciding on the level of risk and frequency of inspections. There were three other published sets of guidance available to the defendant/appellant at the time which were considered by the court:

- 1975 Department of the Environment Circular. This gave no guidance on the frequency of inspection.
- A 2007 Health and Safety Executive Sector Information Minute which dealt with the criminal standard of liability.
- A Forestry Commission Practice Guide, published in 2000, which proved most useful to the court.

When questioned about the HSE document, the claimant's expert had expanded on what constitutes "high risk" and how that ought to affect the frequency of inspection. The guidance indicated that a tree in a place frequently visited by the public requires an individual inspection if it has been identified as having structural faults which are likely to make it unstable, and a decision had been made to keep that tree there. The claimant's expert said:

> "That is the guidance, but if you look at an individual tree, as this tree was, in an area of very very frequent use by the public, a bus service underneath it, you don't necessarily have to follow it and say, 'I'll only do this if it develops a fault. It is prudent management to look at that tree more closely because of its position and its location … you've got to make a decision on trees individually. And, in an area like this, where you've got a single, very large mature tree [next] to a bus stop, by an A road … that tree is a potential high risk and it's in an area of high risk, so … I would inspect more frequently and in more detail."

The court added that the evidence showed that the tree was also leaning out towards the road.[3]

Mr Shepherd, the Parish Council's tree surgeon and specialist, had stated in his 2006 report that the survey was for 24 months. The judge concluded that this meant that the next tree survey should have been conducted two years later.

In 2010, at a presentation to the Parish Council, a tree officer from Waveney DC (referred to as WBC in the judgment) had informed the Parish Council that it owned a large number of trees, which were zoned into high, medium and low risk areas. Trees in the high risk areas were inspected annually. However, due

[2] *Witley Parish Council v Cavanagh* [2018] EWCA Civ 2232 at [10].
[3] *Witley Parish Council v Cavanagh* [2018] EWCA Civ 2232 at [18].

to "a lack of resources",[4] the court heard that this practice had ceased in 2013. Instead, WBC had adopted a three year inspection regime for all of its trees.

Was the defendant/appellant negligent in failing to inspect this particular tree on a more frequent basis or was it acting as a reasonable and prudent landowner?

The law is reasonably clear on where responsibility lies. *Stagecoach Southwestern Trains v Hind*[5] holds that the tree-owner has a duty to act in a reasonable and prudent manner; that duty should not be an unreasonable burden, but where there is an apparent danger he should act, carrying out inspections on a regular basis, calling in an expert where necessary. Several earlier decisions (with which *Stagecoach* concurred) refer to the relevance of the landowner's resources when conducting its inspections. See for example even as far back as the Privy Council decision of *Goldman v Hargrave*[6] which held that the landowner's knowledge and actions based upon it ought to be "within the capacity and resources" reasonably available to the owner.

The defendant/appellant contended that "although this tree was admittedly in a high risk location, it was not a high risk tree by reference to any recognised or published criteria". There was "no prescription in any of the written guidance or in the case law as to the appropriate period between inspections for particular trees".

The court did not accept this argument and found that the defendant/appellant was negligent in failing to inspect this tree at least at two-year intervals. It's last "cursory" inspection had been in 2009 and the tree fell in 2012. Case law provides that the landowner should call in expertise where necessary and having done so, by implication, rely upon it and this includes frequency of inspection (in this case, the suggested 24 months). Further, the Forestry Commission guidance on "zoning a site" provides that:

> "a third zone, representing a need for inspection to be carried out more frequently as well as after severe storms, may be appropriate for the strip along the public road. The need for such a zone applies especially if the road is busy and if the trees are large or old enough to represent a significant potential hazard."

The judge in the High Court had been satisfied that this was a high risk zone, requiring more than the usual three-year inspection regime. When tendering for the 2009 survey, the defendant/appellant had asked for an individual report on this particular tree which the judge said could only have been because of its position and potential for harm (and that in itself a recognition of the need for additional care and attention).

Resources, or a tightening of them, cannot be justification for a failure to inspect some of the trees more carefully and/or frequently. The judge commented: "This lime tree was treated to the same inspection regime as all the other trees, including young saplings in areas far from the madding crowd … I suspect that there may be a small handful of trees within the parish which might have merited more frequent inspection. I suspect that there was none that had more potential for causing harm than this lime tree. What was required here was a distinction. If the vast majority of the tree stock had been inspected (as it could well have been) on a much more infrequent basis … a proper and more rigorous system of inspection could have been instigated in respect of the small number of trees which merited especial care; trees which were heavy, old/mature and in places where they could cause serious damage …" adding "I do understand that the First Defendant is not an insurer and that resources are finite".

A couple of additional points of interest to readers. The claimant/respondent's solicitors initially focussed their liability investigations on the tree inspector, who they felt must have missed the fungal bracket on the tree when checking it in 2009. He was a sole trader who was not insured to conduct tree inspections:

[4] *Witley Parish Council v Cavanagh* [2018] EWCA Civ 2232 at [9].
[5] *Stagecoach South Western Trains v Hind* [2014] EWHC 1891 (TCC).
[6] *Goldman v Hargrave* [1967] 1 A.C. 645; [1966] 3 W.L.R. 513.

his insurance was for tree felling liabilities only. He was not thought to be worth pursuing by those representing the claimant. An alternative claim against the defendant/appellant for failing to use an insured inspector (lack of insurance being likely indicator of lack of competence) was also rejected early on.[7]

Practice points

- Local authorities and other landowners should not rely solely on HSE guidance. Industry-specific guidance will be preferred, being more persuasive, if available. In this case, the Forestry Commission Guidance was obviously more useful to the judge and should have been on the tree-owning council's radar. Other likely sources could include location-specific related guidance such as the Well-Maintained Highways Code of Practice for Highway Maintenance, 2006 (now superseded by the 2016 Well-Managed Highway Infrastructure Code of Practice) which deals with trees along the highway, recommending a basic five year inspection regime, but also suggesting a separate more frequent programme of tree inspections for certain specimens, based on an arboriculturist's assessment of the likely risk for causing damage.
- Even though the case law suggests that the landowner need only call in the experts once a tree defect becomes evident, there is a duty to regularly inspect according to risk: landowners should have a system in place which assesses the risk of damage or injury based not only on the apparent health or size of each tree, but also its potential to cause harm based on its location, or "risk zone".
- Resourcing issues, either financial or manpower, cannot be an excuse for a failure to properly inspect: a one-size-fits-all inspection regime will not be acceptable. The High Court judge in the lower court correctly identified that juggling of resources by the Council would have enabled it to conduct more frequent inspections on the small number of high risk trees, while less frequent inspections would have been reasonable for those others, including "saplings far from the madding crowd".

Helen Blundell

Bellman v Northampton Recruitment Ltd

(Irwin LJ, Moylan LJ and Asplin LJ; 22 October 2018; [2018] EWCA Civ 2214)

Vicarious liability—employment—sufficiently close connection test—assault—employer—employee—personal injury—torts

LT Assault; Employee entertainment; Employees; Employers' liability; Managing directors; Proximity; Vicarious liability

Clive Bellman worked as a sales manager for the defendant, who operated as a recruitment agency for HGV drivers. After a Christmas party on 16 December 2011 Mr Major, the managing director of the defendant, assaulted the claimant. At around 2.00am, the conversation amongst the remaining employees had turned to work, including plans for the following year. At around 2.45am, a group of six including

[7] See R. Langton, "Root & Branch Reform" *APIL PI Focus*, December 2018.

Mr Major and Mr Bellman went outside. They stood together and continued to discuss business. Mr Bellman mentioned a Mr Steven Kelly, a new employee. Mr Kelly had been the subject of conversation in the office and it was understood that he was being paid substantially more than anyone else.

Mr Major became annoyed at being questioned about Mr Kelly's appointment and pointedly returned to the hotel lobby. Once inside, he "summoned" the remaining company employees and began to lecture them on how he owned the company, that he was in charge and that he would do what he wanted to do; that the decisions were his to take and that he paid their wages. The details of what happened next are contained in the judgment following the trial:

> "42 … By this time Mr Major was swearing and Mr Tomlin (the night porter whose evidence is agreed) heard him say 'Fucking Steven Kelly is in the right fucking place'. The Claimant [Mr Bellman] in a non-aggressive manner, challenged this stating that it would be better if he were based at Nuneaton. Mr Major moved towards Mr Bellman stating 'I fucking make the decisions in this company it's my business. If I want him based in Northampton he will be fucking based there' and punched Mr Bellman who fell down.
>
> 43. Mr Bellman got back up, bleeding from his left eye area, holding out his hands in a gesture of surrender and said, 'John, what are you doing? Don't do this'. However, Mr Major appears to have lost all control by this stage. Mr Hughes and Mr Harman pushed John Major back and tried to hold him, but, as the CCTV coverage shows, he broke free, ran back over and hit the Claimant [Mr Bellman] again with a sickening blow with his right fist, knocked him out such that he fell straight back, hitting his head on the ground."

HH Judge Cotter QC had held that there was an insufficient connection between the position in which Mr Major was employed and his wrongful conduct to make it right that the defendant should be liable under the principle of social justice. The appellant argued that this was wrong and the judge had failed to take account of the nature of Mr Major's job as managing director and the power and authority entrusted to him over subordinate employees; the fact that the wrongful conduct was triggered by a challenge to his managerial authority; whether the conduct was personal rather than connected to Mr Major's employment; that the risk of the wrongful conduct was enhanced by the defendant's provision of alcohol; and that he wrongly concluded that the imposition of vicarious liability for conduct in such circumstances would be potentially uninsurable and would place an undue burden on the employer.

The most recent decision on the relevant legal principles was the judgment of Lord Toulson in the Supreme Court in *Mohamud v WM Morrison Supermarkets Plc*.[1] The preceding case law, whilst illustrative of different circumstances, had to be seen through that prism. If that is done, then an evaluative judgment is required. It was a question of law based upon the primary facts as found by the trial judge.

The first question is what field of activities had been assigned to Mr Major as managing director and that had to be addressed broadly. His role was widely drawn and the judge had found that he would have viewed the maintenance of his managerial authority as a central part of his role.

The second question is whether that role and the wrongful act were sufficiently closely connected. The judge below had found they were not. He was wrong: despite the time and place, Mr Major was purporting to act as managing director and exercising that very wide role entrusted to him. He was seeking to drive home his managerial authority and he resorted to blows. Objectively, he was purporting to exercise his authority over his subordinates and was not merely one of a group of drunken revellers whose conversation had turned to work. The attack arose out of a misuse of the position entrusted to Mr Major as managing director. He asserted his authority in the presence of around 50% of the defendant's staff and misused that authority. It was not merely a discussion leading to an altercation between hotel guests and visitors, as the judge described them.

[1] *WM Morrison Supermarkets Plc* [2016] UKSC 11; [2016] A.C. 677.

The unscheduled drinking session was not a seamless extension of the earlier Christmas party, but Mr Major had already been fulfilling his managerial duties for a large part of the evening. Having orchestrated the party, he organised and paid for the taxis to the hotel and continued to provide drinks which were to be paid for by NR. Viewed objectively in that context, although the party and the drinking session was not a single seamless event and attendance was voluntary, it seems to me that Mr Major was not merely a fellow reveller. He was present as managing director of the defendant, a relatively small company, and misused that position, the discussion having been focused on business matters for between 45 minutes and an hour before his managerial decision making was challenged.

Even if he had not been acting as managing director at the hotel, he chose to act as that when he exercised control over the staff and called them together. It was Mr Major's job to take all managerial decisions and to enforce his authority, his remit was wide and he had the ability to decide when and where he would work. He followed up on the challenge to his managerial decisions with a lecture and blows just as in *Mohamud*, Mr Khan followed up on what had been said earlier when he left his kiosk and confronted the customer on the forecourt. In just the same way, Mr Major's lecture followed up by blows, was not personal. He was purporting to act about the defendant's business. This case illustrated the principle that misuse of authority can occur out of hours or when the parties are off-duty, particularly where someone is in a senior position.

There was a sufficient connection between Mr Major's field of activities and the assault to render it just that the defendant should be vicariously liable for his actions.

Comment

Mr Bellman was employed by Northampton Recruitment Ltd ("NR") as a Sales Manager. He recruited HGV drivers and placed them with clients. NR had only three directors and shareholders, a Mr Major being the managing director. He was the "directing mind" of NR and was authorised to act on behalf of NR with a wide remit. He saw himself as in overall charge of all aspects of NR's undertakings and things were done "his way". The trial judge further found as a fact that Mr Major saw the maintenance of managerial authority as a central part of his role.

In 2011, NR held a Christmas party for its office staff and their partners at a golf club. It was attended by 10 of the 11 staff members, including partners. Mr Major oversaw the smooth running of the party and he arranged taxis and accommodation for most of the guests at a nearby hotel. At about midnight, Mr Major paid for taxis to take those who wished to continue chatting and drinking back to the hotel. About 5–6 staff of NR adjourned to the hotel in response to Mr Major's invitation. After further drinks, the party began to wind down and Mr Major was left in the lobby with four other employees and their partners, including Mr Bellman and his partner Ms Thomas.

After 2.00am the focus of the conversation turned exclusively to NR's future business plans and at about 2.45am a group of six, including Mr Bellman and Mr Major, went outside the hotel. The conversation there turned to a new employee Mr Kelly. His appointment had already been the subject of discussion around NR's office as it was believed by staff that he was being paid substantially more than anyone else. Mr Major became annoyed at being questioned about Mr Kelly's appointment and he pointedly returned to the hotel lobby. Once in the lobby he "summoned" the remaining NR employees and proceeded to lecture them about how he owned the company and was in charge, the trial judge finding that Mr Major was probably significantly inebriated at this time and was losing his temper. When Mr Bellman non-aggressively then further questioned Mr Major about Mr Kelly, Mr Major punched Mr Bellman in the face and he fell over. Rising to his feet, bleeding from the left eye, and holding up his hands in a gesture of surrender, Mr Bellman was then the subject of a further punch after a restrained Mr Major had broken free and run towards him. The second punch led to Mr Bellman suffering a fractured skull as he hit the floor resulting in life changing traumatic brain damage.

Having established that Mr Major was the directing mind and will of NR; had a wide remit regarding the operation of NR; was in charge of all aspects of the business without set hours of work; and someone who viewed the maintenance of managerial authority as a central part of his role, the trial judge (HH Judge Cotter QC, sitting as a High Court Judge) concluded that the assault arose as a result of a drunken discussion after a personal choice to have yet further alcohol long after a works event has ended. As such, given the time and place, and the fact that the topic of conversations turned to work late in the evening long after the party had ended, Mr Major's conduct was unconnected with NR's business and thus there was an insufficient connection to make a finding of vicarious liability. Significantly, the trial judge made no reference to his own "broad assessment of what functions or fields of activity were entrusted to Mr Major".

On appeal the trial judge's findings of fact were unchallenged and it was common ground that the most recent and authoritative distillation of the relevant legal principles to be applied was Toulson JSC in the Supreme Court's decision *Mohamud v WM Morrison Supermarkets Plc*.[2]

His two stage test involves:

- broadly assessing what "field of activities" have been entrusted by the employer to the employee, i.e. what was the nature of the employee's job; and
- an assessment of whether there was sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable under the principle of social justice.

The appeal simply asserted that the trial judge had failed to properly apply the unchallenged facts when evaluating whether there was sufficient connection between Mr Major's field of activity and his wrongful conduct to make it right to hold NR liable. On its own evaluation of the same facts the Court of Appeal unanimously overturned the decision of the trial judge albeit Irwin LJ specifically emphasised in his own short judgment that this decision was fact specific and should not be relied upon to fix vicarious liability on an employer simply where there is an argument about work that leads to an assault.

In her lead judgment, Asplin LJ refined her consideration of Mr Major's field of activities in the context of the assault as being:

> "Was he [Mr Major] acting within the field of activities assigned to him by NR when he lectured a group of people including NR employees at 3 am in the morning in a hotel lobby when both he and they were seriously inebriated and when he then went on to assault Mr Bellman?"

Having due regard to the context and circumstances but not being bound by the shackles of actual authority, she held that he was so acting on the facts as found by the trial judge.

Dealing with the question of sufficient connection, Asplin LJ also found that part of the test to have been satisfied for, despite the time and place of the assault, Mr Major was purporting to act as managing director of NR and he was exercising his authority over his subordinate employees. Specifically, his lecture in the hotel lobby after "summoning" staff was focussed on the nature and extent of his authority in relation to NR's business and he chose to wear his metaphorical managing director's hat to deliver that lecture to subordinates, driving home his managerial authority with the use of punches. There was no suggestion that Mr Major's behaviour arose as a result of something personal and he was not simply one of a group of drunken revellers whose conversation turned to work. After a relatively prolonged discussion about NR's business and a challenge to Mr Major's managerial responsibility, Mr Major asserted his authority, his seniority persisting, and he misused his authority in the company of around half of NR's employees after a work event that he had orchestrated. In the premises, there was sufficient connection and it was just that NR was vicariously liable for the actions of Mr Major.

[2] *Mohamud v WM Morrison Supermarkets Plc* [2016] UKSC 11; [2016] A.C. 677.

Recently there have been many cases in this journal considering the evolution in the doctrine of vicarious liability. This case merely applies the now well known two stage test set out by Toulson SCJ in *Mohamud v WM Morrison Supermarkets Plc*.[3] However, given that the grounds of appeal did not contest the factual findings made by the trial judge, clearly, the test remains easier to state than to apply, even for experienced first instance judges.

The article on the case by Mr Bellman's counsel, David Sanderson[4] is enlightening. He wrote:

> "It is in many ways remarkable that the trial judge should have taken such care to make and record findings of fact that seem to clearly to point towards a finding of vicarious liability, only then to dismiss the claim."

I for one would share his apparent surprise.

Here Mr Major had effectively been found to embody the spirit; total operational control; and total managerial authority of NR. He constantly worked within NR's best interests without fixed hours. At the time of his assault he had been at a party organised and managed by him and, although in a different location and after the end of that party, he had "summoned" staff to him to lecture them in the hotel lobby. As such, if he had relinquished his senior role over staff at the end of the party, he had clearly resumed it by the time he assaulted Mr Bellman. The relationship of manager and subordinate, if it had ever gone, had returned by the time of the assault.

The reality, therefore, is that this case does involve extreme facts and it is no surprise that Irwin LJ specifically emphasised how unusual the facts of this case are and how it should not be understood to be sanctioning the imposing of vicarious liability in cases where assaults occur between colleagues, even if one colleague is markedly more senior than the other. Interestingly, however, it has already been cited with approval in *WM Morrison Supermarkets Plc v Various Claimants*.[5]

In that case, considered in detail elsewhere in this edition, concerned an employee uploading confidential personal employee information on the internet from a home address, the data being downloaded by the Morrison employee at work. The fact that the act of uploading was done away from the workplace was relied upon by Morrisons as an insufficient connection but the Court of Appeal cited Bellman as an example of vicarious liability being established even where the tortious act is committed away from the workplace.

Accordingly, although *Bellman* cannot be relied upon for the simple proposition that employers become insurers for violent or other tortious acts by their employees it is another very useful illustration of the application of Toulson SCJ's two stage test and the evaluation of facts necessary to establish vicarious liability.

Practice points

- When considering the "field of activities" an employer entrusts an employee it is necessary to obtain detailed factual evidence of his role, with examples of past conduct if possible.
- Considering whether there is "sufficient connection" the location of the conduct does not necessarily have to be at the workplace or during a work event.
- The key fact is the nature of the relationship between employee and conduct, here Mr Major always remained in a managerial capacity asserting control over staff.
- Expect more cases on vicarious liability exploring the bounds of Toulson SCJ's test.

Jeremy Ford

[3] *Mohamud v WM Morrison Supermarkets Plc* [2016] UKSC 11; [2016] A.C. 677.
[4] D. Sanderson, *APIL PI Focus*, December 2018.
[5] *WM Morrison Supermarkets Plc v Various Claimants* [2018] EWCA Civ 2339; [2019] 2 W.L.R. 99.

WM Morrison Supermarkets Plc v Various Claimants

(The Master of the Rolls Bean LJ, Flaux LJ; 22 October 2018; [2018] EWCA Civ 2339)

Vicarious liability—employment—sufficiently close connection test—assault—employer—employee—personal injury—torts—data protection—unauthorised acts

Data breach; Employers' liability; Misuse of private information; Vicarious liability

Mr Skelton was a senior IT internal auditor employed by Morrisons. Following a disciplinary hearing for an incident involving his unauthorised use of Morrisons' postal facilities for his private purposes, he was given a formal verbal warning on 18 July 2013. Mr Skelton was annoyed by the disciplinary proceedings and the sanction. They left him with a grudge against Morrisons.

On 1 November 2013, an external auditor of the defendant requested several categories of data to undertake the annual audit. Mr Skelton was entrusted with that data, including payroll data, to pass on to them. On 18 November 2013, whilst at work, he copied that data on to a personal USB stick with a view to later disclosing it. On 12 January 2014, he posted a file containing the personal details of 99,998 employees of Morrisons on a file sharing website. He also sent copies of the data to a number of newspapers. The *Bradford Telegraph & Argus* informed the defendant. Within a few hours, they had taken steps to ensure that the website had been taken down. Morrisons also alerted the police.

Mr Skelton was arrested on 19 March 2014. He was charged with fraud, an offence under the Computer Misuse Act 1990 and under the Data Protection Act 1998 ("DPA") s.55. He was tried at Bradford Crown Court in July 2015 and was convicted. He was sentenced to a term of eight years imprisonment.

A group action was brought by a number of employees. It was unsuccessful in establishing that the defendant was primarily liable for the damage they had suffered due to the disclosure, but they were successful in establishing that the defendant was vicariously liable for the actions of Mr Skelton.

The defendant appealed that finding on three grounds:

- The DPA excluded the application of vicarious liability.
- It also excluded the application of causes of action for misuse of private information and breach of confidence and/or the imposition of vicarious liability for breaches of the same.
- The wrongful acts were not undertaken during the course of Mr Skelton's employment and accordingly there could be no vicarious liability.

The common law principle of vicarious liability is not confined to common law wrongs. It applies to a breach of statutory duty provided the statute does not expressly or impliedly indicate otherwise.[1] The DPA did not expressly exclude vicarious liability. It expressly recognises the potential liability of a data controller for the wrongful processing of data by his employees and imposes a primary liability on the employer restricted to taking "reasonable steps" to ensure the reliability of the relevant employee.

The question was whether, taken as a whole, the common law remedy would be incompatible with the statutory scheme and therefore could not have been intended to co-exist with it.[2] First, if Parliament had intended to exclude the common law vicarious liability of an employer for the processing of information by an employee, who happened to be the data controller under the DPA, they would have said so explicitly. Secondly, if the employee could be primarily responsible but the employer could not be vicariously liable

[1] *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34; [2007] 1 A.C. 224.
[2] *R. (on the application of Child Poverty Action Group) v Secretary of State for Work and Pensions* [2010] UKSC 54 followed.

as it would lead to an inconsistency in the principal object of the DPA, and Directive 95/46[3] which it sought to implement, namely the protection of privacy and the provision of an effective remedy for its infringement. Thirdly, the DPA says nothing at all about the liability of an employer, who is not a data controller, for breaches of the DPA by an employee who is a data controller and the DPA is concerned only with the liability of the data controller. It has nothing to say at all about the vicarious liability of another for the wrongful processing of that data by the data controller. The DPA did not impliedly or expressly exclude vicarious liability.

There are two questions to be considered in relation to the issue of vicarious liability here following *Mohamud v WM Morrison Supermarkets Plc*.[4] The first of those required the court to identify the field of activities entrusted to the employee. This had been correctly identified by the court as relating to the receipt, storage and disclosure of the payroll data. The second question was at the heart of the dispute between the parties in this case.

The argument of the appellant was that the close connection test was not satisfied since the tortious act which caused the harm was done by Mr Skelton at his home, using his own computer, on a Sunday, several weeks after he had downloaded the data at work onto his personal USB stick. In this case, the claimants' causes of action were established at the time that the data was improperly downloaded on to the USB stick. It was at that point they could have taken action against him. In *Bellman v Northampton Recruitment*,[5] Asplin LJ had identified that the temporal gap between events was less significant than the nature of the act. The judge had correctly concluded that the actions of Mr Skelton at work, in removing the data, and at home, in disclosing the data, were a seamless and continuous sequence of events.

The argument that where the aim of the wrongdoing was to harm the employer it would be wrong to impose vicarious liability as it would further those aims was not an exception to the irrelevance of motive.

The employer was liable for Mr Skelton's torts.

Comment

At the time of starting to write this comment, the Prime Minister has just survived a vote of no confidence forced on her by hard-line "Brexiteers" within her party who, amongst other things want the UK to back control of our own laws. I make no comment as to whether they are right or wrong, but it is worth reflecting that not all laws or jurisprudence that has emanated from Europe is bad or wrong. For example, the Data Protection Act 1998 ("DPA"), which provides protection for all our personal data, was enacted pursuant to a European Parliament Directive[6] and provides for the protection of individuals with regards to the processing of personal data and was intended to ensure free movement of data within the EU while protecting individuals. Superficially, the DPA is at the centre of this case. More fundamentally though, this case is about vicarious liability and emphasises, once again, how the common law continues to develop.

This Appeal was in respect of liability only, though it will be interesting to see how Langstaff J approaches the issue of damage and quantum in respect of the group action of 5,518 employees whose personal data was posted online by a disgruntled former employee of Morrison's who bore a grudge. It is, of course, also possible (or indeed likely) that Morrisons will seek permission to appeal to the Supreme Court.

While data protection may be at the centre of this case its real interest, particularly in the context of personal injury claims, is vicarious liability. This is Morrison's second brush with vicarious liability; their

[3] Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31.

[4] *Mohamud v WM Morrison Supermarkets Plc* [2016] UKSC 11; [2016] A.C. 667.

[5] *Bellman v Northampton Recruitment* [2018] EWCA Civ 2214; [2018] 10 WLUK 202.

[6] Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31.

first being *Mohamud v William Morrison Supermarket Plc*[7] which involved an assault of a customer by an employee at a petrol filling station. In that particular case, while the actions of the employee were a gross abuse of his position as an employee of Morrisons there was, nevertheless, in connection with both his employment and Morrison's business. WM Morrison had entrusted their employee with his role at the petrol filling station and was responsible for his subsequent abuse of that position when assaulting a customer. The Supreme Court's decision in *Mohamud* has arguably broadened the circumstances in which an employer can be held vicariously liable for the actions of its employees. I think one can go further and say that both *Mohamud* and this case has potentially made it easier for customers and fellow employees to seek redress when they are affected by the unlawful actions of another employee. It is this that will be of interest to personal injury practitioners.

As we all know, vicarious liability is a doctrine in tort law, dating back to the middle ages, which imposes strict liability on employers for the wrongdoing or negligence of their employees while during their employment. Although vicarious liability is a common law principle, it can also apply to breach of statutory duty, provided that the statute does not expressly or impliedly provide otherwise. Consequently, the Court of Appeal had to consider whether vicarious liability was incompatible with the Data Protection Act 1998. The view of the Court of Appeal was that if Parliament had intended to exclude from vicarious liability an employer who was also the data controller it would have specifically said so in the Act. It also took the view that if the employee was primarily responsible for a data breach, it would inconsistent with the intent of the Act and EU Directive 95/46. In short, the Act did not expressly or impliedly exclude vicarious liability.

The employee in this case, a Mr Andrew Skelton, was employed as a senior IT internal auditor. To assist KPMG as external auditors he was asked to provide certain data which included payroll data to enable KPMG to carry out their own audit. Skelton downloaded the data provided by Morrison's HR department from an encrypted USB stick onto his laptop. This data was then downloaded onto another USB stick provided by KPMG and given to them. A couple of weeks later, Skelton downloaded the data again onto yet another USB. Several weeks later, while at home on a Sunday, Skelton downloaded the data from the USB onto his own computer posted details of nearly 100,000 Morrison employees on a file sharing website. Some weeks later again this data, copied onto a CD, was posted anonymously to a local newspaper.

The question then is whether Skelton, when deliberately copying the data, taking it home and posting it on a file sharing site, was acting in the course of his employment. In recent years, what constitutes "in the course of employment" is something that has exercised legal minds in recent years, this is particularly so in sexual abuse cases. *Mohamud* emphasised that:

> "The risk of an employee misusing his position is one of life's unavoidable facts."[8]

That is something that was emphasised in this case when considering the test for vicarious liability set out in *Mohamud,* namely:

- What "field of activities" was entrusted to the employee, or what was the nature of their job?
- Was there sufficient connection between the nature of the role in which someone is employed and their wrongful act?

It is in the context of this case that the application of the *Mohamud* test is interesting. Morrison Supermarkets argued that this close connection test was not satisfied as the act causing the harm was committed in Skelton's own home, using his own computer and some weeks after he had copied the data

[7] *Mohamud v William Morrison Supermarket Plc* [2016] UKSC 11; [2016] A.C. 667.
[8] *Mohamud v WM Morrison Supermarkets Plc* [2016] UKSC at [40].

onto his own USB stick. Following *Bellman v Northampton Recruitment Ltd*,[9] the court concluded that at the point in time when Skelton downloaded the employees' data onto his own USB stick, action could have been taken against him and therefore the time lapse between downloading the data was less important than the nature of the act of posting the data online. The actions of Skelton at work in copying the data and then of disclosing the data from his own home were a seamless and continuous series of events. Accordingly, the appeal was dismissed and Morrison was liable for the torts committed by Skelton.

It will be interesting to see how quantum is addressed. I suspect things may well get compromised. However, with the number of data breaches, deliberate or otherwise, such claims could be a growth area for PI practitioners.

Practice points

- Look to your own data protocols and make sure your businesses are safe.
- The decision has broadened the circumstances in which an employer can be liable for the actions of employees.
- For vicarious liability to be established there needs to be:
  - An examination of the field of activities or role of the employee.
  - Consideration as to whether the wrongful conduct of the employee is sufficiently connected with the field of activities or role of the employee.
  - Provided that there is a seamless connection in the actions of the employee, a gap in time is of less significance.

David Fisher

Yah v Medway NHS Foundation Trust

(Whipple J; 5 November 2018; [2018] EWHC 2964 (QB))

Psychiatric injury—secondary victims—primary victims—birth—mother—expert evidence—the Congenital Disabilities (Civil Liability) Act 1976

Birth defects; Clinical negligence; Mothers; Primary victims; Psychiatric harm; Remoteness

On 9 July 2012, the claimant's daughter was born at the Medway Hospital by emergency caesarean section. She was in poor condition and required resuscitation. Her mother, the claimant, knew something was wrong. Her baby was taken to the special care baby unit, where she was cooled and intubated. She saw her baby for the first time the next morning in a box, surrounded by medical equipment, tubes and monitors, and she could not hold her or touch her.

The baby had since been diagnosed with cerebral palsy. The defendant had admitted liability on the basis that there was a culpable delay in delivering the baby after clear signs of distress were evident. The claimant sought damages for psychiatric injury and the defendant argued that there was no entitlement to those damages.

The central issues for the court were:

- Was the claimant, properly classified, a primary victim in law?

[9] *Bellman v Northampton Recruitment Ltd* [2018] EWCA Civ 2214.

- If she was a primary victim, whether she must show that her psychiatric injury was caused by shock in order to recover damages?
- If she was a primary victim, whether the psychiatric damage that she suffered was too remote from the defendant's admitted negligence to permit recovery of damages?
- Whether she had an alternative claim as a secondary victim?
- If liability was established as either a primary or secondary victim, what level of damages was appropriate?

It was settled law that a baby is part of its mother until birth; until that point, there is a single legal person.[1] In turn, what flows from that principle is that the mother is a primary victim where she suffers personal injury consequent on negligence which occurs before the baby is born. The Congenital Disabilities (Civil Liability) Act 1976 gives a child a right to sue for damages for events that occurred before its birth, but it does not operate to deprive the mother of her rights as a primary victim. If that was intended, then the words in the act would need to be clear as it would have created an exception to the general common law rule that a person who sustains personal injury as a consequence of the negligence of another can sue for compensatory damages.

In any event, it was not clear what legitimate policy objective it would promote. Specifically, the policy objective could not be the avoidance of double recovery because the compensatory principle would prevent either mother or baby from recovering the same loss twice.

There was no requirement for a primary victim who brought a claim for "pure" psychiatric injury to show that the injury was caused by shock.[2] A primary victim could, in principle, claim for a psychiatric injury which had not been caused by shock, but by the accumulation over a period of more gradual assaults on the nervous system, which had given rise to a recognised psychiatric condition.

The evidence established that the claimant had suffered an anxiety disorder following the birth. Depression came later, due to a recognition of the extent of the brain damage to her child. The conditions combined to form a single indivisible mental disorder which has varied in intensity over time and which is ongoing, currently resurgent with the stress of the trial, and with fluctuations likely in future. The contribution of all those causes was material to the outcome. The damage was not too remote.

The claimant's mental disorder was inexorably bound up with the claimant's experiences in the delivery room and with her worry about her child's likelihood of survival in the first few hours and days of its life. The causes of the mental disorder were closely linked to the defendant's obstetric negligence. The first factor was directly contemporaneous with that negligence because the difficult labour was the reflection and direct consequence of the failure to deliver the baby earlier.

If the claimant had proceeded on the basis of being a secondary victim alone she would not have recovered damages. Although the claimant's experiences during the delivery and afterwards were shocking and traumatic, using those terms in the ordinary way, they did not constitute "shock" in an *Alcock*[3] sense.

Damages awarded in the sum of £76,183.

Comment

Many mothers who suffer a traumatic birth of their child which leads to its permanent injury go on to suffer significant adverse psychological reactions, typically involving elements of PTSD. Some sources suggest that the incidence of significant psychological reactions in such circumstances is circa 10%. Psychiatric injury arising in this context is not litigated (at least not in reported cases) quite as much as

[1] *Wild v Southend University Hospital NHS Foundation Trust* [2014] EWHC 4053 (QB); [2014] 12 WLUK 87, *Wells v University Hospital Southampton NHS Foundation Trust* [2015] EWHC 2376 (QB); [2015] 8 WLUK 88 and *RE v Calderdale and Huddersfield NHS Foundation Trust* [2017] EWHC 824 (QB); [2017] 4 WLUK 296 considered.

[2] *Page v Smith* [1996] A.C. 155; [1995] 2 W.L.R. 644 followed.

[3] *Alcock v Chief Constable of South Yorkshire* [1992] 1 A.C. 310; [1991] 3 W.L.R. 1057.

one might expect. This may be because such claims will usually be modest and insignificant in comparison to claims for the injured child upon whom the main focus will rest, but also perhaps because of the difficulty proving factual causation, and uncertainty as to how the law will be applied to such claims. Psychiatric injury claims, or "nervous shock" to use the now outmoded language are rarely straightforward.

In this case, the defendant took the opportunity to attack the claimant's case both on the law and factual causation. As regards the law it was argued first, that the claimant could not bring herself within the category of primary victim because the injury was to her daughter who acquired independent rights under the Congenital Disabilities (Civil Liability) Act 1976. Secondly, it was argued that even if the claimant was a primary victim, she still needed to show that she had suffered her psychiatric injury by a sudden appreciation of a horrifying event such that a psychiatric injury was foreseeable. As an additional gloss on these arguments, the defendant contended that the distinction between primary and secondary victims was not helpful and that there was a blurring of the lines when the injury was sustained in the course of a traumatic birth and its aftermath. This latter argument has been aired by some authors and academics who have written on the vexed subject of psychiatric injury, but there is scant support from the established authorities, and it seems clear that judge's (and practitioners) like the simplicity of segregating claimants into either primary or secondary victims. Certainly, Whipple J had no trouble accepting that there was no scope for going behind the system of classification and the control mechanisms set out in *Alcock* and applied in *Page v Smith*. Although the claimant was only claiming for psychiatric injury and its consequences, the fact that she could also have claimed for the pain and suffering of a negligently prolonged delivery emphasised her status as a primary victim.

Similarly, Whipple J had little truck with the argument that primary victims needed to prove the existence of horrifying trigger before they could claim for purely psychiatric injury. She relied on the House of Lords opinions in *Page v Smith* in this regard, in particular, that of Lord Lloyd who gave the leading speech. At 187B he said:

> "Can it be the law that the fortuitous absence of actual physical injury means that a different test has to be applied [to psychiatric as opposed to physical injury]?"

His answer was a solid and sensible "no!":

> "In an age when medical knowledge is expanding fast, and psychiatric knowledge with it, it would not be sensible to commit the law to a distinction between physical and psychiatric injury, which may already seem somewhat artificial, and may soon be altogether outmoded. Nothing will be gained by treating them as different 'kinds' of personal injury, so as to require the application of different tests of law."

So it is that the control mechanisms for pure psychiatric injury only come into play when considering the duty of care to a secondary victim. And it is not necessary to assess if the claimant is of "ordinary phlegm" as this is a control mechanism relevant only to secondary victims. You take a primary victim as you find her—eggshell skull and all.

Those of us practising in this area of law know just how difficult it is to succeed in a secondary victim claim regarding clinical negligence, and the Court of Appeal's decision in *Ronayne v Liverpool Women's Hospital*[4] emphasises the point. Whipple J held that she would not have found for the claimant if she had not been a primary victim. The judge did not consider the events experienced would constitute "shock" in the *Alcock* sense.

When all is said and done, Whipple J's judgment on the legal principles is uncontroversial but is helpful in clarifying the position of psychiatric harm in the context of birth injuries.

[4] *Ronayne v Liverpool Women's Hospital NHS Foundation Trust* [2015] EWCA Civ 588; [2015] 6 WLUK 554.

As regards the defendant's argument on factual causation, this was wholly dependent upon it being able to show that the claimant's psychological problems were due predominantly to the stress of having to care for her disabled daughter rather than to the stresses of the traumatic birth itself. Unfortunately for the defendant, it was let down badly by its expert psychiatrist, Dr Faith, whom the judge found to be an unhelpful witness who was:

> "overly dogmatic about the classification of mental illness, at the expense, at times, of the evidence … I was not impressed by her stated preference for working for Defendants and the reasons she gave for doing so. I was not impressed by her inclusion of the hospital records in her report as 'seen' in circumstances where she accepted that she had not read them at the time she authored her report."

The judge found that expert's evidence "not only confusing but becoming circular". It turned out that the expert had originally been instructed to report on the claim as one of nervous shock to a secondary victim such that the report focussed on "shock" or the lack of it, an approach which coloured much of her subsequent thinking. However, despite the poor quality of the expert's testimony, she had already agreed in the joint statement that there were three main contributors to the claimant's psychological damage comprising:

- difficult labour culminating in C-section;
- the worry immediately after the birth as to whether the child would survive; and
- the strain of looking after the child.

In the light of these concessions, which Dr Faith said she did not wish to resile from, the judge was able to hold that all three factors made a material contribution to the overall injury and hence factual causation was made out.

As a footnote regarding the defendant's expert, Dr Faith, however, it is interesting to observe that in *Ronayne* the Court of Appeal accepted her evidence when reaching its conclusion that only the most exceptional secondary victim claims arising out of negligent hospital treatment would succeed.

Practice points

- Psychiatric injury claims always bear close analysis of the founding principles developed in *Alcock* and *Page*.
- A mother bringing a claim for psychiatric injury arising out of a peri-natal injury to the foetus will classify as a primary victim.
- Claims for psychiatric injury to secondary victims always turn very much on their own facts, but are exceptionally difficult to establish in the context of clinical negligence.
- Choice of psychiatry expert in a psychiatric injury claim is crucial. Amongst other criticisms made of the defendant's expert, in this case, was the fact that she did not have much experience of treating patients with the type of disorder suffered by the claimant. Instead, the expert had predominantly practised in a secure psychiatric unit containing patients with very different diagnoses. It was also commented how little time she had spent interviewing the claimant as compared with the claimant's own expert. Corners had been cut which let the expert down badly when it came to trial.

Nathan Tavares QC

Lewis v (1) Tindale (2) Motor Insurers' Bureau (3) Secretary of State for Transport

(QBD (Birmingham); Soole J; 14 September 2018; [2018] EWHC 2376 (QB))

Insurance—road traffic—European Union—causation—direct effect—EU law—Motor Insurers' Bureau—principle of conforming interpretation—public authorities—roads—uninsured drivers

Compulsory insurance; Direct effect; EU law; Motor Insurers' Bureau; Personal injury; Road traffic accidents; Uninsured drivers

The claimant brought a personal injury claim against an uninsured driver, the first defendant, and joined the Motor Insurers' Bureau ("MIB") into the proceedings as the second defendant.

The court had to determine, as preliminary issues, the MIB's liability when the accident occurred on private land, whether the Road Traffic Act 1988 could be read so as to extend the compulsory insurance obligation in Directive 2009/103 art.3 to private land, the direct effect of that Directive and the MIB's status as an emanation of the state.[1]

The first defendant had driven the uninsured vehicle from a road onto a footpath before deliberately driving through a barbed wire fence onto private land towards the claimant and colliding with him. The MIB denied having any contingent liability to the claimant on the basis that the accident and injuries were not caused by "the use of a vehicle on a road or other public place".

Soole J concluded that the European Court of Justice had decided that the concept of "use of vehicles" in art.3 covered "any use of a vehicle that is consistent with the normal function of that vehicle": *Vnuk v Zavarovalnica Triglav dd*[2] followed. Although in *UK Insurance Ltd v R & S Pilling*[3] the submissions on causation had included reference to *Vnuk*, the ECJ had not referred to causation in its judgment but had relied exclusively on domestic authority. The critical factual distinction between *R&S Pilling* and the instant case was that the cover provided by the policy in the former was not geographically limited to "the use of a vehicle on a road or other public place" within s.145(3), so the court did not need to consider whether there was a sufficient causal link between its prior use on the road and the subsequent damage. The first defendant's use of the road before taking the deliberate course of entering the field was a fortuitous concomitant of the accident and in no way a contributing factor: *Inman v Kenny*;[4] *Clarke v Clarke*.[5]

To interpret s.145(3) by removing the geographical limitation to a "road or other public place" would go against the thrust of the legislation which provided that particular limitation and raise policy ramifications which were not matters for the court. Moreover, the effect of such a modification would be to impose retrospective criminal liability for the use of uninsured vehicles on private land, which excluded the need for a conforming interpretation of domestic law.

As conceded by the MIB in *RoadPeace v Secretary of State for Transport*,[6] the obligation placed on the state by art.3 to ensure that civil liability in respect of the use of vehicles was covered by insurance was unconditional and sufficiently precise to have direct effect. Since the date of the claimant's accident,

[1] Directive 2009/103 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability [2009] OJ L263/11.
[2] *Vnuk v Zavarovalnica Triglav dd* (C-162/13) EU:C:2014:2146; [2014] 9 WLUK 139.
[3] *UK Insurance Ltd v R & S Pilling (t/a Phoenix Engineering)* [2017] EWCA Civ 259; [2017] Q.B. 1357.
[4] *Inman v Kenny* [2001] EWCA Civ 35; [2001] 1 WLUK 180.
[5] *Clarke v Clarke* [2012] EWHC 2118 (QB); [2012] 3 WLUK 1018.
[6] *RoadPeace v Secretary of State for Transport* [2017] EWHC 2725 (Admin); [2018] 1 W.L.R. 1293.

the ECJ authorities had made it unequivocal that the obligation of compulsory insurance extended to the use of vehicles on private land. The effect of those authorities was not subject to any temporal limitation so art.3 had direct effect of the extent of at least the minimum requirement of €1 million per victim, in accordance with art.9 of the Directive.

In finding that the MIB was an emanation of the state, it was not necessary to establish that it was under state control, *Byrne v Motor Insurers' Bureau*.[7] Private law bodies could be an emanation of the state for the purposes of obligations having direct effect, *White v White*.[8] Although the MIB was a private law body whose contract with the secretary of state required it only to meet an unsatisfied Pt VI liability, the state's unimplemented obligation under the Directive had to be met by its designated compensation body, *Farrell v Whitty*.[9]

Comment

The law relating to compulsory motor insurance has been thrown into a state of some flux in the last few years. A series of decisions from both the Court of Justice of the European Union ("CJEU") and the domestic courts have given rise to considerable change and uncertainty in this area of the law, particularly in relation to the extent of the Motor Insurers' Bureau's ("MIB") liability to cover injury and damage caused by uninsured motorists. The current case represents the most recent contribution to this transformative series of cases but is most unlikely to be the final word on the issue.

There have been compulsory requirements for insurance for motor vehicles in the UK since the implementation of the Road Traffic Act 1930. Further, since 1946 there has been a mechanism in place by which those injured by uninsured motorists could recover compensation via the MIB. The MIB's liabilities have been set out in a series of extra-statutory agreements with the Secretary of State for Transport (or other relevant minister). But since 1972, the law in this area has primarily been determined by European law with the introduction of the First Motor Insurance Directive.[10] This was followed by a series of Directives concerned with motor insurance which were eventually all consolidated into the Sixth Motor Insurance Directive in 2009.[11] Article 3 of the 2009 Directive requires all Member States to bring into force the necessary measures to:

> "ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance."

In addition, art.10 requires each member state to set up a body:

> "with the task of providing compensation … for damage to property or personal injuries caused by an unidentified vehicle or a vehicle for which the insurance obligation provided for in Article 3 has not been satisfied."

The UK Government has sought to rely upon a combination of legislation and the MIB Agreements to attempt to comply with its obligations under the Directive.

However, as the current case illustrates, there is a limitation on the scope of compulsory motor insurance in our domestic legislation that is not contained within the Directive. The Road Traffic Act 1988 s.143(1) restricts the requirement for insurance to use of a motor vehicle "on a road or other public place". The MIB is only required by their various Agreements to satisfy any judgment that would have been covered

[7] *Byrne v Motor Insurers' Bureau* [2008] EWCA Civ 574; [2009] Q.B. 66.
[8] *White v White* [1998] 9 WLUK 310; [1999] 1 C.M.L.R. 1251.
[9] *Farrell v Whitty* (C-413/15) EU:C:2017:745; [2018] Q.B. 1179.
[10] Directive 72/166 on the approximation of the laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability [1972] OJ L103/1.
[11] Directive 2009/103 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability [2009] OJ L263/11.

by the compulsory insurance requirements of the Road Traffic Act 1988. It follows that when somebody is injured by an uninsured motorist on private land, the MIB Agreement (in combination with the 1988 Act) does not require the MIB to satisfy any judgment obtained against the uninsured motorist. In the current case, it was because Mr Lewis was on private farmland when Mr Tindale deliberately collided with him that the MIB refused to accept any liability for his claim.

A series of recent CJEU decisions have raised issues about this limitation of compulsory motor insurance in UK legislation to roads and public places. These start with the decision in *Vnuk v Zavarovalnica Triglav dd*.[12] The case involved an accident in Slovenia where Mr Vnuk fell off a ladder in a farmyard as a result of a trailer being pulled by a tractor colliding with the ladder. He brought a claim against the tractor's insurers, but his case initially failed because the Slovenian courts found the insurance did not cover the use of a tractor in a farmyard. The CJEU concluded that the scope of compulsory third party insurance cover extends to cover any accident caused by the use of a vehicle that is consistent with the normal function of that vehicle. Whilst the case was not concerned with the UK's limitation to use of a vehicle on a road or public place, it was implicit from this judgment that the CJEU considered the Directive to cover "any use", i.e. the use of any motor vehicle being used in almost any way in any location.

The CJEU returned to the question of the scope of compulsory insurance under the Directive in *Torreiro v AIG Europe Ltd*.[13] Mr Torreiro was a passenger in an all-terrain vehicle that overturned whilst travelling off road during a military exercise in Spain. Spanish law did not require vehicles driven on terrain generally unsuitable for use by motor vehicles to be insured. The CJEU held that the fact the vehicle was being used as a means of transport was sufficient to bring it within the scope of the Directive's obligation for compulsory insurance. They concluded that the law in Spain should not have omitted vehicles used on such terrain from the requirement for insurance cover. In other words, the CJEU appeared to be confirming that there cannot be a restriction on where a vehicle is used as a means of transport when it comes to the requirement for insurance cover.

What clearly emerges from such decisions of the CJEU is that the limitation in the Road Traffic Act 1988 restricting compulsory insurance cover to vehicles used on a road or public place is at variance with European law. It was the implications of this situation that Soole J had to consider in this current matter. Soole J accepted that:

> "the CJEU has made it unequivocal that the obligation of compulsory insurance extends to the use of vehicles on private land. This is implicit in *Vnuk* and explicit in subsequent decisions."[14]

He rejected arguments that the Act could be interpreted in any way that was consistent with the Directive. To do so, he felt, "clearly goes against the grain and thrust of the legislation" with its explicit geographical limitation to a road or public place. He was concerned that to find otherwise would have policy ramifications, and might give rise to retrospective criminal offences for those who had not insured their vehicles for use on private land.

But Soole J went on to accept the claimant's arguments that the MIB is an emanation of the state against whom the Directive gave him directly effective rights. It follows from such a finding that those injured by uninsured motorists on private land can potentially bring a claim against the MIB to enforce their right to recover compensation under the Directive. However, it should be noted that Soole J did add that the MIB would be liable only up to the minimum guarantee level set out in the Directive which, at the time of the accident, was one million euros. In some cases involving significant injury or loss, this is unlikely to be sufficient to provide full compensation.

[12] *Vnuk v Zavarovalnica Triglav dd* (C-162/13) EU:C:2014:2146; [2014] 9 WLUK 139; [2016] R.T.R. 10.
[13] *Torreiro v AIG Europe Ltd* (C-334/16) EU:C:2017:1007; [2017] 12 WLUK 533.
[14] *Lewis v (1) Tindale (2) Motor Insurers' Bureau (3) Secretary of State for Transport* [2018] EWHC 2376 (QB) at [96].

This is only a first instance decision. The MIB has been given permission to appeal this decision and it is likely the issue will be revisited in the appeal courts. A certain degree of legal uncertainty will persist in this area until further decisions are handed down by the appeal courts. But as things stand, this is a decision with significant implications, particularly for the MIB who are potentially now liable for accidents on private land. Beyond this, the MIB might also now be potentially liable for other accidents involving vehicles currently excluded from the ambit of compulsory insurance as they were not "intended or adapted for use on roads".[15] Decisions such as *Vnuk* and *Torreiro* suggest that accidents involving certain off road vehicles may well fall within the scope of the Directive notwithstanding their exclusion from insurance requirements in UK legislation. There is clearly now potential to enforce such claims directly against the MIB as well.[16]

Practice points

- On the basis of this decision, the provisions of the Motor Insurance Directive do have direct effect against the MIB, and the MIB are obliged to satisfy judgments pursuant to it.
- Actions arising from a vehicle being used on private land can potentially be brought against the MIB on the basis that they are an emanation of the state and the Motor Insurance Directive is directly enforceable against them.
- Actions arising out of the use of a vehicle that is not generally intended or adapted for use on a road might also have scope to be brought by way of a direct action against the MIB.
- It is important to be aware that such direct actions against the MIB enforcing the Directive are potentially limited to the "minimum requisite cover" set out in the Directive.

Richard Geraghty

Kelly Wallett (On Her Own Behalf and on Behalf of the Dependants of Ian Hill (Deceased)) v Michael Vickers

(Males J; 14 November 2018; [2018] EWHC 3088 (QB))

Personal injury—volenti non fit injuria—ex turpi causa—dangerous driving—racing—encouragement—joint criminal enterprise—causative potency—relative blameworthiness—turpitude

LT Contributory negligence; Dangerous driving; Ex turpi causa; Fatal accidents; Joint enterprise; Road traffic accidents

The deceased and the defendant had been driving alongside each other at speeds close to twice the legal limit. Each with the intent of getting first to the point where the road narrowed. At that point of the road, the deceased lost control of his vehicle and swerved across the central reservation into the path of two oncoming vehicles.

The defendant was found guilty of dangerous driving and sentenced to six months imprisonment and disqualified from driving for 12 months. The claim had proceeded in the court below on the basis that the

[15] Road Traffic Act 1988 s.185(1).

[16] See also *Lewington v Motor Insurers' Bureau* [2017] EWHC 2848 (Comm); [2017] 10 WLUK 672 where Bryan J considered this same restriction within the context of a claim under the MIB Untraced Drivers Agreement, holding that the Road Traffic Act 1988 s.185(1) had to be interpreted so as to be consistent with the compulsory insurance requirements set out in the Motor Insurance Directive.

defendant's dangerous driving, racing with the deceased, caused or contributed to his loss of control so as to give rise to a liability for negligence. The defence pursued alleged both volenti non fit injuria and ex turpi causa. It was the latter that the appeal related to.

The defendant argued that the deceased had been engaged in dangerous driving and that regardless of whether that amounted to a joint criminal enterprise he should be prevented from recovering damages for the consequence of his own criminal act.[1] *Gray* though concerned the serious criminal offence of manslaughter. Absent a joint criminal enterprise dangerous driving would not bar a claim pursuant to the ex turpi causa principle. The claim was to be determined in accordance with the principles of causation and contributory negligence.[2] That would be sufficient to give effect to the requirements of justice and public policy.

The Supreme Court had explained in *R. v Jogee*[3] that in such circumstances, each party is responsible in law for the commission of the criminal offence. When a person assists or encourages another to commit a crime they are an accessory or secondary party. A fundamental principle of criminal law is that they are guilty of the same crime as the principal. It followed that if they were injured by the principal's criminal conduct they could not recover compensation as they stand effectively as an accessory in the shoes of the principle and they would be claiming damages for conduct for which they were in law responsible.

In cases where the claimant was only an accessory, as in the case of a passenger, the ex turpi causa principle could only apply if they could be fixed with responsibility for the criminal conduct pursuant to the principles of joint enterprise. This case was different as both drivers were guilty of dangerous driving as principals. For the purpose of considering the issue of criminal joint enterprise what matters is the defendant's dangerous driving. The question is whether the deceased was a party to a joint enterprise for the defendant to drive dangerously. This requires proof of conduct and a mental element, namely that they encouraged or assisted the commission of the offence and intended to do so with knowledge of the facts necessary to make it a criminal offence.[4]

Each of the two drivers intended to be the first to reach the point where the road narrowed. That was not a common purpose or intent in the required sense. It seemed likely that far from wishing the other to drive dangerously they each wished the other to give way. The finding of a criminal joint enterprise could not stand, and the appeal was allowed.

The deceased bore a greater responsibility for the collision, both in terms of blameworthiness and causative potency. He had been responsible for his decision to drive dangerously and he failed to maintain control of his vehicle. Whilst the defendant was also driving dangerously, he had done so in a way which enabled him to maintain control. Damages were reduced by 60%.

Comment

A most interesting feature about this case concerns the defendant's argument relating to a claimant who is guilty of turpitude. Turpitude is defined in the *Oxford English Dictionary* as "depraved or wicked behaviour or character". The defendant contended that the deceased's driving was criminal conduct that amounted to turpitude. The argument was that there is authority that supports the proposition that any claimant guilty of turpitude is debarred from claiming compensation for their injuries.

The defendant argued that this was their case at the first hearing. This was not accepted by the court but nevertheless, an analysis of the various authorities put forward by the defendant was given in the judgment. The defendant submitted that the deceased's own dangerous driving, which amounted to the

[1] *Gray v Thames Trains Ltd* [2009] UKHL 33; [2009] 1 A.C. 1339 considered.
[2] *McCracken v Smith* [2015] EWCA Civ 380; [2015] 4 WLUK 407 followed.
[3] *R. v Jogee (Ameen Hassan)* [2016] UKSC 8; [2017] A.C. 387.
[4] *R. v Jogee* [2016] UKSC 8 followed.

commission of a serious criminal offence, was sufficient to bar the claim. Reliance was placed on the wider principle stated by Lord Hoffmann in *Gray v Thames Trains Ltd*[5] that:

> "You cannot recover for damage which is the consequence of your own criminal act because it is offensive to public notions of the fair distribution of resources that a claimant should be compensated (usually out of public funds) for the consequences of his own criminal conduct."

In *Gray*, the claimant suffered post-traumatic stress disorder as a result of involvement in a major railway accident for which the defendant was responsible. While suffering from this disorder he killed a man. His plea of guilty to manslaughter by diminished responsibility was accepted and he was detained in a mental hospital. He claimed damages for negligence against the defendant. Lord Hoffmann identified two principles, a narrow principle that damages cannot be claimed for loss of liberty lawfully imposed in consequence of the claimant's own unlawful act and are a wider principle that recovery is barred for loss suffered in consequence of the claimant's own criminal act. Applying the wider principle, the claimant's commission of the offence of manslaughter by diminished responsibility, knowing what he was doing and that it was wrong, was sufficient to bar a claim against the defendant who was responsible for causing the claimant's mental disorder.

The decision in *Gray* was confirmed in *Henderson v Dorset Healthcare University NHS Foundation Trust*.[6] This was another case of manslaughter by diminished responsibility.

The defendant also relied on statements by Lord Sumption in *Les Laboratoires v Apotex Inc*:[7]

> "The ex turpi causa principle is concerned with claims founded on acts which are contrary to the public law of the State and engage the public interest. The paradigm case is, as I have said, a criminal act."

However, Lord Sumption added:

> "there may be exceptional cases were even criminal quasi criminal acts would not constitute turpitude for the purposes of the illegality defence."

He gave as possible examples offences which might be too trivial to engage the defence and cases of strict liability where the claimant was not privy to the facts making his act unlawful. It was unnecessary in this case to explore these examples further or to decide what kind of criminal offences would not amount to "turpitude". The case was not concerned with criminal offences.

As already mentioned, in *Gray* and *Henderson*, despite the apparently unqualified statements of principle, that question whether all criminal offences would constitute turpitude did not arise. Both were concerned with manslaughter by diminished responsibility, which on any view is a very serious offence. It requires proof of an intention to kill.

As Males J, in this case, identified, towards the other end of the spectrum, careless driving is a criminal offence. He went on:

> "but nobody would suggest that careless driving by the claimant prevents the recovery of damages (reduced as appropriate on account of contributory negligence) in a road traffic case where both drivers are partly to blame. In such a case the recovery of damages does not offend public notions of the fair distribution of resources and poses no threat to the integrity of law. On the contrary, the recovery of damages is in accordance with public policy. The claimant is not compensated for the consequence of his own criminal act. Rather, as a result of the reduction for contributory fault, he is

[5] *Gray v Thames Trains Ltd* [2009] UKHL 33.
[6] *Henderson v Dorset Healthcare University NHS Foundation Trust* [2018] EWCA Civ 1841; [2018] 3 W.L.R. 1651.
[7] *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55; [2015] A.C. 430.

> compensated only for that part of the damage which the law regards as having been caused by the defendant's negligence."

Males J goes on to consider dangerous driving. The offence can attract a prison sentence but he did not consider that it was of the same seriousness as manslaughter by diminished responsibility. The question of whether dangerous driving should amount to turpitude for the purpose of the ex turpi causa defence was considered in *McCracken v Smith*.[8] It is worthwhile repeating the facts. The claimant (Daniel) was the pillion passenger with a 16-year-old boy (Damien) riding a stolen trials bike at excessive speed and it crashed into a minibus negligently driven by Mr Bell. The case is important for the determination of this appeal. It deals with the issue of joint enterprise. However, Richards LJ considered whether dangerous driving by Damien, the rider of the bike, would engage the ex turpi causa principle so as to bar a claim against Bell. He said:

> "Since Daniel was jointly responsible for the dangerous driving, he is in the same position as Damien, the actual writer of the bike, as regards the claim in negligence against Mr Bell. The question in each case is whether the fact that the bike was being ridden dangerously provides a defence to the claim. The answer to that question is one with potentially wide ramifications, capable of affecting any driver involved in an accident with a negligent 3rd party in circumstances where he or she is driving dangerously or is committing any other road offence of sufficient seriousness to amount to turpitude for the purposes of the ex turpi causa defence."

The answer to the question was that the claim was not barred:

> "The dangerous driving of the bike had no effect whatsoever on Mr Bell's duty of care or on the standard of care to be reasonably expected of him."

Richards LJ went on:

> "I do not think that the fact that the criminal conduct was one of the 2 causes is of sufficient basis for the ex turpi causa defence to succeed. Our attention has not been drawn to any remotely comparable case where it has in fact succeeded: for reasons I have explained, cases involving the claim by one party to a criminal joint enterprise against another party to that joint enterprise are materially different. In my judgement, the right approach to give effect to both causes by allowing Daniel to claim in negligence against Mr Bell but, if negligence is established, by reducing any recoverable damages in accordance with the principles of contributory negligence so as to reflect Daniel's responsibility for the accident."

Males J then considered the joint enterprise cases. Comments on this have been made in the opening part of this commentary. To amplify the points already made Males J said:

> "rather than working together or encouraging each other to achieve a shared objective, each man was seeking to achieve his own objective which would necessarily mean frustrating the other. Far from wishing the other driver of the other to drive dangerously, it seems highly probable that each would've preferred that the other should slow down and give way. I would acknowledge that intention and desire not necessarily the same thing but there is no basis of any finding that the deceased intended to encourage the defendant drive dangerously."

It is clear from this that joint enterprise means what it says, the parties involved must work together, this was not the position here.

[8] *McCracken v Smith* [2015] EWCA Civ 380; [2015] 4 WLUK 407.

Practice points

- It is important to bear in mind that when the ex turpi causa defence is raised, the defendants can only rely on establishing a joint enterprise. It now seems well established that any other wrongful act involving driving the motor vehicle does not count when applying this defence.

Colin Ettinger

Case and Comment: Procedure

Welsh v Walsall Healthcare NHS Trust

(QBD; Yip J; 28 September 2018; [2018] EWHC 2491 (QB))

Civil procedure—costs—clinical negligence—personal injury—consent—issue-based costs orders—Pt 36 offers—reasonableness

LT Clinical negligence; Consent; Costs; Issue-based costs orders; Part 36 offers

The court was required to determine the appropriate costs order following a clinical negligence claim against the defendant NHS trust.

Following a trial, the claimant had been awarded compensation having suffered serious complications following bariatric surgery. There had been attempts to settle and the claimant made an offer on liability a few days before trial.

The defendant submitted that there should be a departure from the general rule that the unsuccessful defendant should pay the successful claimant's costs because she had not succeeded on the issue of consent and some pre-operative issues which were withdrawn by the claimant at trial. The defendant argued that the consent issue occupied two days of the trial and required six witnesses who would not otherwise have been called.

Yip J held that this had been a complex clinical negligence claim and the claimant was undoubtedly the successful party. However, her case on consent was never fully articulated and it was correctly withdrawn on the fourth day of the trial. The issue had not been properly arguable and, under CPR Pt 44.2(5)(b), it had not been reasonable for her to maintain it through to trial.

The defendant could have protected itself on costs as a whole by making a sufficient offer with account being also taken of the claimant's offer which represented a better outcome for the defendant and would have saved trial costs.

The judge concluded, however, that it would be unjust to ignore the claimant's responsibility for the consent issue in the costs order. Pursuing the consent issue, without proper consideration of the available evidence within the correct legal framework, had added unnecessarily to the total costs expended on both sides.

Accordingly, under CPR Pt 44.2(b), there would be a limited departure from the general rule, following *Factortame Ltd v Secretary of State for the Environment, Transport and the Regions (Costs) (No.1)*[1] and *Smith v Trafford Housing Trust (Costs)*[2] applied.

Reference was also made to *Fox v Foundation Piling*[3] and *Webb v Liverpool Women's Hospital NHS Foundation Trust*.[4]

The appropriate order was that the defendant should pay 85% of the claimant's costs.

[1] *Factortame Ltd v Secretary of State for the Environment, Transport and the Regions (Costs) (No.1)* [2002] EWCA Civ 22; [2002] 1 W.L.R. 2438.
[2] *Smith v Trafford Housing Trust (Costs)* [2012] EWHC 3320 (Ch); [2012] 11 WLUK 724.
[3] *Fox v Foundation Piling* [2011] EWCA Civ 790; [2011] 7 WLUK 206.
[4] *Webb v Liverpool Women's Hospital NHS Foundation Trust* [2016] EWCA Civ 365; [2016] 1 W.L.R. 3899.

Comment

Introduction

Following a trial, the issue of costs is likely to be the next battleground as, unlike those cases in which agreement is reached when costs will usually follow the outcome agreed on substantive issues, the losing party may seek to resist, in whole or in part, an order that costs follow the event.

The judgment on costs, in this case, is a reminder of:

- the significance of Pt 36 offers, for both parties, in mitigating the risk on costs following judgment on substantive issues;
- the circumstances in which the court may properly depart, in a personal injury claim, from the general rule in Pt 44 that the unsuccessful party pay the costs of the successful party; and
- how, if it is appropriate to depart from that general rule, the discretion as to costs under Pt 44 should be exercised, in terms of an appropriate order as to costs.

The significance of Pt 36 offers on costs

Giving judgment the judge referred to the Court of Appeal ruling in *Webb v Liverpool Women's Hospital NHS Foundation Trust*[5] where an important ruling was made on the significance of a Pt 36 offer for a claimant where judgment is "at least as advantageous" as a claimant's Pt 36 offer or a defendant, where the claimant fails to secure judgment "more advantageous" than a defendant's Pt 36 offer.

The Court of Appeal ruled in *Webb* that entitlement to "costs" under Pt 36.17(4)(b)[6] means an entitlement to all costs assessed as payable on detailed assessment without scope for an order of the kind anticipated by Pt 44.2(6).[7]

In *Webb*, the court was concerned with Pt 36.14(3)(b), the predecessor to Pt 36.17(4)(b) which provided for the claimant to have "his costs on the indemnity basis". Sir Stanley Burnton explained that:

> "I think that the meaning of this paragraph was clear: 'his costs' meant 'all his costs'. The masculine possessive pronoun was deleted when the CPR was made gender neutral, but this could not have been intended to alter the effect of the paragraph or the costs denoted by the word 'costs'. On this basis, a successful claimant is entitled to all her costs on an indemnity basis, unless it would be unjust (as provided in 36.14(3)) for her to be awarded those costs."

Whilst in *Webb* the Court of Appeal went on to conclude that the claimant should recover costs prior to the relevant Pt 36 offer, despite not succeeding on a part of the case which had been advanced on breach of duty, the judgment, as a whole, emphasises that with an effective Pt 36 offer the claimant is insulated

[5] *Webb v Liverpool Women's Hospital NHS Foundation Trust* [2016] EWCA Civ 365.

[6]
"(4) Subject to paragraph (7), where paragraph (1)(b) applies, the court must, unless it considers it unjust to do so, order that the claimant is entitled to—
…
(b) costs (including any recoverable pre-action costs) on the indemnity basis from the date on which the relevant period expired …"

[7]
"(6) The orders which the court may make under this rule include an order that a party must pay—
(a) a proportion of another party's costs;
(b) a stated amount in respect of another party's costs;
(c) costs from or until a certain date only;
(d) costs incurred before proceedings have begun;
(e) costs relating to particular steps taken in the proceedings;
(f) costs relating only to a distinct part of the proceedings; and
(g) interest on costs from or until a certain date, including a date before judgment."

from, at least after the end of the relevant period in the offer and unless the costs order provided for under Pt 36 would be "unjust", an argument of the kind developed by the defendant in this case.

Exactly the same approach is likely, for a defendant, if, on the basis of the defendant's Pt 36 offer, there is an entitlement to "costs" under Pt 36.17(3)(a).

Unfortunately for the claimant, in this case, the Pt 36 offer was made at such a late stage it was ineffective at all so far as costs consequently provided for under Pt 36 were concerned. The offer was, nevertheless, relevant to the exercise of the general discretion as to costs under Pt 44 and when considering the offer, in that context, the judge's observations give some useful insights into the nature and potential effect of offers on the issue of liability.

Part 44 discretion as to costs

In *Widlake v BAA Ltd*,[8] Ward LJ when considering how best to assess who is the successful party, and referring to both *Jackson v Ministry of Defence*[9] and *Straker v Tudor Rose (A Firm)*,[10] held that:

> "… the most important thing is to identify the party who is to pay money to the other even in a case of personal injury."

Hence Ward LJ went on to observe:

> "The claimant had to come to court to establish her claim, a genuine claim, because she had suffered an injury through the admitted negligence of the defendant. The judgment in her favour is a vindication of her stance."

Once the successful party has been identified the court must then decide whether it is appropriate to depart from the general rule, such party recover costs from the unsuccessful party, with Jackson LJ cautioning in *Fox v Foundation Piling Ltd*[11] that:

> "There has been a growing and unwelcome tendency by first instance courts and, dare I say it, this court as well to depart from the starting point set out in rule 44.3(2)(a) too far and too often. Such an approach may strive for perfect justice in the individual case, but at huge additional cost to the parties and at huge costs to other litigants because of the uncertainty which such an approach generates. This unwelcome trend now manifests itself in a (a) numerous first instance hearings in which the only issue is costs and (b) a swarm of appeals to the Court of Appeal about costs, of which this case is an example."

Jackson LJ also observed, giving judgment in *Fox*, that:

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

That approach was applied by the Court of Appeal in *Webb*, on the basis it was not unreasonable for the claimant to have pursued an allegation on breach of duty which was not ultimately upheld. Whilst conduct did not have to be "castigated as unreasonable" for a party to be deprived of costs the Court of

[8] *Widlake v BAA Ltd* [2009] EWCA Civ 1256; [2009] 11 WLUK 542.
[9] *Jackson v Ministry of Defence* [2006] EWCA Civ 46; [2006] 1 WLUK 107.
[10] *Straker v Tudor Rose (A Firm)* [2007] EWCA Civ 368; [2007] 4 WLUK 411.
[11] *Fox v Foundation Piling Ltd* [2011] EWCA Civ 790; [2011] 7 WLUK 206.

Appeal considered it was significant that Pt 44.2, when describing conduct relevant to costs, expressly referred to the reasonableness of raising, pursuing or contesting an allegation or issue.

This case, however, was different as it had been unreasonable for the claimant to pursue the unsuccessful allegation relation to consent in a way that did add unnecessarily to the costs incurred.

Issues of consent in clinical negligence claims cases can often be important points for a claimant to advance but, as this case illustrates, only where such a case is properly arguable on the evidence.

That is a reminder, even when allegations are appropriately made at an early stage, to keep the nature, and scope, of the claim under review as the claim progresses and evidence emerges, so that issues are, where possible, narrowed and costs saved.

Although the claimant's offer was not effective for the purposes of Pt 36 consequences it was, nevertheless, relevant to the exercise of the discretion as to costs under Pt 44, being an "admissible offer to settle … which is not an offer to which cost consequences under Part 36 apply", for the purposes of Pt 44.2(4)(c).

The claimant's offer had stated:

> "This is an offer on 'liability' meaning breach of duty and consequent absence of the benefits of paragraph 4(a) in Particulars of Claim and presence of injury consequent upon the January 2012 surgery. The Claimant offers to settle for 80% of damages following a finding of 'liability'."

Yip J commented that:

> "There was some dispute as to precisely what that offer meant or indeed whether any clear meaning could be discerned. However, looked at in the context of the case as a whole, it is plain to me that the Claimant was seeking 80% of the damages to be assessed on the basis that the Defendant's breaches caused the serious complications after the surgery in January 2012 and the loss of the benefits of successful surgery."

On the basis of this interpretation Yip J considered that:

> "The terms of the Claimant's offer fit with my view as to the target of the claim for damages. It also lends support to my view that this is not a case where the Claimant has been only partially successful."

The offer, had it been made in a timely way, would probably have been effective under Pt 36, given the terms of the judgment, and was, in any event, relevant to the exercise of the general discretion under Pt 44, with Yip J explaining:

> "Given the limited impact the consent issue had on the damages claim, even if it was viewed as 80% of the losses attributable to every pleaded allegation, it still represented a better outcome for the Defendant than the result after trial. Had the Defendant thought it necessary, clarification could have been sought and I am confident the Claimant would have been willing to agree that the offer carried no implied admission on the consent issues. Acceptance of the offer therefore represented another way in which the Defendant could have limited the trial costs."

These observations illustrate that an offer on liability, in a case of this kind, might be made on a very broad basis, that the claimant will accept a particular percentage of whatever damages are awarded in return for an agreement there has been a breach of duty causing at least some damage, or more targeted at securing an agreement there have been breaches of duty with a particular causative effect for which, again, the claimant will accept a specified percentage of the damages that would have been payable on full liability, assuming such causative breaches of duty are established.

An offer simply to accept a specified percentage of damages is likely to be effective, see for example *JMX v Norfolk & Norwich Hospitals NHS Foundation Trust*.[12] Assuming the claimant does ultimately

[12] *JMX v Norfolk & Norwich Hospitals NHS Foundation Trust* [2018] EWHC 185 (QB); [2018] 2 WLUK 157.

establish some damage caused by a breach of duty it seems likely the outcome will be "at least as advantageous" to the claimant as the offer since, by definition, the claimant would have accepted a specified percentage of whatever damages are ultimately awarded.

The disadvantage of an offer on liability in those broad terms is that it does not commit the defendant to more than a basic finding that a breach of duty has caused some damage.

If, as in this case, the offer focusses on particular issues of breach and/or causation the claimant has the benefit that if such an offer is accepted that may establish a stronger, more specific, basis for the assessment of damages but may generate a risk, should the case proceed to trial, any judgment cannot readily be shown as being "at least as advantageous" if particular issues of breach and/or causation, that are part of the subject matter of the offer, are not established.

On the particular facts of this case, the fact the claimant had made a targeted offer proved to be helpful to the claimant on costs, as this was the issue on which the claimant succeeded.

In general terms, the approach of the judge does confirm the efficacy of offers on liability if in effect the court making a straightforward comparison between the damages the claimant ultimately receives and the damages the claimant would have recovered had the offer been accepted.

Appropriate order under Pt 44

If, as here, it is appropriate for the court to depart from the general rule found in Pt 44.2 the question then becomes how best to express the order for costs, a range of suggested orders being identified in Pt 44.2(6).

The likelihood, as illustrated by this case, is that in a personal injury or clinical negligence claim, where the court considers it is appropriate to depart from the usual order, will be an order the paying party pay a percentage of the costs of the receiving party.

Practice points

Accordingly, a number of useful practice points can be drawn from this judgment on costs, including the following.

- The claimant should always think about Pt 36 offers, even when there seems little prospect terms will be agreed, because of the significance such an offer can have on the court's discretion as to costs, let alone other potential consequences, in the event the claimant succeeds. Care is required, however, in framing offers, certainly intended to relate to the issue of liability.
- Parties should cooperate in trying to sensibly narrow the issues so that claims, and indeed defences, which have no real prospect of succeeding are not pursued and costs incurred, particularly where such issues require extensive factual or expert evidence, avoided.
- Both parties, if there is a trial, need to be ready to deploy relevant arguments on the appropriate costs order reflecting the terms of Pt 36, where there are any relevant offers, and the more general discretion under Pt 44, recognising the range of important decisions which give helpful guidance on how the court's discretion should be exercised.

John McQuater

Finnegan v Spiers (T/A Frank Spiers Licensed Conveyancers)

(Chancery Division District Registry (Birmingham); Birss J; 27 June 2018; [2018] EWHC 3064 (Ch))

Civil procedure—detailed assessment—payment on account of costs—CPR 36—interim costs—CPR 44.2(8)—CPR 44.9—settlement terms

LT Costs; Interim payments; Part 36 offers; Payments on account

The question before the court was whether there is power to order a payment on account of costs where a Pt 36 offer has been accepted with the consequences set out in r.36.13 which in turn leads to a deemed costs order under r.44.9(1)[1] on the standard basis.

Rule 44.2(8) provides that:

> "Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs unless there is a good reason not to do so."

On 23 March 2017, the claimant accepted a Pt 36 offer made by the defendant. Further to the Pt 36 offer, on 30 May 2017, the parties executed a settlement agreement. The Settlement Agreement at cl.7 stated that "the defendant shall pay the claimant's reasonable costs on a standard basis to be assessed if not agreed up to 24 March 2017". There was no specific reference in the Settlement Agreement to an interim payment on account of costs. The claimant applied for an interim on account of costs in the sum of 19,000. That application was refused on the basis that the court had neither the power or the discretion to make such an order.

Permission to appeal was granted by Birss J on the basis of "some other compelling reason" namely that the issue is a potentially significant point of practice.

Whilst Pt 36 is a complete code the question here was how the deemed costs order under r.44.9 interacted with r.44.2(8).[2] In *Ashman v Thomas*,[3] it was held that a deemed costs order would need to be varied to permit a payment on account of costs if it did not originally provide for that. In *Lahey v Pirelli Tyres Ltd*,[4] the court of appeal had concluded it had no power to vary a deemed costs order.

That alone did not preclude the court from making an order for an interim on account of costs as the correct analysis was that the power to order an interim on account of costs after acceptance of a Pt 36 offer would be within the rule itself. That power was not, though, present in Pt 36 and there was no reason to read r.44.2(8) so as to permit such an order to be made.[5]

Appeal dismissed.

1 "(1) Subject to paragraph (2), where a right to costs arises under—
(a) rule 3.7 or 3.7A1 (defendant's right to costs where claim is struck out for non-payment of fees);
(a1) rule 3.7B (sanctions for dishonouring cheque);
(b) rule 36.13(1) or (2) (claimant's entitlement to costs where a Part 36 offer is accepted); or
(c) rule 38.6 (defendant's right to costs where claimant discontinues),
a costs order will be deemed to have been made on the standard basis."

2 "(8) Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so."

3 *Ashman v Thomas* [2016] EWHC 1810 (Ch); [2016] 7 WLUK 441.

4 *Lahey v Pirelli Tyres Ltd* [2007] EWCA Civ 91; [2007] 1 W.L.R. 998.

5 *Barnsley v Noble* [2012] EWHC 3822 (Ch); [2012] 3 WLUK 182 distinguished on the basis that the court made the order on discontinuance.

Comment

Over recent years the courts have been increasingly ready to order reasonably substantial sums on account of costs when making a costs order that provides for the detailed assessment of those costs.

Prior to 2013, the relevant rule in the CPR was Pt 44.3 (8) which provided that, when one party was ordered to pay costs to another party which were subject to a detailed assessment, the court "may" order an amount to be paid on account of those costs.

In *Fitzpatrick Contractors Ltd v Tyco Fire and Integrated Solutions (UK) Ltd (No.3)*,[6] Coulson J indicated that:

> "the general rule is that, unless there is a good reason why not, the court will order such an interim payment."

Here, Birss J noted those comments were perhaps reflected by the change in wording when the former Pt 44.3(8) became the current Pt 44.2(8), given that the current rule states the court "will" order a reasonable sum on account of costs (unless there is good reason not to do so).

With cases that have been subject to costs budgeting the courts, on the basis, there will need to be a good reason to depart from the budget, have often ordered the bulk of the budgeted costs to be paid on account, for example, *Thomas Pink Ltd v Victoria's Secret UK Ltd*.[7]

There have, however, been issues about the appropriate use of Pt 44.2(8) in a number of circumstances, particularly:

- whether there must be a temporal connection between the order for costs and order for a payment on account of those costs; and
- whether the rule has any application if there is a deemed costs order, for detailed assessment, under Pt 36.

Temporal connection?

A point touched on by Birss J, but in the end not central to the decision reached, was the need for a temporal connection between the costs order and order for payment on account of those costs.

The terms of Pt 44.2(8) are that the court will order a reasonable sum on account of costs "where" the court orders a party to pay costs subject to detailed assessment. The need for a temporal connection between costs order and order for payment on account of costs arises if the word "where" is interpreted as meaning, in context, "when".

Birss J referred to the ruling in *Ashman v Thomas*[8] where the judge dealt with a subsequent request for payment on account of costs by amending the earlier order on the basis that order had not yet been sealed. That decision could be interpreted as implying the need for a temporal connection.

Coincidentally, the judge who decided *Ashman* has since given judgment on the very question of whether there must be a temporal connection between costs order and order for a payment on account of those costs in *Culliford v Thorpe*.[9] The judge concluded such a connection was not necessary and observed:

> "Once it is accepted that the court has jurisdiction in principle to make an order for the payment sum on account of costs in an appropriate case, it is then simply a question of whether the court is minded to exercise that jurisdiction on the facts of the case, at the time when the court is asked to do so. Given the terms of r 44.2(8), I should say that I do not accept that the mere fact that the defendant

[6] *Fitzpatrick Contractors Ltd v Tyco Fire and Integrated Solutions (UK) Ltd (No.3)* [2009] EWHC 274 (TCC); [2009] 2 WLUK 582.
[7] *Thomas Pink Ltd v Victoria's Secret UK Ltd* [2014] EWHC 3258 (Ch); [2014] 7 WLUK 1165.
[8] *Ashman v Thomas* [2016] EWHC 1810 (Ch); [2016] 7 WLUK 441.
[9] *Culliford v Thorpe* [2018] EWHC 2532 (Ch); [2018] 10 WLUK 10.

did not ask for a payment on account by itself amounts to a 'good reason' for not making an order for one."

The decision in *Culiford* might be regarded as confirmation the wording of Pt 44.2(8) does not require a temporal connection between the costs order and any order for a payment on account of those costs.

In this case, however, the basis for the judge's decision was not the need for a temporal connection but the terms of Pt 36.

Part 36?

This decision deals directly with the question of whether, on a deemed costs order arising under Pt 36, the court has power to order a payment on account of costs under the terms of Pt 44.2(8), ahead of the preparation of a bill of costs when, of course, a payment on account might be ordered under Pt 47.16 by way of interim costs certificate.

Given the increasing willingness of the courts to order substantial payments on account of costs, following an order for detailed assessment, it seems counter-intuitive for that approach not to follow when the costs order arises under Pt 36, given that Pt 36 is there for the very purpose of helping to achieve settlement.

The rationale for the decision is, essentially, that Pt 36 is a self-contained code and hence if there is no provision in Pt 36 itself for a payment on account then the court has no power to make such an order.

It is, of course, well-established that Pt 36 is a self-contained code, the terms of the rule itself now spelling that out. Part 36 does not, however, cover every eventuality and where Pt 36 is silent on an issue the court is surely not detracting from the self-contained nature of the rule by looking at other rules in order to make Pt 36 workable. For example, in *Hislop v Perde*,[10] the Court of Appeal turned to Pt 45 in order to deal with a point not expressly covered by the terms of Pt 36, namely late acceptance by the defendant of a claimant's Part 36 offer in a case subject to fixed costs under s.IIIAPt 45. If the reference to Pt 45 was appropriate in those circumstances then why could reference to Pt 44 not be made here?

This decision draws a distinction between deemed costs order under Pt 36, where Pt 44.2(8) is held not to apply, and deemed costs orders arising under Pt 38 on discontinuance where Pt 44.2(8) has been held to apply: *Barnsley v Noble*.[11]

If the policy underpinning substantial payments on account of costs is considered (to help narrow the issues and avoid the prospect of a detailed assessment) it does seem surprising that the key machinery in the civil procedure rules for achieving settlement, namely Pt 36, cannot carry with it the advantages of a payment on account of costs, at least until such time as a bill of costs is served.

Practical considerations

If it is correct that, as the rules presently stand, a party entitled to the benefit of a deemed costs order under Pt 36 cannot secure payment on account of those costs under Pt 44.2(8) some practical considerations arise.

It is, as a preliminary, important to remember that the deemed costs order under Pt 36 only applies where an offer to settle the whole claim is accepted within the relevant period. In other circumstances, the parties will need to agree costs failing which the court will make an order. Either way that leaves open the opportunity for a payment on account of any costs that are to be the subject of a detailed assessment.

If the parties do wish to agree terms on the basis of an offer to settle the whole claim, and within the relevant period of the offer, it may be sensible to explore the question of a payment on account of costs

[10] *Hislop v Perde* [2018] EWCA Civ 1726; [2019] 1 W.L.R. 201.
[11] *Barnsley v Noble* [2012] EWHC 3822 (Ch); [2012] 3 WLUK 182.

prior to acceptance as it may be sensible agreement can be reached. Any such terms can be reflected in a draft order.

Practice points

Key practice points from this decision include the following.

- Parties need to be mindful that, as the law presently stands, if a Pt 36 offer to settle the whole claim is accepted within the relevant period the court cannot then be invited to order payment on account of costs under Pt 44.2(8).
- Accordingly, where the parties wish to agree terms it may be sensible to explore the prospect of agreeing on a suitable payment on account as part of the negotiations before acceptance of the offer.

John McQuater

Mark v Universal Coatings and Services Ltd

(Spencer J; 23 November 2018; [2018] EWHC 3206 (QB))

Civil procedure—personal injury—relief from sanctions—CPR 3.9—CPR 16 PD 4.2 and 4.3—strike out—proportionality—medical evidence on service of proceedings—personal injury—issue of proceedings—schedule of loss requirements

LT Abuse of process; Medical evidence; Particulars of claim; Personal injury claims; Relief from sanctions; Striking out

The appellant's claim for personal injuries had been struck out. A claim form had been issued shortly before the expiry of limitation in June 2015, his solicitors having been instructed in February 2013, seeking damages for silicosis and massive pulmonary fibrosis as a result of inhaling silica dust during his employment with the first and second respondents. A previous order had been obtained, without notice, extending the time for service of the claim form, particulars of claim and medical evidence. On 26 February 2017, the Claim Form and Particulars of Claim had been served without any supporting medical evidence or schedule of loss.

HH Judge Gargan had found that the failure to serve a schedule of loss and medical evidence engaged the principles in *Mitchell*[1] and *Denton*[2] in relation to relief from sanctions. CPR 16 PD 4.2 and 4.3[3] were engaged and there had been no formal application to waive those requirements or for relief from sanction. There was an implied sanction for failing to comply with the requirements of the Practice Direction. Applying the *Denton* 3 stage test there was no good reason for the failure, it was a serious and significant breach and that in considering all the circumstances of the case he was driven to conclude that the claimant's overall conduct had significantly prejudiced the defendants and had undoubtedly affected the smooth

[1] *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537; [2014] 1 W.L.R. 795.
[2] *Denton v TH White Ltd* [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926.
[3]
"4.2 The claimant must attach to his Particulars of Claim a schedule of details of any past or future expenses and losses which he claims.
4.3 Where the claimant is relying on the evidence of a medical practitioner the claimant must attach to or serve with his Particulars of Claim a report from a medical practitioner about the personal injuries which he alleges in his claim."

running of the litigation as a whole. The claim was struck out as a consequence. He further commented that even absent the relief from sanctions principles he would have struck out the claim as an abuse of process given the flagrant disregard for the rules and the cumulative adverse impact on the way the defendants had been able to deal with the claim.

On appeal, it was submitted that the application of the relief from sanctions principles was wrong in law in that PD 16 did not contain any sanction for the failure to serve a medical report or a schedule of loss and that once could not be implied in this case. If such a failure is identified the remedy was said to be for the defendant to apply for an order that the documents be served. There was said to be a material difference between a procedural strike out and the granting of relief from a sanction that has already been imposed. The former required a consideration of the proportionality of the decision to strike out, whereas the latter proceeds on the basis that the sanction was properly imposed.[4]

In complicated personal injury cases, where there is a focus on difficult causation issues, a medical report and schedule of loss served with the Particulars of Claim are simply uninformative. Often the medical report would be no more than a brief recitation of condition and prognosis and a schedule would be no more than outline heads of loss. A court using its case management powers then sets a timetable for exchange of properly drawn medical evidence and schedules of loss further on into the litigation. In such cases, an alternative to serving an anodyne and relatively uninformative schedule of loss and medical report with the Particulars of Claim is to do what was done in the present case and state in the covering letter when the Particulars of Claim are served that these will follow and then leave it to the court to case manage the claim and make provision for service of these documents in due course.

It would be open to a defendant to require a claimant to serve both a schedule and medical report, but, in more complicated cases it would be pointless. This must be contrasted with the simple personal injury action where there would be no difficulty in serving medical evidence and a schedule with the Particulars of Claim.

The relief from sanctions principles apply where the rules either impose an explicit sanction or there is an implied one. A sanction can be implied by reference to the consequences of the rule having not been observed. In the case of a litigant who fails to serve and file a notice of appeal in time, without an extension of time the litigant is unable to appeal as any notice of appeal would be invalid as having been served out of time and the judgment in the court below will stand. Here, the provisions of CPR 16 PD 4 were intended to apply to simple personal injury litigation and the "one size fits all" approach of the CPR leads to documents being served that were unhelpful and uninformative in complex cases. CPR 16 PD 4 was not in the category of the kind of rule or practice direction to which the implied relief from sanction doctrine was to be applied. The use of the word "must" did not change that.

There was no proper basis on which the court could find that it had been misled into granting the initial extension of time for service of the claim form, and the other complaints and rule breaches did not amount to the kind of abuse of process that justified a claim being struck out. There were other and more proportionate steps that the court could have taken including the making of unless orders and penalisation in costs instead of striking out.

Claim reinstated.

Comment

For many years when serving proceedings claimant solicitors dealing with complex cases which simply cannot be fully pleaded and valued there and then have served basic medical evidence perhaps of one expert indicating further opinions are required from other branches of expertise, that prognosis is uncertain and re-examination may be necessary, along with a basic "TBA" (to be advised) schedule of loss setting

[4] *Walsham Chalet Park Ltd v Tallington Lakes Ltd* [2014] EWCA Civ 1607; [2014] 12 WLUK 443.

out the various anticipated heads with the "TBA" phrase underneath them. It was considered that the words of CPR 16 PD 4.2 and 4.3 were clear and unambiguous that a medical report and schedule of loss is required in all personal injury and clinical negligence cases.

CPR 16 PD 4.2 and 4.3 state:

> "4.2 The claimant must attach to his particulars of claim a schedule of details of any past and future expenses and losses which he claims.
>
> 4.3 Where the claimant is relying on the evidence of a medical practitioner the claimant must attach to or serve with his particulars of claim a report from a medical practitioner about the personal injuries which he alleges in his claim."

One would think the word "must" in both of these directions was fairly definitive and unambiguous. That was certainly what was suggested by the defendant's barrister to Spencer J. Perhaps surprisingly, in his judgment, Spencer J concluded that:

> "the word 'must' is used liberally … to imply the need to apply for relief from sanction in all cases where a rule or practice direction contains such wording would, as Mr Walker submitted, result in the courts being inundated with applications quite unnecessarily."

So, although they are expressed in mandatory terms they contain no express sanction for failure to comply.

Spencer J was clear to differentiate between simple fast track personal injury work, where it is fully possible upon service to serve a comprehensive medical report dealing with all matters and a fully pleaded schedule of loss, and more complex personal injury and clinical negligence cases, where, quite simply, it is not. He went onto say that:

> "It seems to me that 16 PD.4 sets a benchmark because it is a practice direction which covers all personal injury claims from the most simple to the most complicated but which, in many of the more complicated cases, is honoured more in the breach than in the observance where the parties sensibly recognise the limitations of what can be achieved at the early stage of service of the particulars of claim."

Therefore, it seems clear that in straightforward lower value personal injury claims failure to serve a medical report and fully pleaded schedule of loss is something the courts expect will be complied with and if this did not happen and the point was taken by the defendant then sanctions could be imposed by the court.

The situation in more complex personal injury and clinical negligence cases is that so long as the claimant can justify the failure to comply and set out in pleadings or correspondence the reasons why there is not a fully pleaded schedule of loss or medical evidence then if the defendant takes the point, the court is unlikely to impose sanctions but rather impose a sensible timetable for provision of the same during the course of the case.

Practice Points

- In fast track, lower value and/or straightforward personal injury cases claimant solicitors should continue to ensure medical evidence and a fully pleaded schedule of loss is served with proceedings.
- In more complex personal injury and clinical negligence cases, basic medical evidence setting out the claimant's condition and if possible, some sort of prognosis should be served along with either a "TBA" schedule of loss setting out the relevant anticipated heads of loss.
- If that is not possible the particulars of claim should state, where appropriate, that:

— the prognosis is unclear and further expert evidence is required to enable the appropriate heads of loss to be identified and calculated;
— service of a TBA schedule of loss at this stage in order to comply with CPR 16 PD4.2 would not advance the case; and
— that the claimant invites the court to give appropriate case management directions at the first CCMC setting a timetable for service of the relevant medical evidence and schedule of loss/counter-schedule.

Kim Harrison

Waring v Mcdonnell

(County Court (Brighton); Venn J; 6 November 2018; [2018] 11 WLUK 203)

Civil procedure—qualified one way cost shifting—counterclaim—availability—recoverability of costs—CPR 44.13—definition of proceedings—interpretation

LT Counterclaims; Damages; Personal injury claims; Qualified one-way costs shifting

On 14 June 2014, the claimant and defendant were cycling in opposite directions on Lodge Lane, Keymer, West Sussex, when they collided head-on. Both sustained a personal injury and both pursued claims for damages for personal injury. On 25 September 2018, judgment for the claimant was entered and the defendant's counterclaim dismissed.

The defendant argued that he had the protection of Qualified One-Way Costs Shifting ("QOCS") and any order for costs made against him could not be enforced by the claimant. The underlying purpose of the QOCS regime was to protect those who suffered injuries from the risk of adverse costs orders obtained by insured, self-insured or well-funded defendants. The purpose was not to protect those who were liable to pay damages to an injured party from the risk of adverse costs orders made against them in their capacity as a defendant or paying party.[1]

The argument of the defendant was based upon the judgment in *Ketchion v McEwan*[2] where it was held that the reference to "proceedings" in CPR 44.13[3] included both the claim and counterclaim. That decision was doubted as several unjust consequences could arise from it:

- insurers of defendants to claims for personal injury arising out of road traffic collisions would be incentivised to encourage counterclaims for damages for personal injury; even if the counterclaim was unsuccessful, there would be no liability for costs;
- claimants making claims for damages for personal injury arising out of road traffic collisions (where a counterclaim was most likely to be made) would be significantly worse off than any other claimant making a claim for damages for personal injury as it was difficult to think of counterclaims for damages following accidents at work, clinical negligence or public liability claims;

[1] An analysis consistent with that of Lewinson LJ in *Howe v Motor Insurers' Bureau* [2017] 7 WLUK 84 and the judgment of Lord Sumption in *Plevin v Paragon Person Finance Ltd* [2017] UKSC 23; [2017] 1 W.L.R. 1249.
[2] *Ketchion v McEwan* [2018] 6 WLUK 625.
[3]
"(1) This Section applies to proceedings which include a claim for damages—
(a) for personal injuries …"

- access to justice would be reduced as it would be surprising if any solicitor continued to act once a counterclaim was intimated as they would be unlikely to recover any costs;
- the Pt 36 regime would have no teeth as costs recovery would be limited to the amount of damages recovered in the counterclaim (if any); and
- liability insurers would not only avoid having to pay ATE premiums and success fees under CFAs, but they would also, in many cases, avoid having to pay any costs to a successful claimant at all.

If such radical changes had been intended then they would have been spelt out. The word "proceedings" did not mean the entire action including the claim, the counterclaim and all the parties. That was consistent with the decision in *Wagenaar v Weekend Travel Ltd*[4] and not every step in proceedings, given a broad definition, that began with a claim for personal injuries is caught within the definition of the word "proceedings" in the context that it is used in CPR 44.13. It encompassed the claim made by the claimant against the defendant, but not the defendant's defence of the claim.

The defendant was not an unsuccessful claimant in the claimant's claim for damages for personal injury (he was not a claimant at all in the claimant's claim); he was an unsuccessful defendant (and an unsuccessful claimant in his counterclaim for damages for personal injury). He only had the protection of the QOCS regime in respect of his claim for damages for personal injury and did not benefit from it in relation to the claimant's claim for damages for personal injury.

Comment

The introduction of the qualified one way costs shifting ("QOCS") regime was intended to maintain access justice for personal injury claimants who had removed in the 2013 round of reforms their ability to recover from the wrongdoer the cost of their after the event insurance policy and their cost of instructing a lawyer to represent them on a no win no fee basis.

It was never intended to provide protection to any other party. CPR 44.13 very carefully delineates the scope of the protection.[5] In more recent judgments, the courts have been very careful to ensure that the wording contained in CPR 44.13 is interpreted in such a way that the intent underlying the introduction of the QOCS regime is protected.[6] This has been necessary due to the inevitable testing of boundaries by parties to an action. In this case the unsuccessful defendant in a personal injury claim sought to avoid payment of the costs due to the successful claimant by arguing that because they had made a counterclaim, they were entitled to the protection of QOCS.

The crucial aspect of the court's decision here was that "proceedings" as used in CPR 44.13 had to be interpreted in the context it was used and that QOCS cover would be available in the circumstances envisaged when the provisions were introduced. The defence of a personal injury claim cannot of itself be a personal injury claim.[7]

[4] *Wagenaar v Weekend Travel Ltd* [2014] EWCA Civ 1105; [2015] 1 W.L.R. 1968.

[5] "(1) This Section applies to proceedings which include a claim for damages—
(a) for personal injuries;
(b) under the Fatal Accidents Act 19767; or
(c) which arises out of death or personal injury and survives for the benefit of an estate by virtue of section 1(1) of the Law Reform (Miscellaneous Provisions) Act 19348,
but does not apply to applications pursuant to section 33 of the Senior Courts Act 1981 or section 52 of the County Courts Act 198410 (applications for pre-action disclosure), or where rule 44.17 applies.
(2) In this Section, 'claimant' means a person bringing a claim to which this Section applies or an estate on behalf of which such a claim is brought, and includes a person making a counterclaim or an additional claim."

[6] *Corstorphine (A Child) v Liverpool CC* [2018] EWCA Civ 270; [2018] 1 W.L.R. 2421 and *Commissioner of Police of the Metropolis v Brown* [2018] EWHC 2471 (QB).

[7] See Whipple J at [52] in *Commissioner of Police of the Metropolis v Brown* above.

The court was also mindful of unjust and unintended consequences arising out of following the decision in *Ketchion v McEwan* and instead preferred maintaining consistency with the approach of the Court of Appeal in *Howe v MIB* and the Supreme Court in *Plevin v Paragon Person Finance Ltd*.

The outcome which saw QOCS protection being denied for the aspect of the case in which the defendant acted as a defendant and having QOCS protection in respect of the counterclaim, where he had a claim for personal injuries is entirely consistent with the purpose of the QOCS regime and the approach in *Wagenaar v Weekend Travel Ltd*.

For the moment, there are two conflicting non-binding decisions and as the defendant, in this case, did not seek permission to appeal the point further the point will need considering at a higher level. In the writer's view, this case is an interpretation of the QOCS rules which is both more convincing than *Ketchion* and consistent with the approach of the higher courts. There is a strong likelihood that this approach would be preferred if the matter was considered at a higher level.

Practice points

- The availability of QOCS cover depends on a consideration of the purpose of introducing the provisions.
- The court should be invited to make a distinction between the defence and the counterclaim, with only the latter attracting QOCS protection as it is the claim for personal injuries that CPR 44.13 attaches to.
- The court should be referred to the cases considered in the judgment as it is the reasoning that makes *Waring* likely to be preferred over *Ketchion*.

Brett Dixon

Cumulative Index

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