Journal of Personal Injury Law

Issue 2 2019

Table of Contents

Case and Comment: Quantum Damages

Case and Comment: Procedure

The Journal of Personal Injury is published by Thomson Reuters, trading as Sweet & Maxwell. Thomson Reuters is registered in England & Wales, Company No.1679046. Registered Office and address for service: 5 Canada Square, Canary Wharf, London, E14 5AQ.

For further information on our products and services, visit *http://www.sweetandmaxwell.co.uk*.

Computerset by Sweet & Maxwell. Printed and bound in Great Britain by Hobbs the Printers Ltd, Totton, Hampshire. No natural forests were destroyed to make this product: only farmed timber was used and replanted.

ISSN 1352-7533

LEGAL TAXONOMY
FROM SWEET & MAXWELL

Each article and case commentary in this volume has been allocated keywords from the Legal Taxonomy utilised by Sweet & Maxwell to provide a standardised way of describing legal concepts. These keywords are identical to those used in Westlaw UK and have been used for many years in other publications such as Legal Journals Index. The keywords provide a means of identifying similar concepts in other Sweet & Maxwell publications and online services to which keywords from the Legal Taxonomy have been applied. Keywords follow the Taxonomy logo at the beginning of each item. The index has also been prepared using Sweet & Maxwell's Legal Taxonomy. Main index entries conform to keywords provided by the Legal Taxonomy except where references to specific documents or non-standard terms (denoted by quotation marks) have been included. Readers may find some minor differences between terms used in the text and those which appear in the index. Please send any suggestions to sweetandmaxwell.taxonomy@tr.com.

Copies of articles from the *Journal of Personal Injury Law*, and other articles, cases and related materials, can be obtained from DocDel at Thomson Reuters Yorkshire office. Current rates are: £7.50 + copyright charge + VAT per item for orders by post and email (CLA account number must be supplied for email delivery). Fax delivery is an additional £1.25 per page (£2.35 per page outside the UK). For full details, and how to order, please contact DocDel on Tel: 01422 888 019. Fax: 01422 888 001. Email: trluki.admincentral@thomsonreuters.com. Go to: *http://www.sweetandmaxwell.co.uk/our-businesses/docdel.aspx*. Please note that all other enquiries should be directed to Customer Support (Go to: *http://www.tr.com/uki-legal-contact*; Tel: 0345 600 9355).

Editorial

I am delighted to have been appointed as the new general editor of JPIL. Being passed the mantle from the eminent Colin Ettinger is both an honour and daunting prospect. Colin is a behemoth in the sphere of personal injury litigation and someone I have admired since I began at the Bar. I only hope I can continue to steer JPIL on its established course of sourcing the best writers to inform and educate both litigators and academics in all aspects of injury litigation.

Fortunately, I have inherited an impressive board of editors to assist in delivering this vision. Their full details can be found at the front of this issue and I am pleased to announce the immediate appointment of Clare Johnston of Kennedys, a worthy inclusion that continues the tradition of academics as well as "claimant" and "defendant" representation on the board.

Despite my limited time in the role, I am already grateful for APIL's active support for the journal and for the invaluable contributions of the Case Editors, Brett Dixon and John McQuater. They are responsible for generating a large part of every issue, producing and securing invaluable case commentary on topical, and often seminal, cases. I look forward to us all working together in the future.

In addition to these stated aims, I personally wish to use the journal to generate a conversation amongst practitioners and academics. All the articles include opinions and/or interpretations of the law that will not be universally held. I therefore welcome constructive comment on any of the issues we cover and will happily include alternative views in later issues if merited. I also actively encourage people to email me with ideas for articles/topics they wish to write on or wish us to cover. My email address is *jford@9goughsquare.co.uk* and it will be printed in every issue henceforth.

So, to this edition. We are very lucky to have the insight of Adam Weitzman QC on the thorny issues surrounding extending vicarious liability and non-delegable duty in a medical negligence context, and for Sabrina Hartshorn in covering practical considerations when seeking the indulgence of the court to exercise s.33 discretion. Additionally, when considering the liability of the MIB, Adam Ball highlights both tactical and practical evidential avenues that can be explored when faced with an "off-road vehicle" defence, as well as analysis and opinion of Katherine Allen when revealing the, at best, evolutionary rather than revolutionary nature of the new 2018 Package Travel Regulations.

Away from liability, Richard Geraghty rightly sounds the death knell for the Fatal Accidents Act 1976 and Chris Thorne constructs a further piece, following up on his 2016 Article, analysing damages for a claimant's loss of autonomy when "choosing" to have a child, highlighting evolving public policy considerations in competing judgments.

Thereafter, in the procedure section of the journal, Alice Taylor's insightful article considers the idea, consultation, and merit of the creation of a role of Independent Public Advocate followed by a Wrigleys Solicitors double bill. First, Lynne Bradey and Kate Edwards inform us of the continuing discussion between the merits of Personal Injury Trusts v Deputyship and then Austin Thornton, with the assistance of Heather Ferguson of Bush & Co, remind us of the oft forgotten CQC regulatory obligations imposed on case managers and care package providers. All in all, a bumper issue, and I am extremely grateful to all our contributors.

Jeremy Ford

No Fault Liabilities and Private Health Providers

Adam Weitzman QC*

LT Clinical negligence; Liabilities; Private health industry; Vicarious liability

While clinical negligence provides a number of challenges to those acting on behalf of claimants, historically, the question of who is legally responsible for the treatment was not usually one of them. Claims were brought against NHS making concerns as to whether the hospital or treating physician was responsible academic; the NHS delivered medical treatment and was the employer of, and so vicariously liable for, clinicians.

This had not always been the case. In a series of cases in the 1940s and 1950s, the Court of Appeal considered the circumstances in which a hospital might be liable without fault for the negligent acts of a clinician.[1] This line of cases extended the ambit of a hospital's vicarious liability for an independent surgeon and, in minority judgments by Lord Greene MR in *Gold* and Denning LJ in *Cassidy*, identified the potential for a hospital to owe a non-delegable duty to its patients. However, as observed by Lord Phillips in *A (A Child) v Ministry of Defence*,[2] these arguments, and so the development of the legal principles governing no fault liability in the health sector, became redundant following the creation of the National Health Service.

The National Health Service Act 1977 imposed on the Secretary of State the duty to provide hospital and medical services to such extent as he considered necessary to meet all reasonable requirements throughout England and Wales. Thereafter authorities administering the NHS ceased to take issue on the extent of their liability for treatment negligently administered, regardless of the precise standing of the individual administering the treatment.

That position has now altered. Following the Health and Social Care Act 2012, much of the medical treatment which would formerly have been provided by the state is privatised and performed by independent contractors. At the same time, there has been a significant growth in private health care. Patients who have insurance or are self-funding will often receive their treatment at a private hospital. These changes in the delivery of treatment has revived issues as to who is responsible for clinical negligence. This might not be a problem if all parties were appropriately insured, but often that is not the case. Some private clinician may have no or insufficient insurance. Alternatively, the MPS and MDU may refuse cover; a recent example being the claims against the breast surgeon Patterson. Where the negligent clinician is uninsured and impecunious, claimant lawyers will need to consider an action against a defendant who can meet the claim; the private hospital, the commissioning body or the company who contracted to provide the treatment. Such will require claimant lawyers to return to causes of action based on vicarious liability and non-delegable duties.

Vicarious liability and non-delegable duties are the two legal exceptions to the usual rule that a party is only liable to another when he has acted, or omitted to act, in a way which is in breach of his duty of care. Both legal concepts have been recently considered, defined and expanded by the Supreme Court. The circumstances in which non-delegable duties would arise were considered in *Woodland v Swimming Teachers Association*[3] while vicarious liability was dealt with in *Various Claimants v Catholic Child*

* 7 Bedford Row.

[1] *Gold v Essex CC* [1942] 2 K.B. 293; [1942] 2 All E.R. 237, *Cassidy v Ministry of Health* [1951] 2 K.B. 343; [1951] 1 All E.R. 574 and *Roe v Ministry of Health* [1954] 2 Q.B. 66; [1954] 2 W.L.R. 915.

[2] *A (A Child) v Ministry of Defence* [2004] EWCA Civ 641; [2005] Q.B. 183.

[3] *Woodland v Swimming Teachers Assoc* [2013] UKSC 66; [2014] A.C. 537.

Welfare Society[4] and *Cox v Ministry of Justice*.[5] Most recently, the court considered both legal doctrines and so their inter-relationship in *Armes v Nottinghamshire CC*.[6]

In redefining and expanding the ambit of these two legal doctrines the Supreme Court has been responding to societal changes: the increase in claims for historic child sexual abuse, where the abuser is often both not an employee of the organisation which gave him access to the child and impecunious; the outsourcing of many services by public bodies to private contractors; and most fundamentally, changes in the economy, so those who actually deliver the service to the consumer are no longer directly employed by the company who provides it. In *Cox*, Lord Reed, identified the court's rationale for expanding the scope of vicarious liability:

> "By focusing upon the business activities carried on by the defendant and their attendant risks, it directs attention to the issues which are likely to be relevant in the context of modern workplaces, where workers may in reality be part of the workforce of an organisation without having a contract of employment with it, and also reflects prevailing ideas about the responsibility of businesses for the risks which are created by their activities. It results in an extension of the scope of vicarious liability beyond the responsibility of an employer for the acts and omissions of its employees in the course of their employment, but not to the extent of imposing such liability where a tortfeasor's activities are entirely attributable to the conduct of a recognisably independent business of his own or of a third party. An important consequence of that extension is to enable the law to maintain previous levels of protection for the victims of torts, notwithstanding changes in the legal relationships between enterprises and members of their workforces which may be motivated by factors which have nothing to do with the nature of the enterprises' activities or the attendant risks."

It is necessary to examine both doctrines and consider how they could be applied to the provision of medical services by the private sector. In respect of each, the Supreme Court has identified five factors which must be present for no-fault liability to be imposed. It has explained that where these factors are present it is fair, just and reasonable for a defendant to be liable without fault because it has placed itself in a position where it has either assumed responsibility for the claimant (non-delegable duties) or created the risk which gives rise to the claimant's injury (vicarious liability). The intent of the Supreme Court is to ensure that a deserving claimant has a creditworthy defendant against whom he can bring proceedings. The distinction between non-delegable duties and vicarious liability is that the former depends upon the relationship between the defendant and claimant and the latter on the relationship between the defendant and tortfeasor.

While each case will turn on its own facts, it is possible to identify the arguments which are likely to be deployed in favour and against the application of either one of these doctrines to institutional private healthcare providers. On this general analysis, it seems more likely that a claim will succeed in vicarious liability than for a non-delegable duty of care.

Woodland involved a claimant who was injured during a school swimming lesson. The local education authority, which formerly itself provided lessons, had contracted out this function to independent instructors. The claimant suffered brain damage when those contractors failed to spot her drowning. Lord Sumption JSC gave the leading judgment. He distinguished between the scope of the normal duty, which was to take care, and a non-delegable duty, which extended beyond simply taking care to ensuring that care was taken. A defendant can discharge the normal duty to take care by selecting and delegating the performance of that duty to a reasonably competent contractor. By contrast, if the duty is non-delegable, it cannot be discharged by the selection of a reasonably competent contractor. The duty will remain with the defendant

[4] *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 A.C. 1.
[5] *Cox v Ministry of Justice* [2016] UKSC 10; [2016] A.C. 660.
[6] *Armes v Nottinghamshire CC* [2017] UKSC 60; [2018] A.C. 355.

even if performed by a third party, and so the defendant will be liable for that third party's negligence. A non-delegable duty could arise where an antecedent relationship existed and, as a result, the defendant had assumed an affirmative duty to protect a particular class of persons against a particular class of risks. Such a relationship was personal to the defendant; while performance could be delegated to a third-party legal responsibility for discharging the duty would remain (§7).

Lord Sumption identified five defining features of the relationship between defendant and claimant which would give rise to a non-delegable duty of care (§23):

> "(1) the claimant is a patient or child, or for some other reason is especially vulnerable or dependent on the protection of the defendant against the risk of injury;
>
> (2) There is an antecedent relationship between the claimant and the defendant, independent of the negligent act or omission itself;
>
> (i) which places the claimant in the actual custody, charge or control of the defendant, and
>
> (ii) from which it is possible to impute to the defendant the assumption of a positive duty to protect the claimant from harm, and not just a duty to refrain from conduct which will foreseeably damage the claimant;
>
> (3) The claimant has no control over how the defendant choses to perform those obligations, i.e. whether personally or through employees or through third parties;
>
> (4) The defendant has delegated to a third party some function which is an integral part of the positive duty which he has assumed towards the claimant; and the third party is exercising, for the purpose of the function thus delegated to him, the defendant's custody care or care of the claimant and the element of control that goes with it;
>
> (5) the third party has been negligent not in some collateral respect but in the performance of the very function assumed by the defendant and delegated by the defendant to him." (§23)

Where an NHS patient's treatment is contracted out to a private provider, the five *Woodland* criteria will normally be satisfied; the NHS will owe a non-delegable duty of care. The continuing obligation upon the NHS to patients for whom it arranges private treatment is recognised by the National Health Service (Clinical Negligence Regulations) 2015.[7] These require the NHSLA to meet the liabilities of the private sub-contractor, a person employed or engaged by that sub-contractor or an employee or agent of the person engaged by the subcontractor (reg.10).

Are non-delegable duties applicable to private hospitals where the surgeon or physician is independent and paid separately by the insurer or the patient? This has yet to be considered. The answer will depend upon whether or not the five *Woodland* criteria apply.

There is no doubt that the first feature is present. The patient is a vulnerable person dependent upon the protection of those who are providing treatment.

Where a patient is admitted to a private hospital there is unlikely to be a dispute about the second feature. Difficulties may arise where the negligent treatment is provided to a patient who is not actually in hospital, for example were a private contractor fails to properly read a scan or test a sample. In such circumstances, the private (or even NHS) hospital is likely to rely on *Farraj v King's Healthcare NHS Trust*[8] to argue that second criteria are not fulfilled because the patient is not under the control of the defendant. In *Farraj*, the issue was whether the Trust owed a non-delegable duty for the DNA testing of foetal tissue carried out by a private laboratory. Dyson LJ held that, as the claimant had not been admitted, she was not under its control or supervision and so no non-delegable duty of care arose. Lord Sumption approved that decision

[7] National Health Service (Clinical Negligence Regulations) 2015 (SI 2015/559).
[8] *Farraj v King's Healthcare NHS Trust* [2010] 1 W.L.R. 2139; [2010] 1 W.L.R. 2139.

Can this argument be expanded beyond the facts in *Farraj* to restrict the scope of non-delegable duties to patients? When Lord Sumption considered control, he was identifying something more than physical control (although on the facts of *Woodland* that was case). Rather he was identifying a relationship which gave rise to a special and personal assumption of responsibility because of the claimant's dependence upon the defendant. The nature of the relationship in the context of medical treatment was considered by Cockerill J in *Razumas v Ministry of Justice*.[9] The claimant, a prisoner, had a leg amputated because of the negligence of the prison GPs. These doctors were engaged by the NHS, not the prison service, but he brought his claim against the Ministry of Justice ("MoJ"), alleging a non-delegable duty, because he was a prisoner and so under the MoJ's physical control. In dismissing this claim, Cockerill J substantially accepted the MoJ's argument that a duty to a patient arises not from control but from the patient's consent to treatment, based on their reliance upon the medical practitioner's skill and care; alternatively, by consenting to treatment, the patient entrusts his physical wellbeing to the care and control of a doctor, so giving rise to an antecedent relationship which involves an obligation upon that doctor to ensure that the treatment is performed competently. Applying this argument, she held:

> "It is clear (see Lord Sumption [24]) that the distinguishing feature of the non-delegable duty cases is 'control over the claimant *for the purpose* of performing a function for which the defendant has assumed responsibility'. See to similar effect Court of Appeal [9] which indicates that one is looking at 'persons in need of particular care, *for which they place themselves or are placed* in the hands of the [relevant target for the non-delegable duty]'."

If "control" in a medical context is based upon consent, and so is interpreted to mean reliance upon the special skill of the medical practitioner or organisation, rather than actual physical custody, a non-delegable duty of care will arise even if the patient is not in hospital. An outpatient from whom a biopsy is taken will be equally dependent for their wellbeing on an accurate result being obtained as inpatients are upon proper treatment.

Defendant's will argue that the third feature is absent. This is potentially the strongest factor mitigating against a non-delegable duty. The patient may choose the surgeon or physician rather than the private hospital. Does this choice negate the non-delegable duty of care? The question asked by Lord Sumption is whether the claimant can control how the defendant choses to discharge its obligations to them. Private hospitals routinely use independent medical practitioners to deliver medical treatment for them. These practitioners are only able to treat private patients because the hospital has granted them practicing privileges. This is not an automatic process. The private hospital has a regulatory obligation to ensure that those to whom it grants such privileges are fit and competent to practice. When undergoing treatment at a private hospital the relationship between the hospital and medical practitioner is determined by the hospital not the claimant, even if the claimant has identified the surgeon. This might be different if the claimant could have chosen a surgeon employed by the hospital, but usually that choice is not available.

The fourth *Woodland* factor is also likely to be contentious; whether the function delegated by the defendant to an independent contractor forms part of, is integral to, the positive duty which it has assumed towards the patient, or whether the obligation is merely to arrange for that function to be provided by another? In *Armes*, Lord Reed examined the precise nature of the statutory duty to accommodate children, when deciding whether the local authority owed a non-delegable duty to those placed with foster parents, as this identified the nature of the obligation it had undertaken to discharge. The statute (Child Care Act 1980 s.22) only created an obligation to arrange accommodation and so there was no non-delegable duty.

In the case of a private hospital, the answer will depend upon the extent of the obligation it undertakes towards its patients. Is it an obligation to treat those patients or simply to provide operating theatres (and potentially theatre staff) for others to use? If it is the former, than the surgeon is performing a function

[9] *Razumas v Ministry of Justice* [2018] EWHC 215 (QB); [2018] P.I.Q.R. P10.

the private hospital has itself undertaken to discharge. If it is the latter, then the hospital is doing no more than making arrangements for another to provide the treatment.

A patient attending a private hospital is certainly not told that they do no more than provide facilities for others. The contracts with the hospital will usually identify an obligation to treat. This is also consistent with the legislation. Private hospitals have a statutory obligation to regulate the treatment provided on their premises, initially under the Care Standards Act 2000, and since 1 October 2010 pursuant to the Health and Social Care Act 2008. It is beyond the scope of this article to examine the statutory provisions in detail. However, under the current regulations, the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 ("the 2014 Regulations"),[10] a duty is placed upon the hospital to provide care and treatment which is appropriate and meets the patients' needs (regs 9 and 12), and obligations are put on the hospital to ensure that those who it employs are competent to provide this care (regs 18 and 19); medical practitioners who are granted practicing privileges by the hospital are defined as employees (reg.2). There are grounds for arguing that when admitting a patient, a private hospital has undertaken to provide treatment, not merely to arrange it.

If a medical practitioner has injured a claimant while providing treatment in a private hospital the fifth *Woodland* factor will also be satisfied.

If a non-delegable duty is not available because factors 3 and 4 are absent can a claimant allege vicarious liability in the alternative? Whereas a non-delegable duty depends upon a breach of the defendant's duty of care to the claimant, vicarious liability can exist where the defendant owes no duty to the claimant but is responsible for the tortious acts of another. Traditionally, this doctrine was restricted to employer/employee relationships; the employer was vicariously liable for the acts and omissions of his employee but not others with whom his business was involved. In response to the changing social circumstances identified above, the doctrine has been expanded, initially to relationships which were akin to employment,[11] but now by a broader test, whether the tortfeasor is integrated into the business activity of the defendant's enterprise.

In *Various Claimants* Lord Phillips, when determining whether a Catholic order, the Christian Brothers, could be vicariously liable for its members' sexually abusive acts, approached the question through the prism of employer/employee, identifying five elements to that relationship which made it fair, just and reasonable to impose vicarious liability. He then asked whether those elements were still present in the relationship between the Christian Brothers and its members, even they were not employees. They were, and vicarious liability was imposed. The five elements were:

> "… (i) the employer is more likely to have the means to compensate the victim than the employee and can be expected to be insured against the liability; (ii) the tort will have been committed as a result of the activity being taken by the employee on behalf of the employer; (iii) the employee's activity is likely to be part of the business activity of the employer; (iv) the employer, by employing the employee to carry out the activity will have created the risk of the tort committed by the employee; and (v) the employee will, to a greater, or lesser degree, have been under the control of the employer."

In both *Cox* and *Armes*, Lord Reed adopted these five elements as the factors that a court would consider when determining whether or not a defendant was vicariously liable for a third-party tortfeasor, albeit that tortfeasor was not in an employment relationship with the defendant. The weight to be attached to the factors would vary depending upon the context (*Armes* §56), but for there to be vicarious liability the second, third and fourth elements would need to be present and so would be the main focus of the court's enquiry. In *Cox*, Lord Reed held that these three factors were inter-related and allowed a court to assess

[10] Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 (SI 2014/2936).
[11] See *E v English Province of Our Lady of Charity* [2012] EWCA Civ 938; [2013] Q.B. 722.

the extent to which the tortfeasor was integrated into the activities of the defendant's enterprise and acting on its behalf when the risk that gave rise to the tortious act materialised:

> "The result of this approach is that a relationship other than one of employment is in principle capable of giving rise to vicarious liability where harm is wrongfully done by an individual who carries on activities as an integral part of the business activities carried on by a defendant and for its benefit (rather than his activities being entirely attributable to the conduct of a recognisably independent business of his own or of a third party), and where the commission of the wrongful act is a risk created by the defendant by assigning those activities to the individual in question."

Cox and *Armes* shift the focus of the court's investigation away from asking whether the relationship between the defendant and tortfeasor is one that is "akin to employment", instead it is focused on whether the tortfeasor's actions, taken in whole or in part, are for the defendant's benefit. This approach reflects modern society, where many business and enterprises arrange services for consumers without employing those who are directly responsible for the provision of that service. The effect of this shift is that control by the defendant over the tortfeasor has become much less important and is only relevant if it is completely absent. The element of control necessary to give rise to vicarious liability will also differ and be less stringent than the control found in an employment relationship; it is enough if the defendant can regulate the tortfeasor, it does not need to be able to direct what he does (per Lord Reed in *Cox* "the significance of control is that the defendant can direct what the tortfeasor does, not how he does it" (§21)).

This approach means that a defendant can now be liable for someone who might formerly have been considered an independent contractor. In *Armes*, the local authority was vicariously liable for foster parents, even though it was accepted that, when providing family life to a child, the foster parents, at least on a micro or day to day level, were acting independently of, and so not controlled by, the local authority. Lord Reed held that if the relationship was considered as a whole the foster parents, by caring for a child, were fulfilling the local authority's obligations and so furthering its purpose. The absence of day to day control did not negate vicarious liability arising from this integrated role. Through the Boarding Out Regulations 1955,[12] the local authority was able, on a macro level, to regulate and so direct what the foster parents did, albeit on a micro level they could not control them. It was able to direct what they did although not how they did it. For the purposes of vicarious liability this macro control was sufficient.

This shift away from an employment test to a test of integration is exemplified in the recent Court of Appeal decision in *Barclays Bank Plc v Various Claimants*.[13] The bank had used an independent GP, Dr Bates, to carry out medical checks and report upon new employees. He had taken the opportunity provided to sexually abuse those he examined. By the time that the claims were made, Dr Bates was dead and his Estate wound up. Only the bank was available to meet the claims. The bank disputed liability on the basis that Dr Bates was an independent contractor. At first instance, Davies J found all five factors were present and so held that the bank was vicariously liable for Dr Bates's assaults. Importantly, she found that although Dr Bates "organised his own professional life" he was, when acting for the bank, under its control. Her decision was upheld by the Court of Appeal, which, relying on *Cox* and *Armes,* rejected the bank's argument that the correct approach was that set out in *E* (above); a defendant was not vicariously liable for an independent contractor because that relationship could not be one which was akin to employment. Irwin LJ held:

> "It is clearly understandable that a 'bright line' test, such as is said to be the status of independent contractor, would make easier the conduct of business for parties and their insurers. However, ease of business cannot displace or circumvent the principles now established by the Supreme Court. Lord Faulks advanced the status of self-employed independent contractor as representing a 'coherent

[12] Boarding Out Children Regulations 1955 (SI 1955/1377).
[13] *Barclays Bank Plc v Various Claimants* [2018] EWCA Civ 1670; [2018] I.R.L.R. 947.

> principle of law', thereby seeking to justify the maintenance of such a principle. The submission may be attractive at first blush. However, as has now become tolerably clear from the fields of employment and taxation law, establishing whether an individual is an employee or a self-employed independent contractor can be full of complexity and of evidential pitfalls. In my view, the *Cox*/*Mohamud* questions will often represent no more challenging a basis for analysing the facts in a given case."

How can this approach apply to private medicine? The enterprise in which private hospitals are engaged is the treatment of patients. To provide that treatment, they must either employ their own surgeons and physicians or rely on outside medical practitioners. The established route by which external medical practitioners provide treatment in private hospitals is by the grant of practising privileges. The private hospital grants the surgeon or physician practicing privileges to provide treatment at their hospital. This is not an amorphous status but one which is recognised in regulations. Under the 2014 Regulations, the hospital is under the same duty to regulate and monitor the treatment provided by those with practicing privileges as with an employee.

If the *Cox* tests are applied to these generic circumstances, is a court likely to find that the private hospital is vicariously liable for independent medical practitioners who provide treatment from its premises, or is there a true absence of control which would negate such liability?

The first factor is whether the private hospital, rather than the medical practitioner who is at fault, is more able to compensate the patient. Usually doctors will carry their own insurance. However, where they do not, a deserving claimant will go uncompensated unless he can claim against the private hospital. This was the position in *Armes*. It may be argued that as a matter of course the problem will not arise because medical practitioners are required to have appropriate insurance. While this is generally true it is not always the case. If the general rule were sufficient to avoid vicarious liability Barclays would not have been held liable.

The second, third and fourth *Cox* factors are all likely to be present: (second) a medical practitioner who injures a patient will have been fulfilling the function of the private hospital, treating such patients; (third) surgeons and physicians at private hospital are part of the business activity of the hospital which relies on charging for treatment to generate an income; (fourth) by allowing the practitioner to provide treatment, through the granting of practicing privileges, the hospital has created the risk of injury through clinical negligence. On a more pragmatic approach, if one stands back and considers the role that a surgeon or physician with practising privileges plays at a private hospital they are clearly integrated into the structure and enterprise of that hospital.

A private hospital may rely on a separate payment by the patient or insurer to the surgeon or physician to argue that there is no vicarious liability. The fact of a separate payment is not likely to be determinative. If the medical practitioner is furthering the business enterprise of the hospital, a separate payment does not indicate an absence of integration. It only reflects new working arrangements in a modern economy. Similar circumstances were considered in the Scottish case of *Grubb v Shannon*[14] which involved a beauty salon. In a considered judgment, the Sheriff rejected the defender's argument that payment by an injured customer directly to one of the hairdressers rather than the salon negated integration and so vicariously liability. Indeed, on the facts of *Various Claimants*, the Christian brothers who had committed the abuse received no payment for the Order, rather they were paid by the school and passed their wages to the Order. To focus on payment to determine vicarious liability would be to return the test to one of employment and so avoid the development of the doctrine to meet the more fluid arrangements of the modern economy.

The final test is whether or not the medical practitioner is truly an independent practitioner over whom the hospital exercises no control. Just as the local authority had macro control over the foster parents in *Armes,* so the hospital exercises control over those to whom it grants practicing privileges. It is able to

[14] *Grubb v Shannon* 2018 S.L.T. (Sh Ct) 193; 2018 Rep. L.R. 48.

direct what they do if not how they do it and, as with the local authority, exercise regulatory control. This is a much lesser form of control than would be exercised over an employee, but that is no longer the test. There is not an absence of any control and it is unlikely that the medical practitioner can be characterised as someone who is running a truly independent business on their own account.

In *Woodland*, Baroness Reed agreed with Lord Sumption but warned that the five factors did not have the force of legislation, and would be subject to interpretation, depending upon the facts of any individual case (§38). Claims against private hospitals will ultimately turn on the particular circumstances of each case but moving forward, claimant lawyers will need to consider the potential liability of the institutional provider as well as the negligent medical practitioner. As Lord Reed observed in *Cox*, the law of vicarious liability was on the move and, "It has not yet come to a stop".

Limitation Act 1980 s.33: *Kimathi v Foreign and Commonwealth Office*:[1] The Need to Present a Watertight Case on Prejudice so that a Court Will Exercise its Discretion

Sabrina Hartshorn[*]

Civil evidence; Conduct; Delay; Discretionary powers; Extensions of time; Limitation periods; Personal injury claim

On 2 August 2018, Stewart J refused to exercise his discretion to allow the claim of one of the Test Claimants ("TC34") to proceed under the Limitation Act 1980 (the "Act") s.33. This decision was made as part of the trial process and not as a preliminary issue. The judgment emphasised the need for claimants to closely consider the balancing exercise they ask a court to undertake and the need for clear and persuasive evidence from the claimant that deals with each of the factors set out under the Act relevant to the claim. In this article, I review the judgment of Stewart J along with recent case law concerning the exercise of discretion under the Act.

The facts

This case was a group action concerning 40,000 claimants who brought claims against the British Government for a number of allegations, including physical abuse, relating to detention in Kenya in the 1950s during the Kenyan Emergency. There were 25 Test Claimants. The trial took over two years to complete. One of the Test Claimants ("TC34") made allegations of abuse by persons for whose conduct, it was alleged, the defendant was liable. TC34 was added to the group register on 30 May 2014, the date TC34 became party to the proceedings. The cause of action had accrued, on TC34's case, in the 1950s and possibly into 1960. TC34 did not plead that his date of knowledge was any later than when the injuries were allegedly caused. Therefore, the only issue in respect of limitation was the exercise of the court's discretion under the Limitation Act 1980 ("the Act").

The Act

As with any case where a court is being asked to extend the primary limitation period, a methodical approach is adopted towards the assessment. The judgment handed down by Stewart J did not depart from this approach. It is therefore important to remind ourselves of the relevant sections of the Act. Subsections (1) and (3) state the following:

> "(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which—
>
> (a) The provisions of section 11 … of this Act prejudice the plaintiff or any person whom he represents; and
>
> (b) Any decision of the court under this subsection would prejudice the defendant or any person whom he represents;

[1] *Kimathi v Foreign and Commonwealth Office* [2018] EWHC 2066 (QB).

[*] 9 Gough Square.

the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates.

(3) In acting under this section the court shall have regard to all of the circumstances of the case and in particular to—

(a) The length of, and the reasons for, the delay on the part of the plaintiff

(b) The extent to which, having regard to the delay, the evidence adduced or likely to be added by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11

(c) The conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's case of action against the defendant

(d) The duration of any disability of the plaintiff arising after the date of accrual of the cause of action

(e) The extent to which the plaintiff acting promptly and reasonably once he knew whether or not the act or omission of the Defendant, to which the injury was attributable might be capable at that time of giving rise to an action for damages

(f) The steps if any taken by the plaintiff to obtain medical legal or other expert advice and the nature of any such advice he may have received."

The case law

Those involved in such applications under the Act will be well aware of the extensive case law that has shaped how courts interpret the factors set out under the Act. Stewart J reminded himself of that case law and was particularly assisted by the more recent summary of the general principles upon which a court must act in such applications provided by Sir Terence Etherton, the Master of the Rolls, in *Chief Constable of Greater Manchester Police v Carroll*.[2] The Master of the Rolls derived a number of principles from the case law that had elaborated on the application of the statutory direction. In summary, the Master of Rolls confirmed that the exercise of a court's discretion is unfettered; it requires the judge to look at the matter broadly; and the matters specified within s.33(3) are not intended to place a fetter on the discretion provided by s.33(1).[3] The essence of the exercise of judicial discretion is a balance of prejudice and the burden is on the claimant to show that his or her prejudice would outweigh that to the defendant.[4] The burden is not necessarily a heavy one but will depend on the facts of the case.[5] The defendant bears the evidential burden of showing that the evidence adduced, or likely to be adduced by the defendant is, or likely to be, less cogent because of the delay[6] and if relevant or potentially relevant documentation has been destroyed or lost by the defendant irresponsibly, this is factor to be weighed against the defendant.[7] It is important to consider the prospects of a fair trial[8] and it is particularly relevant if the defendant's ability to defend the claim has been prejudiced by the lapse of time because of the absence of relevant witnesses and documents.[9] A defendant only deserves to have the obligation to pay damages removed if the passage of time has significantly diminished the opportunity to defend the claim on liability or amount.[10]

[2] *Chief Constable of Greater Manchester Police v Carroll* [2017] EWCA Civ 1992 at [42]; [2018] 4 W.L.R. 32.
[3] *Donovan v Gwentoys Ltd* [1990] 1 W.L.R. 472; [1990] 1 All E.R. 1018.
[4] *Adams v Bracknell Forest BC* [2004] UKHL 29; [2005] 1 A.C. 76.
[5] *Sayers v Lord Chelwood* [2012] EWCA Civ 1715; [2013] 1 W.L.R. 1695.
[6] *Burgin v Sheffield CC* [2005] EWCA Civ 482.
[7] *Hammond v West Lancashire HA* [1998] Lloyd's Rep. Med. 146; (1998) 95(14) L.S.G. 23.
[8] *A v Hoare* [2008] UKHL 6; [2008] 1 A.C. 844.
[9] *A v Hoare* [2008] UKHL 6.
[10] *Cain v Francis* [2008] EWCA Civ 1451; [2009] Q.B. 754.

Considering delay, the period after the expiry of the limitation period carries particular weight but a court can have regard to the period between date of knowledge and first notification of claim.[11] Disappearance of evidence and the loss of cogency of the evidence before the limitation clock starts is relevant but to a lesser degree.[12] The reason for delay is relevant and may affect the balancing exercise. Good and bad reasons can tip the balance in each parties favour.[13] Delay caused by the conduct of the claimant's advisers rather than by the claimant may be excusable.[14] Knowledge or information reasonably suppressed by the claimant which, if not suppressed, would have led to proceedings being issued earlier is relevant in respect of reasons for the delay. Proportionality is material to the exercise of discretion and appeal courts will only interfere with the exercise of the judge's discretion where the judge has made an error of principle or has made a decision which is wrong.[15]

With these principles firmly in his mind, Stewart J turned his attention to the factors set out under the Act.

Section 33(3)(a): Delay and the reasons for delay

The length of delay in TC34's case was 56 years from the date of expiry of the limitation period. TC34 provided no evidence in his witness statement or orally as to the reasons for this delay. The court was invited to draw an inference as to reasons for delay from submissions made on behalf of the claimants that they were illiterate; did not speak English to a conversational standard; were unsophisticated; and largely impecunious in terms of being able to fund a legal action against the UK. Despite these submissions there was no express evidence that these facts were the reasons why the claim was not previously brought. Stewart J stated that:

> "Reasons for delay are not self-proving. It is also unsatisfactory to be asked to draw inferences when Claimants have given written and oral evidence and have said nothing on their reasons for their delay."

[16]

In the absence of any evidence, the claimants sought to rely on the reasons pleaded within the Reply to Defence. Stewart J reiterated that statements of case were not evidence in a trial despite a signed statement of truth attached to the document unless and until it was adopted by TC34 in his evidence whether that be orally or written in the witness statement (CPR32.6). Given that there was no evidence in support of the reasons for the delay, the reasons were not the subject of cross examination by the defendant. However, Stewart J did draw an inference that a reason for not bringing the claim earlier than 1963 was likely due to the fact that TC34 had little or no access to legal advice regarding the possibility of making a claim due to a period of detention between 1955 and 1963. This inference was drawn because of the existence of documentation produced by the defendant regarding access to lawyers. Without any direct evidence as to reasons put forward for the significant delay from 1963 onwards, the scales of prejudice started to tip in the defendant's favour.

The need for witness evidence to support reasons for delay is not controversial and was considered in the case of *Carr v Panel Products (Kimpton) Ltd*.[17] This was a noise induced hearing loss claim in which the Court of Appeal were asked to determine if a District Judge's decision not to exercise his discretion

[11] *Cain v Francis* [2008] EWCA Civ 1451; [2009] Q.B. 754.
[12] *Collins v Secretary of State for Business Innovation and Skills* [2014] EWCA Civ 717; [2014] C.P. Rep. 39.
[13] *Cain v Francis* [2008] EWCA Civ 1451 at [73].
[14] *Corbin v Penfold Co Ltd* [2000] Lloyd's Rep. Med. 247; (2000) 97(17) L.S.G. 35.
[15] *KR v Bryn Alyn Communities (Holdings) Ltd* [2003] EWCA Civ 783; [2003] Q.B. 1441; *Kimathi v Foreign and Commonwealth Office* [2018] EWHC 2066 (QB) at [44].
[16] *Kimathi v Foreign and Commonwealth Office* [2018] EWHC 2066 (QB) at [44].
[17] *Carr v Panel Products (Kimpton) Ltd* [2018] EWCA Civ 190.

in extending the primary limitation period had been wrong, one of the issues being the failure by the judge to consider prejudice to the claimant. McCombe LJ considered that the District Judge could not be faulted in his judgment on this aspect as the claimant had not raised in his witness statement anything as to why any discretion under the Act should be exercised in his favour.[18] There were no specific points of prejudice raised by the claimant in any of the documentation before the Court of Appeal and the District Judge could not be criticised for his judgment on prejudice due to the lack of particularity in the claimant's case.

Section 33(3)(b): Delay and the cogency of evidence

Stewart J highlighted that the relevant delay is not just after the expiry of the limitation period but the total period of delay when considering issues of cogency of the evidence of the parties. He identified two common factors relevant to the issue of cogency: the importance of witness availability and the quality of evidence provided and the effects of the availability or unavailability of documentation. It is well known that the longer the delay, the greater the effect on the cogency of the evidence. As each year passes, the ability to give relevant evidence diminishes. Given that TC34's allegations of abuse related to a period over 50 years ago during a period of unrest in Kenya, there was little documentation available generally and specifically in relation to TC34's detention. It left the defendant in the position of being unable to respond to TC34's allegation positively and with particularity to the allegations made by him. It was argued by the defendant that had the case been brought timeously, documents were likely to have been available which would have led to investigations which yielded material witnesses. TC34 submitted that the relevant documentation had been destroyed irresponsibly. Stewart J disagreed as there was no evidence of such destruction. He stated that:

> "Absent litigation or other requirement to preserve documents, if a claimant does not bring a claim timeously and documents are destroyed or lost, then there is no factor weighing against the Defendant by reason of destruction."[19]

It was clear from the oral evidence provided by TC34 that he was unclear as to dates and periods spent in specific camps in Kenya and that had he brought his claim earlier, TC34's recollection as to dates and periods would probably have been more accurate. The delay had affected the cogency of the evidence.

Delay and the effect on cogency was also discussed in the case of *Fudge v Hawkins & Homes Ltd*,[20] a claim for provisional damages in an asbestosis claim. The claim was issued 5.5 years after the expiry of the limitation period. The only issue was the exercise of discretion under the Act. Shortly before expiry of the primary limitation period, a firm of solicitors the claimant had instructed ceased to act for him due to the lack of information they had. In oral evidence, the claimant struggled to recall dates generally but more particularly in relation to his employment with different employers. During his evidence, the claimant had admitted that he had kept records of his work for tax purposes but had not given the records to solicitors initially instructed because they had not asked for them. He also admitted to destroying the documents after expiry of the limitation period because he saw little point in keeping them. The court was satisfied that the cogency of the evidence had been significantly reduced by the delay in bringing the proceedings and the acts of the claimant during the 5.5 year delay.

[18] *Carr v Panel Products (Kimpton) Ltd* [2018] EWCA Civ 190 at [49].
[19] *Kimathi v Foreign and Commonwealth Office* [2018] EWHC 2066 (QB) at [20]
[20] *Fudge v Hawkins & Homes Ltd* [2018] EWHC 453 (QB).

Section 33(3)(c): Conduct of the defendant

Stewart J confirmed that it is only the conduct after the date the claim is intimated which is relevant under this section of the Act[21] and the conduct of the defendant amounts to conduct procedurally in relation to the claimant/their advisers. TC34 argued that there had been no attempt by the defendant to capture all available oral evidence. TC34 also chose to criticise the way in which the cross-examination was conducted by the Defence in not asking about key events or for explanations of inconsistency. Stewart J did not consider these criticisms to be matters of conduct for the purposes of this section.

Section 33(3)(d): Disability of the claimant arising after the date the cause of action accrued

This was not a factor which needed to be considered in any of the Test Claimants' cases as those that were minors at the time the cause of action accrued, attained their majority years ago. Despite a submission that TC34 had suffered from historic Post Traumatic Stress Disorder which had led to a functional impairment, there was no evidence that this amounted to a disability as defined by the Act, namely a lack of capacity within the meaning of the Mental Capacity Act 2005.

Section 33(3)(e): The extent to which the claimant acting promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable might be capable at that time of giving rise to an action for damages

Stewart J reminded himself that this section requires actual knowledge on the part of the claimant. Stewart J had found that the claimants had actual knowledge shortly after the abuses were alleged to have occurred. Therefore TC34's actions were not prompt and there was no evidence on which to base a finding that the claimant had acted reasonably in not bringing proceedings until recently.

In the case of *Fudge*,[22] the claimant knew by the time of instructing his solicitors shortly before the primary limitation period that his injury might be capable of giving rise to a claim. He did not offer the solicitor his archive of documentation when it was still available and despite being advised by his initial instructing solicitors that the limitation period was coming to an end and the need to seek a second opinion urgently, he chose not to do so for 4.5 years and within that period destroyed his archive. The claimant had clearly on these facts not acted promptly and/or reasonably.

Section 33(3)(f): The steps, if any, taken by the claimant to obtain medical, legal or other expert advice and the nature of any such advice he may have received

TC34 provided no evidence about the steps taken to obtain any such advice or provide any evidence as to why he did not do so. Stewart J considered that the expert advice the court needed to consider was legal and non-psychiatric evidence given that the main focus of the claims were alleged beatings.

Generally

Considerations of proportionality were not relevant in TC34's case. Stewart J's view was that if he considered a fair trial could take place and considered it equitable to allow the action to proceed, even if the amount of the recovery in each individual claim was modest, given the nature and seriousness of the allegations, that would not weigh against the claim proceeding.

[21] *Halford v Brookes (No.1)* [1991] 1 W.L.R. 428; [1991] 3 All E.R. 559.
[22] *Fudge v Hawkins and Holmes Ltd and F.G. Minter Ltd and Charles Winstone (Builders) Ltd* [2018] EWHC 453 (QB).

Stewart J's refusal to exercise his discretion under the Act in TC34's case centred on the significant delay in bringing the claim, the defendant's ability to defend being severely compromised by that delay which resulted in the lack of availability of documentary evidence and witnesses with little opportunity of a fair trial of the core allegations.

Conclusion

On 21 November 2018, Stewart J decided the fate of another Test Claimant ("TC20") in the group action. Unsurprisingly Stewart J came to the same conclusion on disapplying the primary limitation period under the Act as he did in TC34's case. In his judgment on limitation in the case of TC20, Stewart J used a nautical metaphor in an attempt to explain how a court exercised its discretion where a claim is out of time. He stated:

> "When a claim is out of time, the question is whether the boat is seaworthy to launch. If it is, even though it may have defects, then generally it will be proper to allow the voyage to take place. In the case of TC 20 (and TC 34) there is little more than a lop-sided basic structure of a vessel with many essential components missing. The main missing components are evidence from witnesses and documents. The absence of these components, without more, necessitates that the boat must not be put on the water, as it would be doomed to sink immediately. Had TC 20 evidenced all her pleaded reasons for the delay, this would have made no difference. The missing components of witnesses and documents would still be so serious that the boat could not be launched. If the defects caused by their absence had been much less serious, such that the boat, albeit with difficulty, could have safely reached a port, it would have been a different matter."[23]

Despite Stewart J confirming that the absence of direct evidence for the delay in TC34 or TC20's case would have made no difference to his decision under s.33 of the Act, in my view, practitioners must provide witness evidence from the claimant as to the reasons why there has been a delay in bringing the claim if a court is being invited to disapply the primary limitation period. Too often applications under the Act are made on the basis of submissions with no direct evidence from the claimant to support those submissions, as is often the case in industrial disease claims. In these claims, the primary focus is seeking to persuade a court that the case has been brought within the primary limitation period. However, if a claimant does seek a direction under s.33 of the Act as an alternative, then the cases of *Kimathi*[24] and *Carr*[25] confirm that the witness evidence needs to deal with reasons for delay.

In considering any case where the Act is likely to bite, practitioners should also remind themselves that "the Act is a corrective for justice where circumstances allow".[26] Practitioners need to give careful consideration to specific circumstances in an individual case and those factors as outlined in s.33(3)(a)–(f) of the Act. The reasons given by claimants for bringing a claim out of time not only need to be evidenced but they also need to be compelling to overcome the generally held view that the longer the delay in bringing the claim, the greater the difficulty the claimant will have in persuading a court that it is equitable to disapply the primary limitation period.

[23] *Kimathi v the Foreign and Commonwealth Office* [2018] EWHC 3144 (QB) at [317].
[24] *Kimathi v Foreign and Commonwealth Office* [2018] EWHC 2066 (QB).
[25] *Carr v Panel Products (Kimpton) Ltd* [2018] EWCA Civ 190.
[26] *Davies v Secretary of State for Energy and Climate Change* [2012] EWCA Civ 1380 at [55].

Package Travel Claims: Revolution or Evolution?

Katherine Allen*

Consumer protection; Holiday claims; Linked travel arrangements; Package travel; Personal injury claims; Pre-action protocols

2018 was a year of change in the field of personal injury litigation arising out of package holidays on two levels. In April 2018, regulations[1] implementing Directive 2015/2302 on package travel and linked travel arrangements ("PTD 2015") were published and came into effect on 1 July 2018.[2] At the same time, a new Pre-action Protocol for Resolution of Package Travel Claims was introduced that will apply to all claims for gastric illness contracted during a package holiday with a value of less than £25,000 where the letter of claim is sent to the defendant after 7 May 2018. So, will these changes amount to a revolution or are they simply an evolution of the existing framework for dealing with these claims?

The history

In the UK, the Package Travel, Package Holidays and Package Tours Regulations 1992 ("PTR 1992")[3] have been in force since 23 December 1992, bringing into national law the provisions of the first package travel directive.[4] The term "revolution" is defined in the *English Oxford Dictionary* as a "dramatic and wide-reaching change in conditions, attitudes or operation".

The introduction of the PTR 1992 really did create a revolution in the way in which claims arising out of package holidays were litigated. Up until then, even if an organiser based in England and Wales had arranged a package holiday for a traveller, that organiser's responsibility was generally limited to the contractual arrangements they had put in place. Therefore, if the traveller suffered injury while they were away, because of something the accommodation provider had done or not done, the traveller would more often than not be left in the unenviable position of having to sue the accommodation provider in its own jurisdiction. The PTR 1992 changed that forever by introducing the concept of vicarious liability into the package travel arena. PTR 1992 reg.15 provided that:

> "(1) The other party to the contract is liable to the consumer for the proper performance of the obligations under the contract, irrespective of whether such obligations are to be performed by that other party or by other suppliers of services but this shall not affect any remedy or right of action which that other party may have against those other suppliers of services.
>
> (2) The other party to the contract is liable to the consumer for any damage caused to him by the failure to perform the contract or the improper performance of the contract unless the failure or the improper performance is due neither to any fault of that other party nor to that of another supplier of services, because—
>
> (a) the failures which occur in the performance of the contract are attributable to the consumer;

* Partner and Travel Litigation Specialist, Hugh James. Katherine is a Partner at Hugh James specialising in Travel Law. She acts for tourists who have become ill or been injured on package holidays, in road accidents abroad, on cruise liners and on aeroplanes. Katherine also has experience in dealing with claims arising from aviation disasters and terrorist attacks. She is a member of the Association of Personal Injury Lawyers ("APIL"), the Travel and Tourism Lawyers Association, the Pan-European Organisation of Personal Injury Lawyers ("PEOPIL"), and the American Association for Justice. She is the Chair of the PEOPIL RTA European Exchange Group and is an APIL accredited accidents and illnesses abroad specialist.

[1] Package Travel and Linked Travel Arrangements Regulations 2018 (SI 2018/634).

[2] Directive 2015/2302 on package travel and linked travel arrangements, amending Regulation 2006/2004 and Directive 2011/83 of the European Parliament and of the Council and repealing Council Directive 90/31 [2015] OJ L326/1.

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

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

(b) such failures are attributable to a third party unconnected with the provision of the services contracted for, and are unforeseeable or unavoidable; or

(c) such failures are due to—

(i) unusual and unforeseeable circumstances beyond the control of the party by whom this exception is pleaded, the consequences of which could not have been avoided even if all due care had been exercised; or

(ii) an event which the other party to the contract or the supplier of services, even with all due care, could not foresee or forestall."

Therefore, since the introduction of the PTR 1992, if a traveller can establish that personal injury resulted from the failure to perform or the improper performance of the contract, that traveller can recover compensation for the injury and consequent losses from the "other party to the contract", usually the organiser of the holiday. English law will generally apply in these cases as the claim is essentially a claim for breach of contract and the booking terms and conditions will generally contain a clause confirming the jurisdiction of the courts of England and Wales and the application of English law. Over the years, since the introduction of the PTR 1992, case law[5] has confirmed that in cases of improper performance the local standard is to be used in assessing whether there has been a breach. By far the biggest challenge to claimants in these cases will often be obtaining evidence confirming what that local standard is, but even so the PTR 1992 has made it significantly easier for tourists to bring claims against holiday organisers and/or retailers when they have suffered injury on a package holiday abroad.

The definition of the term "package" in the PTR 1992 reg.2(1) reflected the way in which holidays were organised at the time. A package was stated to be:

"… the pre-arranged combination of at least two of the following components when sold or offered for sale at an inclusive price and when the service covers a period of more than twenty-four hours or includes overnight accommodation:

(a) transport

(b) accommodation

(c) other tourist services not ancillary to transport and accounting for a significant proportion of the package …"

The definition of "package" has been the subject of judicial consideration over the last 10 years or so. It was considered in some detail in the case of *Association of British Travel Agents Ltd v Civil Aviation Authority* ("*ABTA v CAA*")[6] which involved consideration of when a holiday was "sold or offered for sale at an inclusive price" so that a travel agent was obliged to have an Air Travel Organiser's Licence ("ATOL"). The ATOL scheme is administered by the CAA. The dispute centred on the CAA's interpretation of the meaning of "package" for the purposes of the Civil Aviation (Air Travel Organisers' Licensing) Regulations 1995[7] as described in a guidance note issued by the CAA ostensibly to assist "travel organisers and travel agents decide what parts of their business needed ATOL protection".

The CAA's guidance note stated, under the heading "inclusive price", that:

"The term refers to the price of the package. It does not matter if the cost of a package is made up of separate sums relating to the value of each element (travel, accommodation, other ancillary tourist services). In these circumstances, the whole arrangement can still be sold at an inclusive price."

In the High Court, Goldring J found:

[5] e.g. *Codd v Thomsons Tour Operators Ltd* [2000] CA B2/1999/1321; *Holden v First Choice Holidays & Flights Ltd*, unreported, 22 May 2006 QBD.

[6] *Association of British Travel Agents Ltd v Civil Aviation Authority* [2006] EWCA Civ 1356; [2007] 2 All E.R. (Comm) 898.

[7] Civil Aviation (Air Travel Organisers' Licensing) Regulations 1995 (SI 1995/1017).

> "156 … the words 'inclusive price' should be given their ordinary and natural meaning. The ordinary and natural meaning of the word 'inclusive' connotes more than a mere arithmetical total of the component parts of a price. If the substance of a transaction is the sale by the travel agent of separate and discrete components of (for example) a holiday, with no one part being connected with or dependent upon any other part (other than that they are sold together), to call the resulting price 'inclusive' is in my view to stretch the ordinary and natural meaning of that word. It is in reality no more an 'inclusive price' than is the total price of goods at the checkout of a supermarket. For the sale of a package at an inclusive price the relationship between the component parts of that package must be such as to mean that the consumer is buying and paying for them as a whole: that the sale of one component part is in some way connected with or dependent on the sale or offer for sale of others."

Goldring J held that the guidance note was unlawful and should be quashed. The decision was upheld by the Court of Appeal. Helpfully, in his judgment, Chadwick LJ applied the findings of Goldring J to a number of different scenarios in which holidays had been booked. He stated:

> "26. The more difficult cases are those in which the price for the whole is equal to the aggregate of the prices for which the components would have been sold or offered for sale separately. The principle is, perhaps, easier to state than to apply in practice … The factual question to be resolved—on a case by case basis—is whether the services are being sold or offered for sale as components of a combination; or whether they are being sold or offered for sale separately, but at the same time.
>
> 27. The point may be illustrated by examples. Suppose a customer, in London, who wishes to spend a week at a named hotel in, say, Rome. He asks his travel agent what the trip will cost him. The agent ascertains that the cost of the return flight will be £X, the cost of the accommodation will be £Y and the cost of the airport transfers will be £Z. Without disclosing the individual cost of each service, the agent offers the customer flights, accommodation and transfers at a price of £(X+Y+Z). the customer accepts without further inquiry. In that case there would be little doubt—as it seems to me—that the services were sold as a pre-arranged combination and at an inclusive price.
>
> 28. Now suppose that the agent has informed the customer that the cost of flights will be £X, the cost of accommodation will be £Y and the cost of transfers will be £Z; and has explained to the customer that he can purchase any one or more of those services, as he chooses, without any need to purchase the others. He has explained, in effect, that the customer can choose to purchase the other services elsewhere; or to make other arrangements. In that case—as it seems to me—there would be little doubt that the services are not offered for sale as a pre-arranged combination and at an inclusive price.
>
> 29. What, then, if the customer chooses, and contracts for, one of those services. It is plain that that service would not be sold as a pre-arranged combination: it is not sold in combination with any other service. And it is plain that that position would not alter, if having paid for one of those services, the customer subsequently decides to take, and contracts for, another of the services. Nor would the position alter if, after paying for the second service, the customer later decides to take, and contracts for, the third service. And it would make no difference if, having entered into three separate contracts and received three separate invoices, the customer were to pay the three invoices with a single cheque. The position would be the same. There would have been no sale of a pre-arranged combination of components at a single inclusive price. Rather, there would have been three separate sales of independent

> services, the aggregate of the prices payable for the three separate services being satisfied by a single payment.
>
> …
>
> 31. Returning to the second of the examples which I have set out, difficult questions of fact are likely to arise if the customer chooses and contracts for two or more of the services on the same occasion. The principle is not in doubt. If the services are sold or offered for sale as components of a combination, there is a package: if they are sold or offered for sale separately but at the same time, there is no package. The question whether they are sold as components of a combination—or separately but at the same time—is a question of fact. That question may not be easy to resolve in the particular case."

The crucial distinction is whether the services are being sold or offered for sale as components of a combination, or as separate components simply sold at the same time. That distinction may not always be understood by a consumer.

The decision in the case of *Civil Aviation Authority v Travel Republic Ltd*[8] is of some assistance. Consumers booking holidays through Travel Republic's website had a choice of flights, hotels and apartments, car hire and other related services which they had to select. The High Court summarised the booking process in this way:

> "Some web links specifically refer to what are described as 'tailor made holidays'. The various components which make up a holiday are ostensibly all sold separately but can be linked together by a customer to provide all the necessary elements of a holiday, and indeed the system consciously facilitates their ability to do so. The total cost of the combined services will be the same as the aggregate cost of each of the components priced separately. In other words there is no price discount for booking more than one element of the holiday."

The view of the High Court was that this scenario fell within the scope of Chadwick LJ's example where individual components were purchased at the same time as a basket of goods, but not as part of a pre-arranged combination for an inclusive price. Therefore there was no package.

The changing landscape of holiday bookings

It is fair to say that the way travellers book their holidays has changed immeasurably over the last 25 years since the PTR 1992 was first introduced. The internet has been transformational, leading to an explosion of travel retailers competing with the traditional tour operators and the cheaper pricing structures they offer have been very popular. However, these arrangements often do not meet the definition of a package and yet many travellers may not appreciate this distinction and will not be aware that they do not have the benefit of the same levels of protection as those that book with a more traditional tour operator. Therefore, there have been increasing instances of consumers purchasing a holiday that they think is a package when in fact it is not.

The new regime

It is against this background that Directive 2015/2302 on package travel and linked travel arrangements ("PTD 2015") was drafted. Given that the last package travel directive upon which the PTR 1992 was founded created such a seismic shift in the way personal injury claims arising from package holidays were taken, are the 2018 Regulations implementing PTD 2015 likely to lead to a further revolution?

[8] *Civil Aviation Authority v Travel Republic Ltd* [2010] EWHC 1151 (Admin); [2010] C.T.L.C. 61.

One suspects that the answer to this question, from the point of view of the traveller, is a resounding "no".

It is true that the 2018 Regulations introduce a wider definition of the term "package" in an attempt to try and include many of the holidays that are booked that would not fall within the traditional definition under the previous regime. Regulation 2(5) defines "package" as:

> "… a combination of at least two different types of travel services for the purpose of the same trip or holiday, if:
>
> (a) those services are combined by one trader, including at the request of, or in accordance with, the selection of the traveller, before a single contract on all services is concluded; or
>
> (b) those services are:
>
> (i) purchased from a single point of sale and selected before the traveller agrees to pay,
>
> (ii) offered, sold or charged at an inclusive or total price,
>
> (iii) advertised or sold under the term 'package' or under a similar term,
>
> (iv) combined after the conclusion of a contract by which a trader entitles the traveller to choose among a selection of different types of travel services, or
>
> (v) purchased from separate traders through linked online booking processes where—
>
> (aa) the traveller's name, payment details and e-mail address are transmitted from the trader with whom the first contract is concluded to another trader or traders, and
>
> (bb) a contract with the latter trader or traders is concluded at the latest 24 hours after the confirmation of the booking of the first travel service,
>
> irrespective of whether the traveller concludes separate contracts with one or more travel service providers in respect of the services."

"Travel service" is defined in reg.2(1) as:

> "(a) the carriage of passengers;
>
> (b) the provision of accommodation which is not intrinsically part of the carriage of passengers and is not for residential purposes;
>
> (c) the rental of—
>
> i. cars;
>
> ii. other motor vehicles within the meaning of Article 3(11) of Directive 2007/46/EC of the European Parliament and of the Council establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles; or
>
> iii. motorcycles requiring a Category A driving licence in accordance with point (c) of Article 4(3) of Directive 2006/126/EC of the European Parliament and of the Council on driving licences
>
> (d) any other tourist service not intrinsically part of a travel service within the meaning of points (a), (b) or (c)."

Regulation 2(6) confirms that when not more than one type of travel service of the kind referred to in para.(a), (b) or (c) of the definition of travel service is combined with one or more tourist services of the kind listed in para.(d) of that definition, there is no package if the services in para.(d) do not account for a significant proportion of the value of the combination and are not advertised as, and do not otherwise represent, an essential feature of the combination; or if they are selected and purchased after the performance of a travel service of the kind listed in para.(a), (b) or (c) of the definition of travel service has started.

At first blush, this would appear to catch many of the holidays that are booked online within the definition of package. However, until consumers know how the travel industry is going to respond to the 2018 Regulations and this ostensibly wider definition, it is too early to tell how effective it will be. One can already see from the definition that there are some obvious ways in which a holiday can be marketed that would avoid the application of the regulations. Travellers, therefore, are still in the dark as to what the future may hold for their holiday booking arrangements.

Regulations 15 and 16 deal with responsibility for the performance of the package, i.e. what would have been the old reg.15 under PTR 1992. Regulation 15(2) states that the organiser[9] is responsible for the performance of the travel services included in the package travel contract irrespective of whether those services are to be performed by the organiser or by other travel service providers. The Directive leaves it to Member States to determine whether the retailer should also be responsible for the performance of the package. The 2018 Regulations do not impose liability on the retailer in this context, although reg.17 does entitle the traveller to contact the organiser via the retailer. The traveller is required to inform the organiser without undue delay, taking into account the circumstances of the case, of any lack of conformity which he perceives during the performance of a travel service included in the package travel contract (reg.15(3)).

"Lack of conformity" is defined in reg.2(1) as "a failure to perform, or the improper performance of, the travel services included in a package".

The remainder of reg.15 deals with the circumstances in which the organiser must remedy the lack of conformity and compensation when the organiser fails to do so, as well as the situations in which the lack of conformity entitles the traveller to terminate the contract.

Of more relevance to those who suffer personal injury during a package holiday is reg.16. Regulation 16(2) states that the traveller is entitled to an appropriate price reduction for any period during which there is a lack of conformity, and reg.16(3) states that the organiser must offer the traveller appropriate compensation for any damage which the traveller sustains as a result of any lack of conformity, and provides that any compensation is to be made without undue delay. Regulation 16(4) confirms the circumstances in which the traveller will not be entitled to compensation. Essentially compensation will not be payable if the lack of conformity is:

- attributable to the traveller;
- attributable to a third party unconnected with the provision of the travel services included in the package travel contract and is unforeseeable or unavoidable; or
- due to unavoidable and extraordinary circumstances.[10]

These are remarkably similar to the defences included in the PTR 1992 reg.15(2).

It is therefore the view of the writer that the 2018 Regulations are unlikely to lead to a revolution in the way in which claims for personal injury arising from package holidays will be dealt with. Although the language appears to be slightly different on a first reading, when you look at the detail the terminology is not dissimilar to that used in the PTR 1992. "Lack of conformity" will still, in the writer's view, fall to be determined by local standards given that the definition of the term refers to the concept of "improper performance". The defences are in remarkably similar terms.

The only real potential for any significant change lies in the wider definition of the concept of "package". This wider definition is a response to the gradual development of the travel industry and the way in which holidays are sold and is therefore much more evolutionary in nature. Its impact will be dependent upon the products that holiday organisers and retailers sell once the new package travel regulations come into

[9] "(a) a trader who combines and sells, or offers for sale, packages, either directly or through another trader or together with another trader; or (b) the trader who transmits the traveller's data to another trader in accordance with"; para.(b)(v) of the definition of package (reg.2(1)).

[10] "a situation beyond the control of the party who seeks to rely on such a situation, the consequences of which could not have been avoided even if all reasonable measures had been taken"; reg.2(1).

force. It therefore remains to be seen whether ongoing innovation in the travel industry will mean that the 2018 Regulations are out of date almost as soon as they come into force.

It should be noted that the PTD 2015 and the 2018 Regulations also introduce the concept of "linked travel arrangements". A linked travel arrangement is an arrangement whereby traders facilitate the procurement of travel services by travellers leading the traveller to conclude contracts with different travel services providers, including through linked booking processes which do not contain the features of a package. Such arrangements will not benefit from the protections referred to in regs 15 and 16 of the 2018 Regulations. Linked travel arrangements are brought within the PTD 2015 and the 2018 Regulations to ensure that these arrangements are regulated insofar as the information required to be given to the traveller before the conclusion of a linked travel arrangement and in relation to insolvency protection.

A costs revolution

Perhaps more revolutionary will be the Government's proposals for dealing with the apparent substantial increase in the number of low value personal injury claims for gastric illness arising from package holidays. During 2018, there have been a lot of reports in the press about the rise in holiday sickness claims, with comments from tour operators about the fraudulent nature of many such claims. The SRA has issued a warning notice confirming its concern that claims are being submitted without proper analysis of the evidence or understanding of the legal position.

While it is dangerous, in the writer's view, to jump to the conclusion that all claims of this nature must be dishonest, there have been a number of examples of claimants being found to have been fundamentally dishonest and those claimants are now facing criminal prosecution and imprisonment. See, for example, the case of *Lavelle and McIntyre v Thomas Cook Tour Operators*[11] in which, almost three years after their holiday, the claimants alleged in a letter of claim that they had suffered gastroenteritis while on holiday.[12] In a feedback questionnaire, Mr McIntyre had completed on the return flight it was stated that the service provided had been either good or excellent and a section regarding illness suffered on the holiday had not been completed. No complaint had been made about the illness in resort and no medical treatment had been obtained in resort or following their return home. DDJ Herzog, sitting in Liverpool County Court, concluded that the claimants' accounts were implausible and no illness had been suffered. He also found that the claimants had been fundamentally dishonest and the adult claimants were ordered to pay the defendant's costs.

Against this background, on 9 July 2017, the Government announced measures to tackle the apparent increase in package holiday sickness claims and on 13 October 2017, the Ministry of Justice published a call for evidence. In April 2018, the Ministry of Justice published the pre-action protocol for resolution of package travel claims. It applies to any claim for gastric illness contracted during a package holiday worth less than £25,000 where the letter of claim has not been sent to the defendant before 7 May 2018. Among other things the pre-action protocol sets out the procedure for sending the letter of claim to the defendant, suggests the content of that letter, the time limits for the defendant to provide an acknowledgment of and response to the letter of claim, the disclosure likely to be material in such a claim and details as to the specialism of expert in cases where the symptoms did not last longer than 28 days.

CPR r.45 now also includes provisions as to the fixed costs and disbursements payable in claims to which the pre-action protocol applies. The substance of the pre-action protocol does not, in the view of the writer, significantly alter the pre-action procedure previously adopted when dealing with these claims. However, it is likely that the fixed costs provisions, together with the proposed increase in the small claims limit, will result in less claims being made, fraudulent or otherwise, as the economic viability of these

[11] unreported.
[12] *Lavelle and McIntyre v Thomas Cook Tour Operators*, unreported, 10 July 2017.

claims makes them less attractive to those previously representing claimants in this arena. For example, where a claim has a value of between £1,000 and £5,000 (and most food poisoning claims will fall within this range) the costs will be limited to a total of £950 plus 17.5% of the damages plus permitted disbursements. While this figure will rise to £2,450 and 17.5% of the damages if proceedings are issued but the case settles before trial and £3,790 and 27.5% of damages if the claim is disposed of at trial, given the amount of expert evidence required in these cases, it will be very challenging for any law firm to deal with these cases profitably.

Not so much a revolution but certainly a further erosion of the principle of access to justice for genuine claimants who suffer what can be quite debilitating short-term illness while on package holidays abroad.

It will take a little time for the impact of these changes to be felt. Although more evolutionary than revolutionary, any claims under the 2018 Regulations are unlikely to be the subject of judicial comment for at least another year and it remains to be seen whether the new definition of "package" really does ensure that the Regulations provide effective protection for consumers in the marketplace. The protocol that now applies to gastric illness claims is more of a dramatic change and calls for further reform are still coming from the travel industry. However, the two may be incompatible, while the Regulations may mean that more holidays than before will be identified as a "package", the reforms contained within the protocol will mean that, at least in the arena of gastric illness, a consumer's choice of lawyer is likely to be severely curtailed.

How to Succeed Against the MIB's Off-Road Vehicle Defence

Alan Ball*

Defences; Driving elsewhere than on roads; Motor Insurers' Bureau; Motorcycles; Personal injury claims; Road traffic accidents; Settlement; Uninsured drivers

This article will discuss a recent case (*KMX v DPX and MIB*[1]) that Carolyn Heaton, Partner at Irwin Mitchell, and I, as well as Henry Witcomb QC, have successfully resolved against the Motor Insurers' Bureau ("MIB"). After over three years of liability being in dispute in August 2018, less than two weeks before trial, the MIB admitted liability in full. This article will discuss the "off-road" vehicle defence used by the MIB and how it was overcome.

We represented a young girl who was catastrophically injured when she was crossing a residential road with her father and brother. The claimant crossed the road and had nearly reached the safety of the pavement when she was struck by an off-road Yamaha YZ85 motorcycle, ridden by a local youth. As a result of this accident, the claimant suffered a catastrophic injury to her brain which has left her with grave disabilities.

The motorcycle ridden by the first defendant was uninsured. We therefore submitted a claim against the MIB in accordance with the MIB Uninsured Drivers Agreement 1999 ("UDA").

The MIB proceeded to investigate liability and offered minimal rehabilitation in the form of jointly instructed case management, but continuously refused to fund the various rehabilitation recommendations made by the Case Manager. Despite the availability of police and witness evidence no admission of liability, or confirmation that the MIB would deal with the claim, was received.

Court proceedings were served on the first defendant and the MIB as second defendant. No defence was filed by the first defendant.

The MIB served its defence and denied liability on two grounds. The first was that the first defendant was not negligent. Based on the police report, CCTV footage, witness evidence and accident reconstruction evidence obtained, the first defendant's negligence was beyond question.

The second argument adopted by the MIB, the focus of this article, was that the MIB did not have to satisfy judgment against the first defendant due to the type of motorcycle ridden by the first defendant. It was argued that it was an "off-road" motorcycle and therefore not classed as a motor vehicle in accordance with the Road Traffic Act 1988 s.185. Consequently, it was asserted that its use by the first defendant did not give rise to a "relevant liability" as defined in clause one of the UDA.

In accordance with the UDA, the MIB would only be responsible if a judgment is obtained against a defendant who was required by the Road Traffic Act 1988 Pt VI to be insured against liability (and that judgment remains unsatisfied). The MIB has to satisfy the judgment if the defendant is found to have been negligent as follows:

- The MIB is only liable to satisfy an "unsatisfied judgment" pursuant to clause five of the Uninsured Drivers Agreement 1999.
- An unsatisfied judgment is one relating to a judgment for a "relevant liability" as defined in clause one of the Uninsured Drivers Agreement 1999.
- A "relevant liability" is one that falls within the Road Traffic Act 1988 Pt VI.

* Solicitor at Irwin Mitchell.
[1] *KMX v DPX and MIB* [2018].

In accordance with the Road Traffic Act 1988 s.143 (within Pt VI) no "motor vehicle" should be used on "a road or other public place" without relevant insurance:

> "A person must not use a motor vehicle on a road or other public place unless there is in force in relation to the use of the vehicle by that person such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Part of this Act."

The Road Traffic Act 1988 s.185 defines a motor vehicle as follows:

> "'motor vehicle' means, subject to section 20 of the Chronically Sick and Disabled Persons Act 1970 (which makes special provision about invalid carriages, within the meaning of that Act), a mechanically propelled vehicle intended or adapted for use on roads."

The words "intended or adapted for use on roads" were significant in our case and were a key part of the MIB's defence in arguing that the motorcycle ridden by the first defendant was not classed as a motor vehicle. The MIB averred that because it was an "off-road" motorcycle intended and manufactured for dirt track and competition use, it was not intended or adapted for road use. The MIB detailed that the motorcycle ridden by the first defendant did not have a speedometer, number plate, or battery, and that the tyres were moulded with the wording "Not for highway use", in addition to various other reasons to support its defence.

In advance of the initial Case Management Conference, the court was requested to set directions leading to a liability only trial, which was due to commence at the beginning of September 2018. We also served a Reply taking issue with the MIB's defence. In our Reply we set out the legal basis as to why the MIB was required to satisfy judgment.

The claimant's legal argument

The MIB would have been aware, that the case law set out in our Reply and below, renders irrelevant the intention of the manufacturer when determining whether a motorcycle is classed as a "motor vehicle". Instead when determining the same, the long established common law test is whether "some general use on the roads is contemplated" as *one* of the uses of a vehicle.[2]

In that case, the defendant was found sitting in a go-kart on an un-adopted road and was convicted of using a motor vehicle on a road. He appealed on the grounds that the go-kart was not intended or adapted for use on roads and was not a motor vehicle. The appeal was allowed and the conviction was quashed. The court held that the test to be adopted was the "reasonable man test". It further held that there must be sufficient evidence to prove beyond reasonable doubt that a "reasonable man" looking at the go-kart would say that one of its uses would be a use on the road.

In his judgment Lord Parker CJ stated:

> "I prefer to make the test whether a reasonable person looking at the vehicle would say that one of its users would be a road user. In deciding that question the reasonable man would not, as I conceive, have to envisage what some man losing his senses would do with a vehicle; nor an isolated user or a user in an emergency. The real question is: is some general use on the roads contemplated as one of the users?"

When answering the question whether a reasonable person would contemplate, as one of its uses some general use of the motorcycle on a road, the test is whether the vehicle "might well be used on the road", as per *DPP v Saddington*.[3] In this case, the defendant drove an unregistered motorised scooter, a "Go-Ped",

[2] *Burns v Currell* [1963] 2 Q.B. 433; [1963] 2 W.L.R. 1106.
[3] *DPP v Saddington* (2001) 165 J.P. 122; [2001] R.T.R. 227.

on a road whilst disqualified and uninsured. It was conceded that the scooter was a mechanically propelled machine.

A further extension of the reasonable man test was considered in *DPP v King*[4] where it was asked "whether some general use on the road is something which *might* well occur" (emphasis added). In this case, the defendant was stopped by police whilst riding a "City Mantis" electric scooter on a public road. The court asked: "the question which the ordinary person is being postulated as considering is the question whether some general use on the road is something which might well occur."

In both of the cases referenced above, the vehicles used by the defendant (a Go-Ped and a City Mantis) were both held to be motor vehicles, despite it being specified by the manufacturer that they should not be used on roads, and even though they could not lawfully be used on roads. They were held to be motor vehicles because one of their foreseeable subsidiary uses was on a road.

Based on the case law set out above, if we were able to prove that "a reasonable person" would say that the motorcycle ridden by the first defendant "could be used on a road", then the MIB would be required to satisfy any unpaid judgment.

In addition to the domestic case law in the claimant's favour, we argued that even if in some way this was not correct, it was clear that pursuant to the *Marleasing*[5] principle the relevant provisions of the Road Traffic Act 1988 had to be interpreted in accordance with the articles of the governing Directive 2009/103.[6]

Under the European Directive all Member States are required to take steps to ensure there is compulsory insurance in place to compensate the victims of road traffic accidents.

Article 3, headed "compulsory insurance of vehicles", states:

> "Each Member State shall, subject to Article 5, take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance."

One of the issues in our case was that the definition of a motor vehicle contained in the European Directive is currently wider than the domestic law definition contained in the Road Traffic Act 1988 s.185, which stipulates that the motor vehicle is "a mechanically propelled vehicle intended or adapted for use on roads". Directive 2009/103 art.1 does not contain the requirement for a motor vehicle to be "intended or adapted for use on roads" and instead defines a vehicle as follows:

> "'vehicle' means any motor vehicle intended for travel on land and propelled by mechanical power, but not running on rails, and any trailer, whether or not coupled."

We therefore argued that in accordance with the *Marleasing* principle, the Road Traffic Act 1988 s.185 must be interpreted in accordance with the European Directive art.1. At [8] of *Marleasing* it was stated:

> "It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by it."

Additionally, we were able to utilise the seminal Court of Justice of the European Union's decision in *Vnuk v Zavarovalnica Trigalev*.[7] In that case, the claimant was injured when knocked off a ladder by a tractor which was manoeuvring in the courtyard of a farm. The question was whether the vehicle should be covered by compulsory insurance. In *Vnuk*, it was held that art.3(1) of the Directive must be interpreted

[4] *DPP v King* [2008] EWHC 447; (2008) 172 J.P. 401.

[5] *Marleasing SA v La Comercial Internacional de Alimentacion SA* (C-106/89) EU:C:1990:395; [1990] E.C.R. I-4135.

[6] 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.

[7] *Vnuk v Zavarovalnica Trigalev* (C-162/13) EU:C:2014:2146; [2016] R.T.R. 10.

as meaning that the concept of "use of vehicles" in that article covers "any use of a vehicle that is consistent with the normal function of that vehicle".

Following *Vnuk*, we were able to argue that motorcycle ridden by the first defendant was a motor vehicle that needed to be included within the provisions of the UDA.

We noted with interest in relation to *Vnuk*, that the MIB's publicly stated position in an article published on its website, dated 3 April 2017, was that it concedes that it should be liable for vehicles used in road traffic situations, a situation which would include our case.

A further salient case which we relied upon was *Lewington v MIB*.[8] In this case, it was argued that an accident caused by the use of a stolen dumper truck on a public road did not give rise to a "relevant liability" as the dumper truck was not intended or adapted for road use, and was not classed as a motor vehicle within the meaning of the Road Traffic Act 1988 s.185. The defence used by the MIB in *Lewington* was very similar to the defence used in our case.

On appeal, the court completely rejected this defence on the grounds that the use of the dumper truck on a public road was one of its foreseeable uses. Bryan J held at [57] of his judgment that:

> "it is quite clear, as I have already identified, that the relevant test is, and has always been understood to be, that set out in *Burns v Currell* namely to look at whether 'a reasonable person looking at the vehicle would say that one of its users would be a road user'—is 'some general use on the roads contemplated as one of the users'."

Further, at [58], it was stated that:

> "in this regard it is quite clear that the purpose of section 185 of the RTA is to provide protection against uninsured drivers in circumstances where one of the users of the item of equipment concerned is use on a road."

Finally, Bryan J considered the compatibility of the domestic case law. Could the Road Traffic Act 1988 s.185 be applied in line with the European Directive, the *Marleasing* principle and the case of *Vnuk*. Bryan J held that the Road Traffic Act 1988 must be interpreted in accordance with the European Directive arts 1 and 3, and that Road Traffic Act 1988 does not permit derogation from the blanket obligation to insure vehicles used on public roads.

How we proved the claimant's case

The first defendant's negligence in our case was clear, and to prove the same witness statements were taken from key witnesses and the Collision Investigation Officer at West Yorkshire Police.

It is evident that the type of "off-road" motorcycle ridden by the first defendant was regularly used on public roads. This was a fact the MIB were well aware of. To prove the same, we served witness evidence from a Police Officer in the off-road motorcycle unit at West Yorkshire Police who was able to provide figures and examples of the frequent use of off-road motorcycles on roads in West Yorkshire, and the daily issues faced by his team.

In addition, we prepared a statement appending numerous published media articles commenting on the widespread use of off-road motorcycles on public roads and the accidents they have caused in the relevant area, and in cities up and down the country. The purpose of this witness evidence was to demonstrate to the court that "off-road" motorcycles are regularly ridden on public roads and that "a reasonable man" would be well aware that they "could be used on roads", thereby satisfying the common law test.

In terms of expert evidence, we obtained expert reports from an Accident Reconstruction expert and a CCTV Analysis expert to prove the negligence of the first defendant. In response to the MIB's off-road

[8] *Lewington v MIB* [2017] EWHC 2848 (Comm); [2018] R.T.R. 18.

vehicle defence, we also instructed a Vehicle Classification expert who was able to analyse why the motorcycle ridden by the first defendant would be classed as a motor vehicle under the Road Traffic Act 1988. Further, our expert was able to helpfully list examples of off-road motorcycles being used on public roads.

The MIB served expert evidence from their own Vehicle Classification expert, but chose not to serve any Accident Reconstruction or CCTV analysis evidence (despite obtaining permission for this evidence), but still did not concede that the first defendant was negligent.

A Joint Statement was prepared by both Vehicle Classification experts, with little agreed upon. We subsequently prepared the claimant's case for trial, but continued to invite the MIB to accept full liability on the basis that they had no reasonable prospect of successfully defending the claim.

We also made a Freedom of Information Request direct to the MIB asking them to identify how many cases involving "off-road" motorcycles they admit liability or settle when the case is worth a certain value. We argued that the MIB was required to provide this information following the case of *Farrell v Whitty*[9] where the Motor Insurers' Bureau of Ireland ("MIBI") were held to be an emanation of the state. The MIB responded stating that, despite the court's findings in this case, they did not believe they were an emanation of the state and would not provide the requested information.

Following the resolution of liability in our case, this position has been clarified by the recent High Court decision in *Lewis v Tindale*[10] where the MIB were held, in keeping with *Farrell v Whitty*, to be an emanation of the state. The court found that there was no legal or factual difference between the MIBI and the MIB.

In that case, the MIB denied it had a contingent liability to satisfy judgment because the accident or injuries were not caused by or arising out of the use of a vehicle on a road or other public place, in accordance with the Road Traffic Act 1988 s.145. The court rejected this defence and held that the MIB was liable to satisfy judgments arising from accidents caused by uninsured motor vehicles on private land. Further, and most significantly, the court held that the provisions of the relevant 2009 European Directive have direct effect against the MIB, and that the MIB is an emanation of the state. Consequently, the court held that the MIB are required to satisfy judgments pursuant to the obligations set out in art.3 of the Directive.

Approximately four weeks before trial of liability in our case, the MIB made a Pt 36 liability offer of a 90/10% split in the claimant's favour. We rejected this offer on the basis that we maintained the claimant was entitled to 100% of her damages. Finally, 12 days before trial, the MIB conceded that the first defendant was negligent and accepted it had a contingent liability to pay the claimant's damages in full.

In our experience, the MIB continue to deploy this "off-road" vehicle defence as standard in large value claims, denying liability in full, despite this defence being rejected by the courts, as was the case in *Lewington*. It is anticipated that the value of cases and the current discount rate may be key factors. Whilst it depends on the circumstances of the case, it should be noted that if this defence is raised by the MIB then the above tactics can, and have been, successful in overcoming this defence and can be similarly adopted to excellent effect in future.

[9] *Farrell v Whitty* (C-413/15) EU:C:2017:745; [2018] Q.B. 1179.
[10] *Lewis v Tindale* [2018] EWHC 2376 (QB); [2019] 1 W.L.R. 1785.

The Fatal Accidents Act: Is it at the End of its Life?

Richard Geraghty*

Claimants; Dependency claims; Fatal accident claims; Fatal accidents

Abstract

The Fatal Accidents Act 1976 ("FAA") is the primary statutory basis upon which claims for damages can be brought on behalf of family members following a fatality. The two main heads of loss contained within the Act, for bereavement and dependency, have both proven to be controversial. Issues have been raised about the limited scope of these statutory provisions, which can unfairly exclude claims by sometimes central figures from the deceased person's life. The Act has been subject to judicial criticism on several occasions. The Court of Appeal has acknowledged that aspects of the Act are out of touch with modern social attitudes. A central component of the Act—the provisions relating to bereavement awards—has been declared incompatible with the European Convention on Human Rights. Whilst there have been several attempts to reform the Act, other than amendments to recognise the status of civil partnerships, there have been no significant changes made to the Act in over three decades. All of this raises the question, has the FAA finally reached the end of its useful life?

The statutory background

There is no common law right to bring a claim in tort for death.[1] Actions for damages arising out of death have their basis in statute, with the entitlement to claim arising under two separate Acts:

- **Law Reform (Miscellaneous Provisions) Act 1934:**

  The estate of a deceased person may bring a claim under this Act. The Act permits the estate to bring any claims that had arisen and could have been brought by the deceased prior to his or her death. Section 1(2)(c) also permits the estate to recover funeral expenses.

- **Fatal Accidents Act 1976:**

  The Act provides the statutory basis for claims for: (i) bereavement; (ii) dependency; and (iii) recovery of funeral expenses where they were paid by a dependent.

The FAA was enacted in 1976 to update an area of law that had its origin in the early Victorian era. The 1976 Act replaced the Fatal Accidents Act 1846, commonly known as *Lord Campbell's Act*. The 1846 Act had first introduced the right for personal representatives to bring an action for damages where the deceased had such a right at the time of their death. The 1976 Act was a major development to the law as it introduced a mechanism by which the relatives of the deceased could recover damages for their own loss. However, whilst the new Act may have brought overdue reform to a socially obsolete area of the law, criticisms were soon raised of it. Questions have repeatedly been asked as to whether the Act provides an adequate legal basis for claims arising out of the death of a loved one that is consistent with modern social attitudes and expectations.

* Partner, Irwin Mitchell.

[1] See, e.g. *Cox v Ergo Versicherung AG (formerly Victoria)* [2014] UKSC 22 per Lord Sumption at [6]; [2014] A.C. 1379.

Problems have arisen with the central provisions under the Act, for both bereavement and dependency claims. These need to be considered in turn.

Bereavement damages

The FAA s.1A provides for damages to be paid for bereavement on the basis of a fixed award, currently £12,980.[2] Only a single award can be paid. Where two parents are eligible to receive the award, it must be split between them.[3]

It is both the level and the scope of the bereavement award that many have considered to be unsatisfactory.

The level of the award

Ascribing a monetary value to the loss of a loved one is, of course, a difficult matter. How do you put a value on the loss of a life? As any practitioner who has ever had to advise a bereaved parent who has lost a child will attest, the amount of damages that can be claimed for bereavement is considerably below the level most in society would expect.

So what was Parliament's intention for a bereavement award? The entitlement to claim an award for bereavement was not included in the FAA when it was first enacted in 1976. The award was introduced a few years later by the Administration of Justice Act 1982 ("AJA"). During the AJA's passage through Parliament, various submissions were made about the aim of the award. Lord Scarman suggested that the award should be compensation for grief but not for loss of society. He described the award as amounting to no more than an acknowledgement by the state that bereavement should be marked by some sympathetic recognition. The award was not intended to put a monetary value on the full extent of the loss caused by the death. To do so would require what Lord Scarman and others considered to be an intrusive investigation into the nature of the relationship between the claimant and the deceased and the extent of the grief actually suffered.

Even if bereavement awards are not intended to provide full compensation for the total loss and suffering experienced by the recipient, many recipients are surprised by the modest, arguably token, amount of the award. Certainly, in comparison to several other jurisdictions in Western Europe, the award is low. In Italy and Spain, bereavement damages can be claimed by a wide class of family members, with awards sometimes totalling several hundreds of thousands of euros. Closer to home within the other jurisdictions within the British Isles, the bereavement awards are also higher. In Northern Ireland, the fixed award is currently £15,100[4] and in the Republic of Ireland it is €35,000.[5] The position in Scotland is markedly different to how it is here. There is no fixed award for bereavement in Scotland and the courts can award such amount as they think just to compensate for grief and sorrow. Such damages may be assessed by a jury. The award can take into consideration the "loss of such non-patrimonial benefit as the relative might have been expected to derive from [the deceased's] society and guidance if [they] had not died".[6] These awards can be paid to a widely drawn class of "immediate family", which includes spouses, civil partners, cohabitees, parents, children, siblings, grandparents, and grandchildren.[7] Awards to individual family members frequently amount to several tens of thousands of pounds. For example, in a case involving the

[2] Damages for Bereavement (Variation of Sum) (England and Wales) Order 2013 (SI 2013/510).
[3] FAA s.1A(4).
[4] Damages for Bereavement (Variation of Sum) (Northern Ireland) Order 2019 (NISI 2019/80).
[5] Civil Liability Act 1961 (s.49) Order 2014 (SI 2014/6).
[6] Damages (Scotland) Act 2011 s.4(3).
[7] The class is set out in the Damages (Scotland) Act 2011 s.14(1)(a)–(d).

death of a 33 year old male, awards were made of £140,000 to his unmarried partner, £80,000 to his daughter (who was only six weeks old at the date of death), and £80,000 to his father.[8]

It should be noted that the process of assessing bereavement damages in Scotland involves a case by case examination of the closeness of the relationship with the deceased. In other words, it involves precisely the sort of process Lord Scarman considered so unpalatable in the parliamentary debates for the AJA in 1982.

The scope of the award

Further concerns about the inadequacy of the provisions for bereavement in the FAA relate to the limited class of people eligible to receive the award. Section 1A (2) restricts bereavement claims to a limited class of potential recipients:

> "A claim for damages for bereavement shall only be for the benefit—
> (a) of the wife or husband or civil partner of the deceased; and
> (b) where the deceased was a minor who was never married or a civil partner—
> (i) of his parents, if he was legitimate; and
> (ii) of his mother, if he was illegitimate."

One controversial omission from this class of potential recipients is unmarried cohabiting couples. Only married couples, or those in a civil partnership, are eligible to receive the award. Even though cohabitees of two or more years are permitted to bring claims for dependency under the FAA, they have no entitlement to a bereavement award. This omission is all the more surprising when you consider that, when bereavement awards were first brought in by the AJA in 1982, the Act also extended the scope of dependency claims to include couples that had been cohabiting for over two years. At no stage during the parliamentary debates during the passage of the 1982 Act was there any discussion concerning whether cohabiting partners should also be entitled to receive a bereavement award. Whilst Parliament saw fit, in 1982, to place two-year cohabitees on a par with married couples in relation to dependency claims, it seemingly never thought to consider if such cohabitees should also be eligible for a bereavement award as a sympathetic recognition of their loss.

The potential injustice arising from the omission of cohabitees from bereavement damages was challenged recently by the claimant in *Smith v Lancashire Teaching Hospitals NHS Foundation Trust*.[9] Jacqueline Smith and her partner, John Bulloch, had lived together for 11 years prior to his death. Mr Bulloch died as a result of negligence on the part of those treating him at the defendant's Hospital. As a cohabitee of over two years, Ms Smith was eligible to bring a claim for financial dependency, but she was not permitted to receive a bereavement award. She brought a claim against the Secretary of State for Justice, arguing that the law's failure to permit such a claim amounted to discrimination against her rights set out at the European Convention on Human Rights ("ECHR") art.8 to respect for private and family life.

The Court of Appeal unanimously agreed that the failure of the FAA to permit Ms Smith a claim for a bereavement award discriminated against this human right. The introduction of a provision for a bereavement award in the FAA was considered to be a positive measure by which the state had shown respect for family life, a core value of art.8. The question was whether that right had been discriminated against by restricting the bereavement award to only those in a relationship confirmed by marriage or civil partnership. The Court of Appeal acknowledged that a relationship such as that between Ms Smith and her deceased partner should be placed on an equal footing to a marriage:

[8] *Claire Anderson v Brig Brae Garage Ltd*, unreported, 2015.
[9] *Smith v Lancashire Teaching Hospitals NHS Foundation Trust* [2017] EWCA Civ 1916; [2018] Q.B. 804.

> "… it is the intimacy of a stable and long term personal relationship, whose fracture due to death caused by another's tortious conduct will give rise to grief, which ought to be recognised by an award of bereavement damages, and which is equally and analogously present in relationships involving married couples and civil partners and unmarried and un-partnered cohabitees."[10]

Further, the Court of Appeal acknowledged the shift in social attitudes towards cohabitation and the decline in the institution of marriage. They recognised that, in terms of social acceptance, society increasingly tended to see no material difference between marriage (or civil partnership) on one hand, and living together as cohabitees on the other. If unmarried cohabitees were to be treated differently, the state needed to be able to justify the differential treatment. The Government was unable to provide any justification for treating married couples differently from cohabitees of over two years in this context. This was held to be discrimination against the art.8 rights of such cohabitees. The Court of Appeal made a declaration that this aspect of the FAA was incompatible with the ECHR.

A declaration of incompatibility does not in itself entitle two-year cohabitees to claim bereavement awards. However, such a declaration does mean that the Government is expected to consider further investigation to bring the law in line with the Convention rights. Since the judgment in *Smith* was delivered in 2017, the Government has not announced any plans to review or reform this aspect of the Act.

The class of people eligible to apply for a bereavement award has also been found wanting or out of touch with society in other ways. For example, there are several circumstances where a parent is ineligible to receive an award on the death of their child:

- **Unmarried Fathers:**

  Where the child of an unmarried couple dies, the mother is potentially eligible to receive a bereavement award but the father is not. The father may have parental responsibility; they may be in a relationship comparable with that of a married couple (as acknowledged in *Smith*), but under the FAA only the mother of an "illegitimate" child is entitled to a bereavement award.

- **Adult children:**

  All parents are also excluded from receiving an award where a child over the age of 18 dies. The FAA makes no provision for a bereavement award for the parents of a deceased adult. Even where a child is injured whilst under the age of 18, but then dies of those injuries over the age of 18, the parents have no entitlement to a bereavement award.[11]

- **Adopted children:**

  The use of the words "legitimate" and "illegitimate" in s.1A excludes adoptive parents from being eligible to receive a bereavement award on the death of their adopted child.

- **Unborn child:**

  No award is payable on the death of an unborn child. A child in utero is not considered to have a legal persona and, therefore, it must follow that they cannot be recognised as a deceased minor for the purposes of s.1A(2)(b).[12]

[10] *Smith v Lancashire Teaching Hospitals NHS Foundation Trust* [2017] EWCA Civ 1916 per Sir Terence Etherton MR at [90].
[11] *Doleman v Deakin* (1990) 87(13) L.S.G. 43.
[12] *Kelly v Kelly* 1997 S.C. 285; (1997) S.L.T. 896.

A further unsatisfactory aspect of bereavements awards is their application to bereaved children. Where a parent dies there is no right for any of their children to receive such an award. The FAA makes no attempt to acknowledge the grief experienced by a child on the loss of a parent.

Following *Smith*, it seems that there is now scope to challenge some of these situations on the basis that they are incompatible with the ECHR. However, achieving a declaration of incompatibility will not give rise to an entitlement to receive an award. It is only where it is possible to interpret the FAA in accordance with the Convention rights that a bereavement award can potentially be recovered, something the Court of Appeal felt unable to do in *Smith* for a cohabitee.

Dependency

The list of people entitled to claim damages for loss of dependency under the FAA is more extensive than for bereavement awards, but is still considered by many to be unsatisfactory in its scope. Section 1(3) of the FAA defines a dependent as:

"(a) the wife or husband or former wife or husband of the deceased;
(aa) the civil partner or former civil partner of the deceased;
(b) any person who—
  (i) was living with the deceased in the same household immediately before the date of the death; and
  (ii) had been living with the deceased in the same household for at least two years before that date; and
  (iii) was living during the whole of that period as the husband or wife or civil partner of the deceased;
(c) any parent or other ascendant of the deceased;
(d) any person who was treated by the deceased as his parent;
(e) any child or other descendant of the deceased;
(f) any person (not being a child of the deceased) who, in the case of any marriage to which the deceased was at any time a party, was treated by the deceased as a child of the family in relation to that marriage;
(fa) any person (not being a child of the deceased) who, in the case of any civil partnership in which the deceased was at any time a civil partner, was treated by the deceased as a child of the family in relation to that civil partnership;
(g) any person who is, or is the issue of, a brother, sister, uncle or aunt of the deceased."

It is the provision for cohabitees that has proven to be the most controversial aspect of this statutory list of dependents. The surviving cohabitant is required to prove a period of cohabitation of at least two years. There may be a well-established relationship where there is a clear financial dependency upon the deceased, but which falls outside the statutory requirements because of the length of time the couple had actually lived together.

Cases such as *Kotke v Saffarini*[13] illustrate the injustice that can arise from this statutory requirement. In *Kotke*, the claimant had been in a relationship with the deceased for several years. They had planned their future together and they had a child together, but she was denied compensation for her dependency as she was unable to establish that she had been living with the deceased in the same household continuously for two years prior to his death. Identifying the precise point in time when a couple can be said to be living together in the same household can be problematic and a very difficult matter to prove. Moreover, many couples in committed and stable relationships will often have to spend time apart, perhaps due to work

[13] *Kotke v Saffarini* [2005] EWCA Civ 221; [2005] 2 F.L.R. 517.

commitments or other factors. Such time spent away from each other would interrupt the continuous period of cohabitation and cause them to fall foul of this rule.

The issue of whether the two-year rule discriminates against the ECHR art.8 right to respect for private and family life was considered by the Court of Appeal in *Swift v Secretary of State for Justice*.[14] Ms Swift had been cohabiting with the deceased for six months when he was killed. They were not married. She was pregnant with the deceased's child at the date of death and their child was born several months later. A unanimous Court of Appeal held that the Act did not contravene the Convention right by excluding cohabitees of less than two years. The court made it clear that the issue was not whether the existing law is unfair and could be made fairer. Rather, it was a question of whether the law pursued a legitimate aim in a proportionate manner. Parliament was considered to have done so when they drew a line at two years to mark out those claims they considered to have a sufficient degree of permanence and constancy to justify qualification for a dependency claim.

It should be noted that Lord Dyson MR accepted in *Swift* that the two-year cohabitation rule could lead to results which many would regard as unjust, and he remarked that the law may well need changing. This is not the first time that such judicial criticism has been raised about this rule. For example, in *Shepherd v Post Office*, Otton LJ cited critical commentary on these statutory provisions in *McGregor on Damages*[15] and *Clerk and Lindsell on Torts*,[16] and went on to question the need for an elaborate list of entitled dependents:

> "… it would be simpler if Parliament were persuaded to provide that any person is entitled to a claim who can show a relationship of dependency and thus dispense with the lists."[17]

A history of proposed reform

This lengthy catalogue of criticism of the FAA inevitably prompts the question, what has been happening to attempt to reform the Act? It transpires that reform of the Act has indeed been considered on several occasions.

Soon after bereavement damages were introduced in 1982 there were calls for reform of both the level and scope of the award. In particular, a series of national disasters involving mass fatalities in the mid-1980s prompted some discussion about the adequacy of compensation in fatal claims. A Private Member's Bill was proposed in the House of Commons in 1988. The *Citizen's Compensation Bill* proposed that the fixed bereavement award, which was then £3,500, be increased to £10,000. The Bill did not become law but it prompted a review by the Lord Chancellor, who issued a consultation paper[18] on the subject. This in turn led to an increase in the award in 1990, although only to £7,500.

In November 1999, the Law Commission published a report entitled "Claims for Wrongful Death"[19] which involved a broad review of the law in relation to fatal claims. The Law Commission recognised the need to modernise this area of the law, which they acknowledged needed to be brought into line with modern social values.

The 1999 report proposed reform of bereavement awards. It recommended expanding the statutory list of those entitled to claim the award to include the spouse, parent, child, brother or sister of the deceased. Adoptive parents, children and siblings should also be included. The report suggested that cohabitees of over two years and anyone engaged to the deceased should be entitled to receive the award. The Law Commission also proposed that the award should be increased by 25% (to £10,000) and, thereafter, should

[14] *Swift v Secretary of State for Justice* [2013] EWCA Civ 193; [2014] Q.B. 373.
[15] *McGregor on Damages*, 16th edn (1997), para.1733.
[16] *Clerk and Lindsell on Torts*, 17th edn (1995), para.27.40.
[17] *Shepherd v Post Office*, *The Times*, 15 June 1995.
[18] Damages for Bereavement: A Review of the Level (1990).
[19] Law Com. No.263.

be RPI linked. If several people were entitled to receive the award, the report suggested that the defendant's total liability be capped at three times the award (£30,000), such sum to be shared between all eligible parties.

The Law Commission report in 1999 also advocated reform of dependency claims. The Commission considered the range of people eligible to make a claim for dependency under the FAA to be too restrictive. The requirement that cohabitees must have lived together for two years was considered to be unfair as it arbitrarily excluded people who may have been financially dependent upon the deceased. They instead proposed a generally worded class of dependents to cover:

> "any other person who was being wholly or partly maintained by the deceased immediately before the death or who would, but for the death, have been so maintained at a time beginning after the death."

A draft Bill was prepared in 1999 to put into effect the Law Commission's proposed amendments to the FAA, but ultimately nothing came of this.

In May 2007, the Department for Constitutional Affairs ("DCA") issued a consultation paper entitled "The Law on Damages".[20] The paper considered issues arising from the Law Commission's 1999 report and looked at change to the FAA. The paper suggested an extension of the statutory list of claimants able to claim bereavement damages, broadening this out to include children of the deceased under the age of 18 and cohabitees of at least 2 years. It also suggested that the award be increased every three years in line with the RPI. The paper further advocated an extension of the list of claimants who could claim for dependency. It proposed that this right to damages should be extended to anyone who could prove dependency immediately prior to the death, including cohabitants of less than two years duration. The paper acknowledged "the injustice that can be caused by the current situation".[21]

On 1 July 2009, the Ministry of Justice ("MoJ") published its response to this consultation paper.[22] In respect of bereavement damages, the Government's response recorded that almost all respondents to the consultation, including the Association of British Insurers, supported an extension of bereavement awards to cohabitees of over two years. There was also broad support for an increase to the list of potential recipients, particularly to include the children of the deceased. The Government confirmed its agreement to these changes to bereavement awards, and it also endorsed the Law Commission's suggested residual category of dependents, commenting that the suggested extension was:

> "the fairest approach to take, and would ensure that all those actually dependent on the deceased could claim while avoiding the possibility of speculative claims based on possible future dependency."[23]

In December 2009, the MoJ produced a draft Civil Law Reform Bill[24] which gave effect to the recommendations to revise the FAA provisions for both bereavement and dependency. In January 2011, the Government decided not to proceed with the proposed Bill, stating that "in the present financial situation we need to focus our resources on delivering our key priorities".[25]

More recently, Keith Vaz MP introduced an Early Day Motion[26] in February 2018 in a further attempt in Parliament to reform the FAA. The motion acknowledged the current disparity in bereavement compensation in England and Wales in comparison to Northern Ireland and Scotland. It suggested that the FAA be amended to provide "a new, fairer way of providing damages to bereaved families in England and Wales, echoing the approach taken in Scotland since the mid-1970s". Others including APIL have

[20] DCA, "The Law on Damages" CP 9/07.
[21] DCA, "The Law on Damages" CP 9/07 para.7 p.13.
[22] MoJ, "Response to Consultation" CP(R) 9/07.
[23] P.44.
[24] Cm.7773.
[25] Written Ministerial Statement made by the Parliamentary Under-Secretary of State for Justice, *Hansard*, 10 January 2011: col.8WS.
[26] Early Day Motion 931 of Session 2017–2019, "Bereavement Damages Cap", tabled 8 February 2018.

also advocated reform of the FAA by adopting the Scottish approach to bereavement damages. However, as things stand, the Motion has never been debated in Parliament.

Conclusion

Multiple attempts at substantive reform of the FAA in each of the last four decades have come to nothing. The declaration of incompatibility in *Smith* in 2017 is supposed to require the Government to reconsider the statutory exclusion of cohabitees from bereavement awards in the FAA. But the need for reform of the Act goes well beyond that discrete provision, and one would hope that the Government might finally embark on a more comprehensive reform of the law of damages in fatal cases. The FAA is clearly out of touch with modern society and how people live their lives in the 21st century. The Act provides an unsatisfactory mechanism for redress in fatal cases, clearly failing to meet the needs and expectations of the bereaved. These shortcomings have been acknowledged on numerous occasions by the Courts, the Law Commission and the Government. The FAA is in very poor health and it must surely now be time to put it out of its misery.

What Price Parenthood? The Value We Place on a Family: Pt II

Chris Thorne*

Family law; Fertility; Measure of damages; Parents; Personal injury; Reproduction; Surrogacy

Abstract

In 2016, the writer tackled the thorny task of summarising the judicial approach to compensating individuals for the loss of the ability to have a family as a result of a tortious act or, very occasionally, a breach of contract. That there is no specific head of damage for loss of parenthood, when viewed against a fast changing social and medical background must be open to question. Is the disparate approach adopted by the courts in relation to such issues sufficient to meet the needs of modern society? That article considered decisions relating to wrongful birth as well as loss of parenthood in an attempt to put such claims into context. Two recent decisions handed down within a matter of days in the Court of Appeal in December 2018 have, to some extent, advanced the issue and in the most recent of the two, revisited Briody v St Helens and Knowsley AHA[1] *at some length, a case considered in Pt I of this article. The writer seeks to draw further strands from the case law to assist practitioners dealing with this complex and novel area of law, and raises the questions: Is there a bar to such a head of damage on the basis that "loss of autonomy" is not properly recognised in English law? Are personal injury lawyers missing out on a growth area?*

Wrongful birth, wrongful conception: Extending the definition?

In the previous article reference was made to an, at the time of writing, unreported case in which a husband recovered damages from his wife for the cost of bringing up a child he had thought his own but which it transpired was that of a third party. Details were necessarily limited but at that time it was believed that £39,000 was awarded for deliberate fraudulent misrepresentation, the wife having substituted her boyfriend's semen sample for that of her husband at an IVF clinic. Unconfirmed reports suggested that the damages included an element for the cost of bringing up the child. *X v Y*[2] is now available as a published judgment, albeit one at first instance in the Central London County Court and any earlier misconceptions can now be corrected.

It is noted that the action was neither in negligence nor contract but for deceit, which might have been of significance when considering the later case of *ARB v IVF Hammersmith*,[3] had the court been willing to accept arguments concerning the distinction between the cause of action and its relationship with public policy propounded by counsel for the claimant in that case. As it was, the Court of Appeal took the view that public policy trumped cause of action in all circumstances.

In *X v Y*, there was a finding of deceit on the part of the mother, Y, and the putative father, X, was acknowledged to have "acted in reliance on Y's representations and suffered damage as a result".

HH Judge Taylor awarded the claimant the sum of £7,500 in respect of general damages, £4,000 for loss of earnings due to shock on discovering the child was not his and £25,321 by way of reimbursement

* Head of Clinical Negligence and Personal Injury at Clarke Willmott LLP.

[1] *Briody v St Helens and Knowsley AHA* [2001] EWCA Civ 1010; [2002] Q.B. 856.

[2] *X v Y* [2015] EW Misc B10 (CC).

[3] *ARB v IVF Hammersmith* [2018] EWCA Civ 2803; [2019] Med. L.R. 119.

of maintenance payments made by X to Y. In so doing, she drew on the judgment of Blofeld J in *A v B*[4] where the deceit was to the same ends but arose out of a natural conception rather than IVF.

In that case, citing the persuasive authority of earlier Australian and US cases, Sir John Blofeld awarded £7,500 general damages for the claimant's "deep sense of loss and … unhappiness, *(although)* his mental state has not required medical attention". In particular, Blofeld J found that he was, "entitled to award general damages in the present case and it would *not be contrary to public policy to do so*" (emphasis added). That finding is an interesting contrast to the approach in *ARB v IVF Hammersmith*[5] discussed in more detail below. In both *A v B* and *X v Y*, although special damages were also awarded, in both cases, the heads of damage were specific and discrete.

Blofeld J specifically made reference to the leading failed sterilisation case, *McFarlane v Tayside Health Board*[6] in which the court declined to award damages for the cost of bringing up a healthy but unplanned child but did award £7,500 for the pain and suffering of pregnancy and delivery. The implication was that pain and suffering was the proper subject of compensation, the loss of the ability to choose whether to have a child was not. Special damages for the cost of bringing up the child were in practical terms, incalculable and in moral terms, unacceptable. It was further recognised in *McFarlane* that whilst there might be a claim in respect of psychological injury suffered by the mother in pregnancy, there could not be an award per se in respect of the child unwanted. The analogy was drawn between wrongful birth—having an unwanted child—and wrongful conception, not being the parent of a child thought to be one's own. It would appear no great extension of those principles to include the inability to have a family within the umbrella of awards and thereby create a head of damage which, in essence, amounts to loss of autonomy. There are clearly resonances in respect of the level of general damages awarded in all three cases, if not in the specific underlying condition being compensated. The case being made here is that all three fall within the overarching definition of loss of choice in relation to parenthood.

However it cannot be ignored that in respect of special damages, in both cases the award reflected the public policy approach in *McFarlane,* that money expended on bringing up a healthy child was not recoverable, extending that principle by analogy to expending money on bringing up a healthy child in relation to whom the claimant was not the biological parent. Whilst that approach to special damages may not preclude an award for "loss of autonomy", it does set the argument against a public policy background which would appear to militate against it.

In both *A v B* and *X v Y*, the special damages ostensibly recovered by the father for the maintenance of the child, were in reality, a partial refund of monies spent by the claimant upon maintaining the deceitful defendant alone, from which the child garnered no benefit. Monies spent maintaining the child were not recoverable as a matter of public policy, nor could they be so in any event if that maintenance had been payable by Order of the court in earlier family proceedings.

Since commencing this analysis of the reported case law, there has also been a highly public disclosure by one of the founders of Moneysupermarket.com in a front-page article in *The Sunday Mail* (6 January 2019) that his ex-wife has agreed to pay him £250,000 in an out of court settlement on discovering that he was not the natural father of their three children from his first marriage. Leaving aside erroneous reporting of this as "the first case of its type", there is unsurprisingly, no indication of the breakdown of damages between general and special but it is assumed the principles adopted in *A v B* and *X v Y* would have informed the approach of both parties' solicitors.

So, to *ARB v IVF Hammersmith*,[7] decided in December 2018 and carrying with it the full weight of the Court of Appeal. Whilst deceit was also at the heart of this case, as it had been in *X v Y*, in *ARB* the mother did not substitute the gametes of her lover for that of her husband in the IVF process. The deceit in *ARB*

[4] *A v B* [2007] EWHC 1246 (QB); [2007] 2 F.L.R. 1051.
[5] *ARB v IVF Hammersmith* [2018] EWCA Civ 2803.
[6] *McFarlane v Tayside Health Board* [2000] 2 A.C. 59; [1999] 3 W.L.R. 1301.
[7] *ARB v IVF Hammersmith* [2018] EWCA Civ 2803.

comprised the mother forging her estranged partner's signature on forms provided by the defendant IVF Clinic, in order to secure conception using ARB's previously stored semen samples. ARB did not consent to the procedure, indeed he was unaware that it had taken place, although he had previously fathered a child with the mother by this means when still in a relationship with her. Despite the deception, the child was ARB's child and he was obliged to provide financial support against a background of shared parental responsibility. The distinction between *ARB* and *X v Y* is obvious, one relates to a man who discovered he was not the father of a child he believed to be his own, the other relates to a man who discovered the existence of a child, of whom he was the father, albeit without his knowledge and consent. Both, however, touch on the issue of autonomy and the right to choose to have a family, or not.

The deceit was established in *ARB v IVF Hammersmith* but, in contrast to *X v Y*, the claim was not brought in deceit and not against the tortfeasor, the mother of the child. Presumably, given the ongoing relationship and shared parental responsibility between ARB and the mother of his two children, an action against the mother herself would have been counterproductive, divisive and economically unviable, although given the nature of the deceit it is hard to imagine how much more the relationship could have been destabilised.

Instead, *ARB* pursued a claim in contract against the fertility clinic which had carried out the procedure relying on the forged documents as evidence of his consent. The court had no difficulty in accepting that there was both a duty upon the clinic to exercise reasonable care in complying with its obligations under statute and regulation, that there was an express obligation not to thaw and implant an embryo without ARB's consent and that the obligation was strict. The failure on the part of IVF Hammersmith to comply with those obligations was lamentable and incomprehensible and indeed breached the basic principles of consent outlined in *Montgomery v Lanarkshire Health Board*[8] (a case which also notably touches on the concept of autonomy and would be worthy of an entire article in its own right on that aspect of the case alone).

Sadly, the inability of fertility clinics and hospitals to adhere to any reasonable standard of care in dealing with documentation in such important circumstances is not unusual. The raft of cases beginning with *Re A*,[9] saw the President of The Family Division effectively work his way through the alphabet, dealing with cases relating to uncertain parentage of children born using IVF, where the treating hospital or clinic had failed to adequately or properly complete standard paperwork in line with regulations and guidance. Sir James Munby noted in the first of those cases that:

> "This judgment relates to a number of cases where much joy but also, sadly, much misery has been caused by the medical brilliance, unhappily allied with the administrative incompetence, of various fertility clinics."

Prophetically he concluded with the prediction: "The cases I have before me are, there is every reason to fear, only the small tip of a much larger problem." And so it has proved, much to the detriment of ARB and others.

Yet *ARB* and indeed this article are not about the continuing failings of the IVF industry, unacceptable though they remain. The relevant issue in *ARB* for these purposes is the applicability of public policy disbarring the claimant from receiving damages in respect of the birth of a healthy child. Their Lordships accepted that there was a clear breach of a strict contractual obligation. They further accepted that the tests of causation and foreseeability were met and the claimant's loss was in the reasonable contemplation of the contracting parties. *Hadley v Baxendale*[10] would thus apply. And yet, despite the best efforts of learned Counsel for the claimant, the court was not prepared to accept the proposed distinction between

[8] *Montgomery v Lanarkshire Health Board* [2015] UKSC 11; [2015] A.C. 1430.
[9] *Re A* [2015] EWHC 2602 (Fam); [2016] 1 W.L.R. 1325.
[10] *Hadley v Baxendale* 156 E.R. 145; (1854) 9 Exch 341.

contract and tort when applying the principles of public policy to the circumstances of the case. *Rees* and *MacFarlane* applied, a healthy child had been born, whether wanted or not and "it is morally unacceptable to regard a child as a financial liability" (per Lady Justice Nicola Davies at [33]).

The anomaly here is that the failed sterilisation case of *Rees v Darlington Memorial NHS Trust*[11] was cited in conjunction with *MacFarlane* almost as if one, with no distinction drawn between the two. That may be justified when the court was considering pure financial loss, *Rees* is quite clearly authority for the basic proposition that special damages are not recoverable for the cost of bringing up an unwanted child and was heavily relied upon in *ARB*. Equally, and in contrast, it should not be overlooked that *Rees* broke important new ground in setting out the rationale for providing a "conventional" award of £15,000 for loss of autonomy, the loss of choice not to have a family, in addition to damages for the pain of pregnancy. This was an entirely new and significant approach in compensating the loss of control over the decision to engage in the basic human imperative to procreate or the equally important decision to choose not to do so.

ARB had pleaded a case solely in contract at first instance and made no claim for the conventional award and thus although like Ms Rees he had also been denied a choice, at least in respect of having additional children, the question of autonomy was not adequately addressed, indeed could not be adequately addressed absent an amendment to the pleadings. It is perhaps notable that the Court of Appeal was thus not only fettered by the fact that the appeal related solely to the applicability of public policy in cases of breach of contract, it did not see fit to open the debate more widely as it had done in *Yearworth v North Bristol NHS Trust*[12] where there was both an invitation to amend the pleadings by the court at commencement of the appeal hearing and the provision of an award of damages. The reasoning in *Yearworth* was somewhat convoluted but in reality, a loss of autonomy claim based in quazi-contract resulted in damages for distress being awarded. The claimants were a group of young men whose semen samples were frozen prior to chemotherapy treatment which might render them infertile. Any hope of fathering children by using the samples was denied them when the samples were allowed to thaw by the defendant Trust. The court awarded damages for distress due to the underlying importance of the subject matter of the contract to them, an approach which might have been adopted in *ARB* without undue difficulty had the claimant wished to make at least a partial recovery in damages.

We shall return to the inconsistencies of approach later but a mere two days after King, Richards and Davies LJJ handed down judgment in *ARB v IVF Hammersmith* the Court of Appeal gave judgment in *XX v Whittington Hospital NHS Trust*,[13] an ostensibly unconnected but equally interesting case dealing with issues of surrogacy. The common thread is the issue of parenthood and damages payable or not, in respect of the removal of the choice to have a child at all or by assisted means.

Ms X suffered a delay in diagnosis of cancer at the hands of the defendant Trust. Surgery resulted in a complete loss of fertility, which could have been avoided with earlier diagnosis. From a large family herself, Ms X and her partner expressed the wish to have four children, which would have been achieved naturally but for the surgery and were now intended to be the product of surrogacy arrangements conducted in the US. The locus of the surrogacy arrangements was significant, in that not only is payment for surrogacy legal in California, the parents can secure full parental rights in respect of any new born child prior to birth. Such arrangements are illegal in the UK, where only reasonable expenses are payable to a surrogate mother and the surrogate mother alone has parental rights at birth. At first instance, the judge awarded £160,000 general damages (a figure significantly in excess of the upper end of the Judicial Studies College Guideline for loss of fertility but also intended to compensate the injury to her bowel and bladder resulting from the delay in treatment) and £74,000 in respect of the cost of surrogacy in the UK. The latter was

[11] *Rees v Darlington Memorial NHS Trust* [2003] UKHL 52; [2004] 1 A.C. 309.
[12] *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37; [2010] Q.B. 1.
[13] *XX v Whittington Hospital NHS Trust* [2018] EWCA Civ 2832; [2019] P.I.Q.R. Q4.

based upon the cost of two surrogate births using only the claimant's pre-treatment frozen eggs, excluding the possibility of two further births using donor eggs. The restriction to two births arose from dicta in *Briody v St Helens and Knowsley AHA*[14] that damages were only recoverable in respect of the mother's ability to have "her own child" and not "a child". In the words of McCombe LJ in *XX*, "the use of donor eggs was not, therefore, restorative of the mother's loss".

The appeal sought to resolve the following issues:

- Was the cost of surrogacy in the US recoverable?
- Was the cost of surrogacy using donor eggs recoverable?
- Was the cost of surrogacy in the UK recoverable?
- Should the level of damages for PSLA be reduced to reflect the fact that by virtue of the surrogacy XX would, to some extent, circumvent the full effects of infertility.

Briody v St Helens and Knowsley AHA was considered at length, a similar case in which a claim for the costs of surrogacy failed, the leading case on the issue, the judgment of Hale LJ being the foremost exposition on the subject and referred to in the previous article on these matters.

The real connection, or indeed disconnect, with *ARB v IVF Hammersmith* comes in the very different approach to that central concept of public policy adopted in *XX*. In the leading judgment delivered by Davies LJ in *ARB,* the focus was upon whether *ARB* was distinguishable from *Rees* and *MacFarlane* on the basis that it was a contractual rather than a tortious claim, there was an underlying assumption that the public policy, that "it is morally unacceptable to regard a child as a financial liability", was correct, and not open to question. Interestingly Davies LJ was also sitting on *XX* and concurred with McCombe LJ's leading judgment, analysing public policy in a way that she had not herself done only a few days earlier in *ARB*. Her Ladyship might, quite properly have said, if asked, that *Rees* and *MacFarlane* are binding House of Lords decisions and *Briody* was a Court of Appeal decision, where the judgment was, at least arguably in part, obiter dicta. There does, however, appear to the writer to be a willingness to find a solution to the public policy bar in *XX*, or put at its lowest, a willingness to explore the issue, which was absent in *ARB*.

On the face of it, *Briody* established that public policy prevented the claimant from recovering the cost of surrogacy in the US on the basis that it would be unreasonable for the defendant to fund activity which was "contrary to the public policy of this country, clearly established in legislation" (Hale LJ at [16]). McCombe LJ was eager to explore whether the perception of public policy as a bar to a remedy, remained the same in 2018 as it had been in 2001. Whilst the issue of the passage of time went unconsidered in *ARB*, here McCombe LJ concluded: "Thus 'public policy' in our law is well recognised to be variable and is not ossified for all time, once identified in any particular context."

At [81] of the judgment, his Lordship reaches the conclusion that "the law no longer requires a bar to the recovery of the damages claimed by Ms X on public policy grounds", apparently thereby taking account of the "variable" nature of public policy and moving the law forward to keep pace with changes in society. However, consideration of the intervening paragraphs gives rise to the suspicion that the judgment is not so bold as would at first appear and that the justification for the apparent change is not rooted in a desire to reflect sweeping social change but in a more pragmatic analysis of the law and an understanding that *Briody*, even at the time, may well have been wrongly decided.

In brief, the analysis in *Briody* was based on the fact that the claimant was proposing to undertake an act which was illegal in this country and could thus, as a matter of public policy, not recover damages to fund the cost of that act. In *XX*, it was acknowledged that Ms X (much like Mrs Briody) was not planning to undertake paid surrogacy in the UK and was thus not proposing to act in contravention to any UK law within the jurisdiction. Surrogacy in the US on the terms proposed was entirely legal in the US. A UK

[14] *Briody v St Helens and Knowsley AHA* [2001] EWCA Civ 1010; [2002] Q.B. 856.

citizen who complied with US law in the US was not breaking any law in England and thus was not acting contrary to public policy. Indeed, it could be argued that a surrogacy contract entered into in the US was enforceable in English courts under the basic principles of the conflict of laws and was highly likely to be sanctioned by the Family Division in the context of parental rights, a position entirely at odds with a finding that seeking the cost of such an exercise by way of damages was in any way contrary to public policy even as understood at the time of *Briody*.

Thus, a claim for damages for surrogacy in the US was not contrary to public policy and it was debatable that it should ever have been so.

Was it then possible to claim damages for the costs of surrogacy arising from the use of donor eggs? Leaving aside the issue of prospects of achieving a successful birth, and thus the question of whether this aspect of the *Briody* judgment was obiter, this element of the case turned on the question of "restorative justice", reverting to the most basic principles of the law of damages, the objective of putting the claimant in the same position or as close as possible to the position they would have been had it not been for the wrong now being compensated. It was the application of that principle in *Briody* which lead the court to express the view that a child which was not the mother's biological child was not putting the claimant in the position which she otherwise would have been. That approach did not find favour with their Lordships in *XX* either. In echoes of the arguments in *Yearworth v North Bristol NHS Trust*,[15] counsel for each party advanced arguments relating to genetic material, prosthetic limbs and the role of "functionality" in determining the objectives of making an award of damages in such circumstances. As in *Yearworth,* the court rejected a limited analysis, focussing more on the desire of the claimant to have a family, finding a remedy for loss of autonomy by any other name.

In this much briefer section of the judgment it might be said that the court was far bolder in its willingness to bring about a change to public policy than when undertaking the far lengthier consideration of the surrogacy issue. Far from exploring a detailed legal analysis, as they had done to undermine the *Briody* judgment in relation to the issue of illegality and then utilising that approach to justify or even side step public policy changes, when dealing with the use of donor eggs the court simply adopted wholesale the skeleton argument of the claimant's Counsel. With appropriate acknowledgment to Christopher Johnston QC the court accepted that:

> "Public policy has changed since *Briody* in 2001. It is no longer appropriate to discriminate in an award of damages between a child born from own egg surrogacy and one born from donor egg surrogacy. The characterisation of the donor egg claim as being impermissibly different from an own egg surrogacy claim does not stand up to analysis in our modern society. Throughout the country there are thousands of children born into families who would be appalled at the thought that simply because they have only a genetic connection to one of their parents, they were somehow of lesser value within the family. Legislation points only one way: that donor egg surrogacies should be seen now to have equal status. The family orthodoxy, which appears to have underpinned the observations on donor egg surrogacy in *Briody*, has been consigned to history. Society does not now place a lesser value on children born with only one of their parents' genes. Same sex relationships can achieve no other result and yet no current public policy would seek to characterise the child as not the child of both parents—even though one does not have any biological connection. This is shown by the passage of the Civil Partnerships Act 2004 and the Marriage (Same Sex Couples) Act 2013."

In other words, society has changed immeasurably since *Briody* and the law should do so as well. Indeed, Sir James Munby has spent many hours of court time in the Family Division, ensuring that documentation and procedure in the plethora of cases following *Re A* correctly reflect the sentiments propounded by Mr Johnston QC, as even now the existence of parental rights by a non-genetically related

[15] *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37; [2010] Q.B. 1.

parent are not in all circumstances automatic and can be undermined by a failure to complete the requisite documentation.

In many ways, the approach was not merely refreshing but provided the direction that might be expected from the Court of Appeal. Eschewing the court's approach only a few days earlier in *ARB v IVF Hammersmith* in which there was a complete failure to revisit the applicability of public policy formulated some 20 years earlier in *XX* the court was able to state with confidence that:

> "The distinction between 'own egg' surrogacy and 'donor egg' surrogacy, employing the partner's sperm, would be entirely artificial. Having regard to the development of social attitudes, I feel able (with the very greatest of respect to Hale LJ's view of 17 years ago) not to follow *Briody* on this point."

It is acknowledged that had the underlying public policy been examined in *ARB*, the result may have remained unchanged, it may well be that the passage of 20 years and the social change which has occurred in that period has no effect on whether a child may be regarded as a financial liability but the failure to even consider that issue is worthy of mention, particularly when set against the forward looking and proactive approach adopted in *XX*. Having decided that there was no public policy bar to the recovery of the cost of overseas surrogacy nor to the use of donor eggs, the proposition that the cost of UK surrogacy was recoverable was unarguable and was bound to succeed.

Whether that recovery of the cost of surrogacy would lead to a reduction in general damages for loss of fertility was considered by Davies LJ. It was acknowledged that there were no comparable authorities on the point. The claimant's legal team had conceded that as the original award of £160,000 for PSLA included an element of damages for the inability to pursue surrogacy in California and the psychological effects of such a bar, then if the cost of US surrogacy were recovered, there should be a reduction in general damages but contended that any such reduction should reflect the risk that the surrogacy may fail and the claimant remain childless or at least have fewer children than she wished. The court, in consequence, substituted an award of £150,000 for general damages taking into account those arguments.

Despite the severity of the claimant's bowel and bladder injuries, it is inescapable that a very significant proportion of the figure awarded is for infertility and yet we have an acceptance by the court that in many families there is no distinction between the genetic and the non-genetic parent. The outcome of the decision with regard to surrogacy was that this claimant was likely to become the non-genetic parent of a large family. There is a degree of tension between the substantial extent to which the courts are prepared to compensate the loss of the ability to have one's own child in general damages (loss of fertility) and the extent to which the law will reimburse the surrogacy cost of having a child which is not ones own. Surely the prospects of success of the latter must result in a meaningful reduction of the former if the parent–child relationship is considered no less in the non-genetic scenario than a genetic relationship? As claimant lawyers, there has to be an acknowledgment that there is an uneasy dichotomy in claiming significant damages in respect of both heads of loss.

Which brings us to the issue of autonomy and whether there should be a discrete head of damage in relation to the loss of the choice of the ability to have a family, or not have a family. In each of the cases cited, the claimant has suffered a loss of choice, a loss of autonomy if you will. They have been deprived by the contractual failings, negligence or downright deliberate deceit of others to engage or withhold from the very fundamental process of perpetuating our species. Short of a making a conscious decision to continue to exist or bring one's own life to an end, it is perhaps the single most important decision in the life of a human being. It may be a decision which is not always undertaken with adequate consideration or analysis. By the nature of things, on occasion it may not be a decision which is given any thought at all but if it is considered, there can be no decision of greater consequence. Is it not therefore a matter which, rather than being a side issue in the assessment of general damages for the loss or damage to the

organs which were once the only means by which we might recreate, should stand in its own right, particularly in view of the advances in medical science which bring into play a whole range of scenarios in which the decision takes centre stage where it had no place in the past? And is it not time for an honest reassessment of public policy in relation to the question of damages for the "child unwanted", possibly bypassing the emotive nature of that phrase by concentrating on the question of autonomy, parenthood and choice in the modern world?

That in itself gives rise to some conflict. *Rees* overtly gave rise to an award in damages for "loss of autonomy" in the sum of £15,000, whilst holding to the principle that there should be no damages for the financial loss arising from the birth of a healthy child. *ARB* in contrast failed to consider loss of autonomy at all. The prospect of pursuing a standalone head of damages broadly defined as "loss of autonomy" was firmly quashed in *Shaw v Kovak*.[16] However, that decision arose from a case in which it was argued (although apparently not pleaded) that conducting surgery on a patient who had not provided "informed consent" was a breach of that patient's personal autonomy, which breach gave rise to a distinct and separate cause of action and head of damage. On any analysis, such a claim was pushing at boundaries to an extent which was unlikely to find favour and which if successful, could have led to significant and perhaps unintended consequences.

As mentioned in the previous article, the use of "loss of autonomy" as a definition of the potential head of damage arising from the loss of choice of the ability to have a family may be a question of semantics and not necessarily helpful if it brings the concept into the realms of *Shaw v Kovak*. The issue has been considered in depth by academic lawyers[17] (with Purshouse carrying out a useful review of the authorities in the light of a Singapore Supreme Court decision) but neither excludes the possibility a discrete head of damage for loss of "reproductive autonomy" being derived from the authorities, despite the evident inconsistency of approach by the courts across this range of case law. *Rees* is the starting point and one which cannot be ignored but the courts, or possibly the legal representatives of the parties in these cases, appear to be failing to engage with the concept. "Loss of reproductive autonomy" is a head of damage consistent with the authorities and one which should be considered as a matter of course where issues of wrongful birth, conception by deceit, or loss of fertility arise, albeit that fresh terminology might be beneficial in framing such a claim.

And finally, are not such claims in essence personal injury claims? Without any disrespect to those who have had conduct of these cases and have no doubt dealt with them with skill and ability, it appears that in what may be a growth area of law, we as personal injury lawyers are at risk of conceding the field to family lawyers and others. Much as the courts might do well to look at their approach to families, autonomy and damages, so might we look to our laurels in developing this practise area with the advantage of an in depth understanding of tort, injury and psychological damage which are all key to the issues under consideration.

[16] *Shaw v Kovak* [2017] EWCA Civ 1028; [2017] 1 W.L.R. 4773.

[17] Paz, "Compensating Injury to Autonomy in English Negligence Law: Inconsistent Recognition" [2018] Med Law Review 26 (4): 585 and Purshouse, "Autonomy, Affinity and the Assessment of Damages …" [2018] Med Law Review 26 (4): 675.

Exploring the Ministry of Justice's Proposals for an Independent Public Advocate

Alice Taylor*

Bereavement; Disasters; Inquests; Public officers; Victim support

Support for those bereaved and injured following a major disaster is often found wanting. The delays and failings surrounding, for example, the contaminated blood inquiry, or the inquiry into child sexual abuse left many of those affected feeling marginalised, unheard, and unsure of where to turn for support. There is clearly a need for reform of how those affected by major, systemic and widespread tragedies are supported in their quest for answers.

In September 2018, as part of its wider Victims Strategy, the Government launched a consultation on introducing an "Independent Public Advocate". This new role is intended to address serious concerns about how far the voices of the bereaved are heard, and how far they are supported in fully understanding and participating in the investigatory process. The Independent Public Advocate ("IPA") will "act for bereaved families after a public disaster and support them at public inquests". The Government acknowledges that complex investigations following a disaster can be daunting and confusing for the bereaved and injured, causing additional distress. The Government hopes that through the introduction of the IPA, the further trauma suffered will be a thing of the past. This article examines what the role of the IPA should look like, in order for bereaved families and those involved in disasters and other major incidents to fully benefit.

That the Government recognises that there is a need for greater support for those bereaved and/or involved in major disasters, is positive. However, the existence of an independent central figure to support families is not a panacea. The introduction of an IPA must go hand in hand with a Government commitment to provide non-means tested legal aid for inquests.

What role should the Independent Advocate have?

The bereaved need additional support to properly engage in investigations following a disaster, so that they can obtain answers. After losing a loved one in traumatic circumstances, many simply do not know where to turn. If established properly, the IPA could provide vital assistance to the injured and bereaved to signpost them to advice and support that they need, and to help them engage fully with investigations.

The Government envisages that the IPA will help the bereaved understand what is going on and what their role is within the investigation and inquiry process, helping them to engage with those investigating the disaster. The Government also suggests that the IPA will be best placed to form an opinion on best practice, and can make recommendations based on this.

The IPA must be given the right powers, and a sufficiently clear remit, to be effective. Each different event will require different support, so the scope of the IPA's role should be broad. One of the IPA's main roles should be the co-ordination of the immediate aftermath of a disaster. Empowering families means signposting those affected to independent legal advice, which will be tailored to their particular circumstances.

The Government suggests that the IPA will not be granted any powers over the inquiry itself. It is vital that the IPA has the power to ensure that an inquiry takes place where required. The difficulties families

* Legal Policy Officer at the Association of Personal Injury Lawyers.

have experienced in trying to obtain answers through an inquiry in the past, was highlighted through the contaminated blood scandal. In the 1970s and 1980s, thousands of haemophiliacs in Britain were given blood from people who were infected with the HIV virus and Hepatitis C. With no central point of contact, and no figure with the recognised power to call for an inquiry, it was not until 2017 that there was an inquiry into what had gone so terribly wrong. According to the (now closed) MacFarlane Trust,[1] up until this point, there had been no assignment of responsibility and no acceptance of liability from any government, healthcare or pharmaceutical entity in the UK. Aside from means tested benefits from some of the surviving victims, no damages or compensation had been paid to those infected or affected. Victims of the scandal began calls for a public inquiry as early as 1987, and there was an attempt in the early 2000s by the former Solicitor General, Lord Archer, to encourage the Government to establish an independent public inquiry, but this was unsuccessful.

Lord Archer chaired a private inquiry in 2007, but this was hampered as the report held no legal or official status, and the inquiry was unable to subpoena witnesses or demand disclosure of documents. An independent public inquiry finally began in 2017, and legal action is now being pursued by those affected and their families. If there had been a central, independent point of contact for affected families, who had the power to recommend to the Government that there should be an inquiry, it is almost certain that there would not have been as great a delay, and answers and redress could have been delivered much earlier.

Once the IPA has fulfilled their role in ensuring that an inquiry takes place if required, and that all parties to the inquiry have legal advice, the IPA should take a step back. The IPA's role should then be to keep a watching brief, ensuring that the inquiry is running as required. The IPA should have a power to intervene if there are severe delays, or other major issues arising which jeopardise the inquiry's success. Of course, the legal representatives of the parties should intervene in these circumstances wherever possible, but if this does not occur, the IPA should be able to step in.

In addition to ensuring that inquiries go ahead when they should, and that they are conducted in the most effective manner possible, the IPA should also have a role in working with the bereaved where concerns are realised about the outcome of a past inquiry.

Having oversight of public inquiries will put the IPA in an ideal position to identify best practice, and make recommendations for how inquiries can be carried out in the future. The IPA could produce a yearly report, which would be available to the public and which would set out the details of the inquiries, the support the IPA has provided, and the outcomes from the inquiries. These yearly overviews will have the potential to be a great source of learning, to ensure the conduct of inquiries continues to improve. After each inquiry, the IPA should also provide the Government with a report tailored to that particular inquiry, setting out lessons learnt and recommendations as to how the conduct of future inquiries could be improved.

When should the Independent Public Advocate be engaged?

The IPA role must not only cover fatalities, but any situation where there is injury leading to an issue of public importance. For the IPA's role to be limited only to those situations which are within the common understanding of a "disaster" would be a wasted opportunity. The IPA, if established, could have provided vital support to the victims of Ian Paterson, and could—as recognised by the Ministry of Justice's consultation—assisted those affected by the Mid-Staffordshire NHS Trust Scandal. The IPA could have played a role in ensuring that inquiries were established in a timely manner, and then acted as a signposting service to those who have been affected by the scandals.

A further example of where the role of the IPA could have assisted in the smooth running of the inquiry, not necessarily within the common understanding of a "disaster", is the Independent Inquiry into Child

[1] The MacFarlane Trust was set up to support people with haemophilia who were infected with HIV as a result of contaminated NHS blood products, and their families.

Sexual Abuse. Initially, this investigation was plagued with resignations due to concerns over independence. The investigation was also originally a panel, rather than an inquiry, with no powers to compel witnesses, or to access and examine classified information. Several survivors' groups also withdrew from the inquiry over concerns that it was not fit for purpose and that survivors were being marginalised. If there had been a person overseeing the administration of the inquiry, initially co-ordinating the parties involved, the inquiry may have run much more smoothly, and would have garnered more confidence from the public and, potentially, the victims.

It is sensible that the decision as to whether the IPA should be engaged should fall to the Secretary of State. The Government recommends that in order to decide whether an event is a disaster for which the support of the Independent Public Advocate should be available, the Secretary of State should have regard to:

- the number of people bereaved or injured as a result of a disaster, including instances of fatal illnesses it may have caused;
- the number, range and type of other agencies or people who have a role or interest in the subsequent inquiry, and the complexity that results;
- the interests of the wider public in understanding the causes of the disaster, such as where there are risks that the disaster could be repeated elsewhere in similar circumstances; and
- whether the public reaction in the immediate aftermath of a disaster, including the reaction of the bereaved and others involved in the disaster, suggests that the support of the Independent Public Advocate is needed.

It is important that these factors are not too prescriptive. It is impossible to predict the nature of the next major disaster, and if the requirements for triggering the support of the IPA are too restrictive, there is a danger that the reform will not have the intended impact. It is also vital that the IPA themselves should be able to make an application to be involved in a particular inquiry, if they feel that they should be involved but have not been asked by the Secretary of State to do so. Families and others involved in the disaster should also be permitted to appeal the Secretary of State's decision not to involve the IPA in a particular inquiry. There should also be a set timeframe within which the Secretary of State must make a decision about whether the IPA should be involved. The Independent Advocate themselves should have the decision as to who would be eligible for their support.

Not a substitute for legal advice

What the IPA must not be is a substitute for legal advice. A number of stakeholders, including the Bar Council, INQUEST and APIL, raised concerns in their response to the Government's consultation that the IPA cannot resolve the need for proper independent legal representation at inquests. The Bar Council stressed that:

> "the proposals do not solve a 'key problem' of the lack of funding for independent representation, and in order to fully participate in the processes following a disaster, survivors and the bereaved need access to independent legal services."

INQUEST highlighted that the IPA can only be considered alongside (reforms to legal aid for inquests, obligations to follow the duty of candour) as a supplementary measure which strengthens the role of the bereaved and survivors. APIL believes that alongside the introduction of an IPA, all bereaved families should have access to non-means tested legal aid for representation at inquests.

The process of an inquest can be extremely daunting and it is unfeasible that the average member of the public would be able to deal with the level of complexity of the evidence and information required in order to represent themselves. This is especially so when taking into account the emotional turmoil that

an inquest inevitably brings to a family. It is extremely traumatic for families without legal representation to review autopsies, and some suffer psychiatric issues as a result. Others have reported that they have put their grief "on hold" in order to get through the inquest process. This has a long-term impact for families who are forced to represent themselves.

Lawyers are also needed to ensure that prevention of future deaths reports are not avoided by the defendant, and that witnesses are effectively questioned. Knowledge is required of the potential outcomes, omissions and acts that may have taken place. There must also be a level playing field—in most inquests, the parties, aside from the bereaved family, will have legal representation, often funded by the public purse.

Ultimately, the bereaved family requires someone to "fight their corner" at the inquest, and the IPA cannot be that person. By the role's very nature, the IPA must be independent of all parties, and cannot represent the interests of one party over another. There is a danger that, left unchecked, the existence of the IPA could dilute access to lawyers, with families being told that the support of the IPA is all that they need. Independent access to lawyers is vital for families to engage meaningfully with the process even with the appointment of an IPA.

What type of person should the Government appoint as Independent Public Advocate?

Previous investigations into major disasters have been plagued by assertions of "cover ups", withholding of information, and a lack of independence from those responsible for leading the investigation. The risk is that the perception will be that the IPA is just another arm of the state. To dispel this, the IPA must be truly independent to reassure those who require the advocate's services. To ensure the smooth conduct of the inquiry and effective engagement from all parties, the IPA should have experience of dealing with large scale matters with multiple different stakeholders. They must be adaptable, and able to ensure support to those who hold differing and conflicting views. The person taking on the role must also have experience in the conduct of inquiries, in order to recognise that the inquiry is progressing as it should and to know when an intervention is necessary. The struggles establishing the contaminated blood inquiry, indicate how difficult it can be to set up an investigation to find out how things went wrong after a major incident. The IPA must have the skills, experience, and have garnered sufficient respect, to be able to scrutinise and challenge those conducting the inquiry and the government, and for both the inquiry and government to listen. The IPA must be skilled in working with those who are bereaved, those who are experiencing grief and trauma, and who have strongly held views that may differ from others around them.

Next steps

Justice Secretary David Gauke confirmed in a letter to the Chair of the Justice Select Committee, Bob Neill, that the Government had received 40 written responses to its consultation, and also feedback through a number of stakeholder workshops. At the time of writing, a formal response will be published in Spring 2019. David Gauke confirmed that the IPA must have a clear and well understood remit, and that they must be able to work well with all of those who are bereaved.

The role of the independent public advocate has the potential to ensure that inquiries after disasters and other widespread "scandals" are handled efficiently and effectively, with bereaved families being fully involved in the inquiry process. Evidence shows that for too long, inquiries have either not taken place when they should have; have been carried out to an unsatisfactory standard; or taken far too long to reach conclusions. If developed correctly, and in line with the recommendations above, the role of an IPA will go a long way towards helping bereaved families feel heard. The IPA cannot be introduced in isolation, however. In order for families to feel truly empowered to engage with inquiries, there must be reform of

the provision for legal aid for inquests, and the introduction of non-means tested legal advice for all bereaved families. We await the Government's formal response with interest.

Vulnerability, Capacity and Managing Damages: The Options Explored

Lynne Bradey

Kate Edwards*

Capacity; Children; Personal injury trusts; Trustees' powers and duties; Vulnerable adults

Managing the funds that result from a successful claim for compensation is essential, and often an on-going process. Deciding on a suitable vehicle for managing funds is a crucial step, especially where questions of capacity and vulnerability arise. Traditionally, the view has been that where a person has capacity to manage their finances, the option for them is a personal injury trust and for those who lack capacity, then a deputy must be appointed by the Court of Protection. Capacity to manage finances is, however, nuanced and the decision about the most appropriate format for managing funds into the future is not as cut and dried as has been imagined. Developments in case law have given guidance on the approach to take. Providing the right advice to your client can save time and maximise the benefit they can take from the funds. Each case should be considered on the particular circumstances of the injured party.

What are Personal Injury Trusts?

Personal Injury Trusts are a creation of benefits legislation, not tax legislation. They are simply a trust of any type which contains funds relating to a personal injury, and only funds from a personal injury. Most of the time, this will be compensation but sometimes it will include capital lump sums from sources such as lump sum insurance pay-outs, fundraising etc. For some benefits, such as Universal Credit, the definition is narrower and if you have some other types of funds it might be helpful to have two separate pots to ensure compliance with the relevant rules for each.

The principal advantage of a Personal Injury Trust to a compensated party is that funds held and managed via a personal injury trust are not taken into account when an individual's entitlement to means tested benefits is calculated. The disregard for personal injury trusts is found in the Income Support (General) Regulations 1987 Sch.10 para.12.[1] This disregard is mirrored in the means tested benefits legislation, with the exception of Universal Credit, as mentioned above, which refers to "compensation" and "a sum awarded or agreed" rather than the definition above and states that:

> "where the funds of a trust are derived from a payment made in consequence of any personal injury to the claimant, the value of the trust fund and the value of the right to receive any payment under that trust [are disregarded]."

Compensation awarded by the slightly more circuitous route of professional negligence can also be validly settled into trust. Between 2006 and 2010, the Department for Work and Pensions argued that it could not but have since relented. The case that decided the point was CIS1269/2010.

* Wrigleys Solicitors.

[1] Income Support (General) Regulations 1987 (SI 1987/1967).

Types of trust

Lawyers get very excited about the type of trust, tax treatment etc. In reality, a bare trust will be best for most people most of the time. This form of trust gives the injured person the most control. They can hire and fire the trustees and break the trust should they wish to and additionally the trust is tax neutral.

Because of that level of control, some people worry about what they would do if they were under pressure. For those people, a different type of trust, probably a discretionary trust, is likely to be more appropriate. Unfortunately, the tax treatment can be more of a problem here as discretionary trusts are subject to their own tax regime which can make management more complex and the trust more costly in terms of taxation. However, if a person qualifies as a disabled person within the Inheritance Tax Act 1984 s.89, the tax disadvantages are mitigated.

Why do clients need Personal Injury Trusts?

For many clients, protecting and continuing their entitlement to means tested benefits will be the main motivation. This is not the only reason, however, that a Personal Injury Trust can be a good option for your client.

Clients in receipt of care contributions from the local authority, or concerned about this in the future, will often be better off with a Personal Injury Trust. This is because the trust acts as a "ring-fence" against the assessment of financial contribution carried out by the local authority to assess how much an individual should pay towards their care.

Some clients like to have trustees to guide them, either because they are nervous of their own abilities with money or because they fear they will be separated from their money by unscrupulous family or newly found friends. A lot of people have never had to manage a significant amount of money and are only too aware that this is their only chance. They take great comfort in advice from somebody who has done this before and knows how it should all work.

Sometimes clients find it helpful to be able to say "it's all in trust", or "it's not in my name". That can be helpful when they are being put under pressure to spend money, bail out family members etc.

Unfortunately, many vulnerable people tend to find themselves in relationships where the other party, whether that is a partner or a friend, is expecting them to fund their lifestyle. Often the injured person can be nervous about setting ground rules because they fear the partner or friend will leave them. Some people perceive that they are less able to find a partner post-injury which can sadly increase their vulnerability to the pressures of those who may not have their best interests at heart.

Some people just find the whole area of investments very daunting. For a lot of people, it is not something that has been part of their life experience so far. They are wary of entrusting their money to someone and want the reassurance of a team that has worked together before with positive results.

For these reasons, many clients find Personal Injury Trusts with professional trustees a much more reassuring and safer way of managing their money.

When should I think about a Personal Injury Trust?

All clients should be advised to consider whether they should use a Personal Injury Trust. Even if your client is not currently in receipt of means tested benefits, or you do not think they are, you should always advise about Personal Injury Trusts. You do not know what will happen in the future and what means tested entitlement your client might lose.

If your client does not want to set up a Personal Injury Trust at the moment, emphasise strongly that they should keep their injury money separate from anything else in case they change their mind later. If funds have been diligently kept separate then a valid Personal Injury Trust may be possible in the future

but where funds have been intermingled with funds from other sources this valuable opportunity could well be lost.

Advice on a Personal Injury Trust should be given early. The first payment received as a result of an injury is disregarded from means tested benefits calculations for 52 weeks but any subsequent payment, even if received within the initial 52 weeks is automatically reportable by a benefits claimant (except for Universal Credit which has more relaxed rules!). You should, therefore, be alert to any other payments (insurances etc) that your client may have received that would use up this disregard period.

Who should be the trustees?

The choice of trustees is highly personal and will depend upon your client's individual circumstances. Your client can be a trustee of their own Personal Injury Trust although this may not always be desirable.

Having family or friends act as lay trustees will be a cost-effective option but the role of trustee may be too onerous for many people, and can give rise to unintended conflicts if there is disagreement about managing the funds. A professional trustee will have the appropriate experience and resources to manage the trust but there will of course be costs implications to this. Where significant funds are requiring management it could be prudent to have a professional trustee, at least until the trust is well established.

If professional trustees are to be appointed in cases where a significant settlement has been made or is anticipated you must bear in mind the judgment in *OH v Craven* before making a referral to an in-house or connected department. This case sets out a procedure for advising the client which is designed to ensure that the court can "be satisfied that the decision to establish a 'personal injury trust' of which the litigation solicitor or their firm is a paid trustee is one untainted by undue influence".[2]

What about children?

Cases involving children are often the cause of some confusion for practitioners. The key here is to establish whether the child is likely to have capacity at the age of 18. If they are likely to lack capacity at the age of 18 then the Court of Protection will have jurisdiction and will appoint a deputy. If they are likely to have capacity at 18 though, the Court of Protection has no jurisdiction. Instead, funds can either remain in the Court Funds Office or you can ask the High Court to set up a trust under Civil Procedure r.21.11

Many children who have those trusts carry them on into adulthood. They have the advantage of continuity and the children can get used to the trust before 18. It also prevents the 18 year old from receiving a large cheque and going straight to the local Ferrari dealership.

Where a trust is for a child the court will require that a professional trustee is appointed until he or she turns 18.

What if my client lacks capacity?

If your client lacks capacity they cannot set up their own Personal Injury Trust. Where there is evidence that the injured party lacks capacity applying for the appointment of a deputy to manage their funds would usually be the default option. However, it is possible to apply to the Court of Protection for a Personal Injury Trust to be set up. The case of *Re HM (SM v HM)*[3] considered the use of personal injury trusts in the context of clients who lack capacity. This case made it clear there would have to be very convincing evidence to show that a trust was better than, not just equal to, a deputyship.

[2] *OH v Craven* [2016] EWHC 3146 (QB) at [35]; [2017] 4 W.L.R. 25.
[3] *Re HM (SM v HM)* [2011] EWCOP B30.

The issue of which vehicle, a deputyship or a Personal Injury Trust, would be the best for managing funds was considered further by Charles J in *Watt v ABC*.[4] In that case, Charles J commented that those making the decision whether to apply for the appointment of a deputy or for a personal injury trust to be authorised, should not proceed on the basis that there is a strong presumption that the court would appoint a Deputy and would not make an order that a trust be created.

Watt v ABC dealt with a claimant who had litigation capacity but lacked capacity to manage some aspects of his finances. He was clearly extremely vulnerable to influence from others and to poor, if not catastrophic, decision making and had at different points in the litigation both established a trust and had a deputy appointed. The question to be considered by Charles J was the suitability of each vehicle for managing the claimant's settlement in the long term. He identified specific "Breakdown Risks" and "the Vulnerability Risk" that would be considered. The Breakdown Risks were that:

> "i) ABC would want his damages award to be used in property development of his choosing,
> ii) if his choices and wishes were not agreed to by a deputy or trustees their relationship with ABC would mirror that set out in those passages between ABC and his solicitor, and whether or not that serious discord arose,
> iii) ABC would regularly challenge the view that he did not have capacity to make decisions relating to the expenditure and management of money and property of substantial value, and
> iv) if he was found to have capacity and so left (with support) to make his own decisions he would lose significant parts of his capital and so be left in a difficult if not a disastrous situation."[5]

The Breakdown Risks here relate to the risk that professional relationships break down due to the claimant's beliefs and behaviour. The factors discussed in this case are clearly case-specific but similar risk factors can clearly be envisaged in other cases of this nature where the claimant struggles with working within the boundaries of professional advice or lacking insight into their difficulties.

The Vulnerability Risk Charles J identified was that "he will (alone or under inappropriate influence) make disastrous or bad decisions that deprive him of the use of the damages awarded to meet his needs caused by his brain injury".[6]

The result of those risks was that whilst the claimant had the capacity to manage some of his finances, he would need professional support to make the decisions he had capacity for, and to take the decisions where he lacked capacity. Charles J rejected the idea that there is a presumption in favour of the appointment of a deputy, referring to the statutory scheme as a starting point in a process of reasoning and that a detailed weighing process should be undertaken to determine best interests in each case on the individual facts. Charles J then set out the following points to be considered in these cases:

> "(1) The management regime for a substantial award of damages should be considered as soon as is practicable.
> (2) This will involve a careful consideration of what the claimant (P) has and does not have the capacity to do and of his or her likely capacity and/or vulnerability in the future. This is relevant to both jurisdictional and best interests issues.
> (3) It will also involve the identification of all relevant competing factors and should not proceed on the basis that there is a strong presumption that the COP would appoint a deputy and would not make an order that a trust be created of the award. Rather, it would balance the factors that favour the use of the statutory scheme relating to deputies (that often found the

[4] *Watt v ABC* [2016] EWCOP 2532; [2017] 4 W.L.R. 24.
[5] *Watt v ABC* [2016] EWCOP 2532 at [15].
[6] *Watt v ABC* [2016] EWCOP 2532 at [16].

appointment of a deputy in P's best interests) against the relevant competing factors in that case.

(4) It will also involve the identification of the terms and effects (including taxation) and the costs of those rival possibilities.

(5) Care should be taken to ensure that applications that are not straightforward are not decided by case officers in the COP but are put before judges of the COP.

(6) The possibility of listing case management hearings or the final hearing of QB proceedings before a judge who is also nominated as a COP judge should be considered. However, the potential for conflict between the respective roles of the judge in the two courts (e.g. one arising from a consideration of without prejudice communication in respect of the QB proceedings concerning its settlement that is not agreed or not approved by the COP judge) and the respective jurisdictions of the two courts need to be carefully considered."

So, what has been the practical impact of this decision for deputies and trustees? In practice, the appointment of a deputy does seem to continue to be viewed as the "normal" route where there is evidence that a claimant lacks capacity to manage some aspects of his finances. There has been little evidence that the court is authorising a significant number of trusts following this decision.

The decision touched upon the differing costs estimated for the two possible pathways in the case. The evidence available was that a trust would be considerably cheaper in terms of professional costs than a deputy appointment. There is no information given about how these two estimates were calculated and it may well be that the difference can be explained by the specific circumstances of that case. In general, there is usually very little difference between the professional running costs of a trust or a deputyship although the deputyship does involve OPG and court fees and the cost of complying with OPG requirements. The duties and obligations of the two roles are broadly similar and the level of client contact will be dictated by the client's needs rather than the management vehicle.

What if my client has fluctuating capacity?

Everyone is assumed to have capacity, but it is a rebuttable presumption. Where there is evidence that a person might lack capacity, the Court of Protection has jurisdiction and may make an order as to the best vehicle for managing your client's funds. Cases where capacity is borderline, or may fluctuate for whatever reason can be the most difficult to decide.

If somebody is not content with the trust and is likely to rail against it, then a trust may be less appropriate. That is mainly because it will be extremely difficult to manage day-to-day. If somebody is making frequent requests to break the trust or change trustees then capacity assessments will need to be carried out but at a more basic day-to-day level, the settlor/beneficiary will be likely to be asking for things which the trustees do not feel they ought to say yes to. In cases where capacity is borderline, that gives the trustees the additional complication of working out what the client has capacity to do which is merely unwise, in which case they could agree with indemnity from the client if appropriate, and what shows a lack of capacity.

Another conundrum which practitioners often come across is the difference between vulnerability and lack of capacity. Somebody can have capacity to make a decision but can be extremely vulnerable and can be put under significant pressure behind the scenes to make a decision to break the trust for example. Of course, being vulnerable does not mean that you lack capacity. A vulnerable person can be significantly protected by a Personal Injury Trust and of course, the trustees would want to make sure that the person was not under any pressure to break the trust but a capacity assessment is likely to come out positive. The building up of a relationship of trust is perhaps the best way of protecting the vulnerable person here.

The recent British Association of Brain Injury Case Managers paper on the Mental Capacity Act also makes the point very well that a client's capacity to make a decision can vary significantly depending if they are presented with the options in a calm and controlled environment in front of the person assessing capacity and when they are trying to make a decision without that calm environment, under pressure from others, in different emotional states or a state of tiredness etc. Someone can have the capacity to make a decision when they go about it in a Mental Capacity Act compliant way, but when those conditions are not present the quality of decision making is often significantly poorer.

Conclusion

Advice about personal injury trusts should be considered as integral to the claims process. The factors of vulnerability and risk identified in *Watt v ABC* must be considered in the context of evidence about capacity and the circumstances of the individual claimant. For a client who has borderline or fluctuating capacity but is content to have a trust and take the advice of trustees, a personal injury trust can work well. We are aware that some trusts have been put in place with a special proviso that the trustees would have capacity assessed if the settlor/beneficiary wanted to break the trust or change trustees. Of course, the trustees ought to be conducting a capacity assessment every time such a request comes in, particularly carefully given that the person has borderline capacity. However, the inclusion of such a clause does help to concentrate the mind and does hopefully prevent situations where the trustee themselves might have been tempted to make a call about the person's capacity rather than have a formal medical assessment. In practice, the deputy route is still, if not the default, considered the usual route and it does offer both protection and flexibility in supporting decision making where the claimant can make decisions.

Regulatory, Quality and Insurance Considerations in Directly Employed Care Arrangements for Claimants Lacking Capacity

Austin Thornton*

Heather Ferguson**

Best interests; Care; Care Quality Commission; Deprivation of liberty; Insurance; Personal injury; Persons lacking capacity

Abstract

In serious personal injury cases, claimants often require the commissioning of complex care packages. Whilst the procedure for obtaining expert evidence regarding care needs in support of a financial claim is well established, the regulatory scheme governing the implementation of care packages is less well known to litigators and to the case managers and financial deputies that support claimants. Failure to get this right can expose individuals to criminal and uninsured civil liability and expose the claimant to poor quality unsupervised care. This article reviews the scheme of regulation covering the provision of care and looks at the role of the various participants in care provision within that framework. It concludes by making six recommendations for effective practice.

Introduction

In a catastrophic injury claim involving major spine or brain injuries, the injured person may hope to recover the cost of their care paid for on a private basis for the remainder of their life. These damages will often be around 75% of the total value of the claim and may be seven or eight figure sums.

Thus the decisions around the design of care packages and their implementation are of high value and of crucial importance to the future well-being of the claimant and of those family members who will look after them with professional support.

Typically, the initial care package design is a co-operative effort between the litigation solicitor, a care expert witness and a case manager, the latter being responsible for implementation.

In practice, care package design falls into three broad categories being:

- Agency care.
- Direct employment.
- Hybrid models.

In an agency package, a professional care agency is contracted to provide the care. It provides and manages the staff and is responsible for clinical governance. It is both a strength and a weakness of agencies that they have a pool of staff that they can move around different packages. This allows them to cover absences effectively and accommodate resignations and dismissals, but it impinges on the continuity of the personal relationship between the service user and their carers and the bespoke knowledge the carer develops which is so important to the provision of good care.

* Austin Thornton is a solicitor and professional deputy at Wrigleys Solicitors LLP with particular responsibility for health and care.
** Heather Ferguson, RN and governance lead in case management and expert witness services.

Agency provision is particularly appropriate for short-term care needs, often related to rehabilitation goals or when there is a high level of clinical complexity and associated risk, e.g. invasive ventilation. This is due to the level of training, competency assessment and governance required where the safe delivery of clinical care overrides client or family wishes. Some care agencies do provide bespoke recruitment for complex care provision but despite this, the care can often breakdown.

As a result, it is common for the care expert witness to recommend that the claimant employ their own staff with the support of a case manager who is responsible for clinical governance, recruitment and human resources issues. This arrangement is generally referred to as "direct employment".

Care package design may combine the direct employment of key staff with the use of agency care to provide occasional staff to cover unplanned absences and respite requirements. These hybrid models may offer the best of both worlds providing effective and flexible care arrangements. They provide more flexibility to meet clinical needs and the resourcing of skills to support safe care delivery.

Where the claimant lacks capacity in relation to the management of their compensation for care, a professional deputy will usually be appointed. The Deputy Standards (Professional) 2015 for property and affairs deputies require that the deputy shall identify and regularly review the care required by P and where they have funds to do so, commission suitable care. Professional deputies are often named as the employer of directly employed staff.

In this article the term "representative" is used to denote any person with legal status to commission care on behalf of a person lacking capacity.

This article examines the statutory, regulatory and insurance considerations around the issues of care package design and implementation in serious injury cases where for the purposes of this article, it is assumed that the claimant substantially lacks capacity both to determine their own care needs and to manage the property and affairs requirements of arranging such packages.

The authors have been motivated to write this article in consequence of many conversations with litigators, case managers, and the families of severely injured people which have disclosed a need for clarity in this area of the law.[1]

The regulation of care

The regulator for care is the Care Quality Commission ("CQC"). The delivery of all personal care and other types of health care is regulated unless it is exempted from regulation. Different types of care are subject to different exemptions. A person who provides regulated care and is required to register with CQC but does not do so commits an offence.[2]

Personal care

Most direct employment packages provide personal care. The statutory definition of personal care is provided in box A.

Box A

The statutory definition of personal care: Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 reg.2

"personal care" means—

(a) physical assistance given to a person in connection with—

(i) eating or drinking (including the maintenance of established parenteral nutrition),

[1] Unfortunately I am advised by case managers that conflicting advice often originates from the Care Quality Commission ("CQC"). Feedback from any CQC official wishing confirm or differ from any points in this article would be very welcome.

[2] Health and Social Care Act 2008 s.10.

(ii) toileting (including in relation to the process of menstruation),

(iii) washing or bathing,

(iv) dressing

(v) oral care, or

(vi) the care of skin, hair and nails (with the exception of nail care provided by a person registered with the Health and Care Professions Council as a chiropodist or podiatrist pursuant to article 5 of the 2001 Order), or

(b) the prompting, together with supervision, of a person, in relation to the performance of any of the activities listed in paragraph (a), where that person is unable to make a decision for themselves in relation to performing such an activity without such prompting and supervision.

Where a person provides personal care, they must register with CQC unless the activity is exempt.

Exemptions from registration for carers providing personal care

Both the types of care activity that are governed by regulation and the exemption from regulation for certain activities are defined by regulation[3] ("the 2014 Regulations").

The 2014 Regulations separately define the service user and the service provider as follows:

> "'service provider' means, in respect of a regulated activity, a person registered with the Commission … as a service provider in respect of that activity;
> 'service user' means a person who receives services provided in the carrying on of a regulated activity."

The Regulations therefore create a division where the service user is given protection by the regulation of the service provider. So it would be an unintended consequence for the Regulations to have the effect that the service user is also the provider of a care service to himself.

Therefore, in a direct employment situation where the cared for person either themselves or through their representative, employs a person to provide care to them, the carer is the "provider" and potentially required to register with CQC. The service user employer is not the provider.

Happily the 2014 Regulations provide that carers working in this situation will be exempt from registration so long as the following conditions are met:

- The carer is recruited by the service user employer alone and not by an employment agency.[4]
- No person other than the service user has direction or control over the carer in their work.[5]

A case manager who recruits staff to be employed by a service user acts as an employment agency and the exemption does not apply. A case manager who has any ongoing direction and control of the employee also causes the exemption to be lost.

It follows that in packages where a case manager is deployed, there is a requirement for registration with CQC.

In this situation, who is required to register? There are three candidates: the employer; the carer; or the case manager.

As the policy of the Regulations is to provide protection for the service user, it is unlikely that the correct interpretation of these provisions is that the employer/service user is required to register.

Since it is the case manager who has direction and control of the carer, the best interpretation is that the case manager is the service provider who must register. This is also consistent with actual practice

[3] Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 (SI 2014/2936).
[4] "Employment agency" is defined by the Employment Agencies Act 1973.
[5] 2014 Regulations Sch.1 para.1(3)(c).

since most case managers servicing the direct employment sector are registered with CQC as personal care providers.

Where a person lacks capacity to employ staff, or if they do not want to employ staff, the 2014 Regulations provide that a "related third party" may act as the employer in their place.

A related third party is:

- A person with parental responsibility for a (minor) child to whom services are provided.
- The donee of a power of attorney or a deputy, in either case whose authority covers the relevant matters.
- A person with other lawful authority.
- Any of the above acting together.
- An Independent User Trust. This is defined as: "A trust established for the purpose of providing services to meet the health or social care needs of a named individual."[6]

Where a person with a power of attorney or a deputyship acts as a related third party, they act as agent for P[7] and so stand in P's shoes for formal legal purposes. As a result they are in an equivalent position to the service user under the Regulations. It is clear from the 2014 Regulations Sch.1 that related third parties are intended to substitute for the service user where the service user lacks capacity.

It follows that where an attorney or deputy employs staff in a direct employment arrangement, they should not be the provider and so this does not affect the proper designation of the case manager as service provider.

This does not apply where the trustees of an Independent User Trust act as an employer. In those circumstances, the trustees are employers in their own right and the service user is their customer. However, the Regulations maintain consistency of the principle that it is the professional care providers who must take responsibility by stating that where the provision of services under arrangements between an IUT and a provider of such services falls to be regarded as a regulated activity, it is the provider and not the IUT which shall be regarded as the person who carries on that regulated activity.[8] Therefore if an IUT employs carers, it will be the carers as actual providers rather than the trustees who employ them who are required to register with CQC, unless the activity is exempt.

A person who is a representative or nominated person under direct payments legislation has "other lawful authority" thereby exempting their carers from registration with CQC so long as the other conditions of exemption are met. This applies to both the social services and NHS direct payments regimes.[9]

Given this consistent approach, whilst there is no specific provision to this effect, it seems likely that parents of minor children who employ staff will also be treated as service users rather than as providers. Again, the staff will be exempt from registration with CQC if the parents wholly direct and control the care, but if a professional case manager is brought in to assist, that exemption will be lost and the case manager will be the provider and carry the regulatory responsibilities.

For the avoidance of doubt, friends and relatives who provide care for no consideration are exempt from registration.[10] It is the authors' view that those in receipt of non-taxable "support payments" and those likely to a receive a gratuitous care award do not work for consideration.

[6] This wording in the 2014 Regulations Sch.1 para.1(4)(d) cross refers to the definition of an Independent User Trust set out in the Care Quality Commission (Registration) Regulations 2009 (SI 2009/3112) reg.4(1).

[7] In relation to a deputyship, see the Mental Capacity Act 2005 s.19(6).

[8] Care Quality Commission (Registration) Regulations 2014 (SI 2014/) reg.4.

[9] It is unresolved whether a person commissioning from mixed private and statutory funds has sufficient lawful authority to exempt the whole package if the privately funded care would otherwise be registrable. The proportions of the mix of private and statutory funds is likely to be a relevant consideration.

[10] 2014 Regulations Sch.2 para.1.

Treatment of disease disorder or injury

The provision of treatment for a disease, disorder or injury by or under the supervision of:

- a health care professional, or a team which includes a health care professional; or
- a social worker, or a team which includes a social worker, where the treatment is for a mental disorder,

is also regulated.

Treatment is defined in Box B

Box B Definition of treatment
"'treatment' … includes—
(a) a diagnostic or screening procedure carried out for medical purposes,
(b) the ongoing assessment of a service user's mental or physical state,
(c) nursing, personal and palliative care, and
(d) the giving of vaccinations and immunisations."

A health care professional includes a registered nurse. The Regulations contain some exemptions but most are unlikely to be relevant in the case management setting. The most relevant exemption is that a mentally capable person may *employ* a qualified nurse to provide nursing care so long as the nurse works wholly under their direction and control.[11] A care package may be supervised by a self-employed nurse but in that event the nurse would have to register themselves.

Significantly, there is no related third-party exemption and it therefore appears that people lacking capacity cannot take advantage of this exemption.

The definition of treatment includes the provision of personal care. This raises a potentially important point for case managers about the category of registration that they need.

Case management companies generally speaking contain qualified health professionals operating in the case management setting. Whilst not all individual cases managers are qualified health professionals, clinical aspects of package design and clinical supervision is done by health professionals who are employed within or are owners of the company. It is the involvement of qualified staff that will generally be required to comply with the registration requirements for case management companies dealing with complex brain and other injuries.

As the definition of treatment includes the provision of personal care, it would appear that all case management companies who use qualified health professionals to provide supervision in complex cases will require this registration. Registration for personal care only would normally be appropriate only for care companies where the work done does not involve health professional oversight.

Hybrid structures where a professional care agency is asked to supply a nurse to supervise a directly employed care team may not work. The agency may decline to take responsibility for staff that they do not employ.

In packages requiring such care, these regulatory difficulties may be used identify that the additional cost of agency care, if there is such an extra cost, is reasonable, and thus assist recovery by the claimant.

Obtaining registration for nursing care through CQC can be undemanding in terms of proof of suitability. The considerations are whether the case management company or independent case manager have the infrastructure, skills and clinical governance to support the service. A professional deputy or other

[11] 2014 Regulations Sch.1 para.13. The exemption in para.13 is restricted to employees. The registrable activity in para.4 applies to all nurse supervision of treatment, which term includes the provision of personal care.

commissioner can do little more than rely on compliance by the case management company with the statutory quality control scheme.

Upgrading registration from personal care to treatment of disease disorder injury can be completed in a matter of weeks if the basic competences of the company required to deliver the care are already in place. Increasing awareness of these issues in the industry is now causing case management companies to review their registrations.

Beyond the appropriate registration, the quality issue lies in the nature of the professional practice. The case manager is not the prescriber and should co-ordinate the care needs to ensure the safety of their client. This must be achieved through a multi-disciplinary approach where care planning, clinical risk management, training and competences are developed, managed and maintained with clinical prescribers. Only the development and implementation of professional standards by the case management industry can ensure that the promise to the catastrophically injured of private funding to deliver a service beyond the capacity of the state will actually achieve that objective.

The fundamental standards

Registration with CQC means that the service provider must comply with the fundamental standards set out in the 2014 Regulations and elaborated upon in CQC guidance. These cover the following headings relating to the quality of care. Person centred care; dignity and respect; consent; safe care and treatment; safeguarding service users from abuse and improper treatment; meeting nutritional and hydration needs; premises and equipment; receiving and acting on complaints; good governance; staffing; fit and proper persons employed; and the duty of candour.

Registered service providers are subject to CQC inspection. A failure to meet the fundamental standards will result in adverse comment from a CQC inspector with a requirement to improve. A serious or persistent failure to meet standards can result in the suspension or removal from the register which prevents the provider from continuing to operate. The Regulations also specify offences for breach of many of the fundamental standards, giving rise to an option of prosecution.

In order to gain registration, a service provider must show, amongst other matters, that they are fit and proper persons to be registered and that they are able to meet the fundamental standards.

All of these requirements are therefore intended to provide significant protection for the service user and this is particularly important where the service user is vulnerable because they lack capacity with regard to decisions concerning their own health and welfare.

CQC and case management

A practical issue for those seeking to navigate the regulatory system is that CQC inspectors and advisors often fail to understand how care provision is supported by the case manager. They often do not understand that a case manager can be a provider under the Regulations whilst not employing the staff. The implication of the advice often given, is that it would be the employer of the staff in a case managed package who would be the provider. But in case managed direct employment arrangements, this means that it is the service user employer who is required to register for the regulation of the care that they provide to themselves, notwithstanding that they hire a professional case manager precisely to take responsibility for the service delivery.

As the majority of case management companies do not themselves employ the staff, such misleading advice can result in case management companies changing how they are regulated and in the past some

case management companies have either not registered or have deregistered based on CQC advice.[12] This is a common source of confusion in the industry.

CQC staff often fail to appreciate that in advising a case manager that they do not need to register because they are not the staff employer, the net effect is that the regulatory regime governing quality and inspection and thereby protecting the service user is undermined.

There is a need in the industry to educate CQC as a regulatory body in terms of case management practices and associated risks. It is essential that the case manager works within regulatory guidelines to ensure standards are maintained and understands the consequences if they are not. Satisfactory inspection reports are an important tool of accountability. A representative should not generally work with a provider which is not registered with CQC, unless, at the least, their application for registration is in process. A representative should pay careful attention to CQC inspection reports and be wary of working with a case manager where an inspection report is unsatisfactory.

From the moment the case manager is required to implement care, the claimant is at risk of poorly planned provision if agreements are not established prior to any care implementation. For example, a case manager may be asked to conduct the supervision of care staff without any involvement in the day-to-day management. As the CQC Regulations for personal care list specific responsibilities, the case manager should not agree to complete certain tasks without having oversight of how care is delivered both clinically and in terms of staff management and performance. In addition, a collaborative approach ensures expectations are managed and costs are agreed and can be monitored moving forward.

Best interests

Litigators may not draw a distinction between their role in making a claim for compensation in civil proceedings and the implementation of a care regime for P during the course of the litigation. However, there is such a distinction in law.

The decision to settle a civil claim for a protected party is reserved to the court.

The design and implementation of a care package for a person lacking capacity is not determined by the court but instead is governed by the Mental Capacity Act 2005 ("MCA") and the care regulations discussed above. As a result, it must be determined that the care package to be implemented is both in P's best interests and regulation compliant.

The MCA provides a statutory process for the making of best interest decisions. A care package cannot be deemed to be in P's best interests unless the decision maker has complied with the requirements of the MCA s.4.[13] Without prejudice to the generality of s.4, subs.6, which deals with the consideration of P's past and present wishes and feelings, beliefs and values, and subs.7, which addresses the requirement to consult:

- anyone named by P;
- carers or others interested in P's welfare; and
- a donee of a power of attorney or a deputy.

This is particularly relevant in order to be able to reach a valid decision to implement a particular care package. This links in with the professional standards requirement for a property and affairs deputy to be satisfied that the private commissioning of care is in the best interests of P. It cannot be in the best interests of P to commission a package that is contrary to the regulatory scheme. In consequence, part of the best interest decision making process must involve checking compliance with that scheme.

[12] These packages cannot be exempt from regulation because the case manager has ongoing direction and control of the package.
[13] Mental Capacity Act 2005 s.4(9).

Application to different employment arrangements

With some exceptions, it is not part of the business model of case management companies to act as the employer of "directly employed" staff. Were they to do so, their function would be indistinguishable from a regular care agency and the package could not properly be described as direct employment at all.

We have seen above that where P lacks capacity to employ staff, the role of employer can be taken on by a related third party.

The Regulations do *not* provide that the following are necessarily qualified as related third parties:

- A spouse.
- The parent of an adult child.
- Any other relative or friend of an adult or child.

As a result, if such a person employs carers in their own right, them not being a related third party, they, as employer or carer, will, in law, be required to register as the provider of the service.

Such relatives can gain related third-party status by obtaining a formal representative power or acting as trustees of an Independent User Trust. This will cause the arrangement to be potentially exempt with the potential result that carers will not be required to register. If a case manager is then used, and the arrangement would be exempt from registration but for their involvement,[14] it will be clear that the case manager is the service provider.

Trust corporations

A trust corporation acting as attorney or deputy cannot be a related third party because the related third-party exemption only applies to real individuals. Therefore, where a trust corporation deputy employs staff and there is no case manager to take on the role of registered provider, the carer is required by the Regulations to be registered with CQC and commits an offence if they do not.

Self-employed carers

There are no exemptions of any kind for self-employed carers. Employment status is a matter of law rather than description. Many nominally self-employed carers may, upon investigation, turn out to have employee or worker status. However, under the Regulations, any properly self-employed carer who is not supervised in the package by a registered provider taking responsibility for the package should register with CQC.

Risks

In practice, the Care Quality Commission is unlikely to be interested in any proactive enforcement in small scale private arrangements.[15] However, providers in such arrangements run the risk that if something goes seriously wrong in the package giving rise to an investigation, there may be pressure to take action. Insurance risks are discussed below.

Employers should bear in mind that part of their basic responsibilities is to provide employees with information about fundamental regulatory duties that may affect them. It would be poor practice to employ carers in circumstances that give rise to legal liabilities without making them aware of these.

[14] The arrangement might not be exempt even without a case manager if an employment agency or employment business supplies the staff.

[15] Some CQC officers will say that the Health and Social Care Act 2008 provisions do not apply to providers who are individuals at all. This is incorrect as a statement of law but CQC may operate an informal policy to that effect. Upon enquiry from one of the authors, CQC declined to elaborate.

Best interests and professional case management

Given the structure and intent of the regulatory system for the provision of care, in a complex case or where P is vulnerable due to a lack of capacity, generally speaking it will require particular justification for a care package to be designed and implemented that is unregulated since the whole purpose of regulation is to provide the protection to P that Parliament has determined is appropriate for professional care.

This means that where a direct employment package is designed, it should be subject to professional case management of an appropriate nature sufficient to ensure that the fundamental standards required to be met by the regulations are maintained within that package.

It follows that in a complex case or protected party cases, in principle, it should be straightforward to convince a court that professionally managed care is a reasonable requirement, the costs of which are recoverable in full for the lifetime of the claimant.

If compensation is recovered on this basis, it may become a best interest issue where the care package that is implemented differs from the care package arrangements which formed the basis upon which the damages claim was based.

For example, deputies may find (and case managers frequently report) that following settlement, a proposal is advanced to cut back or even dispense altogether with professional case management allowing family members full control of the package. This is often justified as a cost-cutting measure but may also be motivated by an understandable wish to minimise outside interference. Notwithstanding these benign motives, the effect could be that the package then fails to meet the fundamental standards and certainly makes it difficult for a professional representative who is not themselves a care provider, to monitor whether care standards continue to be met.

A case manager who has any significant involvement in a package is unlikely to escape identification as the service provider. There is no halfway house in their responsibility to meet the fundamental standards. As a result, where cuts to their involvement compromise their ability to ensure that standards are met, it would be understandable for the case manager to withdraw. This result is not uncommon.

When professional case management is withdrawn, often due to the desire to reduce costs post settlement, any regulatory functions are lost and the risk to the client can increase exponentially. A case manager has the ability and responsibility to identify these risks and provide solutions to minimise cost, whilst providing enough support to keep their client safe.

These measures can include close monitoring and reporting on agreed costs, exploring and supporting increased statutory care funding, creating a care infrastructure where there is front line management support (e.g. a team leader, to manage day-to-day care provision, thus reducing direct case management costs) and monitoring and managing direct care costs to prevent over spend due to misclaimed hours or errors. This can only be achieved in collaboration with the representative, the client and family and associated stakeholders.

A structured Service Level Agreement ("SLA"), implemented at the beginning and setting out key responsibilities, will allow the client and family to maintain some control whilst establishing clear boundaries to allow the case manager to support care safely. Such an SLA also provides clarity for the representative over responsibilities and anticipated costs.

It may be possible to organise the employment arrangements so that the package is exempt from CQC regulation and therefore in strictly legal terms, the package will be regulation compliant. If this is proposed, it must even so be determined that it is in P's best interests to remove the regulatory protection which ensures that the package of care meets the fundamental standards. This is not a decision that should be taken without a clear best interests justification.

Problems of insurance

Even if the removal or substantial withdrawal of professional case management is regulation compliant and can be justified as a best interest decision, it may well give rise to insurance problems.

As litigators well know, an employer undertakes a raft of statutory and common law responsibilities which can found claims for compensation.

Employer insurance against compensation awards for civil liabilities to employees is compulsory. Employers will also want to have public liability insurance and cover against unfair dismissal and other tribunal claims.

EL/PL insurance contracts contain a reasonableness clause as standard. A typical clause states:

> "If you have not taken all reasonable steps to prevent accidents, loss or damage the insurer shall not be liable to make any payment under this policy."[16]

In order to avoid falling foul of this clause, the employer must make a reasonable effort to implement a risk management policy. This may cause problems for professional representatives who operate from offices often very remote from the care location. But even representatives situated locally rarely if ever directly operate effective risk management. Instead, most representatives will seek to delegate risk management to someone else.

In the event of a claim, the risk for employers or their representatives delegating their responsibilities is that the insurer will question whether that delegation was reasonable and effective. This may be a difficult conversation in the context of a claim of negligence where something may have gone badly wrong. Delegation is unlikely to be reasonable unless the representative can show that the person to whom risk management was delegated was competent and understood the extent of their task. This may be impossible where care of any complexity has had professional monitoring stripped out. There is a risk to reliance upon one off risk assessments. Some insurers may also expect the employer to monitor compliance with established risk management practices.

Delegation of risk management to a case manager may be safe but it will be important for the deputy to have a SLA with the case manager setting out the risk management tasks that the case manager is expected to undertake and the representative should be satisfied that the case manager either has or can secure the skills and capacity to be effective.

There are two main professional bodies for case managers, CMSUK and BABICM. Both have professional standards documents. However, case management is not subject to compulsory registration with the Health Professions Council and there is no common professional or clinical qualification. Case managers should not, therefore, undertake or be expected to perform clinical practices themselves unless they have attained competency through another route such as nursing.

It is the responsibility of the case manager to source the appropriate services which can deliver the service to the required standard, including the provision of external training for employed staff. This includes all care planning documents (including risk management), relevant training and competency assessment and complying with employment law. A good case manager would identify and source the relevant skills to support this whilst monitoring and managing costs.

The delegation of the risk management of a care team of any size or needs complexity to an inexperienced family member or carer is likely to be high risk. Whether family members are suitable to undertake the clinical and other risk management requirements of a package requires close assessment to determine best interests.

[16] It is compulsory for an insurer to make a payment to a claimant who is an employee making a civil claim against their employer but the insurer is entitled to recover the sum from the employer if the employer is in breach of this clause. The insurer is not obliged to pay out on other claims where the employer is in breach.

A representative who acts negligently may face a claim from his principal for any losses that the principal faces as a result of a claim. Where the insurer of the direct employment only insures P against a claimant, a negligent agent representative could therefore face a third-party claim from P's insurers. With regard to professional deputies who are solicitors, such a claim may well not be met under solicitors practice insurance. Deputies, in particular, should ensure that they have cover in respect of such a claim. Existing EL/PL insurers in the direct employment insurance market may provide such cover but it usually has to be specifically requested.

In relation to insurance for packages of care with nurses, the nurse should have enhanced insurance through the Nursing and Midwifery Council, in conjunction with applicable insurance for the case manager or case management company.

Tensions in care arrangements

Litigation is a complex and uncertain business in which the extent to which a compensation settlement will turn out to meet the full needs of the claimant can only be judged retrospectively by the passage of time. As a result, claimants and their families viewing matters prospectively are justifiably concerned about costs. Families will also entirely understandably believe that they know the needs of the injured person best. Post settlement it is therefore not uncommon for case management to be seen as a prime target for cost reductions. These are tensions that professional representatives and case managers deal with on a regular basis.

As a result, case managers may try to develop models of care supervision which by means of training and delegation place case management tasks at the correct and least cost location.

In pursuit of their own employers risk management and professional requirements, professional representatives should liaise closely with families, case managers and insurers to ensure that there is a common understanding of the requirements of regulatory, insurance and best interests considerations.

Litigators have a crucial role in setting the scene for this co-operation post settlement. If the claimant and the litigation friend have not understood these requirements during the course of the litigation, but instead have understandably looked forward to largely escaping professionals altogether, they may be very resistive to these requirements. This may be to the detriment of their relationship with those professionals who will be torn between their professional requirements and their relationship with the family, which conflicts may have to be referred to the Court of Protection. This may also be to the detriment of the claimant for whom the regulatory scheme for care and the Mental Capacity Act are designed to provide protection.

Summary of practice points

- Whilst settlement of the claim of a protected party is reserved to a civil court, the implementation of a care package is a best interest decision and must comply with the provisions of the Mental Capacity Act 2005. Commissioning must be done on a best interests basis and should involve the deputy.
- Where a care package is subject to regulatory standards, a package design that proposes to marginalise case management may undermine the achievement of those standards and may well not be in P's best interests.
- It may not be in P's best interests to organise the package so that it is exempt from regulation since Parliament has provided the regulatory scheme for the protection of vulnerable persons in need of care.

- Those undertaking the role of the direct employer of staff must give consideration to their risk management arrangements or risk finding themselves refused an indemnity in the event of a claim.
- It will likely always be necessary for professional representatives, case managers, carers and families to work together during P's lifetime. Professionals should always have it in mind how limited funds can be deployed in the most effective manner. Case managers need to be proactive in finding efficient methods of supervision that will maintain standards but also reduce costs.
- An effective working relationship for the lifetime of P is best established during the course of the litigation to ensure that the care arrangements planned in support of the claimant during the litigation will continue to be effectively implemented.

Deprivation of liberty

A further matter of concern to litigators, case managers and deputies are the steps that must be taken in order to deal with the deprivation of liberty of clients who, usually as a result of acquired brain injury, require packages of care that restrict their liberty such that the European Convention on Human Rights art.5, as incorporated in the Human Rights Act 1998, is engaged. The Mental Capacity Act 2005, which contains the deprivation of liberty safeguards, was amended by Parliament in a bill passed 26 April 2019. This introduces new "liberty protection safeguards" in 2010. The amendments have been controversial. The impact of the new law on the requirements for the delivery of lawful packages of care will be the subject of a later article.

Case and Comment: Liability

Diane Raybould v T&N Gilmartin (Contractors) Ltd

(Sheriff Appeal Court; Sheriff Principal Stephen QC; 18 December 2018; [2018] SAC (Civ) 31)

Liability—Accidents on a public highway—Application of volenti and novus actus—Contributory negligence

LT Breach of duty of care; Causation; Contractors' powers and duties; Contributory negligence; Highway maintenance; Intervening events; Scotland; Volenti non fit injuria

This appeal was brought by the pursuer against a Sheriff's decision to dismiss her claim against public works contractors where, despite the maxim not being pleaded, he had decided that the principle of volenti non fit injuria applied to defeat her claim for personal injury.

The pursuer, aged 59, had medical problems and restricted mobility which required the use of a walking aid. She lived in a house on West Forth Street, Anstruther with the front door opening straight on to the pavement on West Forth Street. On 3 February 2015, she fell when attempting to cross an excavation on the pavement directly outside her home, having left by her back door. The defenders were contractors working on that pavement, excavating sections of the pavement in order to complete the installation of new street lighting on behalf of Fife Council. The digging of the trench also created spoil which was piled adjacent to the excavation. The area was described as a mess.

The pursuer argued that the defenders had breached their common law duty to take reasonable steps to provide her with safe access to and from her front door. In particular, there were said to have been no footway boards provided and therefore no safe access across the excavated trench in front of her door and that the defenders ought to have had regard to the Department for Transport: "Safety at Street Works and Roadworks—A Code of Practice" (2013). It was also said to be relevant that footway bridging boards providing access to residents' properties were put in place following her accident.

The defenders denied owing a duty and had pleaded that she simply stumbled and fell there being no excavation at the place where she lost her footing. At proof, the focus instead was on the pursuer's duty to take care for her own safety albeit she was never cross-examined on facts leading to a potential finding of volenti. However, in his extempore judgment, the Sheriff considered the key issue in the case to be whether the maxim volenti non fit injuria applied. He held that:

> "At the stage when she embarked on crossing, P she knew that there was no board and that one not to be provided. According to her, the conditions were perilous and her opinion was that she couldn't cross. She was walking with a stick and has a number of health problems which affect her mobility. She knew that the barriers were there to discourage or limit access to the area.
>
> In no sense could she be said to be unaware of the risk she was running by attempting to cross the excavated area. Indeed, she was apprehensive at entering the street at all."

He concluded that volenti applied and dismissed her case finding in particular that she was unable to show that the defenders' actions had caused her fall. If he was wrong on that he stated, he would have found her to be 80% contributory negligent.

Issues on Appeal

- Did volenti non fit injuria apply? Did it need to be pleaded? Did it apply where there was no finding of a duty of care that was breached?
- Had the Sheriff accepted that there had been a breach by the defenders of any duty of care owed to the pursuer? On the assumption he did, was the Sheriff entitled to find the defenders' wrongdoing not to be the proximate cause of the pursuer's accident with the result that she had not established causation?
- Whether the Sheriff's fall back apportionment of responsibility for the damage (20/80%) suffered by the pursuer was outside the range of reasonable determinations?

Volenti

The maxim did not apply in the case. It is a defence to a breach of duty by a defender.[1] Necessarily, that means that the duty must exist and breach must have taken place for the defence to be available. There was no evidence that the pursuer knew of the risk and that she accepted the risk or voluntarily assumed the risk either implicitly or explicitly.

The pursuer did not get a fair hearing as a result of the Sheriff's approach to volenti and also due to the defenders' failure to plead or pursue the factual circumstances pointed to volenti or voluntary assumption of risk. The parties had no notice that the Sheriff considered volenti might apply until the Sheriff delivered his extempore decision. It was not appropriate to decide the issue on the basis of a legal maxim not supported by the evidence; not argued for; and for which no notice had been given.

Breach of duty and causation

The Sheriff must have found that a duty was owed and had been breached because only then could he apply the defence of volenti. Further, the evidence supported that a duty was owed and it was breached. The Code of Practice set the standard to be expected of those undertaking such works and it requires safe routes to be provided for pedestrians which includes access to adjacent buildings. It also requires consideration to be given to those with restricted mobility and the provision of footway boards to give people safe access to their properties.

In relation to causation, the Sheriff's views were based on his views on volenti. The issue considered here included whether the actions of the pursuer were so foolhardy as to constitute a Novus actus based on the following chain of events as found:

> "The pursuer wished to get into her home by her own front door having been locked out of the back door. Her husband preceded her into the front door together with the dog. The pursuer is a lady with compromised mobility which would suggest that the most direct route would be best and she had to assess the risk presented by the hazards. The pursuer did not carry on regardless instead she asked a workman standing nearby for assistance in the form of a ramp or foot board. He walked away and did not assist."

The question of whether the chain of causation had been broken required a broad evaluation of the facts and fairness. The court considered the case of *Clay v TUI UK Ltd*[2] and in particular, the judgment of Hamblen J at [27]–[28]:

> "27. Determining whether there has been a Novus actus interveniens requires a judgment to be made as to whether, on the particular facts, the sole effective cause of the loss, damage or

[1] *Winnik v Dick* [1984] S.C. 48; 1984 S.L.T. 185.
[2] *Clay v TUI UK Ltd* [2018] EWCA Civ 1177; [2018] 4 All E.R. 672.

injury suffered is the Novus actus interveniens rather than the prior wrongdoing, and that the wrongdoing, whilst it might still be a 'but for' cause and therefore a cause in fact, has been eclipsed so that it is not an effective or contributory cause in law.

28. As Aikens LJ observed in *Spencer v Wincanton* at [45], where the line is to be drawn is not capable of precise definition. Various considerations may, however, commonly be relevant. In a case involving intervening conduct, these may include:

(1) The extent to which the conduct was reasonably foreseeable—in general, the more foreseeable it is, the less likely it is to be a Novus actus interveniens;

(2) The degree of unreasonableness of the conduct—in general, the more unreasonable the conduct, the more likely it is to be a Novus actus interveniens and a number of cases have stressed the need for a high degree of unreasonableness;

(3) The extent to which it was voluntary and independent conduct—in general, the more deliberate the act, the more informed it is and the greater the free choice involved, the more likely it is to be a novus actus interveniens."

When applying this criteria to this case the following facts were found to be material: (a) it was a common place and foreseeable that a householder would want to access their property; (b) the pursuer asked for assistance, she used her stick to give her another point of contact, she could have asked her husband to arrange access via the back door; (c) a neighbour had managed to navigate the excavation, albeit with difficulty; and (d) the decisions taken were taken against the backdrop of the pursuers restricted mobility.

In the premises, the question was whether the pursuer's actions or response to the hazard could be categorised as being so unreasonable that the defenders' failure to take reasonable steps to provide a safe access by way of a foot board ceased to be the cause of her accident?

That was simply not the case here. The facts and circumstances point to the defenders' failure to take reasonable steps to provide a proper means of access by way of a walk board or ramp to be the real and proximate cause of the pursuer's accident.

Contributory negligence

The Sheriff's hypothetical consideration of negligence and apportionment of responsibility fell out with the range of reasonable determinations.[3] The basis for contributory negligence is the Law Reform (Contributory Negligence) Act 1945 s.1(1)[4] and requires the exercise of judgment based on the facts and circumstances of each case.

The focus is on responsibility for the accident. The Sheriff had focussed on that through the lens of his erroneous findings on volenti. He concluded the pursuer was blameworthy but did not consider the respective blameworthiness of each party. In *Jackson*, the Supreme Court approved the approach of Lord Reid in *Stapley v Gypsum Mines Ltd*:[5]

> "A court must deal broadly with the problem of apportionment and in considering what is just and equitable must have regard to the blameworthiness of each party, but 'the claimant's share in the responsibility for the damage' cannot, I think, be assessed without considering the relative importance of his acts in causing the damage apart from his blameworthiness."

[3] *Jackson v Murray* [2015] UKSC 5; [2015] 2 All E.R. 805 applied.

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

[5] *Stapley v Gypsum Mines Ltd* [1953] A.C. 663; [1953] 3 W.L.R. 279.

This paragraph highlights the requirement of a court to consider both relative blameworthiness and causative potency of the actions of each party. The digging up of the road and leaving no clear method of access bore some causative potency, equally the decision of the pursuer to continue knowing of the risks did as well. Considering all the facts, as found by the Sheriff, the Sheriff Appeal Court held that a 50% deduction for contributory negligence was appropriate.

Appeal allowed.

Comment

In many ways, this is an astonishing case. Here, the trial judge gave an extempore judgment dismissing a claim on grounds that had neither been pleaded nor argued by the defenders. No doubt volenti non fit injuria had not been pleaded for its strict criteria mean it very rarely succeeds. Further, it is extremely unlikely to have any application in a case of negligence against a highways contractor.

Volenti non fit injuria is a voluntary agreement by the claimant to absolve a defendant from the legal consequences of an unreasonable risk of harm created by the defendant, where the claimant has full knowledge of both the nature and extent of the risk. Even when a duty exists and is breached, Volenti provides a complete defence. However, it can only apply if three factual requirements are fulfilled:

- there is an agreement by the claimant to absolve the defendant from legal responsibility for his conduct;
- this agreement is voluntary, not due to compulsion by the defendant or external circumstances; and
- the claimant should have full knowledge of the nature and extent of the risk it is alleged that (s)he had assumed.

An example of volenti in practice was memorably given to me as a law student. By playing a game of rugby, a player agrees to absolve another player from serious injury being reasonably inflicted on him within the laws of the game but he doesn't absolve another player from biting his ear off. His consent does not stretch that far. Thus, the strict requirements are understandably rarely successful, particularly where, as in this case, there was no evidence of the pursuer either explicitly or implicitly consenting to the risk of injury or having full knowledge of the risk she was facing in attempting to cross the excavation.

In reality, the Sheriff went off on "a frolic of his own" when giving his judgment. It was correctly overturned but, by founding his entire judgment on volenti, before the appeal court the parties were left to piece together the factual findings to establish whether there remained sufficient evidence to prove duty; breach and causation. Given the evidence at trial, and that volenti only becomes relevant if duty and breach have been established, much had to be made by the defenders of the remaining issue of causation, arguing for a potential *novus actus interveniens*.

When considering whether the pursuer's conduct amounted to a *novus actus* the Appeal Court rightly highlighted the requirement for a broad assessment of the facts and circumstances. They were guided by *Clay v Tui*, which itself repeated the established dicta of Aikens LJ in *Spencer v Wincanton*.[6] Although this Appeal Court's judgment cannot be seen as the seminal application of the three criteria which highlight factors going to intervening conduct, it did, in my view, correctly find that a pedestrian falling into an excavation whilst trying to enter her own front door was not conduct that broke the chain of causation.

This left the extent of any contributory negligence. The Sheriff's largely unreasoned finding of 80% contributory negligence was found to have been decided in a vacuum given his focus on and initial finding of volenti. This enabled the Appeal Court to find that he had erred in his assessment of contributory negligence, recognising it is unusual for an appeal court to overturn a trial judge on apportionment.

[6] *Spencer v Wincanton* [2009] EWCA Civ 1404; [2010] P.I.Q.R. P8.

The Appeal Court then made its own assessment of responsibility using the well-established and reaffirmed touchstones of causative potency and blameworthiness. It found that the principal causative potency was the defenders' action of creating the excavation and leaving that hazard without safe access but that the purser was also blameworthy in pressing on over dangerous ground, hence the equal proportion of responsibility.

Although some, including me, will regard the finding of equal responsibility as being at the harsh end of the range of apportionment for a pedestrian in the circumstances of this case, for the pursuer at least, the appeal was allowed. The Appeal Court rightly found that the application of old Latin maxims in a case of this nature had not application and justice, as it has been since 1945, is best achieved by considering the causative potency and blameworthiness of each parties' actions rather than denying a claim in its entirety.

Practice Points

- This is a reminder to practitioners that anything can happen at trial, even if allegations have not been pleaded, and the need to advise and account for litigation risk.
- *Volenti non fit injuria* and *novus actus interveniens* should rarely be of application in personal injury litigation.
- After judgment, particularly if given extempore, parties should be careful to ensure that a judge has given reasoned consideration to all the aspects of the case.

Jeremy Ford

Hayley Jane Liddle (personal representative of Sean Lesley Phillips deceased) v Bristol CC

(High Court of Justice Queen's Bench Division; HH Judge Gargan, 19 October 2018; [2018] EWHC 3673 (QB))

Causation—cycling—damages—duty of care—duty to warn—fatal accident claims—local authorities' powers and duties—occupiers' liability—risk—trespassers

LT Cycling; Docks; Duty of care; Fatal accidents; Local authorities' powers and duties; Occupiers' liability; Trespassers

The claimant died on 6 March 2013 when he and his cycle fell into the harbour adjacent to Prince's Wharf in Bristol. The claim was brought by his partner on behalf of his estates and dependents including two children.

Prior to the accident, Sean had been a keen cyclist with a focus mainly on mountain bike rides with friends. His experience of road cycling was limited. At the beginning of 2013, he entered a charity bike ride known as the Amsterdam Challenge. The basis of this was a bike ride to Amsterdam. In order to prepare, he borrowed a suitable bicycle from a friend with the intent of getting himself fit. This was described in the judgment as a fairly new bike in good condition, which had been adjusted by Sean to make it comfortable for him to ride.

As part of his fitness regime, he decided to cycle to work in Bristol city centre from Blackwell. A more experienced friend, Leslie Burton, suggested two possible routes, both of which took Sean over Brunel

Way on to the Floating Harbour and towards Prince's Wharf which runs on the north side of the Floating Harbour. The routes diverged at the floating harbour and which route taken had an impact on his ability to see the signs warning of potential dangers ahead.

The accident occurred on the first occasion that Sean cycled to work, as he was cycling past the M Shed museum. The museum occupies a dock side transit shed and is set back from the side of the wharf. The area was described in the Conservation Area Appraisal as a working heritage wharf with train tracks that ran along the wharf and cranes that were also in use.

Having heard evidence from a number of witnesses, the judge concluded that Sean had sustained a head injury in the accident when he struck a boat moored at the wharf, The Balmoral, as he fell into the water. This, in turn, reduced his ability to save himself and/or co-operate in his rescue. He did not regain consciousness and could not assist in describing the moments before the accident.

CCTV footage showed that Sean had chosen to cycle underneath the cranes, but did not show the accident itself. A witness, who gave evidence at the inquest but not at trial said:

> "I was going past the M Shed area and underneath the three cranes. I walked that way and as I had just gone past, like, the third crane as I can remember, I heard a rattle and a clang to my left. I looked to my left and as I looked to my left I could see the deceased. He lost his balance. It appeared he was on his bike and then toppled over into the dockside."

And:

> "I turned around to the left looking over my—sort of looking parallel to my shoulder and hearing this clatter and a bang, it appeared to me as if the bike had its rear wheel, one of its wheels had jammed within the left hand rails which is what the crane runs in … It went over sideways. He went with the bike."

On questioning, at the inquest, he conceded that the wheel may have been very close to the rail as opposed to actually in it.

The four possibilities raised by the claimant's expert as possible causes of Sean losing his balance were:

- That the tyres slipped on the wet or damp rail tracks.
- One of the wheels dropped into the track recess.
- One of the wheels dropped into the track recess and hit an obstruction.
- Some other reason, unknown and independent of the tracks.

The defendant argued that he may have simply lost control due to inexperience with the bike or reacting to perceived movements of others, he may have slipped on something other than the rails and that in previous accidents there had been dirt displaced from the rails when wheels had entered and no such displacement had occurred here.

On balance, the judge accepted that control was lost when the rear tyre came in to contact with the rails and behaved in a different and unusual manner.

Decision

The Occupiers Liability Act 1957 s.1 applies the duty to dangers due to the state of the premises or to things done or omitted to be done on them. The defendant argued that following *Tomlinson v Congleton*[1] this incident fell outside the scope of that duty of care. Rejecting that argument the judge held that the wharf was a man-made construction and not a lake as in *Tomlinson*. Lord Hobhouse, in that case, had said:

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

> "The state of the premises is the physical features of the premises as they exist at the relevant time. It can include foot paths covered in ice and open mine shafts. It will not normally include parts of the landscape, say, steep slopes or difficult terrain in mountainous areas or cliffs close to cliff paths. There will certainly be dangers requiring care and experience from the visitor but it normally would be a misuse of language to describe such features as 'the state of the premises'."

Insofar as the claim related to the absence of railings then it arose out of the state of a man-made wharf. This was a comparable finding to that in *Staples v West Dorset DC*[2] where the accident on the harbour wall at Lyme Regis, to which the public had access, was not an accident due to the state of the premises. Here there was an additional element: the claimant argued that the danger arose due to the absence of railings and the presence of the rail lines close to the wharf edge. It was not possible to say that this wharf was no more dangerous to cyclists than any other wharf in the rest of the country.

The Occupiers Liability Act was held to apply.

The defendant then argued that Sean was a trespasser, at least from the moment that he went beyond the gate and bollards at the entrance to the wharf in front of the museum. The counter argument for the claimant was that there was either express or implied consent to his use of the wharf to cycle as it had not been clearly withdrawn by the signage in place.

In *Tomlinson*, it had been accepted that the claimant was a trespasser, but the court had commented on the difficulty of the issue, including noting the reference to the words of Scrutton LJ in *The Carlgarth*:[3]

> "When you invite a person in to your house to use the staircase, you do not invite him to slide down the bannisters."

As a consequence, the line may not always be as clear as appears in *Tomlinson*. In this case, cyclists would clearly be visitors up to the line of the gate and bollards. In turn, that meant that if there was a duty owed to cyclists beyond that point it would be on the basis that they should have been warned of the dangers of cycling on the tracks near to the edge of the wharf. Any duty to prevent a cyclist from entering that area would be part of the duty owed to lawful visitors to ensure they were discouraged from putting themselves at risk.

Whether there was a duty to erect railings depends on whether the defendant had sufficiently communicated that there was no permission to continue cycling along the wharf beyond the gates and bollards. This was doubted though to have any practical difference as some duty was owed in any event.

The judge, therefore, proceeded on the basis that Sean was a lawful visitor with the caveat that this would be revisited if it became clear that the question had a material effect on the outcome.

The judge then considered the signage along the route leading up to that point saying:

> "… the package of signs was such that it should have brought to the attention of any cyclist that there were tracks along the wharf which were dangerous for cyclists, that the route was unsafe and that cyclists should use the alternative route."

The claimant's argument that larger and more obvious signs would have led the claimant to a different choice was rejected on the basis that the signs provided were sufficient to warn of the danger on the wharf and that there was a safer route around the rear of the museum. The signs, though, were not sufficient to render Sean a trespasser: there were signs making it clear that cars and bikes were not permitted but no similar signs for cycles. Therefore, the position remained to be considered under the 1957 Act.

A risk assessment document, in 2003, identified the risk to cyclists on the wharf due to the rail lines and an approved cycle route away from the water was sought. The recommendation from the risk assessment

[2] *Staples v West Dorset DC* [1995] 93 L.G.R. 536; [1995] P.I.Q.R. P439.
[3] *The Carlgarth* [1927] P.93.

was that a barrier should be erected, which were erected over time. Further evidence from emails confirmed the need to make some provision for railings or barriers along the water edge.

The defendant argued that this was unnecessary as the risk was an obvious one. In *Staples v West Dorset DC*, the danger of falling off the edge of the quayside was said to be "so obvious to any adult that it was not reasonably to be expected of the defendants that they would offer any protection".

In *Tomlinson*, Lord Hoffmann said at [46]:

> "A duty to protect against obvious risks or self-inflicted harm exists only in cases in which there is no genuine and informed choice, as in the case of employees whose work requires them to take the risk, or some lack of capacity, such as the inability of children to recognise danger (*British Railways Board v Herrington*) … or the despair of prisoners which may lead them to inflict injury on themselves (*Reeves v Commissioner of Police*) …"

On the basis that Sean was a first-time visitor to the area (in the absence of any evidence that he was not), he would not have been aware that any barriers on the water edge ended until he approached the gate. A cyclist faced with that information would have been aware that there was a risk of falling into the water if they went close to the edge. He was not compelled to take that route and had a genuine choice.

There was an obvious danger here. The defendant had taken reasonable steps to see that lawful visitors were reasonably safe and were not required to erect fencing. In addition, there is a public utility in maintaining the dockside heritage, that does not weigh the requirements of modern health and safety requirements as people are more important. It is a factor that is to be taken in to account and if the risk of injury had been more pronounced it would have outweighed it. The defendant was not in breach of any duty that existed.

Finally, arguments that a chicane, better warnings and a prohibition on cycling on the wharf would have prevented the accident absent any barriers relied upon the claimant establishing it would have changed his decision to cycle on the wharf. There was no such evidence.

Judgment for the defendant.

Comment

This sad case highlights some of the complexities surrounding the application of the Occupiers' Liability Act 1957 and/or the Occupiers' Liability Act 1984.

Activities on the premises v the state of the premises

It can often be difficult to determine whether a case falls within the scope of either the 1957 or 1984 Act. Both Acts state that they apply to dangers arising from "the state of the premises *or to things done or omitted to be done on them*" (emphasis added). This has led to a debate about whether the Act applies to dangers arising from activities taking place on premises or whether it is limited to dangers arising from the physical features of the premises. This is compounded in the context of the 1957 Act, which states that the occupiers' duty is to "take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe *in using the premises* for the purposes for which he is invited or permitted to be there" (emphasis added). Whilst some of the case law is inconsistent on this point, the general consensus is that the Acts only apply in relation to dangers arising from the physical features of premises. Nevertheless, deciding whether the claimant has been injured as a result of the premises or by an activity on those premises can be challenging. The difficulty of drawing bright lines of distinction arises where the premises create opportunities for (dangerous) activities to be undertaken.

For example, in *Keown v Coventry National Health NHS Trust*, a child had been climbing up the underside of a fire escape but was injured when he fell.[4] His legal team argued that his injury arose from the state of the premises because the fire escape was amenable to being climbed from the outside and also constituted an inducement to children who played in the grounds of the hospital. Whilst this argument found favour with the trial judge, the Court of Appeal disagreed, finding that the danger actually arose from what the claimant chose to do on the premises. In doing so, they drew on Lord Phillips' judgment in *Donoghue v Folkestone Properties Ltd*, where he said:

> "There are some features of land that are not inherently dangerous but which may tempt a person on the land to indulge in an activity which carries a risk of injury. Such activities include cliff-climbing, mountaineering, skiing, and hang-gliding by way of example. It does not seem to me that a person carrying on such an activity can ascribe to the 'state of the premises' an injury sustained as a result of a mishap in the course of carrying on the activity-provided of course that the mishap is not caused by an unusual or latent feature of the landscape."[5]

Likewise, in *Tomlinson v Congleton BC*, the House of Lords held that the claimant had been injured as a result of his misjudgment in attempting to dive into shallow water rather than the state of the premises.[6] The council, in this case, had been aware that local residents went swimming in the lake and had taken steps to prevent this because it recognised that parts of the lake were shallow and murky. Nevertheless, Lord Hoffmann stated:

> "Mr Tomlinson was a person of full capacity who voluntarily and without any pressure or inducement engaged in an activity which had inherent risk. The risk was that he might not execute his dive properly and so sustain injury. Likewise, a person who goes mountaineering incurs the risk that he might stumble or misjudge where to put his weight. In neither case can the risk be attributed to the state of the premises, otherwise any premises can be said to be dangerous to someone who chooses to use them for some dangerous activity."[7]

Given the "chicken and egg" or circular-like connection between premises and activity in such cases, it is, of course, possible to construct the danger in *Liddle* as having arisen from an activity. The claimant chose to engage in the activity of cycling which carries an inherent risk of injury and chose to cycle over rail tracks close to the edge of the wharf, which increased that risk of injury. Nevertheless, the judge was correct to find that the danger arose from the state of the premises. Referring back to Lord Phillips' judgment in *Donoghue*, the premises here did not simply create the opportunity for or tempt, the claimant to indulge in the activity of cycling and the claimant's injury was not sustained as a result of a mishap in the course of carrying out that activity. The judge found that the claimant did not simply lose control of his bike. Instead, he found that the bike behaved differently as the wheels were going over the surface of the rail track and that this caused Sean to lose control and to topple over. As a result, the danger, in this case, arose from the existence of a physical and unusual feature of the premises: the existence of the rail tracks combined with the lack of railings in the relevant part of the wharf.

Distinguishing between visitors and trespassers

Just because someone enters premises as a visitor, does not mean that they retain this status regardless. A visitor can become a trespasser if they go to a part of the premises they do not have expressed or implied permission to be or if they use the premises in a way which is not permitted. As Scrutton LJ famously

[4] *Keown v Coventry National Health NHS Trust* [2006] EWCA Civ 39; [2006] 1 W.L.R. 953.
[5] *Donoghue v Folkestone Properties Ltd* [2003] EWCA Civ 231; [2003] Q.B. 1008 at [35].
[6] *Tomlinson v Congleton BC* [2003] UKHL 47; [2004] 1 A.C. 46.
[7] *Tomlinson v Congleton BC* [2003] UKHL 47; [2004] 1 A.C. 46 at [27].

stated in *The Carlgarth*: "When you invite a person into your house to use the staircase, you do not invite him to slide down the bannisters."[8] However, it can be difficult to decide whether a visitor has made the transition from visitor to trespasser, especially when the issue is tied up with arguments on the nature of the duty owed. For example, in *Tomlinson*, the claimant's lawyers had conceded that he had become a trespasser on entering the water because swimming in the lake was clearly forbidden. However, Lord Hoffmann noted that:

> "On one analysis, this is a rather odd hypothesis. Mr Tomlinson's complaint is that he should have been prevented or discouraged from going into the water, that is to say, from turning himself into a trespasser. Logically, it can be said that duty must have been owed to him (if at all) while he was still a lawful visitor. Once he had become a trespasser, it could not have meaningful effect."[9]

However, as he later noted:

> "The duty under the 1984 Act was intended to be a lesser duty, as to both incidence and scope, than the duty to a lawful visitor under the 1957 Act. That was because Parliament recognised that it would often be unduly burdensome to require landowners to take steps to protect the safety of people who came upon their land without invitation or permission. They should not ordinarily be able to force duties upon unwilling hosts. In the application of that principle, I can see no difference between a person who comes upon land without permission and one who, having come with permission, does something which he has not been given permission to do. In both cases, the entrant would be imposing upon the landowner a duty of care which he has not expressly or impliedly accepted. The 1984 Act provides that even in such cases a duty may exist, based simply upon occupation of land and knowledge or foresight that unauthorised persons may come upon the land or authorised persons may use it for unauthorised purposes. But that duty is rarer and different in quality from the duty which arises from express or implied invitation or permission to come upon the land and use it."[10]

As such, it is a mistake to tie up discussions of duty with status. As Gargan J correctly stated in *Liddle*, the question in that particular case was whether the claimant had express or implied permission to be cycling in the part of the wharf where the accident happened. This depended on whether Bristol CC had sufficiently communicated to him that permission to continue cycling along the quayside had been withdrawn.

At first, Gargan J decides not to make a decision on the issue because he said: "it is not clear that it makes any real practical difference given that some duty was owed in any event." This is a mistake, of course, because whilst those with visitor status are automatically owed a duty under the 1957 Act (except in so far as s/he is free to and does extend, restrict, modify or exclude his duty by agreement or otherwise), this is not the case with trespassers. In order for a duty to be owed under the 1984 Act, the conditions set in s.1(3) need to be satisfied. Gargan J also noted that he would consider the claimant as a visitor "on the basis that the duty to a trespasser could be no higher". This meant if the claimant succeeded, it would be "necessary to analyse the situation more carefully to see whether a change in his status would affect the outcome". As he found that Bristol CC was not liable under the 1957 Act, this separate inquiry was not required. However, as a matter of legal technicality, it would be preferable for judges to make decisions on the issues before them and then to apply the relevant law.

Nevertheless, having considered the signage in the context of breach, Gargan J did later decide that the claimant was a visitor because he did not expect the reasonable cyclist to have realised that s/he was forbidden from going beyond the gate and bollards. Two important points emerge here. First, when an

[8] *The Carlgarth* [1927] P 93 at 110.
[9] *Tomlinson v Congleton BC* [2003] UKHL 47; [2004] 1 A.C. 46 at [11].
[10] *Tomlinson v Congleton BC* [2003] UKHL 47; [2004] 1 A.C. 46 at [13].

occupier seeks to change the terms of their permission or to revoke it entirely, it must be done in a way that is obvious to the visitor. In this instance, cyclists were plainly warned of the dangers of going forward and that they could and should avoid those dangers by taking the cycle path. However, whilst there were signs clearly prohibiting cars and motorbikes, there was no such sign in relation to cyclists. Secondly, as noted by Gargan J, it is important to consider the circumstances as they would have been appreciated by someone in the claimant's position:

> "The assessment made by a cyclist when cycling along this route is going to be somewhat different than that made in a courtroom after prolonged analysis when one knows that a tragic accident has occurred."

Reasonable safety and warnings

An occupier does not need to make premises completely safe for a visitor but only to "take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe" for the purposes s/he is permitted to be there. This means that the usual negligence factors on breach come into play when setting the standard of care: the likelihood of harm; the gravity of harm; the cost of taking precautions and social utility. As a result, the fact that only one other cyclist had fallen into the harbour and in very different circumstances was relevant to Gargan J's decision that Bristol CC was not liable. In addition, an occupier can make a visitor reasonably safe on their premises despite the existence of dangers by issuing adequate warnings and the *Liddle* case provides a useful reminder of the factors that need to be considered in this respect. First, as found in *Darby v National Trust*, where the claimant drowned in a pond, there is no duty to warn of obvious risks.[11] Otherwise, it is a matter of considering the visibility, location and wording of warning signs. It is usually insufficient to issue a general warning, such as "danger". The specific nature of the danger needs to be outlined, as it was in this case: "Caution, unsafe for cyclists, rail tracks in surfaces, moving trains and vehicles." In addition, highlighting a danger is not usually enough. The visitor needs to be advised on what they need to do to avoid that danger. Here a sign stated "Cyclists use an alternative route", which may not be enough in itself but when combined with markings on the road surface delineating the cycle route going round to the right, meant that Bristol CC was considered to have discharged its duty.

Practice Points

- The Occupiers' Liability Acts of 1957 and 1984 only apply in respect of dangers arising from the "state of the premises". Where a claimant is injured during an activity on premises, the claimant will need to establish that their injury arose from a physical feature of the premises in order to fall within the scope of either Act. The fact that the premises created an opportunity for, or tempted, the claimant to engage in an activity which carried an inherent risk of injury will be insufficient.
- A claimant can enter premises as a lawful visitor but become a trespasser if they go to a part of the premises they do not have expressed or implied permission to be or if they use the premises in a way which is not expressly or impliedly permitted. It will depend on whether the limits to the permission have been clearly communicated.
- It is possible for an occupier to make a visitor reasonably safe by issuing adequate warnings. Whilst there is no duty to warn of obvious risks, warnings of other risks will need to: be

[11] *Darby v National Trust* [2001] EWCA Civ 189; (2001) 3 L.G.L.R. 29.

clearly visible; contain specific information about the nature of the risk and guide visitors on how the risk can be avoided.

Annette Morris

John Carey (as representative of the estate of Lydia Carey) v Vauxhall Motors Ltd

(High Court of Justice Queen's Bench Division; HH Judge Walden-Smith Sitting as a Judge of the High Court; 11 February 2019; [2019] EWHC 238 (QB))

Asbestos—breach of duty of care—causation—de minimis—duty of care—mesothelioma

LIABILITY

Asbestos; Breach of duty of care; Causation; Civil evidence; De minimis; Mesothelioma; Witnesses; Working environment

This claim arose out of a secondary exposure of the original claimant, Lydia Carey, to asbestos from the workplace of the defendant. Her husband had worked in their Dunstable factory and the claimant argued that she inhaled asbestos fibres that were carried home by him during the period that he was working there.

The defendant conceded that she was suffering from biphasic mesothelioma arising from exposure to asbestos fibres of dust and that they owed her a duty of care. It was denied that there was any breach of the duty to take reasonable care to protect her from the risk of exposure to asbestos and that her exposure to asbestos was such that there had been a material risk of her contracting mesothelioma.

Whilst the trial had been expedited, she died a matter of days before that trial. Her husband was appointed to represent her estate pursuant to the provisions of CPR 19.8(1)(b).

The time period in which the asbestos dust was transferred was August 1976 through to June 1979. The defendant denied that the claimant was exposed to asbestos fibres by way of transfer from asbestos her husband had been exposed to whilst working at their factory. It was said that he was not exposed to asbestos on a routine basis and any that he was exposed to would have been transient and minimal. They argued that the exposure had more likely come from either her husband when he worked at another firm in 1979 to 1986 or her father and his exposure to asbestos at the firm he worked at.

The court noted that whilst such an argument could properly be made it would not avoid liability for the defendant:

> "Liability can found against any Defendant who negligently exposed an individual to asbestos to such an extent which made a material contribution to the risk of contracting mesothelioma."

The duty owed to the claimant had been properly conceded as it was well established in law.[1] In *Magereson* it had been made clear by reference to the judgments in *Page v Smith*[2] that the test rested on whether a defendant could reasonably foresee that his conduct would expose a person to a risk of personal injury and that such duty applied beyond the factory wall.

In *Maguire* Judge LJ had observed that:

[1] *Magereson v JW Roberts Ltd* [1996] P.I.Q.R. 358 and *Maguire v Harland & Wolff Plc* [2005] EWCA Civ 01; [2005] P.I.Q.R. P21 and *Gibson v Babcock International Ltd* [2018] CSOH 78; 2018 S.L.T. 886.

[2] *Page v Smith* [1996] A.C. 155; [1995] 2 W.L.R. 644.

> "… a family member is not precluded from establishing liability based on environmental contamination with asbestos dust. In an appropriate case, the environmental principle may apply to members of an employee's family as to anyone else living in the immediate vicinity of premises working with asbestos …"

Lord Phillips in *Sienkiewicz v Grief*[3] held that:

> "The rule in its current form can be stated as follow: when a victim contracts mesothelioma each person who has, in breach of duty, been responsible for exposing the victim to a significant quantity of asbestos dust and thus creating a material increase in risk of the victim contracting the disease will be held to be jointly and severally liable for causing the disease."

It was for the court to determine whether the defendant had exposed the claimant to significant or more than de minimis levels of asbestos. The judge considered the evidence available, including that of the deceased claimant, and found that the husband would have carried home dirt and dust he was exposed to at the factory on his overalls, his work clothes, his skin and hair. That would transfer to her when she shook out his clothes or through laundering them.

The next issue for the court was whether that dirt and dust contained significant asbestos fibres which thereby created a material increase in the risk of the claimant contracting mesothelioma. The judge found that maintenance electricians, such as the husband, were exposed to significant quantities of asbestos dust that were carried home. This caused a material increase in risk:

> "I am satisfied that there was dust in the factory and that during the period 1976 to 1979 that included asbestos fibres that would be picked up onto clothes, hair and skin and transferred home where there would be further transfer of the dust and fibres through the laundering of clothes and normal personal contact."

The duty was held[4] to be:

> "The court has to consider whether Vauxhall fulfilled its duty to take reasonable care by taking all practicable measures to prevent Lydia Carey from inhaling asbestos dust, through contact with their employee John Carey, in light of the known risk that asbestos dust, if inhaled, might cause mesothelioma. That is the case regardless of any potential exposure attributable to either Kent or Satchwell."

Liability had been made out.

Comment

This case is thought to be the first ever litigated overalls case where the claimant has been successful. Overalls cases are known as "secondary exposure cases" and involve the person who contracts mesothelioma being exposed not through the course of their own working life but through exposure from another, usually a family member, such as a parent or spouse/partner.

In this case, Lydia Carey, in her witness evidence, believed she had been exposed to asbestos dust on both her father's overalls as a child and her husband's overalls when he worked at both the defendant's factory and also at another firm.

The duty of care in principle has long been established in this area from the cases of *Magereson* and *Maguire*.

[3] *Sienkiewicz v Grief* [2011] UKSC 10; [2011] 2 A.C. 229.
[4] *John Carey (As Representative of the Estate of Lydia Carey) v Vauxhall Motors Ltd* [2019] EWHC 238 (QB) at [18].

The *Carey* case has further clarified that duty of care in so called "secondary exposure" cases[5] so that post October 1965, all employers have a duty to take reasonable care to prevent both employees and also members of their families from exposure to asbestos dust through inhalation. When considering if that duty of care has been breached consideration needs to be taken as to whether the defendant has taken reasonable care by taking all practicable measures to prevent the inhalation of asbestos dust, in light of the known risk that asbestos dust, if inhaled, might cause mesothelioma.[6]

Exposure levels need to be "significant", which is more than "de minimis" levels of exposure. It is interesting to read in the case how the judge, HH Judge Walden-Smith, went about analysing the relevant evidence to enable him to determine whether the exposure levels at the defendants premises had been significant. First, although Mrs Carey died very shortly before the trial, the judge accepted her evidence in its written form but was clear to state that he had taken into account that there would have been particular areas of that evidence, (such as her description of John Carey being "always dusty and dirty" when working at Vauxhall, that she would shake out his clothes to rid the overalls of the worst of the dust and that she washed his clothes in a tub), that the defendants would have wished to cross-examine her on.[7]

The judge was persuaded by Mrs Carey for her very first statement citing Vauxhalls as somewhere her husband "particularly" came into contact with asbestos as well, of course, other sources. Vauxhall had been suggesting that the concentration upon them was because they were the only viable defendant, an assertion which the judge rejected.

He was persuaded by Mr Carey's evidence that he did not use the voluntary laundry service at Vauxhall's Dunstable factory for washing his overalls because of its cost and the size of the overalls being too big for him. The judge was not persuaded to find (as the defendant had invited him to) that Mr Carey has either misremembering this situation or deliberately lying. The judge also was persuaded by Mr Carey's evidence that he had not been advised that it could be dangerous to take overalls home to be washed and placed weight on the fact that the defendants had not been able to produce any evidence to rebut that assertion.[8]

The evidence also suggested that the overalls themselves would not have prevented dust and fibres from escaping onto the underclothes and skin/hair of those workers wearing them or that workers routinely showered at the end of the day. The judge found that Mr Carey would carry home with him dirt and dust on both his overalls, his underclothes, his skin, and his hair.

When considering the state of the factory itself and the levels of dust and dirt employees were exposed to the lay witness evidence as between claimant and defendant witnesses was starkly polarised, with claimant witnesses describing the factory as "crawling" with asbestos and having to walk through, kneel or lie in dust to carry out their electrical maintenance work and defendant witnesses giving evidence of a cleaner environment and the electricians not coming into contact with significant amounts of asbestos dust.

This evidence was duly analysed by the judge along with contemporaneous maintenance records from the 1980s showing that there was, during that decade, a substantial programme of asbestos removal by the company utilising the asbestos removal contractors Kitsons. The judge duly concluded that in order to remove significant quantities of asbestos in the 1980s from the factory then it followed that in the period of alleged exposure of Mr Carey in the 1970s then there must have been asbestos in the factory in substantial quantities.

The judge was not persuaded by all the claimant's witness evidence, finding that Mr Carey's description of "clouds of dust" was not a realistic description of the working factory environment but that there would

[5] Citing *Gibson v Babcock International Ltd* [2018] CSOH 78.
[6] See *Carey* [2019] EWHC 238 (QB) at [18].
[7] See *Carey* [2019] EWHC 238 (QB) at [25].
[8] See *Carey* [2019] EWHC 238 (QB) at [29].

have been dust around the plant that he was exposed to.[9] This exposure would have included both insulated pipework that he may have disturbed during his electrical maintenance work as well as ceiling tiles which he would have dislodged whilst working in roof voids above the offices and that this could not be described as de minimus exposure. Overall, however, the judge was persuaded by what he heard that Mr Carey was exposed to significant quantities of asbestos dust and that there was by reason of this exposure a material increase in risk.

Significantly, Carey continues and extends the line of reasoning laid down by the Court of Appeal in *Bussey*[10] to secondary exposure cases that post October 1965 exposure that is more than de minimis is likely to be in breach of duty unless the defendant can prove it took all practicable measures to prevent such exposure to asbestos. The Court of Appeal in *Bussey* held that the judge at first instance, in that case, was wrong to have treated *Williams*[11] as having laid down a binding proposition that employers were entitled to regard exposure levels at those below TDN13[12] as safe between 1970 and 1976. *Williams* and subsequent cases following it based upon the TDN13 line of reasoning, therefore, seems to have been further undermined post *Bussey* by the *Carey* judgment which is to be welcomed.

Practice Points

- The judge was able to form his conclusions based upon the lay witness evidence in this case, which continues to show the importance of both claimant and defendant practitioners in this area of tracing as many contemporaneous lay witnesses as possible to give their best recollection of working conditions at the defendant's premises.
- The importance of the contemporaneous maintenance documents showing the removal of asbestos in the 1980s was also highlighted in this case. Claimant practitioners should ensure they request such documentation by way of disclosure at the earliest opportunity.
- The judge decided to give very limited weight to those witnesses who the defendant made a conscious decision not to call to give evidence as opposed to those witnesses they did call. When deciding who to call to give oral evidence at trial part of the tactical considerations practitioners need to consider is that the likely effect of not calling such witnesses will be that their evidence is given very little weight by the court.

Kim Harrison

Elizabeth Rogerson v Bolsover DC

(CA (Civ Div); Nicola Davies LJ, Males LJ, Moor J; 26 February 2019; [2019] EWCA Civ 226)

Landlord and tenant—local government—negligence—defective premises—defects—duty of care—inspection—knowledge—landlords' duties—local authorities' powers and duties

LT Defective premises; Duty of care; Inspection; Landlords' duties; Local authorities' powers and duties; Personal injury

[9] See *Carey* [2019] EWHC 238 (QB) at [59].
[10] *Bussey v 00654701 Ltd (formerly Anglia Heating Ltd)* [2018] EWCA Civ 243; [2018] 3 All E.R. 354.
[11] *Williams v University of Birmingham* [2011] EWCA Civ 1242; [2012] E.L.R. 47.
[12] *Technical Data Note (TDN) 13: Standards for Asbestos Dust Concentration for Use with the Asbestos Regulations 1969*.

The claimant tenant appealed against a county court decision that the defendant landlord had no duty under the Defective Premises Act 1972 s.4 to inspect her property.

In September 2014, the tenant had been mowing her lawn when she stepped on one of two inspection covers in the garden. The cover gave way, resulting in the tenant falling into a void used for water sewage purposes. The cover and the underlying equipment and structure were the property of the water authority.

The tenant brought proceedings for personal injury, loss, and damage against the landlord. Under Sch.2 of the tenancy agreement, the landlord was obliged to maintain the structure and exterior of the property. The tenant relied on a report from a chartered civil engineer, which stated that the cover was between 40 and 60 years old and was corroded. The landlord only called one witness, an operational repairs manager, who produced documents relating to inspections of the property in May 2013 and January 2014.

The district judge stated that it was for the landlord to show that it had complied with its duty of care pursuant to s.4(1)–(3). The district judge concluded that the defect was not known to the landlord, but that the landlord should, in the circumstances, have known of it. She found that a pressure test would have revealed the defect. The district judge found that the inspection covers were a "clear and obvious safety risk", and that there was nothing to demonstrate that the duty to carry out a reasonable inspection of the premises had been carried out in respect of the garden. The tenant was awarded £15,082.88.

The landlord successfully appealed the decision of the district judge though the Circuit judge who heard the appeal did not overturn the district judge's findings regarding the nature or duration of the defect, but concluded that the tenant had failed to establish a breach of s.4(1).

The tenant appealed the decision on first appeal.

The Court of Appeal considered the scope of Sch.2 of the tenancy agreement and the requirements of s.4 of the 1972 Act.

Schedule 2 of the tenancy agreement: the landlord had submitted that the garden, and specifically the inspection covers, did not fall within Sch.2, but also conceded that if a visual inspection revealed an apparent defect which might place the tenant at risk of injury, there would still be a duty to take such care as was reasonably required to ensure they were reasonably safe. Inspections carried out by the landlord had included the garden as an area which required inspection. The fact that the manhole cover and the sewer beneath belonged to the water authority did not obviate the need for an inspection by those acting for the landlord.

Did s.4 require a landlord to implement a system of inspection? A landlord was not necessarily under a duty to implement a system of regular inspection in order to satisfy the s.4 provisions.[1] It was a question of fact in each case. One aspect was the landlord's knowledge as to any likely or known risks or problems in the property. In the instant case, there had been inspections: one triggered by the start of a new tenancy, another by a 10-year stock review. Those were occasions when it was reasonable to implement inspections. However, there was insufficient evidence in the instant case to find that s.4 otherwise required the landlord to institute a system of regular inspection of the property.

Was reasonable care taken in carrying out the inspections? The nature and extent of the inspections carried out was not clear. The district judge was entitled to find that it had not been demonstrated that the duty to carry out a reasonable inspection of the garden had been carried out and that the manhole covers represented a clear and obvious safety risk, particularly to children. Having accepted the tenant's evidence as to how the accident occurred, the evidential burden had shifted to the landlord. There was no sound evidential basis to enable the judge on appeal to conclude that each inspection had been carried out with reasonable care. The landlord had called no first-hand evidence or expert evidence to refute the findings of the tenant's expert regarding the nature and longstanding presence of the defect. No inspection had been carried out even after notification of the accident. On the facts found by the district judge, and

[1] *Sykes v Harry* [2001] EWCA Civ 167; [2001] Q.B. 1014, *Clarke v Taff Ely BC* (1983) 10 H.L.R. 44 and *Lafferty v Newark and Sherwood DC* [2016] EWHC 320 (QB); [2016] H.L.R. 13 considered.

accepted by the appeal judge, there was a physical defect which would have been revealed by a simple pressure test. That was not a complicated test. In those circumstances, it was a defect of which the landlord had known, or should have known, had the inspection been properly carried out. The appeal judge, therefore, erred in finding that there was no duty on the landlord to inspect to ensure that relevant defects did not develop. Such a finding did not reflect the wording of s.4(1), namely that the duty was owed if the landlord "ought in all the circumstances to have known of the relevant defect". It negated the purpose and spirit of s.4.

Accordingly, the appeal was allowed with the order on first appeal being set aside and the original order giving judgment for the tenant restored.

Comment

This appeal concerned a point of principle regarding a landlord's duty to inspect his property for defects. More particularly it concerned the extent of any duty owed under the Defective Premises Act 1972 s.4. This Act was ushered in to address the situation which prevailed at common law beforehand whereby a landlord would only be liable for defects of which he had been given contractual notice. He was otherwise not liable to his tenants or their families/visitors for dangers in the premises.

The Act in part provides:

> "s.4
>
> (1) Where premises are let under a tenancy which puts on the landlord an obligation to the tenant for the maintenance or repair of premises, the landlord owes to all persons who might reasonably be expected to be affected by the defects in the state of the premises a duty to take such care as is reasonable in all the circumstances to see that they are reasonably safe from personal injury or from damage to their property caused by the relevant defect.
>
> (2) The said duty is owed if the landlord knows (whether as a result of being notified by the tenant or otherwise) or if he ought in all the circumstances to have known of the relevant defect.
>
> (3) …"

The central issue for determination by the Court of Appeal revolved around what was required to fix a landlord with knowledge for the purposes of s.4(2). Hitherto there had been a lack of clarity from case law as to the extent of the landlord's duty to inform himself about the state of the premises. The Court of Appeal helpfully reviewed the relevant authorities making it possible for us to derive a few simple propositions from the judgment. First, the test under the Act is not the same as the test for a tenant suing under the contract.[2] The latter would need to prove notice of the defect, either actual notice or notice of the facts which would put the landlord on enquiry as to the defect. Under the Act, the tenant (or person injured) is relieved of this burden and it will suffice if, in all the circumstances, the landlord ought to have known of the relevant defect; a subtly different test and based on well-established principles of negligence.

Secondly, once a claimant has shown that injury was caused by a defect in the property, the evidential burden will shift to the landlord to show that he had taken appropriate steps to comply with s.4 of the Act. It would overstate the situation to say that the mere fact of the accident itself creates an adverse inference for the landlord to rebut.

Thirdly, s.4 of the Act does not require a landlord to implement regular inspection of the property in order to satisfy the duties owed under it.[3] In each case, it will be a question of fact as to what knowledge the landlord had as to the known or likely defects within the property. Where a landlord does not have

[2] Relying on *Sykes v Harry* [2001] EWCA Civ 167.
[3] *Clarke v Taff-Ely BC* (1983) 10 H.L.R. 44 was not authority for s.4(1) requiring regular inspections by landlords.

actual knowledge of the defect, the question will be what steps he ought reasonably to have taken to inspect the premises. This will depend on all the circumstances, and may well involve an obligation to insect on the particular facts of the case.

Fourthly, it will be necessary to determine whether an inspection which the landlord ought reasonably to have carried out would have revealed the defect. If inspections are carried out, they will need to be shown to have been satisfactory. The mere fact of inspection is not enough to overcome the burden under the Act.

The judgment creates no new law, but as noted above, it provides useful clarification to the interpretation of s.4. It reminds us that landlords cannot turn a blind eye to defects in the premises they let to tenants.

Practice Points

- What steps a landlord should take to inspect a property for defects is very fact specific.
- Where there was no actual knowledge of the defect by the landlord, whilst the tenant does not need to prove notice, he will need to show that the defect would have been revealed had appropriate steps to inspect been taken. Expert evidence is likely to be required for this purpose.

Nathan Tavares QC

Suhail Mohmed v Elliot Barnes, EUI Ltd

(High Court of Justice Queen's Bench Division; Turner J; 24 January 2019; [2019] EWHC 87 (QB))

Contributory negligence—road traffic accidents—necessity—self defence

LT Necessity; Negligence; Personal injury; Road traffic accidents; Self-defence

On the evening of 24 July 2014, the first defendant, driving a VW Polo car collided with, and caused serious injuries to, the claimant, who was a pedestrian, in the car park of McDonald's in China Town, Bolton.

The first defendant had travelled to the car park as a group of people travelling in two cars. The VW Polo was parked adjacent to the other vehicle, a Ford Fiesta. A confrontation developed between the group and a group of Asian males.

After the initial altercation, the defendant's group returned to their vehicles. In the parking bay next to the VW Polo was a Mercedes in which the claimant was sitting as a front seat passenger. Neither the driver, Mr Bagas, nor the claimant knew either group of people.

One of the people in the Ford Fiesta made racist comments aimed at the group of Asian males. Mr Bagas believed the comments were aimed at him and got out of his car to remonstrate with them. The driver of that vehicle was in the process of reversing out of the bay he had been parked in and drove away. Mr Bagas turned his attention to the occupants of the VW Polo. The defendant was the driver of that vehicle, who having reversed out of the bay moved forward and collided with and injured the claimant who, by this time, had alighted from the Mercedes.

The defendant relied upon a defence of self-defence and necessity. In his version of events, the atmosphere in the car park deteriorated after the original altercation and after the occupants of the Ford Fiesta had made further provocative comments the group of Asian males move towards the vehicles in

an aggressive fashion. Mr Bagas, it was said, was also shouting and swearing at the same time as the Asian males began to attack his car. It was alleged that Mr Bagas challenged the defendant to a fight and attempted to pull open his door.

By that time, the passengers in his vehicle had become panicked and he accelerated forwards with the door still open fearing for the safety of himself and his passengers and for the integrity of the car. He thought that the claimant would move out of the way but he did not and he ran over him and made good his escape.

The action was pursued in negligence only and Turner J noted that practically, there was not a circumstance where if the defendant had fallen below the standard of the reasonable man, and hence been negligent, he could at the same time avail himself of the defence of necessity or self defence. Based upon the circumstances there was no need to consider them separately.

Scott v Shepherd[1] whilst being the leading case in the area was to be treated with caution as it was heard as long ago as 1770 and long before the development of the modern law of negligence. In circumstances where the injured claimant is an innocent bystander, whom the defendant did not intentionally cause harm to, then using the term "self-defence" or "emergency" was unhelpful and misleading. It would be better to apply the familiar tests for breach of duty and causation:

> "The better modern view is that the stallholders X and Y in Scott would have escaped liability because their conduct was objectively reasonable without the need to demonstrate a 'compulsive necessity for their own safety and self-preservation'."

This was not to ignore the concepts but to place them as factors to be taken in to account in the balancing exercise of the court when it considered what action was objectively reasonable at the time.

The defendant had been acquitted of causing serious injury by dangerous driving in a criminal trial by jury. Turner J doubted the relevance of this as the degree of fault required was higher, the burden of proof was more onerous, the evidence in the cases differed, the jury did not have to give reasons for the acquittal and the fact of acquittal and the judge's comment were not in themselves material evidence in a subsequent civil trial.[2] The evidence given at the trial though was admissible, as hearsay.[3]

Turner J found that there had been a group of males around the VW Polo at the time the defendant sought to escape. He drew on evidence given at trial by witnesses, CCTV footage and the notes taken in police notebooks. It was initially disputed by counsel for the claimant that the police notebook evidence was admissible, despite the fact that it was in the agreed bundle of documents. In *Charnock v Rowan*,[4] it was held to be decisive on the same point:

> "It was properly adduced because it formed part of an agreed bundle which, by virtue of CPR 32 PD 27.2, not only operates—subject to notice of objection or to a contrary order of the court—an admission of the authenticity of the documents in the bundle but makes them admissible as evidence of the truth of their contents. From that point, subject to any want of proper pleadings, it is for the claimants' lawyers to take instructions on any apparent discrepancy revealed by the documents and thus capable of being a topic of crossexamination."

The evidence in the records was held to be admissible and the fact that they were hearsay went only to weight and not admissibility.

Turner J accepted that the Asian males were banging on the Polo and trying to open the doors, that Mr Bagas was threatening and had managed to open the driver's door and grab him. Consequently:

[1] *Scott v Shepherd* 96 E.R. 525; (1772) 2 Wm. Bl. 892.
[2] *Hollington v F Hewthorn & Co Ltd* [1943] K.B. 587; [1943] 2 All E.R. 35.
[3] Civil Evidence Act 1995.
[4] *Charnock v Rowan* [2012] EWCA Civ 2; [2012] C.P. Rep. 18.

> "He was in genuine fear for his safety and that of his two female passengers. These are not nicety the relative risks involved in choosing between the options open to him …
>
> The fact that he accelerated away at speed was, in my view, understandable and reasonable. Unfortunately, the claimant was standing in his path. The defendant knew of his presence but did not run him down intentionally. I accept that he hoped and expected that the claimant would have been able to move out of his way."

and:

> "I do not doubt that, if he had acted less decisively and one or both of his passengers had suffered serious harm as a result of being dragged from the Polo and assaulted, his level of guilt would have been no less acute."

The defendant had acted in a way which did not fall below the standard of the reasonable driver placed in a threatening and developing situation. Consequently, he was not liable in negligence.

Case dismissed.

Comment

This first instance decision of Turner J in the High Court involved consideration of the closely related defences of self-defence and necessity. These are issues that potentially arise in tort claims where the defendant seeks to evade any liability on the basis that their actions were justified as they occurred in circumstances of threat, danger or emergency. Here, the issues arise in the context of a road traffic accident claim pleaded in negligence.

Self-defence

The defence of self-defence is found in both criminal and civil law. A person is entitled to act reasonably in defence of themselves or third parties. The force used in self-defence must not be greater than is needed to repel the attack, but the law does not require a person to "measure the violence to be deployed with mathematical precision".[5] The court must consider the situation the defendant was faced with at the time and in the context of the heat of the moment, not with the benefit of hindsight in the calm atmosphere of the courtroom.

The issue of injury caused to a bystander by a defendant when defending himself against an attack was considered back in the mid-18th century in *Scott v Shepherd*.[6] In that case, the defendant threw a firework into a crowded marketplace. A market stallholder threw it aside in order to save himself and his goods. It landed on another stall, where the stallholder also threw it away from himself and his stall. The firework then exploded in the claimant's face. The court found the defendant who initially threw the firework to be liable, but considered there to be no liability on the part of the two stallholders as they had acted "under a compulsive necessity for their own safety and self-preservation".

Necessity

The defence of necessity is well-established in the criminal courts. There are three elements to the defence in that context:

- The commission of the offence was necessary, or reasonably believed to be necessary, for the purpose of avoiding or preventing death or serious injury to the person or another.

[5] *Cross v Kirby*, *The Times*, 5 April 2000 CA.
[6] *Scott v Shepherd* 96 E.R. 525; (1772) 2 Wm. Bl. 892.

- That necessity was an essential ingredient, the *sine qua non*, of the commission of the offence.
- The commission of the crime, viewed objectively, was reasonable and proportionate having regard to the evil to be avoided or prevented.[7]

The concept of a defence of necessity in the context of civil liability is less clearly defined and has been considered by the courts on relatively few occasions. Nevertheless, it is recognised as a defence in tort claims and indeed can be found in case law as far back as the early 17th century. In *Mouse's case*,[8] a ferryman in a boat, that was caught in a storm, threw overboard various items of cargo, including the claimant's property, to lighten the load and to prevent the boat from sinking. The court found that the ferryman was not liable to the claimant for the loss of his property as he had acted lawfully and out of necessity to save the lives of his passengers and himself.

Application to the modern law of tort

Ancient authorities such as *Mouse's case* and *Scott* pre-date the emergence of the modern law of negligence. As Turner J warned in the current case, caution must be exercised in applying the dicta in centuries old cases as if the law had stood still in the interim. The linked concepts of necessity and self-defence are today simply a basis for providing some lawful justification for acts that would otherwise be deemed to be tortious. As stated in *Clerk & Lindsell on Torts*,[9] the two concepts are "linked by the common requirement of reasonableness" and nothing really turns on the terminology. The issue for a court in determining breach of duty in negligence is whether the defendant's conduct has fallen below the standard of the reasonable man—can it be said on the facts that the defendant's conduct was objectively reasonable? So if the claimant in *Scott* were making his claim today (rather than in the 18th century), the two stallholders would probably be able to evade liability on the basis that their conduct was objectively reasonable, rather than having to prove a "compulsive necessity for their own safety and self-preservation".

The current case sees these concepts considered in the context of a road traffic accident where a pedestrian was knocked down by the defendant whilst he was seeking to drive away from a threatening and rapidly developing situation. Here Turner J was prepared to accept that the defendant motorist acted in an "understandable and reasonable manner" when he ran down the claimant. The threat of violence by Mr Bagas and his attempts to open the car door and grab him were deemed to be sufficient reason to objectively justify the defendant driving towards the claimant and hoping he would move out of the way in time.

One should be wary of treating such a decision as any sort of binding authority that a motorist who drives away from a threatening incident will have a defence to a claim in negligence. Most road traffic accident cases turn on their own facts. Whilst the courts have set down some general principles of law in road traffic claims, liability is usually dependent on the particular factual circumstances of the accident. An illustration of how a court may take a very different view of the actions of a motorist responding to a threat of violence can be found in the decision of Pittaway J in *McHugh v Okai-Koi*.[10]

In *McHugh*, the defendant had parked her car in a pub carpark close to a supermarket where she needed to do some shopping. On returning to her vehicle she was confronted by Mr and Mrs McHugh, who were both very drunk. They confronted her, accusing her of having parked too close to their vehicle. Words were exchanged and the defendant then attempted to drive away from the couple, who were acting aggressively, threatening her with violence, kicking the car, attempting to open the doors and trying to reach into her vehicle. She stopped a short distance away but Mrs McHugh then climbed onto the bonnet of her car in an attempt to prevent her from driving away. The defendant drove away at a speed of 10–15mph

[7] See *Archbold Criminal Pleading, Evidence and Practice*, 17-132.
[8] *Mouse's case* 77 E.R. 1341; (1608) 12 Co. Rep. 63.
[9] *Clerk & Lindsell on Torts*, 22nd edn, 3-145.
[10] *McHugh v Okai-Koi* [2017] EWHC 1346 (QB).

and turned onto a road. This caused Mrs McHugh to be thrown off the vehicle and to strike her head on an item of roadside furniture, causing fatal injuries.

In *McHugh,* it was held that the defendant had been subjected to a frightening experience and had panicked because of a genuine fear for her safety, but it was deemed to be a misjudgement to drive off with the assailant on the bonnet. The judge concluded that she should have waited in her car until the police arrived. The defendant's actions were considered to have fallen below the degree of care expected of a reasonable, competent and prudent driver. She was found liable for the death, although a reduction of 75% was made for contributory negligence.

When considering these two contrasting decisions it is difficult to see how the defendant in *Mohmed* was in any greater danger or had any more reason to fear for his safety than the defendant in *McHugh*. One motorist is permitted to assume that a pedestrian would jump out of the way of his speeding vehicle, whilst the other is expected to have sat and waited in her stationary car with her attackers attempting to force their way into the vehicle until such time as the police arrived.

It does have to be acknowledged that in *McHugh* a criminal court had already rejected the defendant's defence of necessity and convicted her of a charge of causing death by careless driving. The judge considered himself bound by the notion that the criminal law cannot apply a lesser standard than the civil law. Be that as it may, these two cases are still difficult to reconcile. Such contrasting outcomes demonstrate just how difficult it can be to assess when a court might be prepared to accept that a defendant's actions can be justified on the grounds of necessity or self-defence.

Practice Points

- A defendant can escape liability in negligence if they can satisfy the court that their actions were objectively reasonable as they acted through necessity or self-defence in circumstances of threat, danger or emergency.
- A criminal conviction for the same action that is the subject of the claim brought in tort against a defendant is likely to preclude any defence of necessity or self-defence.

Richard Geraghty

Frank Perry v Raleys Solicitors

(SC; Lady Hale PSC, Lord Wilson JSC, Lord Hodge JSC, Lord Lloyd-Jones JSC, Lord Briggs JSC; 13 February 2019; [2019] UKSC 5)

Negligence—legal profession—personal injury—professional negligence—burden of proof—causation—dishonesty—findings of fact—legal advice—loss of chance—professional negligence—solicitors—vibration white finger

LT Burden of proof; Causation; Honesty; Loss of chance; Professional negligence; Special damages; Vibration white finger

The defendant firm of solicitors appealed against the Court of Appeal's decision that it was liable in professional negligence to the claimant, its former client, in respect of a failure to advise of an opportunity to make a personal injury claim.

The claimant, a former miner, had developed vibration white finger ("VWF") and sought compensation through a government scheme. The scheme provided for general and special damages; special damages could include a services award in respect of tasks such as gardening and DIY. Advised by the defendant, the claimant settled his claim for general damages only. The claimant subsequently issued proceedings against the defendant, claiming damages for the loss of an opportunity to claim a services award.

The judge found that the claimant had not established that the defendant's admitted negligence had caused him to settle at an undervalue. The trial judge held that the claimant had given dishonest evidence before him as to his ability to perform the tasks unaided, and concluded that the claimant had not established that he would have made an honest claim for services if competently advised.

The Court of Appeal held that the trial judge had wrongly conducted a trial within a trial on causation, namely whether the claimant would have brought an honest claim if competently advised; that he had wrongly imposed a burden on the claimant to prove that he would have brought a successful claim; that he had found the claimant's evidence dishonest without him having been aware of an allegation of dishonesty; that he had disregarded expert evidence which supported the finding of a disability; and that he had irrationally found that the claimant and his family had all given false evidence.

The Supreme Court dealt first with causation in professional negligence cases. As laid down in *Allied Maples Group Ltd v Simmons & Simmons*,[1] the courts distinguished between those matters which a claimant had to prove and those better assessed on the basis of the evaluation of a lost chance. To the extent that the question whether the claimant would have been better off depended upon what they would have done if competently advised, that had to be proved on the balance of probabilities. To the extent that the outcome depended on what others would have done, that depended on a loss of chance evaluation, Allied Maples applied. The application of the balance of probabilities test to what the claimant would have done meant that if the claimant proved on the narrowest balance that they would have brought the claim, they suffered no discount in the claim's value by reason of the substantial possibility that they might not have done so. Conversely, if they failed, however narrowly, to prove they would have brought the claim, they got nothing. Since proving that matter was of such fundamental importance, there was no reason why either party to the negligence proceedings should be deprived of the benefit of a trial of that issue. If the issue could be illuminated by facts which would have been investigated in the underlying claim, that was not of itself a good reason not to test them in a trial. In the instant case, the claimant had to prove that, properly advised, he would have claimed a services award within time. The judge had been correct to add that the claim would have had to be honest: dishonest claims fell outside the category of lost claims for which damages could be claimed in negligence against professional advisers, *Kitchen v Royal Air Force Association*[2] applied. The claimant could only have brought an honest claim if he believed that: he had, before developing VWF, carried out the tasks unaided; after developing VWF, he needed assistance in carrying them out; and his need for assistance was due to a lack of grip or dexterity brought on by VWF. Although the cause of lack of grip or dexterity could be a matter of medical opinion, the other elements fell within the claimant's knowledge. Such facts did not fall within the categories of futurity or counter-factuality which traditionally needed a loss of a chance assessment; they were facts about the claimant's actual condition at the relevant time. The judge had not been wrong to conduct a trial of the question whether the claimant would have brought an honest claim for a services award if competently advised.

The Supreme Court then dealt with the burden of proof. Although, at one point, the trial judge had used language which suggested that the claimant had to prove not only that he would have made an honest claim but that it would have been successful, his analysis of causation in the context of the judgment as a whole made clear that he was not imposing some additional burden.

[1] *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 W.L.R. 1602; [1995] 4 All E.R. 907.
[2] *Kitchen v Royal Air Force Assoc* [1958] 1 W.L.R. 563; [1958] 2 All E.R. 241.

The Supreme Court then turned to findings of fact. During cross-examination, evidence had been put to the claimant of his activities following retirement which was inconsistent with his evidence about his disability. The trial judge had been entitled to conclude that that had sufficiently told the claimant that he was being accused of lying. The judge had been obliged to balance his perception that the claimant was lying against the expert's opinion. His conclusion that the expert's opinion did not prevail over the claimant's thoroughgoing lack of credibility did not go beyond the range of reasonable conclusions. The credibility of oral testimony was a matter for the trial judge; there was nothing to support a conclusion of irrationality in the judge's assessment of the family's evidence.

The Supreme Court, accordingly, allowed the defendant's appeal.

Comment

Two critical issues in civil litigation underpin this important Supreme Court decision: honesty in making a claim; and the very high burden for an appeal court overturning a finding of a trial judge based on testimony and cross-examination of witnesses.

The tangle that led to these appeals was not assisted by the scheme dealing with Vibration White Finger ("VWF") caused by excessive exposure to vibratory tools. The respondent, a retired miner, had like many of his colleagues, been afflicted by VWF. A medical report confirmed this. When a test case of 25,000 similar VWF cases was brought against the National Coal Board there was a finding that the employers had failed to take reasonable steps to limit the exposure of miners.[3] Faced with an avalanche of potential claims the Department for Trade and Industry, which then assumed responsibility for claims against British Coal, set up a specialist scheme to provide tariff-based compensation to afflicted miners. This framework for compensation was administered pursuant to a Claims Handling Arrangement from 22 January 1999, made between the Department and a group of solicitors' firms representing claimants. Given the "mass production" of these claims, it is perhaps unsurprising that occasionally matters go awry.

Following a traditional tort law pattern, the administrative scheme contemplated general and special damages for personal injuries. After a Service Agreement in May 2000, the special damages element required the claimant to establish that before he developed VWF he could accomplish six routine domestic tasks, but that subsequently by reason of VWF he could no longer undertake those tasks without assistance. These "six tasks" relate to routine domestic matters connected to gardening, window cleaning, "Do-It-Yourself" around the home, decorating, car washing and car maintenance. In the normal way, a high score on VWF diagnosis would automatically produce a "Services Award" relating to these six tasks. Lord Briggs in giving a unanimous decision in the Supreme Court indicated, perhaps even as an understatement, that the scheme "provided for a relatively light touch system of checking claims".[4] Having commenced a claim in 1996 with Raleys before the setting up of the scheme, Mr Perry then settled in 1999 for the general damages element alone. Subsequently, in 2009, he issued professional negligence proceedings against Raleys claiming that their negligence had deprived him of the special damages element. At this belated stage, he was met with a tenacious defence.

After a two-day trial, HH Judge Saffman, who heard evidence from the claimant, his wife and two sons, concluded that Mr Perry had not in fact suffered any significant disability in performing any of the six tasks without assistance. While the Court of Appeal suggested that this was "one of those very rare cases where an appellate court should interfere with the factual conclusions of the trial judge",[5] Lord Briggs in the Supreme Court notes the "detailed and lucid reserved judgment" in which the trial judge indicated that "it was Mr Perry's complete lack of credibility as a witness that had led to his finding that he would

[3] See generally *Armstrong v British Coal Corp* [1997] 8 Med. L.R. 259.
[4] *Perrys v Raleys Solicitors* [2019] UKSC 5 at [4].
[5] *Perrys v Raleys Solicitors* [2017] EWCA Civ 314 per Gloster LJ at [40]; [2017] P.N.L.R. 27.

not have been able to make an honest claim for a Services Award".[6] As well as medical records clearly indicating no problem with manual dexterity, there were photographs of Mr Perry fishing, at a time when he said he had had to give up this pastime due to impairment. One can perhaps understand the sympathetic viewpoint of the Court of Appeal in concluding that if the routine trajectory of Mr Perry's VWF claim had followed the standard procedure and included a special damages element at the outset, this problematic area of Mr Perry's personal life would not have been explored in detail at a trial. Inevitably, the learned judge had to assess not only the status of prior and post-injury dexterity but also "comorbidity" with a back injury suffered. Sadly for the luckless Mr Perry, the spotlight illuminated an issue of fundamental dishonesty.

The Supreme Court decision does a tour around cases on causation in professional negligence cases and in particular *Gregg v Scott*[7] and *Hanif v Middleweeks* (a firm).[8] Lord Briggs concludes that if "nuisance value claims" as in *Kitchen v Royal Air Force* ("Though I had no claim in law, still, I had a nuisance value which I could have so utilised as to extract something from the other side"[9]) fail the standard of care then a fortiori there can be no successful action for "dishonest claims".[10]

On the second issue of "perversity", the Court of Appeal were certainly harsh in their criticisms of the learned trial judge, indicating he made material errors of law, wrongly assumed that the burden of proof was on the claimant, and failed to consider, or misunderstood, relevant evidence.[11] Having quoted the statement of Lloyd LJ in *Cook v Thomas*:

> "… in a case in which the judge has had the benefit of oral evidence from the witnesses, has made findings of fact which are rationally explained, has described in detail his assessment of the respective witnesses as regards their reliability … an appellant who seeks to show that the judge's findings of fact, or some of them, are unsustainable faces a seriously difficult task,"[12]

the Court of Appeal nonetheless unanimously indicate this high bar has been attained in *Frank Perry*. The Supreme Court unanimously disagreed, vindicating HH Judge Saffman on his approach to the law, and concluding that the Court of Appeal had drawn "strong conclusions about a fact-finding exercise at trial by an experienced judge".[13] Endorsing the time-honoured presumption that the atmosphere of the courtroom cannot be "recreated by reference to documents (including transcripts)"[14] the Supreme Court states that:

> "… it is a very strong thing for an appellate court to say, from a review of the paper records of a trial, that the trial judge was irrational in concluding that witnesses were not telling the truth, all the more so when the trial judge gives detailed reasons for that conclusion in a lengthy reserved judgment, and those reasons do not disclose any failure by him to consider relevant materials, or any disabling failure properly to understand them. The credibility (including honesty) of oral testimony is, of all things, a matter for the trial judge."[15]

This is certainly a trenchant reiteration by the Supreme Court of a fundamental point about the sanctity of findings by a trial judge, and such conclusions are not to be over-ridden save in exceptional circumstances such as a fundamental failure to apply the appropriate legal analysis.

[6] *Perrys v Raleys Solicitors* [2019] UKSC 5 at [10].
[7] *Gregg v Scott* [2005] UKHL 2; [2005] 2 A.C. 176.
[8] *Hanif v Middleweeks (a firm)* [2000] Lloyd's Rep. P.N. 920.
[9] *Kitchen v Royal Air Force Assoc* [1958] 1 W.L.R. 563.
[10] *Perrys v Raleys Solicitors* [2019] UKSC 5 at [26].
[11] See the abstract at *Perrys v Raleys Solicitors* [2017] EWCA Civ 314.
[12] *Cook v Thomas* [2010] EWCA Civ 227 at [48].
[13] *Perrys v Raleys Solicitors* [2019] UKSC 5 at [49].
[14] *Perrys v Raleys Solicitors* [2019] UKSC 5 at [51](v) in a series of points.
[15] *Perrys v Raleys Solicitors* [2019] UKSC 5 at [63].

Practice Points

- Honesty is of paramount importance in making a VWF claim on the "six tasks" at any stage of the proceedings.
- The Supreme Court reiterates a fundamental presumption against reversing a trial judge's fact-finding decision, and in this particular case concluded that "none of the grounds upon which the Court of Appeal considered that this was one of those rare cases where it was appropriate to reverse" had been established "to the requisite high degree".[16]

Julian Fulbrook

[16] *Perrys v Raleys Solicitors* [2019] UKSC 5 at [67].

Case and Comment: Quantum Damages

XX v Whittington Hospital NHS Trust

(Court of Appeal (Civil Division); Mccombe LJ, King LJ, Davies LJ; 19 December 2018; [2018] EWCA Civ 2832)

Cancer—clinical negligence—egg donors—fertility—public policy—recovery of expenses—special damages—surrogacy—United States—illegality

Clinical negligence; Common law; Fertility; Illegality; Measure of damages; Public policy; Surrogacy

The claimant had succeeded in a claim for clinical negligence. The principal issue on the appeal was whether the judge was correct in law to refuse or limit her recovery of damages in relation to surrogacy arrangements she intended to make either in California or this country. The second issue was whether, in so far as the judge awarded damages for such surrogacy expenses as would be lawful in this country, he was correct to differentiate between "own egg" and "donor egg" surrogacies. Finally, dependent on the decision on surrogacy issues should there be a reduction in damages for pain, suffering and loss of amenity.

The cross-appeal by the NHS Trust sought to reverse the judge's award of damages in respect of the costs of limited, non-commercial surrogacy in the UK. Alternatively, if he was correct to award damages for that head it was argued that he should not have awarded general damages which reflected the claimant's complete infertility and that the damages for PSLA awarded by the judge should be reduced accordingly.

The claimant was 35 years old at the date of the hearing and at 29, had been diagnosed with stage II B cervical cancer. The delay in diagnosis prevented her from having fertility-saving surgery. She suffered a complete loss of fertility. On being told of her inability to bear children, she postponed treatment for her life-threatening cancer in order to take second and third opinions on whether her fertility could, after all, be saved. The opinions confirmed her complete loss of fertility and on 16 July 2013, she underwent a cycle of ovarian stimulation and egg harvest, producing 12 eggs which were then cryopreserved by vitrification.

The surgery and chemo-radiotherapy caused irreparable damage to her uterus and ovaries, along with other issues. The onset of infertility led to the claimant and her long-standing partner deciding to have their own biological children by surrogacy. She came from a large family and intended to have four children. Their wish was to have the relevant surrogacy carried out in California.

Surrogacy is lawful in California, including commercial arrangements which are binding on the parties. In this country, it is limited. Commercial surrogacy arrangements are unlawful and it is a criminal offence to advertise either for a surrogate or to offer oneself as a surrogate: Surrogacy Arrangements Act 1985 ("SAA") ss.2 and 3. Any such arrangement is unenforceable. However, it is to be noted that no criminal offence is committed by a person in the claimant's position by being a party to a commercial surrogacy arrangement. Non-commercial surrogacy is permitted in this country, but only reasonable expenses may be paid to the surrogate mother. In addition, the surrogate mother chooses the parent, and it is the other way around in California.

There were distinct advantages to the claimant using the California system. Her evidence was that the prospect of "being at the mercy of someone else's choosing" was frightening, but she would use the UK system if she could not secure damages for the Californian system.

The judge below concluded that the claim for damages to undertake the surrogacy in California had to fail. He found that he was bound so to hold by the decision of this court in *Briody v St Helens and Knowsley AHA*[1] ("*Briody*"). It did not matter that a contract made in California was lawful; in this country, such a contract was unlawful and could not found a claim for the expenses of it as damages. The "reasonable" expenses of such a contract could not, he held, be severed as the contract remained illegal as a whole and was contrary to public policy.

In *Briody*, damages were sought in respect of surrogacy costs in California. On appeal, the claim was again rejected on the basis that, in that case, the chances of success were so low that it was unreasonable to expect a tortfeasor to meet them and that the surrogacy agreement was unlawful in this country and it would be wrong to award damages to acquire a child by methods which did not comply with English law.

Lord Faulks for the NHS Trust argued that the decision of the judge below in following *Briody* should not be interfered with as it is a complex area of law and policy which is under consideration by the Law Commission. That it would have been wrong to anticipate what the Commission may advise and what Parliament may do as a result. He also submitted that only the Supreme Court could go behind the decision in *Briody*. His reliance on *The Economist* magazine in support of his position was quickly rejected:

> "It is further submitted that views on many aspects of surrogacy differ across the world and we should exercise caution in any expression of public policy in the law: Lord Faulks supported this submission by reference to an anonymous article from *The Economist* magazine of 13 May 2017. (I would observe that the magazine has a high reputation, but (with respect) an article of this character cannot carry significant authority as a source of the common law or even as a guide to it.)"

For the claimant, it was said that the ratio of *Briody* was simply that the prospects of success were so low that the expenditure was not reasonable. Here the chances of success were said to be much better so damages should be permitted. The public policy points made in *Briody* were said to be obiter dicta and not binding. In addition, there had been substantial shifts in public opinion on the topic and changes in UK legislation[2] since *Briody* that recovery of reasonable medical expenses should be permitted.

The court found that "the two limbs of this court's decision in *Briody* should be seen as co-existent parts of one ratio decidendi". Notwithstanding that things were said by the claimant to have moved on. In *Re C (Parental Order)*,[3] Thies J made a parental order in favour of married applicants in respect of a surrogate birth, arranged in California, where nearly US$95,000 had been paid by the applicants to achieve the result.

The court took the view that:

> "there is plenty of judicial authority, arising from the diversity of the family in modern society, which requires the court to ask itself, when such questions arise in contexts such as the present, whether the law is achieving a necessary coherence and consistency in sticking rigidly to a perception of public policy formulated even a few years ago …"

The claimant did not propose to do anything illegal. The arrangement in California was lawful there. In making such an arrangement, she would not be committing a criminal offence in the UK or there. The sole remaining prohibition in the UK statutes appears to be to render unlawful commercial surrogacy business in the UK with those running and some of those who might use them being subjected to criminal

[1] *Briody v St Helens and Knowsley AHA* [2001] EWCA Civ 1010; [2002] Q.B. 856.

[2] Under the Human Fertilisation and Embryology Acts ("HFEA") 1990 and 2008, third party surrogacy relationships in this country are now permitted in limited circumstances. While payments which are "commercial" remain unlawful, reasonable payments to surrogates and non-profit making agencies facilitating surrogacies are now allowed. Parliament has also permitted the family courts to sanction overseas surrogacy arrangements by way of "parental orders", including the sanction of payments made in the context of such arrangements: see HFEA 1990 s.30 and HFEA 2008 s.54, especially subs.(7) and (8) respectively of those Acts.

[3] *Re C (Parental Order)* [2013] EWHC 2408 (Fam); [2014] 1 F.L.R. 757.

proceedings. Any illegality under the statutes is of a very narrow focus. In determining the true ambit of modern public policy, it was necessary to focus on that as:

> "Focus on what the prohibition is about is the core of the modern law of illegality."

The law on illegality had moved on:

> "This is a result of the new formulation of the law of illegality, as a bar to a civil claim, adopted by the majority of the Supreme Court in *Patel v Mirza* [2016] UKSC 42, a case decided well after *Briody* and to which Sir Robert Nelson was not referred. In my judgment, *Patel* gives this court a fresh opportunity to examine the 'public policy' behind the bar to this particular civil claim which was held to exist 17 years ago in *Briody*."

Public policy was well recognised to be variable and not ossified for all time, once defined in one context. The claimant proposed to do nothing that was unlawful on her part. There was nothing in the UK statutes to suggest she wanted to do anything contrary to the law or the morals of UK statutes. There was an incoherence in depriving her of her claim at the outset when she personally proposed no wrongdoing, either under Californian law or under UK law.

The law no longer required a bar to recovery of the damages claimed by the claimant on public policy grounds.

In relation to the "donor egg" issue it fell to be decided based upon the restitutionary principle of an award of damages in tort:

> "… 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."[4]

It was accepted that X would probably achieve one or two live births through surrogacy using her own eggs, and expenses incurred for such surrogacy should, therefore, be recoverable, irrespective of whether the treatment was to occur in the UK or in California. Furthermore, an award of damages for the cost of donor egg surrogacy also reflected the modern law as to restorative compensation. Social changes in the years since *Briody* had led to the current acceptance of an infinite variety of forms of family life, the creation of which was often facilitated consequent on the advances in fertility treatment including the increased use of donor eggs. The distinction between "own egg" surrogacy and "donor egg" surrogacy, employing the partner's sperm, would be entirely artificial and could not be maintained.[5]

The award of general damages for pain, suffering and loss of amenity was reduced from £160,000 to £150,000. It had been awarded on the basis of total infertility as well as other issues. It took in to account provisional damages for psychological sequalae and the inability to recover the Californian surrogacy costs. Balanced against that there was still a risk of failure in California.

Comment

Unlike laws set out in statute, the common law is not fixed and it can evolve and develop over time. As society changes, as public attitudes move on, so also can (and should) the common law. The current case is an example of the common law responding to a change in social thinking and moving with it, here in the context of surrogacy. From rejecting claims for the cost of surrogacy on public policy grounds in 2001,

[4] *Livingstone v Rawyards Coal Co* (1880) 5 App. Cas. 25; (1880) 7 R. (H.L.) 1.
[5] *Briody v St Helens and Knowsley AHA* [2001] EWCA Civ 1010 not followed.

the Court of Appeal has now pirouetted neatly to permit the recovery of such costs in a medical negligence claim.

Damages for surrogacy costs?

Of course, the general rule of damages in tort law is that a court should seek, as far as is possible in monetary terms, to put the injured person back into the position they would have been in were it not for the harm caused to them. A claimant who has his leg amputated as a result of the defendant's negligence can recover damages to include the cost of prosthetic limbs to enable him to resume as many of his pre-accident activities as possible. Likewise, any reasonably incurred medical expenses can be recovered. So where negligent medical treatment results in a woman becoming infertile, why should she not be permitted to recover the costs of engaging a surrogate to enable her to have the children she would otherwise have intended to have?

This was the question that first came before the Court of Appeal in 2001 in *Briody v St Helens and Knowsley AHA*.[6] The recovery of such surrogacy costs was refused on that occasion. So what was their objection?

In *Briody*, the Court of Appeal rejected a claim for the cost of surrogacy on the three main grounds:

- Such arrangements were not permitted in English law so it would be contrary to public policy to award damages to facilitate the acquisition of a child in this way.
- The prospects of a successful surrogate pregnancy using the claimant's "own eggs" was so small that it would not be reasonable to expect the defendant to pay for the attempt.
- The cost of a surrogacy using "donor eggs" was not recoverable as it is not restorative of the claimant's position as the court considered neither the child nor the pregnancy to be the claimant's own.

The science of the use of harvested eggs has moved on considerably in the last two decades and the prospects of a successful pregnancy are now markedly higher, so the second of these reasons no longer holds. But what of the public policy concerns raised in *Briody*, and the view that a baby born through donor eggs does not compensate for the loss of the claimant's ability to have her own children? Have such considerations moved on as much as the science in the same period?

Illegality and public policy

As a general rule, the courts will not permit a claimant to benefit from or recover damages for their own illegal act. It is generally considered to be contrary to public policy to permit claims founded upon illegality. The doctrine of illegality has existed in English law for several centuries, but it has recently been reconsidered and brought up to date by the Supreme Court in *Patel v Mirza*.[7] Their Lordships looked broadly at the scope and nature of the doctrine of illegality and, in doing so, have refreshed the approach the courts should adopt to it.

In his lead judgment, Lord Toulson considered the broad approach the courts should now take to the doctrine:

> "So how is the court to determine the matter if not by some mechanistic process? In answer to that question, I would say that one cannot judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system, without (a) considering the underlying purpose of the prohibition which has been

[6] *Briody v St Helens and Knowsley AHA* [2001] EWCA Civ 1010; [2002] Q.B. 856.
[7] *Patel v Mirza* [2016] UKSC 42; [2017] A.C. 467.

> transgressed, (b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and (c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality."[8]

Having regard to the modern interpretation of the doctrine of illegality in *Patel*, the Court of Appeal reviewed the current state of the law in relation to surrogacy. Various statutory changes and alterations to the legal framework surrounding surrogacy since the decision in *Briody* prompted the court to conclude that there was nothing illegal (in either the UK or in California) in what the claimant was proposing. But more than this, the court acknowledged that social policy relating to surrogacy had also changed. Public policy considerations are not immutable and must be revised as social attitudes evolve. The diversity of the family in modern society is such that issues relating to surrogacy had to be reappraised. The court was prepared to find that permitting the cost of surrogacy arrangements could no longer be considered to be contrary to public policy.

Restorative damages

What then of the issue that permitting the recovery of the costs of surrogacy using donor eggs would breach the principle that damages should seek to restore the injured person back to the position they would have been in? Here it was argued by the defendants that the claimant's inability to have children would not be restored or compensated for by the provision of funds to permit a pregnancy and a child that were not hers.

But the court was unwilling to accept this distinction between "own egg" and "donor egg" pregnancies. Many children now have a genetic connection to only one of their parents. Society does not now place a lesser value on children born with only one of their parents' genes. It was observed that the family orthodoxy that underpinned the observations on donor egg surrogacy in *Briody* has been consigned to history. Both "own egg" and "donor egg" pregnancies achieved through surrogacy would go some way to restoring the loss of fertility suffered by the claimant, and there should be no difference in the way the law treats them.

Opening the floodgates?

It has been suggested that permitting such claims would open the floodgates, not just to claims for surrogacy costs, but also to a variety of unconventional treatments and therapies. Is this a genuine concern?

The law permits the recovery of reasonably incurred treatment costs. A claimant is permitted to recover the cost of private treatment even though such treatment may be available free of charge on the NHS.[9] The courts routinely award damages for past and future costs for treatment such as physiotherapy or dental costs. Recovery of the cost of other less conventional treatments is often a moot point. For example, conflicting decisions can be found on matters such as herbal treatments or massage therapy. Generally, a court considering an unusual or unconventional treatment will need to consider if the claimant has demonstrated some relief or benefit from the treatment when determining if it has been reasonably incurred.

This decision does perhaps suggest that the cost of treatments or drugs that are not currently available, licenced or permitted in the UK—but are available elsewhere—may now be recoverable in certain circumstances. But it remains the case that all such issues must still be assessed on a case by case basis.

The Court of Appeal was keen to stress in this judgment that their award of surrogacy costs here should not be taken to imply that a court would be right in every case to permit recovery of the cost of such

[8] *Patel v Mirza* [2016] UKSC 42 per Lord Toulson at [101].

[9] The Law Reform (Personal Injuries) Act 1948 provides at s.2(4) that: "In an action for damages for personal injuries … there shall be disregarded, in determining the reasonableness of any expenses, the possibility of avoiding those expenses or part of them by taking advantage of facilities available under the National Health Service."

extensive arrangements. In each case, the court must still consider whether the proposed surrogacy arrangements are reasonable in all the circumstances.

Does the law move on?

This case is an interesting example of the Court of Appeal acknowledging that the common law is not set in stone and must change with the times. Sometimes it does this slowly. For example, it was not until 1992 that the common law recognised that rape could occur within marriage.[10] Here the common law has shifted much more quickly, reversing its position on surrogacy costs in less than two decades. This is a progressive judgment that is in tune with shifting social attitudes, if not even slightly ahead of the curve. However, the defendant hospital Trust in this matter are, at the time of writing, seeking permission to appeal this decision to the Supreme Court, so the position may not yet be settled.

Practice Points

- It is now possible for a claimant to recover the cost of surrogacy arrangements in claims where the defendant's negligence has resulted in infertility. This can include provision for the cost of surrogacy arrangements overseas that would not be permitted as arrangements in the UK.
- The reasonableness of both the nature and extent of the surrogacy arrangements must still be considered in each case.
- No distinction is to be made by the courts between "own egg" and "donor egg" surrogacies.
- It remains possible that this case may still be reviewed by Supreme Court, so it has to be acknowledged that this may not be the final position of the law in respect of this issue.

Richard Geraghty

Michael Quinn v Ministry of Defence

(QBD (NI); McAlinden J; 27 September 2018; [2018] NIQB 82)

QUANTUM/DAMAGES

Personal injury—damages—aggravated damages—exemplary damages—facial scarring—injury to feelings—measure of damages—Northern Ireland

Aggravated damages; Exemplary damages; Facial scarring; Injury to feelings; Measure of damages; Northern Ireland

The plaintiff claimed damages against the defendant in respect of injuries suffered when he was shot by a soldier on "Bloody Sunday" in Northern Ireland.

The plaintiff, aged 17 at the time of the shooting, was participating in a civil rights march when security forces opened fire on him and other participants. He was struck in the face by a bullet, which shattered his right cheekbone and passed through his nasal passages before exiting his face to the left of his nose. He suffered significant scarring; a large depressed contour defect in the right side of his face due to loss of bone and soft tissue; significant damage and obstruction to the nasal area; drooping of the right lower eyelid and muscle weakness, with twitching; weakness of the right upper lip; and loss of sensation. The

[10] *R. v R* [1992] 1 A.C. 599; [1991] 3 W.L.R. 767.

plaintiff returned to college and completed his A levels but did not attain the grades expected. He attended university and pursued a successful career in banking. He was depressed after the injury and became emotional when giving evidence. He stated that, during his banking career, he had been discouraged from discussing the cause of his injuries, which made him feel stigmatised as a troublemaker until he and other victims were exonerated by the Saville report in 2010. He also claimed to have suffered a severe, intense and enduring injury to his feelings resulting from the injury. The plaintiff had recently been offered the possibility of reconstructive surgery involving fat grafting.

The court dealt with assessment of: general damages; injury to feelings and aggravated damages; and exemplary damages.

General damages

Having regard to the guidance in the *Green Book* s.8A, and the need to avoid potential overlap when awarding compensation for injuries, the appropriate award for the plaintiff's physical injuries was £125,000. Although it was likely that the plaintiff would undergo reconstructive surgery to improve the contour defect, he had had to live with that defect for 46 years. There would also be pain and suffering involved in the surgery. There was insufficient evidence of the plaintiff having suffered any recognised psychiatric condition which was compensatory in law.

Injury to feelings and aggravated damages

In order to merit an award of aggravated damages, there had to have been exceptional or contumelious conduct or motive on the part of the defendant in committing the wrong which had caused mental distress to the plaintiff, *Clinton v Chief Constable of the Royal Ulster Constabulary* followed.[1] It was beyond question that the defendant's wrongful acts on the day in question had given rise to emotions of extreme fear, if not terror, in the plaintiff's mind. The defendant's behaviour was contumelious and imbued with a degree of malevolence and flagrancy which was truly exceptional. The plaintiff had clearly established his claim for injury to feelings in relation to the day of the shooting. Moreover, in seeking to justify the acts of the soldiers who opened fire on civilians on Bloody Sunday, the defendant had sought to assert for many years afterwards that the victims were involved in mob violence, casting an ongoing cloud of suspicion over them until 2010. That conduct justified an award of aggravated damages in the sum of £38,000.

Exemplary damages

It was the character of the defendant's behaviour, rather than the cause of action sued upon, which determined whether exemplary damages were appropriate. In so far as the object of exemplary damages was deterrence, they had to be calculated on different criteria from those employed in the calculation of compensatory damages. The considerations relevant to awards of exemplary damages were: (a) whether the plaintiff was the victim of punishable behaviour; (b) that exemplary damages should be moderate; and (c) the parties' means; *Rookes v Barnard (No.1)*[2] followed. The parties' conduct might also be relevant to the assessment, *Thompson v Commissioner of Police of the Metropolis*[3] followed. Moreover, the level of an exemplary award might be affected by the amount of the compensatory one, so that a larger award in exemplary damages might be made in cases where the compensatory award was regarded as inadequate. The defendant's conduct, in being directly responsible for the deaths and injuries on 30 January 1972,

[1] *Clinton v Chief Constable of the Royal Ulster Constabulary* [1999] N.I. 215.
[2] *Rookes v Barnard (No.1)* [1964] A.C. 1129; [1964] 2 W.L.R. 269.
[3] *Thompson v Commissioner of Police of the Metropolis* [1998] Q.B. 498; [1997] 3 W.L.R. 403.

and thereafter in perpetuating a lie that the victims had been engaged in significant wrongdoing, constituted oppressive, arbitrary and unconstitutional conduct. However, since the UK Government had funded the Bloody Sunday Inquiry and had fully accepted its findings, and given the size of the compensatory award, the need for deterrence had not been established. The cost to the Government represented adequate punishment. Therefore, no award of exemplary damages was justified.

Damages were assessed accordingly.

Comment

Aggravated and exemplary damages have been the source of both controversy and confusion over the years and were examined by the Law Commission during the 1990s.[4]

Aggravated damages

For aggravated damages, the issue is that they "occupy a murky middle ground between normal compensatory damages and exemplary damages".[5] They are awarded where a defendant has been guilty of some exceptional misconduct, which gives them a punitive feel. However, the dominant view is that they are compensatory because they seek to compensate the claimant for mental distress and injured feelings suffered as a result of the way in which the tort has been committed. The Law Commission had suggested a more principled approach to aggravated damages than the courts have achieved to date and put forward a statutory definition that sought to clarify their role. Whilst these recommendations were rejected by the Government, their analysis has nevertheless been useful in guiding judges.[6] The Law Commission laid down two basic preconditions for an award of aggravated damages and it was on the basis that these were met that the judge in *Quinn* decided that they should be awarded:

- exceptional or contumelious conduct or motive on the part of a defendant in committing the wrong or, in certain circumstances, subsequent to the wrong; and
- mental distress sustained by the plaintiff/claimant as a result.[7]

Aggravated damages are available for a number of different torts including assault and battery, false imprisonment, defamation and statutory discrimination though not generally for negligence. In *Kralj v McGrath*, the plaintiff pursued a negligence and breach of contract claim against her obstetrician.[8] During the delivery of her twins, it was discovered that the second was in a "transverse" position. The obstetrician sought to correct this by internally rotating the child. No anaesthetic was administered and the baby later died from the severe injuries sustained during the delivery. Medical experts had described the obstetrician's treatment as "horrific" and as "completely unacceptable" and so the plaintiff sought aggravated damages. Lord Woolf rejected this aspect of her claim stating:

> "It is my view that it would be wholly inappropriate to introduce into claims of this sort, for breach of contract and negligence, the concept of aggravated damages. If it were to apply in this situation of a doctor not treating a patient in accordance with his duty, whether under contract or in tort, then I would consider that it must apply in other situations where a person is under a duty to exercise care. It would be difficult to see why it could not even extend to cases where damages are brought for personal injuries in respect of driving. If the principle is right, a higher award of damages would be appropriate in a case of reckless driving which caused injury than would be appropriate in cases

[4] M. Lunney, D. Nolan and K. Oliphant, *Tort Law: Text and Materials*, 6th edn (Oxford University Press, 2017), p.891.
[5] Law Commission, Aggravated, Exemplary and Restitutionary Damages (Law Com. No.247, 1997).
[6] Department of Constitutional Affairs, *The Law of Damages* (2007).
[7] *Quinn v Ministry of Defence* [2018] NIQB 82 at [1.4].
[8] *Kralj v McGrath* [1986] 1 All E.R. 54; (1985) 135 N.L.J. 913.

> where careless driving caused identical injuries. Such a result seems to me to be wholly inconsistent with the general approach to damages in this area, which is to compensate the plaintiff for the loss that she has actually suffered, so far as it is possible to do so, by the award of monetary compensation and not to treat those damages as being a matter which reflects the degree of negligence or breach of duty of the defendant. What I am saying is no more than that what the court has to do is to judge the effect on the particular plaintiff of what happened to her. Accordingly, the nature of Mrs Kralj's experience was relevant to the damages she was awarded only in so far as it served to increase the distress she suffered."[9]

This position, though later approved in *AB v South West Water Services Ltd*,[10] was criticised by the Law Commission. It could see no good reason for refusing aggravated damages in such claims and noted that Lord Woolf's analysis simply revealed the continued confusion over the role of such damages.[11]

Another difficulty was highlighted in *Richardson v Howie* where the Court of Appeal stated that in cases of assault and similar torts, damages for injured feelings could and should be subsumed within the general damages award, rather than reflected in a separate aggravated damages award, save in wholly exceptional cases.[12] Nevertheless, separate awards for aggravated damages quite rightly continue to be made. Putting a monetary valuation on mental distress caused by aggravating features is inevitably difficult. Whilst there is very little guidance on this, the Court of Appeal in *Thompson v Metropolitan Police Commissioner* indicated that they should not normally be less than £1,000 or more than double the basic compensatory damages unless the compensatory damages are modest.[13]

Exemplary damages

Exemplary damages are intended to punish the defendant and to deter him/her from engaging in similar behaviour in the future. However, they are controversial in nature because they are seen by some to confuse the civil and criminal functions of the law and to allow punishment without the safeguards of the criminal process. As a result, their use has been severely restricted despite the fact that they are more freely available in other jurisdictions. In *Rookes v Barnard (No.1)*, Lord Devlin described them as a "weapon to be used with constraint" and confined them to certain categories of case:

> "… in which an award of exemplary damages can serve a useful purpose in vindicating the strength of the law and thus affording a practical justification for admitting into the civil law a principle which ought logically to belong to the criminal … The first category is oppressive, arbitrary or unconstitutional action by the servants of the government … Cases in the second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff … To these two categories which are established as part of the common law there must of course be added any category in which exemplary damages are authorised by statute."[14]

Some note that the distinctive functions of criminal and civil law can be exaggerated, as the boundaries between the two areas of law, are not clear cut.[15] The Law Commission concluded that "civil punishment can be adequately distinguished from criminal punishment and has an important and distinctive role to

[9] *Kralj v McGrath* [1986] 1 All E.R. 54 at 61.
[10] *AB v South West Water Services Ltd* [1993] Q.B. 507; [1993] 2 W.L.R. 507.
[11] *Quinn v Ministry of Defence* [2018] NIQB 82 at [1.36].
[12] *Richardson v Howie* [2004] EWCA Civ 1127; [2005] P.I.Q.R. Q3.
[13] *Thompson v Metropolitan Police Commissioner* [1998] Q.B. 498; [1997] 3 W.L.R. 403.
[14] *Rookes v Barnard (No.1)* [1964] A.C. 1129 at 1221; [1964] 2 W.L.R. 269.
[15] See, e.g. Peel and Goudkamp, *Winfield & Jolowicz, Tort*, 19th edn (Sweet & Maxwell, 2014), para.23-023 and Deakin, Johnston and Markesinis, *Markesinis and Deakin's Tort Law*, 7th edn (Oxford University Press, 2013), p.802.

play".[16] As a result, they recommended that such damages should be retained but that they should be available for any tort or equitable wrong (excluding breach of contract) where the defendant had "deliberately and outrageously disregarded the plaintiff's rights".[17] This recommendation has not been implemented and so the circumstances in which exemplary damages can be awarded continue to be governed by *Rookes*.

The need to retain exemplary damages for the first category of case has been questioned. For example, in *Cassell & Co v Broome*, Lord Diplock noted that they are a "blunt instrument" to use to punish and deter today in view of other common law developments to curb excesses of executive power.[18] Lord Scott in *Kuddus v Chief Constable of Leicestershire Constabulary* also questioned the deterrent effect of exemplary damages met out of public funds in cases against defendants such as the Ministry of Defence and Northern Ireland Office.[19] Nevertheless, the continuing view, as stated by Lord Nicholls in *Kuddus,* is that:

> "From time to time cases do arise where awards of compensatory damages are perceived as inadequate to achieve a just result between the parties. The nature of the defendant's conduct calls for a further response from the courts. On occasion conscious wrongdoing by a defendant is so outrageous, his disregard of the plaintiff's rights so contumelious, that something more is needed to show that the law will not tolerate such behaviour. Without an award of exemplary damages, justice will not have been done. Exemplary damages, as a remedy of last resort, fill what otherwise would be a regrettable lacuna."[20]

Another area of disagreement concerns whether exemplary damages should be available for oppressive actions by private individuals or corporations. Lord Devlin in *Rookes* specifically excluded such cases but, in *Kuddus*, Lord Nicholls questioned whether this was still appropriate given some large corporations and even some individuals now exercise enormous power.[21]

It is important to note that just because a case falls into one of Lord Devlin's categories does not mean the claimant will automatically receive exemplary damages. As demonstrated in *Quinn*, it is for the judge to decide whether they are appropriate in the circumstances of the case with reference to the need to punish and deter. Having said that, there is limited guidance in the case law on this. As the Court of Appeal made clear in *Holden v Chief Constable of Lancashire*, "oppressive", "arbitrary" and "unconstitutional" action need not be treated as synonymous.[22] However, as noted by the Northern Ireland Court of Appeal in *Clinton v Chief Constable of the Royal Ulster Constabulary*, whilst unconstitutional action alone may be enough to ground an award of exemplary damages, there must be aggravating features for such an award to be justified.[23] The court referred to *McGregor on Damages*, where it is stated: "a central requirement for exemplary damages has always been the presence of outrageous conduct, disclosing malice, fraud, insolence, cruelty and the like."[24]

In terms of damages, the focus is on the defendant's conduct rather than on the claimant. As outlined in *Rookes*, the sum awarded should be the minimum necessary to punish the defendant and to show others that tort does not pay. This means that both the gravity of the defendant's conduct and their financial position are both relevant. In *Thompson v Metropolitan Police Commissioner*, which concerned trespass to the person and malicious prosecution, the Court of Appeal stated that where:

[16] Law Commission, Aggravated, Exemplary and Restitutionary Damages (Law Com. No.247, 1997), para.1.25.
[17] Law Commission, Aggravated, Exemplary and Restitutionary Damages (Law Com. No.247, 1997), para.1.44.
[18] *Cassell & Co v Broome* [1972] A.C. 1027 at 1129; [1972] 2 W.L.R. 645.
[19] *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29; [2002] 2 A.C. 122 at [108].
[20] *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29; [2002] 2 A.C. 122 at [63].
[21] *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29; [2002] 2 A.C. 122 at [66].
[22] *Holden v Chief Constable of Lancashire* [1987] Q.B. 380; [1986] 3 All E.R. 836.
[23] *Clinton v Chief Constable of the Royal Ulster Constabulary* [1999] N.I. 215.
[24] *McGregor on Damages*, 16th edn, para.447.

> "… exemplary damages are appropriate they are unlikely to be less than £5,000. Otherwise the case is probably not one which justifies an award of exemplary damages at all. In this class of action the conduct must be particularly deserving of condemnation for an award of as much as £25,000 to be justified and the figure of £50,000 should be regarded as the absolute maximum, involving directly officers of at least the rank of superintendent."[25]

This provides some useful guidance though the Northern Ireland Court of Appeal in *Flynn v Chief Constable of Northern Ireland* noted that it does not "form a binding code in terms of the level of achievable damages".[26] Finally, while the assessment of compensatory damages cannot be affected by the amount awarded as exemplary damages, the converse is not true. As Lord Devlin noted in *Rookes*, it is only if the compensatory sum "is inadequate to punish him for his outrageous conduct to mark their disapproval of such conduct and to deter him from repeating it, then it can award some larger sum".[27]

Practice Points

- Aggravated damages are compensatory in nature and can be awarded in relation to several torts (though not generally negligence) to compensate a claimant for mental distress caused by exceptional or contumelious conduct or motive on the part of a defendant in committing the tort or, in certain circumstances, subsequent to the tort.
- Aggravated damages should not normally be less than £1,000.
- Exemplary damages are punitive in nature and (unless allowed by statute) can only be awarded in cases involving oppressive, arbitrary or unconstitutional action by servants of the government or where a defendant has sought to profit by his/her tort.
- Whether exemplary damages are appropriate will depend on the circumstances of the case but will generally require aggravating features, such as outrageous conduct, malice, fraud, insolence or cruelty.
- Where exemplary damages are appropriate, they are unlikely to be less than £5,000.

Annette Morris

[25] *Thompson v Metropolitan Police Commissioner* [1998] Q.B. 498 at 514; [1997] 3 W.L.R. 403.
[26] *Flynn v Chief Constable of Northern Ireland* [2017] NICA 13 at [27].
[27] *Rookes v Barnard (No.1)* [1964] A.C. 1129 at 1228.

Case and Comment: Procedure

Bianca Cameron v Liverpool Victoria Insurance Co Ltd

(SC; Lord Reed DPSC, Lord Sumption JSC, Lord Carnwath JSC, Lord Hodge JSC and Lady Black JSC; 20 February 2019; [2019] UKSC 6)

Civil procedure—road traffic—insurance—CPR—claim forms—dispensing with service—motor insurance—notice—road traffic accidents—service by alternative permitted method—unknown persons—Directive 2009/103

EU law; Motor Insurers' Bureau; Parties; Road traffic accidents; Service; Unknown persons; Untraced drivers

The defendant insurer appealed against a decision that the claimant motorist could bring proceedings following injury in a hit-and-run collision against "the person unknown" who had been the driver of the car at fault.

The driver of the car at fault was never identified, but its registered keeper was. An insurance policy covered one named individual, not the registered keeper, to drive the car. The motorist issued proceedings against the keeper, erroneously believing him to be the driver. When it became clear that he was not, the motorist added the insurer as a defendant, seeking a declaration under the Road Traffic Act 1988 s.151 that it was obliged to satisfy any unsatisfied judgment against the keeper. The insurer denied liability, arguing that the policy did not cover the keeper and the driver had not been identified. The motorist applied for permission to amend her claim form and particulars of claim by removing the keeper as first defendant and substituting "the person unknown driving vehicle [registration number] who collided with vehicle [registration number] on [date of accident]".

The district judge dismissed the application of the motorist and granted summary judgment in favour of the insurer.

The Court of Appeal reversed that decision, holding that the court had discretion to permit an unknown person to be sued when the driver could not be identified, because otherwise it would not be possible to obtain a judgment which the car's insurer would be bound to satisfy, and that it was irrelevant that the motorist had an alternative right against the Motor Insurers' Bureau.

The Supreme Court dealt with the issues of suing unnamed persons and European law.

Suing unnamed persons

The critical question was what the basis of the court's jurisdiction over parties was, and in what circumstances, jurisdiction could be exercised against persons who could not be named. There were two kinds of unnameable defendants: defendants who were identifiable but whose names were unknown, for example, squatters who were identifiable by their location; and those who were anonymous and could not be identified, such as most hit-and-run drivers. In the first category, it was possible, in principle, to locate or communicate with the defendant and know without further inquiry whether they were the person described in the claim form, whereas in the second category it was not. The legitimacy of issuing or amending a claim form could be tested by asking whether it was conceptually, not just practically, possible

to serve it. Generally, service of originating process was the act by which the defendant was subjected to the court's jurisdiction, *Barton v Wright Hassall LLP*[1] followed, *Dresser UK Ltd v Falcongate Freight Management Ltd (The Duke of Yare)*[2] applied. An identifiable but anonymous defendant could be served, if necessary by alternative service under CPR r.6.15, because it was possible to locate or communicate with the defendant and identify them as the person described in the claim form. However, one did not identify an unknown person simply by referring to something they had done in the past. That did not enable anyone to know whether any particular person was the one referred to. It was a fundamental principle that a person could not be made subject to the court's jurisdiction without having such notice of the proceedings as would enable them to be heard, *Porter v Freudenberg*[3] applied. Subject to any contrary statutory provision, it was an essential requirement for any form of alternative service that it could reasonably be expected to bring the proceedings to the defendant's attention. So far as *Abbey National Plc v Frost*[4] intended to state the law generally when it held the opposite, it was wrong, Abbey National doubted. No exception to that principle of natural justice could be justified in the context of the compulsory insurance of motorists. Service could be dispensed with under r.6.16 where the defendant was, in fact, aware of the proceedings or had deliberately evaded service, but a person could not be said to evade service unless they actually knew that proceedings had been or were likely to be brought against them. A person who was anonymous and could not be identified could not be sued under a pseudonym or description unless the circumstances were such that service of the claim form could be effected or properly dispensed with.

European law

That result was not inconsistent with Directive 2009/103.[5] The court assumed that art.18 required the provision of a direct right of action against the insurer in respect of the underlying wrong of the person responsible and not just a liability to satisfy judgments entered against that person. However, the motorist was not trying to assert a direct right against the insurer for the underlying wrong. Her claim against the insurer was for a declaration that it was liable to meet any judgment against the other driver. Her claim against the driver was for damages, but the right that she asserted against him on the instant appeal was a right to sue him without identifying him or observing rules of court designed to ensure that he was aware of the proceedings. Nothing in the Directive required the UK to recognise such a right. Nor did art.10 require recourse to the MIB to be unnecessary in a case where the car, although not the driver, had been identified. While the MIB's indemnity was slightly smaller than the insurer's, it was consistent with the Directive.

The appeal was, accordingly, allowed.

Comment

Lord Sumption in a unanimous decision of the Supreme Court confirms that the appropriate trajectory in a "hit and run" motor claim, where the identity of the driver is a "person unknown", is to claim against the Motor Insurers' Bureau. The suggestion that "Defendant solicitors and insurers toasted the decision"[6] in *Cameron v Liverpool Victoria* is perhaps something of an exaggeration, but this decision has certainly

[1] *Barton v Wright Hassall LLP* [2018] UKSC 12; [2018] 1 W.L.R. 1119.
[2] *Dresser UK Ltd v Falcongate Freight Management Ltd (The Duke of Yare)* [1992] Q.B. 502; [1992] 2 W.L.R. 319.
[3] *Porter v Freudenberg* [1915] 1 K.B. 857.
[4] *Abbey National Plc v Frost* [1999] 1 W.L.R. 1080; [1999] 2 All E.R. 206.
[5] 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.
[6] "Up Front: 'Unknown driver' clarity" [2019] *Law Society Gazette* L.S. Gaz 4 (2).

clarified the current state of the law while raising several questions as to whether legislative intervention may now be required.

Sir Ross Cranston, dissenting in the Court of Appeal, indicates that in his view "the threshold is high when a court exercises a discretion under the rules to allow proceedings against unnamed parties".[7] Lord Sumption in the Supreme Court endorses that analysis. While suggesting that it is a fundamental principle of UK Law that "Justice must be available to both sides" in that "a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable them to be heard".[8] Lord Sumption then rehearses some of the current exceptions, indicating that "Judging by the reported cases, there has recently been a significant increase".[9]

Indeed, he clearly approves of exceptions against the general rule that proceedings may not be brought against unnamed parties, such as CPR 55.3(4) which allows a claim for possession of property and injunctive relief against "trespassers" who are unidentifiable squatters. This overruled the decision of Stamp J in *In re Wykeham Terrace Brighton*,[10] so there is certainly precedent for moving "the boundary stone".[11] Lord Sumption also notes the technique in action against "copyright pirates".[12] The "much wider jurisdiction" of actions and orders against unnamed wrongdoers was also "first opened up" by Sir Andrew Morritt V-C in *Bloomsbury Publishing Group Plc v News Group Newspapers* where Lord Sumption indicates that the "real object" of an injunction relating to unauthorised publication of a Harry Potter book was to expose "thieves" to contempt of court proceedings.[13] So far so good: "trespassers", "pirates" and "thieves".

However, when Gloster LJ in the Court of Appeal indicates that the court:

> "can and should, in accordance with principle, exercise its procedural powers to permit an amendment of the claim form … to allow a claimant to substitute an unnamed defendant driver, identified by reference to the specific vehicle which he or she was driving at a specific time and place"[14]

this is clearly a bridge too far for English Law. While the Supreme Court dwells on the natural justice implications offended by extending the right of service on "unnamed drivers", it is striking that little is said about the natural justice implications for Bianca Cameron. It is abundantly clear that she is the innocent victim of a "hit and run" driver who smashes her car so that it is a write off, collides with a second vehicle, and then proceeds to run away. This fleeing driver certainly knew why he was escaping the scene, because of the inevitable probability that his identity would be established both for criminal and civil purposes. While much is made by Lord Sumption and Sir Ross Cranston of the "European" notion of insuring a vehicle rather than a driver, it is clear here that the "keeper" of the miscreant vehicle knew very well who the driver of the car was, and indeed incurs a fine and penalty points in withholding that information. Furthermore, it is clear that the insurer had issued a policy to an entirely fictitious person, a fact inevitably known to the keeper of the vehicle, but Lord Sumption does not seem to brand this egregious conduct of the keeper, possibly also by not necessarily wild supposition as the actual "hit and run" driver, with any opprobrium. With respect, it is very difficult to disagree with Gloster LJ's point in the Court of Appeal that as a commercial entity "the insurer, having received the economic benefit, should bear the economic risk".[15] In support of an approved extension, Lloyd Jones LJ underlines that "the policy was taken out fraudulently in a fictitious name".[16]

[7] *Cameron v Liverpool Victoria* [2017] EWCA Civ 366 at [105]; [2018] 1 W.L.R. 657.
[8] *Cameron v Liverpool Victoria* [2019] UKSC 6 at [17]; [2019] 1 W.L.R. 1471.
[9] *Cameron v Liverpool Victoria* [2019] UKSC 6 at [11]; [2019] 1 W.L.R. 1471.
[10] *In re Wykeham Terrace, Brighton* [1971] Ch. 204; [1970] 3 W.L.R. 649.
[11] The famous comment by Bingham LJ on psychiatric damage in *Attia v British Gas Plc* [1988] Q.B. 304 at 320; [1987] 3 W.L.R. 1101.
[12] *EMI Records Ltd v Kudhail* [1985] FSR 35.
[13] *Bloomsbury Publishing Group Plc v News Group Newspapers* [2003] EWHC 1205 (Ch); [2003] 1 W.L.R. 1633.
[14] *Cameron v Liverpool Victoria* [2017] EWCA Civ 366 at [40].
[15] *Cameron v Liverpool Victoria* [2017] EWCA Civ 366 at [42].
[16] *Cameron v Liverpool Victoria* [2017] EWCA Civ 366 at [65].

While Lord Sumption proudly notes that the UK "was the first country in the world to introduce compulsory motor insurance"[17] it is clear that dishonest persons who remain anonymous and cannot be identified as "hit and run" drivers, or withholders of the truth as keepers of vehicles, or liars on insurance documents bring about serious injustice for innocent victims such as Bianca Cameron. By using only the MIB route she was not able to recover her hire costs for a replacement vehicle, nor any vehicle damage claims, and will only receive a token contribution towards her legal costs. There would appear to be something in the order of 17,000 such innocent victims of "hit and run" drivers per annum.

Lord Sumption sweeps away any inconsistencies with the Sixth Motor Insurance Directive 2009/103, stating that the submission "was pressed with much elaboration", but that he would deal with any such matters "quite shortly".[18] In a penetrating analysis on the European Law aspects of this case, Dr Nicholas Bevan in the *New Law Journal* suggests that Lord Sumption not only misstates the law but delivers a *per incuriam* decision that "blatantly flouts binding CJEU precedent".[19] Perhaps the undignified rush to the exit door of the EU has narrowed the focus just to the perceived merits of traditional English Law rather than remaining open to remedies adopted elsewhere to support the innocent victims of a "hit and run" driver.

Practice Points

- The Supreme Court re-establishes the rule that the sole trajectory for a victim of a "hit and run" driver who is not identified is through the compensation scheme managed by the Motor Insurers' Bureau.
- This inevitably means that the innocent victim is unable to claim hire costs for a replacement vehicle, property damage to the vehicle, and full legal costs in bringing a claim.
- Notwithstanding the innovative approach in the Court of Appeal to extend precedents on claims against unidentifiable defendants, buttressed by European Directives aimed at a focus on vehicle keepers and supporting higher compensation for victims, it will require legislative change to accomplish such aims.

Julian Fulbrook

EXB (a protected party by his mother and litigation friend DYB) v FDZ, Motor Insurers' Bureau, GHM, UK Insurance Ltd

(High Court of Justice (QBD); Foskett J; 13 December 2018; [2018] EWHC 3456 (QB))

Best interests—brain damage—deputies—mental capacity—personal injury—protected parties—road traffic accidents—settlement

LT Best interests; Brain damage; Deputies; Mental capacity; Protected parties; Road traffic accidents; Settlement

The court had given approval to the settlement reached between the parties pursuant to the requirements of CPR 21.10. It was thought by those who knew him best, including his mother and his very experienced

[17] *Cameron v Liverpool Victoria* [2019] UKSC 6 at [2].
[18] *Cameron v Liverpool Victoria* [2019] UKSC 6 at [27].
[19] Dr N. Bevan, "Principle v process" 169 N.L.J. 7832, 14.

solicitor, that it would be in the claimant's best interests not to be told the amount at which the settlement had been achieved.

The court was provided with a transcript of the solicitor's conversation with the claimant:

> "In a nutshell, his own view at that time was that he did not want to know how much it was, his reason being that he would 'probably end up spending it' and likened it to having just 'won the lottery or something'. He does appreciate that he receives some weekly sums that he regards as his 'wages' which is a matter of some daily comfort to him."

Giving evidence by video link to the court it was said that:

> "As I understood him, he felt that the less stress to which he was exposed, the better, and that knowing too much about the financial position would cause him stress. He said that it was 'better that I go on not knowing'."

He was though heard to say, when leaving the conferencing room, that he had been "conned" into agreeing to not knowing the sum. Dr Wall, his treating neuropsychologist, who heard this commented that his ability to weigh up competing considerations was compromised by his brain damage. His case manager said that his "decision making is very much in the moment without consideration of the consequences".

His case manager, Mr Unsworth, gave evidence to the effect that he struggles with money, cannot control his impulses, is impressionable and vulnerable. He associates with undesirable people and would tell them of the settlement. That echoed the view of his mother. Mr Unsworth went on to say that he is frustrated by money, and obsessively needs to spend it:

> "In that state of mind he cannot rationalise, and it increases his frustration. He gets to the point where he has smashed walls, smashed telephones, thrown other things within his house—because he gets himself so worked up over money. In my opinion, everyone who knows EXB, and knows him well, would say that it is not in his best interests to know a specific figure because he would not cope with knowing that figure. It would cause no end of problems, and increase his vulnerability. He has never said to any of his support team 'How much have I got', and actually says as long as he has got the peace of mind of knowing that his future is secure, and he has his wages, then he is content.
>
> Having a figure in EXB's head would, in my view, feed the issues that he has. It would feed his impulsivity, an impulsive nature and requests for money. Even now, without that knowledge, he has asked for funds to purchase a van when he does not have a licence to drive, he has bought hundreds of £s worth of trainers in a couple of days."

The concern was that the money, needed for the future, would be spent. Examples were given as follows:

> "He told me of an occasion when the Claimant was provided with money for a holiday and spent some of the money on a canoe or dinghy and an occasion when he received £2000 in back benefits and spent it within four days. He has been known to purchase three or four pairs of the same trainers on the same occasion."

The neuropsychologist's view was that the claimant's ability to weigh up competing considerations was compromised and that his decision-making was impulsive and rigid. Her view was that knowing the settlement sum would make him more vulnerable to his own impulses and to other people.

The advocate to the court submitted that the principles in the Mental Capacity Act 2005 ("MCA") s.4 and the United Nations Convention on the Rights of Persons with Disabilities art.3 suggested that ordinarily a person in the claimant's position should be informed of the details of a settlement award so that he was treated in the same way as a person without a disability.

The claimant accepted that depriving him of knowledge of the size of his award constituted an interference with those Convention rights, but the issue was whether greater harm would be done by conveying the information to him.

Best interests

The claimant did not, and was not likely to at some time in the future, have capacity in relation to this issue. This would need to be kept under review though, by the Deputy. The wishes of the claimant, when he is capable of weighing up the competing considerations, is that it would be better that he did not know.

The evidence that it would not be in his best interest to know was overwhelming. Concerns over the dissipation of the fund designed to fund his lifetime's needs was one consideration of importance, as was his inability fully to understand the value of money and the frustrations (leading to confrontations) to which this gives rise.

The primary question was whether he could not, on the balance of probabilities, make for himself the decision about whether he should be told the value of the award. He has expressed a view without knowing the exact figure and in light of the fact that his ability to make this decision is variable and that he could not necessarily sustain over any meaningful period the making of such a decision given his inability to control his impulses and weigh up all the relevant considerations it was appropriate to declare that he did not have the capacity to make the decision.

Whilst it was arguable that the Deputy may have the authority to decide not to tell the claimant, a court order would assist in the relationship between the claimant and the Deputy. The Court of Protection ("CoP") had the power to make the necessary order(s):

> "IT IS DECLARED AND ORDERED PURSUANT TO SECTION 15(1)(c)AND SECTION 16 OF THE MENTAL CAPACITY ACT 2005 THAT:
>
> 1. The Claimant lacks the capacity to decide whether or not he should know the amount of the Settlement.
> 2. It is in the Claimant's best interests that he does not know the amount of the Settlement.
> 3. It shall be unlawful for any person (whether the Claimant's deputy or any other person who has knowledge of the amount of the Settlement) to convey by any means to the Claimant information about the amount of the Settlement, save that this declaration does not make unlawful the conveyance of descriptive information to the Claimant to the effect that the Settlement is sufficient to meet his reasonable needs for life.
>
> AND IT IS FURTHER ORDERED THAT:
>
> 4. There is permission to the Deputy to disclose a copy of this order to any person with knowledge of the amount of the Settlement.
> 5. The Third and Fourth Defendants do pay the Claimant's costs of this application, to include the costs of the hearing on 29th November 2018, on the standard basis such costs to be subject to a detailed assessment if not agreed."

The need for the order arose directly out of the injury caused by the tortfeasor and they should meet the costs of it whether as a head of damage or by way of an application for costs.

Obiter, some consideration should be given to streamlining the process for such applications as they could arise with some frequency in these types of cases.

Comment

Anyone who has acted for a claimant who lacks mental capacity to litigate and to manage their affairs, and who has received a large compensation award will no doubt have experienced the conundrum of

whether to tell them the size of the award, how to tell them, and how to try and prevent them disclosing the information unwisely to others, potentially to their detriment. It is a common problem. Many legal advisers will duck the issue and leave it to the deputy given that it is the deputy who is authorised by the Court of Protection to make decisions affecting the claimant's property and affairs. This is not necessarily a solution for several reasons, however. First, a deputy may not have been appointed before the compensation award is approved, so what do you do prior to their appointment? Secondly, what do you do about others who know the size of the award and may feel obliged to disclose the information to the claimant, such as relatives, the case manager, a support worker, or an Independent Financial Advisor? Thirdly, the property and affairs deputy may decide (as the deputy did in this case) that the "best interests" decision we are concerned with, namely whether the claimant has the mental capacity to decide whether or not he should know the amount of the settlement, did not fall within the scope of his appointment.

As with any issue of mental capacity, the starting point is that there is a presumption of capacity unless the contrary is proved.[1] The mere fact that a person has a deputy appointed to manage their property and affairs does not imply that they lack the capacity to decide whether or not they should know the amount of the settlement. Capacity is issue-specific, and as Foskett J observed, a person with a disability has a right not to be discriminated against. He cited the UN Convention on the Rights of Persons with Disabilities ("CRPD") and, in particular, art.3, namely:

> "The principles of the present Convention shall be:
> 1. Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
> 2. Non-discrimination;
> 3. Full and effective participation and inclusion in society."

Application of the MCA and its Code of Practice also requires that the views of the individual concerned be consulted and that all practicable steps be taken to help him make the decision.

Accordingly, the presumption we work to is that a claimant will be deemed to have the capacity to decide to be told the amount of the award unless proved otherwise and that they have a right to know pursuant to the UN Convention. If the claimant agrees with his legal and treating team that he should not know the amount of the award, the issue may be resolvable without too much difficulty. If the medical or other relevant evidence suggests that they do not have the capacity to make that decision, however, an issue of best interests then arises whether or not they want to know the size of the award. It seems to this author that the issue is one of property and affairs that is implicitly capable of determination by a property and affairs deputy, and so falls within their general terms of appointment. This issue was not specifically decided in the present case, however, and the judge left the scope of the deputy's appointment for others to determine.

Assuming for the moment that the deputy does accept the decision as falling within the terms of his appointment he can then make a "best interests" determination without reference to the CoP, as long as the decision is properly supported by expert evidence and documented in accordance with the provisions of the MCA. This requires appropriate recording of the decision-making process so that it can be scrutinised if necessary and justified, and to enable a periodic review of the decision. Hence it ought to be possible for the deputy to determine if the claimant lacks the capacity to decide whether or not to be told the size of the award, and that he should not be told if that is in his best interests. Should the claimant or any other interested person dispute the deputy's decision the matter ought to be referred to the CoP for determination. What the deputy cannot effectively do by themselves is prevent others from informing the claimant.

In the present case, the deputy did not want to be the decision maker because he felt it would undermine his relationship with the claimant. Nor did he want to be perceived as a "gatekeeper" of relevant information

[1] MCA 2005 s.1(1).

from the litigation friend, litigation solicitor, or member of the support team. This is why the judge made the order in the terms he did, which left the deputy in a more neutral position vis-à-vis the claimant and others. It also had the clear benefit of making it unlawful for:

> "any person (whether the claimant's deputy or any other person who has knowledge of the amount of the Settlement) to convey by any means to the Claimant information about the amount of the Settlement."

This is a very wide injunction potentially binding persons as yet unknown, and it is rare for the CoP to make orders preventing disclosure against people who are not parties to the proceedings. It is certainly open to question whether it is too widely drawn and whether other judges will follow it, but Foskett J did suggest that a copy of his judgment be considered by the Deputy Head of Civil Justice and the Vice-President of the Court of Protection. This was primarily so that they could consider whether a streamlined procedure was warranted for dealing with the issues that arose in this case which are issues that may commonly occur in PI litigation. Clearly, a full hearing with live evidence from a number of expert and lay witnesses, including the claimant, is not a cost-effective way of determining the issue in most situations. However, in many cases (if not most), an anonymity order and a properly recorded "best interests" decision by the deputy ought to suffice.

Practice Points

- There are many claimants with mental capacity issues for whom knowledge of the size of a compensation award would be detrimental to their best interests.
- Whether or not a claimant has the mental capacity to decide to be told the amount of an award requires specific determination regardless of the appointment of a deputy.
- Best interests decisions on this issue do not automatically require referral to the court of protection but can be dealt with by a professional acting in accordance with the mca as long as there is no significant dispute and that robust procedures are followed and documented.

Nathan Tavares QC

Ellis v Heart of England NHS Foundation Trust

(High Court of Justice (QBD); HH Judge McKenna; 20 December 2018; [2018] EWHC 3505 (Ch))

Clinical negligence—discretion—extensions of time—general practitioners—limitations—personal injury claims

LT Clinical negligence; Discretion; Extensions of time; General practitioners; Limitations; Personal injury claims; Prejudice

The claimant brought claims against three defendants alleging negligent medical treatment following his presentation at the third defendant's surgery on the evening of 25 February 2013. The GP recorded a history of acute numbness and weakness of the left leg, and found that the claimant had impaired sensation below the knee and was unsteady on both feet. Two days later, the claimant returned to the surgery and had bloods taken. Although abnormal results were reported within minutes, the claimant was sent home and suffered a seizure later that day. He was taken to a hospital run by the first defendant, where a CT

scan revealed a cerebral abscess. After some delay, he was transferred to a hospital run by the second defendant, where the abscess was drained. He made a slow recovery and was left with epilepsy; disruption of his cognitive and behavioural functioning; and permanent left-sided weakness. He claimed that the GP's examination of him had been inadequate and that, had he been urgently admitted to hospital for treatment, he would have made a full recovery. The first and second defendants made partial admissions in relation to the delay following admission to hospital, which, the claimant asserted, had exacerbated the damage caused by the GP's negligence.

The claimant instructed solicitors in October 2013 and sent letters of claim to all three defendants in May 2015. Following several agreed extensions of time, limitation was extended to 27 June 2016. The GP served a letter of response in March 2016 denying liability and causation. In September 2016, having received an expert GP's report which did not support the claim against the GP, the claimant's solicitors indicated that the claim against him would not be pursued. Further extensions were agreed with the first and second defendants extending limitation to 27 January 2017. Shortly before that date, the claimant obtained a favourable opinion from a different GP expert and issued a claim form against all three defendants. The GP raised limitation as a defence.

The correct approach to exercising the discretion under the Limitation Act 1980 to extend the limitation period set out in s.11 had recently been reviewed by the Master of the Rolls in the case of *Chief Constable of Greater Manchester Police v Carroll*.[1] The principles were summarised as follows:

> "Section 33(3) of LA 1980 requires the court, when exercising its discretion under section 33(1), to have regard to all the circumstances of the case but also directs the court to have regard to the five matters specified in sub-sections 33(3)(a)–(f). There are numerous reported cases in which the court has elaborated on the application of that statutory direction in the context of the particular facts of the case. In many of the cases the court has stated various principles of general application. The general principles may be summarised as follows.
>
> (1) Section 33 is not confined to a 'residual class of cases'. It is unfettered and requires the judge to look at the matter broadly: *Donovan v Gwentoys Ltd* [1990] 1 W.L.R. 472 at 477E; *Horton v Sadler* [2006] UKHL 27; [2007] 1 A.C. 307 at [9] (approving the Court of Appeal judgments in *Finch v Francis* Unreported 21 July 1977); *A v Hoare* [2008] UKHL 6; [2008] 1 A.C. 844 at [45], [49], [68] and [84]; *Sayers v Lord Chelwood* [2012] EWCA Civ 1715; [2013] 1 W.L.R. 1695 at [55].
>
> (2) The matters specified in section 33(3) are not intended to place a fetter on the discretion given by section 33(1), as is made plain by the opening words 'the court shall have regard to all the circumstances of the case', but to focus the attention of the court on matters which past experience has shown are likely to call for evaluation in the exercise of the discretion and must be taken into a consideration by the judge: *Donovan* at 477H–478A.
>
> (3) The essence of the proper exercise of the judicial discretion under section 33 is that the test is a balance of prejudice and the burden is on the claimant to show that his or her prejudice would outweigh that to the defendant: *Donovan* at 477E; *Adams v Bracknell Forest BC* [2004] UKHL 29; [2005] 1 A.C. 76 at [55], approving observations in *Robinson v St Helens MBC* [2003] P.I.Q.R. P9 at [32] and [33]; *McGhie v British Telecommunications Plc* [2005] EWCA Civ 48; (2005) 149 S.J.L.B. 114 at [45]. Refusing to exercise the discretion in favour of a claimant who brings the claim outside the primary limitation period will necessarily prejudice the claimant, who thereby loses the chance of establishing the claim.

[1] *Chief Constable of Greater Manchester Police v Carroll* [2017] EWCA Civ 1992; [2018] 4 W.L.R. 32.

(4) The burden on the claimant under section 33 is not necessarily a heavy one. How heavy or easy it is for the claimant to discharge the burden will depend on the facts of the particular case: *Sayers* at [55].

(5) Furthermore, while the ultimate burden is on a claimant to show that it would be inequitable to disapply the statute, the evidential burden of showing that the evidence adduced, or likely to be adduced, by the defendant is, or is likely to be, less cogent because of the delay is on the defendant: *Burgin v Sheffield City Council* [2015] EWCA Civ 482 at [23]. If relevant or potentially relevant documentation has been destroyed or lost by the defendant irresponsibly, that is a factor which may weigh against the defendant: *Hammond v West Lancashire HA* [1998] Lloyd's Rep. Med. 146.

(6) The prospects of a fair trial are important: *Hoare* at [60]. The Limitation Acts are designed to protect defendants from the injustice of having to fight stale claims, especially when any witnesses the defendant might have been able to rely on are not available or have no recollection and there are no documents to assist the court in deciding what was done or not done and why: *Donovan* at 479A; *Robinson* at [32]; *Adams* at [55]. It is, therefore, particularly relevant whether, and to what extent, the defendant's ability to defend the claim has been prejudiced by the lapse of time because of the absence of relevant witnesses and documents: *Robinson* at [33]; *Adams* at [55]; *Hoare* at [50].

(7) Subject to considerations of proportionality (as outlined in (11) below), the defendant only deserves to have the obligation to pay due damages removed if the passage of time has significantly diminished the opportunity to defend the claim on liability or amount: *Cain v Francis* [2008] EWCA Civ 1451; [2009] Q.B. 754 at [69].

(8) It is the period after the expiry of the limitation period which is referred to in sub- subsections 33(3)(a) and (b) and carries particular weight: *Donovan* at 478G. The court may also, however, have regard to the period of delay from the time at which section 14(2) was satisfied until the claim was first notified: *Donovan* at 478H and 479H–480C; *Cain* at [74]. The disappearance of evidence and the loss of cogency of evidence even before the limitation clock starts to tick is also relevant, although to a lesser degree: *Collins v Secretary of State for Business Innovation and Skills* [2014] EWCA Civ 717; [2014] P.I.Q.R. P19 at [65].

(9) The reason for delay is relevant and may affect the balancing exercise. If it has arisen for an excusable reason, it may be fair and just that the action should proceed despite some unfairness to the defendant due to the delay. If, on the other hand, the reasons for the delay or its length are not good ones, that may tip the balance in the other direction: *Cain* at [73]. I consider that the latter may be better expressed by saying that, if there are no good reasons for the delay or its length, there is nothing to qualify or temper the prejudice which has been caused to the defendant by the effect of the delay on the defendant's ability to defendant the claim.

(10) Delay caused by the conduct of the claimant's advisers rather than by the claimant may be excusable in this context: *Corbin v Penfold Co Ltd* [2000] Lloyd's Rep. Med. 247.

(11) In the context of reasons for delay, it is relevant to consider under sub-section 33(3)(a) whether knowledge or information was reasonably suppressed by the claimant which, if not suppressed, would have led to the proceedings being issued earlier, even though the explanation is irrelevant for meeting the objective standard or test in section 14(2) and (3) and so insufficient to prevent the commencement of the limitation period: *Hoare* at [44]–[45] and [70].

(12) Proportionality is material to the exercise of the discretion: *Robinson* at [32] and [33]; *Adams* at [54] and [55]. In that context, it may be relevant that the claim has only a thin prospect

of success (*McGhie* at [48]), that the claim is modest in financial terms so as to give rise to disproportionate legal costs (*Robinson* at [33]; *Adams* at [55]); *McGhie* at [48]), that the claimant would have a clear case against his or her solicitors (*Donovan* at 479F), and, in a personal injury case, the extent and degree of damage to the claimant's health, enjoyment of life and employability (*Robinson* at [33]; *Adams* at [55]).

(13) An appeal court will only interfere with the exercise of the judge's discretion under section 33, as in other cases of judicial discretion, where the judge has made an error of principle, such as taking into account irrelevant matters or failing to take into account relevant matters, or has made a decision which is wrong, that is to say the judge has exceeded the generous ambit within which a reasonable disagreement is possible: *KR v Bryn Alyn Community (Holdings) Ltd* [2003] EWCA Civ 783; [2003] 3 W.L.R. 107 at [69]; *Burgin* at [16]."

Judgment

The defendant argued that a robust approach should be taken, relying upon the approach in the relief from sanctions jurisdiction and the decisions in *Mitchell v News Group Newspapers*[2] and *Denton v TH White Ltd*.[3] In addition, the entire period of delay was relevant not just the period from the agreed extension of time to the actual date of issue.[4] The delay was also said to be due to the dilatory conduct of the claimant's solicitors. That the claimant had not set out his position at the earliest opportunity, that the prejudice from dimming of memories was obvious, that the GP had been emotionally prejudiced by being released from the action and then it being resurrected some months later were also said to be relevant.

By contrast, it was submitted that any prejudice to the claimant would be limited by virtue of the fact that he could continue to pursue his claims against the first and second defendants where admissions of breach of duty have been made and where it was said the arguments as to causations were very similar.

The court was not persuaded by those arguments and would permit the case to proceed under the principles in *Carrol*. There was no reason for importing the relief from sanctions approach to s.33. The court's discretion is unfettered but what is required is a broad consideration of the balance of prejudice with the burden of proof resting on the claimant.

The GP had known in early March 2013 that a claim was contemplated when relatives of the claimant had attended upon him to discuss his delay in referring him to hospital. Given that he had had formal notification of the claim in May 2015, he had been able to notify the Medical Protection Society, record his recollections and discuss the matter with his solicitors well within the primary limitation period. Similarly, the fact that he had been able to send a letter of response in March 2016, following an extension of time granted at his own request, showed that he had been able to fully consider, investigate and respond to the claimant's allegations well within the primary limitation period.

He had agreed to an extension of the limitation period. That suggested that he and his legal team were content that his ability to defend the claim would not be prejudiced.

Comment

The defendant's argument in this case that the court should take a "robust" approach to the interpretation of s.33 was given short shrift by HH Judge McKenna who was unequivocal in that he could see no justification for importing relief from sanctions case law into what is the judges "unfettered" discretion under s.33. The judge reiterated that the court needs to have regard to all the circumstances of the case.

[2] *Mitchell v News Group Newspapers* [2013] EWCA Civ 1537; [2014] I W.L.R. 795.
[3] *Denton v TH White Ltd* [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926.
[4] Relying on *Catholic Child Welfare Society (Diocese of Middlesbrough) v CD* [2018] EWCA Civ 2342; [2019] E.L.R. 1.

When I am explaining how the court might interpret s.33 to my clients I always focus on three broad topics before drilling into the detail: (a) the length of the delay; (b) the reasons for the delay; and (c) whether or not a fair trial is still possible (balance of prejudice "test").

Turning to the length of the delay in this case, was it the seven months between the last extension of time agreed between the parties or should the length of the delay be taken from the expiry of the primary limitation period? Key to the judge's reasoning seems to be that the third defendant had, in fact, both been notified of the claim well within the primary limitation period and had, via his legal representatives, given three extensions of time to extend limitation. The defendant argued that the entirety of the period of delay should be looked at rather than the seven months of delay between the expiry of the agreed extension of time for issue of proceedings and the actual date of issue. Had the court been minded to agree to this line of argument, then, arguably it could be open to defendants in any case where an extension of time to limitation had been validly agreed inter partes to seek to rescind that agreement post proceedings and ask for the period of delay that they themselves had agreed to, to be taken into account when considering balance of prejudice under s.33. This would seem inherently unfair to the claimant and cause them very real prejudice and the court dismissed this argument.

Secondly, looking at the reasons for the delay in this case, the claimant could not be seen to be at fault for first, deciding not to proceed against the third defendant on the basis of both negative liability GP evidence and negative Counsel's opinion in this regard. He surely would have been criticised for seeking to continue a claim against the GP when at that time he was being advised the prospects of success did not merit it. Once alternative specialist Counsel and thereafter alternative GP liability evidence was obtained which was supportive of the claim was obtained he acted to inform the GP of the change of stance.

The key reasoning in the judgment focuses, however, on whether or not a fair trial is possible and the balance of prejudice. Who would suffer greater prejudice in this case, the claimant if the case could not proceed against the third defendant or the third defendant if the case did, in fact, proceed against him? Key to looking at prejudice, in this case, was the fact that the third defendant had, in fact, been notified of the claim well within the primary limitation period and was able to formally respond having considered the allegations against him.

Secondly, the three extensions of time by agreement tended to point towards the third defendant and his legal representatives being content that those extensions did not prejudice his ability to defend the claim in any real practical sense. This flows into what I consider to be the key paragraph in the judgment, at [39], where HH Judge McKenna states:

> "Very significantly, the third Defendant has not been able to identify any prejudice that he has suffered or will suffer in the investigation, preparation or presentation of his defence. No documentation has been lost nor has contact with any potential witness been lost. The third Defendant has the benefit of his contemporaneous record of his consultation and his own recollection of the consultation given the contents of his defence. Moreover, the third Defendant was notified about the family's concern within a very short period after the consultation and has the opportunity to discuss the issues with his advisers and to record his recollections well within the primary limitation period. His position is not in any way adversely affected as a result of the delay."

Conversely, the judge found that the claimant would suffer very real prejudice should he not be able to pursue his claim against the third defendant.

The defendant's argument that he would suffer emotional prejudice as a result of being first released from the claim followed by being brought into it again on receipt of new and supportive liability evidence by the claimant was not persuasive to the judge either.

Practice Points

- Consider carefully when requesting extensions of time to the claim against all possible defendants the consequences of letting such extensions lapse for any reason and be vigilant to doing all that is possible to protect your client's position in that regard.
- When advising a client how likely a judge is to exercise his or her discretion under the Limitation Act 1980 s.33 to allow a case to proceed out of time, ensure you have done a thorough analysis of all factors but particularly on consideration as to whether anything has occurred during the period of relevant delay which would make a fair trial more difficult. This could include the loss of key documents or evidence during that delay period, the loss or death of key witnesses and the effect that the passage of time has on the memory in the absence of contemporaneous documents or notes.
- Act as promptly as is practicably possible as a legal adviser to issue proceedings in circumstances such as this case (where subsequent positive expert advice comes to light) in order to protect the client's position so far as you are able to do so.

Kim Harrison

JLE (a child by her mother and litigation friend ELH) v Warrington and Halton Hospitals NHS Foundation Trust

(Sen Cts Costs Office; Master McCloud; 20 December 2018)

Civil procedure—costs—CPR—costs—detailed assessment—interpretation—Pt 36 Offers—proportionality

Costs; Detailed assessment; Part 36 offers

Following the conclusion of a clinical negligence claim brought by the claimant against the defendant, the court had to determine a costs dispute between the parties and interpret Pt 36.17(4).

The claimant presented a bill of costs for some £615,000. The claimant made a Pt 36 offer of £425,000, which the defendant did not accept.

At a detailed assessment, the claimant beat her offer by around £7,000, the award of interest on the bill as assessed pushing the sum assessed above the level of the Pt 36 offer. The master determined the costs consequences in r.36.17(4)(a), (b) and (c), but was not invited to address the 10% additional amount provided for in r.36.17(4)(d) and consequently did not do so. After the order had been lodged, but before it was sealed, the claimant contended that the four consequences in r.36.17(4) were not severable and that the court did not have the power to order some, but not all of them. The issue was how the court should apply the "injustice" test in r.36.17(4).

The claimant submitted that the test was a gateway criterion which, once overcome, triggered all of the consequences (a)–(d) with no discretion on the part of the court to select among them. The defendant argued that the court had to consider injustice separately for each of (a)–(d) and decide whether it was just to award all, some, or none of the consequences within the provision.

The court held on the proper approach to the injustice test in r.36.17 (4) that the wording of the rule indicated the "injustice" test was intended to apply globally to all of (a)–(d). The claimant's arguments, founded on the apparent policy of r.36.17 and the advantages of certainty, were persuasive. However, an examination of relevant authorities, none of which were directly on point, led to the conclusion that (a)–(d)

were severable. The preferable construction, consistent with judicial comity and consistency of approach generally, was to hold that courts should apply the "injustice" test separately for each, and then go on to consider, in the round, the overall effect of applying all four, *Ayton v RSM Bentley Jennison*[1] and *Thinc Group Ltd v Kingdom*[2] followed, *Davison v Leitch*[3] and *Bataillon v Shone*[4] considered.

When exercising discretion the court held, in all the circumstances, that it would be clearly disproportionate and unjust to allow the 10% "bonus" provided for in r.36.17(4)(d). 10% of a large bill, compared with the very small percentage margin by which the offer was beaten, would amount to a disproportionate windfall leading to injustice, rather than a windfall which was consistent with the objective of the rules. The fact that the Pt 36 offer had only been exceeded by virtue of the interest on the bill was of no influence, nor, in most cases, would the extent to which an offer had been beaten be material. However, if the court did not operate a high bar for the exercise of its discretion, the purpose of the cost penalty rules could be defeated. The 10% bonus remained disproportionate even when looking at the overall effect in the round of what would be the cumulative penalties under (a)–(d).

Costs were determined accordingly.

Comment

Introduction

In *Fox v Foundation Piling Ltd*,[5] Jackson LJ confirmed that Pt 36 was intended to be a "clear and simple framework within which parties can settle litigation".

An important way in which Pt 36 can indeed be "clear and simple" is certainty.

The need for certainty was also reflected by Jackson LJ giving judgment in *Fox* when he said:

> "… where one party makes a Part 36 offer and then achieves a more advantageous result than that proposed in his offer, the provisions of rule 36.14 modify the court's general discretion in respect of costs."

The degree of certainty which should be offered by Pt 36 was also recognised by Briggs LJ in *PGF II SA v OMFS Co 1 Ltd*[6] when he referred to the costs consequences as being "automatic". Similarly, Arden J referred to those consequences at "normal" in *Yentob v MGN Ltd*.[7]

Part 36 consequences should unless, as the rule, itself provides, "unjust" indeed be "automatic" or "normal". Otherwise, the effectiveness of the rule, in encouraging settlement, and certainty, which helps to avoid satellite litigation, will be diluted which, in turn, has the potential to undermine, rather than further, the overriding objective.

It is inevitable, in the 20 years since Pt 36 was introduced, case law has accumulated over the interpretation of the rule. To give the requisite degree of certainty, which brings with it proportionality, it is essential courts decide costs issues under Pt 36 on the basis of authority rather than reverting to first principles with all the risk that entails of inconsistency, uncertainty and disproportionate satellite litigation.

It is notable that a number of relevant authorities were not referred to in the judgment of the Master and, accordingly, this decision should, perhaps, be treated with some caution.

[1] *Ayton v RSM Bentley Jennison* [2018] EWHC 2851 (QB); [2018] 5 Costs L.R. 915.
[2] *Thinc Group Ltd v Kingdom* [2013] EWCA Civ 1306; [2014] C.P. Rep. 8.
[3] *Davison v Leitch* [2013] EWHC 3092 (QB).
[4] *Bataillon v Shone* [2015] EWHC 3177 (QB).
[5] *Fox v Foundation Piling Ltd* [2011] EWCA Civ 790; [2011] C.P. Rep. 41.
[6] *PGF II SA v OMFS Co 1 Ltd* [2013] EWCA Civ 1288; [2014] 1 W.L.R. 1386.
[7] *Yentob v MGN Ltd* [2015] EWCA Civ 1292; [2015] 6 Costs L.R. 1103.

In that context, a number of issues arising out of the judgment can be considered including: the consequences provided for under Pt 36.17(4); when those consequences will be unjust; and the nature and extent of the court's discretion.

Part 36.17(4) Consequences

The Master observed that:

> "The question for me is whether the Court has the power to award some, but not all of the consequences set out in CPR r.36.17(4) where the claimant has achieved an award more advantageous that its own Part 36 offer, and if the Court does have that power, whether that power should be exercised so as to allow the consequences at subparagraphs (a), (b) and (c) of the Rule, but not that at (d)."

That is not the first time this question has arisen, very similar issues having being determined on appeal in *Cashman v Mid Essex Hospital Services NHS Trust*.[8]

It is, perhaps, important to remember the reasons why Pt 36.17(4) provides a range of consequences, for a claimant who obtains judgment "at least as advantageous" as the claimant's own Pt 36 offer, including indemnity costs, enhanced interest and an additional amount.

The award of indemnity costs does not reflect misconduct on the part of the defendant in declining to accept the claimant's offer but, rather, reflects the rules providing the claimant with an incentive to make reasonable offers and the defendant with a disincentive to reject any such offer. As Simon Brown LJ observed in *Kiam v MGN Ltd*:[9]

> "If the claimant thought that, even if he were to make and then beat an offer, he was going to get no more than his costs on the standard basis, why would he make it? It would afford him no advantage at all. He would do better simply to claim at large and recover his costs whatever measure of success he gained. His position is, in short, quite different from that of the defendant who plainly has every incentive to make a settlement offer, generally by way of payment into court, irrespective of the basis on which any costs order will be made."

Accordingly, whilst indemnity costs have traditionally been regarded as penal, and only to be awarded where justified on the basis of conduct "out of the norm", in *McPhilemey v Times Newspapers Ltd*,[10] Chadwick LJ confirmed incentives to accept a Part 36 offer were "not to be regarded as producing penal consequences".

Similarly, in the context of enhanced interest under Pt 36.17(4), Sir Geoffrey Vos said in *OMV Petrom SA v Glencore International AG*[11] that the whole thrust of Pt 36 is "to use both the carrot and the stick" and also observed that:

> "32. … the objective of the rule has always been, in large measure, to encourage good practice. As Lord Woolf put it in the *Petrotrade* case, 'Part 36.21(2) and (3) create the incentive for a claimant to make a Part 36 offer', and a party who has behaved unreasonably 'forfeits the opportunity of achieving a reduction in the rate of additional interest payable'. Chadwick LJ in the *McPhilemey* case said that it was 'an incentive to encourage claimants to make, and defendants to accept, appropriate offers of settlement'."

The judgment, in this case, focused on the further benefit introduced for claimants in 2013, namely the additional amount provided for under what is now Pt 36.17(4)(d). In *Cashman*, Slade J observed:

[8] *Cashman v Mid Essex Hospital Services NHS Trust* [2015] EWHC 1312 (QB); [2015] 3 Costs L.O. 411.
[9] *Kiam v MGN Ltd* [2002] EWCA Civ 66; [2002] 1 W.L.R. 2810.
[10] *McPhilemey v Times Newspapers Ltd* [2001] EWCA Civ 933; [2002] 1 W.L.R. 934.
[11] *OMV Petrom SA v Glencore International AG* [2017] EWCA Civ 195; [2017] 1 W.L.R. 3465.

> "10. … In paragraph 3.16 of his Report Lord Justice Jackson observed that the gains which a claimant would make under the amended CPR 36.14(3) should enable them to pay the success fee which would not be recoverable from the paying party under the new CFA regime."

Sir Geoffrey Vos also mentioned the award of an additional amount in *OMV Petrom SA* when he said:

> "37. … The Jackson reforms undoubtedly introduced a penal award of up to £75,000 as an additional sum calculated on the basis of the amount of the court's award or, in the absence of such an award, the amount of the claimant's costs. But whatever the consultation papers show as to what consultees thought about the nature of the existing provisions, Jackson LJ's final report had said expressly at paragraph 1.1 of Chapter 41 that the existing Part 36 was backed up by a scheme of penalties and rewards in order to encourage the making of reasonable settlement offers and the acceptance of such offers."

Cashman considered the very point identified by the Master as the key issue in this case. The court clearly does have power to provide for some, but not all, of the consequences provided for under Pt 36.17(4) will apply. However, the "automatic" or "normal" position is that such consequences do apply and should only not be applied where the court can properly conclude that particular consequence would be "unjust".

In principle, therefore, the Master was quite entitled to conclude that the claimant should not have the additional amount but could only do so if such an outcome could properly be characterised as "unjust" for the purposes of Pt 36.

Unjust

A danger, giving rise to uncertainty and inconsistency, is the, potentially insidious, replacement of a test based on whether the consequences provided for under the rule are "unjust" with an analysis of whether the party facing those consequences has been "unreasonable".

In *Matthews v Metal Improvements Co Inc*,[12] Stanley Burnton J said:

> "32. … the Deputy District Judge seems to have answered the question whether it was unjust to make the usual order by considering whether it had been reasonable for the Claimant to have rejected the Part 36 payment when it was made and later to accept it. But that consideration, while it may be relevant to the question whether it would be unjust to make the usual costs order, cannot be identified with it.
>
> 33. Moreover, the Deputy District Judge's approach is based on a misunderstanding of the function of a Part 36 payment or offer. The Defendant may make a conservative payment in the hope that it will tempt the claimant to accept a conservative estimate of the value of his claim. He may make a generous Part 36 payment because he is reluctant to incur the risks and costs of going to trial, and hopes thereby to avoid them. The Defendant may quite properly make a low payment in the hope that events or evidence will favour him: for example, that his expert will advise favourably in due course; that a prognosis of the claimant's injuries which are the subject of his claim will prove over-pessimistic; that cross-examination of the claimant or his witnesses may be successful; or that the trial judge will quantify general or special damages modestly. Conversely, there is nothing unreasonable in a competent claimant rejecting a Part 36 payment in the hope that at trial the judge will take a generous view of his damages. The risks that the parties run are costs risks, in the

[12] *Matthews v Metal Improvements Co Inc* [2007] EWCA Civ 215; [2007] C.P. Rep. 27.

> case of the defendant that he will have to pay all of the claimant's costs, notwithstanding his payment, and in the case of the claimant that he will have to pay the defendant's costs from the last date when he could have accepted the payment. In other words, the function of a Part 36 payment is to place the Claimant on that costs risk if, as a result of the contingencies of litigation, he fails to beat the payment."

In *Smith v Trafford Housing Trust*,[13] Briggs J emphasised that:

> "The burden on a claimant who has failed to beat the defendant's Part 36 offer to show injustice is a formidable obstacle to the obtaining of a different costs order. If that were not so, then the salutary purpose of Part 36, in promoting compromise and the avoidance of unnecessary expenditure of costs and court time, would be undermined."

Significantly, for present purposes, when giving judgment in *Downing v Peterborough & Stamford Hospitals NHS Foundation Trust*,[14] Sir David Eady observed:

> "It is elementary that a judge who is asked to depart from the norm on the ground that it would be 'unjust' not to do so should not be tempted to make an exception merely because he or she thinks the regime itself harsh or unjust."

On the basis of these decisions, the Court of Appeal emphasised, once again, the need to depart from the automatic or normal cost consequences under Pt 36 only when these would be unjust in *Briggs v CEF Holdings Ltd*,[15] where Gross LJ said:

> "36. In my judgment, it is very important not to undermine the salutary purpose of Part 36 offers. It is important too that in considering often attractively advanced submissions as to uncertainty the court should not be drawn into microscopic examination of the litigation details. It is true that every case in this area is fact-specific but the important point is that there is a general rule which emerges from Part 36, namely, that if the offer is not accepted within time then the claimant bears the costs of the defendant until such time as the offer is accepted. If, of course, the offeree can show injustice, then a different situation will prevail—but it is up to the offeree to show injustice, not simply that it may have been difficult to form a view as to the outcome of the litigation. The whole point of the Part 36 offer is to shift the incidence of the risk as to costs onto the offeree. As observed in the note in Civil Procedure (set out above), it is important not to undermine that salutary purpose."

Given that the language used by the Master when giving judgment referred to the additional amount as a "windfall" and a "bonus" is hard not to escape the conclusion that the sound advice given by Sir David Eady in Downing was not heeded. It does, indeed, seem hard to characterise an award provided for under the rules, regarded as a necessary incentive and which all parties expect to be awarded normally, as any kind of bonus or windfall.

Consequently, there must be a question as to whether the proper application of the "unjust" test guided the exercise of the court's discretion.

Court's discretion

The Master, as a preliminary to exercising the discretion under Pt 36.17(4) observed:

[13] *Smith v Trafford Housing Trust* [2012] EWHC 3320 (Ch); (2012) 156(46) S.J.L.B. 31.
[14] *Downing v Peterborough & Stamford Hospitals NHS Foundation Trust* [2014] EWHC 4216 (QB); [2015] 2 Costs L.O. 203.
[15] *Briggs v CEF Holdings Ltd* [2017] EWCA Civ 2363; [2018] 1 Costs L.O. 23.

> "Taken together in my mind the most significant factors are (1) the very small margin by which the offer was beaten relative to the much greater size of the bill (2) the fact that where a bill is reduced (and seems to have been expected to be reduced) significantly, it will on the whole generally be very difficult for a party to know precisely or even approximately to within a few percent, where to pitch an offer such that even a competent costs lawyer would operate close to chance level as to whether an offer is likely to be 'over' or 'under' at the end of the hearing, and (3) the large size of the 10% 'bonus' award relative to the margin by which the offer was beaten."

On this basis, the Master concluded:

> "In all the circumstances in my judgment the 'bonus' of 10%, in this case, would be a clearly disproportionate sum and it would be unjust to award it. That is also the case when one looks at the overall effect in the round of what would be the cumulative penalties in sub-rules (a)–(c) added to (d)."

The discretion conferred by Pt 36.17(4), when that rule engages, is not unfettered but has to be exercised within the confines of the rule itself, as explained by relevant authorities.

Each case is, of course, different but it is notable almost exactly the same issue arose in *Cashman v Mid Essex Hospital Services NHS Trust*[16] where allowing an appeal against a decision by the Master that the claimant should not recover an additional amount, Slade J held:

> "23. If the precondition for entitlement to payments under CPR 36.14(3) is triggered by judgment being entered for a claimant which is at least as advantageous as their Part 36 offer, unless the court considers it unjust to do so, having taken into account all the relevant circumstances including those set out in CPR 36.14(4), there is no discretion as to whether an order for payment under each of the sub-paragraphs is to be made. There is only a discretion as to the percentage interest to be awarded under CPR 36.14(3)(a) and (c). There may be circumstances in which it would be unjust to make an award under CPR 36.14(3)(d) where it is not unjust to do so under the other subparagraphs. It could be said that the provision of interest under CPR 36(3)(a) and (c) is primarily compensatory although the possibility of an award of a higher rate than would be available in the market introduces a penal element. However as is rightly recognised by Mr Marven, the purpose of CPR 36.14(3)(d) is penal.
>
> 24. The reason given by the Master for holding that it would be unjust to 'reward' the Claimant with the additional amount prescribed by CPR 36.14(3)(d) was the size of the additional award. The Master considered that had the rule permitted him to award a figure fixed by applying the prescribed percentage to the difference between the sum which the Claimant offered to accept and the sum which was allowed on assessment, that may have been a just result. The reason the Master held it to be unjust to make the additional award was because there was a significant reduction to the Claimant's bill of costs. The approach adopted by the Master penalises the Claimant for making what turned out to be a reasonable Part 36 offer. It is the terms of the Part 36 offer not the level of the sums claimed in the bill of costs which are to be considered under CPR 36.14(4). Whilst all the relevant circumstances are to be considered in deciding whether it would be unjust to make an award under any of the paragraphs of CPR 36.14(3), it was not suggested that there was any particular feature or consequence of the bill of costs other than its size which would render the making of an order under CPR 36.14(3)(d) unjust.
>
> 25. The making of an order of the level required by CPR 36.14(3)(d) was decided as a matter of policy as explained in the Jackson Report. Under the previous regime it was considered

[16] *Cashman v Mid Essex Hospital Services NHS Trust* [2015] EWHC 1312 (QB)); [2015] 3 Costs L.O. 411.

> that a claimant was insufficiently rewarded and the defendant insufficiently penalised when the claimant has made an adequate Part 36 offer. In my judgment the Master fell into the temptation referred to by Sir David Eady in paragraph 61 of Downing of making an exception by not making an award under CPR 36.14(3)(d) not because he considered the making of such an award unjust but because he thought it unjust to make an award of the required amount, 10% of the assessed costs. The Master considered it would not have been unjust to award an additional amount based on the difference between the Part 36 offer and the sum of costs allowed on assessment. However this is not the regime specified in CPR 36.14(3)(d). In this case it is the Claimant who has been penalised for making a reasonable Part 36 offer rather than the Defendant for not accepting it. In my judgment that approach is contrary to the intent and effect of CPR 36.14(3)(d)."

As that passage makes clear, a party should not be penalised for making a reasonable offer. Exactly the same point was made by the Court of Appeal in *Rolf v De Guerin*[17] where Rix LJ held that the trial judge had:

> "20. … misapplied the purpose of such an offer in his judgment as to costs, in holding it against Mrs Rolf.
>
> 34. The judge did err fundamentally in his appreciation of the significance of Mrs Rolf's Part 36 offer. The Part 36 mechanism provides a formal, regulated, procedure for a party, including a claimant, to express a willingness to accept something less than total success in his open position in the litigation. If the offer is not accepted and the offeror does better in the final result than his offer, he is entitled, unless the court considers it would be unjust, to costs on an indemnity basis from the expiry of the 'relevant period' (i.e. a basic three weeks, unless the offer extends it) plus interest at an enhanced rate up to 10% above base rate. Therefore there are advantages to a party in pitching his offer realistically, and there are potential disadvantages to an offeree in declining the offer. However, there is nothing about the procedure which states that an offeror is to be prejudiced as to costs because he has expressed his willingness to accept less than his open position. That would make the procedure a most dangerous one to use."

This approach also runs the risk of reintroducing what is sometimes termed the "near-miss" rule (see, for example, *Sugar Hut Group Ltd v A J Insurance*[18]).

Courts inevitably exercise discretion, appropriate to the facts of the particular case, in many circumstances but, particularly under a self-contained rule such as Pt 36, that discretion needs to be more confined to give the requisite degree of certainty and help further the overriding objective.

Reverting to the point made earlier in the introduction Sir Geoffrey Vos explained in *OMV Petrom SA v Glencore International AG*[19] that:

> "The culture of litigation has changed even since the Woolf reforms. Parties are no longer entitled to litigate forever simply because they can afford to do so. The rights of other court users must be taken into account. The parties are obliged to make reasonable efforts to settle, and to respond properly to Part 36 offers made by the other side. The regime of sanctions and rewards has been introduced to incentivise parties to behave reasonably, and if they do not, the court's powers can be expected to be used to their disadvantage. The parties are obliged to conduct litigation collaboratively and to engage constructively in a settlement process."

[17] *Rolf v De Guerin* [2011] EWCA Civ 78; [2011] C.P. Rep. 24.
[18] *Sugar Hut Group Ltd v A J Insurance* [2016] EWCA Civ 46; [2016] C.P. Rep. 19.
[19] *OMV Petrom SA v Glencore International AG* [2017] EWCA Civ 195; [2017] 1 W.L.R. 3465.

Practice Points

A number of practice points can be drawn from this judgment.

- Parties likely to face arguments about costs relating to the application of Pt 36 need to be armed with all relevant authorities at the hearing, to ensure these are applied.
- Notwithstanding the difficulties that can arise at hearings parties should make use of the machinery provided by Pt 36 for making offers but expect a degree of certainty about the application of the rule by the court.
- For Pt 36 to work effectively, and indeed for the 2013 reforms achieve their objectives, the courts do need to take a consistent approach to Pt 36.

John McQuater

Lacey v Leonard

(High Court of Justice (QBD); The Honourable Mrs Justice Slade DBE; 20 December 2018; [2018] EWHC 3528 (QB))

Personal injury—personal injury claims—defendant pre-action disclosure—reasons—CPR 31.16

LT Personal injury; Personal injury claims; Pre-action disclosure; Pre-action protocols; Procedural guides; Reasons

The claimant was involved in a road traffic accident on 14 August 2016 when he suffered a personal injury. The indication to the defendant in the letter of claim, on 26 September 2016, was that the value would be in the region of £750,000. At that stage, there was no evidence supporting the value of the claim disclosed.

The insurers for the defendant applied on 26 January 2018 for pre-action disclosure under CPR 31.16, which provides:

"31.16— **Disclosure before proceedings start**

(1) This rule applies where an application is made to the court under any Act for disclosure before proceedings have started 1.
(2) The application must be supported by evidence.
(3) The court may make an order under this rule only where—
  (a) the respondent is likely to be a party to subsequent proceedings;
  (b) the applicant is also likely to be a party to those proceedings;
  (c) if proceedings had started, the respondent's duty by way of standard disclosure, set out in rule 31.6, would extend to the documents or classes of documents of which the applicant seeks disclosure; and
  (d) disclosure before proceedings have started is desirable in order to—
    (i) dispose fairly of the anticipated proceedings;
    (ii) assist the dispute to be resolved without proceedings; or
    (iii) save costs."

That application was refused by Master Gidden on 2 May 2018, which the defendant appealed.

In the letter of claim, notice was given that whilst the value of the claim took the matter outside of the pre-action protocol there was an intent to instruct "a consultant orthopaedic surgeon, care expert, occupational therapist/equipment expert, accommodation expert and if necessary consultant physiotherapist and specialist in disabled drivers assessments". On 27 October and 5 December 2016, the insurers asked for an update and sought to agree on a joint rehabilitation provider. That could not be agreed between the parties.

On 27 June 2017, liability for the accident was admitted by the defendant. The application for pre-action disclosure of 26 January 2018 sought:

"(1) Medical records relating to the index accident (App Notice item 1(a));
(2) Evidence of Mr Lacey's pre-accident earnings including any wage slips from 3 months prior to the accident or 3 years of tax returns prior to the accident (item 1(e));
(3) Evidence of any job offers and acceptances for the Claimant from 6 months prior to the accident (item 1(f))."

The basis for the refusal was that the documents sought could be reconciled with CPR 31.16(3)(d) in that disclosure would not dispose fairly of the anticipated proceedings or assist in the resolution of the dispute without the need for proceedings or save costs. He confirmed that decision was based on the submissions given by the claimant:

> "I say this in light of the submissions made by the respondent to the application—the would be claimant—which in my view have sufficient force to weigh against an exercise of discretion: principally it is argued that having regard to the nature of the documents sought as well as the nature and value of any claim the respondent may pursue, the parties are unlikely to reach an agreement to settle the claim without the crucial benefit of expert medical evidence. Clearly the provision, by way of pre-action disclosure, of wage slips, tax returns, medical records and job offers, cannot enable the parties to be as critically informed of the risks and the potential value of the claim or the fair disposal of it, as will their having to hand relevant, expert, medical opinion. The limited pre-action disclosure that remains in issue in this instance is unlikely by itself to lead to saving of costs or capable of resolving or disposing fairly of the anticipated proceedings."

The appeal was on the basis that there had not been adequate reasons given by the Master.

The Appeal

The starting point was the decision of Lord Phillips MR in *English v Emery Reimbold & Strick Ltd*[1] at [16]:

> "We would put the matter at its simplest by saying that justice will not be done if it is not apparent to the parties why one has won and the other has lost."

In essence, a judge is bound to give reasons for his decision. In *English*, Lord Phillips MR continued to explain that the extent of the reasons to be given required consideration of the practical requirements of the appellate system. The reasoning must be sufficient for the appellate court to understand why the judge below had reached the decision they had. That did not mean every factor that was weighed in the appraisal of the evidence must be recorded in the judgment.

The appellant was concerned that the judge had not explained why he had discounted the grounds on which they had argued disclosure was desirable, namely that they wanted their own medical evidence and that might assist in disposing of the case without the need for proceedings; and it might assist the parties

[1] *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605; [2002] 1 W.L.R. 2409.

in agreeing on rehabilitation which in turn would save costs. It was further explained that the request for information related to earnings was in light of a request for an interim payment by the claimant in the sum of £25,500.

There was also said to be no indication of why the Master had not given reasons for rejecting the defendant's argument that *Wells v OCS Group Ltd*[2] could be distinguished on the basis that *Wells* only related to an application for pre-action disclosure of medical records and the focus here was on an absence of information post initial valuation of £750,000 upon which the insurers could seek to resolve the claim put forward.

Simply saying that the parties were unlikely to reach a settlement agreement without the benefit of medical evidence, did not satisfy the test in *English*. He did not deal with the points raised by the defendant, in particular in relation to *Wells* and whether he considered himself bound by it. He had not given reasons for dismissing the principal arguments relied upon in support of the application.

Re-determination

The parties had agreed that, in the event of a successful appeal, then the court would have to re-determine the original application:

> "In my judgment the evidence before the court does not suggest that pre-action disclosure of medical records relating to the accident would assist in resolving the dispute without proceedings, nor lead to a saving of costs. As the parties have recognised and as explained by Nelson J in *OCS* it is expert medical reports and not raw data which may or may not be relevant which are likely to form a basis for settlement."

There was nothing in the correspondence that suggested an interim payment would only be paid on receipt of medical records, and in fact, a counter offer of £10,000 had been made. The argument that the medical records would assist in agreeing a rehabilitation provider did not bring the application within CPR 36.16(3)(d). It is far removed from establishing a base for saying that it would lead to a saving of costs or resolution of the claim. The request for earnings related information failed as the claimant had explained in correspondence a lack of employment in the relevant period and that there had been no job offers or acceptances:

> "Whilst there must be some sympathy with the insurers of Mr Leonard in being faced with an unparticularised claim for the large sum of £750,000, their application for pre-action disclosure does not satisfy CPR 31.16(3)(d) and is dismissed."

Comment

In personal injury claims what comes first? The proverbial "chicken" in the shape of medical evidence or the "egg" of medical notes and records? There is supposed to be equality of arms in civil litigation. Sometimes, as the paying party, I feel that there is anything but. An accident can occur, a claim can be presented, and the claimant solicitors can then build their case behind closed doors until they decide to serve proceedings. All too often, defendants will not be allowed their own medical facilities, and all too often, will not be allowed copies of medical records. In many respects, this case emphasises that. I am sure that there is more to this particular claim than meets the eye, but how is it an accident can occur in the middle of August 2016, a claim be presented in late September 2016 and a comment made at that time that £750,000 would be claimed and yet as of the date of the Hearing before Mrs Justice Slade DBE, some

[2] *Wells v OCS Group Ltd* [2008] EWHC 919 (QB); [2009] 1 W.L.R. 1895.

two years later little more was known? And let's not forget that in September 2016, the discount rate was 2.5%. Surely there has to be a better way of dealing with such claims?

In a nutshell, the defendants knew that they were facing a potentially large claim. There was no rehabilitation in place and they were not allowed copies of medical notes and, presumably were not allowed facilities for their own medical examination. Liability has been admitted in June 2017 and so in January 2018, nearly 30 months post-accident, issued an application for pre-action disclosure. As I say, I am sure that there is more to say regarding this claim than the bare facts of the judgment suggests, but I think the defendants issued their application out of desperation. Unfortunately for the defendants, Master Gidden refused an order seeking disclosure of not only the post-accident medical records but also pre-accident earnings details and any evidence that there was relating to job offers and acceptances. The defendants appealed.

On appeal, before Mrs Justice Slade DBE, it was submitted that following the admission of liability in June 2017, medical records should have been disclosed and as they had not been further costs were being incurred. The defendant argued in their Grounds for Appeal:

> "7. The Appellant had put forward a number of grounds on which the documents sought were desirable, namely:
>
> a. The potential settlement of the dispute without proceedings: the Appellant had said that it would likely wish to have its own expert medical evidence (if the claim was justifiably £750,000) and if facilities for examination of the Respondent were provided, then the prior disclosure of the documents, in particular the medical records, would potentially enable settlement without the need for the issuing of proceedings;
>
> b. The costs saved by the potential successful rehabilitation of the Respondent. The costs would be save [d] by the avoidance of the need for the instruction experts in certain fields of expertise or the facilitation of the parties agreeing on joint experts. The disclosure of documents in support of his injuries and losses was said to be likely to aid the parties in reaching an agreement as to an appropriate rehabilitation provider or in the Appellant making an interim payment (as had been requested by the Respondent but thitherto rejected by the Appellant)."

While I think things could have been done differently, I do have some sympathy with the defendant's predicament.

At 30 months post-accident, it is probably a little late for rehabilitation, but the Pre-Action Protocol does place an ongoing obligation on the parties to consider rehabilitation. If a joint provider could not be agreed upon, then agreement as to the case manager to be retained by the claimant solicitor, an immediate needs assessment and ongoing funding of rehabilitation via interim payments with rolling disclosure of case management and therapeutic notes and records would have given much insight.

In this case, the defendants wanted to know what they were truly facing in respect of Mr Lacey's claim. They might have invited the claimant solicitors for their own medical facilities; they might have requested insight into the claimant solicitor's timescales for obtaining their own evidence; they might have invited disclosure of that evidence. We don't know, but it is also worth noting what the Protocol says about medical evidence:

> "7.2 Save for cases likely to be allocated to the multi-track, the Protocol encourages joint selection of, and access to, quantum experts, and, on occasion liability experts e.g. engineers. The expert report produced is not a joint report for the purposes of CPR Part 35. The Protocol promotes the practice of the claimant obtaining a medical report, disclosing it to the defendant

who then asks questions and/or agrees it and does not obtain their own report. The Protocol provides for nomination of the expert by the claimant in personal injury claims."

As we know, the Protocol is silent on what should happen in respect of multi-track cases, but para.7.2 implies that the approach to expert evidence is different in multi-track cases; presumably Pt 35, but that does not help pre-litigation. More importantly perhaps, what is said at the outset of the Protocol is relevant and I think could well go to conduct in respect of the issue of costs:

"1.1.2 If at any stage the claimant values the claim at more than the upper limit of the fast track, the claimant should notify the defendant as soon as possible. However, the 'cards on the table' approach advocated by this Protocol is equally appropriate to higher value claims. The spirit, if not the letter of the Protocol, should still be followed for claims which could potentially be allocated multi-track. All parties are expected to consider the Serious Injury Guide in any claim to which that Guide applies (*http://www.seriousinjuryguide.co.uk/*)."

While the claimant's solicitors are not signatories to the Guide, there is nevertheless an expectation that the Guide will be considered. There is also an expectation of a "cards on the table" approach. Declining to provide access to post accident medical records and earnings details is, in my opinion, hardly evidence of a "cards on the table approach".

No matter how much sympathy the judge may have had with the defendant's predicament, on the bare facts of this case, I think it was bound to fail. Even seeking to restrict disclosure of medical records to post-accident records did not assist. However, I do wonder if a subtler approach of asking about what evidence the claimant had and, inviting disclosure of the evidence on which they intended to rely, so that a joint settlement meeting could be held pre-issue, which would serve to save costs, might have prepared the ground better for an eventual application for pre-action disclosure under CPR 31.16.

Ultimately, though, there is a better way of dealing with claims like this and that is articulated in the Serious Injury Guide.

Practice Points

- Defendants, applications for pre-action disclosure will not assist.
- Claimant solicitors sometimes do not assist their clients by not adopting a cards on the table approach and getting on with the case.
- Both sides need to be mindful in the opening comments of the Pre-Action Protocol and, I would say, embrace the Serious Injury Guide and its ethos.
- When faced with similar situations, sometimes, dialogue and persuasion, rehabilitation and use of interim payments can assist defendants and help move the case to earlier resolution.

David Fisher

Zeromska-Smith v United Lincolnshire Hospitals NHS Trust

(Spencer J; 8 March 2019; [2019] EWHC 552 (QB))

Anonymity—clinical negligence—open justice—press—psychiatric harm—stillbirth

LT Anonymity; Clinical negligence; Open justice; Psychiatric evidence; Psychiatric harm; Stillbirth

The claimant sought an order for anonymity within proceedings she had brought seeking damages for psychiatric injury arising out of the stillbirth of her daughter on 27 May 2013. Provision had been made for the Press Association to be served with notice of the application and written submissions had been received.

Liability for the stillbirth of the baby had been admitted by the defendant. Whilst they had conceded they would have to meet damages arising out of that, they disputed the damages sought for a pathological grief reaction combined with depression that the claimant was seeking damages for. Subsequent to the incident, she had given birth to two children and it was said that she suffered from a disabling separation anxiety in relation to them.

A witness statement was submitted by the solicitor with conduct of the claim indicating a value in excess of £6,000,000 which was said to be bound to attract the attention of the media. It was argued that an order granting anonymity to the claimant would not offend the principle of open justice as that would be satisfied by naming the defendant. Balanced against that was said to be the trauma of reliving deeply personal and private matters in the public eye, along with a risk of suicide and that publication of the claimant's identity would serve no useful public purpose but would risk considerable further harm to the claimant's already precarious mental health and harm to her children and family.

It was also said that there was a significant risk that social media would be used to disseminate the information and that could lead to significant harm also, that her children would also be necessarily identified and open the family to unwanted contact from persons seeking to take financial advantage of them if they recovered damages.

The Press Association conceded that as the case engaged the claimant's ECHR art.8[1] rights it had to be balanced against the art.10[2] rights of the press. Also, that such orders should only be made where a party is not a protected party in exceptional circumstances.

The starting point was the fundamental principle of common law that justice is administered in public and judicial decisions are pronounced publicly. This was integral to protecting the rights of the parties and maintaining public confidence in the justice system.[3] At the time, this principle, set out in *Scott*, noted two recognised exceptions to the principle of open justice:

> "… cases involving wards of court or lunatics and cases involving a secret process where the effect of publicity would be to destroy this subject matter."

Both of those exceptions were said to be present because the principle object of the Courts of Justice was to secure justice. The former required anonymity to protect the ward and the latter as justice could not be done if it had to be done in public.

The principles in *Scott* were no part of the Civil Procedure Rules Pt 39 which provides that the general rule is that a hearing will be in public.[4] The exceptions to that rule[5] focus on the use of the word necessary.

The decision of the Court of Appeal in *JXMX v Dartford and Gravesham NHS Trust*[6] was based upon the arguments made before that court as to the special status of a child or protected party seeking approval of an award of damages. As a consequence, a practice has developed where anonymity orders are routinely made in relation to approval hearings in respect of children and protected parties. This was of no assistance to an adult of full capacity seeking such an order:

[1] European Convention on Human Rights: "a right to respect for one's private and family life, his home and his correspondence".

[2] "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."

[3] *Scott v Scott* [1913] A.C. 417.

[4] Rule 39.2(1) provides: "The general rule is that a hearing is to be in public."

[5] Rule 39.2(3) provides: "A hearing, or any part of it, may be in private if … (d) a private hearing is necessary to protect the interests of any child or protected party; or … (g) the court considers this to be necessary in the interests of justice."

Rule 39.2(4) provides: "The court may order that the identity of any party or witness must not be disclosed if it considers non-disclosure necessary in order to protect the interests of that party or witness."

[6] *JXMX v Dartford and Gravesham NHS Trust* [2015] EWCA Civ 96; [2015] 1 W.L.R. 3647.

> "I do not consider that, in a case such as the present, the principle of 'open justice' is adequately satisfied by the name of the Defendant being published, but not the name of the Claimant."

The decision of Nicol J in *ABC v St George's Healthcare Trust*[7] where an anonymity order was made in relation to a claimant who was neither a child or protected party illustrates the principle that the general principle was not absolute, and:

> "… that case illustrates that the general principle is not absolute, and can be departed from where such departure is necessary in circumstances which are truly exceptional. The order was made because of the exceptional circumstances of that particular case …"

In this case, the revelation of personal matters was inherent in making a claim of this type. Having chosen to bring them, the claimant could not escape those consequences.

Applications such as this should be made in advance of the trial and should be served on the Press Association:

- So the Press Association would have an opportunity to make representations.
- The outcome of any such application could be relevant to a claimant's decision to settle proceedings.

Application refused.

Comment

This case demonstrates that applications for the grant of an anonymity order are far from certain. The case arises out of a claim for psychiatric injury and damage following the stillbirth in 2013 of the claimant's daughter. It is a reminder that a fundamental principle of the common law is that justice is administered in public and that judicial decisions are also made public. This overriding principles of "open justice" is there to ensure public confidence in the civil justice system and to protect the rights of those engaged in litigation.

However, in this respect, sometimes the rights of the parties are better served by their remaining anonymous. The Civil Procedure Rules r.39.2(1) provides:

> "The general rule is that a hearing is to be in public."

Rule 39.2(3) goes on to say:

> "A hearing, or any part of it, may be in private if … (d) a private hearing is *necessary* to protect the interests of any child or protected party; or … (g) the court considers this to be *necessary* in the interests of justice."

And then at r,39.2(4):

> "The court may order that the identity of any party or witness must not be disclosed if it considers non-disclosure *necessary* to protect the interests of that party or witness." (emphasis added)

So, the key to anonymity is what is *necessary*.

In this case, the claimant had set her heart on having a daughter; she and her husband had prepared for the birth of their daughter and had decorated and prepared a nursery. After the claimant had gone full term it was discovered that there was no heartbeat and that the baby had died in utero. The defendant health authority admitted liability. The claimant had gone on to have two healthy children but claimed damages

[7] *ABC v St George's Healthcare Trust* [2015] EWHC 1394 (QB); [2015] P.I.Q.R. P18.

for intractable pathological grief and depression and pathological separation anxiety in relation to her two children.

The application for anonymity was made at the start of the trial, which was adjourned so that the Press Association had the opportunity to make submissions. Their submissions made the point that the rights of the press had to weighed against the ECHR art.8 right to respect for one's "private and family life …". It also argued that anonymity orders should only be made in exceptional circumstances when the claimant is not a protected party.

The application for anonymity was made on a number of grounds which can be summarised as:

- A schedule in excess of £6m had been served and thus the case was bound to attract press and public interest.
- The claim had already put pressure on the claimant's marriage and children.
- The claimant was a suicide risk.
- Having to relive events of the past in open court could easily lead to irreparable damage to the family.
- That the public interest and ensuring that the defendant was accountable for its actions could be achieved without the need to identify the claimant.
- There was a risk that the claimant would be abused in social media etc as she was Polish.
- She might be persuaded to either invest unwisely or to succumb to begging letters.

The claimant also sought to rely on *ABC v St George's Healthcare Trust*.[8] Here an anonymity order was made to a claimant who was neither a child nor a protected party. However, Spencer J did not feel that that case helped the claimant here:

> "Rather that case (*ABC*) illustrates that the general principle is not absolute, and can be departed from where such departure is necessary in circumstances which are truly exceptional."

The facts behind *ABC* almost read like a soap opera plot. In 2007, the claimant's father shot and killed the claimant's mother. He was convicted of manslaughter on grounds of diminished responsibility and sentenced under the Mental Health Act s.37. In 2009, he was diagnosed by St George's Healthcare Trust with Huntingdon's Disease. If a parent has Huntingdon's there is a 50% chance that any child will inherit the disease. Despite attempts to have the claimant's father agree to the disclosure of the condition to his daughter, he refused. Sometime later, the claimant herself who had a child was accidentally told that her father had Huntingdon's and she herself was diagnosed in 2013. Had she known at the time of her pregnancy that she had the disease, she would have terminated her pregnancy. So, the father of claimant has Huntingdon's, the claimant has the condition and there is a 50% chance that the claimant's daughter will also inherit the disease. The daughter did not know her mother had the disease and that as children are not tested until adulthood, she did not know that she was at risk.

On hearing the anonymity application in 2015, Nicol J accepted that there could be:

> "serious consequences for the daughter were she to find out about these matters through a report of the present proceedings. This together with the rights of the claimant and her daughter not to have their private lives interfered with by the action of the court, appear to me to justify the restriction in publicity which the Claimant sought."

As Spencer J puts it in *Zeromska-Smith*:

> "It seems to me that the harm to the claimant's daughter from finding out that she had a 50% chance of having inherited Huntingdon's Disease by chance rather than through a managed mechanism

[8] *ABC v St George's Healthcare Trust* [2015] EWHC 1394 (QB).

> whereby she was informed of this at age which was considered appropriate and in circumstances where she was given appropriate advice and counselling, was a powerful reason for making the anonymity order in that case on wholly exceptional basis."

With regards to the present case, he went onto to say that the revelation of personal matters to the claimant and her family as intrinsic to a claim of this nature:

> "Having chosen to bring these proceedings …, the Claimant cannot avoid the consequences of having made that decision in terms of the principle of open justice and the consequent publicity potentially associated with such proceedings being heard in open court."

Accordingly, the application for anonymity was rejected.

Spencer J also commented on the timing of the application in *Zeromska-Smith*. He was not impressed that the application was made at the start of the trial and without notice being given to the Press Association. He said that, in general, such applications should be made well in advance of any trial with notice given the Press Association so that they have the opportunity to make representations.

Practice Points

- A fundamental principle of common law is one open justice. This means that anonymity orders are not guaranteed.
- The key to anonymity is what is *necessary* in the interests of justice, protection of a child or protected party or the interests of a party or witness.
- When a claimant brings a personal injury claim, it is inevitable that one's personal history, including medical history, will be brought into the open. That may not be sufficient to pass the "necessary" test if an anonymity order is sought.
- Where it is appropriate to seek an anonymity order, the application needs to be made in advance of any trial and should be served on the Press Association.
- The outcome of an application may well influence a claimant's approach to settlement.

David Fisher

Cumulative Index

This index has been prepared using Sweet & Maxwell's Legal Taxonomy.